

FAIRNESS PAYS AND UNFAIRNESS COSTS BOTH TO THE ASSESSEE AS WELL AS REVENUE

Section 203AA of Income Tax Act reads as under:
Furnishing of statement of tax deducted.

203AA. The prescribed income-tax authority or the person authorised by such authority referred to in sub-section (3) of section 200, shall, within the prescribed time after the end of each financial year beginning on or after the 1st day of April, 2008 prepare and deliver to every person from whose income the tax has been deducted or in respect of whose income the tax has been paid a statement in the prescribed form specifying the amount of tax deducted or paid and such other particulars as may be prescribed.

Hence it casts a duty on revenue to prepare and deliver annual tax statement of tax deducted or paid in respect of a person. It does not require that tax deducted has to be deposited as a necessary condition for an amount to be included in 26AS. Section 200(3) lays down the duties and obligations of deductor. Duty to prepare means duty to prepare correct and complete annual tax statement ("ATS" for short). Hence, any missing entry due to non deposit of tax by deductor is liable to be corrected by the concerned authority. Similarly duty to deliver means duty to deliver in time.

However, the practice being followed is not in harmony with the law. The assessee gets credit only for TDS reflected in 26AS. If a deductor does not pay tax, then revenue does not give credit for the tax deducted by deductor and paid by assessee notwithstanding irrefutable and solid evidence is provided of payment by assessee. Even the FAQs on Income Tax website says that assessee has to contact the deductor and that credit shall be given only for the amount reflected in 26AS. One such FAQ and its answer reads as under: -

I have not received TDS certificate from the deductor. Can I claim TDS in my return of income?

Yes, the tax credit in your case will be reflected in your Form 26AS and, hence, you can check Form 26AS and claim the credit of the tax accordingly. However, the claim of TDS to be made in your return of income should be strictly as per the TDS credit being reflected in Form 26AS. If there is any discrepancy in the tax actually deducted and the tax credit being reflected in Form 26AS then you should intimate the same to the deductor and should reconcile the difference. The credit granted by the Income-tax Department will be as per Form 26AS.

That implies that the tax deducted is held by the deductor in trust for the deductee and not in trust for the revenue. Hence, Interim Resolution Professional cannot take possession or control of such amount as per Explanation (a) to Section 18 (g) IBC 2016. Similarly, 36(4)(a)(i) OF IBC 2016 provides that it does not form part of Liquidation Estate Asset and hence cannot be used for recovery. Hence tax dues cannot be recovered from such amount.

It may be mentioned that it is unfair for revenue to leave the assessee to fend for itself despite providing proof of having paid amount to the deductor. In ultimate analysis it may also be seen as double taxation or violation of Constitutional Right guaranteed under Article 19 (1) (g), Article 21 and even Article 300A. Now this unfair and unconstitutional practice may work against the Income Tax Department itself because as per Insolvency and Bankruptcy Code 2016, the revenue's claim cannot be recovered from tax deducted but not deposited by deductor for the simple reason that it held in trust for third part and not in trust for income tax department.