

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 19.04.2021

DELIVERED ON : 26.04.2021

CORAM

THE HON'BLE MR.JUSTICE M. DURAISWAMY

AND

THE HON'BLE MRS.JUSTICE R.HEMALATHA

Tax Case Appeal Nos.289 of 2016, 345 of 2016
and 348 of 2015

The Principal Commissioner of Income Tax - 4,
121, Mahatma Gandhi Road,
Chennai. Appellant in TCA.No.289/2016

The Commissioner of Income Tax - 4,
121, Mahatma Gandhi Road,
Chennai. Appellant in TCA.No.345/2016

The Principal Commissioner of Income Tax - 2,
121, Mahatma Gandhi Road,
Chennai. Appellant in TCA.No.348/2015

Vs.

M/s.Kal Comm. Private Ltd.,
No.73, MRC Nagar Main Road,
Chennai - 600 028. Respondent in TCA.No.289/2016

M/s.Kal Comm. Private Ltd.,
Murasoli Maran Towers,
No.73, MRC Nagar Main Road,
MRC Nagar, Chennai-600 028. Respondent in TCA.No.345/2016

M/s.Kal Comm. Private Ltd.,
Murasoli Maran Towers,
No.73, MRC Nagar Main Road,
Chennai. Respondent in TCA.No.348/2015

T.C.A.No.289 of 2016 filed under Section 260A of the Income
Tax Act, 1961 against the order of the Income Tax Appellate
Tribunal, Madras "A" Bench, dated 28.08.2015 passed in
I.T.A.No.126/Mds/2015 for the Assessment Year 2010-11.

Against the Order of the Commissioner of Income Tax (Appeals)-II, Chennai dated 08/10/2014 in ITA.No.619/13-14 against the Order of the Deputy Commissioner of Income Tax, Company Circle - II (4), Chennai dated 21-03-2013 in PAN/GIR.No.AABCK 3906B for the Assessment Year 2010-2011.

T.C.A.No.345 of 2016 filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "B" Bench, dated 09.10.2015 passed in I.T.A.No.1029/Mds/2015 for the Assessment Year 2011-12.

Against the order of the Commissioner of Income Tax (Appeals) - 8, Chennai dated 02.03.2015 in ITA.No.1860/13-14, against the Order of the Deputy Commissioner of Income Tax Company Circle - II (4), Chennai - 34 in PAN/GIR.No.AABCK 3906B for the Assessment Year 2011-2012.

T.C.A.No.348 of 2015 filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "C" Bench, dated 28.08.2014 passed in I.T.A.No.1985/Mds/2014 for the Assessment Year 2009-10.

Against the order of the Commissioner of Income tax (Appeals)-11, Chennai dated 22.01.2014 in ITA.No.515/13-14 against the Order of the Assistant Commissioner of Income Tax, Company Circle - II (4), Chennai dated 30.12.2011 in PAN/GIR.No.AABCK 3906B for the Assessment Year 2009-2010.

For Appellant : Mr.Karthik Ranganathan
(in all 3 TCAs) Senior Standing Counsel

For Respondents : Mr.Sathish Parasaran,
(in all 3 TCAs) Senior Counsel
for Mrs.M.Sneha

सत्यमेव जयते
C O M M O N J U D G M E N T

M.DURAISWAMY, J.

T.C.A.No.348 of 2015 arises against the order passed in I.T.A.No.1985/Mds/2014 in respect of the Assessment Year 2009-10 on the file of the Income Tax Appellate Tribunal, Madras "C" Bench. T.C.A.No.289 of 2016 arises against the order passed in I.T.A.No.126/Mds/2015 in respect of the Assessment Year 2010-11 on the file of the Income Tax Appellate Tribunal, Madras "A" Bench. T.C.A.No.345 of 2016 arises against the order passed in I.T.A.No.1029/Mds/2015 in respect of the Assessment Year 2011-12 on the file of the Income Tax Appellate Tribunal, Madras "B"

Bench.

2.All the three appeals have been filed by the Revenue challenging the orders passed by the Income Tax Appellate Tribunal. Since the issues involved in all these appeals are common, all the three appeals are disposed of by this common judgment.

3.The brief case of the appellant-assessee is as follows:

(i)For the Assessment Year 2009-10, the assessee filed its return of income declaring an income of Rs.7,65,36,865/-. The return was processed under Section 143(1) and selected for scrutiny. The Assessing Officer, while completing the assessment under Section 143(3) of the Act, assessed the income at Rs.7,65,36,865/-. However, the Assessing Officer has not allowed the assessee's claim of credit for TDS of Rs.1,02,58,243/- on the ground that the concerned income was not offered to tax in the return of income.

(ii)For the Assessment Year 2010-11, the assessee filed its return of income declaring an income of Rs.13,62,81,800/- and the return was processed under Section 143(1) and selected for scrutiny. The Assessing Officer, while completing the assessment under Section 143(3) of the Act, assessed the income at Rs.13,62,81,800/-. However, the Assessing Officer has not allowed the assessee's claim of credit for TDS of Rs.2,46,80,256/- on the ground that the concerned income was not offered to tax in the return of income.

(iii)For the Assessment Year 2011-12, the assessee filed its return of income declaring a total income of Rs.18,43,99,980/- and the Assessing Officer completed the assessment under Section 143(3) determining the total income at Rs.18,54,99,980/-, by disallowing Rs.2,62,70,314/- of TDS claimed by the assessee relating to the subscription charges collected on behalf of M/s.Sun TV Network Limited and demanding tax of Rs.1,98,10,730/-. The Assessing Officer disallowed the assessee's claim of TDS on the ground that the concerned income (i.e.) Subscription Charges were not offered to tax in the return of income. The Assessing Officer in his orders noticed that the assessee has not included the TDS amounts in the Profit and Loss Account.

(iv)Aggrieved over the assessment orders, the assessee preferred appeals before the Commissioner of Income Tax (Appeals) and the CIT (Appeals), allowed the appeals by following the assessee's own case in respect of the Assessment Year 2006-07 in I.T.A.No.884/Mds/2011 dated 21.10.2013, wherein it has been held that the Subscription Charges collected by the assessee was not the income of the assessee. Further, the Tribunal, in its order dated 21.10.2013, held that the

Subscription Charges collected by the assessee was collected on behalf of M/s.Sun TV Network Limited and was in turn remitted to M/s.Sun TV Network Limited. Further, the Tribunal held that the Cable Operators are deducting TDS in the name of the assessee as it was paid to the assessee and therefore, the assessee is entitled to credit on the TDS made by the Cable Operators. Challenging the orders passed by the CIT(Appeals), the Revenue preferred appeals before the Income Tax Appellate Tribunal and the Tribunal also, following the earlier order passed by the Tribunal in the assessee's own case for the Assessment Year 2006-07 in I.T.A.No.884/Mds/2011 dated 21.10.2013, confirmed the orders of the CIT(Appeals). Aggrieved over the orders of the Income Tax Appellate Tribunal, the Revenue has filed the above appeals.

4.The Tax Case Appeal in T.C.A.No.348 of 2015 was admitted on the following substantial question of law:

"Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee is eligible for TDS credit without offering the corresponding income in its hand, which is against the provision to Section 199 of the Income Tax Act?"

5.The Tax Case Appeals in T.C.A.Nos.289 of 2016 and 345 of 2016 were admitted on the following substantial questions of law:

"1)Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee is eligible for TDS credit without offering the corresponding income in its hand, which is against the provision to Section 199 of the Income Tax Act?"

2)Whether on the facts and in the circumstances of the case, the Tribunal was right in directing the Assessing Officer to decide the issue by giving credit for TDS deducted on payments which has not been offered as assessee's receipt and this income after ignoring the unambiguous provisions of Section 199(2) of the Income Tax Act?"

6.Heard Mr.Karthik Ranganathan, learned Senior Standing Counsel appearing for the appellant-Revenue and Mr.Sathish Parasaran, learned Senior Counsel appearing for Mrs.M.Sneha, learned counsel for the respondent-assessee.

7.Mr.Karthik Ranganathan, learned senior standing counsel appearing for the appellant-Revenue contended that the Income Tax Appellate Tribunal ought not have followed the assessee's own case in respect of the Assessment Year 2006-07 in

I.T.A.No.884/Mds/2011 dated 21.10.2013 without considering the provisions of Section 199 of the Income Tax Act and Rule 37BA of the Income Tax Rules. Further, the learned senior standing counsel submitted that as per Section 199(2), any sum referred to in sub-section (1A) of Section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made.

8.It would be appropriate to extract the provisions of Section 199 of the Income Tax Act, which reads as follows:

" Section 199. Credit for tax deducted.

(1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.

(2) Any sum referred to in sub-section (1A) of section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made.

(3) The Board may, for the purposes of giving credit in respect of tax deducted or tax paid in terms of the provisions of this Chapter, make such rules as may be necessary, including the rules for the purposes of giving credit to a person other than those referred to in sub-section (1) and sub-section (2) and also the Assessment Year for which such credit may be given."

9.In support of his contentions, the learned senior standing counsel relied upon the following judgments:

(i)[1987] 30 taxmann 265 (Mad.) [Commissioner of Income Tax Vs. Tanjore Permanent Bank Ltd.] wherein the Division Bench of this Court held as follows:

"...

6.The following facts are not in dispute. The assessee has advanced monies to its constituents for the purpose of the State Electricity Board Bonds. On the instructions of the constituents the bonds have been purchased by the assessee with the amount advanced by it to the constituents. But the bonds had been taken in the name of the assessee-bank and kept in its possession as a security for the loan advanced to its constituents for the purchase of the bonds. Though the bonds were in the name of the assessee, the interest income from the bonds has not been returned by the assessee as part of its income in the relevant Assessment Year. This is presumably for the reason that

the bank itself treated the bonds as security and the interest income from the bonds as the income of the constituents. Since the amounts had been advanced by the assessee- bank to its constituents for the purchase of the bonds, the bank had been collecting the interest on the loans given to its constituents. Therefore, the assessee, on the belief that the income from the bonds is the income of the constituents, has not returned the income from the securities as part of its income. Though these facts were before the ITO at the time of the original assessment, he merely proceeded on the basis of the tax deduction certificate and granted the relief to the assessee, without going into the question as to whether the assessee is entitled in law to get credit for the sum of Rs. 22,975. Normally, before credit is given for the sum of Rs. 22,975 which is the tax deduction at source on the interest earned on the bonds in question, the ITO should consider two matters : (1) Whether the assessee is the owner of the bonds so as to claim the benefit of the tax credit, and (2) Whether the income in respect of which the tax has been deducted at source had been offered for assessment ? Without going into these two questions, the ITO appears to have blindly given tax credit for a sum of Rs. 22,975 on the basis of the tax deduction certificate given by the Tamil Nadu State Electricity Board. Subsequently the ITO found that the allowance of the tax credit is a mistake and on that basis, he initiated proceedings under section 154. The Tribunal has taken the view that the question as to who is the owner of the security on the facts of this case, is a debatable issue and on the basis of such a debatable issue, the ITO could not initiate rectification proceedings.

7. We are not, however, inclined to accept the view of the Tribunal in this case. Once it is admitted by the assessee that the bonds had been purchased for the benefit of its constituents by using the money advanced to them by the assessee but the bonds were taken in the assessee's name and kept in its possession as security for the payment of the monies advanced to its constituents, the legal inference which will normally follow from this admission is that the bank has got the custody of the bonds only as a security for the payments of the money advanced by it to its constituents. When the assessee says that it is in custody of the bonds of the constituents only as a security for the amounts advanced to them, the assessee-bank should be taken to be in possession of the bonds only as a creditor and not as their owner.

Even according to the assessee the bonds had been purchased with the monies advanced by it to the constituents. Therefore, with reference to the bonds the bank is only a creditor of the constituents and not their true owner. It is no doubt true, the bonds have been taken in the name of the assessee-bank and the certificate of deduction of tax was given in the name of the assessee. But once the assessee admits that it is in possession of the bonds only as a security for the amounts advanced to its constituents, the bank should be taken to be an ostensible owner and the real or beneficial owner of the bonds is only its constituents. In this case, the Tribunal has placed emphasis on the facts that the bonds are in the name of the assessee and the certificates of deduction have been given in the name of the assessee. That will make the assessee only an ostensible owner. When the assessee itself has admitted that the beneficial owners of the bonds are the constituents, we do not see how a debatable issue arises as to the ownership of the bonds. Even according to the assessee, it is the ostensible owner of the bonds and the real owners are its constituents. This is clear from the stand taken by the assessee that the bonds were purchased with the constituents' money, though they were purchased in the bank's name as security for the payment of the monies advanced to the constituents by the bank. According to us no debatable issue arises on the admitted facts and the facts admitted by the assessee and found by the ITO. It was never the assessee's case that it is the beneficial owner of the bonds purchased. It had the custody of that bonds bought only as a security for repayment of the advances made by it to its constituents. As already stated, once a loan is advanced by the assessee to the constituents and that amount has been utilised for the purchase of the bonds, the assessee can never claim to be the beneficial owner of the bonds. The fact that the assessee did not offer for assessment the interest income received from the bonds will itself indicate that the assessee proceeded on the basis that the beneficial ownership of the bonds was with the constituents and that as such the Income received therefrom is the income of the constituents. If really the assessee has offered the interest income from the bonds for assessment and claimed benefit of tax credit in relation to that income in respect of which tax was deducted, it is possible to say that the assessee is claiming tax credit on behalf of the constituents to pass on the benefit to the constituents or as one having a charge on the bonds. But in this

case without offering the interest income from the bonds for assessment the assessee merely claims the benefit of tax credit. It is well established that a tax credit can be given only in cases where the tax is paid on the income in respect of which deduction has been made at source.

...

10. The learned counsel for the assessee would contend that in a case as this where the income from the securities has not been offered for assessment, the only way open to the ITO is to call upon the assessee to offer the income from the securities for a assessment but he cannot withdraw the benefit of the tax credit already given. We are not in a position to accept the contention of the learned counsel for the assessee. It is no doubt true, the ITO can, by initiating proceedings under section 147 of the Act, reopen the assessment and include the income from the securities as income of the assessee treating the assessee as the owner of the securities based on the fact that the certificates stand in the name of the assessee-bank and ignoring the assessee's contention that it has got only a charge on the securities for the amount advanced to the constituents. But that will not take away the jurisdiction of the ITO to initiate proceedings under section 154 to rectify a mistake apparent from the record, the mistake being that he has given the benefit of tax credit in a case where the income in respect of which tax has been deducted at source has not been offered for assessment. That is clearly a mistake on the part of the ITO. Even if the mistake is treating the assessee as the owner of the securities cannot be treated as a mistake as according to the Tribunal it is a debatable issue, still giving tax credit in a case where the related income has not been offered for assessment is a mistake and that can be taken as the basis by the ITO for initiating proceedings under section 154."

(ii)[2017] 84 taxmann.com 53 (Gujarat)]Naresh Bhavani Shah (HUF) Vs. Commissioner of Income Tax] wherein a Division Bench of Gujarat High Court held as follows:

"...

8. It can thus be seen that the Act contains detailed provision for collecting tax at source, depositing such tax with the government revenue and issuance of certificates to the deductee of such tax so deducted. The anxiety of the department, therefore, to ensure the credit of tax deducted at source is given to the rightful person in consonance with the certificate

of TDS can easily be appreciated when large number of such transactions in any accounting year are likely to take place. The most dependable identification of the deductee would be his PAN which would be a unique identification number so far as an individual or an entity is concerned. The anxiety of the department therefore to ensure proper matching of the PAN in the TDS certificate as compared to the PAN of the assessee who claims the benefit of such tax deducted at source, therefore, cannot be lightly brushed aside. The short question is, In a genuine case like the case on hand, is the person remedyless?

9. It is in this context, the provision of Section 199 would come into play. As per sub-section (1) of Section 199 any deduction of tax at source would be treated as payment of tax on behalf of the person from whose income the deduction was made or the owner of the security or of the depositor or of the owner of the property or unit holder or the share holder as the case may be. Sub-section (3) of Section 199 however permits a deviation authorizing the power to make rules in respect of giving credit of tax deducted at source or the year during which the credit of such tax deducted at source should be granted. In exercise of such powers, Rule 37BA of the Income Tax Rules 1962 has been framed, relevant portion of which reads as under:

"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 authorized by such authority.

(2)(i) If the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for tax deducted at source shall be given to the other person in cases where---

(a) the income of the deductee is included in the total income of another person under the provisions of section 60, section 61, section 64, section 93 or section 94;

(b) the income of a deductee being an association of persons or a trust is assessable in the hands of members of the association of persons, or in the hands of trustees as the case may be;

(c) the income from an asset held in the name of a deductee, being a partner of a firm or a karta of a Hindu undivided family, is assessable as

the income of the firm, or Hindu undivided family, as the case may be;

(d) the income from a property, deposit, security, unit or share held in the name of a deductee is owned jointly by the deductee and other persons and the income is assessable in their hands in the same proportion as their ownership of the asset:

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."

10. It can thus be seen that under sub-rule 2 of Rule 37BA where whole or 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 could be given to such other person and not to the deductee provided the three conditions contained therein are satisfied. These conditions in brief are that the deductee files a declaration with the deductor in this respect, such declaration would contain the details of the person entitled to the credit and the reasons for giving such credit and lastly the deductor issues certificate for deducting tax at source in the name of such a person. In the present case, the petitioner could have applied to RBI in terms of sub-rule 2 of Rule 37BA and completed the procedure envisaged therein. However, one can gather that there is no dearth of power with the department to grant credit of tax deducted at source in such a genuine case. We are not suggesting that the requirements of sub-rule 2 are not to be followed before such benefit can be granted. Invariably in all cases such procedure would have to be completed before a person can rightfully claim credit of tax deducted at source where the TDS certificate shows the name and PAN of some other person."

(iii)[2012] 19 taxmann.com 157 (Ker.) [Commissioner of Income Tax Vs. Smt.Pushpa Vijoy] wherein a Division Bench of Kerala High Court held as follows:

"...

8.After hearing both sides and on going through the order of the Tribunal, what we notice is that though the Tribunal has referred to Section 199 of the Income Tax Act, they have not considered the scope of the provisions in detail. Section 199 of the Income Tax Act has undergone various changes and for reference, we extract hereunder the section as it stood during the relevant Assessment Years, i.e., 1997-1998 to 2000-2001, to which these appeals relate.

"199. Credit for tax deducted - Any deduction made in accordance with the provisions of sections 192 to 194, section 194A, section 194B, section 194BB, section 194C, section 194D, section 194E, section 194EE, section 194F, section 194G, section 194H, section 194-I, section 194J, section 194K, section 195, section 196A, section 196B, section 196C and section 196D and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or depositor or owner of property or of unitholder or of the shareholder, as the case may be, and credit shall be given to him for the amount so deducted on the production of the certificate furnished under section 203 in the assessment made under this Act for the Assessment Year for which such income is assessable.

Provided that-

(i) in a case where such person or owner or depositor or unitholder or shareholder is a person, whose income is included under the provisions of section 60, section 61, section 64, section 93 or section 94 in the total income of another person, the payment shall be deemed to have been made on behalf of, and the credit shall be given to, such other person;

(ii) in any other case, where the dividend on any share is assessable as the income of a person other than the shareholder, the payment shall be deemed to have been made on behalf of and the credit shall be given to, such other person in such circumstances as may be prescribed. [Emphasis supplied]

What is clear from the above provision is that the assessee is entitled to credit of tax paid in the assessment in which the income is assessed. In other words, the assessee should claim credit of tax based on

TDS certificate in the year in which the assessee returns the income from which deduction is made for the purpose of assessment. Even after the amendment of the section through the introduction of sub-section (3) of Section 199 of the Income Tax Act, the Central Board was authorised to make rules for giving credit for tax deducted at source. As required under that section, Rule 37BA was framed by the Income Tax (6th Amendment) Rules, 2009 wherein it is specifically provided sub-rule 3(i) as follows:-

(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.

9. As already stated, the Tribunal however without referring to the statutory provisions and the Rules held that the respondents-assesseees are entitled to credit of tax in the Assessment Year following the year in which the tax is recovered and remitted by the Banks based on TDS certificates issued by the Banks. The Tribunal has also made reference to Section 143(1) of the Income Tax Act wherein the assessee is entitled to credit of tax paid directly or indirectly including payments made by payers who recovered tax and remitted the same under the provisions of Chapter XVII of the Income Tax Act. However, Section 143(1) of the Income Tax Act is subject to Section 199 of the Act which specifically provides that tax has to be credited based on TDS certificate only in the assessment in which the income from which deduction is made is assessed to tax. So much so, Section 143(1)(c) will be subject to sub-sections (1) and (3) of Section 199 read with Rule 37BA of the Income Tax Rules and when taken together the effect is that the assesseees can retain the TDS certificates and claim credit in the assessment for the Assessment Year in which assessee returns the income on which deduction of tax is made for assessment.

...

11. The question to be considered is whether the assessing officer was justified in refusing to give credit for tax payments based on TDS certificates issued by the Bank for the reason that income is not returned for assessment by the assesseees in the Assessment Year following the year in which tax is recovered and paid by the Banks. We do not think there is any justification for assesseees' claim because Section 199 of the Income Tax Act makes it clear that the assessee is entitled to credit based on TDS certificate only in the Assessment Year in which income from which tax is deducted is assessed. Therefore, when the statute makes it mandatory that credit of tax based

on TDS certificate is available only in the Assessment Year in which the income from which tax deducted at source is assessed, we do not know how the Tribunal can over-rule the statutory provisions and allow the claim. In our view, going by the practical difficulty to retain TDS certificates for several years until the interest is returned for assessment on cash basis, prudent assessees should return income on which tax is recovered and remitted by the payer in the Assessment Year following the year in which such income is subject to deduction of tax and remittance by the payer. The assessees who do not do it should follow Section 199 and Rule 37BA, retain the TDS certificates and claim credit in the Assessment Year in which such income is returned for assessment.

12. The finding of the Tribunal that there is no provision in the Income Tax Act or Rules to defer credit of tax in assessments based on TDS certificates obtained is really incorrect because sub-sections (1) and (3) of Section 199 read with Rule 37BA of the Income Tax Rules specifically authorise the assessee to retain TDS certificates and to produce it and claim credit in the year in which income on which recovery of tax made is returned for assessment. As of now, the Act does not provide that assessees should return the income for assessment in the Assessment Year following the previous year in which tax is recovered at source and TDS certificate is issued by the payer and if so provided assessment and credit of tax will go together which will avoid botheration for the assessees as well as for the Departmental Officers. In our view, the provisions contained in sub-sections (1) and (3) of Section 199 read with Rule 37BA of the Income Tax Rules serve a purpose because if income is not assessable in the Assessment Year and at the same time assessees are entitled to credit of tax recovered and remitted in respect of such income, the Department will be compelled to refund the entire tax amount every year and along with it if refund is not made within three months from filing of return, mandatory interest will also payable, as provided under Section 243(1) of the Income Tax Act which will defeat the purpose of TDS provisions in the Act. Therefore, we do not find any justification for the Tribunal to allow credit of tax based on TDS certificates without corresponding assessment of income in the Assessment Years concerned which is against the statutory provision. We also do not find any merit in the contention of the respondents-assessees that the amount covered by TDS certificates itself should be treated as income of the

previous year relevant for the Assessment Year concerned and the tax amount should be assessed as income by simultaneously giving credit for the full amount of tax remitted by the payer. In these cases, the entire interest credited should be assessed on maturity of the deposit and on payment by the bank, as the assessee is admittedly following cash system of accounting. However, in our view, if Section 145(1) is amended for assessment of income on which TDS is made in the Assessment Year following the year in which deduction is made irrespective of the system of accounting followed by the assessee, the same will avoid problems for the assessee and the Department.

Based on the findings above, we allow the Departmental appeals by reversing the orders of the Tribunal and that of the first appellate authority and by restoring the assessments denying credit of tax in the assessments for which corresponding income is not assessed. However, since we are allowing the Departmental Appeals, we leave it open to the respondents-assessee to claim credit based on the very same TDS certificates against the interest income assessed in the year in which such income is assessed."

(iv)[2016] 67 taxmann.com 224 (Andhra Pradesh) [ICRCL-KBL (JV) Vs. Assistant Commissioner of Income Tax, Circle-7(1), Hyderabad] wherein a Division Bench of the Andhra Pradesh High Court held as follows:

"...

27. On being asked how the Revenue could retain the amount representing the tax deducted at source from the petitioners bills, and not pay it either to the petitioner or to the sub-contractor, Sri T. Vinod Kumar, learned Senior Standing Counsel for Income Tax, would submit that, as the income is assessable in the hands of the sub-contractor, it is they, and not the petitioner, who can claim credit and, whenever any such claim is made, the Department would give them credit for the TDS, and refund the amount in accordance with Rule 37BA of the Rules. It is, however, not in dispute that the sub-contractor has not made any claim for being given credit for the tax deducted at source by the Government from the bills of the petitioner herein. It is not as if there were conflicting claims by the petitioner-JV on the one hand, and its constituent sub-contractor on the other, both seeking credit for the tax deducted at source by the Government, necessitating retention of these amounts by the Revenue till resolution of the conflicting claims. As held by the Division Bench of this Court, in Bhooratnam and Co.

(supra), the Revenue cannot be allowed to retain the amounts representing the tax deducted at source without credit being given to anybody. If credit of tax is not allowed to the petitioner-assessee, and the subcontractor has not made any claim for refund, it would result in credit of the TDS not being taken by anybody and this, as has been rightly pointed out by the Division Bench in Bhooratnam and Co. (supra), is not the spirit and the intention of the law.

28.To the limited extent the assessing authority denied credit to the petitioner, for the tax deducted at source from their bills by the Government, the impugned assessment orders/rectification orders are set aside. The assessing authority shall determine the quantum of credit for TDS which the petitioners are entitled to in terms of this order, and refund the amount so computed to the petitioners herein in accordance with law. The entire exercise, culminating in final orders being passed, shall be completed within a period of three month from the date of receipt of a copy of this order. It is made clear that this order shall not preclude the assessing authority, if he so chooses, from reopening the assessments, and in passing orders thereafter in accordance with Sections 147 and 148 of the Act.

29.All the writ petitions are disposed of accordingly. The miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs."

10.The learned senior standing counsel appearing for the appellant - Revenue also relied upon the provisions of Rule 37BA (2)(i) of the Income Tax Rules and submitted that 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.

11.Countering the submissions made by the learned senior standing counsel appearing for the appellant-Revenue, Mr.Sathish Parasaran, learned senior counsel appearing for the respondent-assessee submitted that the provisions of Rule 37BA (2)(i) was amended on 01.11.2011 and the new provisions came into effect only with effect from 01.11.2011 and therefore, the said provision is not applicable to the case of the respondent-assessee for the reason that the subject matter of the above

appeals are pertaining to the Assessment Years 2009-10, 2010-11 and 2011-12. The learned senior counsel further submitted that the judgments relied upon by the learned senior standing counsel for the appellant - Revenue are not applicable to the facts and circumstances of the present appeals. The learned senior counsel further submitted that the respondent - assessee was only a collection agent of M/s.Sun TV Network Limited, collecting the Subscription Charges and the invoices, which had been raised in the name of the respondent - assessee on the subscription income from the pay channels during the relevant year and remitted to M/s.Sun TV Network Limited, had been accounted. The learned senior counsel further submitted that the subscription charges were collected by the assessee only on behalf of M/s.Sun TV Network Limited. In support of his contentions, the learned senior counsel relied upon the judgment reported in [2013] 357 ITR 396 (Andhra Pradesh) [CIT Vs. Bhooratnam & Co.], wherein a Division Bench of the Andhra Pradesh High Court held as follows:

"....

16. This amendment has done away with the specified four clauses in the pre-amended Rule 37BA which restricted the benefit of the rule only in four specified situations. It has thus widened the scope of the rule 37 BA thereby enabling the credit of taxes to the actual payee in whose hands the income is assessable and not restricting this benefit only to the specified four situations.

17. In our view, the CIT (Appeals) and the Tribunal have rightly held that the assessee is entitled to the credit of the TDS mentioned in the TDS certificates issued by the contractor, whether the said certificate is issued in the name of the Joint Venture or in the name of a Director of the assessee company. They have considered the terms of the agreement dated 12-03-2003 among the parties to the joint venture and held that credit for TDS certificates cannot be denied to the assessee while assessing the contract receipts mentioned in the said certificates as income of the assessee. The income shown in the TDS certificates has either to be taxed in the hands of the joint venture or in the hands of the individual co-joint venturer. As the joint venture has not filed return of income and claimed credit for TDS certificates and the TDS certificates have not been doubted, credit has to be granted to the TDS mentioned therein for the assessee.

18. Rule 37BA is a procedural provision dealing with the manner of giving credit for tax deducted at source for the purposes of section 199. It therefore applies to pending proceedings. As observed in State of Madras v. Lateef Hamid & Co. AIR 1972 SC 1781, where a

new procedure is prescribed by law, it governs all pending cases.

19. In *Tikaram & Sons v. Commissioner of Sales Tax* AIR 1968 SC 1286 it was held that alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be. The amendment to Rule 37 BA mentioned above which has been introduced by the Income Tax (8th amendment) Rules, 2011 notified vide Notification No. 57/2011 dated 24-10-2011, being procedural in nature, would have retrospective effect and has to be given effect to.

20. The Revenue cannot be allowed to retain tax deducted at source without credit being available to anybody. If credit of tax is not allowed to the assessee, and the joint venture has not filed a return of income, then credit of the TDS cannot be taken by anybody. This is not the spirit and intention of law.

21. Therefore, in our view, the Assessing Officer erred in denying the benefit of the TDS mentioned in the TDS certificates filed by the assessees on the ground that the TDS certificate is issued in the name of the joint venture ora Director and not the assessee.

22. In this view of the matter both the appeals are dismissed as they are without any merit. There is no question of law much less any substantial question of law to be considered in these appeals. No costs."

12. On a careful consideration of the materials available on record, the submissions made by the learned counsel on either side and the judgments relied upon by the learned counsel on either side, it could be seen that the Assessing Officer disallowed the assessee's claim on credit of TDS on the ground that the Subscription Charges were not offered to tax in the return of income. However, the respondent-assessee contended that it is only a collection agent for M/s. Sun TV Network Limited and that the corresponding subscription income derived from pay channels stood accounted/offered as income in the hands of M/s. Sun TV Network Limited. The Assessing Officer held that the TDS credit relevant to subscription charges could not be allowed in the assessee's hands in view of proviso 1 & 2 to Section 199 of the Income Tax Act. The respondent-assessee strenuously contended that the amounts received by them from various Cable Operators cannot be construed as their income, but represents the income of their principal viz., M/s. Sun TV Network Limited.

13. On a perusal of the Agreement dated 14.10.2002 entered into between M/s. Sun TV Network Limited and the respondent, it is clear that the respondent - assessee is entitled to a fixed

commission on the collection amount from M/s.Sun TV Network Limited. It was also contended by the respondent-assessee that the said Agreement was produced before the Assessing Officer at the time of assessment proceedings. However, the Assessing Officer has not considered the said document. The recitals of the Agreement dated 14.10.2002 itself are self-explanatory about the services provided by the respondent-assessee with regard to the collection of Subscription Charges on behalf of M/s.Sun TV Network Limited in turn for a fixed commission. The Agreement was entered as early as on 14.10.2002 (i.e.) much prior to the Assessment Year 2009-10, 2010-11 and 2011-12. All these collection charges have been credited to the account "Subscription Charges" as and when they have been billed and this account has been debited at the end of the financial year when the same was paid back to M/s.Sun TV Network Limited. Therefore, the amounts in question have been routed through the accounts maintained by the assessee, which forms part of the Balance Sheet and in turn, forms part of the Profit and Loss Account. Therefore, the amount received by the assessee is the collection of Subscription Charges on behalf of their principal viz., M/s.Sun TV Network Limited and does not partake the character of income chargeable to tax in their hands. In the assessee's case, the income chargeable to tax is only the commission income and interest income. Therefore, the Subscription Charges collected on behalf of M/s.Sun TV Network Limited is chargeable as income only in the hands of M/s.Sun TV Network Limited and does not partake the character of any expenditure revenue or capital in the hands of the assessee.

14.As per Section 199(2), credit for TDS can be allowed only when the corresponding income is offered for taxation in the year in which such TDS is claimed and deduction of TDS was allowed without the corresponding income being declared in the Profit and Loss Account. As per the Agreement entered into between the respondent and M/s.Sun TV Network Limited and for practical purposes, the invoices were raised by them on various Cable Operators and the TDS certificates were issued by the payers (i.e.) the Cable Operators in the name of the respondent - assessee, the respondent is entitled to claim the credit for the TDS certificates. Merely because the income has been offered and processed in the hands of M/s.Sun TV Network Limited, credit for TDS deducted in the name of the respondent - assessee cannot be denied. It is not in dispute that the respondent - assessee has remitted the entire gross amount received from the Cable Operators to M/s.Sun TV Network Limited. The amount remitted by the respondent to M/s.Sun TV Network Limited includes the amount of TDS deducted by the Cable Operators at the time of payment made by them to the assessee. As already stated, in lieu of the services rendered by the respondent - assessee, they are entitled to receive the fixed commission. Since tax has already

been deducted and paid to the Government at the time of making collections, the assessee is entitled to get credit of the same while receiving the commission income. M/s.Sun TV Network Limited had engaged the services of the respondent for collection of Subscription Charges against the commission. However, the Cable Operators, at the time of payment of subscription, deducted the tax at source and remitted the remaining amount to the assessee. The subscription collected by the assessee cannot be construed as its income and hence, the same is not taxable in the hands of the assessee. Further, the amounts collected by the assessee are credited to separate account viz., "Subscription Charges". The said account was debited at the end of the Financial Year when the amounts are paid to M/s.Sun TV Network Limited. Since the subscription collected by the assessee from various Cable Operators are not the income of the assessee, the same were not shown in the Profit and Loss Account. The subscription amount is the income of M/s.Sun TV Network Limited and as such, the same is taxable in the hands of M/s.Sun TV Network Limited. The levy of tax on the respondent - assessee would amount to double taxation.

15.As rightly contended by the learned senior counsel appearing for the respondent, since the amended provision of Rule 37BA(2)(i) came into effect only on 01.11.2011, the same is not applicable to the cases on hand.

16.The ratio laid down by the Andhra Pradesh High Court in the judgment reported in [2013] 357 ITR 396 (Andhra Pradesh) [CIT Vs. Bhooratnam & Co.], (cited supra), relied upon by the learned senior counsel appearing for the respondent, applies to the facts and circumstances of the present case.

17.So far as the judgment reported in [2016] 67 taxmann.com 224 (Andhra Pradesh) [ICRCL-KBL (JV) Vs. Assistant Commissioner of Income Tax, Circle-7(1), Hyderabad] is concerned, it is a case of conflicting claims by the petitioner therein on the one hand and its constituent sub-contractor on the other hand, both seeking credit for the tax deducted at source by the Government, necessitating retention of these amounts by the Revenue till resolution of the conflicting claims. In the said case, both the petitioner as well as the sub-contractor sought credit of the tax deducted at source, hence, the said ratio cannot be applied to the cases on hand.

18.Since the provisions of Rule 37BA (2)(i) came into effect only on 01.11.2011, the ratio laid down in the judgment reported in [2017] 84 taxmann.com 53 (Gujarat) [Naresh Bhavani Shah (HUF) Vs. Commissioner of Income Tax] has no application to the present appeals.

19.So far as the judgment reported in [1987] 30 taxmann 265

(Mad.) [Commissioner of Income Tax Vs. Tanjore Permanent Bank Ltd.], cited supra, is concerned, the Division Bench of this Court clearly held that when the bonds were taken in the assessee's name and kept in its possession as security for the payment of the money advanced to its constituents, the legal inference which will normally follow from this admission is that the bank has got the custody of the bonds only as a security for the payments of the money advanced by it to its constituents. Further, the Division Bench held that when the assessee says that it is in custody of the bonds of the constituents only as a security for the amounts advanced to them, the assessee-bank should be taken to be in possession of the bonds only as a creditor and not as their owner. Since the facts and circumstances of the present appeals differ from the case reported in [1987] 30 taxmann 265 (Mad.), the ratio laid down in the said judgment is not applicable to the present appeals.

20. Since the facts and circumstances of the present appeals differ from the judgment reported in [2012] 19 taxmann.com 157 (Ker.) [Commissioner of Income Tax Vs. Smt. Pushpa Vijoy], the said judgment has no application in the present cases.

21. For the reasons stated above, we do not find any error or irregularity in the orders passed by the Income Tax Appellate Tribunal. We are of the considered view that the orders passed by the Tribunal are just and proper.

22. In these circumstances, we find no ground much less any substantial question of law to interfere with the orders passed by the Income Tax Appellate Tribunal and the Commissioner of Income Tax (Appeals). The Tax Case Appeals are liable to be dismissed. Accordingly, the Tax Case Appeals are dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. Income Tax Appellate Tribunal,
Madras "A" Bench.
2. Income Tax Appellate Tribunal,
Madras "B" Bench.

3. Income Tax Appellate Tribunal,
Madras "C" Bench.

4.The Commissioner of Income Tax,
(Appeals)-II, Nungambakkam,
Chennai - 34.

5.The Commissioner of Income Tax,
(Appeals)-8, Chennai - 34.

6.The Deputy Commissioner of Income Tax,
Company circle - II (4),
Nungambakkam, Chennai - 34.

7.The Assistant Commissioner of Income Tax,
Company Circle II (4),
Chennai - 3.

8.The Principal Commissioner of Income Tax - 4,
Chennai.

9.The Commissioner of Income Tax - 4,
Chennai.

10.The Principal Commissioner of Income Tax - 2,
Chennai.

+3cc to Mr.M.Sneha, Advocate, S.R.No. 25265, 25266, 25267

Tax Case Appeal Nos.289 of 2016, 345 of 2016
and 348 of 2015

SMI (CO)
GN(16/06/2021)