

आयकर अपीलीय अधिकरण, न्यायपीठ – “SMC(B)” कोलकाता,  
IN THE INCOME TAX APPELLATE TRIBUNAL “SMC(B)” BENCH: KOLKATA  
(समक्ष)Before श्री महावीर सिंह, न्यायीक सदस्य)  
[Before Shri Mahavir Singh, JM]

आयकर अपील संख्या / I.T.A No.2417/Kol/2013

निर्धारण वर्ष / Assessment Year: 2008-09

Mr. Parmanand Tiwari,  
(PAN: ABIPT7714M)  
(अपीलार्थी/Appellant)

Vs. Income-tax Officer, Wd-54(1), Kolkata  
(प्रत्यर्थी/Respondent)

Date of hearing: 21.08.2014

Date of pronouncement: 02.09.2014

For the Appellant: N o n e

For the Respondent: Shri David Z. Chawngthu, Addl. CIT, Sr. DR

**आदेश/ORDER**

This appeal by assessee is arising out of order of CIT(A)-XXXVI, Kolkata in Appeal No. 398/CIT(A)-XXXVI/Kol/Wd. 54(1)/2010-11/910 dated 30.08.2013. Assessment was framed by ITO, Ward-54(1), Kolkata u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) for AY 2008-09 vide his order dated 28.12.2010.

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the order of AO disallowing credit of TDS at Rs.1,48,078/-. For this assessee has raised following ground nos. , 3 and 4:

*“2. On the facts and in the circumstances of the case, the learned CIT(A) erred in upholding the order of the A.O. disallowing credit in respect of the amount of tax deducted at source of Rs.1,49,078/- in the name of the parthnership firm M/s Tiwari & Co. of which the appellant was an erstwhile partner and which remained fully converted into the proprietorship concern of the appellant throughout the period covered by the appellate year under consideration.*

*3. On the facts and in the circumstances of the case, the learned CIT(A) erred in neglecting to take into account the fact that the entire income in respect of the TDS amounts had duly been included in the total income of the appellant as his income from proprietorship concern and hence, on facts as well as law, the credits for TDS should also have been considered in the hands of the appellant alone.*

*4. On the facts and in the circumstances of the case, the learned CIT(A) further erred in overlooking the fact that the credits in respect of the TDS amounts under consideration had neither been claimed nor allowed in the hands of any other assessee.”*

3. Brief facts leading to the above issue are that the assessee is an individual and a professional Chartered Accountant. Earlier, assessee was partner in the firm M/s. Tiwari & Co. having PAN: AACFT6997P. This firm M/s. Tiwari & Co. was dissolved w.e.f. 30.12.2006 and assessee i.e. Mr. Parmanand Tiwari became proprietor of this firm w.e.f. 30.12.2006. The

assessee during the course of assessment proceedings filed return of income electronically on 29.09.2008 for AY 2008-09 i.e. the relevant assessment year. The AO after going through the details of TDS certificates found that all the TDS certificates are issued in the name of M/s. Tiwari & Co. having PAN: AACFT6997P, which belongs to partnership firm and not of individual. During the course of assessment proceedings, the AO required the assessee to produce reconciled statement of professional receipts vis-à-vis the claim of TDS. The assessee revealed that the credit claimed for TDS certificates issued in favour of M/s. Tiwari & Co. for the reason that M/s. Tiwari & Co. became proprietorship concern of the assessee and earlier this was a partnership firm. This partnership firm M/s. Tiwari & Co. got discontinued w.e.f. 30.12.2006. Before the AO, the assessee relied on the provisions of section 37BA of the I. T. Rules, 1962 (hereinafter referred to as “the Rules”), wherein M/s. Tiwari & Co. declared and confirmed that the income on which tax has been deducted at source for AY 2008-09 relevant to FY 2007-08 is assessable in the hands of the assessee Mr. Parmanand Tiwari other than the deductee and credit for such deduction of tax at source be given to him as income on account of TDS is includible in the assessment proceedings of Mr. Parmanand Tiwari, the assessee. The assessee contended before the AO that he has already included the said entire income in the return of income and accordingly, the credit for TDS shall be allowed in accordance with Rule 37BA of the Rules. The AO disallowed the claim of the assessee by observing that Rule 37BA of the Rules as inserted by IT (Sixth Amdt.) Rules (hereinafter referred to as “Amendment Rules”) w.e.f. 01.04.2009 only and hence, the credit in the hand of individual assessee i.e. Mr. Parmanand Tiwari cannot be allowed. For this, he observed in para 4.1 of the assessment order as under:

*“4.1. In regard to point (c) of para 3.1. it is worthy note that the Rule 37BA of the I. T. Rules, 1962 has been inserted by the I T (Sixth Amdt.) Rules, w.e.f. 1-4-2009 only. As per provision of 37BA of the Income Tax Rules where in it has clearly been mentioned that credit for tax deducted at sources and paid to the Central Government shall be given to the person provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of other person in the information relating to deduction of tax referred to sub rule (1) of Rule 37BA. In this case Rule 37BA as mentioned by the assessee does not cover the situation. It is also worthy to note that the deductee has made declaration before Assessing Officer which is wrong as Assessing Officer is not the deductor of tax at source. Therefore, the contention of the assessee is not tenable.”*

Aggrieved, assessee came in appeal before CIT(A), who also confirmed the action of AO by observing as under:

*“The rule even though available for subsequent year, makes it abundantly clear that credit will be given based on the information by the deductor. The only mitigating circumstances has been given in the proviso, when the deductee (in this case M/s. Tiwari & Co. partnership firm), files a declaration to the deductor, and the deductor report the tax deduction in the name of the other person.*

*4.3. In view of the above the A.O. has correctly not given credit to TDS made in the name of M/s. Tiwari & Co. partnership firm, in the hands of appellant, erstwhile partner, even though he had shown the income of the firm in his hands voluntarily.”*

Aggrieved, now assessee is in appeal before Tribunal.

4. I have heard Ld. Sr. DR and gone through facts and circumstances of the case. The facts are clearly narrated above and there is no dispute as regards to the facts of the case. The assessee is a Chartered Accountant carrying on his profession under the partnership firm M/s. Tiwari & Co. for and from the year 1983. The partnership firm M/s. Tiwari & Co. got dissolved w.e.f. 30.12.2006 and assessee became proprietor of this firm. The assessee has included the income qua the TDS certificates issued in the name of M/s. Tiwari & Co. having PAN AACFT6997P, which stands for the partnership firm and also claimed the credit for TDS in the individual capacity. The AO completed the assessment whereby he included the entire income of the firm M/s. Tiwari & Co. but did not allow the credit for TDS at Rs.1,53,380/- for the reason that the TDS credit is not reflected in the PAN of Shri Parmanand Tiwari, the Chartered Accountant in his individual capacity. During the course of assessment proceedings, assessee submitted proper declaration giving the entire fact that the income of M/s. Tiwari & Co. has duly been included in the hands of its proprietor and is assessable in the hands of the assessee. M/s. Tiwari & Co. under whose PAN this TDS has been deducted, has not made any separate claim of the TDS and also not declared separate income on this account. After going through the facts in entirety, I find that this is only a technical breach and that also for the reason that these professional receipts received by the assessee are commitment of earlier years when the firm was in existence. These receipts are earned by the professional work of M/s. Tiwari & Co. as proprietary concern in individual capacity of Shri Parmanand Tiwari. Wrong submission of PAN by deductors does not debar for claiming of TDS deducted particularly when the income is included in the hands of the assessee. Now the legislature, to mitigate the rigours of law, has amended the provisions of section 37BA of the Act by the Amendment Rules, 2009 w.e.f. 01.04.2009. The relevant rule reads as under:

*“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) Where under any provision 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:*

*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 authorised 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.”*

From the above provisions of Rule 37BA of the Rules, wherein it has clearly been mentioned that credit for tax deducted at source and paid to the Central Government shall be given to the person provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of other person in the information relating to deduction of tax referred to in sub-rule (1) of Rule 37BA of the Rules. Further, sub-rule (3) of Rule 37BA of the Rules provides that for the purpose of giving credit in respect of tax deducted in term of provisions of Chapter XVII for the purpose of giving credit to a person other than those referred to in sub-section (1) and also the assessment year in which such credit may be given. In view of the above provision of section 37BA of the Rules and the provisions of section 199(1) of the Act, the credit for tax deduction could be given to the person from whose income tax has been deducted. The Rule as amended by the Amendment Rules, 2009 w.e.f. 01.04.2009 makes it abundantly clear that the credit will be given based on the information by deductor. The proviso to sub-rule (2) of Rule 37BA of the Rules mitigates the hardship faced by assessee for claiming credit of TDS whereby deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of other person in the information relating to

deduction of tax as referred to in sub-rule (1) of Rule 37BA of the Rules. In such provisions of law, the assessee should have been allowed credit for TDS in the given set of facts and circumstances of the case. The only issue is that the amended provision is applicable w.e.f. 01.04.2009 and the relevant assessment year involved is 2008-09. Whether the amended Rule as amended by Amendment Rules, 2009 is a beneficial provision mitigating the hardship of the assessee and in turn the same can be declared as retrospective and will apply to all pending matters. Similar issue was dealt by Hon'ble Supreme Court in the case of Allied Motors Pvt. Ltd. Vs. CIT (1997) 224 ITR 677 (SC), wherein it has been held that *"the provisions of the first proviso, which has newly been inserted by the Finance Act, 1987, with effect from 1<sup>st</sup> April, 1998, to section 43B is remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation, and is of clarificatory nature and, therefore, has to be treated as retrospective with effect from 1<sup>st</sup> April, 1984, the date on which section 43B has newly been inserted by the Finance Act, 1983."* Similarly, here also the Rule was inserted by the Amendment Rules, 2009 to remove the hardship faced by assesseees and to give true meaning to the provision of section 199 of the Act. In such circumstances, I direct the AO to allow the credit of TDS after verifying declaration to be filed by deductee in term of proviso to sub-rule (2) of Rule 37BA of the Rules. In term of the above, the appeal of assessee is allowed.

5. In the result, appeal of assessee is allowed.

6. Order pronounced in open court on 02.09.2014.

Sd/-

**महावीर सिंह, न्यायीक सदस्य**  
(Mahavir Singh)  
Judicial Member

Dated : 2nd September, 2014

वरिष्ठ निजि सचिव Jd.(Sr.P.S.)

आदेश की प्रतिलिपि अग्रेषित:- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – Mr. Parmanand Tiwari, 107/1, Park Street, Kolkata-700 016
2. प्रत्यर्थी/Respondent – ITO, Ward-54(1), Kolkata
3. आयकर कमिशनर (अपील)/ The CIT(A), Kolkata
4. आयकर कमिशनर/ CIT Kolkata
5. विभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

सहायक पंजीकार/Asstt. Registrar.