IT-Assessee Cannot Claim Any Credit for TDS on Income Which Is Not Offered For Taxation

ORDER

PER NRS GANESAN, JM:

All the appeals of the Department relate to three independent assessees. Since common issues arise in all the three appeals, we have heard all these appeals together and dispose of the same by this common order.

2. Shri K.V.N. Charya, the learned DR submitted that the only issue arises for consideration is giving credit for the tax deducted at source (TDS) while receiving the mobilisation advance by the assessee. According to the learned DR the assessee claimed TDS without offering the corresponding income for taxation. The Assessing Officer found that since the income was not offered for taxation credit shall not be given for the tax deducted at source u/s. 199 of the Income-tax Act, 1961. However, the CIT(A) by following the order of this Tribunal in Progressive Construction Ltd. vs. JCIT in I.T.A. No. 482/Hyd/2001 dated 23.11.2006 found that the nexus between the TDS and the corresponding income would remain notional/ conceptual. The learned DR further pointed out that the Chandigarh Bench of this Tribunal in Pradeep Kumar Dhir (2008) 303 ITR (AT) 45 (Chd) had an occasion to consider an identical situation. By majority opinion, the Tribunal found that the assessee cannot claim any credit for the TDS on the income which is not offered for taxation. The Tribunal further found that the benefit for the TDS is to be allowed as per the provisions of the Income-tax Act u/s. 199. In view of this majority decision according to the learned DR the decision of this Tribunal in the case of Progressive Construction Ltd.(supra) may not be applicable to the facts of this case. Referring to the Special Bench decision of the Mumbai Bench of this Tribunal in DCIT vs. Oman International Bank (2006) 100 ITD 285 (SB) (Mum) the learned DR submitted that the Third Member case would have the sanctity as that of the decision of the Special Bench. Therefore, according to the learned DR this Bench of the Tribunal is bound by the decision of the Third Member in the case of Chandigarh Bench in Pradeep Kumar Dhir (supra) rather than theDivision Bench decision of this Tribunal in Progressive Construction Ltd. (supra).

3. On the contrary, Shri Raghavendra Rao, the learned counsel for the assessee submitted that this Tribunal in the case of Progressive Construction Ltd. (supra) considered this issue elaborately and found that credit shall be given to the TDS on production of the certificate for the assessment year for which such income is assessable. The Tribunal further observed that the nexus between the TDS and corresponding income element would remain rather notional/conceptual. This Tribunal followed the decision of the Mumbai Bench of this Tribunal in Toyo Engineering (I) Ltd. (5 SOT 616). The decision of the Hyderabad Bench of this Tribunal was distinguished by the Bench by following the decision Mumbai Bench of this Tribunal. The decision in the case of Progressive Construction Ltd. (supra) was subsequently followed in a number of other cases. Therefore, according to the learned counsel for the assessee this Bench of the

Tribunal is bound by the decision of the co-ordinate Bench of this Tribunal on identical circumstances of the case. …

4. Shri Raghavendra Rao further submitted that in the case before the Chandigarh Bench of this Tribunal in Pradeep Kumar Dhir (supra), the assessee was following cash system of accounting. In the case before us, according to the learned counsel for the assessee, the assessee was following mercantile system of accounting. Therefore, the decision of the Chandigarh Bench of this Tribunal may not be applicable to the facts of this case.

5. We have considered the rival submissions on either side and also perused the material on record. Admittedly tax was deducted from the mobilisation advance. The question arises for consideration is whether the TDS shall be given credit when the corresponding income was not offered for taxation. We have carefully gone through the provisions of section 199 of the Act which read as follows:

"199. (1) Any deduction made in accordance with the foregoing provisions of this Chapter and paid to the Central Government shall be treated as a payment of tax on behalf of the person from whose income the deduction was made, or of the owner of the security, or of the depositor or of the owner of property or of the unit-holder, or of the shareholder, as the case may be.

(2) Any sum referred to in sub-section (IA) of section 192 and paid to the Central Government shall be treated as the tax paid on behalf of the person in respect of whose income such payment of tax has been made.

(3) The Board may, for the pur0poses of giving credit in respect of tax deducted or tax paid in terms of the provisions of this Chapter, make such rules as may be necessary, including the rules for the purposes of giving credit to a person other than those referred to in sub-section (1) and sub-section (2) and also the assessment year for which such credit may be given."

6. From the Third Member decision of the Chandigarh Bench of this Tribunal it appears that section 199 was amended by Finance Act, 1987. Till June 1, 1987 the language employed by the Parliament in section 199 was different insofar as it provided giving credit to the assessee in respect of TDS for the assessments immediately following the assessment year. However, by Finance Act, 1987 the language of section 199 was substantially modified to give credit to the TDS in respect of the income which is assessable. While taking note of the amendment made by Finance Act, 1987, the learned Judicial Member has observed as follows:

"It may be pertinent to mention that section 199 quoted above is the section as amended from time to time and as applicable for the assessment year 2002-03. Till June 1, 1987, the language of section 199 was different in so far as it provided for giving credit to the

assessee in respect of TDS in the assessment for the immediately following assessment year. By the Finance Act, 1987, the language of section 199 was modified to the extent that the credit for the tax deducted at source was provided to be given in the assessment year in which TDS is assessable. As against the words "credits shall be given … for such assessment year for which such income is assessable", the section provided "the credit shall be given … for the immediately following year under this Act". Thus, the Legislature having modified the language of section 199 with effect from June 1, 1987, in my considered view, there is no escape from the view that the credit for TDS is to be given in the year in which the income in respect of which tax has been deducted at source is assessable to tax.

It is not disputed that the assessee has not offered the income credited by the three parties in respect of which tax has been deducted at source on the ground that income is offered to tax on receipt basis and the amounts have not in fact been received. The Assessing Officer has, in my view, been reasonable to give credit for the tax deducted at source to the extent the income has been offered for taxation by the assessee in the year under appeal. As pointed out earlier, the assessee has disclosed the amount of TDS as income in the year under appeal as provided under the statute and credit to the extent TDS relates to such income has been allowed by the Assessing Officer."

7. The Third Member while resolving the disputed question found that giving credit to TDS has nothing to with the system of accounting followed by the assessee. It is observed that section 199 of the Act provides for giving credit to the TDS in respect of the income which is offered for taxation. The Third Member has observed as follows:

" …. I have no quarrel with the above proposition but I am unable to agree that the credit for the tax deducted at source is to be allowed as per any system of accounting followed by the assessee. In the present case, there is no dispute regarding cash system of accounting followed by the assessee and his income has been computed as per the above system. No addition has been made for income which the assessee was "entitled" to receive but did not actually receive. No credit for TDS on such nonassessable income could be claimed. Benefit for the tax deducted at source is to be allowed as per statutory provisions contained in section 199 of the Act. It has nothing to do with the system of accounting followed by the assessee. Further there is no dispute that the Revenue should have a consistent approach but the above principle of law has no application where interpretation of the statutory provisions is involved. If in a particular year a statutory provision was wrongly interpreted and applied, the Revenue can correct the error as income is required to be computed by correctly applying and enforcing law. Error cannot be perpetuated. Therefore, on correct interpretation of section 199 and for the reasons given above, I am of the view that the Assessing Officer was right in allowing credit for tax deducted at source on pro-rata basis. The credit for the balance amount mentioned in the certificate is to be allowed in the year in which such income is disclosed or is otherwise found to be assessable by the Revenue."

8. In view of the majority opinion of this Tribunal it is very clear that unless the assessee offers the income for taxation, the TDS cannot be given credit. A similar view

was taken by majority opinion by the Mumbai Bench of this Tribunal in Smt. Varsha G. Salunke vs. DCIT (2006) 98 ITD 141 (TM).

9. We have also carefully gone through the decision of this Tribunal in Progressive Construction Ltd. This Tribunal after considering the language of section 199 found that nexus between TDS and the corresponding income element would remain notional. However, the amendment made by the Parliament by Finance Act, 1987 was not taken into consideration by the Bench while deciding the case in Progressive Construction Ltd. (supra). This Bench of the Tribunal in Progressive Construction Ltd. apparently followed the decision of the Mumbai Bench of this Tribunal in Toyo Engineering (I) Ltd.. However, the Chandigarh Bench of this Tribunal after considering the decision of the Mumbai Bench of this Tribunal in Toyo Engineering (I) Ltd. found that unless income is offered for taxation credit cannot be given for the TDS. As rightly submitted by the learned DR, the decision of the Third Member of this Tribunal would have more weightage than the Division Bench of this Tribunal. In other words, the majority opinion expressed by the Chandigarh Bench of the Tribunal in Pradeep Kumar Dhir (supra) would have a binding nature rather than this Tribunal's decision in Progressive Construction Ltd. (supra). Even otherwise, as found by the Tribunal in Progressive Construction Ltd. (supra) the majority opinion expressed by the Chandigarh Bench would prevail.

10. The learned counsel for the assessee made an attempt to distinguish the decision of the Chandigarh Bench of this Tribunal on the ground that the assessee before the Chandigarh Bench was following cash system of accounting. However, in the case before us the assessee was following mercantile system of accounting. This issue was also considered by the Third Member in Chandigarh Bench of this Tribunal and found that method of accounting has nothing to do in giving credit to the TDS. In view of the above observation of the Third Member and the majority decision of the Chandigarh Bench of this Tribunal, we find no substance in the arguments of the learned counsel for the assessee. Moreover, admittedly, the assessee has not offered the corresponding income for taxation and the Assessing Officer has not made any addition also. In view of the above decision, we are unable to uphold the order of the CIT(A) and the same is set aside and the order of the Assessing Officer is restored.

11. In the result, all the three appeals of the Revenue are allowed.

September 24, 2010