आयकर अपीलीय अधिकरण
कोलकाता 'एसएमसी' पीठ, कोलकाता में
IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA

श्री राजेश कुमार, लेखा सदस्य
एवं
श्री संजय शर्मा, न्यायिक सदस्य
के समक्ष
Before
SRI RAJESH KUMAR, ACCOUNTANT MEMBER
&
SONJOY SARMA, JUDICIAL MEMBER

I.T.A. No.: 764/KOL/2023
Assessment Year: 2016-17

Vishal Pachisia*.....*Appellant
[PAN: AFRPP 4570 J]

Vs.

ITO, Ward-44(1), Kolkata*.....*Respondent

Appearances by:

Assessee represented by – *Sh. Miraj D. Shah, A/R.*

Department represented by – *Sh. Ankur Goyal, JCIT, Sr. D/R.*

Date of concluding the hearing : October 18th, 2023
Date of pronouncing the order : November 7th, 2023

ORDER

Per Rajesh Kumar, Accountant Member:

This appeal preferred by the assessee is against the order of Learned Commissioner of Income-tax (Appeals)- NFAC, Delhi [hereinafter referred to Ld. 'CIT(A)'] dated 08.05.2023 for the Assessment Year (in short 'AY') 2016-17.

2. At the outset, we notice that there is a delay of 17 days in filing the appeal which was stated to be on account of the assessee being out of station and filing of the appeal only after returning to the station. After hearing the rival contentions and perusing the material on record we find that the appeal is for sufficient reasons and therefore, the same is condoned.

3. The only issue raised by the assessee in various grounds of appeal is against the order of Ld. CIT(A) upholding the order of the Assessing Officer (in short ld. 'AO'), CPC passed u/s 143(1) of the Act dated 26.06.2018 wherein the credit for TDS deducted at source by the employer of Rs. 3,96,700/- was not allowed.

4. The facts in brief are that the assessee is a salaried employee employed with M/s. Falcon Tyres Ltd. at its Kolkata office and during the year received salary of Rs. 17,40,264/-. The employer deducted the TDS from the salaries of the assessee of Rs. 3,96,700/-. However, the same was not deposited in the Government treasury. The assessee filed the return of income on 30.03.2018 and claimed the credit for TDS deducted at source of Rs. 4,10,292/-. However, the AO, CPC allowed the credit to the tune of Rs. 13,592/- in respect of TDS deducted at source thereby denying the credit of Rs. 3,96,700/- to the assessee on the ground that the same was not deposited by the employer M/s. Falcon Tyres Ltd. in the Government treasury.

5. Ld. CIT(A) also upheld the order passed by the AO, CPC on the ground TDS deducted at source of Rs. 3,96,700/- by the employer has not been deposited in the Government treasury and

therefore, the assessee is not entitled to claim the credit thereof and thus, justified the upholding of the order passed by the AO, CPC.

6. After hearing the rival contentions and perusing the material on record, we find that the assessee during the year was working with M/s. Falcon Tyres Ltd. and received salaries of Rs. 17,40,264/- on which the employer has duly deducted the TDS at source. However, out of the TDS deducted, a sum of Rs. 3,96,700/- was not deposited in the Government treasury and therefore, the same was not reflected in Form 26AS. When the assessee filed the return of income after claiming the credit for TDS ,the same was denied by the AO, CPC in the order/intimation passed u/s 143(1) of the Act dated 26.06.2018 thereby raising a demand of Rs. 4,18,720/-. Ld. CIT(A) simply affirmed the order of the AO by holding that since the TDS deducted at source has not been deposited in the Government treasury by the employer, the assessee is not entitled to claim the credit thereof. In our opinion, where the TDS has been deducted at source from the salary which has not been deposited with the Government treasury , then assessee cannot be called upon to deposit the demand arising out of non-credit of the said TDS by the Revenue. The case of the assessee is supported by the departmental Circular F.No. 275/29/2014-IT (B) which is extracted below for the ready reference:

"F.No. 275/29/2014-IT (B)
Government of India
Ministry of Finance
Central Board of Direct Taxes

(CBDT)

New Delhi, Dated: 11th March, 2016

Office Memorandum

Sub: Non-deposit of tax deducted at source by the deductor- Recover}' of demand against the deductee assessee.

Vide letter of even number dated 01.06.2015, the Board had issued directions to the field officers that in case of an assessee whose tax has been deducted at source but not deposited to the Government's account by the deductor, the deductee assessee shall not be called upon to pay the demand to the extent tax has been deducted from his income. It was further specified that section 205 of the Income-tax Act, 1961 puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch in such situations cannot be enforced coercively.

2. However, instances have come to the notice of the Board that these directions are not being strictly followed by the field officers.

3. In view of the above, the Board hereby reiterates the instructions contained in its letter dated 01.06.2015 and directs the assessing officers not to enforce demands created on account of mismatch of credit due to non-payment of TDS amount to the credit of the Government by the deductor. These instructions may be brought to the notice of all assessing officers in your Region for compliance.

This issues with the approval of Member (Revenue &TPS).”

7. The case of the assessee is also supported by a series of decisions namely *Incredible Unique Buildcon Private Limited vs. ITO* reported in No.-*W.P.(C) 7797/2023* order dated 31.05.2023 and Coordinate Bench Pune in the case of *Mukesh Padamchand Sogani vs. ACIT* in *ITA No. 29/PUN/2022* order dated 30.01.2023.

8. In all the above decisions, the issue of non-deposit of TDS by the deductor has been allowed in favour of the assessee by holding that once the TDS is deducted then the liability resulting from the non-deposit of TDS by the deductor cannot be fasten on the deductee. For the sake of convenience, we are reproducing herein

the operative part of the decision in the case of *Mukesh Padamchand Sogani (supra)* wherein the Coordinate Bench under the similar circumstances has held as under:

> *"6. Be that as it may, we are extantly concerned with the Intimation issued by the Central Processing unit u/s. 143(1) of the Act in which the credit for Rs.8,21,149/- was not allowed because the amount was not deposited by the employer. In this regard, it would be relevant to take note of the prescription of section 143(1) dealing with the processing of return. Clause (a) of section 143(1) provides for making certain adjustments to the income declared for determining the total income. Clause (b) states that the taxes, interest and fee, if any, shall be computed on the basis of the total income computed under clause (a). Clause (c), which is material for our purpose, runs as under :*
>
> *'(C) the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the tax, interest and fee, if any, computed under clause (b) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under section 89, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax, interest or fee;'*
>
> *7. On going through section 143(1) of the Act, it becomes ostensible that the total income as computed under its clause (a) is considered for computing the amount of tax etc. payable on it as per clause (b). Clause (c) then comes into operation, which provides for determining the amount payable or refundable to the assessee after adjusting the amount of any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable u/s.89 etc. from the amount of tax determined under clause (b). Essence of clause (c) of section 143(1) is to allow adjustment of tax deducted or collected at source or advance tax etc. against the tax liability on total income. Important thing to be borne in mind in this regard is that though the word paid' has been used after the words 'advance tax', but it is absent in the context of 'tax deducted at source'. The effect of this is that unlike advance tax, the credit for tax deducted at source is to be allowed only when it is deducted and there is no further stipulation of the same having been paid also as a condition precedent. As a sequitur, credit for the amount of tax deducted at source is not*

dependent upon its subsequent deposit by the deductor. Once there is deduction of tax at source, the benefit of such tax deduction has to be allowed in the hands of deductee u/s 143(1) of the Act irrespective of its subsequent deposit or non-deposit by the deductor.

8. Our view is fortified by section 234B dealing with interest for default in payment of advance tax. This section provides that where an assessee fails to pay due advance tax etc., he shall be liable to pay simple interest at the specified rate on the amount of 'assessed tax'. The term "assessed tax" has been defined in Explanation 1 to mean the tax on total income determined u/s. 143(1) or regular assessment as reduced by the amount of: '(i) any tax deducted or collected at source in accordance with the provisions of Chapter XVII on any income which is subject to such deduction or collection and which is taken into account in computing such total income'. Since section 234B has reference to advance tax. Computation of advance tax has been dealt with in section 209 of the Act. There are four clauses, (a) to (d) of section 209(1) of the Act, and clause (d) provides that : 'the income-tax calculated under clause (a) or clause (b) or clause (c) shall, in each case, be reduced by the amount of income-tax which would be deductible or collectible at source during the said financial year ....'. Effect of the above provision is that if there is an income on which tax is deductible at source, then such income will be reduced for determining the advance tax liability and the consequential interest liability u/s 234B of the Act, even if no tax was actually deducted at source. The Finance Act, 2012 inserted a proviso to section 209(1) nullifying the above position of deducting income on which tax is deductible but not actually deducted. Instantly, we are confronted with a situation in which the deductor has duly deducted tax at source but not paid the same to the exchequer. Albeit gap between 'tax which would be deductible' as per section 209(1)(d) and 'tax deducted at source' has been abridged by insertion of proviso to section 209(1), but the open space between the 'tax deducted at source' as per section 143(l)(c) and 'tax deducted at source and deposited' still persists.

9. Coming back to the context under consideration, we find that the requirement for allowing credit is only of the amount of tax deducted at source and not the amount eventually getting deposited with the Government after deduction. Since a sum of Rs.8,21,149/- was duly deducted at source by the employer from the salaries credited/paid to the assessee for the year under consideration, we hold that benefit of such tax deducted at source has to be allowed in Intimation u/s

143(1) of the Act notwithstanding the fact that it was not deposited. The impugned order is overturned pro tanto.

10. In the result, the appeal is allowed."

9. We therefore, respectfully following the decision of the Coordinate Bench and also other the Hon'ble Courts, set aside the order of Ld. CIT(A) and direct the AO to allow the credit of TDS deducted at source to the assessee.

10. In the result, the appeal filed by the assessee is allowed.

Kolkata, the 7th November, 2023.

Sd/-	*Sd/-*
[Sonjoy Sarma]	[Rajesh Kumar]
Judicial Member	Accountant Member

Dated: 07.11.2023

Bidhan (P.S.)

Copy of the order forwarded to:

1. ***Vishal Pachisia, 14/4, Sovaram Bysack Street, Burra Bazar, Kolkata-700 007.***
2. ***ITO, Ward-44(1), Kolkata.***
3. CIT(A)-NFAC, Delhi.
4. CIT-
5. CIT(DR), Kolkata Benches, Kolkata.

//True copy //

By order

Assistant Registrar
ITAT, Kolkata Benches
Kolkata