

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16015 of 2015

Nai Rajdhani Path Pramandal, Road Construction Department, Government of Bihar, Patna, through its Executive Engineer, Chandra Mohan Kumar Mishra, son of Shri Mahendra Kishore Mishra, resident of Village-Sutihar, P.O. Sutiha, P.S.Parihar, District-Sitamarhi.

.... Petitioner

Versus

1. Commissioner of Income Tax (T D S) having its office at Central Revenue Building, Beer Chand Patel Marg, Patna.
2. Commissioner of Income Tax (Appeals)-II, having its office at Central Revenue Building, Beer Chand Patel Marg, Patna.
3. Assistant Commissioner of Income Tax, TDS Circle, Patna.

.... Respondents

Appearance :

For the Petitioner : Mr. D.V.Pathy, Advocate
Mrs. Manjhu Jha, Advocate
For the Respondents : Mrs. Archana Sinha @ Archana Shahi, Advocate
Mrs. Shalini Bihari, Advocate

CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

and

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 15-02-2016

In a proceeding under Section 201(1) read with Section 201(1A) of the Income Tax Act, 1961 ((hereinafter referred to as ‘the Act’), instituted against the petitioner, which is a department of the State Government, constituted to construct and maintain roads and bridges in the State of Bihar, the respondent No. 3 herein, namely, Assistant Commissioner of Income Tax, TDS Circle, Patna, held that the petitioner had not deducted income tax, at source, on the payments made to Bihar Rajya Pul Nirman Nigam Limited and Bihar State Road Development Corporation Limited ((hereinafter referred

to as 'the Corporations') for the period 2012-13, 2013-14 and 2014-15 and, therefore, raised a demand of Rs. 4,07,33,189/-, Rs.50,99,60,809/- and Rs.63,51,95,228/- for the period 2012-13, 2013-14 and 2014-15 respectively.

2. Aggrieved by the demands so raised, the petitioner filed appeal along with an application for stay of the demand, before the respondent No.2, namely, Commissioner of Income Tax (Appeals)-II, Patna, on the ground, *inter alia*, that the payments, made to Bihar Rajya Pul Nirman Nigam Limited and Bihar State Road Development Corporation Limited, are in the nature of allotments of funds to the said Corporations, on the instructions of the Government of Bihar, for the purposes of construction of roads and bridges and that the same did not constitute *a contract for work* under Section 194(1) of the Act.

3. Having preferred an appeal, as indicated above, accompanied by an application for stay of the demand so raised, before the respondent No.2, namely, Commissioner of Income Tax (Appeals)-II, Patna, the petitioner also filed an application before the respondent No.3, namely, Assistant Commissioner of Income Tax, TDS Circle, Patna, for stay of the said demand, but the respondent No.3, Assistant Commissioner of Income Tax, TDS Circle, Patna, rejected the request for stay on the ground that filing of an appeal is



not a sufficient reason to keep a demand in abeyance. However, while the appeal was pending consideration before the respondent No.2, namely, Commissioner of Income Tax (Appeals)-II, Patna, the respondent No.3, namely, Assistant Commissioner of Income Tax, TDS Circle, Patna, attached the accounts of the petitioner maintained with the District Treasury Officer, Patna, for recovery of the whole amount, in dispute, totaling to a sum of Rs.1,18,58,89,226/-.

4. Though the appeal is still pending for consideration by the respondent No.2, namely, Commissioner of Income Tax (Appeals)-II, Patna, this writ application has been made, under Article 226 of the Constitution of India, by the petitioner seeking, *inter alia*, issuance of a writ or writs setting aside and quashing the notice, dated 22.09.2015, as contained in Annexure-4, issued by the respondent No. 3, namely, Assistant Commissioner of Income Tax, TDS Circle, Patna, under Section 226(3) of the Income Tax Act, 1961, raising the demand as aforementioned for the period 2012-13, 2013-14 and 2014-15.

5. We have heard Mr. D. V. Pathy, learned Counsel, appearing for the petitioner, and Ms. Archana Sinha @ Archana Shahi, learned Counsel, appearing for the respondents.

6. Without expressing any opinion on the correctness or the otherwise of the substantial questions of law, which have been



raised by the writ petitioner including the question as to whether the payments made by the petitioner to the Corporations were in the nature of payment of contract or simple disbursement of amount on behalf of the State Government, we may point out that it has been submitted, on behalf of the petitioner, that even if it is assumed that the petitioner was liable to make deduction, at source, of the payments, which had been made to Bihar Rajya Pul Nirman Nigam Limited and Bihar State Road Development Corporation Limited, the fact of the matter remains, according to Mr. D. V. Pathy, learned Counsel, appearing for the petitioner, that both Bihar Rajya Pul Nirman Nigam Limited and Bihar State Road Development Corporation Limited, have filed their returns and, in terms of the assessments made, taxes have also been paid by the two Corporations, and since the taxes, due from Bihar Rajya Pul Nirman Nigam Limited and Bihar State Road Development Corporation Limited, have already been received by the Income Tax Department, the Income Tax Department ought not to proceed against the present petitioner under Section 201(1) read with Section 201(1A) of the Act, and, therefore, the petitioner's account ought not to have been attached and ought to be, now, released from attachment.

7. Appearing on behalf of the respondents, Ms. Archana Sinha @ Archana Shahi, learned Counsel, has not been able to

dispute that in terms of the assessment made by the said two Corporations, taxes have been paid.

8. In the circumstances indicated above, does it remain legally open to the respondents to insist on the demands, which have been raised and which stand impugned in the statutory appeal, which the petitioner has filed? Yet another question is : If, in terms of the assessments, made by the said two Corporations, the Corporations have already paid taxes, is it legally valid and justified for the respondents to continue to keep under attachment the account of the petitioner maintained with the District Treasury Officer, Patna, for the purposes of recovery of the said sum of Rs.1,18,58,89,226/-?

9. Our quest for an answer to the above questions brings us to the Circular No.275/201/95-IT(B), dated 29.01.1997, which states, “ no demand visualized under Section 201(1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under Section 201(1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under section 271C of the Income-tax Act”.

10. A careful reading of the Circular, which we have reproduced above, clearly shows that no demand, as envisaged by



Section 201(1) of the Act, can be enforced against the *deductor* if the tax, due to be paid by the *deductee*, has already been paid by the *deductee*. In other words, if the *deductor* (i.e., the petitioner herein), who has to make deduction at source of the payments made to the *deductee* (i.e., the Corporations) failed to make the deduction, will the *deductor*, i.e., the petitioner herein, remains liable to make the payment of the tax, which was due by the *deductee*, i.e., the Corporations?

11. This is the vital question, in the light of the provisions of Section 201(1) of the Act, if the *deductees* (i.e., the Corporations) have made the payment of the tax on the amounts, which were to be deducted, at source, by the *deductor* (i.e., the petitioner), such payments will not only absolve the *deductees*, but also the *deductor*. This position, emerging from the Circular aforementioned, has been amply clarified by the Supreme Court by pointing out, in ***Hindustan Coca Cola Beverate P. Ltd. v. Commissioner of Income-Tax***, reported in, [2007] 293 ITR 226 (SC), that when there is no dispute that the tax due has already been paid by the *deductee*-assessee, a proceeding, under Section 201(1) of the Income Tax Act, 1961, read with Section 201(1A) thereof, is untenable and, therefore, cannot be continued against the *deductor*.

12. Giving the Circular, dated 29.01.1997

aforementioned, issued by the Central Board of Direct Taxes, a statutory recognition, a proviso has been added to sub-Section (1) of Section 201 of the Income Tax Act, 1961, which reads as follows:

“201. Consequences of failure to deduct or pay.— (1)

Where any person, including the principal officer of a company, —

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of Section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

1[Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—

- (i) has furnished his return of income under section 139;*
- (ii) has taken into account such sum for computing income in such return of income; and*
- (iii) has paid the tax due on the income declared by him in such return of income,*

And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:]

2[Provided further that] no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.]”

13. In the light of the proviso to Clause (b) of sub-section (1) of Section 201 of the Act, there can be no escape from the conclusion that if the person, who fails to deduct, whole or part of the tax, at source, shall not be deemed to be an *assessee in default* if in respect of such tax, the *deductee* has furnished his return of income under Section 139 of the Act and, while furnishing the return, has taken into account such sum for computing income in such return of income and has paid the tax due on the income declared by him in such return of income coupled with a certificate to this effect from an accountant in such form as may be prescribed.

14. Having, therefore, regard to the factual aspects of the present case and the law relevant thereto, we are clearly of the view that the respondent No.2, namely, Commissioner of Income Tax (Appeals)-II, Patna, is duty bound to take up the appeal at the earliest and if it is found that the taxes, which were to be deducted, at source, by the present petitioner while making payment to the said two Corporations, have been paid by the said two Corporations as

deductees, the impugned demands, raised by the respondent No.2, namely, Commissioner of Income Tax (Appeals)-II, Patna, shall be set aside and the attachment of the account of the petitioner, maintained with the Government Treasury, Patna, shall be vacated without delay.

15. In order to, therefore, taking the controversy, which the present writ petition has raised, to its logical conclusion in accordance with law, we hereby direct the petitioner to appear before the respondent No. 2, namely, Commissioner of Income Tax (Appeals)-II, Patna, in connection with the appeal, in question, within a week from today and, within a week thereafter, the appellate authority, namely, respondent No.2, Commissioner of Income Tax (Appeals)-II, Patna, shall, upon examining the issue, as has been discussed above, pass appropriate reasoned order(s) and do the needful as warranted by law.

16. With the above observations and directions, this writ petition shall stand disposed of with no order as to costs.

(I. A. Ansari, ACJ)

(Chakradhari Sharan Singh, J)

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