

Can the Assessee Withhold TDS to Adjust It against Excess Taxes Paid Earlier?

CS.PR. Raamaanathan*

The TDS deducted by the Assessee is not the Assessee's own tax liability but the Assessee is under obligation and duty to deposit the same with the Government and non-deposit of the TDS deducted by the Assessee is an apparent contradiction of the provisions of the Income Tax Act, 1961. The Mumbai bench of the Income-tax Appellate Tribunal in the case of HCC Pati Joint Venture v. Assistant Commissioner of Income-tax held that when there is failure of deduction of tax or failure to deposit the same, the Assessee will have to face penal consequences as per the Act. This article presents a thorough analysis of the case.

1. Introduction

Recently, the Mumbai bench of the Income-tax Appellate Tribunal in the case of *HCC Pati Joint Venture v. Assistant Commissioner of Income-tax*¹ held that notwithstanding the fact that an Assessee is entitled to claim refund of excess tax paid or get it adjusted against tax liability under provisions of Income Tax Act, 1961, Assessee cannot withhold TDS deducted from payment made so as to adjust same against excess taxes paid earlier. An analysis of the case has been attempted hereunder.

2. Brief Facts of the Case

During the assessment year 2005–06, the Assessee made several payments on different dates towards sub-contracting expenses. During the course of the assessment, the Assessing Officer noted that the Assessee has deducted the tax at source on the payments made to the various parties but not deposited within the financial year or before the due date. The Assessee made total payments of Rs.73,95,380 during the year. The Assessing Officer issued a notice to the Assessee to show cause as to why the expenses to the extent charged to profit and loss account and claimed of Rs. 32,87,534 should not be disallowed under Section 40(a)(ia) of the Income Tax Act, 1961. The Assessee submitted in response to the notice that during the financial year 2003–04 there was an excess deposit of tax to the tune of Rs. 1,26,417 and a portion of such excess deposit was adjusted against the current year's tax liability. The Assessing Officer rejected the explanation offered by the Assessee and disallowed the aforesaid payments. The Assessee challenged the disallowance of Rs. 32,87,534 under Section 40(a)(ia) of the Act. The Commissioner Appeals also upheld the disallowance in the first appeal preferred by the Assessee against the order. Hence, the Assessee preferred a second appeal before the Income Tax Appellate Tribunal, Mumbai.

3. Taxpayer's Submissions

The Assessee submitted that during the financial year 2003–04, there was excess deposits of tax which was intimated to the Assessing Officer and the same was deducted against the tax on the payment made in the current year and instead of being deposited had been adjusted against the said excess payment of TDS made in the immediately preceding financial year. The Assessee placed a reliance on the Circular No. 285, dated

* Dy. Gen. Manager (Corporate Affairs) and Company Secretary.

20th October, 1980 of the Central Board of Direct Taxes that the excess payment made by the Assessee which is more than the tax deducted at source should be adjusted against the existing tax liability and even after adjustment against such liability, the balance amount if any should be refunded to the Assessee.

The Assessee has further submitted that the department has not disputed that the excess deposits of tax by the Assessee in the previous year and therefore the Assessee is entitled for adjustment of the said excess payment against the current year tax liability. The Assessee also relied upon the decision of the jurisdictional High Court in the case of *BASF (India) Ltd. v. W. Hasan, CIT²* and submitted further that the said High Court has considered Circular No. 790, dated 20th April, 2000 and it held that the said circular gives the right to the refund of TDS to the deductor. Thus, the circular created vested right to claim of refund of TDS. The Assessee also submitted that when he is entitled for refund of excess deposit of tax, then on the same ratio, it has to be adjusted against the tax liability and therefore the disallowance made by the Assessing Officer under Section 40(a)(ia) was unjustified and illegal. The Assessee pleaded for setting aside the order of Assessing Officer.

4. Tax Department's Submissions

The department has submitted that there is no provision in the Income Tax Act, 1961 for adjustment of the excess tax deducted at source deposited by the deductor against the liability of the Assessee. Further submission was that the circular relied upon by the Assessee is only necessary administrative measure and the claim of the refund or adjustment has to be decided by the Assessing Officer and the Assessee has no right to adjust the same on its own. The circular of the Central Board of Direct Taxes is an administrative measure for refund of the excess TDS deposited by the deductor. Further contention of the department was that the said circular did not give right to the Assessee not to deposit the TDS deducted for the subsequent assessment year.

5. Tribunal's Ruling

The Income Tax Appellate Tribunal, Mumbai bench, after considering the rival contentions, held that there was no dispute about refunding of excess TDS after adjustment of existing tax liability in terms of Circular 285 of the Central Board of Direct Taxes and in terms of ruling of the jurisdictional High Court in the case of *BASF (India) Ltd.*, the Assessee has vested right to claim the refund of the excess payment of TDS. But, whether the Assessee is entitled not to deposit the TDS amount deducted for the payments made and claim adjustment of the excess payment made in the earlier years. The real issue in the case was disallowance of the claim of expenditure on the basis that the Assessee deducted the tax but not deposited with the Government within the period as prescribed under the statute and Section 40(a)(ia) and not about the non-refunding of the excess payment of TDS or adjustment of the excess payment against the current tax liability. The undisputed fact is that the Assessee made the payment to sub-contractor and deducted the taxes but the same was not deposited with the Government on the pretext that the Assessee has adjusted the same against the excess payment in the earlier years. When there is failure of deduction of tax or failure to deposit the same, the Assessee will have to face penal consequences as per the Act. The provisions of Section

40(a)(ia) are in the nature of additional measure to ensure the deduction and deposit of the tax deducted at source within time.

The Assessee made more payment than what is required and the CBDT has given right to the deductor to claim either refund or adjust the excess payment. The refund and claim of excess payment against tax due has to be decided by the revenue authorities. But in the garb of the said claim of excess deposit of the TDS deducted by the Assessee on the payment during subsequent year cannot be withheld by the Assessee. The Assessee has to deposit the TDS in compliance with the provisions of the Act. Since the TDS deducted by the Assessee is not the Assessee's own tax liability but the Assessee is under obligation and duty to deposit the same with the Government and therefore, non-deposit of the TDS deducted by the Assessee is an apparent contradiction of the provisions of the Act.

Besides, when tax is deducted at source on the payment, the said payment would be allowed as expenditure if the Assessee fulfils the requirements of Section 40(a)(ia) of the Act. Assessee cannot withhold the tax deducted at source, notwithstanding the fact that the Assessee is entitled to claim the refund or get it adjusted against the tax liability under the provisions of the Act.

In view of the above proposition, the Tribunal held that when the Assessee undisputedly the deducted the tax but to the extent the same was not deposited with the Government, the provisions of Section 40(a)(ia) are attracted and the claim of the deduction of such expenditure would be disallowed. Finally, the Tribunal held that there was no error or illegality in the order of the lower authorities *qua* this issue and at the same time the Assessee has a right to claim refund of TDS or adjustment against the current tax liability.

6. Conclusion

This is a significant decision of the Mumbai Tribunal wherein it was held that when an Assessee deducted tax at source on the payments made by him has to be deposited with the Government within the stipulated time. If he has not done so, Section 40(a)(ia) of the Income Tax Act, 1961 would get attracted and the claim of deduction of expenditure would be disallowed. However, this would have no bearing on the right of the Assessee to claim the refund or adjustment against the current liability of tax.

1. MANU/IU/0823/2011

2. MANU/MH/1137/2005