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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 2659/2012

COURT ON ITS OWN MOTION ..... Petitioner
Through Mr. P.L. Bansal, Sr. Advocate with
Mr. Ruchir Bhatia, Advocate.
Mr. S.R. Wadhwa, Advocate.

versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel and Mr. Puneet Gupta, Jr. Standing Counsel.
Mr. Nagesh Behl, CA.

**CORAM:**
**HON'BLE MR. JUSTICE SANJIV KHANNA**
**HON'BLE MR. JUSTICE S.P.GARG**

**O R D E R**

**% 31.08.2012**

We have examined the counter affidavit filed by the Revenue/Income Tax Department. In the counter affidavit it has been acknowledged and accepted that the tax payers are facing difficulties in receiving credit of Tax Deducted at Source (TDS for short). It is also accepted that tax payers are facing difficulties in getting refunds on account of adjustment towards arrears.

2. In the counter affidavit steps taken by the Revenue to eliminate and rectify the problems and difficulties faced by the tax payers are mentioned. It is stated that changes in the software and the procedure

have been made or are being undertaken so that the problem, glitches and difficulties are eliminated.

3. Having heard the parties, we feel that the problems faced by the tax payers can be broadly classified into two categories. Firstly, failure and difficulties in getting credit of TDS paid. The said amount is deducted from the income earned by the assessee but even for several reasons not attributable to the tax payers, they are denied credit. The second category consists of adjustment of past demands or arrears of the tax from the refund payable. The two problems have to be addressed and tackled separately.

4. With regard to the second category, it is noticed that the Income Tax Department has initiated process of centralised computerization of records, centralized computerized filing and processing of returns and issue of refunds, which is to be appreciated and is laudable. The problem is not for the said reason but because of the wrong and incorrect data uploaded in the centralized computer system. In the counter affidavit it is stated that the Assessing Officers were asked to carry out physical verification of the past demands and to create manual arrears D&CR for upto the financial year 2010-11 vide Board's letter dated 28th April, 2010. This was followed by several other letters written by the Board wherein it was emphasized that the Assessing

Officer must verify and correct the arrears recorded in the D&CR. This was necessary as the arrears or demands were to be uploaded in the Central Processing Unit (CPU for short) at Bengaluru. In the counter affidavit it is stated that more than 46.23 lac entries of demand aggregating to Rs. 2.33 lac crores for the period prior to 1st April, 2010, were uploaded on CPC arrear/demand portal pursuant to the information uploaded/furnished by the Assessing Officers.

5. It is pointed out by Mr. Nagesh Behl, Chartered Accountant, who is present in the Court that CPC, Bengaluru has written letter dated 21st August, 2012 to the Chief Commissioners of Income Tax all over India pointing out that the figures and demands uploaded by the Assessing Officers require verification and reconciliation. Obviously, the reference is to the factual position that several demands uploaded are incorrect and wrong. Payments made, rectification orders passed and appeal effects have not been incorporated resulting in uploading of non-existing demands. The letter states that while processing the returns, refunds to the extent of Rs. 4800 crores have been adjusted towards the arrears on the basis of the data of past arrears uploaded by the Assessing Officers. The said letter indicates that there is need that this adjustment should be duly recorded in the personal records and accounts being maintained by the Assessing Officers as the adjustment

is not being given due credit at their end. The relevant portion of the letter dated 21st August, 2012 reads:-

> "Kind reference is invited to the above, wherein the assessing officers have been instructed to verify and reconcile the demands where such demand or adjustment thereof by CPC is disputed by the taxpayer. They have also been advised to upload amended figure of arrear demand on the Financial Accounting System (FAS) portal of Centralized Processing Center (CPC), Bengaluru wherever there is balance outstanding arrear demand still remaining after aforesaid correction/reconciliation.
>
> Against the arrear demands uploaded by the assessing officers CPC has collected demands to the tune of Rs.4800 crores by way of adjustment of refunds. The particulars of adjustment already done by CPC in specific cases need to be taken into account by the assessing officers in the course of verification/reconciliation of demands at their end. Besides, the assessing officers have also to taken into consideration the regular tax payments (minor head 400) made by the assessee to arrive at the correct outstanding demand. As the reconciliation has to be done by a large number of assessing officers of respective CCIT(CCA) region there is a need of supervisor and monitoring of this activity by the CIT(CO)."

6. Section 245 of the Income Tax Act, 1961 empowers and authorizes an Assessing Officer to adjust refunds against demand. The said Section reads:-

> "**245. Set off of refunds against tax remaining payable**.—Where under any of the provisions of this Act a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals) or Chief Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section."

7. The respondents in their counter affidavit have accepted that the Board has from time to time issued directions that the aforesaid Section and the procedure prescribed should be strictly adhered to. Reference is made to Instruction Nos. 1952, 1969 and 1989 dated 14th August, 1998, 20th August, 1999 and 20th October, 2010, respectively. In the counter affidavit it accordingly stated as under:-

> "Accordingly, it was again reiterated that the provisions of section 245 of the I.T. Act, 1961 must be followed and written intimation must be sent to the assesses before adjusting refund of the outstanding demand and any lapse in this regard shall be viewed seriously. The CCsIT/DGsIT/CsIT were direct to ensure compliance of the aforesaid direction. Thus, enough safeguards have been provided not only in the I.T. Act, 1961 but also in the Instructions issued by the CBDT."
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> (emphasis supplied)

8. There can be no doubt that the aforesaid statement made states

the correct position in law. Section 245 of the Income Tax Act, 1961 envisages prior intimation to the assessee so that he can respond before any adjustment of refund is made towards a "demand" relating to any other assessment year. Thus opportunity of response/reply is given and after considering the stand and plea of the assesse, an order/direction for adjustment when justified and proper is made. The section postulates and mandates a two stage action. Prior intimation, and then a subsequent action when warranted and necessary of adjustment, of the refund towards arrears.

9. In the very next paragraph of the counter affidavit, the Revenue has taken a different stand and has contradicted themselves. They have stated as under:-

> "After handing over of old demands to the CPC and commencement of processing of returns by CPC, the procedure u/s 245 of the Income Tax Act, 1961 is being followed by CPC before making adjustment of the refunds and assesses are being given full details with regard to the demands which are being adjusted. The intimation u/s 143(1) issued from CPC incorporates the full details of the existing demands that the adjusted against the refunds. Further, when the processing of a return at CPC results in demand, the communication u/s 245 is incorporated into the intimation itself. As far as the demands uploaded by the AOs to CPC portal are concerned, CPC has already issued a communication of the taxpayers through e-mail (wherever e-mail address is available) and by speed post informing him the existence of the demand in the books of the AO

> and that such demand is liable for adjustment against refund u/s 245 of the IT Act, 1961. As on dated 14.6 lakh such communications have been sent through e-mail and 8.33 lakh communications have been sent through speed post."
>
> (emphasis supplied)

10. In the said paragraph it is accepted that when a return is processed under Section 143(1), the CPU itself adjusts the refund due against the existing demand i.e. there is adjustment, but without following the procedure prescribed under Section 245, which requires prior intimation so that the assessees can respond or give their explanation. It is also stated in the said paragraph that 14.6 lac communications have been sent by e-mail and 8.33 lac communications have been sent through speed posts making adjustments of refunds. The total amount adjusted as per the letter dated 21st Aug., 2012 is Rs. 4800 crores.

11. At this stage, Mr. Sanjeev Sabharwal, sr. standing counsel states that in some cases prior intimation was sent. Ms. Prem Lata Bansal, Sr. Advocate, however, submits that in very few cases prior intimation was sent and the procedure prescribed under Section 245 was not followed. She further submits that in cases where prior intimation was given, the assessees were required to get in touch with the Assessing Officer and file response. But the Assessing Officer did not accept the reply/response on the ground that the assessee should approach CPU,

Bengaluru. At the same time, CPU, Bengaluru did not accept the reply/response on the ground that the assessee should approach the Assessing Officer. It is submitted that the procedure is contrary to statute as an order of adjustment after issue of prior intimation has to be passed by the Assessing Officer. The difference between the first and second stage is being obliterated and the section violated.

12. The respondents will file an affidavit in this regard explaining the true and correct position. They shall clearly indicate whether prior intimation was sent before adjustment or with the first intimation itself adjustment was made and in how many cases prior intimation was sent or was not sent before making adjustments. They shall also indicate the procedure followed if an assessee wants to file or has filed a response/reply pursuant to the prior intimation and whether such responses are/were entertained, examined, verified and opinion of the Assessing Officers are/were taken. It shall be stated whether any adjustment order is subsequently passed by the Assessing Officer.

13. We issue interim direction to the respondents that they shall in future follow the procedure prescribed under Section 245 before making any adjustment of refund payable by the CPU at Bengaluru. The assessees must be given an opportunity to file response or reply and the reply will be considered and examined by the Assessing

Officer before any direction for adjustment is made. The process of issue of prior intimation and service thereof on the assessee will be as per the law. The assessees will be entitled to file their response before the Assessing Officer mentioned in the prior intimation. The Assessing Officer will thereafter examine the reply and communicate his findings to the CPC, Bengaluru, who will then process the refund and adjust the demand, if any payable. CBDT can fix a time limit for communication of findings by the Assessing Officer. The final adjustment will also be communicated to the assessees.

14. This brings us to the problem where adjustments of refund has been made by the CPC, Bengaluru, without following the procedure prescribed under Section 245 of the Act and adjustment has been made for non-existing or fictitious demands. Obviously, the Revenue cannot take a stand that they can make adjustments contrary to the procedure prescribed under Section 245 of the Act based on the wrong data uploaded by the Assessing Officers. Question of payment of interest also arises. However, before issuing final directions in this regard, an affidavit as directed above explaining the procedure adopted by them should be brought on record. Opportunity is given to the Revenue to adopt a just and fair procedure to rectify and correct their records and issue refunds with interest without putting a harsh burden and causing

inconvenience to the assessee.

15. This brings us to the first problem relating to the failure of the taxpayers to get credit of the TDS, which has been deducted from the income payable/paid to them. The said problem can be further bifurcated into two categories. The first category relates to cases where the amount is reflected in Form 26AS, but because of incorrect entries in the return or small mismatch with the return data, the taxpayers do not get credit. The second category pertains to the cases where the TDS has been deducted by the deductor but the tax payer has been denied and deprived credit for the failure of the deductor to correctly upload the TDS return or details. Thus, the taxpayers do not get credit of the same in spite of payment. Thus they are forced and compelled to make double tax payment.

16. The magnitude of the problem can be understood and appreciated as it is stated that in the financial years 2010-11 and 2011-12 as many as 43% and 39% of the returns processed in Delhi charge were found to be defective. Total demand in Delhi Zone of Rs.3000 crores (approximately) for the financial year 2010-11 was created and the same became arrears payable in the next financial years. After rectification applications and consequent corrective orders, the figure has come down to Rs.1900 crores, which is still a substantial amount.

17. One of the queries/issues, raised in the order dated 30th May, 2012, reads as under:-

> "Whether Department has informed the deductors about incorrect details and had asked them to rectify the errors with in a time period? In case of failure, what action is taken? What happens when a complaint is made by a deductee?"

18. Most of the assessees have a grievance that in spite of writing letters to the deductors to rectify and correct the TDS details, the deductors fail and neglect to do so, as the failure does not entail any adverse consequence or action against them. The deductee being the tax payer is out of pocket and is harassed, but the deductor does not suffer, when the deductee does not get benefit of the tax paid. The response given by the Revenue is as under:-

> "(i) When returns are processed u/s 200A by TDS assessing Officers the deductors are informed about the errors in such returns. In case of failure to correct such errors by the deductors, no penal provision is provided under the Act. They can only be persuaded to correct such errors.
> (ii) While processing returns at CPC if any TDS credit claimed by the taxpayer in the return doesn't match with the details uploaded by the deductor list of such mismatches is sent to the tax deductors total of 20119 such communications had been issued by CPC up to April 2011. A deductor-wise consolidated list of such mismatches are sent from CPC to the CIT (TDS) having jurisdiction over the deductor for necessary follow-up with the deductors."

19. The response is unconvincing and unsatisfactory. It expresses complete helplessness on the part of the Revenue to take steps and seeks to absolve them from any responsibility.

20. Mr. Nagesh Behl, CA has drawn our attention to Section 272BB, wherein penalty of Rs.10,000/- has been prescribed for failures on the part of the deductor. The Board will examine the said provision and whether the same can be invoked in cases where complaints are received from the tax payers that in spite of requests, the deductors fail to rectify the defects or upload the correct TDS details. Denying benefit of TDS to a tax payer because of fault of the deductor, which is not attributable to the deductee, is a serious matter and causes unwarranted harassment and inconvenience. Revenue cannot be a silent spectator and wash their hands or express helplessness. This problem is normally faced by the small taxpayers including senior citizens as they do not have Chartered Accountants and Advocates on their pay roles. The marginal amount involved compared to the efforts, costs and frustration, makes it an unviable and a futile exercise to first approach the deductor and then the assessing officer. Rectification and getting the corrections done and to get them uploaded is not easy. Most of the assessees will and do write letters but without response and desired results. This aspect must be examined by the Board and

appropriate steps to ameliorate and help the small tax payers including senior citizens should be taken and implemented.

21. Mr. S.R. Wadhwa, Advocate states that he would like to make a representation in this regard to the Board and give suggestions. He is at liberty to do so on his behalf and on behalf of the All India Federation of Tax Practitioners. Similarly, Ms. Prem Lata Bansal, Sr. Advocate and Mr. Nagesh Behl, CA are at liberty and can make their suggestions. Suggestions will be given to Mr. Sanjeev Sabharwal, Sr. Standing Counsel, who shall within 7 days, forward them to the Board.

22. In the counter affidavit it is stated that there can be small errors or mistakes which can result in denial of benefit of TDS or self-assessment tax. In the counter affidavit it is stated as under:-

| Mismatch relates to | Possible reasons for mismatch | Steps to avoid Mismatch |
|---|---|---|
| TDS/TCS | TAN of deductor/collector wrongly quoted in the return | Furnish the correct TAN Number of the Tax Deductor/Collector in the return of Income. |
| | TDS relating to salary wrongly indicated in the TDS Schedule for other than salary or vice-versa. | Use appropriate Schedules in the Return to report TDS on Salaries, and TDS on Incomes other than Salaries. |
| | TDS/TCS aggregated under one TAN Number even though TDS/TCS effected by several Deductors/Collectors. | Indicate the TDS/TCS amounts effected by each Deductor/Collector separately in the Schedules provided in the return of Income. |

| | | |
|---|---|---|
| Advance Tax/Self-Assessment tax | BSR code of the bank branch/challan serial number/date of payment/amount paid stated in return does not match with information in 26AS. | Ensure that BSR code of the bank branch/challan serial number/date of payment/amount paid as stated in return matches with information available in 26AS. |
| | Advance Tax/Self Assessment Tax Payment particulars filled up wrongly in the Schedules meant for TDS/TCS for vice versa | Use appropriate Schedule in the Return to report Advance Tax/Self Assessment Tax Payment Particulars. |
| | Mistake in PAN, Assessment Year etc. committed while preparing the challan. | Furnish the correct particulars to the bank branch where challan was paid and request for uploading corrected challan data to NSDL. |

23. It is further stated in the counter affidavit:-

"Procedure for rectification and correction of mismatch.

(i) While communicating the intimation after processing of the electronic returns, CPC also intimates to the assessee a report of mismatch of tax credit. The template of such mismatch communication (M5) is appended herewith. On receipt of the same, tax payers are requested to examine their records and correct the error(s) of the nature indicated above.

(ii) Thereafter the tax payer ma approach CPC, Bangalore for 'Rectification' of the earlier intimation based onn corrected entries, and the entitled tax credit is allowed to the taxpayer by CPC.

<u>Procedure for giving credit even when there is slight mismatch.</u>

(i) That the taxpayer is not allowed to credit of taxes even if there is a lightest of mismatch in the TDS particulars reported in form 26AS is not correct

because the board has been issuing Instructions to the filed formations for permitting credit of TDS with or without verification depending upon the facts of the case as mentioned in the instructions. In this regard, a reference may be made to Instruction No.2 of 2011 dated 9th February, 2011 and Instruction No.1 of 2012 dated 2nd February, 2012.

(ii) In the said Instructions, the Board has asked the Assessing Officers to accept the TDS claims without verification in all returns where the difference between the TDS claimed and matching TDS amount reported in AS26 data does not exceed rupees one lac. Therefore, the Department is aware of the inconvenience which may be caused to smaller taxpayers and has taken a very liberal view of the matter."

24. However, during the course of hearing before us it is pointed out that the figure of Rs. 1 lac has now been reduced to Rs.5,000/- in case of one assessee. (This Rs.5,000/- does not relate to each or individual TDS certificate, but one/single assessee).

25. There can be small and insignificant mismatches, which if purely technical should be condoned or ignored. After all tax has been paid or credited in the name of the assessee. Once the amount is correctly and rightly reflected in Form AS26, small or technical mismatch in the return should not be a ground to deny credit of the amount paid. In such cases, if the Assessing Officer feels that benefit of TDS reflected in AS26 should not be given, he should issue notice to the assessee to revise or correct the mistake and only if the necessary

rectification or correction is not made, an order under Section 143(1) should be passed and the demand should be raised. We issue an interim direction to this effect.

26. There are two more issues, but these we feel cannot be addressed and examined in a PIL. Revenue has contended that the decision in the case of ***Dr. Prannoy Roy & Another Vs. Commissioner of Income Tax and Another*, (2009) 309 ITR 231 (SC)** is not applicable. This issue/grievance can be raised by the individual assesse concerned. The second aspect relates to credit of TDS by the taxpayers even when tax is not been credited or paid to the government. We do not think that it will be appropriate to address this question in a PIL. We have entertained this PIL not to decide individual claims but in view of the general problems faced by the tax payers specially small tax payers/individuals regarding issue of refunds, which are denied on the basis of wrong or bogus demands or incorrect record maintenance and the problem faced by them in getting full credit of the tax, which is deducted from their income and paid to the Revenue. The problem is apparent, real and enormous. It has escalated because of Centralized Computerization and problems associated with the incorrect and wrong data which is uploaded by both the deductors or payees and the Assessing Officers. The issue is of general governance, failure of

administration, fairness and arbitrariness. The magnitude of the problem and the number of tax payers adversely affected thereby is apparent from the counter affidavit, wherein it is admitted that 43% and 39% of the returns in Delhi zone for the Financial Year 2010-11 and 2011-12 respectively were defective. Substantial number of these defaults relate to mismatch of TDS details and the tax payers have been denied benefit of TDS claimed by them. For the Financial Year 2010-11, the approximate demand created in Delhi Zone because of the defective returns was Rs.3000 crores, which stands reduced to Rs.1900 crores after the tax payers approached the Assessing Officers for corrections. Every attempt possible has to be made to redress the grievance of the tax payers. The tax payers should not be made to run around, make repeated visits to deductor or the Assessing Officer. Rejection of TDS, which has been deducted and paid, hurts the assessee and puts him to needless inconvenience, harassment and costs. It gives bad name to the Revenue. On the issue of refunds also, there is no dispute and it is admitted position that Section 245 of the Income Tax Act has to be complied with. After computerization and pursuant to directions issued by the Board, the Assessing Officers have uploaded data with regard to "past arrears". The amount mentioned in the counter affidavit is Rs.2.33 lac crores, which is a substantial

amount. Arrears, if payable, must be paid. However, the position is that the tax payers are claiming and stating that the arrears have been wrongly shown and the Assessing Officers have not correctly uploaded the data and have ignored the Board's directions. Magnitude and the number of assessees adversely affected by the uploading of wrong and incorrect data can be easily appreciated from the figure of Rs.2.33 lac crores. As per the counter affidavit, on the basis of this data in one assessment year alone, in about 23 lac adjustments have been made and the tax payers denied the refund claimed. The follow up and the procedure adopted after these 23 lac notices were issued, is not mentioned. This effectively means that most of the said assessees have been denied refunds. The facts stated above justify issue of notice and orders passed to activate and impress upon the Revenue to take appropriate remedial and corrective action.

27. It has been pointed out to us by Ms. Prem Lata Bansal that in several cases refunds have been adjusted on account of the debit entry made under the head "modified". These entries are made by the Assessing Officer and thus the refund is reduced to nil or zero. Copies of two such adjustment orders have been shown to us. The said orders will be filed in the Registry and copies will be given to the counsel for the Revenue, who will take appropriate instructions on this aspect. It is

stated that there are thousands of cases of similar nature. Learned counsel for the Revenue will obtain instructions whether directions can be issued to the Assessing Officers to provide full details and particulars of the entries made under the head 'modified'. We may note that in these cases, processing has been done for the purpose of intimation under Section 143(1) of the Income Tax Act, 1961.

28. Relist on 2nd November, 2012. Affidavit in terms of this order will be filed within six weeks. We permit All India Federation of Tax Practitioners to intervene in the present matter. W.P.(C) 5443/2012 will be taken up for hearing along with this matter.

Copy of this order be given dasti to the learned counsel for the parties.

**SANJIV KHANNA, J.**

**S.P.GARG, J.**

**AUGUST 31, 2012**
**NA/VKR**