IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 6193 of 2021

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KARTIK VIJAYSINH SONAVANE

Versus

DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 8

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Appearance:
DARSHAN R PATEL(8486) for the Petitioner(s) No. 1
MR.VARUN K.PATEL(3802) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE SONIA GOKANI** and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 15/11/2021

ORAL ORDER
(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. Here is the petitioner who is a pilot by profession and was an employee of M/s. Kingfisher Airlines. The Kingfisher Airlines deducted the Tax Deducted at Source ('TDS' hereinafter) to the tune of Rs. 7,20,100/- for the Assessment Year 2009-10 and Rs. 8,70,757/- for the Assessment Year 2011-12 in case of the petitioner. The amount since had not been deposited by the Airlines in the Central Government Account, the credit when claimed by the petitioner, the same was obviously not given by the respondent and the demand had been raised with interest.

2. This since had aggrieved the petitioner, he approached

this Court challenging the recovery notices dated 19.11.2013 and 21.08.2014 with the following prayers: -

> *"(A) Issue a writ of certiorari and/or a writ of mandamus and/or any other writ direction or order directing the respondent to cancel the outstanding demand as reflected on IT Portal at Annexure- C and to cancel the unjust demand raised by the respondent by issuance of recovery notices dated 19.11.2013 at Annexure – F, notices dated 21.08.2014 at Annexure - J (Colly) and notice issued on 22.12.2015 at Annexure -K;*
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> *(B) Issue a writ of certiorari and/or a writ of mandamus and/or any other writ direction or order directing the respondent to cancel the outstanding demand as reflected on IT Portal at Annexure-C and to cancel unjust demand raised by the respondent by issuance of recovery notices dated 19.11.2013 at Annexure -F, notices dated 21.08.2014 at Annexure- J (Colly) and notice issued on 22.12.2015 at Annexure-K, and to return the amount already adjusted by the respondent along with statutory interest.*
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> *(C) Award the cost of this petition.*
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> *(D) Grant such other and further reliefs as this Hon'ble Court deems fit."*

3. It is averred that the petitioner had filed the return of income for the assessment years 2009-10 and 2011-12 and he claimed the TDS of Rs. 7,20,100/- and Rs. 8,70,757/-respectively as the tax paid in advance.

3.1. The department had raised the demand of the said amount and on 12.12.2019, the amount of Rs. 89,960/- had been adjusted against the demand for the assessment year 2019-2020. This was informed to the petitioner by State Bank

of India.

3.2. He preferred an application under Section 154 of the Income Tax Act before the respondent no. 1 on 29.03.2010 and sought the refund for the assessment year 2009-10. On 19.11.2013, a notice had been issued to the petitioner for recovery of the outstanding arrears to the tune of Rs. 11,26,775/- for the assessment year 2011-12.

3.3. The request was made by the petitioner for canceling the demand for the assessment year 2009-10 vide its communication dated 07.12.2013. He also filed an application under Section 154 of the IT Act on 18.12.2013 for the assessment year 2011-12 and made a similar request to the respondent no.1. He reiterated such request in a combined manner on 17.09.2014 and urged for the cancellation of the demands.

3.4. His essential plea was that the obligation of the employer cannot be thrust upon him however, paying no head to such a request, the respondent issued the recovery notice on 21.08.2014 for both the assessment years 2009-10 and 2011-12.

3.5. Once again, the demand notice had been issued on

22.12.2015 for the assessment year 2011-12. The petitioner made request on 13.01.2016 to the respondent to drop the recovery proceedings and cancel the demands. This was reiterated on 23.12.2019.

3.6. As all such requests fell on deaf ears, he has chosen to approach this Court with the aforementioned prayers.

4. The affidavit-in-reply is filed by the respondent – Joint Commissioner of Income Tax (OSD), Circle 1(1)(1), Vadodara, who *inter alia* stated that the petitioner failed to disclose the violation of any of his statutory or constitutional right and hence, the petition under Article 226 cannot be maintained.

4.1. According to respondent, it was a duty of the petitioner to join the necessary parties i.e. the Kingfisher Airlines as according to the petitioner, the employer has deducted the TDS and not deposited to the government. There is a gross delay and latches in preferring the petition since the TDS was deducted during the financial years 2008-09 and 2010-11 and it was urged that the petition is not to be sustained.

4.2. According to the respondent, it is not in dispute that the petitioner was working as an employee with the Kingfisher Airlines and the employer deducted the amount of TDS from

his salary for the assessment years 2009-10 and 2011-12, but has failed to discharge the liability of depositing the same. In absence of any TDS reflected in the system, which is averred to have been deducted by the deductor, and his failure to submit even Form-16 issued by them for the assessment year 2011-12, would also not entitle him to get the TDS credit.

4.3. It is thus the say of the respondent that in the present case, the system of Income Tax Department would not allow such credit on the TDS in absence of the deposit of the TDS by the deductor, the demand notice had been issued.

5. Rejoinder affidavit also has been filed which may not be required further elaboration.

6. We have heard learned advocate Mr. Darshan Patel appearing for the petitioner and learned Senior Standing Counsel Mr. Varun Patel appearing for the respondent.

7. The factual matrix presented before this Court has not been disputed. It is also not being disputed that the case is no longer *res integra* and is covered by the decision of this very Court rendered in case of **Devarsh Pravinbhai Patel vs. Assistant Commissioner of Income Tax Circle 5(1)(1) [SCA No. 12965/2018 with SCA No. 12966/2018, decided**

on 24.09.2018] where too, the petitioner was an employee of the Kingfisher Airlines and worked as a pilot. In his case also the TDS on the salary made to the petitioner had not been deposited. It is only when the department raised the tax demand with interest and initiated the actions of the recovery that this Court was approached. Relying on the decision of the Bombay High Court rendered in case of Assistant Commissioner of Income Tax and Others vs. Om Prakash Gattani [(2000) 242 ITR 638], this Court allowed the same.

Vital would be to reproduce the relevant findings and observations.

> *"4. The issue is no longer res integra. The Division Bench of this Court in case of Sumit Devendra Rajani (Supra) examined the statutory provisions and in particular Section 205 of the Income-tax Act, 1961. The Court concurred with the view of the Bombay High Court in case of Asst. CIT VS. Om Prakash Gattani, reported in (2000) 242 ITR 638 and observed as under -*
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> > *"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.16 A have been produced by the assessee – deductee and consequently impugned demand notice issued under Section 221(1) of the Act cannot be*
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> > *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.16 A 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.16 A 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."

5. Facts in both case are very similar. Under the circumstances, by allowing these petitions we hold that the Department cannot deny the benefit of tax deducted at source by the employer of the petitioner during the relevant financial years. Credit of such tax would be given to the petitioner for the respective years. If there has been any recovery or adjustment out of the refunds of the later years, the same shall be returned to the petitioner with statutory interest."

8. In **case of Om Prakash Gattani (supra)** Gauhati High Court was dealing with the TDS not deposited of prize money payable to the petitioner. It held and observed thus: -

"13. From a perusal of the provisions quoted above relating to the deduction of tax at source in the

matters relating to prize money of lotteries, it is evident that the person responsible to make the payment to the assessee is under the statutory obligation to deduct the amount at source. After deduction of the amount he is required to deposit the same to the credit of the Central Government and to issue a certificate of deduction. So far as credit for the amount deducted is concerned, it is to be given on the deposit being made to the credit of the Central Government on production of a certificate furnished under Section 203 of the Income-tax Act. On payment of the amount to the credit of the Central Government, it would be treated as payment of tax.

14. 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 asses see 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.

15. However, the position as indicated above would not mean that mere deduction of the tax amount at source would amount to total discharge of the tax liability so long as the amount deducted is not deposited in the coffers of the Central Government. It is for this reason Section 199 of the Income-tax Act makes it clear that credit for tax deducted would be given when the amount is deducted and paid to the Central Government and a certificate of deduction is produced as furnished under Section 203 of the Income-tax Act. It is obvious that unless the amount is paid to the Central Government, the tax liability is not discharged, nor can it be said that the assessee has made the payment of the tax amount payable to the Government. We find no force in the submission made on behalf of the petitioner-respondent that on mere deduction of the amount at source, credit for tax deducted must be given and it cannot be withheld even though the person responsible to deduct the tax at source has not made it over to the Central Government. In our view, if that contention is accepted that credit for tax deducted has to be given on mere deduction of the amount at source, in that event, perhaps, there would be no legal justification to treat the person responsible to deduct the amount at source as an assessee in default in respect of the tax. Once credit on account of payment of tax is given, the tax liability will stand discharged. Any step to recover the amount of tax can be taken only in case the tax liability is not discharged and it still subsists. In this view of the matter, Shri K. P. Sarma, learned counsel appearing for the Revenue, has rightly defended the note appended by the Assessing Officer in the order of assessment making it clear that credit for the amount deducted was not being given and that will be given only when evidence as to actual payment of the amount to the Central Government is furnished. But this position would not legally justify initiation of recovery proceedings against the assessee from whose income tax has been deducted at source, but the person responsible to deduct the tax fails to deposit the same in the Government treasury. The statutory scheme evolved to employ this mode of recovery of tax at source also

points to the same position and in our view rightly. Otherwise a taxpayer from whose income tax is liable to be deducted at source would be exposed to a great vulnerable position. If some unscrupulous persons responsible to deduct the tax at source, after deducting the amount do not deposit the amount in the Government treasury, such persons should be saddled with the tax liability. Therefore, under Section 201 of the Income-tax Act it has been aptly provided that the person responsible to deduct the tax would be deemed to be an assessee in default so that he can be proceeded against for recovery of the amount instead of the assessee who has already parted with the amount, but due to some commission or omission on the part of the person responsible to deduct the amount at source over whose activity he has no control, he may not be subjected to double payment of tax and brunt of arduous recovery proceeding. The provisions as contained in Section 201 of the Act provide a kind of protection to the assessee where tax liability as standing against him is not yet discharged and credit for the amount deducted cannot be given in terms of Section 199 of the Income-tax Act.

16. A perusal of Section 205 of the Income-tax Act clarifies the position where it provides that where tax is deductible at source, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income. What is noticeable in this provision is that its applicability is not dependent upon the credit for tax deducted being given under Section 199 of the Income-tax Act. What is necessary for applicability of this provision is that the amount has been deducted from the income. In case where 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. Learned counsel for the appellant could not show that under the law it may be permissible to proceed against the assessee even after deduction of the tax at source, nor learned counsel for the petitioner-respondent could persuade us to hold that merely by deduction of tax at source, credit for deduction of tax at source has to be given even though the amount

may not have been made over to the Government treasury. The reason for this has already been explained by us in the discussion held in the earlier part of this judgment as the mere deduction of tax at source would not close the chapter of tax liability unless it is deposited in the Government treasury."

9. The facts being almost identical, no separate reasoning are desirable and the petition is being ***ALLOWED***. The department is precluded from denying the benefit of the tax deducted at source by the employer during the relevant financial years to the petitioner.

10. It is given to understand by learned Senior Standing Counsel Mr. Varun Patel that the proceedings have been initiated against the employer.

11. The credit of the tax shall be given to the petitioner and if in the interregnum any recovery or adjustment is made by the respondent, the petitioner shall be entitled to the refund of the same, with the statutory interest, within eight (8) weeks from the date of receipt of copy of this order.

12. Petition is accordingly disposed of.

(SONIA GOKANI, J)

(NISHA M. THAKORE,J)

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