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

SHRI M. BALAGANESH, ACCOUNTANT MEMBER
SHRI RAHUL CHAUDHARY, JUDICIAL MEMBER

ITA No. 895/MUM/2022
(Assessment Year: 2017-18)

Hampi Expressways Pvt. Ltd.,
M/s Kalyaniwalla & Mistry LLP,
Esplanade House, 2nd Floor,
29, Hazarimal Somani Marg, Fort,
Mumbai - 400001
[PAN:AADCH6031L] ..... Appellant

Vs

Dy. Commissioner of Income Tax –
Range 1(1)(2), Mumbai,
Room No. 533, 5th Floor,
Aayakar Bhawan, M.K. Road,
Mumbai - 400020 ..... Respondent

Appearances

For the Appellant/Assessee	:	Shri M.M. Golvala Shri Amey Wagle
For the Respondent/Department	:	Shri Tejinder Pal Singh
Date of conclusion of hearing	:	21.07.2022
Date of pronouncement of order	:	18.10.2022

O R D E R

Per Rahul Chaudhary, Judicial Member:

1. By way of the present appeal the Appellant has challenged the order, dated 16.03.2022, passed by the Ld. Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [hereinafter referred to as 'the CIT(A)'] for the Assessment Year 2017-18, whereby the Ld. CIT(A) had dismissed the appeal filed by the Appellant against the Assessment Order, dated 26.12.2019 passed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. The Appellant has raised the following grounds of appeal:

> *"1. The learned CIT(A) erred in approving the order of AO refusing to claim full credit for TDS of Rs. 66,49,131/-.*
>
> *2. The learned CIT(A) erred in ignoring the submissions filed by the Appellant on 23rd August 2021 and further erred in holding that no submissions were made by the Appellant.*
>
> *3. The learned CIT(A) erred in not granting TDS credit of Rs. 66,49,131/- on the ground that the receipts from National Highway Authorities were not credited to the Profit & Loss account.*
>
> *4. Having regard to the facts and circumstances of the case the Assessing Officer be directed to grant further credit for TDS Rs. 66,49,131/-.*
>
> *5. The learned NFAC erred in confirming the interest under section 234B of Rs. 23,09,726/- as against Rs. 98,434/- payable as per the Return of Income.*
>
> *6. The learned NFAC erred in confirming the interest under section 234D of Rs. 43,967/- as against Nil leviable.*
>
> *7. Having regard to the facts and circumstances of the case the Assessing Officer be directed to reduce the interest under section 234B and section 234D."*

3. The relevant facts in brief are that the Appellant filed return of income on 30.10.2017 declaring loss of INR 74,03,960/- and book profit under Section 115JB of the Act of INR 3,95,08,905/-. The case of the Appellant was selected for scrutiny. In the computation of income, the Appellant had claimed credit of INR 66,49,131/- consisting of INR 66,26,115/- being tax deducted at source by National Highway Authority of India (NHAI) and INR

23,016/- being tax deducted at source by State Bank of India (SBI). However, vide order, dated 26.12.2019, passed under Section 143(3) of the Act the Assessing Officer denied credit for the aforesaid tax deducted at source holding that the Appellant had failed to offer corresponding income to tax during the relevant assessment year and therefore, the Appellant was not entitled to claim credit of tax deducted at source of INR 66,49,131/- in terms of Section 199 read with Rule 37BA of the Income Tax Rules, 1962.

4. Being aggrieved, the Appellant preferred appeal before CIT(A) against the Assessment Order, dated 26.12.2019, passed under Section 143(3) of the Act. However, the CIT(A) dismissed the appeal holding as under:

> *"From the perusal of the order u/s 143(3), it is seen that the AO has clearly narrated the facts in respect of the submissions made by the appellant at the time of assessment proceeding. The Assessing Officer has alleged that the appellant has not shown receipts from the National Highway Authorities. The entire receipts and payments is forming the part of the ledger and nothing is reflected in the P&L account. Since the appellant has not credited any amount to the P&L account, the appellant is not entitled for credit of TDS. Hence, the AO is justified in denying the credit." (Emphasis Supplied)*

5. Being aggrieved, the Appellant is now in appeal before us challenging the order passed by the CIT(A) on the ground reproduced in paragraph 2 above.

Ground No. 1 to 4

6. Ground No. 1 to 4 pertain to denial of credit of tax deducted at source of INR 66,49,131/- and are, therefore, taken together hereinafter.

7. The Ld. Authorised Representative for the Appellant submitted that the Appellant had entered into a contract with NHAI for

construction of a national highway on Hospet-Chitradurga section in Karnataka State. As per the aforesaid agreement, the Appellant was entrusted with the responsibility of shifting utilities being trees, electric cables, electrical fittings etc., situated on the said highway, from the current location to a temporary location, so that there are no interruptions in the construction work and the supply of utilities/services. The cost of shifting of the utilities was to be borne by NHAI, and the Appellant was only required to arrange for the utility shifting work and therefore, the Appellant appointed L&T Ltd. (hereinafter referred to as 'the Sub-Contractor') for carrying out the said utility shifting work. It is the contention of the Appellant that the Sub-Contractor raised invoices on the Appellant at periodic intervals and the Appellant, in turn, raised corresponding invoices of the same amount on NHAI. To record the above transactions in its books, the Appellant opened a separate ledger account-"6500023-NHAI Utility Shifting". Appellant, deducted tax at source at the rate of 2% under Section 194C of the Act. Similarly, the Appellant while making payment of utility shifting charges to Sub-Contractor, tax at source at the rate of 2% under section 194C of the Act. Since the transactions with the NHAI were of the same amount as that of transactions with the Sub-Contractor, the balance in the abovesaid ledger account was 'Nil'. On account of back-to-back arrangement and there was no profit accruing to the Appellant. Therefore, the Appellant had not shown the receipts from NHAI and the corresponding expenses paid to the Sub-Contractor in the Profit and Loss Account. The impact on the profits or Taxable income would have been 'Nil' even if the above receipts/payments were routed through the Profit and Loss

Account instead of the abovesaid ledger account. In view of the above, the Ld. Authorised Representative for the Appellant submitted that the Appellant was entitled to claim credit of tax of INR 66,26,115/- deducted at source by NHAI. In this regard, the Appellant relied upon the following judicial precedents

- CIT vs. Bhooratnam & Co. (29 taxmann.com 275) (AP)
- CIT vs. Relcom (62 taxmann.com 190) Delhi
- IVRCL KBL (JV) vs. ACIT, Hyderabad (67 taxmann.com (A.P)
- Supreme Reneable Energy Ltd. vs. ITO (124 ITD 394) Chennai ITAT)
- Escorts Ltd. vs. DCIT (15 SOT 368) (Delhi ITAT)

As regards, tax deducted at source by SBI amounting to INR.23,016/-, the Ld. Authorised Representative for the Appellant submitted that the corresponding income of INR 2,30,136/- has been offered to tax during the relevant assessment year. The finding returned by the Assessing Officer is factually incorrect whereas the CIT(A) has confirmed the order of the Assessing Officer in this regard without dealing with the submission of the Appellant.

8. Per contra, the Ld. Departmental Representative submitted that, admittedly, the Appellant has not credited the contract receipts from NHAI to the Profit & Loss Account. He submitted that since the Appellant has not offered the income to tax, the Assessing Officer and the CIT(A) were justified in not granting credit of tax deducted at source by NHAI. He placed reliance on the order passed by authorities below to support his contention. As regards, credit of tax deducted at source by SBI, he submitted that the matter be remanded to the Assessing Officer for verification.

9. We have heard the rival contention and perused the material on record including the judicial precedents cited during the course of hearing. As per Form 26AS placed on record NHAI and SBI have deducted tax of INR 66,26,115/- and INR 23,016/-, respectively.

9.1. On perusal of computation of income and Note 21-'Other Income' forming part of Notes to the Financial Statements for the previous year ended 31.03.2017 relevant to the Assessment Year 2017-2018, it is clear that the Appellant has offered to tax interest income of INR 2,30,136/- and therefore, the Assessing Officer is directed to grant credit of tax deducted at source by SBI amounting to INR 23,016/- to the Appellant.

9.2. As regards tax deducted at source by NHAI the Ld. Authorised Representative for the Appellant had contended that the issue before us is squarely covered by the judicial precedents cited before us.

9.3. We note that in the case before us, the Appellant has not offered the contract receipts to tax. Whereas, in the case of Bhooratnam & Co. (supra) the assessee claiming the credit of tax deducted at source had offered for taxation the contract receipts. The issue before the Hon'ble Andhra Pradesh High Court was whether the Joint Venture executing the works contract or the individual Co-Joint Venturer would be entitled to claim credit of tax deducted at source. The income was offered to tax by the individual Co-Joint Venturer but the certificate of tax deducted at source was issued in the name of the Joint Venture. Taking note of the fact that the Joint Venture had not filed any return of income and thus, neither offered any income

to tax nor claimed any credit of tax deducted at source, the Hon'ble High Court permitted the Co-Joint Venturer, offering corresponding receipts to tax, to claim credit of tax deducted at source. Similarly, in the case of IVRCL-KBL (JV) [supra] the assessee had declared gross contract receipts of INR 1,07,55,16,904/-. However, since the aforesaid receipts were passed on to a sub-contractor, the assessee had declared 'Nil' income. The Assessing Officer denied credit to tax deducted at source on the ground that all work was done by the sub-contractor and all income was assessable in the hands of the sub-contractor. In a writ petition preferred by the assessee in that case, the Hon'ble Andhra Pradesh High Court allowed of claim of credit of tax deducted at source to the assessee holding that there was privity of contract between the Government and the assessee and therefore, income had accrued to and was assessable in the hands of the assessee. Further, tax was deducted from the payments made to the assessee. Therefore, in view of the provisions of Section 199 of the Act read with Rule 37BA(2)(i) of the Rules, the assessee was entitled to claim credit of tax deducted at source.

9.4. In the case of Escorts Limited (supra), the assessee had claimed that the income was not liable to tax and therefore, had not disclosed the same in the return of income. The Tribunal allowed the assessee to claim credit of tax deducted at source in the aforesaid facts and circumstance. To the same effect is the decision of the Tribunal in the case of Supreme Renewable Energy Ltd. (supra). However, in the appeal before us, it is not the case of the Appellant that the contract receipts were not liable to tax in the hands of the Appellant.

9.5. In the case of Relcom (supra), the Ho'ble Delhi High Court permitted the assessee to claim credit for tax deducted at source even though income was not assessable in the hands of the assessee since the vendor had inadvertently issued certificate of tax deducted at source in the name of the assessee in respect of income of its sister concern taking note of the fact that the aforesaid sister concern of the assessee had not raised any objection and had also not claimed credit of tax deducted at source. It would be pertinent to note that while granting the relief the Hon'ble Delhi High Court observed that the Rule 37A was not directly applicable to the facts of the case and reliance was placed on the same to demonstrate that not in all circumstances credit of tax deducted at source is given to the deductee.

9.6. Having said as aforesaid, we note that the common thread running through the above judicial precedents on the basis of which relief has been granted to assessees in varied facts and circumstances is that Revenue cannot be allowed to retain tax deducted at source without credit being available to anybody, and therefore, either the deductee or the person in whose hand income is assessable should be allowed to claim credit of tax deducted at source by granting purposive interpretation of the provisions of Section 199 of the Act and Rule 37BA of the Rules dehors the procedural requirements specified therein which should give way to substantial justice. In this regard, we are guided by the following observations of the Hon'ble Andhara Pradesh High Court in the case Bhooratnam & Co (supra):

> *"13. S.199 (1) of the Act provides that any deduction of tax made in accordance with the provisions of Chapter XVII of the Act 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. Under sub section (3) of Section 199, the CBDT may, for the purpose of giving credit in respect of tax deducted at source or paid in terms of the provisions of Chapter XVII of the Act, make such rules as may be necessary, including the rules for the purpose of giving credit to a person other than those referred to in sub section (1) and sub section (2) and also the assessment year for which such credit may be given.

14. Rule 37BA of the Rules framed under Section 199(3) of the Act (introduced with effect from 01-04-2009 by Income Tax (Sixth Amendment) Rules, 2009 by the CBDT) is as follows:

> *"Credit for tax deducted at source for the purposes of section 199.*
>
> *37BA. (1) Credit for tax deducted at source and paid to the Central Government in accordance with the provisions of Chapter XVII, shall be given to the person to whom payment has been made or credit has been given (hereinafter referred to as deductee) on the basis of information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorised by such authority.*
>
> *(2) (i) If the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for tax deducted at source shall be given to the other person in cases where-*
>
> *(a) the income of the deductee is included in the total income of another person under the provisions of section 60, section 61, section 64, section 93 or section 94;*
>
> *(b) the income of a deductee being an association of persons or a trust is assessable in the hands of members of the association of persons, or in the hands of trustees, as the case may be;*
>
> *(c) the income from an asset held in the name of a deductee, being a partner of a firm or a karta of a Hindu undivided family, is assessable as the income of the firm, or Hindu undivided family, as the case may be;*
>
> *(d) the income from a property, deposit, security, unit or share held in the name of a deductee is owned jointly by the deductee and other persons and the income is assessable in their*

hands in the same proportion as their ownership of the asset:

Provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other 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.

(3) (i) Credit for tax deducted at source and paid to the Central Government, shall be given for the assessment year for which such income is assessable.

(ii) Where tax has been deducted at source and paid to the Central Government and the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax.

(4) Credit for tax deducted at source and paid to the account of the Central Government shall be granted on the basis of –

(i) the information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorized by such authority: and

(ii) the information in the return of income in respect of the claim for the credit,

subject to verification in accordance with the risk management strategy formulated by the Board from time to time."

15. By the Income Tax (8th amendment) Rules, 2011, the CBDT amended Rule 37 BA and in sub rule (2), for clause (i), the following clause was substituted:

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

16. This amendment has done away with the specified four clauses in the pre-amended Rule 37BA which restricted the benefit of the rule only in four specified situations. It has thus widened the scope of the rule 37 BA thereby enabling the credit of taxes to the actual payee in whose hands the income is assessable and not restricting this benefit only to the specified four situations.

17.-19 xx xx

20. The Revenue cannot be allowed to retain tax deducted at source without credit being available to anybody. If credit of tax is not allowed to the assessee, and the joint venture has not filed a return of income, then credit of the TDS cannot be taken by anybody. This is not the spirit and intention of law.

21. Therefore, in our view, the Assessing Officer erred in denying the benefit of the TDS mentioned in the TDS certificates filed by the assessees on the ground that the TDS certificate is issued in the name of the joint venture or a Director and not the assessee."(Emphasis Supplied)

9.7. The above decision was considered by the Hon'ble Delhi High Court In the case of Relcom (supra). In that case the Hon'ble Court permitted the Appellant to claim credit of tax deducted at source holding as under:

"7. The revenue relies on the phrase "shall be treated as a payment of tax on behalf of the person from whose income the deduction was made" to contend that the assessee's TDS claim cannot be based on the receipts of M/s REPL. However, the assessee fairly admitted throughout the proceedings for its TDS claim of Rs. 1,20,73,097/- that the benefit of such

claim has not been availed by M/s. REPL. Therefore, the revenue, having assessed M/s REPL's income in respect to such TDS claim cannot now deny the assessee's claim on the mere technical ground that the income in respect of the said TDS claim was not that of the assessee, given that M/s Relcom (the assessee) and M/s REPL are sister concerns and M/s REPL has not raised any objection with regard to the assessee's TDS claim of Rs. 1,20,73,097/-.

8. *This Court's reasoning is supported by a ruling of the Division Bench of the Andhra Pradesh High Court in CIT v. Bhooratnam & Co. [2013] 357 ITR 396/216 Taxman 6/29 taxmann.com 275 where the Court noted as follows:*

> *"In our view, the CIT (Appeals) and the Tribunal have rightly held that the assessee is entitled to the credit of the TDS mentioned in the TDS certificates issued by the contractor, whether the said certificate is issued in the name of the Joint Venture or in the name of a Director of the assessee company. They have considered the terms of the agreement dated 12-03-2003 among the parties to the joint venture and held that credit for TDS certificates cannot be denied to the assessee while assessing the contract receipts mentioned in the said certificates as income of the assessee. The income shown in the TDS certificates has either to be taxed in the hands of the joint venture or in the hands of the individual co-joint venturer. As the joint venture has not filed return of income and claimed credit for TDS certificates and the TDS certificates have not been doubted, credit has to be granted to the TDS mentioned therein for the assessee.*
>
> *** * ***
>
> *The Revenue cannot be allowed to retain tax deducted at source without credit being available to anybody. If credit of tax is not allowed to the assessee, and the joint venture has not filed a return of income, then credit of the TDS cannot be taken by anybody. This is not the spirit and intention of law."*

9. *At this stage, it is also relevant to note the provisions of Rule 37BA of the Income Tax Rules, 1962, which envisions grant of TDS credit to entities other than the deductee (herein, M/s REPL). We must clarify that we are not oblivious of the fact*

that Rule 37BA is not directly applicable in the facts of this case. The reliance placed on Rule 37BA is merely to demonstrate that in not all circumstances is TDS credit given to the deductee.

10. This Court relies upon the well-settled dictum that procedure is the handmaid of justice, and it cannot be used to hamper the cause of justice Sardar Amarjit Singh Kalra v. Pramod Gupta, [2003] 3 SCC 272. Therefore, the revenue's contention that the assessee, instead of claiming the entire TDS amount, ought to have sought a correction of the vendor's mistake, would unnecessarily prolong the entire process of seeking refund based on TDS credit." (Emphasis Supplied)

9.8. In the case before us, the objection of the Revenue is that the Appellant is claiming credit for tax deducted at source corresponding receipts of which have not been credited to the profit and loss account and therefore, not offered to tax. While the stand of the Appellant is that there was back to back arrangement with the Sub-Contractor and therefore, the entire receipts were passed on to the Sub-Contractor leaving 'Nil' income to be disclosed in the return of income. We are of the view that while the Appellant cannot be denied the credit for credit for tax deducted at source in the facts and circumstances of the present case, the Revenue cannot be denied opportunity to examine the receipts and corresponding payments. The Appellant has placed on record, separate ledger account maintained showing receipts from NHAI and corresponding payments to sub-contractors *(placed at Page 43 of the paper-book)*. Accordingly, the Assessing Officer is directed verify that the receipts and deducibility of the corresponding payments reflected in the aforesaid ledger account during the relevant assessment year, and thereafter, allow the claim of credit of tax

deducted at source by NHAI amounting to INR 66,26,115/-. With the aforesaid directions and in view of our findings in paragraph 9.1 above, Ground No. 1 to 4 are disposed off.

Ground No. 5 to 7

10. Ground No. 5, 6 & 7 pertaining to interest under Section 234B/D of the Act are disposed off as being consequential in nature.

In result, the present appeal preferred by the Appellant is allowed for statistical purposes.

Order pronounced on 18.10.2022.

Sd/-	*Sd/-*
(M. Balaganesh)	(Rahul Chaudhary)
Accountant Member	Judicial Member

मुंबई Mumbai; दिनांक Dated : 18.10.2022
Alindra, 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
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आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai