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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 17.02.2023*

+ **W.P.(C) 6610/2019**

SANJAY SUDAN

..... Petitioner

Through: Mr Shashi Mathews with Mr
Abhishek Book, Advs.

versus

THE ASSISTANT COMMISSIONER OF INCOME
TAX & ANR.

..... Respondents

Through: Mr Sanjay Kumar, Senior Standing
Counsel with Ms Hemlata Rawat,
Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

1. The principal issues which come to fore for consideration in the instant writ petition are as follows:

(i) Where withholding tax has been deducted, whether the deductee, i.e., the assessee, can be called upon to pay tax equivalent to the deduction made ?

(ii) Whether the respondents/revenue can adjust the withheld tax which has not been deposited by the deductor in the Central Government Account, against the refund due and payable to the

deductee/assessee?

2. It is not in dispute that the petitioner was an employee of Kingfisher Airlines Limited [hereafter referred to as “KAL”] from 12.01.2008 up until 10.02.2012.

3. It is also not in dispute that insofar as the assessment year (AY) 2012-13 is concerned, the petitioner’s employer, i.e., KAL, had withheld, towards withholding tax payable on salary, an amount equivalent to Rs.13,98,901/-.

3.1 The record shows that the withholding tax is reflected in Form 16A issued by the petitioner’s employer, i.e., KAL.

3.2 It has also come to fore that KAL did not deposit the withholding tax and, hence, a demand amounting to Rs.11,62,580/- was raised by the respondents/revenue, for AY 2012-13.

3.3 According to the petitioner, because of the outstanding demand concerning AY 2012-13, the refund payable to him for AY 2015-16 was not paid to him, and instead, set-off against the said demand.

4. It appears that the petitioner did articulate his grievance *via* an application dated 05.02.2019, which did not receive the response that the petitioner expected. Instead, the respondents/revenue, *qua* the said application, have indicated that since the withholding tax amount is not reflected in Form 26AS, the demand shall remain outstanding, as reflected in the impugned order.

4.1 The petitioner in this backdrop has challenged the notice dated 28.02.2018 as, according to him, it virtually amounts to compelling the petitioner to pay the demand, which is not recoverable from him, as per the provisions of Section 205 of the Income Tax Act, 1961 [in short, “Act”].

4.2 In support of this plea, the petitioner also placed reliance on the instruction dated 01.06.2015 issued by the Central Board of Direct Taxes [in short, “CBDT”].

5. Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the respondents/revenue, says that the credit for withholding tax can only be given in terms of Section 199 of the Act, when the amount is received in the Central Government account.

5.1 It is, therefore, his submission that while no coercive measure can be taken against the petitioner, the demand will remain outstanding and cannot, thus, be effaced.

6. We have heard counsel for the parties.

7. According to us, Section 205 read with instruction dated 01.06.2015, clearly point in the direction that the deductee/assessee cannot be called upon to pay tax, which has been deducted at source from his income. The plain language of Section 205 of the Act points in this direction. For the sake of convenience, Section 205 is extracted hereafter:

“Section 205 Bar against direct demand on assessee.

Where tax is deductible at the source under the foregoing provisions of this Chapter, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income.”

8. The instruction dated 01.06.2015 is aligned with the aforesaid provision of Act inasmuch as it clearly provides in paragraph 2 that since the Act places a bar on a direct demand *qua* the deductee assessee, the same cannot be enforced coercively. For the sake of convenience, paragraph 2 of the said Instruction is extracted hereafter:

“...2. As per Section 199 of the Act credit of Tax Deducted at Source is given to the person only if it is paid to the Central Government Account. However, as per Section 205 of the Act the assessee shall not be called

upon to pay the tax to the extent tax has been deducted from his income where the tax is deductible at source under the provisions of Chapter-XVII. Thus the Act puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch cannot be enforced coercively... ”

9. The question, therefore, which comes to fore, is as to whether the respondents/revenue can do indirectly what they cannot do directly.

9.1 The adjustment of demand against future refund amounts to an indirect recovery of tax, which is barred under Section 205 of the Act.

9.2 The fact that the instruction merely provides that no coercive measure will be taken against the assessee, in our view, falls short of what is put in place by the legislature via Section 205 of the Act.

10. Therefore, in our view, the petitioner is right inasmuch as neither can the demand *qua* the tax withheld by the deductor/employer be recovered from him, nor can the same amount be adjusted against the future refund, if any, payable to him.

11. Thus, for the foregoing reasons, we are inclined to quash the notice dated 28.02.2018, and also hold that the respondents/revenue are not entitled in law to adjust the demand raised for AY 2012-13 against any other AY. It is ordered accordingly.

12. Notably, in paragraph 7 of the writ petition, the petitioner has adverted to the fact that he is entitled to refund of Rs.1,94,410/- in respect of AY 2015-16.

12.1 Mr Sanjay Kumar, learned Senior Standing Counsel, who appears for the respondent/revenue says the amount claimed towards refund is not in dispute.

12.2 Given this position, the petitioner's claim which is not in dispute will have to be refunded.

12.3 It is so directed.

13. The writ petition is disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

FEBRUARY 17, 2023/pmc