(2014) 271 CTR 89 : (2014) 369 ITR 673

Gujarat High Court

Case No: Special Civil Application No. 2349 of 2014

Sumit Devendra Rajani	APPELLANT
Vs	
Assistant Commissioner of Income Tax	RESPONDENT

Date of Decision: June 23, 2014

Acts Referred:
Constitution of India, 1950 â€" Article 226#Income Tax Act, 1961 â€" Section 143(1), 154, 16, 194J, 201

Citation: (2014) 271 CTR 89 : (2014) 369 ITR 673

Hon'ble Judges: Mukesh R. Shah, J; Kaushal Jayendra Thaker, J

Bench: Division Bench

Advocate: Ketan H. Shah, Advocate for the Appellant; Mauna M. Bhatt, Advocate for the Respondent

Judgement

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Mukesh R. Shah, J.
Rule. Ms. Mauna Bhatt, learned advocate waives service notice of Rule on behalf of respondent. In the facts and

circumstances of the case and with the consent of the learned advocates for the respective parties, the present Special Civil Application is taken up

for final hearing today.

2. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction and order

quashing and setting aside the recovery notice dated 06.01.2012 (Annexure D), by which, the petitioner-assessee has called upon to pay demand

of Rs. 6,82,148/- raised under Section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the ""Act"") for the AY 2010-11.

3. The facts leading to the present petition in nutshell are as under:

3.1. That the petitioner is an individual and assessed to tax under the Act, therefore, for the AY 2010-11 the petitioner filed his return of income

dated 30.12.2010 declaring net taxable income of Rs. 29,54,982/-. In the return of income, the petitioner also claimed the credit of tax deducted

at source of total Rs. 5,86,606/- TDS deducted by his employer M/s. Amar Remedies Limited. However, without giving credit of the TDS

deducted by his employer M/s. Amar Remedies Limited on the salary income as well as on the amount received towards professional and

technical fees received from the said M/s. Amar Remedies Limited, the department has raised the demand of Rs. 6,82,148/- by impugned notice

issued under Section 221(1) of the Act.

3.2. It is the case of the petitioner that the petitioner was received salary income of Rs. 21,50,400/- from M/s. Amar Remedies Limited, Mumbai

and out of the said salary income, TDS is deducted of Rs. 5,86,606/- by the said M/s. Amar Remedies Limited. It is the case of the petitioner that

the petitioner was also receiving the professional and technical fees from the said M/s. Amar Remedies Limited of Rs. 24,00,000/- and TDS

deducted by the said M/s. Amar Remedies Limited is of Rs. 2,40,000/-. It is the case of the petitioner that the petitioner received both TDS

certificate i.e. in respect of salary income in Form No. 16 on 22.09.2010 and in respect of professional and technical fees in the form of 16A

dated 22.08.2010 from his employer-M/s. Amar Remedies Limited mentioning PAN-AAACA3774G and TAN of the deductor as

MUMA21298E. It is the case of the petitioner that Form No. 16 dated 22.09.2010, it is found that they have furnished that they have furnished

TDS statement also of various quarters i.e. quarter nos. I, II, III and IV as per the acknowledgment number mentioned therein. According to the

petitioner, TDS was made on two occasions i.e. Rs. 1,58,486/- and Rs. 4,28,120/- vide cheque no. 0076, BSR Code No. 0261632 of the Bank,

which was deposited by the employer on 02.08.2010 and 02.09.2010 vide challans No. 54601 and 83046 respectively. It is the case on behalf of

the petitioner that as such the aforesaid Form No. 16 dated 22.09.2010 regarding TDS under the head salaries was duly signed by one Srinivas D.

Samudra, Accounts Manager of Amar Remedies Limited, Mumbai. It is also the case on behalf of the petitioners that petitioner has also received

Form No. 16 A dated 22.08.2010 under Section 194J for TDS of Rs. 24,00,000/- in reference to professional charges of Rs. 24,00,000/- from

M/s. Amar Remedies Limited wherein the details regarding TDS return filed by the deductor and the PAN and TAN number were also mentioned

by them. It is submitted that the said TDS of Rs. 2,40,000/- was deposited by cheque no. 776 on 24.07.2010 vide challan no. 47008 and BSR

Code No. 261632 of the Bank.

3.3. It is the case on behalf of the petitioner that despite the above and without giving credit of the tax deducted at source at Rs. 5,86,606/-,

demand of Rs. 6,82,148/- has been raised.

3.4. It is the case on behalf of the petitioner that immediately on receipt of impugned notice under Section 221(1) of the Act, the petitioner

addressed a letter dated 13.1.2012 drawing the attention of the authority submitting that so called demand raised may be pertaining to non giving

of proper credit of TDS claimed from M/s. Amar Remedies Limited. It is the case on behalf of the petitioner that even the petitioner also submitted

the application under Section 154 of the Act in reference to notice under Section 221(1) of the Act, which has not been disposed of. It is also the

case on behalf of the petitioner that petitioner''s advocate addressed letter dated 30.10.2013 enclosing therewith Form No. 26AS also to

respondent no. 1 and requested to dispose of application dated 13.1.2012 and to serve so-called intimation under Section 143(1) of the Act. It is

the case on behalf of the petitioner that thereafter and despite the above, respondent no. 2 has issued intimation under Section 245 dated

22.11.2013 starting recovery of demand and adjusted the refund of AY 2013-14 of Rs. 1290/- against the outstanding demand of AY 2010-11.

Hence, petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India.

4. Shri Ketan Shah, learned advocate for the petitioner has vehemently submitted that impugned demand/recovery notice of Rs. 6,82,148/- subject

to penalty under Section 221(1) of the Act without giving any credit of the tax deducted at source of total Rs. 5,86,606/- is absolutely illegal and

most arbitrary. It is submitted that as per Form No. 16 and 16 A deductor-M/s. Amar Remedies Limited as such TDS of Rs. 5,86,606/-,

particulars of which are given in Form no. 16 and 16A and as such petitioner-assessee has received the less amount i.e. amount after deducting

TDS. It is submitted that even in the Form no. 26AS there is mentioned that the amount of TDS deducted however in the Form No. 26AS credit

of Rs. 2,40,000/- only has been given and as such no credit of Rs. 5,86,606/- has been given. Relying upon Section 205 of the Act, it is submitted

by Shri Shah, learned advocate for the petitioner that even in a case where deductor may not have deposited the amount of TDS, where tax is

deductible at the source under Chapter XVII, assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted

from that income. It is submitted that in such case the department is required to recover amount from the deductor and no such recovery can be

made from assessee. It is submitted that, therefore, once the amount is deducted by the deductor, in the present case by the employer-M/s. Amar

Remedies Limited and for which form under Section 16 and 16A has been issued by the deductor, the department bound to give the credit to the

tax deducted at source of Rs. 5,86,606/-. It is submitted that therefore, the impugned demand/recovery notice without giving credit of TDS of Rs.

5,86,606/- is absolutely illegal and most arbitrary which deserves to be quashed and set aside.

4.1. Shri Shah, learned advocate for the petitioner has heavily relied upon the decision of the Gauhati High Court in the case of Assistant

Commissioner of Income Tax and Others Vs. Om Prakash Gattani, and the decision of the Bombay High Court in the case of Yashpal Sahni Vs.

Rekha Hajarnavis, Assistant Commissioner of Income Tax and Others, . Shri Shah, learned advocate for the petitioner has also relied upon the

another decision of the Bombay High Court in the case of The Director of Income Tax (International Taxation) Vs. NGC Network Asia LLC, as

well as decision of the Karnataka High Court in the case of Smt. Anusuya Alva Vs. Deputy Commissioner of Income Tax and Others, as well as

decision of the Division Bench of this Court in the case of Commissioner of Income Tax Vs. Ranoli Investment Pvt. Ltd. and Others, , in support

of his above submissions and in support of his prayer to allow the present Special Civil Application and to direct the department to give credit of

TDS of total Rs. 5,86,606/-.

4.2. Making above submissions and relying upon the above decisions, it is requested to allow present Special Civil Application and grant the relief

as prayed for.

5. Ms. Mauna Bhatt, learned advocate has appeared on behalf of the respondent-revenue. An affidavit in reply is filed by the Assessing Officer. It

was submitted that as such no TDS credit of Rs. 5,86,606/- on account of Form No. 16A by M/s. Amar Remedies Limited appeared on the ITD

system of department and therefore, no credit of the TDS was given to the assessee. It was further submitted that even in 26AS statement of the

assessee, no such TDS deduction of Rs. 5,86,606/- was reflected. It is submitted that the only the amount of Rs. 24,000/- deposited by Amar

Remedies Limited against form No. 16A and Rs. 4333/- by Union Bank against form no. 16A were reflected in the system, which were given

credit to the assessee at the time of processing of return. It was further submitted that however as the credit of TDS of Rs. 5,86,606/- was not

given, as no such credit of TDS is available with the department.

5.1. Today, when the present petition was taken up for final hearing, Ms. Bhatt, learned advocate for the revenue has placed on record one

communication dated 12.06.2014 by the Assistant Commissioner of Income Tax (OSD), Circle-10, Ahmedabad, by which, it is reported that

aforesaid efforts were made from Mumbai office (Income Tax Department) to gather the information from deducto i.e. Amar Remedies Limited

vide letter dated 06.05.2014 and/or direct to supply the details of TDS deducted and deposited in the case of assessee for the AY 2010-11. It is

submitted that in response, the deductor vide his letter dated 12.5.2014 has requested some time for verify all data and necessary documents and

enclosed a copy of TDS challan and court order. It is submitted that on perusal of the aforesaid letter, it is found that the amount of Rs. 5,77,333/-

was deposited by the deductor on 14.7.2010, TDS amount allocated against Rs. 2,40,000/- for F.Y. 2009-10 and the balance amount of Rs.

3,37,333/- allocated against Rs. 5,86,606/-. It is submitted that however no evidence regarding claimed of Rs. 3,37,333/- has been provided by

the deductor till date. It is further stated in the said communication that after availability of ITD and BCP, deductee details in the case of ARL have

been uploaded from ITD systems by the Mumbai office and found that in quarter 4 of 24Q Rs. 1,58,486/- and in quarter 4 of 26Q Rs. 2,40,000/-

deposited on 31.3.2010 in the name of Shri Devendra Rajani. It appears that assessee mentioned wrong PAN AAHPR3027C instead of PAN:

AAHPR3027P for the quarter 4 of 24Q. It is stated that the deductor has been asked to submit the details in the case of assessee vide letter dated

22.5.2014 and 30.5.2014, however no reply has been received till date. It is further stated that in absence of details/evidence from the deductor

side, the Department may give the credit of TDS amounting to Rs. 2,40,000/- and further of Rs. 1,58,486/- only as available with the ITD

systems. It is further stated that in future if the details of so claimed TDS provided by the deductor the department may give the credit of the same

after due verification. The said communication dated 12.06.2014 is directed to be taken on record. Considering the aforesaid factual background,

present petition is required to be considered.

6. Heard Shri Ketan Shah, learned advocate for the petitioner-assessee and Ms. Mauna Bhatt, learned advocate for the Income Tax Department.

7. The grievance which is voiced in the present petition by the assessee is that though deductor-employer-Amar Remedies Limited had deducted

TDS for total Rs. 5,86,606/- and for which Form 16 A has been issued by it, department has not given credit of the said TDS to the petitioner-

assessee-deductee and when the assessee has claimed the said deduction, the same has not been granted and demand is raised by issuing notice at

Annexure D. Therefore, short question which is posed for consideration of this Court is whether in case the deductor had deducted the TDS and

for the same Form no. 16A has been issued by deductor, the credit of the same can be denied to the assessee and deductee solely on the ground

that such credit does not appear on ITD system of the department and/or same does not match with the ITD system of the department ?

8. At the outset, it is required to be noted that under Chapter XVII, more particularly, Section 204 of the Act the liability to deduct the tax at

source would be upon the employer/payer/deductor-in the present case Amar Remedies Limited. As per Section 205 of the Act whether tax is

deductible at source under Chapter XVII, the assessee shall not be called upon to pay tax himself to the extent to which tax has been deducted

from that income. That the deductor is required to issue Form no. 16 A providing particulars with respect to the amount of tax deducted at source

in the relevant assessment year. In the present case, it is the case on behalf of the petitioner and/or as per the return of income filed the total sum of

Rs. 5,86,606/- has been deducted by the deductor-Amar Remedies Limited as TDA and for which M/s. Amar Remedies Limited-deductor has

issued Form no. 16A. It is also the case on behalf of the petitioner that out of total salary of Rs. 21,60,000/- to be received from M/s. Amar

Remedies Limited-deductor he has received salary after deducting the amount of tax at source by the deductor for which form no. 16A has been

issued i.e. he has received Rs. 5,86,606/- and on account of said amount deducted at source by the M/s. Amar Remedies Limited. Under the

circumstances and considering Sections 204 and 205 when the deductor who is liable to deduct the tax at source under Chapter XVII deducts the

TDS and issued form no. 16A the assessee-deductee shall be entitled to credit of the same. As stated above and as per Section 205 of the Act

whether tax is deductible at the source under Chapter XVII, the assessee shall not be called upon to pay the tax himself to the extent of which tax

has been deducted from that income. Meaning thereby, the assessee/deductee is entitled to credit of such amount of TDS. Assuming that in a given

case the deductor after deducting the TDS may not have deposited with the department. However, in such situation, the department is to recover

the said amount from the deductor and assessee-deductee cannot deny the credit of the same. Identical question came to be considered by the

Bombay High Court in the case of Yashpal Sahni (supra) and considering Section 205 of the Act in para 15 of the Bombay High Court has

observed as under:

15. Chapter XVII of the IT Act, 1961 provides for collection and recovery of tax by two modes. They are (one) directly from the assessee and

(two) indirectly by deduction of tax at source. In the present case, we are concerned with the second mode of recovery, namely recovery of tax by

deduction at source.

9. In the said decision, the Bombay High Court has considered and relied upon the decision of the Om Prakas Gattani (supra). In the said decision

the Gauhati High Court after considering the relevant provision under Chapter XVII has observed and held that so far as assessee is concerned, he

is not supposed to do anything in the whole transaction except that he is to accept the payment of the reduced amount which is deducted income

tax at source. It is observed that on the amount being deducted the assessee only gets a certificate to that effect by the person responsible to

deduct the tax. In the said decision Gauhati High Court has quashed and set aside the notice issued under Section 226(3) of the Act to the bankers

of the assessee observing in para 7 as under:

7. So far the assessee is concerned, he is not supposed to do anything in the whole transaction except that he is to accept the payment of the

reduced amount from which is deducted income-tax at source. The responsibility to deposit the amount deducted at source as tax is that of the

person who is responsible to deduct the tax at source. On the amount being deducted the assessee only gets a certificate to that effect by the

person responsible to deduct the tax. In a case where the amount has been deducted by the person responsible to deduct the amount under the

statutory provisions, the assessee has no control over the matter. In case of default in making over the amount to the account of the Central

Government, it is obviously the person responsible to deduct or the person who has made the deduction who is held responsible for the same. The

responsibility of such person is to the extent that he has to be deemed to be an assessee in default in respect of the tax. He may be deemed to be

an assessee in default not only in cases where after deduction he does not make over the amount to the Central Government but also in cases

where there is failure on his part to deduct the amount at source. This responsibility has been fastened upon him under Section 201 of the Income-

tax Act. It is, of course, without prejudice to any other consequences which he or it may incur. Presently we are not concerned with the case

where the person responsible to make the deductions has not deducted the amount at all. It may or may not fall in a different category from one

where the amount has been deducted and not made over to the Central Government. We are concerned with the latter category of cases. As

indicated earlier, on the facts it is nobody''s case that the amount was actually not deducted at source by Chandra Agencies. What seems to be in

dispute is the deposit of the said amount in the account of the Central Government. The Income-tax Department seems to have made enquiries

about the exact date of payment to the Central Government which Chandra Agencies could not furnish on the ground that the papers were

forwarded to the chairman of Vaibhavshali Bumper. In such a category of cases we feel that the amount of tax can be recovered by the Income-

tax Department treating the person responsible to deduct tax at source as an assessee in default in respect of the tax. It would not be possible to

proceed to recover the amount of tax from the assessee. The assessee cannot be doubly saddled with the tax liability. Deduction of tax at source is

only one of the modes of recovery of tax. Once this mode is adopted and by virtue of the statutory provisions the person responsible to deduct the

tax at source deducts the amount, only that mode should be pursued for the purpose of recovery of tax liability and the assessee should not be

subjected to other modes of recovery of tax by recovering the amount once again to satisfy the tax liability. It is, therefore, provided under Section

201 of the Income-tax Act that the person responsible to deduct the tax at source would be deemed to be an assessee in default in case he

deducts the amount and fails to deposit it in the Government treasury. As observed earlier, the assessee has no control over such person who is

responsible to deduct the income-tax at source, but fails to deposit the same in the Government treasury. In this light of the matter, in our view, the

notices issued under Section 226(3) of the Income-tax Act to the bankers of the petitioner-respondent to satisfy the tax liability from the bank

account of the petitioner-respondent are illegal. It is not that the Income-tax Department was helpless in the matter. The person responsible to

deduct the tax at source would move into the shoes of the assessee and he would be deemed to be an assessee in default. Whatever process or

coercive measures are permissible under the law would only be taken against such person and not the assessee.

10. We are in complete agreement with the view taken by the Bombay High Court and Gauhati High Court. Applying the aforesaid two decisions

of the Bombay High Court as well as Gauhati High Court, the facts of the case on hand and even considering Section 205 of the Act action of the

respondent in not giving the credit of the tax deducted at source for which form no. 16A have been produced by the assessee- deductee and

consequently impugned demand notice issued under Section 221(1) of the Act cannot be sustained. Concerned respondent therefore, is required

to be directed to give credit of tax deducted at source to the assessee-deductee of the amount for which form no. 16A have been produced.

11. In view of the above and for the reasons stated petition succeeds. It is held that the petitioner-assessee-deductee is entitled to credit of the tax

deducted at source with respect to amount of TDS for which Form No. 16A issued by the employer-deductor-M/s. Amar Remedies Limited has

been produced and consequently department is directed to give credit of tax deducted at source to the petitioner-assessee-deductee to the extent

form no. 16A issued by the deductor have been issued. Consequently, the impugned demand notice dated 6.1.2012 (Annexure D) is quashed and

set aside. However, it is clarified and observed that if the department is of the opinion deductor has not deposited the said amount of tax deducted

at source, it will always been open for the department to recover the same from the deductor. Rule is made absolutely to the aforesaid extent. In

the facts and circumstances of the case, there shall be no order as to costs.