IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A.L.SAINI, AM

आयकरअपीलसं./**ITA No.126/SRT/2021**

(निर्धारणवर्ष / **Assessment Year: (2019-20)**

(Virtual Court Hearing)

Liladevi Dokania Plot No.1/2,Mayur House, Beside Milleniumm Market, Ring Road, Surat-395002	**Vs.**	Income Tax Officer Ward-1(2)(3), Aayakar Bhawan, Majura Gate, Surat-395001
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **ABIPD 2171 Q**		
(Appellant)		**(Respondent)**

Assessee by : Shri Suresh K Kabra, C.A

Respondent by : Shri Deependra Kumar, SR-DR

सुनवाईकीतारीख/ **Date of Hearing : 27/04/2022**

घोषणाकीतारीख/**Date of Pronouncement: 27/06/2022**

आदेश / **O R D E R**

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

Captioned appeal filed by the assessee, pertaining to assessment year 2019-20, is directed against the order passed by the Learned National Faceless Appeal Centre (NFAC) /Commissioner of Income Tax (Appeals) ['CIT(A)' for short] order dated 06.08.2021, which in turn arises out of an order passed by the Assessing Officer.

2. The grounds of appeal raised by the assessee are as follows:

"1.The Ld Faceless CIT(A) has erred and was not just and proper on the facts of the case and in law in dismissing the appeal of the assessee without affording proper opportunity and not considering the submission made.

*2. The Ld Faceless CIT(A) has erred and was not just and proper on the facts of the case and in law in not allowing the credit of "**TAX deducted but not paid into Government a/c**" disregarding the provisions of section 205 of the Act.*

3. Prayer.

3.1 The credit of Rs.5,71,770/- may be kindly allowed against the Tax payable and the Tax demand by CPC may be deleted."

3. Brief facts *qua* the issue are that assessee before us is an individual and during the assessment year he earned income from "house Property". The Tenant, while paying the rent to assessee had deducted TDS from the payment, but did not deposit in the Government account. The assessee had claimed the whole of the amount of TDS as credited against the tax payable. However, since the deductor (tenant), did not deposit the TDS amount to the credit of the Government account, therefore it was not reflected in the Form 26AS of the assessee. Though the Assessing Officer (CPC) did not allow the credit of TDS of Rs.5,71,770/-.

4. Aggrieved by the order of Assessing Officer (CPC), assessee carried the matter in appeal before Ld. NFAC/CIT(A) who has confirmed the action of Assessing Officer. Aggrieved, the assessee is in further appeal before us.

5.Before us, Shri Suresh K Kabra, Learned Counsel for the assessee submits that in case of the assessee, the deductor has deducted TDS but not deposited to the Central Government Account, therefore, it is mistake committed by the Deductor and for that assessee should not be penalized. There is no default on the part of assessee, therefore, assessing officer may be directed to grant the benefit of TDS.

6.On the other hand, the Ld. DR for the Revenue has primarily reiterated the stand taken by the Assessing Officer, which we have already noted in our earlier para and is not being repeated for the sake of brevity.

7. We have heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld CIT(A) and other materials brought on record. Before us, Ld. Counsel for the assessee filed copy of Form 26AS up to 05.08.2021 vide page 1-2 of the paper book. Copy of TDS chart- Rent receipt from Tenant for the financial year 2018-19 is filed, vide page-3 of the paper book. Copy of ledger account of Tenant for the

financial year 2018-19 is filed vide page no. 4 of the paper book. The copy of ledger account of Tenant for financial year 2019-20 is furnished vide page no. 5 of the paper book. The contra account of Tenant for the financial year 2018-19 is furnished, vide pages 6-8 of the paper book. The TDS receivable ledger account is furnished, vide page 9 of the paper book. The copy of bank statement of Vijaya Bank, is furnished, vide pages 10-15 of the paper book.

8. From the above documents furnished by the assessee, it is evidently clear that assessee received the rent income, and the Tenant (Deductor) has deducted TDS but has not deposited the TDS so deducted into the Central Government Account. Considering these facts, we note that issue under consideration is no longer *res integra.* The Hon`ble High Court of Gujarat in the case of Kartik Vijaysinh Sonavane, [2021] 132 taxmann.com 293 (Gujarat) held that where TDS has been deducted by employer of assessee, it will always been open for department to recover same from said employer and credit of same could not have been denied to assessee. The findings of the Hon`ble Court is reproduced below:

"7. The factual matrix presented before this Court has not been disputed. It is also not being disputed that the case is no longer res integra and is covered by the decision of this very Court rendered in case of Devarsh Pravinbhai Patel v. Asstt. CIT [R/SCA No. 12965 of 2018, on 24-9-2018] where too, the petitioner was an employee of the Kingfisher Airlines and worked as a pilot. In his case also the TDS on the salary made to the petitioner had not been deposited. It is only when the department raised the tax demand with interest and initiated the actions of the recovery that this Court was approached. Relying on the decision of the Gauhati High Court rendered in case of Asstt. CIT v. Om Prakash Gattani [2001] 117 Taxman 549/[2000] 242 ITR 638 this Court allowed the same. Vital would be to reproduce the relevant findings and observations. "4. The issue is no longer res integra. The Division Bench of this Court in case of Sumit Devendra Rajani (supra) examined the statutory provisions and in particular Section 205 of the Income-tax Act, 1961. The Court concurred with the view of the Bombay High Court in case of Asst. CIT v. Om Prakash Gattani , reported in (2000) 242 ITR 638 and observed as under - "10. We are in complete agreement with the view taken by the Bombay High Court and Gauhati High Court. Applying the aforesaid two decisions of the Bombay High Court as well as Gauhati High Court, the facts of the case on hand and even considering Section 205 of the Act action of the respondent in not giving the credit of the tax deducted at source for which form no. 16 A have been produced by the assessee - deductee and consequently impugned demand notice issued under section 221(1) of the Act cannot be sustained. Concerned respondent therefore, is required to be directed to give credit of tax

deducted at source to the assessee deductee of the amount for which form no. 16 A have been produced.

11. In view of the above and for the reasons stated petition succeeds. It is held that the petitioner assessee deductee is entitled to credit of the tax deducted at source with respect to amount of TDS for which Form No. 16A issued by the employer deductor - M/s. Amar Remedies Limited has been produced and consequently department is directed to give credit of tax deducted at source to the petitioner assessee - deductee to the extent form no. 16 A issued by the deductor have been issued. Consequently, the impugned demand notice dated 6-1-2012 (Annexure D) is quashed and set aside. However, it is clarified and observed that if the department is of the opinion deductor has not deposited the said amount of tax deducted at source, it will always been open for the department to recover the same from the deductor. Rule is made absolutely to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs." 5. Facts in both case are very similar. Under the circumstances, by allowing these petitions we hold that the Department cannot deny the benefit of tax deducted at source by the employer of the petitioner during the relevant financial years. Credit of such tax would be given to the petitioner for the respective years. If there has been any recovery or adjustment out of the refunds of the later years, the same shall be returned to the petitioner with statutory interest." 8. In case of Om Prakash Gattani (supra) Gauhati High Court was dealing with the TDS not deposited of prize money payable to the petitioner. It held and observed thus:-

"13. From a perusal of the provisions quoted above relating to the deduction of tax at source in the matters relating to prize money of lotteries, it is evident that the person responsible to make the payment to the assessee is under the statutory obligation to deduct the amount at source. After deduction of the amount he is required to deposit the same to the credit of the Central Government and to issue a certificate of deduction. So far as credit for the amount deducted is concerned, it is to be given on the deposit being made to the credit of the Central Government on production of a certificate furnished under section 203 of the Income-tax Act. On payment of the amount to the credit of the Central Government, it would be treated as payment of tax. 14. So far the assessee is concerned, he is not supposed to do anything in the whole transaction except that he is to accept the payment of the reduced amount from which is deducted income-tax at source. The responsibility to deposit the amount deducted at source as tax is that of the person who is responsible to deduct the tax at source. On the amount being deducted the assessee only gets a certificate to that effect by the person responsible to deduct the tax. In a case where the amount has been deducted by the person responsible to deduct the amount under the statutory provisions, the assessee has no control over the matter. In case of default in making over the amount to the account of the Central Government, it is obviously the person responsible to deduct or the person who has made the deduction who is held responsible for the same. The responsibility of such person is to the extent that he has to be deemed to be an assessee in default in respect of the tax. He may be deemed to be an asses see in default not only in cases where after deduction he does not make over the amount to the Central Government but also in cases where there is failure on his part to deduct the amount at source. This responsibility has been fastened upon him under section 201 of the Income-tax Act. It is, of course, without prejudice to any other consequences which he or it may incur. Presently we are not concerned with the case where the person responsible to make the deductions has not deducted the amount at all. It may or may not fall in a different category from one where the amount has been deducted and not made over to the Central Government. We are concerned with the latter

category of cases. As indicated earlier, on the facts it is nobody's case that the amount was actually not deducted at source by Chandra Agencies. What seems to be in dispute is the deposit of the said amount in the account of the Central Government. The Income-tax Department seems to have made enquiries about the exact date of payment to the Central Government which Chandra Agencies could not furnish on the ground that the papers were forwarded to the chairman of Vaibhavshali Bumper. In such a category of cases we feel that the amount of tax can be recovered by the Income-tax Department treating the person responsible to deduct tax at source as an assessee in default in respect of the tax. It would not be possible to proceed to recover the amount of tax from the assessee. The assessee cannot be doubly saddled with the tax liability. Deduction of tax at source is only one of the modes of recovery of tax.. Once this mode is adopted and by virtue of the statutory provisions the person responsible to deduct the tax at source deducts the amount, only that mode should be pursued for the purpose of recovery of tax liability and the assessee should not be subjected to other modes of recovery of tax by recovering the amount once again to satisfy the tax liability. It is, therefore, provided under section 201 of the Income-tax Act that the person responsible to deduct the tax at source would be deemed to be an assessee in default in case he deducts the amount and fails to deposit it in the Government treasury. As observed earlier, the assessee has no control over such person who is responsible to deduct the income-tax at source, but fails to deposit the same in the Government treasury. In this light of the matter, in our view, the notices issued under section 226(3) of the Income-tax Act to the bankers of the petitioner-respondent to satisfy the tax liability from the bank account of the petitioner-respondent are illegal. It is not that the Income-tax Department was helpless in the matter. The person responsible to deduct the tax at source would move into the shoes of the assessee and he would be deemed to be an assessee in default. Whatever process or coercive measures are permissible under the law would only be taken against such person and not the assessee. 15. However, the position as indicated above would not mean that mere deduction of the tax amount at source would amount to total discharge of the tax liability so long as the amount deducted is not deposited in the coffers of the Central Government. It is for this reason Section 199 of the Income-tax Act makes it clear that credit for tax deducted would be given when the amount is deducted and paid to the Central Government and a certificate of deduction is produced as furnished under section 203 of the Income-tax Act. It is obvious that unless the amount is paid to the Central Government, the tax liability is not discharged, nor can it be said that the assessee has made the payment of the tax amount payable to the Government. We find no force in the submission made on behalf of the petitioner-respondent that on mere deduction of the amount at source, credit for tax deducted must be given and it cannot be withheld even though the person responsible to deduct the tax at source has not made it over to the Central Government. In our view, if that contention is accepted that credit for tax deducted has to be given on mere deduction of the amount at source, in that event, perhaps, there would be no legal justification to treat the person responsible to deduct the amount at source as an assessee in default in respect of the tax. Once credit on account of payment of tax is given, the tax liability will stand discharged. Any step to recover the amount of tax can be taken only in case the tax liability is not discharged and it still subsists. In this view of the matter, Shri K. P. Sarma, learned counsel appearing for the Revenue, has rightly defended the note appended by the Assessing Officer in the order of assessment making it clear that credit for the amount deducted was not being given and that will be given only when evidence as to actual payment of the amount to the Central Government is furnished. But this position would not legally justify initiation of recovery proceedings against the assessee from whose income tax has been deducted at

source, but the person responsible to deduct the tax fails to deposit the same in the Government treasury. The statutory scheme evolved to employ this mode of recovery of tax at source also points to the same position and in our view rightly. Otherwise a taxpayer from whose income tax is liable to be deducted at source would be exposed to a great vulnerable position. If some unscrupulous persons responsible to deduct the tax at source, after deducting the amount do not deposit the amount in the Government treasury, such persons should be saddled with the tax liability. Therefore, under section 201 of the Income-tax Act it has been aptly provided that the person responsible to deduct the tax would be deemed to be an assessee in default so that he can be proceeded against for recovery of the amount instead of the assessee who has already parted with the amount, but due to some commission or omission on the part of the person responsible to deduct the amount at source over whose activity he has no control, he may not be subjected to double payment of tax and brunt of arduous recovery proceeding. The provisions as contained in Section 201 of the Act provide a kind of protection to the assessee where tax liability as standing against him is not yet discharged and credit for the amount deducted cannot be given in terms of Section 199 of the Income-tax Act. 16. A perusal of Section 205 of the Income-tax Act clarifies the position where it provides that where tax is deductible at source, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income. What is noticeable in this provision is that its applicability is not dependent upon the credit for tax deducted being given under section 199 of the Income-tax Act. What is necessary for applicability of this provision is that the amount has been deducted from the income. In case where the amount has been deducted but not paid to the Central Government that eventuality is taken care of by Section 201 of the Income-tax Act. Learned counsel for the appellant could not show that under the law it may be permissible to proceed against the assessee even after deduction of the tax at source, nor learned counsel for the petitioner-respondent could persuade us to hold that merely by deduction of tax at source, credit for deduction of tax at source has to be given even though the amount may not have been made over to the Government treasury. The reason for this has already been explained by us in the discussion held in the earlier part of this judgment as the mere deduction of tax at source would not close the chapter of tax liability unless it is deposited in the Government treasury."

9. The facts being almost identical, no separate reasoning are desirable and the petition is being ALLOWED. The department is precluded from denying the benefit of the tax deducted at source by the employer during the relevant financial years to the petitioner.

10. It is given to understand by learned Senior Standing Counsel Mr. Varun Patel that the proceedings have been initiated against the employer.

11. The credit of the tax shall be given to the petitioner and if in the interregnum any recovery or adjustment is made by the respondent, the petitioner shall be entitled to the refund of the same, with the statutory interest, within eight (8) weeks from the date of receipt of copy of this order. 12. Petition is accordingly disposed of."

9. Therefore, respectfully following the judgment of Hon`ble High Court of Gujarat in the case of Kartik Vijaysinh Sonavane (supra), we direct the Assessing

Officer to verify the claim of the assessee and allow credit of TDS in accordance with law.

10. In the result, the appeal of the assessee is allowed.

Order is pronounced on 27/06/2022 by placing the result on the Notice Board.

Sd/-	**Sd/-**
(PAWAN SINGH)	**(Dr. A.L. SAINI)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Surat/दिनांक/ Date: 27/06/2022
Dkp Outsourcing Sr.P.S.

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. Pr.CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

// True Copy //

Assistant Registrar/Sr. PS/PS
ITAT, Surat