IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH KOLKATA

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No.530/Kol/2023
Assessment Year: 2020-21

Turner Morrison Ltd., 6, Lyons Range, Kolkata (PAN: AAACT9790M)	Vs.	DCIT, Circle-4(1), Kolkata.
(Appellant)		**(Respondent)**

Present for:
Appellant by : Shri Miraj D. Shah, AR
Respondent by : Shri S. Datta, CIT, DR

Date of Hearing : 01.02.2024
Date of Pronouncement : 07.02.2024

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of Ld.CIT(A), National Faceless Appeal Centre (NFAC), Delhi, vide order No. ITBA/NFAC/S/250/2022-23/1051499048(1) dated 28.03.2023 passed against the Intimation by CPC u/s.143(1) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 06.08.2021 for AY 2020-21.

2. Grounds of appeal taken by the assessee are reproduced as under:

"1. That on the facts and circumstances of the case, the learned Commissioner of Income Tax Appeals, National Faceless Appeal Centre (hereinafter referred to as "CIT(A)" has erred in not allowing credit of Rs. 19,08,955/- TDS deducted by tenant, M/s Cox & Kings Limited (TAN MUMC01692F) and credit of which is not appearing in form 26AS of the appellant inspite of filing of evidence for TDS deduction.

2. That on the facts and circumstances of the case, the learned (A) has erred in not giving a clear direction to the Assessing Officer for not recovering the demand in relation to TDS of Rs 19,08,955/- deducted by deductor (M/s Cox

& Kings Limited) and to refund the amount of Rs 19,08,955/- recovered from appellant.

3. That on the facts and circumstances of the case, the learned CIT(A) has erred in not following the provisions of law, CBDT Circulars and instructions in relation to TDS deducted by deductor but credit of which is not appearing in form 26AS .

4. That in any case and in any view of the matter, the learned CIT(A) has grossly erred in not allowing credit of TDS of Rs.19,08,955/- deducted by deductor, M/s Cox & Kings Limited (TAN MUMC01692F) and claimed by the appellant in its return of."

2.1. The moot point arising from the above stated grounds relate to credit of TDS not allowed to the assessee of Rs.19,08,955/-, deducted by M/s. Cox & Kings Ltd., owing to credit not appearing in Form 26AS of the assessee and not following the CBDT Circular and Instruction.

3. In this respect, brief facts of the case are that assessee filed its return of income on 02.02.2021 claiming credit of TDS of Rs.2,10,07,258/- and a refund of Rs.10,84,09,330/-. In the intimation issued u/s. 143(1), on processing of the return, TDS credit to the extent of Rs.19,15,879/- was not allowed since it did not appear in Form 26AS. Assessee submitted that credit of TDS could not be denied since filing of revised return of TDS by the deductor is not the responsibility of the assessee and it does not have any control on the TDS deductor to compel them to file their revised TDS returns. Aggrieved, assessee went in appeal before the Ld. CIT(A).

3.1. Assessee referred to several judicial precedence as well as CBDT Circular to buttress its contentions. Before the Ld. CIT(A), assessee had submitted that credit for three TDS entries were not given by the Ld. AO, out of which later, two reflected in Form 26AS. In respect of credit of TDS from Cox & Kings Ltd. it was submitted that assessee had received rental income from Cox & Kings Ltd. who after deducting TDS paid rent to the assessee. Even though TDS was deducted from rent paid to the assessee, Cox & Kings Ltd. had not deposited the TDS so deducted by it. For supporting this claim,

assessee furnished copies of letter written to Cox & Kings Ltd. as well as to the Department, in the office of Ld. DCIT-1(1), TDS Circle, Mumbai. Considering the submissions made by the assessee, Ld. CIT(A) gave direction to the Ld. AO to verify the details of TDS credit and allow the claim as per the provisions of the Act. It was also directed to adhere to the CBDT Circular vide no. 275/29/2014-IT(B) dated 11.03.2016. Appeal of the assessee was thus partly allowed.

3.2. Decision taken by the ld. CIT(A) on this issue vide para 7.2 is extracted below:

> *"The order u/s 143(1) passed by the AO, submissions of the appellant and the material on record have been considered. After considering the rectification order passed by the A.O., CPC, Bengaluru, the TDS of Rs. 19,15,979/- was not allowed by the A.O., CPC since the data of TDS deducted by M/s Cox and King Limited was not fully available in the Form 26AS of the appellant. During the course of appeal, the appellant sought Video Conference on the issue of TDS and the same was provided on 20.03.2023 at 3.30PM. During the course of hearing, the appellant submitted A.O. had not given credit of 3 TDS entries, out of which 2 are now reflecting in the Form 26AS. The appellant submitted that it had received rental income from Cox and King, who after deducting TDS, had paid the rent to the appellant. However, the TDS so deducted on rent was not deposited by the Cox and King. The appellant on this issue submitted copies of letter written to Cox and King dated 06.08.2019 and letter written to DCIT1 (1), TDS Circle, Mumbai for non deposit of TDS by the deductor on 08.08.2019 and again on 23.08.2019. The appellant also cited C8DT circular F. No. 275/29/2014-IT(8) dated 11.03.2016 wherein it was instructed not to enforce demand wherein mismatch is due to non-payment of TDS by the deductor to the government account. The appellant did not have TDS certificate. The appellant was requested to submit copies of ledger of Cox and King and bank accounts statements highlighting the payments from the party. The same is yet to be submitted by the appellant. From the details filed, it appears that the there was a genuine problem of non deposit of TDS by the deductor as the same is evident from the letters written by the appellant to the DCIT-1(1), TDS Circle, Mumbai. The appellant submitted that two of TDS claims are now available in Form 26AS. Therefore, the AO is directed to verify these TDS credit and allow the claim as per the provisions of the Act. The AO is also directed to adhere to the CBDT circular F. No. 275/29/2014-IT(B) dated 11.03.2016 in this issue. Ground No. 14 raised by the appellant is thus partly allowed."*

4. Aggrieved, assessee is in appeal before the Tribunal.

5. Before us, ld. Counsel for the assessee reiterated the facts narrated above. Ld. Counsel referred to the CBDT Office

Memorandum dated 11.03.2016 (supra) according to which in case of an assessee whose tax has been deducted at source but not deposited to the government account by the deductor, the deductee assessee shall not be called upon to pay the demand to the extent tax has been deducted from his income. In the said Office Memorandum, it is further specified that section 205 of the Act puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mis-match in such situation cannot be enforced coercively.

5.1. The aforesaid CBDT office Memorandum is extracted below:

F.No. 275/29/2014-IT (B)
Government of India
Ministry of Finance
Central Board of Direct Taxes
(CBDT)

New Delhi, Dated: 11th March, 2016

Office Memorandum

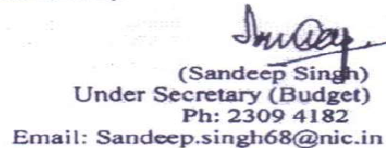
Sub: Non-deposit of tax deducted at source by the deductor- Recovery of demand against the deductee assessee.

Vide letter of even number dated 01.06.2015, the Board had issued directions to the field officers that in case of an assessee whose tax has been deducted at source but not deposited to the Government's account by the deductor, the deductee assessee shall not be called upon to pay the demand to the extent tax has been deducted from his income. It was further specified that section 205 of the Income-tax Act, 1961 puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch in such situations cannot be enforced coercively.

2. However, instances have come to the notice of the Board that these directions are not being strictly followed by the field officers.

3. In view of the above, the Board hereby reiterates the instructions contained in its letter dated 01.06.2015 and directs the assessing officers not to enforce demands created on account of mismatch of credit due to non-payment of TDS amount to the credit of the Government by the deductor. These instructions may be brought to the notice of all assessing officers in your Region for compliance.

This issues with the approval of Member (Revenue &TPS).



(Sandeep Singh)
Under Secretary (Budget)
Ph: 2309 4182
Email: Sandeep.singh68@nic.in

All Principal Chief Commissioners/ Principal Directors General of Income Tax.
All Chief Commissioners/ Directors General of Income Tax.

Copy to:

1. Chairperson and all Members of CBDT.
2. All Joint Secretaries and Commissioners in CBDT.
3. Pr. DGIT (Systems) and Pr.DGIT (Admin.).
4. Additional Directors General (Recovery) and (PR, PP&OL).
5. Web Managers of irsofficersonline.gov.in and incometaxindia.gov.in for placing the Office Memorandum on the respective portal.
6. Office of Comptroller & Auditor General of India (30 copies).

6. Ld. Counsel referred to judicial precedence of the Coordinate Bench of ITAT, Kolkata in the case of Vishal Pachisaia Vs. ITO in ITA No. 764/Kol/2023 dated 07.11.2023 as well as Hon'ble Delhi High Court in the case of PCIT Vs. Jagsit Singh, 2023:DHC:8522-DB.

7. We have perused the material on record contained in paper book of 24 pages. We take note of the letter written by the assessee to Cox & Kings Ltd. dated 06.08.2019 in respect of non-deposit of TDS deducted by it from the bill for license fees raised by the assessee. We also take note of the submission made by the assessee before the DCIT-1(1), TDS Circle, Mumbai, duly acknowledged by the date stamp from the office of ACIT (TDS) 1(1), Mumbai dated 09.08.2019 whereby all the required documentary evidence and details were placed on record. These factual documentary evidences have not been controverted or disputed by the department.

7.1. We find that assessee had raised a bill towards licence fees for the period April, 2019 to June 2019 amounting to Rs.1,90,88,550/- plus GST, totalling to Rs.2,25,24,489/-. Assessee had received net amount of Rs.21,06,15,634/- after TDS of Rs.19,08,855/-. The tax so deducted was not deposited in the government treasury and therefore, the same did not reflect in Form 26AS, resulting in denial of TDS credit while processing its return thereby raising a demand. We note that case of the assessee is supported by several judicial precedence referred by the Ld. Counsel whereby issue of non-deposit of TDS by the deductor has been held in favour of assessee by holding that once tax is deducted then the liability resulting from non deposit of tax so deducted by the deductor cannot be fastened on the deductee (assessee). We also refer to the decision of Hon'ble High Court of Delhi in the case of Jagsit Singh (supra) wherein this issue has been examined elaborately which is extracted as under:

"7. In this context, it is important to note that sub-section (3) of Section 199 of the Act alludes to the power invested in the Central Board of Direct Taxes (CBDT) to frame rules as to how credit in respect of tax deducted or tax paid in terms of Chapter XVII is to be given. [See Rule 37BA). Significantly, the CBDT is empowered to frame rules that may be necessary to give credit to a person "other than those referred to in sub-section (1) and sub-section (2) .." of Section 199. Therefore, Section 199, read in its entirety, does not limit credit only to those deductees whose deductors have deposited the amount with the Central government.

7.1 Moreover, the expression "and paid" to the Central Government found in Section 199(1) must be contextualized in the setting in which it is placed, i.e., Chapter XVII, whereby, the sanctions for failing to deposit tax with the Central government are laid on the payor/deductor.

7.2 Section 199, which is contained in Chapter XVII and, inter , includes provisions for collection and recovery of tax. Chapter XVII of the Act is divided into eight (8) parts.

7.3 Part A, which is general, includes Sections 190 and 191. Part B concerns Deduction [of tax] at source. Part BB relates to the Collection [of tax] at source. Part C pertains to Advance payment of tax. Part D concerns Collection and recovery of tax.

7.4 Part E concerns 'tax payable under provisional assessment' and includes Sections 233 and 234 of the Act as omitted by the Taxation Laws (Amendment) Act, 1970 [w.e.f. 1-4-1971], and the Direct Tax Laws (Amendment) Act, 1987 [w.e.f. 1-4-1989], respectively.

7.5 Part F concerns Interest chargeable in certain cases. Lastly, Part G provides for provisions for the levy of fees in certain cases.

8. As would be evident, Chapter XVII of the Act puts in place a legislative scheme for the collection of taxes by various modes, which includes direct levy [See Section 191], deduction of tax at source, or collection at source.

8.1 Sections 192 to 195 and 196A to 196D provide for the deduction of tax at source for payments made under various heads. For instance, payments made by way of salary, interest on securities, dividends, and interest (other than interest on securities), winnings from lotteries or crossword puzzle, and winnings from horse race are amenable to deduction of tax at source under Sections 192, 193, 194, 194A, 194B and 194BB, respectively.

8.2 Likewise, payments made to contractors and insurance commission, payments made in respect of life insurance policy, and payments made to the non-resident sportsmen or sports associations are liable for deduction to tax at source under Sections 194C, 194D, 194DA, and 194E, respectively.

8.3 As far as payments made to non-residents [not being a company], or to a foreign company are concerned, any interest (not being interest referred to in section 194LB or section 194LC or section 194LD) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head ·Salaries·) payable to such non-resident is made amenable to deduction of tax at source under Section 195 of the Act.

8.4 Specifically, the grossing up principle finds statutory recognition in Section 198 of the Act. This is a principle, whereby, income which is payable, say, under any agreement/arrangement [in a case not referred to in Section 192(JA), and the tax chargeable on that income is required to be deducted by

the payor; then the income is increased by the payor/deductor and offered to tax inclusive of the tax deducted at source.

8.5 Chapter XVII also contains provisions where, if tax is not deducted at source, it can be recovered from the payee. This is contained in Sections 191 and 202 of the Act.

8.6. Significantly, Chapter XVII contains provisions for penalizing the payor/deductor when he fails to deposit the tax deducted at source with the Central Government. For instance, the Act provides for consequences qua the person who is obliged to deduct tax at source but fails to do so or; after deducting fails to deposit the same. Under Section 201, such a person is deemed to be an 'assessee-in-default' and would, upon this eventuality occurring, be liable to pay interest [See sub-section (1A) of Section 201].

8.7 Furthermore, the 'assessee-in-default'is also liable for imposition of penalty under Section 221 of the Act. Besides this, outside Chapter XVII, penalty can also be levied under Section 271 C.

8.8 In addition, thereto, a person who fails to deposit tax deducted at source, under the provisions of Chapter VII-B, is liable for punishment with rigorous imprisonment under Section 276B.

8.9 That said, both impositions of penalty and prosecution are subject to the defence of 'reasonable cause' as provided in Sections 273B and 278AA of the Act respectively.

9. Importantly, Section 201(2), provides that where a person who, although required to, does not deduct tax 23 or does not pay the tax deducted at source or after deducting fails to pay wholly or part of the tax as required under the Act, would have a statutory charge created on his assets concerning both the tax as well as the interest payable under sub-section (1A) of the said provision.

10. Thus, in our opinion, the Act does not seem to cast a burden on the deductee/payee with regard to the deposit of money, which is retained as tax, by the payer i.e., the deductor. Therefore, insofar as the deductee/payee is concerned, once the payer/deductor, who acts as an agent of the Central Government, has retained money towards tax, credit for the same cannot be denied, having regard to the consequences and the modes available for recovering the said amount from the payer/deductor.

11. In this particular case, the deductors are individuals who, concededly, after retaining the tax deducted at source did not fully deposit the same, as noted above, with the Central Government.

12. Upon the respondent/assessee becoming aware of this fact, a police complaint was lodged, which was brought to the notice of the appellant/revenue. Despite this aspect being brought to the notice of the appellant/revenue, no steps were taken either under the provisions of the Act or under the common law for recovery or even under the extant statute(s) for bringing deductors to book in accordance with the law.

13. In our opinion, the argument advanced by Mr Bhatia that the amount deducted towards tax at source will not be given credit because the deductor has chosen not to deposit the amount with the Central Government is erroneous for another reason, which is that the nature of the amount retained by the deductor continues to remain as 'tax'.

13.1 This aspect clearly emerges upon perusal of the contents of the information provided in the Tax Payers Information Series-28 booklet titled "Tax Deduction at Source (TDS) Other Than Salaries" published by the Income Tax Department. The booklet notes that tax deducted at source will be treated as payment of 'tax' on the assessee's behalf. For convenience, the relevant part of the booklet is extracted hereafter:

> *"4.2 Credit of TDS Where taxes have been deducted at source from any payment of income receivable by an assessee, the amount of tax deducted at source would be included in the income of the assessee while computing the income of the assessee and would be deemed to be the income received (S.198). Further credit will be given to the assessee while calculating the net tax payable by him and the tax deducted at source will be treated as a payment of tax on his behalf (i.e. to the Central Government by the payer who has deducted the tax at source (S.199)."* *[Emphasis is ours]*

14. The Act has, thus, provided a regime as to how tax is required to be collected against certain payments. Once the deductee adheres to the statutory regime and allows the deductor to retain money towards tax, the nature of the amount cannot change and, therefore, the deductee, in our view, would be entitled to the credit of the amount retained by the deductor towards tax. Any other view would result in a situation where even though the assessee would have grossed up his income [by including the tax deducted at source] and offered the same for taxation, he would be denied the benefit of having the resultant tax demand adjusted against tax deducted at source by the payer. This handicap the assessee/deductee [i.e., the respondent/assessee] would suffer only because the deductor, who acts as the agent of the Central Government, chooses not to deposit the amount retained towards tax."

8. Considering the facts on record, CBDT Office Memorandum and the judicial precedents, we set aside the order of Ld. CIT(A) and direct the Ld. AO to verify the claim of the assessee to allow the credit of tax deducted as claimed, after taking into consideration the directors contained in CBDT Office Memorandum, provisions of section 205 of the Act as well as judicial precedence dealt herein. Accordingly, grounds taken by the assessee are allowed for statistical purposes.

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

Order is pronounced in the open court on 07th February, 2024

Sd/-	Sd/-
(Sanjay Garg)	(Girish Agrawal)
Judicial Member	Accountant Member

Dated: 07th February, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent.
3. CIT(A), NFAC, Delhi
4. CIT
5. DR, ITAT, Kolkata Bench, Kolkata

//True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata