A.F.R
Court No.33

Civil Misc Writ Petition (Tax) No.657 of 2013

Rakesh Kumar Gupta
Vs.
Union of India and another
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Hon'ble Tarun Agarwala,J.
Hon'ble Dr. Satish Chandra,J.

(Per: Tarun Agarwala,J.)

The petitioner is a civil contractor and is deriving his income by executing civil contracts in various Government Departments. For the Assessment Year 2010-11, the petitioner, in the course of his business, received certain payments from the Government Departments, which in the instant case is, the North Central Railway and a total sum of Rs.3,14,766/- as tax was deducted at source by the Government Department (hereinafter referred to as "TDS").

For the Assessment Year 2010-11, the petitioner filed his income tax return in Form-4, showing his gross income at Rs.6,86,650/-. The petitioner disclosed that he was liable for payment of tax amounting to Rs.82,295/- and consequently, claimed a refund of Rs.2,32,370/-.

The returns were processed by the Central Processing Centre of the Income Tax Department at Bangalore. The returns were accepted under the deemed assessment scheme. The Central Processing Centre, Bangalore issued an income tax refund of Rs.43,740/-. No intimation was given to the petitioner as to why the balance amount of Rs.1,88,630/- was not refundable.

The petitioner, accordingly, filed an application under Section 154 of the Income Tax Act (hereinafter referred to as "the Act") for rectification of the mistake and praying for the refund of the balance amount. Reminders were sent and when it became known to the petitioner that his application was not received by the Department, the petitioner filed a second application under Section 154 of the Act. When nothing happened, the petitioner, being frustrated, filed the present writ petition under Article 226 of the Constitution of India praying for a writ of mandamus commanding the respondents to refund an amount of Rs.1,88,631/- along with interest to the petitioner.

The Income Tax Department has filed a counter affidavit admitting that the return was processed and was accepted and that a refund of Rs.43,750/- was issued to the petitioner. The Department, however,

denied having received the first application filed by the petitioner under Section 154 of the Act and submitted that the second application was not entertained since the said application was not signed by the assessee nor any power of attorney was attached to the application. On the issue of refund of the TDS, the respondents in paragraph 14 of the counter affidavit admitted that the refund was allowed only of that amount which matched the TDS in Form 26AS and that the balance amount was not refunded since it was mismatched and, therefore, credit was not given on these TDS certificates.

In the light of the aforesaid stand taken by the parties, we have heard Sri Nitin Kesarwani, the learned counsel for the petitioner and Sri Shambhu Chopra, the learned counsel for the Income Tax Department.

The difficulty faced by the tax payers relating to credit of tax deducted at source, i.e., TDS, which stands paid by the deductor was considered by the Delhi High Court in a Public Interest Litigation in **Court On its Own Motion vs. Commissioner of Income Tax**, 2013 (352) ITR 273. The Court found that a large percentage of cases were coming up where an assessee was entitled to be given the credit of TDS,

which had been deducted by the deductor, but, was not being given credit by the Income Tax Department on account of the fact that the TDS was not reflected in Form-26AS for various reasons. The Court noticed that there were cases where the deductor failed to upload the correct and true particulars of the TDS, which had been deducted, as a result of which, the assessee was not given credit of the tax paid. The Court also noticed that there were cases where the details uploaded by the deductor and the details furnished by the assessee in the income tax returns were mismatched and, on this ground, credit was not given to the assessee.

The Delhi High Court also noticed that on account of mismatch, the tax payer was required to approach the income tax authority for rectification of the earlier intimation and based on corrected entries prayed for refund of the TDS. The Court found that the problem was apparent, real and enormous and had escalated because of centralised computerisation and problems associated with incorrect and wrong data, which was uploaded by the tax deductors. The Delhi High Court found that the issue of not giving credit of the TDS deducted by the deductor was one of general governance, failure of administration, fairness and

arbitrariness. The Court found that the Income Tax Department admitted that the Central Processing Unit at Bangalore had errors and faults, which was required to be rectified. The Delhi High Court further found that filing of an application under Section 154 of the Act for rectification and correction by the assessee entails substantial expenses on the part of the assessee. The Delhi High Court further observed that rectification and getting corrections made by the deductor and to get them uploaded was not an easy task. Filing a revised return or getting the application under Section 154 processed, was not only daunting, but expensive and that the problem of not getting the credit was being faced by a majority of small and middle class tax payers, including senior citizens. The Delhi High Court, accordingly, issued a mandamus directing the Central Board of Direct Taxes (hereinafter referred to as the "CBDT") to issue directions with regard to giving credit of unmatched and mismatched TDS certificates.

Pursuant to the said decision of the Delhi High Court, the CBDT issued instruction No.5 of 2013, dated 8.7.2013, directing that where the assessee approaches the assessing officer with requisite details and particulars in the form of TDS certificate as an

evidence against any mismatch amount, the assessing officer would verify whether or not the deductor had made payment of the TDS in the government account and, in the event, the payment had been made, credit of the same would be given to the assessee. For facility, the relevant portion of instruction No.5 of 2013 is extracted hereunder:

> "In view of the order of the Hon'ble Delhi High Court (reference: para 50 of the order): it has been decided by the Board that when an assessee approaches the Assessing Officer with requisite details and particulars in the form of TDS certificate as an evidence against any mismatched amount, the said Assessing Officer will verify whether or not the deductor has made payment of the TDS in the Government Account and if the payment has been made, credit of the same should be given to the assessee. However, the Assessing Officer is at liberty to ascertain and verify the true and correct position about the TDS with the relevant AO (TDS). The AO may also, if deemed necessary, issue a notice to the deductor to compel him to file correction statement as per the procedure laid down."

In the light of the decision of the Delhi High Court and the instructions issued by the CBDT, we find that the admitted position in the instant case is, that the returns were processed and accepted by the Income Tax Department. A sum of Rs.43,740/- was refunded and the balance amount was not refunded on account of the TDS being mismatched. It is also admitted that the TDS certificates were also filed by

the assessee. It is also an admitted position that the deductor in the instant case is a Government Department.

We find from a perusal of the counter affidavit that no effort was made by the assessing officer to verify the fact as to whether the deductor had made the payment of the TDS in the government account. On the other hand, the Income Tax Department has shown their helplessness in not refunding the amount on the sole ground that the details of the TDS did not match with the details shown in Form 26AS. The stand of the respondents is, that a refund could be allowed only on matching the TDS with that disclosed in Form 26 AS.

In the instant case, it is apparent that there is a mismatch between the details uploaded by the deductor and the details furnished by the assessee in the income tax returns. The Court finds that when the assessment was processed and a refund of Rs.43,740/- was issued, no intimation was given by the department as to why the balance TDS amount could not be credited in favour of the petitioner. The Court further finds that the assessing officer was under a duty to verify whether or not the deductor had made the payment of the T.D.S. in the government account.

The petitioner has suffered a tax deduction at

source, but has not been given due credit inspite of the fact that he has been issued a TDS certificate by a government department. There is a presumption that the deductor has deposited TDS amount in the government account especially when the deductor is a government department. By denying the benefit of TDS to the petitioner because of the fault of the deductor causes not only harassment and inconvenience, but also makes the assessee feel cheated. There is no fault on the part of the petitioner. The fault, if any, lay with the deductor. In the instant case, nothing had been indicated that the fault lay with the petitioner in furnishing false details.

Section 237 of the Income Tax Act provides for refund. For facility, the said provision is extracted hereunder:-

> "**237**. If any person satisfies the [Assessing] Officer that the amount of tax paid by him or on his behalf or treated as paid by him or on his behalf for any assessment year exceeds the amount with which he is properly chargeable under this Act for that year, he shall be entitled to a refund of the excess."

Further, Section 243 relates to payment of interest on delayed refund. For facility, the said provision is extracted hereunder:

> "**243**. (1) If the [Assessing] Officer does not grant the refund,-

> (a) in any case where the total income of the assessee does not consist solely of income from interest on securities or dividends, within three months from the end of the month in which the total income is determined under this Act, and
> (b) in any other case, within three months from the end of the month in which the claim for refund is made under this Chapter,
>
> the Central Government shall pay the assessee simple interest at [fifteen] per cent per annum on the amount directed to be refunded from the date immediately following the expiry of the period of three months aforesaid to the date of the order granting the refund.
>
> *Explanation.*- If the delay in granting the refund within the period of three months aforesaid is attributable to the assessee, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which interest is payable.]
>
> (2)Where any question arises as to the period to be excluded for the purposes of calculation of interest under the provisions of this section, such question shall be determined by the [Chief Commissioner or Commissioner] whose decision shall be final.
>
> [(3) The provisions of this section shall not apply in respect of any assessment for the assessment year commencing on the 1st day of April, 1989 or any subsequent assessment years.]"

In the light of the aforesaid, we find from the perusal of the counter affidavit, that the respondents have denied refunding the TDS on the ground that the refund would only be granted when the TDS matches with the details mentioned in Form 26AS. Since the

mismatching is not attributable to the assessee and the fault solely lay with the deductor, we find that a case has been made out for grant of a mandamus for refund of the TDS amount. The petitioner has also made out a case for payment of interest since we find that the delay in refunding the amount was attributable solely with the Income Tax Department and there is no fault on the part of the assessee.

For the reasons stated aforesaid, the writ petition is allowed. A writ of mandamus is issued commanding respondent no.2 to refund an amount of Rs.1,88,631/- along with interest as per the law within three weeks from the date of the production of a certified copy of this order is produced before respondent No.2.

In the circumstances of the case, respondent No.2, will also pay cost of Rs.25,000/- to the petitioner within the same period.

Dated: 6.5.2014.
AKJ.

(Dr. Satish Chandra,J.) **(Tarun Agarwala,J.)**