

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI**(DELHI BENCH 'F' : NEW DELHI)****BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**ITA No.185/Del/2021
(Assessment Year : 2013-14)

Sh. Rajeshwera Rao Peri Flat No. 303, Vayuputra Heights Chandrapalem, Durganagar Madhurawada, Vishakhapatnam- 530041 PAN : ACUPP7109B	Vs.	CIT (TDS)-2, New Delhi & Anr,
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Ujjwal Jindal, CA Sh. Udai Jindal, CA
Revenue by	Sh. T. Kipgen, CIT-DR

Date of hearing:	05.04.2023
Date of Pronouncement:	12.04.2023

ORDER**PER ANUBHAV SHARMA, JM:**

The appeal has been preferred, against the order dated 07.01.2021 of CIT(A)-TDS(2) (in short for convenience referred here in after as 'Revisonal Authority'), New Delhi arising out of an order u/s 263 of Income Tax Act, 1961 (hereinafter referred as 'the Act'), against the order dated 23.03.2020 passed u/s 201(1), 201(1A) of the Act by the DCIT, 76(1), New Delhi, (in short for convenience referred here in after as 'Ld. AO')

2. The facts in brief are that the appellant was working as Ex-Chief Manager, Oriental Bank of Commerce and the appellant was removed from the services of the Bank vide Disciplinary Proceedings order dated 27.06.2003. He had challenged the same by way of a writ petition no. 9308/2004 before Hon'ble Delhi High Court and vide judgment dated 21.08.2013, the Hon'ble High Court was pleased to set aside the removal from service order and modified the punishment. Hon'ble High Court has also entitled to pension, gratuity and leave encashment.

2.1 The Bank preferred appeal against order dated 21.08.2013. Thereafter, the matter was referred for mediation and a settlement agreement was arrived. During the appeal, the bank had deposited Rs. 46,70,066/- before the Hon'ble High Court in the form of Arrears of wages, Leave encashment, Gratuity dues, Monthly pension, Commuted value of pension of which on the basis of this settlement agreement Rs. 22,01,608/- was released in favour of the bank and 24,68,458/- was released in favour of the employee/ appellant.

2.2 On the amount Rs. 22,01,608/- being forgone by the appellant, as per the terms of settlement, the entries of deduction made by the bank towards TDS of Rs. 11,06,499/- was also reversed.

2.3 Thereafter, the appellant filed a Civil Miscellaneous Application no. 27897/ 2015 in ILPA No. 731/2015 before Hon'ble High Court seeking release of TDS amount Rs. 11,06,499/- upon the foregone amount on which Hon'ble High Court was pleased to pass following order :-

“This court is of the opinion that the only relief that the applicant can claim in this proceeding seeking clarification

of the order dated 16.09.2014 is with the respect to the treatment of amounts deposited as Tax Deducted at Source (TDS). The Income Tax authorities shall consider and appropriately grant the relief which the applicant may be eligible and entitled to claim, having regard to the provisions of Section 89 of the Income Tax act, 1961 for spread -over of the income tax liability (calculated on lump sum basis while deducting TDS) The Income Tax authorities shall grant the relief to the extend permissible in accordance with law. "

2.4. Accordingly, the appellant filed the grievance before Ld. AO Deputy Commissioner of Income Tax-76(1), New Delhi. The bank/assessee was issued notice and it submitted that the amount of Rs. 11,06,900/- was part of arrears of wages which was foregone by the complainant as per settlement agreement dated 05.08.2014. As the amount of wages was not payable to the appellant question of deduction and payment of TDS does not arise.

3. The ld. AO taking into consideration Section 192 of the Act observed that TDS is required to be deducted at the time of actual payment of salary only and as the amount of wages was not payable under the settlement agreement. There is no liability of deducting TDS. Thus, in the proceedings u/s 201(1) of the Act, no default was found.

4. The appellant approached the Ld. CIT(A) by way of petition u/s 263 of the Act and based upon the facts and order of ld. AO, no merit was found and the same was dismissed as non-maintainable.

5. The assessee has raised following grounds :-

"1. Because the Ld CIT(TDS) has in its order dated 07.01.2021 mentioned that the disputed amount of Rs 11,06,499 which was retained by bank as TDS was part of arrears of wages of the Appellant. Further stated that the Respondent Bank had deposited the amount of Rs 22,01,608/- with the Hon'ble High Court Registry on account of

'Arrears of Wages'. Consequently, as per law the Respondent Bank was to deposit the statutory dues by way of TDS for it arose on account of "Arrears of Salary/Wages" of the Appellant.

Hence, the order of Ld CIT in this case is not valid and tenable as per law, and as such, the CIT(TDS) order may please be quashed.

2. *Because the Ld DCIT in its order dated 23.03.2020, has erred in law while stating that the amount of TDS of Rs 11,06,499/- was kept in sundry account by bank and not paid to the complainant/appellant least considering the fact, that as per Ld DCIT own order, reference has been given of Hon'ble Delhi High Court order dated 01.02.2016 which stated that- "Income Tax Authorities shall consider and appropriately grant the relief which applicant may be eligible u/s 89 of Income Tax Act, reference Delhi High Court order dated 16.09.14 w.r.t treatment of amount deposited as TDS".*

Hence, the proper course of action is not followed by the Ld DCIT while completing the proceedings u/s 201(1)/201(1A). As such, the order may please be quashed.

3. *Because both the Ld DCIT and Ld CIT(TDS), failed to observe the fact that the Respondent Bank violated the Hon'ble Delhi High Court order dt 01.02.2016, by reversing the TDS entry on its own accord and whims, without any law to this effect.*

4. *Because Section 192(1) of the Income Tax Act is to be read with Section 15 of the Act which defines 'salary'. That Section 15 envisages- 'any salary due from an employer/former employer to an assessee in the previous year whether paid or not'. Thus, salary income is chargeable to tax either on due or receipt basis. That once salary has accrued its subsequent waiver is only an application of income, liable to be taxed and does not change/modify its nature/essence since income had already accrued in the form of salary, wages etc.*

5. *Because neither the Ld DCIT nor Ld CIT(TDS), in their respective orders, have ever discussed the position of Section 15 of the Income Tax Act, 1961. Hence, the proper course of action is not followed by the Ld. DCIT/CIT. As such, the orders may please be quashed.*

6. *Because the Settlement Agreement dated 05.08.14 was entered into b/w the Appellant and Respondent Bank, and stated that the amount of Rs 22,01,608/- along with accrued interest was to be released in favour of First Party (i.e. OBC Bank) and that LPA No 731/2013 shall stand withdrawn.*

7. *Because both the Ld DCIT and Ld CIT(TDS), failed to acknowledge the fact that the Respondent Bank, reversed the TDS entry of Rs 11,06,499/- pursuant to settlement agreement dated 05.08.14 instead of depositing the same in govt. account, without application of mind and in absence of any legal provisions, law and sections to this effect.*

8. *Because the order dated 28.08.2017 passed by Lc ACIT, New Delhi clearly directed the Respondent Bank to deposit the TDS amounting to Rs 11,06,499/- owing to deduction on arrears of wages and salary of the Appellant to be deposited into govt. account. Further order dated 03.11.2017 by the same Ld ACIT, reiterated and stated that - a waiver of accrued income in a settlement is considered as application of income.*

9. *Because the judgment delivered by Hon'ble Delhi High Court dated 21.08.2013 explicitly mentioned in the last para that: 'The petitioner is entitled to pension, wages regarding earned leave and gratuity as a consequence of this order, thereby meaning the said wages "accrued" to the Appellant herein'.*

10. *Because it is the settled law and there are a catena of judgments to this effect that, any income which is foregone/given up, after it has accrued or arisen to the assessee must be taxed (present case). However if salary, wages are foregone before it accrues, it can't be taxed because of the act of surrender of accrual of income.*

11. *That the appellant craves leave to add, alter, delete and modify any of the ground of appeal at the time of hearing."*

6. Heard and perused the record.

6.1 On behalf of the appellant it was submitted that if a part of salary was foregone on the basis of settlement agreement, after it had become accrued, the TDS was payable. It was submitted that when the waiver of accrued income is not based on commercial justification such income is assessable to tax and the written submissions dated 20.02.2023 with reference has been made to judgments in ***CIT vs. Mahar Singh 90 ITR 219; CIT vs. Shiv Prakash 222 ITR 583 SC and CIT vs. Hindustan Motors 202 ITR 839.***

7. Ld. DR however submitted that the assessee is in fact coming in appeal for the benefit of Revenue. However, as to applicability of the provisions of TDS he admitted that there is no liability to deduct TDS on accrual basis and TDS has to be deducted only at the time of payment.

8. The Bench has given due consideration to the matter on record and submissions. The first and foremost thing that comes up to determine is, if the appellant is entitled to file the appeal against order dated 07.01.2021.

9. In this context, referring to Section 253(1) of the Act it becomes clear that any assessee aggrieved by any of the orders mentioned in para 1(a) to 1(f) of the Act may file appeal before the Tribunal against such order.

9.1 Next, Section 2(7) of the Act describes the 'assessee' as follows :-

7) " assessee" means a person by whom³ any tax] or any other sum of money is payable under this Act, and includes-
(a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person;
(b) every person who is deemed to be an assessee under any provision of this Act;
(c) every person who is deemed to be an assessee in default under any provision of this Act;

10. In the case in hand the facts show that the appellant had approached the lower Tax Authorities in pursuance of order dated 01.02.2016 of Hon'ble High Court. The Ld. DCIT-76(1), New Delhi had considered the receipt of complaint from the appellant to proceed u/s 201(1) of the Act and in para 7 mentions that notice was issued to 'deductor assessee' and thereafter on the basis of reply of the bank which was considered to be assessee in those proceedings. Ld. DCIT, Circular 76(1), New Delhi concluded that there was no default regarding TDS and accordingly concluded the proceedings u/s 201(1).

11. Now, this order is appealable u/s 246(1)(i) r.w.s. 146A(1)(ha) before the Commissioner of Appeals. However, such appeal can be filed by 'assessee' or 'any deductor' or 'any collector'. The appellant happens to be none of them.

11.1 It appears that therefore, appellant approached Ld. CIT(TDS)-2 u/s 263 of the Act which was disposed of as non-maintainable. An appeal against order u/s 263 is maintainable before the Tribunal by virtue of Section 253(1)(c) of the Act. As observed this appeal is maintainable by an 'assessee', however, the aforesaid discussion establish that appellant is neither 'assessee' nor 'assessee in default'. Therefore, the appeal preferred by him, against the order dated 07.01.2021, mentioned in form 36 as "review order u./s 263 of the Income Tax Act, 1961" is not maintainable.

12. Even otherwise on merits it can be observed that section 192 of the Act provides deduction of tax 'at the time of payment'. However, in the case in hand admittedly there was no payment of the salary etc, which was foregone as per terms of settlement in the mediation proceedings.

13. The Bench is of considered view that the foregone salary may after its accrual be chargeable to tax in the hands of appellant, but the appellant cannot claim that his employer should have deducted tax on the basis of accrual. The grounds raised have no substance. **Consequently, the appeal is dismissed.**

Order pronounced in the open court on 12th April, 2023.

Sd/-

(SHAMIM YAHYA)

ACCOUNTANT MEMBER

Date:-12.04.2023

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(ANUBHAV SHARMA)

JUDICIAL MEMBER

AR, ITAT
New Delhi