

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'D' BENCH
MUMBAI**

**BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
MS. PADMAVATHY S, ACCOUNTANT MEMBER**

**ITA No.233/Mum/2023 & 234/Mum/2023
(Assessment Year : 2020-21)**

| | | |
|---|-----|--|
| DCIT, Circle-14(1)(2) Room No.455, 4 th Floor Aayakar Bhavan M.K.Road Mumbai – 400 020 | Vs. | M/s. Reliance Infrastructure Limited Ground Floor, Reliance Centre, 19, Walchand Hirachand Marg, Ballard Estate Mumbai – 400 001 |
| PAN/GIR No.AACCR7446Q | | |
| (Appellant) | .. | (Respondent) |

| | |
|------------------------------|-----------------------|
| Assessee by | Shri Jitendra Sanghvi |
| Revenue by | Smt. Riddhi Mishra |
| Date of Hearing | 04/05/2023 |
| Date of Pronouncement | 16/05/2023 |
| | |

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeals have been filed by the Revenue against separate impugned order of even date, 28/10/2022 for the A.Y. 2020-21 in relation to proceeding u/s. 143(1) for not granting claim of TDS. In both the appeals the common ground raised reads as under:-

"On the facts and in the circumstances of the case and in law, did the Ld. CIT (A) err in allowing the appeal of the assessee to grant the claim of TDS to a person other than the deductee as per section 199(3) of the Act wherein the section 199(3) is to be read with rule 37BA of the Act in such cases and the conditions mentioned in rule 37BA for such cases i.e. proviso of rule 37BA (2)(1), rule 37BA(2)(ii) and 37BA(2)(iii) were not full filled"

2. The brief facts are that the assessee has claimed TDS credit of Rs.68 Crores in the revised return of income filed on 27.05.2021. The return was processed u/s 143(1) vide Intimation dated 08.06.2022 wherein credit for TDS of Rs. 40.43 crore was not granted.

3. The TDS credit of Rs. 40,42,92,666 which has not been granted by the CPC is in respect of the tax deducted by Tata Power Company Ltd. (TPC) on payment made to Adani Electricity Mumbai Ltd. (AEML) having PAN - AADC0088F. The TDS credit for the same is appearing in Form 26AS of AEML. The TDS credit has been claimed by the assessee in its original as well as revised return of income. The claim of TDS credit in respect of AEML was revised to Rs. 40,42,92,666 in the revised return of income filed on 27.05.2021 from Rs. 40,13,40,000 claimed in the original return of income filed on 06.02.2021. AEML in its return of income filed for AY 2020-21 had not claimed credit for TDS of Rs. 40.43 crore appearing in their Form 26AS. Instead AEML has transferred the credit of TDS to the PAN of Reliance Infrastructure Ltd. ("Rinfra") i.e. AACCR7446Q in the return of income since the corresponding income does not belong to AEML

and has not been accounted and offered to tax in its return of income and which has been offered to tax by Rinfra. Thus, AEML by transferring the credit to the PAN of Rinfra has admitted that the income as well as the corresponding TDS credit belongs to Rinfra.

4. The CPC while processing the original as well as revised return of income has not granted credit for TDS of Rs.40.43 crore claimed in its return, since the TDS credit did not appear in Form 26AS of the assessee.

5. The Id. CIT (A) had granted TDS after observing and holding as under:-

“The issue for adjudication is that the Appellant transferred business of generation, transmission and distribution of electricity to another company Adani Electricity Mumbai Ltd. (AEML) vide share purchase agreement dated 21.12.2017 which came effective from 1st April 2018. Maharashtra Electricity Regulatory Commission (MERC) vide its order dated 28 June 2018 transferred the distribution license from the Appellant to AEML.

As per the fact, Maharashtra Electricity Regulatory Commission (MERC), the governing body in para 148(n) of its order dated 28th June 2018 had noted and approved transfer of License on the condition that all past dues shall vest with the Appellant.

Meanwhile, The Supreme Court in Civil Appeal No 3229 of 2007 considered the case between Tata Power Company Ltd. (TPC) and Reliance Energy Ltd. (now known as Reliance Infrastructure Ltd - Appellant) with regard to the payment of standby charges

made by Appellant to TPC. In terms of the Supreme Court order and MERC Order, TPC made payments to AEML and deducted tax thereon. The amounts on which TDS was deducted belonged to the Appellant as per the agreement. TPC in its quarterly TDS return recorded the above payment and TDS in the name of AEML as a result the TDS credit appeared in the 26AS statement of AEML.

Assessing Officer denied credit for tax deducted at source of Rs 40,42,92,666 deducted by TPC to the Appellant as it was appearing in Form 26AS of AEML.

Here, the subsequent treatment of this TDS amount is important to arrive at the decision.

AEML in their return of income for AY 2020-21 has transferred the TDS credit to the Appellant in accordance with the procedure prescribed in the form of return of Income. Thus AEML has not claimed credit for Rs.40,42,92,666 appearing in their Form 26AS and has transferred the same to the PAN of the Appellant in their return of income. The copy of acknowledgment of ITR of AEML along with transfer of TDS to the PAN of appellant has been furnished by appellant in the reply and is reiterated here.”

6. The ld. CIT DR submitted that, when there is a proper procedure laid down and there is a requirement under Rule 37BA, then same should be complied with, so that the TDS credit is available to the assessee. She further submitted that now process of requirements of Rule 37BA cannot be bypassed. She requested the bench that Tata Power Company should be directed to revise their TDS return substituting the Name and PAN of the assessee in place of AEML so that the credit of TDS is

reflected under the PAN of the assessee and thereby, TDS credit would be automatically granted to the assessee.

7. She further stated that now the process of granting TDS credit is system driven and only when the credit as reflected under the PAN of the assessee in Form 26AS on the Income Tax Portal, credit for TDS and consequential refund can be granted. There is no manual intervention in the procedure of granting TDS credit. Therefore, it was very essential for TPC to revise their TDS return substituting the name of AEML with that of the assessee so that the TDS credit is clearly reflected in Form 26AS of the Appellant for issue of refund.

8. We have heard both the parties and also perused relevant materials on record. The only issue for adjudication is, whether TDS deducted by M/s. Tata Power Company on payment made to M/s. Adani Electricity Mumbai Ltd. (AEML in short) can be given to the assessee. The issue of claiming of credit by the assessee had arisen from the fact that assessee has transferred the business of generation, transmission and distribution of electricity to AEML vide share purchase agreement dated 21/12/2017 which came effective from 1st April 2018 and MERC vide order dated 28/06/2018 transferred the distribution license from assessee to AEML. Meanwhile, the Hon'ble Supreme Court in Civil Appeal No.3229 of 2017 considered the cost between Tata Power Company Ltd and assessee with regard to payment of stand by charges made by the assessee to TPC. In terms of the

judgement of the Hon'ble Supreme Court and MERC order, Tata Power Company made payments to AEML and deducted tax thereon. However, as per the agreement, the amount for which TDS was deducted belong to the assessee as per the agreement, but Tata Power Company in its quarterly TDS return recorded the above payment in TDS in the name of AEML instead of the assessee and the TDS credit appeared in 26AS statement of AEML and it is for this reason the credit for tax deducted at source has been denied to the assessee. Another important fact is that, AEML in the return of income for A.Y.2020-21 have transferred the TDS credit to the assessee in accordance with the procedure prescribed in the form of return of income and also categorically declared that it has taken no claim or credit of the said TDS amount appearing in the form 26AS and has been transferred the same to the PAN of the assessee in the return of income. All these facts are borne out from the copy of acknowledgement of income tax return of AEML alongwith transfer of TDS to the PAN of the assessee which is evident from the record in the return of income showing transferring the credit to the PAN of the assessee as noted by the ld. CIT (A) above.

9. Not only that, AEML have even applied for ruling before Authority for Advance Ruling (AAR) clarifying in whose hands pending Regulatory Assets under Approval which also includes amount received from TPC will be taxable. The AAR categorically held that income so received by AEML is taxable in the hands of the assessee on principle of diversion by overriding title. The CIT

of AEML had also filed the report with the AAR that the income does not belong to AEML but it is taxable in the hands of the assessee. Thus, there is no dispute that this income belongs to the assessee and is taxable in the hands of the assessee. Accordingly, the corresponding TDS on the said income is to be allowed in the hands of the assessee.

10. The provision of Section 199(1) reads as under:-

“199(1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.”

11. Thus, deduction is allowed for the amount paid to the Treasury of Central Government which shall be treated as payment of tax on behalf of the person from whose income the deduction was made, where the TDS was deducted on income which has been shown and offered to tax by an assessee, which here in this case is Reliance Infrastructure Ltd. The enabling provision of Section 199(1) allows deduction on the payment of tax who has offered the income. Rule 37BA which has been framed by the CBDT in terms of section 199(3) provides credit for tax deducted at source for the purpose of Section 199, which reads as under:-

“37BA (1) Credit for tax deducted at source and paid to the Central Government in accordance with the provisions of Chapter XVII, shall be given to the person to whom payment has been made or credit has been given (hereinafter referred to as deductee) on the basis of information relating to deduction of tax furnished by the deductor to the income-tax authority or the person authorised by such authority.

(2) (i) Where under any provisions of the Act, the whole or any part of the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for the whole or any part of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee.

Provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person in the information relating to deduction of tax referred to in sub-rule (1).]

(ii) The declaration filed by the deductee under clause (i) shall contain the name, address, permanent account number of the person to whom credit is to be given, payment or credit in relation to which credit is to be given and reasons for giving credit to such person

(iii) The deductor shall issue the certificate for deduction of tax at source in the name of the person in whose name credit is shown in the information relating to deduction of tax referred to in sub-rule (1) and shall keep the declaration in his safe custody.

3) (i) Credit for tax deducted at source and paid to the Central Government, shall be given for the assessment year for which such income is assessable.

(ii) Where tax has been deducted at source and paid to the Central Government and the income is assessable over a

number of years, credit for tax deducted at source shall be allowed across those years in the same proportion in which the income is assessable to tax.

12. Thus, Sub-Rule (2) provides that, if whole or any part of the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, credit for the whole or any part of the tax deducted at source, as the case may be, shall be given to the other person and not to the deductee. Provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of the other person in the information relating to deduction of tax given to the person whom payment has been made or credit has been given. The case of the ld. CIT DR is that this procedure has not been followed by the assessee as provided in the Rule 37BA(2) and therefore, tax credit is not allowable and accordingly, the ld. AO is justified in denying the credit of TDS and on that ground, the appeal has been dismissed.

13. What needs to be seen is harmonious construction of Section 199(1) read with the conditions provided in rule 37BA and intention of the legislature was not to deny the credit, if the income on which tax has been deducted at source is assessable in the hands of a person other than the deductee, whereas the intention is to grant credit for the tax deducted at source on behalf of the person from whose income the deduction has been made.

14. Now here in this case, the deductee has produced evidences and also the certificate has been given by the ld. AO and ld. CIT of AEML that neither income belongs to AEML nor it has claimed any TDS and in fact in the return of income filed by AEML, the same has been transferred to the assessee. The relevant letter filed by the ld. AO of AEML reads as under:-

*“The DCIT-14(1)(2),
Mumbai.*

Sir,

*Sub: CPGRAM in the case of M/s Reliance Infrastructure Ltd,
PAN:AACCR7446CQ for AY 2020-21-reg.*

*Ref: Your letter no. DCIT-14(1)(2)/CPGRAM/2022-23 dtd
02.01.2023.*

Kindly refer to the above.

2. As per the return filed assessee M/s Adani Electricity has filed return for AY 2020-21 declaring loss of Rs.847,68,74,126/- The assessee has shown book profit of Rs.267,79,45,428/- The assessee has claimed prepaid taxes of Rs.51,31,34,194/- including TDS claim of Rs 16,36,20,217/-. On perusal of return it is seen that assessee has not claimed TDS reflecting in the 26AS of Rs.40,42,92,666/- deducted by Tata Power Co. Further in response a letter issued by this office regarding TDS claim the assessee has stated that the TDS of Rs.40,42,92,666/- belongs to M/s Reliance Infrastructure (PAN AACCR7446Q) and it has not claimed this TDS in AY 20-21 years and will not claim in future years. In the assessee's case order u/s 143(3) has been passed on 22.09.2022 wherein TDS credit of Rs.16,14,62,340/- has been granted (copy of the same is enclosed). As the undersigned has no objection for giving credit of TDS amounting

to Rs 40,42,92,666/- to Reliance Infrastructure Ltd. reflecting in the 26AS of Adani Electricity Ltd for the assessment year under consideration 2020-21.

Thanking You,

Yours faithfully,

*(Ishwar N. Nimje)
ITO-15(3)(1), Mumbai*

15. Here is the case the deductor, i.e., Tata Power Company have refused to issue certificate or rectify the form and when assessee had made specific request, then instead they stated that they are not in a position to issue TDS certificates in favour of the assessee based on AAR order which is applicable to AEML and RInfra who are party to it. Instead Tata Power Company have requested AEML to get directions from the Income Tax department asking TPC to issue TDS certificate in favour of RInfra. When the same was done, then again officials from Tata Power Company stated that they have already made the payment to AEML, deducted and deposited the tax thereon and filed the TDS return accordingly and if a revised TDS return is filed and a revised TDS certificate in favour of Rinfra would be issued, they would receive queries from the Income tax department resulting in unnecessary litigation. They suggested the following alternatives to the assessee in their email, the copy of which has been filed before us:

- AEML may declare in their return of income that TDS pertains to Rinfra and Rinfra may claim TDS in their assessment following the provisions of section 199.

- Rinfra/ AEML may approach the AO/CIT(TDS) for Issue of direction to TPC for issue of revised TDS certificate in the name of Rinfra.

16. To the above alternatives suggested by TPC Officials, Rinfra Official vide email dated 19.05.2020 provided point wise response that the alternative options suggested by TPC were not viable and the only legal and proper course of action was that TPC should revise the TDS return and substitute the name of Rinfra in place of AEML who received the amount as trustee on behalf of Rinfra. To this the TPC official once again vide their email dated 23.05.2020 did not agree to the revision of TDS return and did not co-operate.

17. Now, here is a case where deductor, i.e., Tata Power Company has refused to issue a certificate in favour of the assessee or comply with the Rules u/s.37BA due to whatever perceptions and apprehensions they had. There is no provision or mechanism also to enforce such certificate from Tata Power Company. Now, can an assessee be denied the credit for TDS under these circumstances as narrated above? A Form or a Rule is an aid to implement the provisions of the main enactment, i.e., Income Tax Act and the procedure prescribed under the Rule is to facilitate and implement tax. Rules and Form cannot be interpreted so as to make the main provisions of the Act subservient to such Rules or forms prescribed therein to make the procedure cumbersome and lead to grueling situation to

comply like here in this case or lead to denial of credit which assessee is otherwise eligible under the provisions of the Act. There has to be some kind mechanism or enabling provision for redressal of grievance within the department to resolve when such kinds of controversy come up and the tax payers or the assessee should not be drawn to protracted legal battles before the Court for their justifiable claim. There is no prescribed form available, at least nothing has been brought to our knowledge either under the Rules or provided by the CBDT. To make such rectification, if deductor fails to issue certificate or comply with the provisions of the Rules, other than deductor revising its Form 26AS online which due to many circumstances and apprehensions deductor may not do it. In such genuine cases, at least Assessing Officer should be authorised or empowered to examine the matter and give the credit of TDS to which assessee is eligible for it.

18. Herein in this case, it is not even disputed by the department that assessee is entitled for credit for TDS. Either some mechanism should be devised by the department to address such grievances in such circumstances or authorised the Assessing Officer to examine it and allow; or the strict conditions provided in Rule 37BA should be read in the provisions of Section 199(1) to make it workable in genuine cases where department is sure no double credit is allowed or claimed. Because Rules should not frustrate the main provisions of the Act. Be that as may be, however, in the peculiar facts and circumstances of the case, we direct the ld. AO to give credit of

TDS deducted by Tata Power Company which is the subject matter of dispute before us in both the appeals. This order should be complied with and assessee should not be drawn to further litigation on the ground that the IT system does not support or does not have any mechanism to give credit. We direct the Assessing Officer of the assessee to ensure that credit of the TDS amount is given to the assessee. Accordingly, the order of the Id. CIT (A) is confirmed and the appeal filed by the Revenue is dismissed.

19. In the result, both the appeals of the Revenue are dismissed.

Order pronounced on 16th May, 2023

**Sd/-
(PADMAVATHY S)
ACCOUNTANT MEMBER**

**Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER**

Mumbai; Dated 16/05/2023
KARUNA, *sr.ps*

Copy of the Order forarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai