आयकर अपीलीय अधिकरण, हैदराबाद पीठ

IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' ' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member
AND
Shri K. Narasimha Chary, Judicial Member

ITA No. 34/Hyd/2023		
Assessment Year: 2019-20		
Shri Rajesh Dadu Hyderabad PAN:AERPD6385C	Vs.	Dy.C.I.T. Circle 4(1) Hyderabad
(Appellant)		(Respondent)
Assessee by:	Shri B. Radha Krishna, CA	
Revenue by:	Shri KPRR Murthy, CIT(DR)	
Date of hearing:	23/03/2023	
Date of pronouncement:	31/03/2023	

ORDER

Per R.K. Panda, A.M

This appeal filed by the assessee is directed against the order dated 9.11.2022 of the learned CIT (A)-NFAC, relating to A.Y.2019-20.

2. Although a number of grounds have been raised by the assessee, however, these all relate to the order of the CIT (A)-NFAC in upholding the order passed by the CPC in not giving credit of TDS amount of Rs.10,11,000/-.

3. Facts of the case, in brief, are that the assessee is an individual and filed his return of income for the impugned A.Y on 31.10.2019 declaring total income at Rs.1,57,94,132/- and paid

tax of Rs.53,85,276/- consisting of advance tax of Rs.30,00,000/- and tax deducted at source of Rs.25,05,786/- and claimed a refund of Rs.1,20,510/-. The CPC Bengaluru in the intimation u/s 143(1) did not give credit of Rs.10,11,000/- being the TDS u/s 194IA of the Act by Mr. Pradeep Ramrakhyani.

4. The assessee filed an appeal before the CIT(A)-NFAC and the CIT (A) – NFAC upheld the action of the CPC by observing as under:

> *"4. The submissions made by the appellant have been given careful consideration. From the details filed by the assessee, it has been noticed that during the year under consideration, the assessee sold his immovable property for a consideration of Rs.10,11,00,000/-. The contention of the assessee is that while making the purchase consideration, the vendee/agreement holder Mr.Pardeep Ramrakhyani had deducted TDS of Rs.10,11,000/- under the provisions of section 1941A of the Act, but the same was not deposited by the vendee into Central Government account and no Form 26B uploaded by him. From the details furnished by the assessee, it is not clear/evident whether the vendee/agreement holder Mr.Pardeep Ramrakhyani had made TDS of Rs.10,11,000/-. it is the plea of the assessee that the said amount or TDS of Rs.10,11,000/- had been deducted but not deposited by the vendee but no documentary evidence has been filed in this regard. To know this fact, a notice was issued on 27.09.2022 which is as under:*
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> *"For early disposal of your appeal filed for the above assessment year, it is requested that furnish documentary evidence by 29.09.2022 to the effect that Mr. Pardeep Ramrakhyani had made TDS of Rs. 10,11,000/- u/s 194IA of 1.T.Aci which has been claimed not to have been deposited in Central Govt. Account."*
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> *The appellant is filed written reply which is reproduced below:*
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> *"Copy of the written submissions, sale deed and other documents in this regard were already submitted on online on12/09/2022, 07/09/2020 and 20/01/2021 and on 17/08/2021 in response to earlier hearing notices. Kindly take the same on record as a reply in response to this notice.*
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> *Apparently, the assessee has not filed any evidence whatsoever that the vendee had made TDS of Rs.10,11,000/-, in the absence of which no direction in this regard can be given to the assessing officer. However, the assessee is at liberty to file evidence to this effect before the assessing officer. It is made clear that no credit of TDS can be allowed if the same is not appearing on the Income Tax Portal. Since the TDS of Rs.10,11,000/- is not being shown in Income Tax Portal, the action of the*

AO CPC in not allowing the credit of Rs.10,11,000/- is held to be justified and is confirmed. If the appellant files any evidence to the effect that the vendee had made TDS of Rs.10,11,000/-, the A is directed not to take any coercive measures to collect the outstanding demand to this extent. Thus, the grounds raised by the appellant are hereby allowed for statistical purpose."

5. Aggrieved with such order of the learned CIT (A)-NFAC the assessee is in appeal before the Tribunal.

6. The learned Counsel for the assessee submitted that the assessee has sold a property named as PARADISE PEARL situated at 1-7-1 78, 182 to 184, Mahatma Gandhi Road, Prenderghast, Secunderabad to Mr Pradeep Ramrakhyani for a total consideration of Rs. 10,11.00,000/- vide an Agreement of Sale cum-General Power of Attorney with Possession, registered with Sub Registrar, Secunderabad on 13.02.2019 vide document No.443 of 2019. While making the purchase consideration to the assessee, the Vendee/Agreement Holder Mr. Pradeep Ramrakhyani, has deducted TDS @ 1% of the sale consideration amounting to Rs. 10,11,000/- as per the provisions of section 194IA of the Income Tax Act, 1961 as the consideration is in excess of Rs.50,00,000/- and paid the balance amount to the assessee accordingly. The same was affirmed by the Vendee even at page No 6 at Point No.3 of the said registered document which can be taken as a proof that the vendee has deducted the tax component and withheld said TDS amount. Therefore, it is clearly established from the deed which was registered that the vendee has deducted tax at source. As the tax was deducted under section 194lA by the vendee, it is his duty to remit the same, upload Form 26QB and issue TDS certificate in Form No.16B. However, the vendee has not given the required form in Form 16B for deduction of Tax at Source to the assessee in spite of repeated

requests before filing the return of income by the assessee and the tax amount is also not appearing in the assesse's Annual Tax Statement. As the tax was already deducted by the vendee from the assessee, the demand raised by the DCIT, CPC at Bangalore against the assessee is not correct and the same should be recovered from the Vendee, Mr. Pradeep Ramrakhyani, as per the provisions of Sec.201 of the Income Tax Act, 1961, as the particulars of the Tax deducted at source for the said amount along with the complete address and PAN of the Vendee is already made available to the department in the return of income filed by the assessee under part 'B' of the 'Schedule CG' of Long Term Capital Gains.

7. Referring to the following decisions he submitted that once it is established that the tax has been deducted at source, the same cannot be recovered from the assessee and due credit has to be given on that TDS:

1) Yashpal Sahni vs. Rekha Hajarnavis vs. ACIT (2007) 165 Taxman 144 (293 ITR 539)(Bom),

2) Smt. Anusuya Alva v. Dy. CIT (205) 278 ITR 206 (Kar.)

3) Hon'ble Gujarat High Court in the case of CIT vs.Om Prakash Gattani (2000) 242 ITR 638.

4) Hon'ble Karnataka High Court in the case of Annusuya Alva v. CIT (2005) 147 Taxman 152.

5) Delhi Bench of the Tribunal in the case of Aricent Technologies Holdings Ltd vs. Addl. CIT in ITA 5708/Del/2019 dated 23.12.2019

8. He also relied on various other decisions and submitted that once the deductor has deducted the tax at source, the Department has no power to recover TDS amount from the

deductee. He accordingly submitted that the order of the CIT (A) be set aside and the assessee be given due credit of TDS payment of Rs.10,11,000/-.

9. The learned DR, on the other hand, heavily relied on the order of the CIT (A)-NFAC. He submitted that since no evidence whatsoever is available that the vendee has deposited the TDS amount of Rs.10,11,000/- therefore, no credit of the same can be allowed to the assessee. He accordingly submitted that the grounds raised by the assessee should be dismissed.

10. We have heard the rival arguments made by both the sides, perused the orders of the AO and the learned CIT (A)-NFAC and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us by both sides. We find the assessee in the instant case sold his immovable property for a consideration of Rs.10,11,00,000/- to one Mr. Pradeep Ramrakhyani who deducted TDS of Rs.10,11,000/- under the provisions of section 194IA but the same was not deposited by the vendee into the credit of the Central Govt. A/c and he had not uploaded Form No.26QB. We find the CPC therefore, did not give TDS credit of Rs.10,11,000/- in the intimation passed u/s 143(1) and the CIT (A)-NFAC upheld the action of the CPC, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the learned Counsel for the assessee that once the deductor has deducted the tax at source withholds tax out of payments due/paid to the assessee, but does not deposit the tax withheld by it, the assessee should not suffer for the same and due credit of the TDS is to be given to the assessee and action under the provisions of the Act can be taken against the deductor

who after deducting the tax has not deposited the same to the credit of the Central Govt.

11. We find merit in the above arguments of the learned Counsel for the assessee. A perusal of the agreement of sale cum GPA dated 12.02.2019, a copy of which is placed in the paper book, shows that the vendee has deducted an amount of Rs.10,11,000/- as TDS and surcharge @ 1% of the total sale consideration of Rs.10,11,00,000/-. Clause 3 of the said agreement of sale cum GPA reads as under:

> *"3. That an amount of Rs.10,11,000/- have been deducted by the Vendee as TDS and surcharge @ 1% on the total sale consideration of Rs.10,11,00,000/- received by the SRI RAJESH DADU u/s 194-1A of the Income Tax Act, which came into force from 1.06.2013".*

12. Under these circumstances, we have to see as to whether the assessee is liable for deposit/payment of the TDS of Rs.10,11,000/- already deducted by the vendee, but not deposited or be given credit of the same. We find an identical issue had come up before the Delhi Bench of the Tribunal in the case of Aricent Technologies Holdings Ltd vs. Addl. CIT in ITA 5708/Del/2019 order dated 23.12.2019 where the Tribunal after considering various decision has held as under:

> *"17. Now, coming to the next stand of the assessee wherein it has been pointed out that in case deductor deducts tax at source i.e. withholds tax, out of payments due / paid to the assessee; but does not deposit the tax withheld by it, then why should the assessee suffer?*
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> *18. Under section 199(1) of the Act, it is provided that if tax has been deducted at source in accordance with the provisions of the Chapter XVII and paid to the Central Government, the same shall be treated as payment of tax on behalf of the person, from whose income, the deduction was made.*
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> *19. Further section 205 of the Act reads as under:-*

205. Where tax is deductible at the source under [the foregoing provisions of this Chapter], the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income."

20. Under section 205 of the Act, it is further provided that where the tax had been deducted at source by the deductor out of payments due to the deductee, then such deductee cannot be held liable for payment of such tax which was deducted at source by the deductor. In other words, under the provisions of the Act, it is provided that there is liability upon the person making the payments, to deduct tax at source in line with the provisions of Chapter XVII of the Act. Once such tax had been deducted then the deductor is liable to deposit the same into the credit of the Central Government. Such amount which is withheld by the deductor out of the amount due to the deductee i.e. person to whom the payments are made, then the said deduction shall be treated as payment of tax on behalf of the person from whom such deductions was made, as per the provisions of section 199(1) of the Act. Further there are provisions under the Act dealing with the recovery of tax at source from the person who have withheld the same. In terms of section 205 of the Act, the assessee/deductee cannot be called upon to pay tax, to the extent to which tax had been deducted from the payments due. Consequently, it follows that credit for such tax deducted at source, which is deducted from the account of the deductee, by the deductor, is to be allowed as taxes paid in the hands of the deductee, irrespective of the fact whether the same has been deposited by the deductor to the credit of the Central Government or not. The deductee in such circumstances cannot be denied credit of tax deducted at source on its behalf. Under the Act, the provisions are enshrined under which recovery of tax from the account of the person, who had deducted the such tax, are provided. Accordingly, we hold that where the assessee is able to furnish the necessary details with regard to tax deduction at source out of the amounts due to it, then the action which follows is allowing the credit of such tax deducted at source to the account of the deductee. In case where the deductor deposits the tax deducted at source to the credit of the Central Government and the deduction reflects in Form No.26AS may be on a later date, then it is incumbent upon the assessee to produce the necessary evidence in this regard and it is also the duty of the Assessing Officer to allow such credit of tax deducted at source, as taxes paid in the hands of the deductee assessee.

21. We find support from the ratio laid down by the Hon'ble Bombay High Court in Yashpal Sahani vs. Rekha Hajarnavis, Assistant Commissioner of Income-tax [2007] 165 taxman 144 (Bom.) and Hon'ble Gujarat High Court in the case of Sumit Devendra Rajani vs. Assistant Commissioner of Income-tax [2014] 49 taxmann.com 31 (Gujarat).

22. The Hon'ble High Court in latest decision dated 30.01.2019 in Pushkar Prabhat Chandra Jain vs. Union of India [2019] 103 taxmann.com 106 (Bombay) has held as under:-

7. Section 205 of the Act carries the caption "Bar against direct demand on assessee". The section provides that where tax is deducted at the source under the provisions of Chapter XVII, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been

deducted from that income. This provision came up for consideration before division bench of this Court in case of Yashpal Sahni Vs. Rekha Hajarnavis and ors. It was a case where the employer while paying salary to the employee had deducted tax at source Rs.6.66 lakhs. Subsequently, disputes arose between the employer and employee due to which service of the employee was terminated. The employee filed the return of income claiming credit of TDS of Rs.6.66 lakhs. The Assessing Officer issued intimation under Section 143(1)(a) of the Act denying credit of TDS of Rs.6.66 lakhs on the ground that such amount was not deposited by the employer. This Court in such background after referring to Section 205 of the Act held and observed as under:"

20. From the language of Section 205, it is clear that once the tax is deducted at source, the same cannot be levied once again on the assessee who has suffered the deduction. Once it is established that the tax has been deducted at source from the salary of the employee, the bar under Section 205 of the Act comes into operation and it is immaterial as to whether the tax deducted at source has been paid to the Central Government or not, because elaborate provisions are made under the Act for recovery of tax deducted at source from the person who has deducted such tax.

21. In the present case, the petitioner assessee has furnished monthly pay slips and bank statements to show that from his salary tax was deducted at source by the employer respondent No. 6. Authenticity of the said pay slips and bank statements have not been disputed by the revenue. Thus, it is clear that the tax has been deducted at source by the respondent No. 6 from the salary paid to the petitioner. Therefore, the only question to be considered is, if the employer respondent No. 6 has failed to deposit the tax deducted at source from the salary income of the petitioner to the credit of the Central Government, whether the revenue can recover the TDS amount with interest once again from the petitioner?

22. In the present case, though the respondent No. 6 has deducted the tax at source from the salary income of the petitioner, the respondent No. 6 has not issued the TDS certificate in Form No. 16 to the petitioner. As a result, the petitioner is not entitled to avail credit of the tax deducted at source. However, once it is established that the tax has been deducted at source, the bar under Section 205 of the Act comes into operation and the revenue is barred from recovering the TDS amount once again from the employee from whose income, TDS amount has been deducted. It is pertinent to note that the purpose of issuing TDS certificate under Section 203 of the Act is to enable the assessee to avail credit of the tax deducted at source in the relevant assessment year. If the TDS certificate is not issued, then under Section 199 of the Act, the assessee from whose income, tax has been deducted at source will not be entitled to take credit of the said amount. In that event, on account of the non availability of the credit, the assessee would be liable to pay tax once again even though the tax was deducted at source. Thus, it would be a case of double taxation which is not permissible in law. To avoid such anomaly, Section 205 has been enacted, to the effect that, once the tax is deducted at source by the employer company, then, the person from whose income, the tax has been deducted at source shall not be called to pay the said tax again. From the language of Section of 205 of the Act, it is clear that the bar operates as soon as it is established that the tax has been deducted at source and it is wholly irrelevant as to whether the tax deducted at source is paid to the credit of Central Government or not and

whether TDS certificate in Form No. 16 has been issued or not. Also the mere fact that the employer may not issue TDS certificate to the employee does not mean that the liability of the employer ceases. The liability to pay income tax if deducted at source is upon the employer.

23. As held by the Gauhati High Court in the case of Omprakash Gattani (supra), once the mode of collecting tax by deduction at source is adopted, that mode alone is to be adopted for recovery of tax deducted at source. Although it is obligatory on the part of the person collecting tax at source to pay the said TDS amount to the credit of the Central Government within the stipulated time, if such person fails to pay the TDS amount within the stipulated time, then, Section 201 of the Act provides that such person shall be deemed to be an assessee in default and the revenue will be entitled to recover the TDS amount with interest at 12% p.a. and till the said TDS amount with interest is recovered there shall be a charge on all the assets of such person or the company. Penalty under Section 221 of the Act and rigorous imprisonment under Section 276B of the Act can also be imposed upon such defaulting person or the company. Thus, complete machinery is provided under the Act for recovery of tax deducted at source from the person who has deducted such tax at source and the revenue is barred from recovering the TDS amount from the person from whose income, tax has been deducted at source. Therefore, the fact that the revenue is unable to recover the tax deducted at source from the person who has deducted such tax would not entitle the revenue to recover the said amount once again from the employee assessee, in view of the specific bar contained in Section 205 of the Act.

24. As stated earlier, in the present case the petitioner assessee has established that from his salary income, tax has been deducted at source by the employer respondent No. 6 and, therefore, the revenue has to recover the said TDS amount with interest and penalty from the respondent No. 6 alone and the revenue cannot seek to recover the said amount from the petitioner assessee in view of the specific bar contained under Section 205 of the Act. The fact that the petitioner is not entitled to the credit of the tax deducted at source for the non issuance of the TDS certificate by the respondent No. 6, cannot be a ground to recover the amount of tax deducted at source from the petitioner. In other words, even if the credit of the TDS amount is not available to the petitioner assessee for want of TDS certificate, the fact that the tax has been deducted at source from salary income of the petitioner would be sufficient to hold that as per Section 205 of the Act, the revenue cannot recover the TDS amount with interest from the petitioner once again."

8. The situation arising in the present petition is similar. The department does not contend that the petitioner did not suffer deduction of tax at source at the hands of payer, but contends that the same has not been deposited with the Government revenue. As provided under Section 205 of the Act and as elaborated by this Court in case of Yashpal Sahni (supra) under such circumstances the petitioner cannot be asked to pay the same again. It is always open for the department and in fact the Act contains sufficient provisions, to make coercive recovery of such unpaid tax from the payer whose primary responsibility is to deposit the same with the Government revenue scrupulously and promptly. If the payer

after deducting the tax fails to deposit it in the Government revenue, measures can always be initiated against such payers."

23. Applying the same parity of reasoning, we direct the Assessing Officer to allow the credit of tax deducted at source in the hands of the assessee, where the assessee produces the primary evidence of same being deducted tax at source out of the amount due to it. The ground of appeal no. 6 is thus allowed."

13. We find the Hon'ble Karnataka High Court in the case of Smt. Anusuya Alva vs. Dy. CIT reported in (2005) 278 ITR 206 (Kar.) while deciding an identical issue has observed as under:

"7. The question is to whether the failure on the part of such person should result in the assessee making good the amount, though in reality, to that extent of such tax liability, the assessee has already been relieved of the amount.

8. Section 205 of the Act reads as under:

"205. Bar against direct demand on assessee : Where tax is deductible at the source under Sections 192 to 194, Section 194A, Section 194B, Section 194BB, Section 194C, Section 194D, Section 194E, Section 194EE, Section 194F, Section 194G, Section 194H, Section 194-I, Section 194J, Section 194K, Section 195, Section 196A, Section 196B, Section 196C and Section 196D, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income."

On a plain reading of this provision, it is very clear that in a situation where the tax is deductible at source under Section 194-I of the Act, as in the present case, and to the extent to which the tax has been deducted from the income, the assessee shall not be called upon to pay the tax himself/herself to such extent. That means what the section provides for is to put an embargo or prohibition from raising a demand on the assessee in respect of the amount, which was deductible and actually deducted to the extent it has been deducted. The section by itself does not say that the amount should also be paid to the Central Government. There is no doubt that such an obligation is cast on the person responsible namely, the person who has deducted the amount and the Act also provides for initiation of proceedings against the person on his/her failure to do so, right upto the prosecution of the person for recovery of the amount with interest. The condition of remittance is not referred to or made a requirement for the protection to the assessee under Section 205 of the Act. Even if one reads the earlier provisions such as 192, 194-I, 199, 200, 201, 202 and 203 to presume that payment being on behalf of the assessee having expressly made applicable when the amount is remitted and granted to give credit to the amount of the tax payable by the assessee also, only when the amount deducted is also remitted, whereas, there is a clear departure in the case of Section 205 by not mentioning the words 'remittance of the amount' in this section. Here again, for imposing the bar on the

Revenue for making a direct demand on the assessee, what is indicated in the section is a requirement in law for deduction and factual deduction and nothing more. Insofar as such requirements are concerned, in the present case, it is not much in dispute that it has happened or fulfilled. In fact, the bar only is not to raise demand on the assessee herself or to enforce recovery on the assessee after the deduction is made in respect of the amount deducted. That means, once deduction is made, the Revenue is expected to look upto the person who had deducted the tax for realizing the amount, if such person fails in remitting the amount to the Central Government.

9. I am of the view that this understanding and such interpretation of Section 205 of the Act is also in consonance with the general principles of law, particularly the principles of the Law of Principal and Agent. If we look at the scheme for the provision of deduction of tax at source, it becomes obvious that such person is acting on behalf of the Revenue, i.e., as an agent of the Revenue. In fact, the person is enabled statutorily to make deduction and remit the amount to the Central Government, though in the instant case, the person who has deducted the amount may be the tenant or lessee of the petitioner and there is such inter se relationship as between the two, insofar as the deduction of tax at source representing 20 per cent of the monthly rent payable as envisaged under Section 194-I of the Act is concerned, the deduction is under the statutory obligation and on behalf of the Revenue and because of the compulsion herein. It is not as if the petitioner could prevent such deduction. When the person like a tenant acts as a representative or agent of the Revenue for such deduction and if there is any violation on his/her part, the consequence should fall only on the Revenue and that cannot be foisted on the assessee. It is no doubt true that the assessee if pays the tax in terms of the tax liability, i.e., under the assessment order and to the extent of the amount is not paid to the Government remains a liability on the assessee also and could look upto the tenant to recover the amount for reimbursement. The question in the light of the provisions is that, should the assessee be driven to that plight ? I think that the provision is to provide a protection to the assessee and to prevent the Revenue from embarking on the recovery proceedings in respect of such amount. If such being the object of the provision, it is not possible to understand the word 'deduct' occurring in Section 205 as 'deducted and remitted'.

10. Even on the general principles of law, the Law of Principal and Agent, as discussed above, for a default of the agent of the Revenue, the petitioner-assessee, who is a third party in relation to such relationship cannot be penalised. In the circumstances, I am of the view that the Revenue is to be definitely restrained in terms of Section 205 of the Act from enforcing any demand on the assessee-petitioner insofar as the demand with reference to the amount of tax which had been deducted by the tenant of the assessee in the present case, and assuming that the tenant had not remitted the amount to the Central Government. The only course open to the Revenue is to recover the amount from the very person who has deducted and not from the petitioner."

14. The various other decisions relied on by the learned Counsel for the assessee also support his case to the proposition

that the Revenue cannot deny the TDS credit to the assessee and the only option left for the Revenue is to proceed against the deductor by holding him to be an assessee-in-default. We, therefore, set aside the order of the CIT (A)-NFAC and direct the CPC to give due credit of Rs.10,11,000/- to the assessee. The grounds raised by the assessee are accordingly allowed.

15. In the result, appeal filed by the assessee is allowed.

Order pronounced in the Open Court on 31st March, 2023.

Sd/-	**Sd/-**
(K. NARASIMHA CHARY) **JUDICIAL MEMBER**	**(R.K. PANDA)** **ACCOUNTANT MEMBER**

Hyderabad, dated 31st March, 2023

Vinodan/sps

Copy to:

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5	Guard File

By Order