IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 13863 of 2022

==========

MILAN ARVINDBHAI PATEL

Versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 4(1)

==========

Appearance:
MR DARSHAN B GANDHI(9771) for the Petitioner(s) No. 1
MR SP MAJMUDAR(3456) for the Petitioner(s) No. 1
MR NIKUNT K RAVAL(5558) for the Respondent(s) No. 1

==========

CORAM: **HONOURABLE THE ACTING CHIEF JUSTICE MS. JUSTICE SONIA GOKANI**
and
HONOURABLE MR. JUSTICE SANDEEP N. BHATT

Date : 13/02/2023

ORAL ORDER
(PER : HONOURABLE THE ACTING CHIEF JUSTICE MS. JUSTICE SONIA GOKANI)

1. The petitioner is an individual, seeking to challenge the action under Article 226 of the Constitution of India of cancelling the outstanding demand as reflected on income tax portal for the Assessment Year 2010-11, 2011-12 and 2012-13 and to quash the recovery notices dated 14.02.2020, dated 15.02.2020 and dated 14.02.2020 for the respectively assessment years, for recovering the unpaid TDS amount of the employer of the petitioner i.e. Kingfisher Airlines as well as seeking the refund of an amount which is adjusted against the outstanding demand.

2. As averred, the petitioner is a pilot working with Indigo Airlines since 2013. During the Assessment Years 2010-11 to 2012-13, he was working with Kingfisher Airlines.

3. The petitioner filed his return of income under Section 139 of the Income Tax Act ('the Act' for short) for AY 2010-11, 2011-12 and 2012-13.

4. The notice was received from the office of the Assessing Officers on 19.11.2013 and 21.08.2014 seeking recovery of outstanding demand of Rs.19,40,707/- for Assessment Year 2011-12 and further notice of 03.03.2015 recovery of 25,12,913/- for Assessment Year 2012-13. In fact, the petitioner, as averred, is eligible for the refund of Rs.45,570/- for the AY 2012-13.

5. The department has issued recovery notices. The petitioner approached his employer – Kingfisher Airlines, requesting to furnish the certificate in relation to the TDS amount deducted. Certificate was given along with the computation of salary on 19.11.2015 stating the Form-16 is under process and filing of annual TDS return will be completed shortly.

6. The summary of income tax return and refund due to the petitioner is given below.

Sr. No.	Asst. Year	Tax Payable`	Tax paid by TDS	Advance Tax	Self Assessment Tax	Refund as per ITR
1	2011-12	16,04,286	15,84,858	65,000	NA	45,750
2	2012-13	16,93,965	17,31,599	NA	NA	37,630
3	2013-14	17,17,358	18,60,410	NA	NA	1,43,050
4	2014-15	19,02,072	20,07,358	NA	NA	1,05,290
5	2015-16	21,55,917	22,03,117	NA	NA	47,200
6	2017-18	29,86,210	27,94,988	NA	1,91,220	NA
7	2018-19	32,60,344	27,81,751	2,70,000	2,08,590	NA
8	2019-20	30,09,273	30,14,452	NA	NA	23,150
9	2020-21	29,22,787	30,14,452	NA	NA	28,000
10	2021-22	13,42,951	14,99,507	NA	NA	1,56,560
Total Refund due						**5,86,630**

7. According to the petitioner, the promoter of Kingfisher Airlines – Mr. Vijay Malya got bankrupt, on 11.03.2016, the Government of India – Ministry of Finance circulated office memorandum amongst all the Income Tax Departmental Officers directing them not to raise any demand of taxes on account of mismatch of credit of TDS due to non-payment of TDS by the Kingfisher Airlines. Therefore, the present petition, with the following main prayers.

> *"10(A) Your Lordships may be pleased to issue a writ of certiorari / mandamus or writ in the nature of certiorari / mandamus quashing the impugned notices of recovery dated*

14.02.2020 and 15.02.2020 for the Assessment Year 2010-11, 2011-12 and 2012-13 at Annexure – D (Colly.) and cancel the outstanding demand as reflected on Income Tax Portal for the Assessment Year 2011-12 and 2012-13 at Annexure – F;

(B) Your Lordships may be pleased to issue a writ of mandamus or writ in the nature of mandamus directing the respondent Assessing Offcier to return the amount of Rs.5,88,820/-, i.e. the amount of refund which is already adjusted against the amount due as per chart mentioned in para 3.4, with interest rate of 9% p.a. within a period of 6 weeks from the date of receipt of the copy of the judgment;

(C) During the pendency and final disposal of the present petition, Your Lordships may be pleased to stay the operation and implementation of the impugned notices of recovery dated 14.02.2020 and 15.02.2020 for the Assessment Year 2010-11, 2011-12 and 2012-13 at Annexure – D (Colly.) as well as direct the respondent not to take corrective action against the outstanding demand as reflected on Income Tax Portal for the Assessment Year 2011-12 and 2012-13 at Annexure – F;"

8. The affidavit-in-reply of the respondent disputes that the demand of refund on the ground that the credit of TDS of an assessee after granting the said TDS amount matched with e-TDS return filed by the tax deductor, would be otherwise automatic. However, in the case of petitioner, the system of Income Tax Department is not allowing any credit of TDS for AY 2010-11, 2011-12 and 2012-13 as per his claim. His return was processed under Section 143(1) of the Act without grant of credit of TDS and therefore, the demand has been raised for the respective assessment years,

which includes tax and interest.

According to respondent, the online credit of TDS claims for these years is not possible due to the reasons that credit of TDS is not shown by e-TDS data because of the system of the Income Tax Department.

9. On hearing the learned advocate Mr. Darshan Gandhi for the petitioner and learned Senior Standing Counsel Mr. Nikunt Raval for the respondent – Authorities, this Court notices the Office Memorandum dated 11.03.2016 shows the non-deposit of tax deducted at source by the deductor - recovery of demand against the deductee assessee. The Board issued the direction to the Filed Officer that in case an assessee whose tax has been deducted at source but is not deposited to the Government's account by the deductor, the assessee shall not be called upon to pay the demand to the extent tax has been deducted from his income. It was also specified that Section 205 of the I.T. Act 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 effectively.

As some of such directions of the Board were not being strictly followed, the Board had reiterated the

instructions contained in its letter dated 01.06.2015, directing 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.

10. Here is also the case where the petitioner is a pilot by profession and was an employee of Kingfisher Airlines, which has deducted the TDS from his salary for AY 2010-11, 2011-12 and 2012-13. It is not in dispute that such amount had not been deposited by the Airlines to the Central Government's account and therefore, when the credit was claimed by the petitioner, obviously, the same was not given. Hence, the demand was raised with interest. The petitioner seeks to challenge this, relying on the decision of this Court in case of *Kartik Vijaysingh Sonavane versus Deputy Commissioner of Income Tax – Special Civil Application No.6193 of 2021, dated 15.11.2021*, wherein similarly situated assessee, the Court allowed the petition, directed the department not to deny the benefit of tax deducted at source by the employer during the relevant financial year. Relevant findings and observations of the same are necessary to reproduce here, which are as under :

> *"7. The factual matrix presented before this Court has not been disputed. It is also not being disputed that the case is no longer res integra and is covered by the decision of this very Court rendered in case of* ***Devarsh***

Pravinbhai Patel vs. Assistant Commissioner of Income Tax Circle 5(1)(1) [SCA No. 12965/2018 with SCA No. 12966/2018, decided on 24.09.2018] *where too, the petitioner was an employee of the Kingfisher Airlines and worked as a pilot. In his case also the TDS on the salary made to the petitioner had not been deposited. It is only when the department raised the tax demand with interest and initiated the actions of the recovery that this Court was approached. Relying on the decision of the Bombay High Court rendered in case of Assistant Commissioner of Income Tax and Others vs. Om Prakash Gattani [(2000) 242 ITR 638], this Court allowed the same. Vital would be to reproduce the relevant findings and observations.*

> *"4. The issue is no longer res integra. The Division Bench of this Court in case of Sumit Devendra Rajani (Supra) examined the statutory provisions and in particular Section 205 of the Income-tax Act, 1961. The Court concurred with the view of the Bombay High Court in case of Asst. CIT VS. Om Prakash Gattani, reported in (2000) 242 ITR 638 and observed as under -*
>
> > *10. We are in complete agreement with the view taken by the Bombay High Court and Gauhati High Court. Applying the aforesaid two decisions of the Bombay High Court as well as Gauhati High Court, the facts of the case on hand and even considering Section 205 of the Act action of the respondent in not giving the credit of the tax deducted at source for which form no.16 A have been produced by the assessee – deductee and consequently impugned demand notice issued under Section 221(1) of the Act cannot be sustained. Concerned respondent therefore, is required to be directed to give credit of tax deducted at source to*

the assessee deductee of the amount for which form no.16 A have been produced.

11. In view of the above and for the reasons stated petition succeeds. It is held that the petitioner assessee deductee is entitled to credit of the tax deducted at source with respect to amount of TDS for which Form No.16A issued by the employer deductor – M/s. Amar Remedies Limited has been produced and consequently department is directed to give credit of tax deducted at source to the petitioner assessee – deductee to the extent form no.16 A issued by the deductor have been issued. Consequently, the impugned demand notice dated 6.1.2012 (Annexure D) is quashed and set aside. However, it is clarified and observed that if the department is of the opinion deductor has not deposited the said amount of tax deducted at source, it will always been open for the department to recover the same from the deductor. Rule is made absolutely to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs."

5. Facts in both case are very similar. Under the circumstances, by allowing these petitions we hold that the Department cannot deny the benefit of tax deducted at source by the employer of the petitioner during the relevant financial years. Credit of such tax would be given to the petitioner for the respective years. If there has been any recovery or adjustment out of the refunds of the later years, the same shall be returned to the petitioner with statutory interest."

8. In ***case of Om Prakash Gattani (supra)*** *Gauhati*

High Court was dealing with the TDS not deposited of prize money payable to the petitioner. It held and observed thus: -

> *"13. From a perusal of the provisions quoted above relating to the deduction of tax at source in the matters relating to prize money of lotteries, it is evident that the person responsible to make the payment to the assessee is under the statutory obligation to deduct the amount at source. After deduction of the amount he is required to deposit the same to the credit of the Central Government and to issue a certificate of deduction. So far as credit for the amount deducted is concerned, it is to be given on the deposit being made to the credit of the Central Government on production of a certificate furnished under Section 203 of the Income-tax Act. On payment of the amount to the credit of the Central Government, it would be treated as payment of tax.*
>
> *14. So far the assessee is concerned, he is not supposed to do anything in the whole transaction except that he is to accept the payment of the reduced amount from which is deducted income-tax at source. The responsibility to deposit the amount deducted at source as tax is that of the person who is responsible to deduct the tax at source. On the amount being deducted the assessee only gets a certificate to that effect by the person responsible to deduct the tax. In a case where the amount has been deducted by the person responsible to deduct the amount under the statutory provisions, the assessee has no control over the matter. In case of default in making over the amount to the account of the Central Government, it is obviously the person responsible to deduct or the person who has made the deduction who is held responsible for the same. The responsibility of such person is to the extent that he has to be deemed to be an assessee in default in respect of the tax. He may be deemed to be an asses see in default not only in cases where after deduction he does not make over the*

amount to the Central Government but also in cases where there is failure on his part to deduct the amount at source. This responsibility has been fastened upon him under Section 201 of the Income-tax Act. It is, of course, without prejudice to any other consequences which he or it may incur. Presently we are not concerned with the case where the person responsible to make the deductions has not deducted the amount at all. It may or may not fall in a different category from one where the amount has been deducted and not made over to the Central Government. We are concerned with the latter category of cases. As indicated earlier, on the facts it is nobody's case that the amount was actually not deducted at source by Chandra Agencies. What seems to be in dispute is the deposit of the said amount in the account of the Central Government. The Income-tax Department seems to have made enquiries about the exact date of payment to the Central Government which Chandra Agencies could not furnish on the ground that the papers were forwarded to the chairman of Vaibhavshali Bumper. In such a category of cases we feel that the amount of tax can be recovered by the Income-tax Department treating the person responsible to deduct tax at source as an assessee in default in respect of the tax. It would not be possible to proceed to recover the amount of tax from the assessee. The assessee cannot be doubly saddled with the tax liability. Deduction of tax at source is only one of the modes of recovery of tax.. Once this mode is adopted and by virtue of the statutory provisions the person responsible to deduct the tax at source deducts the amount, only that mode should be pursued for the purpose of recovery of tax liability and the assessee should not be subjected to other modes of recovery of tax by recovering the amount once again to satisfy the tax liability. It is, therefore, provided under Section 201 of the Income-tax Act that the person responsible to deduct the tax at source would be deemed to be an assessee in default in case he deducts the amount and fails to deposit it in the Government treasury. As

observed earlier, the assessee has no control over such person who is responsible to deduct the income-tax at source, but fails to deposit the same in the Government treasury. In this light of the matter, in our view, the notices issued under Section 226(3) of the Income-tax Act to the bankers of the petitioner-respondent to satisfy the tax liability from the bank account of the petitioner-respondent are illegal. It is not that the Income-tax Department was helpless in the matter. The person responsible to deduct the tax at source would move into the shoes of the assessee and he would be deemed to be an assessee in default. Whatever process or coercive measures are permissible under the law would only be taken against such person and not the assessee.

15. However, the position as indicated above would not mean that mere deduction of the tax amount at source would amount to total discharge of the tax liability so long as the amount deducted is not deposited in the coffers of the Central Government. It is for this reason Section 199 of the Income-tax Act makes it clear that credit for tax deducted would be given when the amount is deducted and paid to the Central Government and a certificate of deduction is produced as furnished under Section 203 of the Income-tax Act. It is obvious that unless the amount is paid to the Central Government, the tax liability is not discharged, nor can it be said that the assessee has made the payment of the tax amount payable to the Government. We find no force in the submission made on behalf of the petitioner-respondent that on mere deduction of the amount at source, credit for tax deducted must be given and it cannot be withheld even though the person responsible to deduct the tax at source has not made it over to the Central Government. In our view, if that contention is accepted that credit for tax deducted has to be given on mere deduction of the amount at source, in that event, perhaps, there would be no legal justification to treat the person responsible to deduct the amount at

source as an assessee in default in respect of the tax. Once credit on account of payment of tax is given, the tax liability will stand discharged. Any step to recover the amount of tax can be taken only in case the tax liability is not discharged and it still subsists. In this view of the matter, Shri K. P. Sarma, learned counsel appearing for the Revenue, has rightly defended the note appended by the Assessing Officer in the order of assessment making it clear that credit for the amount deducted was not being given and that will be given only when evidence as to actual payment of the amount to the Central Government is furnished. But this position would not legally justify initiation of recovery proceedings against the assessee from whose income tax has been deducted at source, but the person responsible to deduct the tax fails to deposit the same in the Government treasury. The statutory scheme evolved to employ this mode of recovery of tax at source also points to the same position and in our view rightly. Otherwise a taxpayer from whose income tax is liable to be deducted at source would be exposed to a great vulnerable position. If some unscrupulous persons responsible to deduct the tax at source, after deducting the amount do not deposit the amount in the Government treasury, such persons should be saddled with the tax liability. Therefore, under Section 201 of the Income-tax Act it has been aptly provided that the person responsible to deduct the tax would be deemed to be an assessee in default so that he can be proceeded against for recovery of the amount instead of the assessee who has already parted with the amount, but due to some commission or omission on the part of the person responsible to deduct the amount at source over whose activity he has no control, he may not be subjected to double payment of tax and brunt of arduous recovery proceeding. The provisions as contained in Section 201 of the Act provide a kind of protection to the assessee where tax liability as standing against him is not yet discharged and credit for the amount deducted cannot be given in terms of Section 199 of the

Income-tax Act.

16. A perusal of Section 205 of the Income-tax Act clarifies the position where it provides that where tax is deductible at source, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income. What is noticeable in this provision is that its applicability is not dependent upon the credit for tax deducted being given under Section 199 of the Income-tax Act. What is necessary for applicability of this provision is that the amount has been deducted from the income. In case where the amount has been deducted but not paid to the Central Government that eventuality is taken care of by Section 201 of the Income-tax Act. Learned counsel for the appellant could not show that under the law it may be permissible to proceed against the assessee even after deduction of the tax at source, nor learned counsel for the petitioner-respondent could persuade us to hold that merely by deduction of tax at source, credit for deduction of tax at source has to be given even though the amount may not have been made over to the Government treasury. The reason for this has already been explained by us in the discussion held in the earlier part of this judgment as the mere deduction of tax at source would not close the chapter of tax liability unless it is deposited in the Government treasury."

9. The facts being almost identical, no separate reasoning are desirable and the petition is being ***ALLOWED***. The department is precluded from denying the benefit of the tax deducted at source by the employer during the relevant financial years to the petitioner.

10. It is given to understand by learned Senior Standing Counsel Mr. Varun Patel that the proceedings have been initiated against the employer.

> *11.* The credit of the tax shall be given to the petitioner and if in the interregnum any recovery or adjustment is made by the respondent, the petitioner shall be entitled to the refund of the same, with the statutory interest, within eight (8) weeks from the date of receipt of copy of this order.
>
> *12.* Petition is accordingly disposed of.*"*

11. The above ratio would have direct applicability in the instant case. Reference of Section 205 of the I.T. Act is to the effect where it provides that the tax when is deductible at source, assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted form that income. Its applicability is not dependent upon the credit for tax deducted being given under Section 199 of the I.T. Act.

12. Facts being identical, petition is allowed. The department shall not be denying the benefit of tax deducted at source by the employer during the relevant financial years to the petitioner. The credit of the tax shall be given to the petitioner and if in the interregnum, any recovery or adjustment is made by the department, the petitioner shall be entitled to the refund, with the statutory interest, within eight (08) weeks from the date of receipt of copy of this order.

13. Petition is accordingly disposed off.

(SONIA GOKANI, ACJ)

(SANDEEP N. BHATT,J)

M.H. DAVE