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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 31.10.2023
Judgment pronounced on: 29.11.2023

+ **W.P.(C) 6990/2022****MR. BHANU MOHAN KAILA**

..... Petitioner

Through: Mr Pragyan Pradip Sharma, Mr Mudit
Makhijani and Mr Eeshan Pandey,
Advocates.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr Krishna Chandra Dubey,
Advocate for R-1.
Mr Aseem Chawla, Sr. Standing
Counsel with Ms Pratishtha
Chaudhary and Mr Aditya Gupta,
Advocates for Revenue.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE GIRISH KATHPALIA****[Physical Hearing/Hybrid Hearing (as per request)]****GIRISH KATHPALIA, J.**

1. By way of this writ petition under Articles 226 and 227 of the Constitution of India, petitioner has sought the following reliefs:

i. Issue a Writ of Certiorari or Mandamus or appropriate writ, direction or order setting aside the Impugned Intimation dated 15.01.2014 issued by the Respondent No. 3 under Section 143(1) of the Act raising a demand of tax of Rs. 21,50,150/- (Rupees Twenty-One Lakh Fifty Thousand One Hundred and Fifty Only) for the



Assessment Year 2012-13 as being arbitrary, illegal and unreasonable; and.

ii. Issue a Writ of Certiorari or Mandamus or appropriate writ, direction or order setting aside the Impugned Letters dated 02.12.2021 and 20.01.2022 issued by the Respondent No.2 in the Petitioner's case under Section 143(1)(a) of the Act raising a demand of tax of Rs. 21,50,150/- (Rupees Twenty-One Lakh Fifty Thousand One Hundred and Fifty Only) for the Assessment Year 2012-13 as being arbitrary, illegal and unreasonable; and

iii. Issue a Writ of Certiorari or Mandamus or appropriate writ, direction or order directing the Respondents not to initiate any proceeding for recovery in accordance with Chapter XVII of the Act pursuant to the Impugned Letters.

iv. Issue such other order, Writ or direction as may deem fit by this Hon 'ble Court'.

On issuance of notice, the respondents/revenue entered appearance through counsel and filed a counter affidavit. We heard learned counsel for both sides.

2. Briefly stated, factual matrix relevant for present purposes is as follows.

2.1 The petitioner, employed with Kingfisher Airlines Limited since November 2006 as Head of Sales, Western Region was getting regular salary with tax deducted at source by his employer.

2.2 For Assessment Year (AY) 2012-13, petitioner filed return of his income on 31.10.2012 declaring his total income as Rs.59,42,410/- after deduction of tax and claimed credit of TDS to the tune of Rs.16,67,100/- and the self assessment of Rs.18,939/- paid on 30.09.2012.



2.3 In view of business conduct of his employer and salaries of employees remaining unpaid, petitioner resigned from service on 08.10.2013.

2.4 On 15.01.2014, respondent no. 3 issued intimation under Section 143(1) of the Act raising demand of Rs.16,83,765/- with interest to the tune of Rs.4,66,385/- for AY 2012-13. The petitioner sent reply dated 24.02.2014 informing that apparently his employer had not deposited the tax deducted at source, so the outstanding dues be recovered by the respondents from his employer. Thereafter vide letter dated 31.03.2014, petitioner further informed the respondents that he had received salary in Financial Year 2011-12 after deduction of tax but the same was not being reflected in Form 26AS for which petitioner could not be held liable so respondents should keep the demand in abeyance.

2.5 By way of circular dated 01.06.2015 followed by Office Memorandum dated 11.03.2016 of Central Board of Direct Taxes, it was reiterated that in accordance with Section 205 of the Income Tax Act, the assessee should not be called upon to pay tax to the extent the same had been deducted from his income where the tax is deductible at source under the provisions of Chapter XVII of the Act.

2.6 Subsequently, in the year 2019, petitioner came to know that by orders of Karnataka High Court, process of liquidation of his employer, the Kingfisher Airlines Limited had commenced, on 28.08.2019, so petitioner submitted there his affidavit of proof of debt.



2.7 On 02.12.2021, petitioner received a letter from respondents raising a demand of Rs.21,50,150/- towards outstanding tax for AY 2012-13. Again on 20.01.2022, petitioner received letter from respondents demanding the outstanding tax of Rs.21,50,150/- for AY 2012-13. On 25.01.2022, petitioner sent reply and requested the respondents to delete the incorrect demand. But to no avail.

2.8 Hence, the present writ petition.

3. The factual position pleaded by the petitioner and admitted by the respondents is that the respondents have raised against the petitioner a demand of outstanding income tax to the tune of Rs.21,50,150/- for AY 2012-13, for which the petitioner is being issued notices of demand repeatedly. It is also not in dispute that as reflected from records, the petitioner was being paid salary after deduction of income tax at source but his employer namely Kingfisher Airlines Limited did not deposit the same with the revenue.

4. That being so, the core issue to be considered by us is as to whether any recovery towards the said outstanding tax demand can be effected against the petitioner in view of the admitted position that the tax payable on salary of the petitioner was being regularly deducted at source by his employer namely Kingfisher Airlines Ltd. who did not deposit the deducted tax with the revenue.



5. The said issue stands covered by the judgment of this court in the case of *Sanjay Sudan vs Assistant Commissioner of Income Tax*, [2023] 148 taxmann.com 329 (Delhi). The relevant observations made in the said judgment are set forth hereafter:

“5. Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the respondents/revenue, says that the credit for withholding tax can only be given in terms of Section 199 of the Act, when the amount is received in the Central Government account.

5.1 It is, therefore, his submission that while no coercive measure can be taken against the petitioner, the demand will remain outstanding and cannot, thus, be effaced.

6. We have heard counsel for the parties.

7. According to us, Section 205 read with instruction dated 01.06.2015, clearly point in the direction that the deductee/assessee cannot be called upon to pay tax, which has been deducted at source from his income. The plain language of Section 205 of the Act points in this direction. For the sake of convenience, Section 205 is extracted hereafter:

“Section 205 Bar against direct demand on assessee.

Where tax is deductible at the source under the foregoing provisions of this Chapter, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income.”

8. The instruction dated 01.06.2015 is aligned with the aforesaid provision of Act inasmuch as it clearly provides in paragraph 2 that since the Act places a bar on a direct demand qua the deductee assessee, the same cannot be enforced coercively. For the sake of convenience, paragraph 2 of the said Instruction is extracted hereafter:

“...2. As per Section 199 of the Act credit of Tax Deducted at Source is given to the person only if it is paid to the Central Government Account. However, as per Section 205 of the Act the assessee shall not be called upon to pay the tax to the extent tax has been deducted from his income where the tax is deductible at source under the provisions of Chapter XVII. Thus the Act puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch cannot be enforced coercively...”

9. The question, therefore, which comes to fore, is as to whether the respondents/revenue can do indirectly what they cannot do directly.

9.1 The adjustment of demand against future refund amounts to an indirect recovery of tax, which is barred under Section 205 of the Act.

9.2 The fact that the instruction merely provides that no coercive



measure will be taken against the assessee, in our view, falls short of what is put in place by the legislature via Section 205 of the Act.

10. Therefore, in our view, the petitioner is right inasmuch as neither can the demand qua the tax withheld by the deductor/employer be recovered from him, nor can the same amount be adjusted against the future refund, if any, payable to him."

6. On behalf of revenue, it was contended that no credit for tax can be given to the petitioner, since in view of the provisions under Section 199 of the Income Tax Act the credit can be given only when the tax which was deducted at source is paid to the Central Government and in the present case, admittedly the tax deducted from salary of the petitioner has not been deposited by his employer. This contention was raised also in the case of **Sanjay Sudan** (supra) but not accepted by this court.

7. Further, in the case of **BDR Finvest Pvt. Ltd. vs DCIT**, WP(C) 9043/2021 decided by this court on 31.10.2023, it was clarified that payment of the tax deducted at source to the Central Government has to be understood as the payment in accordance with law.

8. The petitioner having accepted the salary after deduction of income tax at source had no further control over it in the sense that thereafter it was the duty of his employer acting as tax collecting agent of the revenue under Chapter XVII of the Act to pay the deducted tax amount to the Central Government in accordance with law. The employer of the petitioner having failed to perform his duty to deposit the deducted tax with the revenue, petitioner cannot be penalized. It would always be open for revenue to proceed against employer of the petitioner for recovery of the deducted tax.



9. Same view has been taken by this court in the case of *PCIT vs Jasjit Singh*, ITA 295/2023 decided on 02.11.2023 (*subsequent to the date when judgment in this case was reserved*). Section 199 of the Act, in our view cannot operate as impediment to grant relief to the petitioner.

10. In view of the aforesaid, the petition is allowed, thereby setting aside the intimations/communications dated 15.01.2014, 02.12.2021 and 20.01.2022 issued by respondent no. 3 under Section 143 of the Act raising a demand of tax to the tune of Rs.21,50,150/- and consequently, also restraining the respondents from carrying out any recovery proceedings pertaining to the said intimations/ communications. However, it is clarified that in case the petitioner is able to obtain any amount of money towards tax deducted from his income at source for the Assessment Year 2012-13 from his employer, the same shall be deposited by him with the revenue forthwith.

**GIRISH KATHPALIA
(JUDGE)**

**RAJIV SHAKDHER
(JUDGE)**

NOVEMBER 29, 2023/as