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

+ **W.P.(C) 8275/2018**

TUPPERWARE INDIA PVT. LTD. Petitioner

Through: **Ms. Ananya Kapoor, Adv. for
Mr. Salil Kapoor and Mr. Sumit
Lalchandani, Advs.**

versus

**(COMMISSIONER OF INCOME TAX (INTERNATIONAL
TAXATION)-3 & ANR. Respondents**

Through: **Mr. Prashant Meharchandani,
Sr. Standing Counsel along
with Mr. Akshat Singh, Jr.
Standing Counsel and Ms.
Ritika Vohra, Adv.**

**CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR
KAURAV**

**ORDER
01.02.2024**

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1. The petitioner has filed the instant writ petition under Article 226 and 227 of the Constitution of India, assailing the orders dated 19.01.2017 and 29.03.2018, whereby, the claim of the petitioner seeking refund of excess Tax Deducted at Source ["TDS"] amounting to Rs. 67,41,620/- deducted under Section 195 of the Income Tax Act, 1961 ["Act"], for the Assessment Year ["AY"] 2012-13 has been rejected.

2. The facts of the present case exhibit that the petitioner is a company incorporated under the Indian Companies Act, 1956, primarily engaged in manufacturing and trading of molded plastic



items, which includes import on lease basis from overseas group companies. It is seen that the petitioner imported molds during the concerned AY from Dart Industries Inc. USA [**“Dart USA”**] and the payments were made according to the rental agreement between the petitioner and Dart USA. As per the agreement, the mold lease rent was agreed to be paid by the petitioner on the basis of actual production days.

3. Contemporaneously, due to the change in method for charging rent on mold lease, certain deliberations were made between the petitioner and Dart USA to increase the said rent. However, before the negotiations could be finalized, the petitioner made a provision for higher rental in its books of accounts, as the estimated mold lease rent came out to be Rs. 7,19,96,529/-. Pursuant to the revised estimate, the petitioner made a deduction of Rs. 71,99,653/- as TDS on higher side and deposited the same. Later, the increase in mold lease rent did not happen and the rent was recognized to be Rs. 45,80,337/-, which resulted in excess deposit of TDS amounting to Rs. 67,41,620/-, as the actual TDS amounted to Rs. 4,58,035/- only in the given circumstances.

4. Learned counsel appearing on behalf of the petitioner submits that on 06.02.2013, the petitioner made an application before the Assessing Officer [**“AO”**] for a refund of higher tax deducted in accordance with the procedure prescribed under the Central Board of Direct Taxes [**“CBDT”**] circular dated 23.10.2007. However, no action was taken by the concerned authority on the said application. She submits that on account of inaction of the tax authorities, the petitioner filed another application dated 16.01.2017, but this was rejected by respondent no.1 without providing any opportunity of



hearing to the petitioner. She also submits that being aggrieved by the rejection of its application for refund, the petitioner preferred an application on 21.03.2017 before respondent no.2, but to no avail.

5. Learned counsel submits that the respondents have acted *de hors* the applicable provisions and arbitrarily rejected the applications of the petitioner, in as much as the petitioner is entitled for the refund of excess TDS under Section 195 of the Act. She contends that since no income has accrued to the lessor i.e., Dart USA in respect of the anticipated increase in rent for the concerned AY and which did not take place, there is no rationale behind withholding the excess TDS amount by the respondents.

6. While referring to the CBDT circular dated 23.10.2017, she contends that the case of the petitioner is covered by the said circular, which stipulates that in such cases where income does not either accrue to the non-resident or it accrues but the excess amount in respect of which refund is claimed, is borne by the deductor, then the TDS on the aforesaid income belongs to the deductor. She also submits that since the negotiations between the petitioner and Dart USA never culminated into a transaction or any agreement, the petitioner is rightfully entitled for claiming the benefit envisaged in the said circular.

7. Learned counsel for the petitioner further submits that even otherwise also, if any amount which is credited to the Government does not fall into the category of tax, the said amount cannot be unjustifiably retained by the Government. She contends that it is a trite principle of law that nobody can be unjustly enriched at the expense of another person and therefore, the refund of excess TDS claimed by the petitioner is permissible within the contours of law.



She submits that as per the CBDT circular dated 26.04.2016, the refund of excess TDS must be initiated along with the interest under Section 244A of the Act, from the date of the payment of such tax.

8. *Per contra*, learned counsel for the respondents vehemently opposes the submissions advanced by the learned counsel for the petitioner. He submits that under the provisions of the Act, the petitioner/deductor is not entitled to the refund of excess TDS deposited by it and only the payee will get the refund.

9. He further submits that the entire reliance of the petitioner on the CBDT circular dated 23.10.2017 is misplaced and devoid of any merit. He submits that the case of the petitioner does not fall in the category of cases stipulated in Clause 2 of the said circular. According to him, there is no material on record to suggest that the contract was either cancelled wholly or partially, or the existing agreement was replaced by a new understanding to make the petitioner eligible for claiming the refund of excess TDS. He submits that the petitioner has created such an enhanced provision merely on the basis of oral discussions and no intricate details are known to the respondents.

10. We have heard the learned counsels appearing on behalf of the parties and perused the record.

11. The brief controversy involved in the instant petition is whether the respondents are authorised by law to withhold the excess TDS paid by the petitioner and whether the deductor is entitled for refund of the said payment of excess TDS.

12. Before advertng to the factual position, it is significant to refer to Article 265 of the Constitution of India, which reads as under:-



“265. Taxes not to be imposed save by authority of law

No tax shall be levied or collected except by authority of law.”

13. Thus, the cardinal duty of imposition or collection of taxes which flows from Article 265 is that it can only be exercised by the authority of law and not otherwise. A bare perusal of the facts of the present case would signify an undisputed position that in lieu of the discussions between the petitioner and Dart USA regarding the enhanced mold lease rent of Rs. 7,19,96,529/-, the petitioner while anticipating tax liability made a bonafide payment and deposited the TDS amounting to Rs. 71,99,653/- (i.e., at the rate of 10%). However, those deliberations never materialised into a transaction or a contract and the petitioner paid the lease rent amounting to only Rs. 45,80,337/- and the TDS was deducted and paid on the aforesaid amount equivalent to Rs. 4,58,035/-. Therefore, it is clearly established that no income had accrued to Dart USA *qua* the excess TDS paid by the petitioner and consequently, no right of retention of the said amount vests in the respondents.

14. The rationale imported in the impugned orders passed by the respondents i.e., orders dated 29.03.2018 and 19.01.2017, manifests that the petitioner is denied the refund of the excess TDS deposited by it as its case does not fall within the gamut of cases mentioned in the CBDT circular dated 23.10.2017.

15. We find no substance in the above-mentioned reasoning provided in the impugned orders as a bare glance at the said circular would indicate that the primary objective behind the said circular is to lay down a procedure for refund of tax deducted under Section 195 of



the Act in certain situations. For the sake of clarity, relevant clauses of the said circular are reproduced as under:-

“2. The cases which are being referred to the Board mainly relate to circumstances where, after the deposit into Government account of the tax deducted at source under section 195,

- a) the contract is cancelled and no remittance is made to the non-resident;
- b) the remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount has been returned to the person responsible for deducting tax at source;
- c) the contract is cancelled after partial execution and no remittance is made to the non-resident for the non-executed part;
- d) the contract is cancelled after partial execution and remittance related to non-executed part is made to the non-resident. In such cases, the remitted amount has been returned to the person responsible for deducting the tax at source or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the non-resident;
- e) there occurs exemption of the remitted amount from tax either by amendment in law or by notification under the provisions of Income-tax Act, 1961;
- f) an order is passed under section 154 or 248 or 264 of the Income-tax Act, 1961 reducing the tax deduction liability of a deductor under section 195;
- g) there occurs deduction of tax twice from the same income by mistake;
- h) there occurs payment of tax on account of grossing up which was not required under the provisions of the Income-tax Act, 1961;
- i) there occurs payment of tax at a higher rate under the domestic law while a lower rate is prescribed in the relevant double taxation avoidance treaty entered into by India.

2.1 In the cases mentioned above, income does not either accrue to the non-resident or it accrues but the excess amount in respect of which refund is claimed, is borne by the deductor. The amount deducted as tax under Section 195 and paid to the credit of the Government therefore belongs to the deductor. At present, the refund is given only on a claim being made by the non-resident with whom the transaction was intended or in terms of Circular No. 790 dated 20th April, 2000.

8. The refund as per this circular is, inter alia, permitted in respect of transactions with non-residents, which have either not materialized or have been cancelled subsequently. It,



therefore, needs to be ensured by the Assessing Officer that they disallow corresponding transaction amount, if claimed, as an expense in the case of the person, being the deductor making refund claim. Besides, in all cases, the Assessing Officer should also ensure that in the case of a deductor making the claim of refund, the corresponding disallowance of expense amount representing TDS refunded is made.”

16. Even otherwise also, reliance can be placed to the latin maxim “*jure naturae aequum est, neminem cum alterius detrimento, et injuria fieri locupletiores*” which translates to and settles the position that by natural law, it is just that no one should be enriched by another’s loss or injury. Put otherwise, no one can be unjustly enriched at the expense of others. It is pertinent to refer to the decision of the Coordinate Bench of this court in the case of **Indglonal Investment and Finance Ltd. v. ITO** [2011 SCC OnLine Del 2609], wherein, it was held that:-

“6. Article 265 and a claim for refund for violation of the principles underlying the said article or under the general principles of equity, justice and good conscience as well as the statutory provisions in tax enactments was settled by the Constitutional Bench decision of nine judges in **Mafatlal Industries Ltd. v. Union of India** 111 STC 467 (SC) ; (1997) 5 SCC 536. The said decision interprets article 265 of the Constitution and lays down legal principles, which we feel are equally applicable to the arguments raised. **The Supreme Court in the said case has held that article 265 mandates that no tax can be levied or collected except by authority of law, which means that tax collected contrary to law has to be refunded;** but the question is—when a tax is considered to have been levied and collected without authority of law.”

[Emphasis supplied]

17. With regards to the contention raised by learned counsel for the respondents regarding the refund of the disputed amount only to the payee, reliance can be placed on the decision of the Hon’ble Supreme Court in case of **Union of India v. Tata Chemicals Ltd.** [(2014) 6



SCC 335], wherein, while refunding the excess TDS along with the interest, the court held as under:—

“37. A “tax refund” is a refund of taxes when the tax liability is less than the tax paid. As per the old section an assessee was entitled for payment of interest on the amount of taxes refunded pursuant to an order passed under the Act, including the order passed in an appeal. In the present fact scenario, the deductor/assessee had paid taxes pursuant to a special order passed by the assessing officer/Income Tax Officer. In the appeal filed against the said order the assessee has succeeded and a direction is issued by the appellate authority to refund the tax paid. The amount paid by the resident/deductor was retained by the Government till a direction was issued by the appellate authority to refund the same. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorisedly by the Department. **When the collection is illegal, there is corresponding obligation on the Revenue to refund such amount with interest inasmuch as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244-A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a resident/deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/foreign company.**

38. Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there-being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which ex



ae quo et bono ought to be refunded, the right to interest follows, as a matter of course.”

[Emphasis supplied]

18. Reference can also be made to the decision of the Division Bench of the Bombay High Court in the case of **Sunflag Iron and Steel Co. Ltd. v. CBDT** [2016 SCC OnLine Bom 195], wherein in a similar set of circumstances, whereby, the resident/deductor has paid the tax in lieu of anticipated liability, the Court held as under:-

“25. At the cost of repetition, we have no hesitation in holding that the refund made by the respondents would squarely fall within the ambit of section 240 of the said Act, inasmuch as their lordships in the case of Tata Chemicals (cited supra) have clearly held that the provisions of section 240 are wide enough and they include all sorts of proceedings. Undisputedly, the tax which was deducted and paid by the assessee was under the provisions of sections 195 and 201 of the said Act. Undisputedly, the advance tax which was paid was more than the liability to pay the tax. The tax was deducted and paid on an anticipation that the third instalment was to be paid to the non-resident German company. However, after the agreement with the non-resident German company, whereby it had waived the third instalment, the tax deducted at source on account of the payment of the third instalment was required to be refunded by the respondent Revenue.

26. If the contention as raised by the Revenue is to be accepted, it would result in causing great hardship to the honest taxpayers. **If an honest taxpayer on account of anticipated liability deducts more amount of tax and deposits the same and ultimately if it is revealed that there was no liability to pay the tax, then in such a case permitting the Revenue to retain that tax and not to permit refund to the person who has honestly deposited the said amount, would be permitting unjust enrichment of the State and depriving the honest taxpayer of his legitimate due. We find that such an interpretation would not also be permissible in view of public policy.”**

[Emphasis supplied]

19. Considering the given facts and in light of the abovementioned judicial pronouncements, it is crystallised that by no prudent stretch of imagination, the respondents are entitled to withhold the excess TDS



deposited by the petitioner in lieu of the anticipated liability for concerned AY as the same would amount to collection of tax without any authority of law.

20. Therefore, the writ petition is allowed. The impugned orders dated 29.03.2018 and 19.01.2017 are, hereby, set aside. The respondents are directed to issue a refund of excess TDS amounting to Rs. 67,41,620/- along with the applicable rate of interest as per extant law as expeditiously as possible not exceeding beyond six months.

21. With the aforesaid directions, the petition is disposed of.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 01, 2024/p/shs