

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.90 OF 2019

Pushkar Prabhat Chandra Jain

... Petitioner

V/s.

Union of India and anr.

... Respondents

Ms.Neha Anchliya with Mr.Naresh Jain i/by M/s Argud Partners
for the Petitioner.

Mr.Sham Walve for the Respondent.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : JANUARY 30, 2019.**

P.C.:-

1. Heard learned counsel for the parties for final disposal of the petition.

2. Petitioner has challenged a notice dated 5th February, 2018 issued by the respondent No.2-Income Tax Officer under Section 226(3) of the Income Tax Act, 1961 ("the Act" for short). The petitioner has further prayed for refund of a sum of Rs.3,67,600/-

already recovered from the petitioner and to permanently restrain the respondents from recovering balance amount of Rs.6,69,250/- for which a further notice dated 10th September, 2018 was issued by the respondent No.2.

3. Brief facts are as under :-

Petitioner is an individual. The petitioner had sold an immovable property under a deed dated 23rd November, 2015 to Mr. and Mrs. Bhanpurwala for total consideration of Rs.9 crores. The purchasers of the said property had made a net payment of Rs.8 crores 91 lakhs to the petitioner after deducting tax at source at 1% of the payment in terms of section 194IA of the Act.

4. The petitioner filed the return of income for the assessment year 2016-17 on 12th October, 2017 declaring total income of Rs.2,28,62,110/-. In such return of income electronically filed by the petitioner, he had claimed a total of TDS of Rs.10,71,187/-. The Central Processing System of the Income Tax Department noticed that only an amount of Rs.1,71,187/- was deposited with the Government revenue and thus gave credit of TDS to the

petitioner only to the extent of such sum. This mismatch of the TDS claimed by the petitioner and recognized by the department was on account of the fact that purchasers of the immovable property from the petitioner, had not deposited the sum of Rs.9 lakhs deducted from the petitioner while making payment of the sale consideration. In an intimation issued by the respondent under Section 143(1) of the Act, therefore, a demand of Rs.10,36,850/- was raised against the petitioner. This comprised of the principal tax of Rs.9 lakhs for which the TDS credit was not granted and interest payable thereon. Subsequently, the return of the petitioner was taken in limited scrutiny on specific three grounds which did not include the question of TDS mismatch. Be that it may, during the pendency of such scrutiny assessment proceedings the respondent No.2 issued the impugned notice dated 5th February, 2018, which was addressed to the Branch Manager of State Bank of India attaching the bank account of the petitioner in the said bank for recovery of an amount of Rs.10,36,000/-. On 26th March, 2018, the respondent No.2 withdrew a sum of Rs.2,46,900/- from the petitioner's said bank account. A further sum of Rs.1,20,700/- was withdrawn

from the same account on 6th April, 2018. Thus, a total of Rs.3,67,600/- came to be withdrawn by the department from petitioner's bank account for recovery of the said unpaid demand. The petitioner represented to the department under communication dated 6th April, 2018 and objected to the attachment of the bank account pointing out as under:-

- (i) The petitioner had noticed that there was a shortfall of TDS of Rs.9 lakhs which can relate only to the tax deducted at source by the purchaser of the flat which may not have been deposited with the department.
- (ii) The purchasers had already deducted the tax at source in terms of Section 194IA of the Act. The petitioner has already offered the sale consideration of Rs.9 crores to tax in the return filed.
- (iii) The petitioner referred to Section 205 of the Act and contended that in a situation like the present case, recovery can be made only against the deductor-payee. The petitioner can not be asked to pay the said amount again.

5. The respondent did not accept the representation of the

petitioner upon which the present petition has been filed.

6. Facts on record are not seriously in dispute. As noted, the petitioner sold an immovable property for sale consideration of Rs.9 crores. The purchasers paid only Rs.8 crores 91 lakhs retaining Rs.9 lakhs towards TDS. The department does not argue that this amount of Rs.9 lakhs so deducted is not in tune with the statutory requirements. It appears undisputed that the deductors did not depositing such amount in the Government revenue. Under the circumstances, the petitioner is asked to pay the said sum again, since the department has not recognized this TDS credit in favour of the petitioner.

7. Section 205 of the Act carries the caption "Bar against direct demand on assessee". The section provides that where tax is deducted at the source under the provisions of Chapter XVII, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income. This provision came up for consideration before division bench of this

Court in case of **Yashpal Sahni Vs. Rekha Hajarnavis and ors.**¹.

It was a case where the employer while paying salary to the employee had deducted tax at source Rs.6.66 lakhs. Subsequently, disputes arose between the employer and employee due to which service of the employee was terminated. The employee filed the return of income claiming credit of TDS of Rs.6.66 lakhs. The Assessing Officer issued intimation under Section 143(1)(a) of the Act denying credit of TDS of Rs.6.66 lakhs on the ground that such amount was not deposited by the employer. This Court in such background after referring to Section 205 of the Act held and observed as under:-

“20. From the language of Section 205, it is clear that once the tax is deducted at source, the same cannot be levied once again on the assessee who has suffered the deduction. Once it is established that the tax has been deducted at source from the salary of the employee, the bar under Section 205 of the Act comes into operation and it is immaterial as to whether the tax deducted at source has been paid to the Central Government or not, because elaborate provisions are made under the Act for recovery of tax deducted at source from the person who has deducted such tax.

21. In the present case, the petitioner assessee has furnished monthly pay slips and bank statements to show that from his salary tax was deducted at source by the employer - respondent No. 6. Authenticity of

1 (2007) 293 ITR 539 (BOM)

the said pay slips and bank statements have not been disputed by the revenue. Thus, it is clear that the tax has been deducted at source by the respondent No. 6 from the salary paid to the petitioner. Therefore, the only question to be considered is, if the employer-respondent No. 6 has failed to deposit the tax deducted at source from the salary income of the petitioner to the credit of the Central Government, whether the revenue can recover the TDS amount with interest once again from the petitioner?

22. In the present case, though the respondent No. 6 has deducted the tax at source from the salary income of the petitioner, the respondent No. 6 has not issued the TDS certificate in Form No. 16 to the petitioner. As a result, the petitioner is not entitled to avail credit of the tax deducted at source. However, once it is established that the tax has been deducted at source, the bar under Section 205 of the Act comes into operation and the revenue is barred from recovering the TDS amount once again from the employee from whose income, TDS amount has been deducted. It is pertinent to note that the purpose of issuing TDS certificate under Section 203 of the Act is to enable the assessee to avail credit of the tax deducted at source in the relevant assessment year. If the TDS certificate is not issued, then under Section 199 of the Act, the assessee from whose income, tax has been deducted at source will not be entitled to take credit of the said amount. In that event, on account of the non availability of the credit, the assessee would be liable to pay tax once again even though the tax was deducted at source. Thus, it would be a case of double taxation which is not permissible in law. To avoid such anomaly, Section 205 has been enacted, to the effect that, once the tax is deducted at source by the employer-company, then, the person from whose income, the tax has been deducted at source shall not be called to pay the said tax again. From the language

of Section of 205 of the Act, it is clear that the bar operates as soon as it is established that the tax has been deducted at source and it is wholly irrelevant as to whether the tax deducted at source is paid to the credit of Central Government or not and whether TDS certificate in Form No. 16 has been issued or not. Also the mere fact that the employer may not issue TDS certificate to the employee does not mean that the liability of the employer ceases. The liability to pay income tax if deducted at source is upon the employer.

23. As held by the Gauhati High Court in the course of Omprakash Gattani (supra), once the mode of collecting tax by deduction at source is adopted, that mode alone is to be adopted for recovery of tax deducted at source. Although it is obligatory on the part of the person collecting tax at source to pay the said TDS amount to the credit of the Central Government within the stipulated time, if such person fails to pay the TDS amount within the stipulated time, then, Section 201 of the Act provides that such person shall be deemed to be an assessee in default and the revenue will be entitled to recover the TDS amount with interest at 12% p.a. and till the said TDS amount with interest is recovered there shall be a charge on all the assets of such person or the company. Penalty under Section 221 of the Act and rigorous imprisonment under Section 276B of the Act can also be imposed upon such defaulting person or the company. Thus, complete machinery is provided under the Act for recovery of tax deducted at source from the person who has deducted such tax at source and the revenue is barred from recovering the TDS amount from the person from whose income, tax has been deducted at source. Therefore, the fact that the revenue is unable to recover the tax deducted at source from the person who has deducted such tax would not entitle the revenue to recover the said

amount once again from the employee-assessee, in view of the specific bar contained in Section 205 of the Act.

24. As stated earlier, in the present case the petitioner-assessee has established that from his salary income, tax has been deducted at source by the employer-respondent No. 6 and, therefore, the revenue has to recover the said TDS amount with interest and penalty from the respondent No. 6 alone and the revenue cannot seek to recover the said amount from the petitioner-assessee in view of the specific bar contained under Section 205 of the Act. The fact that the petitioner is not entitled to the credit of the tax deducted at source for the non issuance of the TDS certificate by the respondent No. 6, cannot be a ground to recover the amount of tax deducted at source from the petitioner. In other words, even if the credit of the TDS amount is not available to the petitioner assessee for want of TDS certificate, the fact that the tax has been deducted at source from salary income of the petitioner would be sufficient to hold that as per Section 205 of the Act, the revenue cannot recover the TDS amount with interest from the petitioner once again.”

8. The situation arising in the present petition is similar. The department does not contend that the petitioner did not suffer deduction of tax at source at the hands of payer, but contends that the same has not been deposited with the Government revenue. As provided under Section 205 of the Act and as elaborated by this Court in case of **Yashpal Sahni (supra)** under

such circumstances the petitioner cannot be asked to pay the same again. It is always open for the department and infact the Act contains sufficient provisions, to make coercive recovery of such unpaid tax from the payer whose primary responsibility is to deposit the same with the Government revenue scrupulously and promptly. If the payer after deducting the tax fails to deposit it in the Government revenue, measures can always be initiated against such payers.

9. Counsel for the revenue is correct in pointing out that for long after issuing notice under Section 266(3) of the Act, petitioner has not brought this fact to the notice of the respondent No.2 which led the respondent No.2 to make recoveries from the bank account of the petitioner. In that view of the matter, at best petitioner may not be entitled to claim interest on the amount to be refunded.

10. Under the circumstances, petition is disposed of with following directions:

(i) Taking note of the fact that the respondents have lifted the

bank account attachment, no need to quash the attachment.

(ii) Two impugned notices dated 5th February, 2018 as at annexure “B” to the petition and 10th September, 2018 as at annexure “J” to the Petition for recovery are quashed.

(iii) The respondents shall refund a sum of Rs.3,67,600/- to the petitioner within four weeks from today. If so done, there shall be no interest liability, failing which beyond such period the respondents shall pay simple interest at the rate of 8% p.a. on such amount till actual payment.

11. In the result, the petition is disposed of accordingly.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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