

(2012) 08 P&H CK 0325

High Court Of Punjab And Haryana At Chandigarh

Case No: Writ Petition No. 10258 of 2012

Serco BPO (P) Ltd.

APPELLANT

Vs

Assistant
Commissioner of
Income TaxRESPONDENT

Date of Decision: Aug. 14, 2012**Acts Referred:**

- Constitution of India, 1950 - Article 226, 227
- Income Tax Act, 1961 - Section 192, 193, 194, 194A, 194C

Citation: (2012) 253 CTR 410 : (2013) 169 PLR 251 : (2012) 210 TAXMAN 381**Hon'ble Judges:** Gurmeet Singh Sandhawalia, J; Ajay Kumar Mittal, J**Bench:** Division Bench**Advocate:** Salil Kapoor with Saurabh Kapoor, for the Appellant; Yogesh Putney, for the Respondent

Judgement

Ajay Kumar Mittal, J.

In this petition filed under Art. 226/ 227 of the Constitution of India, the petitioner a private limited company has sought issuance of directions by way of a writ of mandamus to the respondent to issue tax deduction certificate (TDC) under s. 197 of the IT Act, 1961 (in short, "the Act") for the financial year 2012-13. A few facts relevant for the decision of this case, as narrated in the petition may be noticed. The petitioner is a company incorporated under the provisions of the Companies Act, 1956 and is subsidiary of Serco BPO Holdings (P) Ltd. It is engaged in providing business support services to domestic customers through its business processing outsourcing units in India. Provision of business support services to customers in the domestic Indian market involves aggressive price competition with relatively low margins due to existence of multiple players in the market. The same has resulted in significant losses to the petitioner. According to the petitioner, in view of substantial losses incurred by it during the financial years 2008-09 to 2011-12, the estimated taxable income shall be nil. The petitioner is

also likely to incur losses during the financial year 2012-13. Delayed issuance of tax deduction certificates under s. 197 of the Act has adversely impacted the cash flow position of the petitioner, thereby causing significant financial hardship to the petitioner. Accordingly, the petitioner filed an application dt. 3rd April, 2012 under s. 197 of the Act for issuance of a nil tax deduction certificate in respect of revenues receivable from its customers during the financial year 2012-13, Annex. P.7. A show-cause notice dt. 25th April, 2012, Annex. P.8 was issued to the petitioner. The petitioner filed its reply to the notice, Annex. P.9. On 21st May, 2012, the application under s. 197 of the Act filed by the petitioner was rejected primarily on the ground of pendency of proceedings under ss. 276B and 271C of the Act. Hence this petition.

2. Notice of the petition was issued to the respondent. In The written statement filed on behalf of the respondent, the action has been sought to be justified on the ground that the penalty proceedings under s. 271C and prosecution proceedings under s. 276B of the Act are pending against the petitioner for not complying with the provisions of tax deduction at source (IDS). It has been further stated that though the petitioner has incurred losses in the past, yet the estimated tax liability did not justify the issuance of certificate under s. 197 of the Act r/w r. 28AA of the IT Rules, 1962 (for brevity, "the Rules"). Further, the petitioner has not availed the statutory remedy of revision under s. 264 of the Act. On the above premises, prayer for dismissal of the petition has been made.

3. Learned counsel for the petitioner submitted that under s. 197 r/w r. 28AA of the Rules, the respondent-Department can decline issuance of TDC in following two eventualities :

(i) in case the AO was not satisfied that the recipient had justified the deduction of income tax at any lower rates; or

(ii) no deduction of income tax was to be made on the income of the recipient.

According to the counsel, any other consideration was legally not permissible and the respondent has tried to justify the rejection of application for issuance of TDC under s. 197 of the Act which is legally not justified. Learned counsel has relied upon judgment of the Bombay High Court in [Larsen and Toubro Ltd. and Another Vs. The Assistant Commissioner of Income Tax \(TDS\) and Others](#), to substantiate his contention.

4. Controverting the aforesaid submissions, learned counsel for the Revenue raised two-fold submission :

(a) The assessee-petitioner had violated the provisions of TDS and proceedings under ss. 276B and 271C of the Act were pending;

(b) The petitioner had the remedy of revision under s. 264 of the Act in view of judgment of the Delhi High Court in , [SIS Live Vs. Income Tax Officer](#),

On the aforesaid premises, it was submitted that the writ petition was liable to be dismissed.

5. We have heard learned counsel for the parties and perused the record.

6. It would be expedient to reproduce s. 197 of the Act which reads thus :

197(1) Subject to rules made under sub-s. (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 ss. 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA and 195, the AO 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, as the case may be, the AO shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.

(2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the AO, deduct income tax at the rates specified in such certificate or deduct no tax, as the case may be.

(2A) The Board may, having regard to the convenience of assesseees and the interests of Revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-s. (1) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

7. This section provides that where, the tax is deductible at source in terms of ss. 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA and 195 of the Act and the recipient justifies the deduction of tax at any lower rate or no deduction of tax is to be made to the satisfaction of the AO, the AO shall issue the requisite certificate. The effect of issuance of such certificate would be that the person responsible for paying the income shall or shall not deduct tax in terms of the certificate so issued. Under sub-s. (2A), enabling powers have been conferred on the Board to make rules for prescribing procedure in relation to the issue of certificates by the AO for no deduction of tax at source or deduction at a lower rate. It empowers the Board to make rules specifying (i) the cases in which and the circumstances under which, an application may be made for the grant of a certificate under sub-s. (1); and (ii) the conditions subject to which such certificate may be granted and providing for all other matters connected there with.

8. Rules 28(1), 28AA, 28AB and 29 of the Rules are relevant for the purposes of this section. Rule 28(1) *ibid* stipulates that an application by a person for a certificate under sub-s. (1) of s. 197 shall be made in Form No. 13. Rule 28AA deals with certificate for deduction at lower rates or no deduction of tax from income other than dividends. Rule 28AB provides for certificate of no deduction of tax in case of certain entities whereas r. 29 relates to certificate of no deduction of tax or deduction at lower rates from dividends.

For resolving the present controversy, r. 28AA is the relevant rule. Rule 28AA of the Rules reads thus :

Rule 28AA.--(1) Where the AO, on an application made by a person under sub-r. (1) of r. 28 is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, as the case may be, the AO shall issue a certificate in accordance with the provisions of sub-s. (1) of s. 197 for deduction of tax at such lower rate or no deduction of tax.

(2) The existing and estimated liability referred to in sub-r. (1) shall be determined by the AO after taking into consideration the following :

(i) tax payable on estimated income of the previous year relevant to the assessment year;

(ii) tax payable on the assessed or returned income, as the case may be, of the last three previous years;

(iii) existing liability under the IT Act, 1961 and WT Act, 1957;

(iv) advance tax payment for the assessment year relevant to the previous year till the date of making application under sub-r. (1) of r. 28;

(v) tax deducted at source for the assessment year relevant to the previous year till the date of making application under sub-r. (1) of r. 28; and

(vi) tax collected at source for the assessment year relevant to the previous year till the date of making application under sub-r. (1) of r. 28.

(3) The certificate shall be valid for such period of the previous year as may be specified in the certificate, unless it is cancelled by the AO at any time before the expiry of the specified period.

(4) The certificate shall be valid only with regard to the person responsible for deducting the tax and named therein.

(5) The certificate shall be issued direct to the person responsible for deducting the tax under advice to the person who made an application for issue of such certificate.

9. Under sub-r. (1) of r. 28AA of the Rules, on satisfaction of the AO that the existing and estimated tax liability of a person justifies the deduction of tax at lower rate or no deduction of tax, the AO shall issue a certificate in terms of s. 197(1) of the Act. Sub-r. (2) enumerates the manner for determination of existing and estimated liability referred to in sub-r. (1). The certificate remains operative for the period specified therein until cancelled by the AO under sub-r. (3). It remains valid only with regard to the person responsible for deducting the tax and named therein in terms of sub-r. (4). Sub-r. (5) provides that the certificate shall be issued direct to the person responsible for deducting the tax under

advice to the person who made the application to the AO.

10. The issue of certificate under sub-s. (1) of s. 197 of the Act is mandatory on fulfilment of conditions enumerated under the rules. For determining the existing and estimated liability of the assessee where tax deduction is from income other than dividends, the AO is to be guided by sub-r. (2) of r. 28AA of the Rules. The AO cannot be held justified to plead that though the assessee fulfils the requisite conditions stipulated under r. 28AA or the concerned rule, but shall not grant the certificate in exercise of his discretion. The power vested in the AO is to be exercised in a judicious manner. He is required to furnish reasons while deciding the application filed by the assessee. The perusal of the application filed by the assessee clearly demonstrates that the AO had rejected the application on twin grounds :

- (i) the assessee had violated the provisions of TDS; and
- (ii) proceedings under ss. 276B and 271C of the Act were pending.

None of these grounds validly form part of reasons for rejecting an application filed by an assessee under s. 197(1) of the Act read with r. 28AA of the Rules. The order rejecting the application of the petitioner is patently illegal being contrary to law and the AO had failed to exercise jurisdiction vested in him under the Act.

11. The objection raised by the Revenue with regard to alternative remedy of revision available under s. 264 of the Act as held by the Delhi High Court in SIS Live"s case (supra) and also by the Bombay High Court in Larsen & Toubro Ltd."s case (supra) cannot act as a complete bar to the exercise of writ jurisdiction of this Court.

12. The apex Court in Ram & Shyam Company vs. State of Haryana & Ors. AIR 1985 SC 1147 delving into this issue had noticed as under :

Ordinarily it is true that the Court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Art. 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. More often, it has been expressly stated that the rule which requires the exhaustion of alternative remedies is a rule of convenience and discretion rather than rule of law. At any rate it does not oust the jurisdiction of the Court.

It was further observed that where the order challenged is patently illegal or invalid as being contrary to law, the petition would lie to the High Court.

Accordingly, the order declining issuance of certificate in terms of s. 197 of the Act r/w r. 28AA of the Rules cannot be legally sustained. While allowing the writ petition, a direction is thus, issued to the AO to redecide the application within a period of two weeks from the date of receipt of certified copy by passing a fresh order in accordance with law keeping in view the observations made hereinabove.