

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 6088 of 2018**

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OPJ TRADING PRIVATE LIMITED

Versus

INCOME TAX OFFICER TDS 2

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Appearance:

MR RK PATEL with DARSHAN R PATEL(8486) for the PETITIONER(s) No. 1
MR MR BHATT, SENIOR ADVOCATE with MRS MAUNA M BHATT(174) for
the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 11/09/2018

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Petitioner has challenged an order dated 31.3.2018 passed by the respondent – Income-tax Officer on an application filed by the petitioner on 7.3.2017 requesting for a certificate of exemption from deduction of tax at source in terms of Section 197 of the Income-tax Act, 1961 ('the Act' for short).

2. Brief facts are as under :-

The petitioner is a company registered under the Companies Act and is engaged in trading and financing activities. For the assessment year 2018-19, the petitioner

applied to the Assessing Officer on 7.3.2018 for granting a certificate of exemption from deduction of tax at source. In such an application, the petitioner provided necessary documents and details which included its provisional profit and loss accounts for the year ending on 31.3.2018 alongwith projected tax payable. The petitioner also annexed copies of certificate under Section 197 issued by the Department for lower deduction of tax for last two years. In the application the petitioner projected a negative income of Rs.47.96 crores (rounded off) for the said assessment year 2018-19. This application came to be rejected by the respondent which was communicated to the petitioner under letter dated 31.3.2018. In this letter it was conveyed to the petitioner as under :-

"In this connection, I hereby intimate you that your application for Lower Deduction Certificate is hereby filed after approval of higher authorities. This is for your kind information."

3. It emerges from the affidavit-in-reply filed by the Department in this petition that upon receipt of the application from the petitioner, the Assessing Officer called for certain details under a communication dated

19.3.2018, as under :-

"In this connection, you have shown profit of Rs.1,48,00,384/- on total revenue of Rs.65,23,63,808/- i.e. 2.27%, whereas loss of Rs.47,96,57,334/- is projected in F.Y. 2017-18.

In view of the above, you are requested to furnish your explanation in this regards within three days from the receipt of this letter as to why your application for lower deduction should not be treated as filed."

4. After considering the petitioner's response to such queries, the Assessing Officer further wrote to the petitioner on 27.3.2018 as under:-

"On perusal of the submission it is noticed that you have taken loan of Rs.870.00 cr. on which you have paid interest of Rs.103 cr. the average rate comes to 11.84%. On the other hand you have given loan and advance of Rs.860 or and interest received interest of Rs.67.83 crores the average rate comes @ 7.88%. Please explain interest received and paid ?"

5. The information received from the petitioner through such correspondence in addition to already supplied alongwith the application was processed by the Assessing Officer who placed his recommendation to the higher authorities for allowing deduction of

tax at source in case of the petitioner at a reduced rate of 1% (as against 10% required to be deducted on payment of interest by the debtors of the assessee company). The notes as produced alongwith the Annexure-R3 by the respondent alongwith the affidavit, read as under :-

"PUC

29/03/2018

As directed by your goodself the details/explanation vide this office letter dated 27/03/2018 called for and assessee has furnished his reply on 27/03/2018. Further, it is noticed that the calculation of interest shown by the assessee is short and assessee was requested to place correct the same thereafter the loss comes to Rs.26.57 crores. Further assessee has furnished revised provisional income and exp. Account and details of party wise finance cost (long term borrowing) called. The assessee has shown provisional interest of Rs.102.97 cr. and in one case account Navla Steel and Power Ltd., closed and assessee has paid interest Rs.3,83,16,990/- in which TDS deducted as per this office records. During the current year F.Y. 2017-18 assessee has claimed interest on Debenture of Rs.99.14 cr. and Documentation of Processing Fee of Rs.13.31 cr. Hence loss shall be arrived.

In view of the above fact and considering the facts and reply of the assessee the proposal is resubmit @ 1% for kind perusal and approval, if deemed fit."

6. On these notes the Chief Commissioner of Income-tax (TDS) Ahmedabad expressed his opinion as under :-

"The assessee company submitted application for lower TDS @ NIL in Form No.13 showing loss of Rs.47.96 cr. on total interest receipt of Rs.68.63 cr. in the projected P & L A/c. Whereas in the P.Y. there was profit of Rs.1.48 cr. on total revenue of Rs.65.23 cr. After being questioned about the genuineness/rational of huge losses, the assessee has submitted revised working reducing losses to Rs.26.57 cr. after showing higher income.

The assessee's projections are questionable as the only business of the assessee is obtaining loans from outside parties and advancing loans/making investments in group companies at marginally higher rates than the charges payable. However, in this year assessee is showing huge payments to outside parties for loans arrangements but not charged to group companies. I am of the view that the projected accounts are not acceptable and hence the application may be considered for rejection.

Submitted for approval to reject the application and inform the PAN A.O. about the wrong/false projected figures."

7. In view of such background of facts, counsel for the petitioner submitted that in the year under consideration the petitioner has run into huge losses. The provisional loss is now confirmed in the final accounts which have been prepared. The loss as per the final

accounts comes to Rs.46.88 cr. (rounded off). Petitioner's request for non-deduction of tax at source was therefore justified. The Assessing Officer after taking into consideration the revised suggested figures also noted that there would be sizable loss, despite which he recommended deduction of tax at source at 1%. The Commissioner of Income-tax had no authority to overrule such opinion of the Assessing Officer. In terms of Section 197 of the Act and Rule 28AA of the Income-tax Rules, the Assessing Officer has exclusive statutory powers and functions in this respect. His discretion cannot be governed by the higher authority. Counsel relied on the decision of Patna High Court in case of **Bihar Industrial Area Development Authority vs. Assistant Commissioner of Income-tax (TDS)**, reported in (2016) 66 **taxmann.com** 357, in which the Court set aside the order refusing to grant exemption under Section 197 of the Act without assigning reasons. Reliance was also placed on the decision of the Bombay High Court in case of **Larsen & Toubro Ltd., vs. Assistant Commissioner of Income-tax (TDS)**, reported in 326 **ITR** 514, in which the Court opined that an application under Section 197 of the Act

cannot be rejected on whim and caprice of the Assessing Officer.

8. On the other hand, learned counsel Shri Bhatt for the Department submitted that the opinion of the Assessing Officer for granting certificate for deduction of tax at reduced rate was not a final opinion. It was merely a tentative consideration. The higher authorities brought correct facts to the notice of the Assessing Officer. It prima facie appears that the petitioner has contrived losses. At the stage of deciding application under Section 197 of the Act the petitioner's liability has to be judged only on prima facie basis. Detail consideration at that stage is not envisaged. Only in assessment such issues can be finally decided. He submitted that at belated stage certificate of exemption should not be granted. He relied on the following judgments :-

(i) Judgment of this Court in case of **Sarika Estate and Investments Pvt. Ltd., vs. Assistant Commissioner of Income-tax, reported in 246 ITR 254**, which was at interim order, in which the Court noted that in certain cases application for exemption under

Section 197 were being granted which applications were made after crediting the tax deducted at source with the Department. The Court desired CBDT should look into this issue of permissibility of entertaining such applications.

(ii) In case of Division Bench of this Court in **Essar Oil Ltd., vs. Income-tax Officer**, reported in (2013) 30 taxmann.com 39, in which following observations were made :-

*"12. In case of **Sarika Estate & Investments Private Limited v. Assistant Commissioner of Income Tax**, reported in 246 ITR 254, in a writ petition seeking benefit of Section 197 of the Income-tax Act, 1961, a claim was made inter alia that there was no time limit for making an application under Section 197 of the Income-tax Act, 1961, for issuance of certificates and it was contended further that the authorities had been issuing certificates after payment or crediting amount of interest. This Court held that grant of certificates under Section 197 on applications made after the amount of interest was credited was in violation of the express provisions of law. It was also held that since the certificates had been issued in almost all cases, there would be a class of people, who having applied for the certificate after credit of interest, were under a bona fide belief that such practice has come to stay. The Court, therefore, directed CBDT*

to issue appropriate guidelines in this respect. The Court in that case noted that the Central Board of Direct Taxes had written a letter to the petitioner reiterating that since the certificate was applied for after the amount of interest was credited, the question of issuing certificate for non-deduction of tax at source under Section 197 (1) does not arise and that the grievance of the petitioner was to be treated as settled. In this context, the Court had directed the CBDT to consider whether and under what circumstances such a practice has developed and that, if such practice was not permissible, to decide as to what it should do and issue appropriate guidelines in the matter notwithstanding any individual reply sent to the petitioner.

24. It was found that the contractors submitted Certificate dated 9th September 1997 issued by the ITO authorizing deduction of tax at source from one person and the application for certificate was made on 6th August 1997. It also held that the deduction of tax had to be made at the time of credit of the amount; or at the time of payment thereof, by cash or issuance of cheque/draft, and therefore, certificate issued on 9th September 1997 could not have retrospective effect and for the amount paid between 1st April 1997 to 9th September 1997, the default can be said to have been committed, as neither there was any certificate which could have any application for such period, nor was there any mention in the certificate that the same would have effect from 1st April 1997. And therefore, it held that defect

cannot be rectified by the certificate."

(iii) In case of **Ansaldo Engergia SpA vs. Income-tax Officer, reported in 261 ITR 467**, in which learned Single Judge of the Madras High Court in the context of withdrawal of a certificate under Section 197 of the Act observed that at that stage the liability of the petitioner is not being finally determined and if ultimately it is found that the petitioner is liable to pay tax at the rate lower than the deduction to be made, such amount will be refunded.

(iv) In case of **Infoparks vs. Deputy Commissioner of Income-tax (TDS) reported in 329 ITR 404**, in which the learned Single Judge of Kerala High Court also expressed an opinion that the issues of the assessee's tax liability cannot be decided in the proceeding under Section 197 of the Act, can only be a subject matter of assessment proceeding.

9. Section 197 of the Act pertains to certificate of deduction at low rate. Sub-section (1) of Section 197 reads as under :-

"(1) [Subject to rules made under sub-section (2A) [where, in the case of any income of any person [or sum payable to any person], income-tax is required to be

*deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193 (194) 194A, [194C] 194D, [194G] [194H] [194-I] [194J] [194K] [***] [194LA] [194LBB, 194LBC] and Assessing Officer is satisfied] that the total income [***] of the recipient justifies the deduction of income-tax [***] at any lower rates or no deduction of income-tax [***] at any lower rates or no deduction of income-tax [***], as the case may be, the [Assessing] Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate."*

10. Sub-section (2) of Section 197 provides that where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.
11. Under sub-section (1) of Section 197 it is an Assessing Officer who can entertain and decide an application of an assessee for either total exemption or permission for reduced tax deduction at source. The statute has used the language that if the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any low rates or no deduction of income-tax, as the case may be, the

Assessing Officer shall on application made by the assessee in this behalf give to him such certificate as may be appropriate. It is undoubtedly true that the deduction of tax at source and depositing it with the Government revenue by the payee does not decide the final tax liability of the recipient of the income which would be the subject matter of assessment of the return. If tax higher than what is actually due to be paid by the assessee to the Department is recovered in form of TDS, the assessee can always claim refund of such excess tax. However, subsection (1) of Section 197 has been enacted to give relief to the assessee, whose income may not justify deduction of tax at full rate or no deduction altogether. Necessarily, therefore, the satisfaction of the Assessing Officer at that stage about the total income of the recipient justifying reduced collection of tax at source would be *prima facie* in nature.

12. Two things emerge from the said provisions; firstly, that such consideration cannot be devoid of exercise of sound discretionary powers and based on mere *ipse dixit* of the Assessing Officer. Secondly, that the power vests with the Assessing Officer. No

provision or rule is brought to our notice which would enable the higher authority to govern such discretion of the Assessing Officer statutorily vested in him under sub-section (1) of Section 197 of the Act. We may therefore proceed on such basis.

13. With this background, we may revert to facts of the case. The Assessing Officer on tentative re-working out of the assessee's accounts formed a prima facie opinion that the loss of the assessee would come to Rs.26.57 cr. He therefore suggested collection of tax at reduced rate of 1%. The Commissioner of Income-tax however expressed an opinion that the losses projected by the company do not appear to be genuine. It was noted that such projections are questionable, since only business of the assessee is obtaining loans from the outside agencies and advancing loans or making investments in group companies. During the year under consideration large amount of interest were paid to outside parties on loans but similar charges were not collected from the group companies to whom advances were made.

14. In view of our conclusion above that it is the power and duty of the Assessing Officer

to decide applications under Section 197(1) of the Act, we would have ordinarily requested the Assessing Officer to reconsider the issue and take a final decision without being guided or governed by any outside influence. We do not accept the contention of the petitioner that the notes put up by the Assessing Officer suggesting collection of tax at reduced rate of 1% was expression of his final decision. The Assessing Officer, therefore, not having expressed his final decision his opinion would not be binding to the Department. In such background, as noted, ordinarily our preference would have been to ask the Assessing Officer to reconsider the entire issue also looking into the aspect of possible contrived losses. However, in facts of the present case, we do not propose to adopt this procedure. Firstly, the periodic interest would have been paid to the petitioner by the payees during the year under consideration. The last date of filing return for the petitioner as well as payees would be 30.9.2018, by which time the question of deducting correct tax at source and depositing in the Government revenue would have to be crystallized, failing which untold complications could arise, not only in case of petitioner's assessment but also in

relation to assessment of the payees. We do not wish to bring about such a flux or fluid situation. It would be impracticable if not impossible to expect the Assessing Officer to re-examine the issues and pass a fresh order citing brief reasons for either granting or not granting application of the petitioner. Even otherwise, we have serious doubt after the tax is actually deposited with the Revenue, certificate of exemption can be issued. As against this, the petitioner's option for claiming refund of tax which may have been deducted and deposited in the Government revenue is not foreclosed.

15. In facts of the present case, therefore, the petition is dismissed.

(AKIL KURESHI, J)

(B.N. KARIA, J)

K.K. SAIYED

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