

[2023] 149 taxmann.com 134 (Article)

Bar on direct demand against Deductee - Jus in re



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The Delhi High Court in a landmark decision in *Sanjay Sudan v. Asstt. CIT and another* [\[2023\] 148 taxmann.com 329/452 ITR 107](#) provided relief to an ex-kingfisher airlines employee in whose case taxes are deducted by the employer who defaulted in deposit of such TDS with the government. The Court prevented the department from recovering such TDS as well as also called upon the department not to make any adjustment of such amounts from any refunds due and payable in future. The judgement ruled:

"that neither could the demand in respect of the tax withheld by the deductor-employer be recovered from him, nor could such amount be adjusted against the future refund, if any, payable to the assessee. The Department was not entitled in law to adjust the demand raised for the assessment year 2012-13 against any other assessment year. The assessee was entitled to refund under section [237](#) in respect of the assessment year 2015-16."

The revenue plea that since the withholding tax amount is not reflected in form 26AS, the demand shall remain outstanding and that it cannot be effaced is not acceded to by the Court who quashed the demand notice in this case.

This has been a case of Kingfisher Airlines Limited employee who is a well known defaulter. The initial efforts made by filing grievances even failed in this case.

In this case providentially following were marked:

- A. The record showed that the withholding tax is reflected in form 16A (should be read as Form16) issued by the petitioner's employer, i. e., Kingfisher Airlines Limited.
- B. It has also come to knowledge of the revenue that Kingfisher Airlines Limited did not deposit the withholding tax and, hence, a demand amounting to Rs. 11,62,580 was raised by the respondents- Revenue, for the assessment year 2012-13.

On a similar issue, the Gujarat High Court, in the case of ***Kartik Vijaysinh Sonavane v. Dy. CIT***

[2021] 132 taxmann.com 293/[2022] 284 Taxman 278/440 ITR 11 (Gujarat), cancelled the demand raised upon an employee for the TDS amount not paid by his employer. Kartik was also a pilot in Kingfisher Airlines. Surprisingly, this case was not cited in Sanjay Sudan case (supra).

Also, Other than salary issue, in the case of deduction under **sec 194I**, The Karnataka High Court in the case of **Smt. Anusuya Alva v. Dy. CIT [2005] 147 Taxman 152/278 ITR 206** also held that if the tenant has deducted tax from the rent but has not paid it to the Government, the only course open to the revenue is to recover the amount from the tenant who has deducted the tax and not from the landlord.

Like this there are several other cases of employer companies who step in or out of NCLT forums or Enforcement Directorate or CBI or income tax lead investigations where the revenue is seized of information on defaults in deposit of taxes deducted from individual employees but are not deposited by the employer. The affected employees of such companies may take shelter from this decision of the Delhi High Court in Delhi NCR jurisdiction though but to make such plea it would be hard for them to gather fact of deduction of tax by the employer in the absence of Form 16 in their possession as no employer would issue a certificate admitting taxes withheld but not deposited with the government. Often in such case there is no even payslip issued by the employer. On the other hand, for an employee to follow the course of a writ petition often would be cost ineffective.

Relevant Provisions in the Act:

Section 205 of the Income-tax Act prohibits recovery of tax from a taxpayer if tax is already deducted from his income by the deductor. A person cannot be called upon to pay taxes if tax was deductible on his income and such tax has been deducted. (emphasis on "deducted" supplied)

Section 191 provides that the liability of a salaried person to make direct payment of the tax arises if no tax has not been deducted from his salary.(Again emphasis on "deducted" supplied)

Thus the provisions are crystal clear that once the TDS is deducted, the liability of the employee ceases to exist. Accordingly, a taxpayer shall be liable to pay the tax himself only if a particular income is not covered within the TDS provisions or if it is covered, **but tax has not been deducted**. He cannot be held liable if tax has been deducted but not paid to the Govt.

Further, if the amount has been deducted but not paid to the Central Government, that eventuality is taken care of by **Section 201** of the Income-tax Act. AO could not show that under the law, it may be permissible to proceed against the assessee even after deduction of the tax at source.

Clarifications issued

Considering the seriousness of the matter and continued litigations, the CBDT has issued Instruction dated 01-06-2015 and Instruction dated 11-03-2016 on this matter. The CBDT has clearly stated that in cases where TDS is deducted by the employer or deductor and the same has not been deposited with the Government, and the Assessing Officer cannot raise tax demands upon the payees.

Incumbent Duty of Revenue

Taxpayer's Charter issued by the highest tax body Central Board of Direct Taxes make a promise to provide complete and accurate information. It reads that the Department shall provide accurate information for fulfilling compliance obligations under the law. Where the employees fail to gather Form 16 or details of taxes withheld by the employer the revenue may step in and gather such details from the employer and

provide the same to the employee to defend his case against frivolous TDS demands.

de rigueur expectation from Revenue

In the light of the above said appalling facts and limitations faced by the employees / deductees to gather facts of TDS deducted by employer /deductor there is a Actiones strict Juris (Action of strict law) upon the revenue to help all those employees which is currently kept at abeyance. Taking cue from the Court decision the revenue may self-identify similar nature of frivolous demands in case of salaried employees where their employer in the corresponding have defaulted in deposit of TDS based on which the demands pending against employees be suo motu kept in abeyance or written off, as the case may be to protect the interests of employees and their refunds due and payable in future.

Food for Deliberations

- ◆ In the next possible Form 16 and the TDS returns may be suitably amended to showcase separately schedule for details of TDS deducted and details of TDS deposited during the financial year in employee case of deductions u/s 192 and those must also be highlighted in the Annual Information Statement (AIS).
- ◆ The penalties for issue of Form 16 currently is mere RS. 500 for every day failure must be risen to Rs. 1000 per day and more importantly such amounts should be compensated to the employee instead to make up for the mental agony and hardship just as in this case where future refunds are adjusted against frivolous demands.
- ◆ Apart from this sec 201(2) shall be strictly implemented and charge should be immediately created.
- ◆ Suitable modifications in faceless assessment system to incorporate all provisions of the ACT (special reference to section 205)

Conclusion

The deductee is legally entitled to benefit if the tax is already deducted. Remarkably, resort to writ is to be taken by the assessee for the matter that should be handled at AO level.

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