आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
'' A'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./**ITA Nos. 1838 & 176/AHD/2019**

निर्धारण वर्ष/Asstt. Years: (2012-2013 & 2013-2014)

Smt. Paulomi Iyer, 4th Floor, Gala Mart, Sun City Road, South Bopal, Ahmedabad. **PAN: AAQPI3927C**	Vs.	D.C.I.T, Circle-4(2), Ahmedabad.
(Applicant)		**(Respondent)**

Assessee by	:	Shri S.N. Soparkar, Sr. Advocate with Shri Parin Shah, A.R
Revenue by	:	Shri Ravindra, Sr.D.R

सुनवाई की तारीख/**Date of Hearing : 01/02/2023**
घोषणा की तारीख /**Date of Pronouncement: 29/03/2023**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned two appeals have been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-4, Ahmedabad arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Years 2012-2013 & 2013-14.

First, we take up **ITA No. 1838/AHD/2019** for AY 2012-13 an appeal by the assessee.

2. The assessee has raised following grounds of appeal:

1. Ld. CIT (A) erred in law and on facts dismissing appeal filed by the appellant challenging order of AO enforcing demand of Rs. 45, 34, 620/- not following procedure laid down in sec. 205 in proceedings set aside by Hon'ble ITAT

2. Ld. CIT (A) erred in law and on facts confirming action of AO calling upon the appellant to again pay taxes already deducted by the payer failing to follow directions of Hon'ble ITAT to conduct proper & just inquiry in true spirit with respect to deduction of tax from payment of bills by the payer as confirmed in the communication addressed to the appellant.

3. Ld. CIT (A) erred in law and on facts confirming action of AO not granting credit of TDS of Rs. 33, 09, OOO/- on the ground of non assertion as to whether the deductor actually deducted tax from payments made to the appellant or if deducted whether it was deposited into Government Account.

4. Ld. CIT (A) erred in law and on facts to hold that AO had taken possible steps to verify the issue as per the directions of Hon'ble ITAT overlooking the fact that AO relying on inadequate and no inquiry by officers at Kolkata denied credit of tax deducted but not deposited by the payer.

5. Ld. CIT (A) gravely erred in law and on facts to hold that neither the appellant nor AO produced additional corroborative evidence before the appellate authority not considering submissions clearly depicting the IP addresses, Mail box details along with date and time of communication that could have been referred to Information Technology Cell of IT department for independent verification that payer deducted tax at source.

6. Both the authorities erred in law and on facts not to appreciate that the failure of payer to deposit tax deducted from payment made to the appellant in Government Treasury should not be reason to penalised the appellant by denying credit of taxes.

3. The only effective issue raised by the assessee is that the learned CIT(A) erred in confirming the demand order of the AO without considering the provision of section 205 of the Act.

4. At the outset, we note that this is second round of litigation before us. The background of case is that the assessee is an individual and engaged in the profession of service provider. During the year under consideration, the assessee provided services of SAP implementation to one of her client namely M/s Jain Infraproject Ltd a Kolkata based public company. The assessee raised 3 invoices

of Rs. 1,10,30,000/- each against the services provided. As per the assessee the impugned client deducted tax at source for Rs. 33,09,000/- under the provision of section 194J of the Act. Accordingly, she claimed credit of such tax deduction in the return of income filed for the year under consideration.

5. The AO during the assessment proceedings found that no such tax was deposited by the impugned client. Therefore, the AO denied the benefit of tax credit of Rs. 33,09,000/- and accordingly, the demand against the assessee was raised. On appeal by the assessee, the learned CIT(A) also confirmed the same by holding that there is no proof that the party has deducted tax at sources and deposited the same in Government Treasury.

6. Against the order of the learned CIT(A), the assessee preferred second appeal before this Tribunal in ITA No. 1926/AHD/2016. The Tribunal vide order dated 20-02-2018 set aside the issue to the file of the AO with the following direction:

> *6. The contention of the learned Counsel for the assessee to the extent of application of Section 205 is concerned, they deserve to be accepted and it is to be held that demand against the assessee cannot be effected if her receipts have already suffered tax at source; however, there is a difference in the version put forth by the assessee vis-à-vis construed by the Revenue. The ld. CIT(A) has recorded a finding that facts indicate that no taxes were deducted. On the other hand, assessee pleaded that TDS was made by the payer. We find that none of the authority has carried out any investigation in this connection. The alleged correspondence submitted before us was never cross verified. We fail to understand the basis of recording the finding by the ld. CIT(A) in paragraph no.5.1 extracted supra. How the ld. First Appellate Authority reached at conclusion that tax was not deducted at source? This conclusion has been based on the inference that since the assessee failed to pursue legal remedies against the deductor for persuading him to deposit the deducted amount in the Government Treasury. This inference is totally misplaced. It is not supported by any evidence. Considering this aspect, we deem it appropriate to set aside this issue to the file of the Assessing Officer. The Assessing Officer shall first determine as to whether on the alleged payment received by the assessee, TDS was to be deducted or not. If deducted, then whether the payer has deducted the tax or not. If it is established that payer has deducted the tax, then the ld. Assessing Officer shall follow the procedures laid down in Section 205 of the Income-tax Act and should not enforce the demand against the assessee. In case the TDS was not deducted, then the ld. Assessing Officer will be at liberty to enforce the demand against the assessee. The Assessing Officer shall readjudicate this issue after providing due opportunity of hearing to the assessee.*

7. The AO in the set aside proceedings found that the assessee furnished same document which were already available on record in the first round of litigation. The AO further wrote a letter to Pr.DIT (Inv) Kolkata to make inquiry from M/s Jain Infra-Project Ltd to find out whether the impugned party deducted tax at source on the bill raised by the assessee or not. If deducted, then whether the same was deposited to the Government account or not. The DDIT(Inv.), Unit-6 Kolkata in report dated 22-11-2018 submitted that in this regard notice under section 131(1) was issued and served to the said party but no response was received. Likewise, on request of DDIT(Inv.), Unit-6 Kolkata, a notice for inquiry in this regard was also issued by DCIT, Circle-2 TDS Kolkata but the same was also not responded by the party M/s Jain Infraproject Ltd. Therefore, the AO in absence of cross examination from the alleged tax deductor again denied the credit of TDS to the assessee.

8. On appeal by the assesse, the learned CIT(A) confirmed the order of the AO by observing as under:

> *I have examined the action taken by the AO and the AO has taken possible steps to verify the issue as per directions of Hon'ble ITAT. The fact remains that there is no additional corroborative evidence which could be | produced either by appellant or AO before the first appellate authority. The AO has spent a reasonable time and made an honest attempt to comply with the directions of ITAT. There has not been any difference in the evidences which were before the Hon'ble ITAT in original proceedings and the AO in second proceedings- There is no additional evidence on which a leverage can be given to the appellant. As neither the incident of deduction of TDS is getting confirmed from the record in this office nor indirectly getting supported by the payment to the government treasury(though not necessary in this case as has been pointed out by Hon'ble ITAT). the undersigned has no mandate to take a decision different from than that of AO in this case. In my opinion, (he incident of payment of taxes in Government Treasury is independent and can lend immense support to a view that the incident of deduction of TDS has really happened In my opinion, any direction to accord credit for TDS which has not been deposited in Government account is nothing less than of a fraud on Government Exchequer. The ground no. 1 & 2 of appeal are dismissed.*

9. Being aggrieved by the order of learned CIT(A), the assessee is in appeal before us.

10. The learned AR before us filed a paper book running from pages A-1 to 59 and submitted that the fact that the party has deducted the TDS on the payment made to the assesse can be verified from the trails of the emails which are placed on pages 20 to 21 of the paper book. Likewise, the letter was issued by the party placed on page 35 of the paper book stating that it is going to deposit the amount of TDS which will reflect against the name of the assesse immediately. All these facts were duly brought to the notice of the assessing officer which were not disputed by the authorities below. Thus, it was prayed by the learned AR that the benefit of the provisions of section 205 should be granted to the assesse. The learned AR in support of his contention has also relied on the judgement of Hon'ble **HIGH COURT OF GUJARAT** in the case of **Sumit Devendra Rajani *v.* Assistant Commissioner of Income-tax** reported in 369 ITR 673.

11. On the other hand, the learned DR vehemently supported the order of the authorities below.

12. We have heard the rival contentions of both the parties and perused the materials available on record. It is the second round of litigation before us. The ITAT in first round of litigation observed that as per the provision of section 205 of the Act, if the payer deducts tax at source on the amount of income paid to the assessee, then no tax demand can be raised against the assessee to the extent of tax deducted on such income. However, the correspondence with regard to deduction of tax at source between assessee and impugned party M/s Jain Infraproject Ltd on the basis of which assessee is claiming the credit of TDS has nowhere been cross verified by the Revenue authorities. On the other hand, the revenue without having any cogent evidence held that tax was not deducted at source. Therefore, the Hon'ble bench was pleased to set aside the issue to the file of the AO with direction to verify whether on the alleged payment received by the assessee was subjected to the deduction of tax, if yes then verify whether the payer has deducted the tax or not. If it is established that payer has deducted the

tax, then the ld. Assessing Officer shall follow the procedures laid down in Section 205 of the Income-tax Act.

12.1 However, we find that the AO in the set aside proceedings wrote a letter to ld. Pr. DIT (Inv) Kolkata to make inquiry from M/s Jain Infraproject Ltd with regard to deduction of tax on the transaction discussed above. In response to the same, the ld. DDIT(Inv.), Unit-6 Kolkata replied that the party i.e. M/s Jain Infraproject Ltd did not respond to the notices issued under section 131 of the Act. The AO merely on the reasoning that the party did not respond to the notice issued by the DDIT(Inv.), Unit-6 Kolkata and DCIT, Circle-2 TDS Kolkata rejected the evidences furnished by the assessee in the form of e-mail correspondence, letter issued by the party i.e. M/s Jain Infraproject Ltd. stating that the tax has been deducted, the ledger copy showing payment received after deduction of tax. The ITAT on earlier occasion while setting aside the file to the AO casted obligation on him (the AO) to cross verify the evidences furnished by the assessee and find out the fact that tax was deducted or not by the party M/s Jain Infraproject Ltd. In our considered opinion, the AO in the set aside proceedings failed to comply with the directions of the ITAT in its true sense. As such, the AO after receiving report from DDIT(Inv.) Unit-6 Kolkata that the party has not responded to the notices issued did not try to adopt any other means to verify and determine the fact whether tax at source was deducted or not against the invoices issued by the assessee. On the contrary, the assessee has discharged her onus by furnishing the necessary details to justify that the party i.e. M/s Jain Infraproject Ltd has deducted the TDS. Even on consideration of the circumstantial evidences, the difference between the amount of the invoices raised and the amount received by the assessee from the party is exactly matching with the amount of TDS. Thus, the circumstantial evidences suggest that the assessee has received the payment after the deduction of TDS by the party i.e. M/s Jain Infraproject Ltd. The necessary details of the invoices raised and the amount received along with the difference representing the amount of TDS is extracted as under:

Deatil of invoice issued		
Dated		Amount
11-11-11		1,10,30,000
11-12-11		1,10,30,000
11-01-12		1,10,30,000
04-01-13		1,66,85,400
Total (A)		**4,97,75,400**
Deatil of payment Received		
Date	Mode	Amount
24-09-11	RTGS	5,00,000
04-11-11	RTGS	94,27,000
25-01-12	RTGS	50,00,000
15-03-12	RTGS	98,54,000
18-01-13	Bank Guarantee	2,00,00,000
Total (B)		**4,47,81,000**
Difference between A &B		**49,94,400**
TDS amount @ 10%		**49,77,540**
Amount still pending W/o		**16,860**

12.2 Once, the assessee has discharged the onus imposed on her, the onus shifted upon the revenue to disprove the contention of the assessee based on the documentary evidence. However, we find that the Revenue despite of having enough powers under the statute failed to disprove the contention of the assessee as wrong based on the cogent information. The Revenue cannot absolve from its duty merely on the reasoning that the other party i.e. M/s Jain Infraproject Ltd. is not responding to the notices issued upon it. In view of the above, we hold that the assessee is entitled for the benefit of the provisions specified under section 205 of the Act. Hence, the ground of appeal of the assessee is allowed.

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

Coming to ITA No. 176/AHD/2019 by the assessee for A.Y. 2013-14

13. At the outset we note that the issues raised by the assessee in its grounds of appeal for the AY 2013-14 is identical to the issues raised by the assessee in ITA No. 1838/AHD/2019 for the assessment year 2012-13. Therefore, the findings given in ITA No. 1838/AHD/2019 shall also be applicable for the assessment years 2013-14. The appeal of the assessee for the A.Y. 2012-13 has been decided by us vide paragraph No.12 of this order in favour of the assessee. The learned AR and the DR also agreed that whatever will be the findings for the assessment year 2012-13 shall also be applied for the assessment years 2013-14. Hence, the ground of appeals filed by the assessee is hereby allowed.

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

14. In the combined result, both the appeals filed by the assessee are allowed.

Order pronounced in the Court on 29/03/2023 at Ahmedabad.

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 29/03/2023
Manish