IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.547/Bang/2013
Assessment year : 2007-08

The Deputy Commissioner of Income Tax, Circle - 12(3), 14/3, 4th Floor, Rastrothana Bhavan (Opp. RBI), Nrupathunga Road, Bengaluru.	Vs.	M/s. Sasken Network Engineering Limited, No.139/25, Amarjyothi Layout, Ring Road, Domlur, Bengaluru-560071. **PAN : AAICS 4405 Q**
APPELLANT		RESPONDENT

Appellant by	:	Smt. R. Premi, JCIT(DR)(ITAT), Bengaluru.
Respondent by	:	Shri. C. Narayan, CA

Date of hearing	:	07.07.2021
Date of Pronouncement	:	12.07.2021

O R D E R

Per N.V. Vasudevan, Vice President

This is an appeal by the Revenue against the order dated 30.01.2013 of CIT(Appeals)-III, Bengaluru, relating to Assessment Year 2007-08.

2. The facts and circumstances under which the said appeal by the Revenue arises for consideration are the assessee is a company incorporated under the Companies Act, 1956 and engaged inter alia in the business of installation and commissioning services. The assessee filed its return of income ('Rol') under section 139(1) of the Income-tax Act, 1961 (Act') on October 31, 2007 declaring taxable income of Rs 3,05,04,940 on which taxes of Rs 1,02,67,963 were payable. On account of credit for taxes deducted at source (TDS') amounting to Rs 1,21,26,857 and self assessment tax amounting to Rs 1,60,0000 a

refund of Rs 34,58,894 was claimed. The RoI was selected for scrutiny and the assessment was concluded vide assessment order under section 143(3) of the Act dated December 17, 2009 wherein income returned by the assessee in the RoI was accepted by the Deputy Commissioner of Income-tax, Circle 12(3) (A0).

3. During the course of assessment proceedings, the assessee vide letter dated August 17, 2009 had filed additional TDS certificates, amounting to Rs 1,13,86,500 issued to it by Nokia India Private Limited (Nokia India). The said certificates were not filed by it along with the RoI filed since the TDS certificates were received only after the expiry of time prescribed for filing of original as well as revised RoI for AY 2007-08. The Details of the TDS certificates and the credit for TDS claimed by the assessee vide the aforesaid letter were as follows:

Certificate Number	Amount on which tax deducted (Rs)	Total TDS (Rs)
533/ Nokia-ACCL/ 2006--07 dated June 4, 2007	182,332,205	10,228,837
534/ Nokia-ACCL/ 2006-07 dated June 4, 2007	14,128,499	792,608
535/ Nokia-ACCL/ 2006--07 dated June 4, 2007	429,045	9,628
536/ Nokia-ACCL/ 2006-07 dated June 4. 2007	6,335,600	355,427
TOTAL	**20,32,25,349**	**1,13,86,500**

4. During the course of assessment proceedings, the AO called upon the assessee to explain as to why the corresponding income on which TDS was made was not declared in the RoI by the assessee. The assessee submitted that TDS of Rs.1,13,86,500 was deducted by Nokia India during Assessment Year 2007-08 on the basis of mere purchase orders issued to the assessee. By letter dated 11.12.2000, (Nokia Siemens Networks Private4 Limited (NSN) which had subsequently acquired the network business of Nokia

India) confirmed that in the books of NSN, the said expense accruals of 1NR 20,27,96,304/- were reversed in FY 2007-08 (AY 2008-09) in accordance with NSN accounting policy and actual invoiced expenses recorded against same. Accordingly, accruals to the extent of services not fully rendered and / or are not in compliance of contractual terms get reversed in NSN's accounting process and fresh accruals are provided for services rendered and not invoiced as at year end by vendor. In accordance with this policy, actual invoices received from Sasken amounting to 1NR 5,81,28,005 were booked for services rendered by the assessee during FY 2007-08 (AY 2008-09). Fresh accruals were provided for unbilled services as on Mar 31, 2008 for 1NR 7,41,34,119 on the basis of the above accounting policy in relation to the Assessee's contracts and TDS deposited on same by NSN.

5. The assessment was concluded vide assessment order under section 143(3) of the Act dated December 17, 2009 wherein income returned by the assessee in the RoI was accepted by the AO. In the said assessment order, the AO did not make any addition on account of income not declared as per TDS certificate amounting to Rs. 20,27,96,304/-. By implication, the AO has accepted the plea of the assessee that income of Rs.20,27,96,304/- did not accrue to the assessee in AY 2007-08. The AO also did not give credit in respect of the aforesaid TDS claim amounting to Rs.1,13,86,500/-.

6. The assessee filed a rectification application under section 154 of the Act dated November 22,2010 before the AO requesting him to grant credit of TDS amounting to Rs.1,13,86,500/-. However, the AO rejected the rectification application vide an order dated July 26, 2012 on the ground that since the corresponding income of Rs.20,27,96,304/- corresponding to the tax deducted and deposited as per TDS Certificate has not been offered to taxation by the assessee for the subject AY, the request for granting credit for TDS of Rs.1,13,86,500/- could not be allowed.

7. On appeal by the assessee, CIT(A) allowed credit of TDS as requested by the assessee in the application u/s.154 of the Act. The following were the relevant observation of the CIT(A):

> *"6.0. I have perused the order u/s 154 and the arguments of the appellant, along with the case laws relied upon by him. On a consideration of the facts, I find that I am not in agreement with the AO's stand. Once the TDS is recovered from the appellant and deposited into the Govt. treasury, the credit for the same has to be given to the appellant, since there is no provision in law for the year in appeal for a direct refund of the TDS already deposited even if the same happened to be deducted in excess. I have to note that the claim of the appellant is duly supported by the form 26AS also, which testifies to the amount being actually accounted for in the Govt. account. It is a material fact that the action of the deductor in deducting and depositing the TDS into the Government account is outside the control and influence of the appellant. To deny credit on an interpretation such as the one adopted by the AO would not stand for a fair and equitable application of law, particularly when the provisions of Sec.200A allowing for correction and refund were not applicable to the year of this appeal.* ***The law applicable to the year in question does not provide for the appropriation by the Government of the TDS deducted in excess, and since a refund is not possible, the only fair alternative is to give the credit for the same to the person whose tax is deducted at source. Not giving the credit in these circumstances would amount to unjust enrichment, to which- the Government cannot by law be a party.*** *This is clearly brought out by the ITAT Delhi in the case of Escorts Ltd Vs. Deputy Commissioner of Income Tax [(Delhi ITAT) 15 SOT 368].*
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> *7.0. I also have to note that the appellant company has submitted an undertaking that no credit has been claimed by the company in respect of this amount of Rs.1,13,86,500/- in any other proceeding. The AO is accordingly directed to allow the credit of the TDS to the appellant company in the year when the same was deducted by the depositor ie. M/s Nokia Siemens Networks P Ltd and so certified by it."*

8. Aggrieved by the order of the CIT(A), the Revenue has preferred the present appeal raising the following grounds of appeal:

1. *The order of the learned CIT(A) is opposed to law and facts of the case.*
2. *On the facts and in the circumstances of the case the learned CIT(A) has erred in directing the A.O to allow credit for TDS without appreciating the*

fact that the assessee has not disclosed any income attributable to TDS amount amounting to Rs. 20,27,96,304.

3. *On the facts and in the circumstances of the case the learned CIT(A) has erred in law in directing the A.O. to allow credit for TDS without noticing the statutory position that in terms of section 199 r.w.s. 35BB (3)(i) that credit for TDS shall be given in the A.Y. in which the income attributable to TDS amount is assessable to tax.*
4. *On the facts and in the circumstances of the case the learned CIT(A) has failed to appreciate the fact that the assessee has claimed credit for TDS of Rs 1,13,86,500 but the corresponding income attributable to TDS amount was not disclosed in the return of income filed for AY 2007-08.*
5. *On the facts and in the circumstances of the case the learned CIT(A) has failed to appreciate the fact that the deductor has committed a mistake in deducting the tax at source on the basis of purchase order placed by the assessee company without there being any actual services rendered by the assessee during the A.Y. under reference and as said transaction was reversed in the succeeding A.Y. i.e. A.Y. 2008-09 based on actual invoices raised.*
6. *For these and other grounds that may be urged at the time of hearing, it is prayed that the order of the CIT(A) in so far as it relates to the above grounds may be reversed and that of the Assessing Officer may be restored.*
7. *The appellant craves leave to add, alter, amend and / or delete any of the grounds mentioned above.*

9. The learned DR submitted that as per section 199 of the IT Act, no assessee can claim the TDS credit without admitting corresponding income and placed reliance on the following case laws:

1. *Pardeep Kumar Dhir Vs. ACIT [2007] 107 1TD 118:* It is the decision of Hon'ble ITAT Chandigarh B Bench [third member[
2. *ACIT Vs Himachal Joint Venture [2008] in ITA No.344 Et 345 /Bang/2008* of Hon'ble ITAT A Bench of Bangalore
3. *ITO Vs Sri Anupallavi Finance and Investments (2011)* 9 *taxmann.com 163* of Hon' ble ITAT Chennai A Bench.

10. The Learned DR further submitted that in all the above said decisions whatever case laws relied upon by the Assessee before CIT(A) has been dealt and distinguished by the decision of the Third Member case in the case of Pradeep Kumar Dhir (supra). As

per section 200A(1) (f) of the Act, inserted by the Finance Act, 2009, w.e.f. 1.4.2010 provides that if a deductor has remitted excess amount of TDS into government account, he/she can claim the refund before Assessing Officer of TDS. It was also submitted that CBDT circular No.285 dated 21-10-1980 prescribes procedure for regulating refund of amounts paid in excess of tax deducted and / or deductible. The CBDT has issued another circular No.2/2011 dated 27-4-2001 wherein the circular No.285 and its scope were extended on account of insertion of new Chapter XVII of the Act. As per circular No.2 /2011 section 192 to 194LA of the Income Tax Act, 1961 was covered. Paragraph 1.5 of the circular No.2/2011 gives the scope for person deducting tax to claim refund. Paragraph 6 of the same circular has clarified provisions of section 200A of the Act prescribing processing of TDS return and issue of refund claim for the period up to 31-3-2010 shall apply. Further, the CBDT has issued another circular No.6/2011 dated 24-8-2011 wherein it was clarified that the refund claims pertaining to period up to March 31, 2009 can be submitted to the Assessing Officer [TDS] up to 31-12-2012.

11. The learned DR prayed that in the present case, the CIT(A) has ignored all the circulars and decided the appeal in favour of assessee on incorrect assumption of fact that section 200A was effective from 1-4-2010 and hence it is not applicable to the case of assessee for AY 2007-08 and that since the person deducting tax has not other remedy, credit should be given to the deductee. Such decision of CIT(A) is contrary to provision of Act and above said CBDT circulars.

12. The Learned Counsel for the assessee reiterated submissions made before the lower authorities and relied on the order of CIT(A).

13. We have given a careful consideration to the rival submissions. It is clear from the facts of the case that a sum of Rs.20,32,25,349/- which was reflected as amount on which TDS was deducted had not been accounted for as income by the assessee for Assessment Year 2007-08. It is a plea of the assessee that the tax deductor was deducting tax on the

basis of purchase orders whereas the assessee was accounting for income only on the basis of bills raised by it after services were rendered by the assessee. The assessee has not given any explanation with regard to when and how the income of Rs.20,32,25,349/- had been accounted for by it as income. At the time of hearing, the Counsel for assessee submitted that the TDS amount of Rs.1,13,86,500/- erroneously deducted by the deductor had been subsequently adjusted to the extent of Rs.53,51,643/-. Though a chart giving in-voice numbers and dates have been filed, these details not had not been filed either before the lower authorities or any stand taken before the lower authorities that subsequently a part of the TDS amount has been adjusted against amounts due by the assessee to the deductor. In such circumstances, we have to proceed on the basis of facts as it prevailed before the lower authorities.

14. The provisions of section 199 of the Act as it existed prior to 01.04.2008 clearly lays down that credit for TDS will be given in the Assessment Year for which such income is assessable. The ITAT, Chandigarh Bench (third member) in the case of Pradeep Kumar Dhir Vs. ACIT (2207) 107 ITD 118 (Chandigarh 3rd Member) has laid down the proposition that credit for tax deducted at source under section 199 of the Act has to be given to an assessee for the amounts deducted in the assessment made under the Act in the Assessment Year for which such income is assessable. The Tribunal laid down that the conditions for getting the benefit of TDS as per section 199 of the Act are (1) The assessee should produce the certificate for the amounts of tax deducted at source and (2) Show that income subjected to TDS is disclosed in the return of the Assessment Year as "assessable". Similar proposition has been laid down in the decision cited by the learned DR before us.

15. Section 199 of the Act was however substituted by the Finance Act, 2008 w.e.f. 01.04.2008 and as per the substituted provisions, credit is to be given as per the provisions made in the Rules. In terms of section 199, Rule 37BA provides that credit for tax deducted at source and paid to the Central Government shall be given for the

Assessment Year for which such income is assessable. In case the income is assessable over a number of years, credit for tax deducted at source shall be allowed across those years in the same proportionate in which the income is assessable to tax.

16. In the present case, the CIT(A) has allowed relief to the assessee on the basis that the refund to the deductor is not possible. The learned DR has however rightly pointed out that as per the CBDT's Circular No.2/2011 dated 2.04.2011, there is a procedure for the deductor to claim refund before the AO. The basis on which the CIT(A) allowed relief to the assessee is therefore not sustainable. The learned Counsel for the assessee also placed reliance on the decision of the Hon'ble Karnataka High Court in the case of CIT Vs. Elsamex-TWS-SNC-JV in ITA No.819/2007 judgment dated 17.10.2014. That was a case where the assessee had suffered a loss and the income in respect of TDS credit was claimed, had been included in the return of income. The Court also found that mobilization advance was not income and therefore the question of paying Income Tax cannot arise. The aforesaid decision is therefore distinguishable. The learned DR has also placed reliance on the decision of Hon'ble Kerala High Court in the case of CIT Vs. Smt. Pushpa Vijoy (2012) 19 taxmann.com 157 (Kerala) wherein the Hon'ble Kerala High Court took the view that in the light of provisions of section 199 of the Act, an assessee is entitled to credit of tax based on TDS certificates only in Assessment Year in which income in respect of which tax is deducted is assessed to tax. The other decision cited by the learned Counsel for the assessee of the various Benches of ITAT are contrary to the law laid down by the 3rd Member decision in the case of Pradeep Kumar Dhir (supra). In the case of Escorts Vs. DCIT (2207) 15 SOT 368 (Delhi) (Delhi), the factual background under which credit for TDS was allowed was that the assessee claimed that the income which was subject to TDS was not taxable in his hands. In the present case, the assessee has not explained as to the status of the income as reflected in the TDS certificate. The other decision cited by the learned Counsel for the assessee in the case of Toyo Engg. India Ltd., Vs. DCIT (2006) 5 SOT 616 (Bombay) is contrary to the law laid down in 3rd Member decision in the case of Pradeep Kumar Dhir (supra). The decision of

the Hon'ble Andhra Pradesh High Court in the case of M/s. Bhooratnam and Co. 357 ITR 396 was a case where TDS certificates of an assessee were in the name of joint venture partners and credit was not given by the Department. The Hon'ble Andhra Pradesh High Court held that credit should be given to the contractor whether certificate is issued in the name of joint venture or in the name of contractor. Thus, all the decisions cited by learned Counsel for the assessee are found distinguishable and not applicable to the facts of the present case. For the reasons given above, we are of the view that the order of the CIT(A) cannot be sustained and the credit for TDS cannot be allowed to the assessee in facts and circumstances of the case. Accordingly, the appeal of the Revenue stands allowed.

17. In the result, appeal by the Revenue is allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	*Sd/-*
(CHANDRA POOJARI)	**(N. V. VASUDEVAN)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Bangalore,
Dated : 12.07.2021.
/NS/*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.