IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI GAGAN GOYAL, AM

आयकर अपील सं/ I.T.A. No.477/Mum/2022
(**निर्धारण वर्ष** / Assessment Years: 2016-17)

Dhananjay G. Mishra Prop. Yeoman Marine Services (YMS) W-1402, World Crest, Senapati Bapat Marg, Lower Parel, The World Towers Delisle Road, Mumbai-400013.	**बनाम** / Vs.	ACIT, Circle-20(1) Piramal Chambers, Lalbaugh, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AFLPM1475K		
(अपीलार्थी / **Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Satish Mody
Revenue by:	Shri Mahiita Nair (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 30/06/2022
घोषणा की तारीख /Date of Pronouncement: 26/07/2022

आदेश / O R D E R

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax(A) (NFAC), Delhi dated 20.12.2021 for assessment year 2016-17.

2. The main grievance of the assessee is against the action of the Ld. CIT(A) confirming the order of the Assessing Officer not allowing the credit of TDS of Rs.24,41,710/-.

3. Brief facts pertaining to the issue is that assessee is an individual having a proprietary concern running in the name of Yeoman Marine Services (*herein after in short* 'YMS') which was succeeded by a private limited company Yeoman Marine Services Private Limited (*herein after in short* 'YMSPL') w.e.f. 01.11.2015. Appellant is a contractor in ship repairing business. During the year the appellant

filed return of income on 17.10.2016 declaring total income of Rs.4,38,18,610/-. Thereafter, the case of the assessee was selected for scrutiny under CASS. The AO noted during the course of assessment proceedings that even though the assessee's proprietary concern (YMS) was succeeded by a private limited company (YMSPL) from 01.11.2015, the assessee has claimed the entire credit of TDS in the hands of the proprietorship concern (YMS); and has claimed to have offered for tax the receipt after the date of succession in the hands of company (YMSPL). The AO noted that the assessee has claimed TDS credited of Rs.73,58,540/-. However, the AO noted that the assessee has received contract receipts u/s 194C of the Income Tax Act, 1961 (hereinafter "the Act") of Rs.18,25,37,779/- during the year under consideration. However, in trading account under construction contract receipts only Rs.5,13,99,597/- has been credited. When asked by the AO to explain this discrepancy. The assessee replied that during the year under consideration the sole proprietorship concern i.e. Yeoman Marine Services (YMS) was succeeded by Yeoman Marine Services Pvt. Ltd. (YMSPL) on 31.10.2015. And thereafter, the proprietorship concern YMS ceased to exist after 01.11.2015. However, since the running contracts continued, the customers continued to release receipts in the name of YMS instead of YMSPL. It was brought to the notice of AO that the receipts of YMS received after 01.11.2015 has been accounted for in the books of YMSPL. And the assessee drew the attention of the AO the provision of Section199 of the Act as well as under Rule 37BA of the Income Tax Rule, 1961 (hereinafter "the Rule") which governed the credit for tax deduction at source for the

purpose of Section 199 of the Act, which according to assessee provides that the credit of TDS will be given where corresponding income is assessable and in the same assessment year and to the same person.

4. However, the AO did not accept the assessee's contention and he rejected the same by stating so at para no. 4.2 of his assessment order. And thereafter, he was of the opinion that the tax credit claimed by the assessee to the tune of Rs. 24,41,710/- cannot be allowed. And therefore, he disallowed the same by holding as under: -

> "4 Even though the receipts have been duly accounted however it is not in line with the provisions of the act to claim the TDS credit for an income which has been offered by someone else. The company and the individual are two separate entities and even though they may be related by virtue of directorship they are unrelated during the income tax scrutiny proceedings. The assessee in this case has claimed the TDS credit for an income that has been offered by the company and reduced its tax liability which is not permissible by law. The credit of TDS can only be given to the extent income offered by the assesses. Reconciliation submitted by the assessee:

Section		YMS		YMSPL		Total
	Receipts	TDS	Receipts	TDS	Receipts	TDS
194C	8,46,10,327	15,80,788	8,87,27,452	16,57,710	17,33,37,779	32,38,498
194J	19,60,000	1,96,000	78,40,000	78,40,000	98,00,000	9,80,000
Total	8,65,70,327	17,76,788	9,65,67,452	24,41,710	18,31,37,779	42,18,498

> 4.3 The assessee further submitted that he is accounting his income on mercantile system on the basis of bills raised while the receipts in Form 26AS are on payment basis therefore Rs. 4,39,18,292/- is on account of income already offered in FY 2015-16.

5. Considering the facts and circumstances of the case, TDS credit of Rs. 24,41,710/- is disallowed and the total income is assessed accordingly."

5. Aggrieved by the aforesaid action of the AO, the assessee preferred an appeal before the Ld. CIT(A) and even though it was brought to his notice that the entire receipt from 01.11.2015 has been offered in the hands of the YMSPL post the succession and TDS credit it has not been claimed by the private limited company (YMSPL), the Ld. CIT(A) did not accept the contention of assessee and held as under: -

"5. Findings and Decision

5.1 Ground No. 1, 2 & 3: Ground 1, 2 & 3 are interlinked and taken up together for adjudication. All these grounds relate to disallowance of TDS credit amounting to Rs.24,41,710/-. During the year under consideration appellant derived income from Salaries, Profits and Gains of Business or Profession and income from other sources.

5.2 The main issue involve in this appeal is the disallowance of TDS credit of Rs. 24,41,710/-. As per records YMS i.e. proprietorship concern was over as on 31.10.2015 but the contracts continued in the name of YMS and receipts were generated in name YMS instead of YMSPL. During the course of appellate proceedings, appellant filed submissions and case laws in support of its contentions which were found non-tenable and irrational. When the YMS has been put to an end and succeeded by a new company the contracts should be revised and the TDS should be deducted in the name of the new company. The provisions of Rule 37BA(2)(i) have been legislated specifically to deal with such a situation, and they read as under:

"(i) Where under any provisions of the Act, the whole or any part of the income on which tax has been deducted at source assessable in the

hands of a person other than the deductee, credit for the whole or any part of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee:

Provided that the deductee files a declaration with the deductor and the deductor reports deducion in name of person in the information relating to deduction of tax referred to in sub-rule (1).]

(ii) The declaration filed by the deductee under clause (i) shall contain the name, address, permanent account number of the person to whom credit is to be given, payment or credit in relation to which credit is to be given and reasons for giving credit to such person.

(iii) The deductor shall issue the certificate for deduction of tax at source in the name of the person in whose name credit is shown in the information relating to deduction of tax referred to in sub-rule (1) and shall keep the declaration in his safe custody."

As per these provisions, the credit for this TDS of Rs. 24,41,710/- should have been claimed by the company YMSPL. The deductee should have given a declaration in this respect to the deductors, and they would have incorporated the information relating to the company YMSPL in the information of TDS certificates, thereby enabling the company to claim the credit for this TDS. Thus the appellant has not complied with these statutory provisions, and consequently the credit for this TDS cannot be allowed. It is reiterated that this credit can be allowed in the hands of the new company YMSPL on the compliance of the above mentioned conditions, but it cannot be allowed in the hands of the appellant in any case. The provisions of Rule 37BA(2)(i) make it amply clear. Therefore, the grounds of appeal no. 1, 2 and 3 are hereby disallowed."

6. Aggrieved by the aforesaid action of the Ld. CIT(A), the assessee is before us.

7. We have heard both the parties and perused the records. The facts narrated above are not repeated for the sake of brevity. The main grievance of the assessee who was proprietor of proprietary concern YMS till 31.10.2015 (until taken over by Private Limited company (YMSPL) from 1.11.2015) is that since it was a contractor of ship repairing and even though the YMS (Proprietary concern) ceased to exist from 01.11.2015, the business of ship repairing (running contract) continued to be executed by the private limited company (YMSPL). And the customers continued to release payments in the name of YMS instead of YMSPL (even after 01.11.2015) and the undisputed fact is that receipts of YMS received after 01.11.2015 has been accounted in the books of YMSPL; and that YMSPL has offered tax on its turnover after 01.11.2015 (without claiming any TDS credit). However, as noted (supra), even though YMS ceased from 31.10.2015, the customers continued to release receipts in the name of assessee (YMS) and duly deducted tax on it (TDS), which was claimed by the assessee in its Return of Income, which has been denied to the assessee proprietor of YMS by AO/CIT(A) on the strength of section 199 of the Act read with Rule 37BA of the Rules taking not of the fact that YMS ceased on 31.10.2015, and the receipts after 01.11.2015 is that of private limited company YMSPL and the TDS credit on the turnover from 01.11.2015 can be claimed only by M/s. YMSPL and not the assessee/YMS. Before us, the Ld. AR has cited the decision of the Hon’ble Andhra Pradesh High Court, in the case of IVRCL –KBL

(JU) Vs. ACIT (writ petition no. 31680 of 2015) dated 29.02.2016 wherein on similar facts the AO denied the TDS credit claimed by the joint venture (Joint Venture) on the reason that assessee/joint venture did not perform the contract and the contract was executed by the sub-contractors and the TDS deducted in the name of assessee/joint venture cannot be claimed as refund in that case, since joint venture/assessee in that case filed ROI-Nil and that the joint venture/assessee was a devise used for submitting bid/tender; and all contractual works were executed by constituent members/sub-contractors; and the joint venture/assessee was the connecting link between the state government irrigation department and the sub-contractors' and the assessee/Joint venture had to hand over the contract work to sub-contractors/constituents and never intended to execute the contract; and the admission of gross receipts in their Profit & Loss account by the joint venture was only to transfer the same to the sub-contractors/constituents; and as no real work was carried out by the assessee, according to AO no income had accrued to assessee/joint venture and therefore according to AO, no credit for TDS was allowable to assessee/joint venture in terms of Rule 37 BA(2) (1) of the Rules. And held as in the present case in hand, that TDS credit must be given to the constituent/sub-contractor [from 01.11.2015 to YMSPL] which actually performed and competed the work and not to assessee/joint venture. And the assessee/joint venture challenged the action of AO before the Hon'ble High Court and their Lordship allowed the claim of assessee.

8. And the Ld. AR drew our attention to a similar case wherein the Hon'ble Calcutta High Court in the case of CIT Vs. Ganesh Narayan Brijlal Ltd, held in IT Appeal No. 257 of 2009 dated 10.08.2009 as under: -

> "The subject matter of challenge in the appeal is a judgement and order dated 20th March, 2009 passed by the learned Income Tax Appellate Tribunal, "A" Bench, Kolkata in ITA 104/Kol/2009 pertaining to assessment year 2005-06 by which an appeal preferred by the revenue was dismissed.
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> The aggrieved revenue has come up in appeal. The following question of law has been suggested :- "Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is correct in deleting addition of Rs.74,22,427/- being rental received by the assessee but not returned as income on the ground it pertained to portion sold to three companies by executing registered transfer deeds even though the entire rent was received by the assessee and tax was deducted at source therefrom." Mr.Agarwal, learned advocate appearing for the appellant/revenue submitted that he has instructions not to press the aforesaid question. He submitted that he would like to press another question which is as follows :
>
> "Whether the assessee is entitled to get the benefit of the tax deducted at source when the case of the assessee is that the rent realized belonged to the assessee only partially ?
>
> From the assessment order the following facts and circumstances are discernable.

"It is evident from the TDS certificates submitted along with the return of income during the relevant year, the total rent received by the assessee company was Rs.1,07,69,778/- against whom TDS of Rs.5,59,807/- was claimed. But in P/L account, Rs.33,47,351/- only was taken as the rental income by the assessee company. On being asked, it was submitted by the assessee company in course of assessment proceedings that some portion of the building was sold to three companies namely, M/s.Nadia Security Printing and Stationery Co.Ltd, M/s.Nadia Pulb & Board Ltd and M/s. Deepsikha Properties Ltd."

Mr.Agarwal drew our attention to the computation made by the assessing officer from which it would appear that the assessee got credit of a sum of Rs.5,69,782/-, deducted on account of tax by the tenants. He contended that in case, the rent did not belong to the assessee in its entirety, the assessee could not have in that case claimed the benefit of the tax deducted at source in its entirety. Mr.Avra Mazumder, learned advocate for the assessee submitted that the assessee has paid the share of the co-owners of the property including the amount deducted on account of tax. There is, as such, no reason why the assessee should not be entitled to the benefit of the tax deducted at source.

Mr.Agarwal seeking to counter the submission advanced by Mr.Mazumder, drew our attention to sub-section (1) of Section 199 of the Income Tax Act, 1961, which provides as follows :

" 199. Credit for tax deducted. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of

the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be."

Mr.Agarwal contended that in case, the assessee is interested in claiming the benefit of the tax deducted at source in its entirety, the assessee cannot avoid the liability to pay tax on the entire rental income. We have not been impressed by the submission advanced by Mr.Agarwal.

The assessee is undoubtedly an owner of the property but he is not an absolute owner. His ownership is restricted to a certain percentage of the right in the property. The assessee has collected the rent payable with respect to the property in its entirety and thereafter has passed on the rent including the amount deducted on account of the tax to the other co-owners. There is, as such, no reason why the assessee should not be entitled to enjoy the benefit of tax deducted at source. Mr. Agarwal did not dispute that the assessee has paid the share of the co-owners including the share in the amount of tax deducted at source.

In the facts of the case, we find no merit in the submission advanced by Mr.Agarwal. The question is, therefore, answered in the affirmative and against the revenue. The appeal is, as such, dismissed.

It is recorded that there is an application for condonation of delay of 35 days. We have taken up the appeal for hearing after having condoned the delay."

9. Here in this present case, the AO has not allowed the credit of TDS of Rs.24,41,710/- though the same has been deducted by the payers and credited in the name of assessee in the Government Treasury. In this case sub-section (2) & (3) of Section 199 are not

attracted to the fact of the case, sub rules (2) & (3) of Rule 37BA of the Rules are also not applicable. So only sub section (1) of Section 199 & sub rule (1) of Rule 37BA of the Rules are relevant to the facts of the case. Section 199(1) of the Act, allows credit of tax deducted & paid to Central Government in the hands of the person from whose income, the tax has been deducted. In other words, the credit of tax deducted has to be given in the hands of the deducted i.e. the person from whose income the deduction was made and no restriction can be read into the sub-section [sec. 199(1)] that credit of TDS should be given only to the amount of income or receipt offered in the return of income of in the profit & loss account. And sub-rule(1) of Rule 37BA of the Rules allows credit in the hands of the deductor on the basis of the information related to deduction of tax furnished by the deductor. After 01.04.2008, the requirement of TDS certificate has been dispensed with & now the credit is being allowed as per Rule 37BA(4) of the Rules on the basis of information available in the income tax statement (ITS) of the assessee on the database of the department or on the basis of Form no. 26AS. In this case, the tax deducted at source is available in the ITS and the department has not given credit for tax of Rs.24,41,710/- to the private limited company YMSPL or refunded the same to the deductor. In such a scenario, as per Section 199(1) of the Act, tax credit of Rs.24,41,710/- should be given to the assessee. However, the AO to verify whether any credit of TDS of Rs.24,41,470/- has been allowed in the hands of M/s. YMSPL. If it has not been allowed, then the credit of this amount should be given to the

assessee. With this limited direction, the appeal of the assessee is allowed for statistical purposes.

10. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 26/07/2022.

Sd/-	Sd/-
(GAGAN GOYAL) **ACCOUNTANT MEMBER**	**(ABY T. VARKEY)** **JUDICIAL MEMBER**

Mumbai; Dated 26/07/2022.
Vijay Pal Singh, (Sr. PS)

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

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सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**