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

% *Date of decision: 31.05.2023*

+ **W.P.(C) 7797/2023**

INCREDIBLE UNIQUE BUILDCON PRIVATE LIMITED

..... Petitioner

Through: Mr Prakul Khurana and Ms Vrinda Lakhotia, Advocates.

versus

OFFICE OF THE INCOME TAX OFFICER WARD (12) (1) NEW DELHI

..... Respondent

Through: Mr Abhishek Maratha, Sr. Standing Counsel with Mr Akshat Singh, Jr. Standing Counsel.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

CM APPL. 30117/2023

1. Allowed, subject to just exceptions.

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2. Issue notice.

3. Mr Abhishek Maratha, learned senior standing counsel, who appears on behalf of the respondent/revenue, accepts notice.

4. Mr Maratha cannot but accept that the issue raised in the present writ



petition is covered by the judgment of this court dated 17.02.2023, passed in WP(C) 6610/2019, titled *Sanjay Sudan v. The Assistant Commissioner of Income Tax & Anr.*

4.1 In this context, Mr Maratha says that a counter-affidavit is not required to be filed, as the instant writ petition concerns a pure question of law.

5. Broadly the facts obtaining the case are as follows:

6. This writ petition concerns Financial Year (FY) 2010-11[Assessment Year (AY) 2011-12].

7. The petitioner had, as it appears, provided services to an entity going by the name Clutch Auto Ltd. (CAL). The value of the service provided amounted to Rs.8,50,26,199/-. The said entity, i.e., CAL, deducted tax at source amounting to Rs.24,96,199/-. It is the petitioner's stand that the tax at source deducted by CAL was not completely deposited with the respondent/revenue.

8. The petitioner also claims that the balance amount, after deducting tax at source, was also not remitted to it by CAL. Insofar as this aspect is concerned, the petitioner claims that it is an issue which is being agitated before the concerned bench of the National Company Law Tribunal (NCLT).

9. We may note that according to the petitioner, CAL only deposited Rs.69,897/- towards tax deducted at source, resulting in a deficit of Rs.24,26,302/-. This aspect is not disputed by the respondent/revenue.

9.1 Therefore, the grievance of the petitioner is that it has not been given credit for the tax deducted at source by CAL, which was not deposited with



the respondent/revenue.

10. The petitioner thus avers that instead of being granted credit for the tax deducted at source by CAL, a demand amounting to Rs.15,24,840/- was raised against it.

11. In these circumstances, the petitioner has approached this court with the following substantive prayer:

“a) Issue writ in the nature of mandamus or any other appropriate writ/ order/ direction to the effect directing the Respondent to issue the refund amounting to Rs. 11,39,870 I- due to the Petitioner for AY 2011-12”

12. This very issue, as indicated above, arose for consideration in **Sanjay Sudan**’s case. It would, therefore, be appropriate to set forth the relevant paragraphs of the said judgment:

“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.

11. Thus, for the foregoing reasons, we are inclined to quash the notice dated 28.02.2018, and also hold that the respondents/revenue are not entitled in law to adjust the demand raised for AY 2012-13 against any other AY. It is ordered accordingly.

12. Notably, in paragraph 7 of the writ petition, the petitioner has adverted to the fact that he is entitled to refund of Rs.1,94,410/- in respect of AY 2015-16.



12.1 Mr Sanjay Kumar, learned Senior Standing Counsel, who appears for the respondent/revenue says the amount claimed towards refund is not in dispute.

12.2 Given this position, the petitioner's claim which is not in dispute will have to be refunded.

12.3 It is so directed.

13. The writ petition is disposed of in the aforesaid terms."

13. Clearly, what follows is that while respondent/revenue cannot recover the deficit tax at source from the petitioner, which was deducted and pocketed by CAL, and they cannot also refuse to grant credit for the same. The rationale being what the appellant/revenue cannot do directly, it is impermissible for it to reach the same end indirectly.

14. Given this position, the prayer made in the writ petition is allowed.

15. The respondent/revenue will refund Rs.11,39,870/- to the petitioner, as prayed.

16. The writ petition is disposed of in the aforesaid terms.

17. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

MAY 31, 2023 / tr