

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA Nos.542 to 547/Ind/2023
(Assessment Years: 2012-13 to 2017-2018)

District Organiser Tribal Welfare Bhopal, B- Block, Old Secretariat, Collector Parisar, Bhopal	Vs.	ITO (TDS)-1 Bhopal
(Appellant / Assessee)		(Respondent / Revenue)
PAN: BPLD03510D		
Assessee by	Shri Milind Wadhwani, AR	
Revenue by	Shri Ashish Porwal, Sr.DR	
Date of Hearing	22.07.2024	
Date of Pronouncement	23.07.2024	

O R D E R

Per Bench:

These 6 appeals by the assessee are directed against 6 separate orders of Commissioner of Income Tax (Appeals), National Faceless Appeal Centers,(NFAC) Delhi all dated 13.12.2022 arising from the orders passed u/s 201(1) of the Income Tax Act for the Assessment Years 2012-13 to 2017-2018 respectively.

2. There is a delay of 320 days in filing these appeals. The assessee has filed an application for condonation of delay which is supported by the affidavit of the Assistant Commissioner, Tribal Welfare, Bhopal. The Ld. AR of the assessee has submitted that the assessee is a Government department/office of Government of Madhya Pradesh working for the welfare of the Tribals. The impugned order was not served to the assessee in physical form despite the fact that the assessee has in the form No.35 has specifically denied the mode of notice through e-mail. The assessee was not having the knowledge of the impugned order till it has received the summons issued u/s 131 of the Act and came to know that the impugned order was passed on 13.12.2022 whereby the appeals of the assessee were dismissed. Further the Assistant Commissioner and other staff of the assessee were engaged in the election duty of State Legislative Assembly election and therefore, the appeals could be filed only on 28.12.2023. Hence, the Ld. AR has submitted that the delay in filing these appeals may be condoned as the assessee was not aware of the impugned order before October, 2023 when the assessee received the summons u/s 131 of the Act. The Ld. AR has pointed out that the A.O has passed the order u/s 201(1) of the Act in respect of the payments made by the assessee to the Bhopal Development Authority (BDA) which in turn has to execute and undertake the work through the contractors and the payment made to the contractors was subjected to the TDS u/s 194C of the Act. Thus, the deduction of tax at source on the payment to the BDA is required as it would not

attract the provisions of Section 194C of the Act for deduction of TDS as the same is only transfer from one Government department to another Government department which is a nodal agency for getting the work executed. He has further submitted that even otherwise the A.O while passing the order u/s 201(1) of the Act has added the amount paid to the BDA by other departments and therefore, there is a factual mistake in computing the tax liability of this account. On the other hand Ld. DR has not seriously objected if the delay in filing the appeal is condoned.

2.1 We have considered rival submissions and carefully perused the cause of delay explained by the assessee in the application as well as in the affidavit. The assessee explained the reasons for the delay that before the summons issued u/s 131 of the Act dated 27.09.2023 which was received by the assessee only in the month of October, 2023, the assessee was not having any information/ knowledge about the impugned order as the said order was never served upon the assessee in physical form. There is no dispute that in the Form 35 the assessee has specifically negated the service of notice or the communication sent on e-mail. This factual position is not disputed by the revenue that the impugned order was passed ex-parte and the same was communicated only through electronic mode through e-mail to the e-mail id available with the department. It is pertinent to note that the impugned order was passed by the A.O u/s 201(1) of the Act for the default on the part of the assessee to deduct the tax at source in respect of payment made to BDA for the execution of the work through tendering process and finally the

payment made to the contractor after deduction of TDS by the BDA. The assessee has also filed the certificate issued u/s 26A of the Act in respect of fact that BDA has duly considered these amounts in their computation of income and filed the return of income. Apart from these reasons explained by the assessee it is pointed out that there is a mistake in calculation made by A.O of the TDS default on the part of the assessee by taking some payment received by BDA from the departments other than the assessee. Accordingly when the assessee has explained the cause of delay as the assessee was not aware of the impugned order passed by the CIT(A) till the recovery proceedings were initiated and notices were issued u/s 131 of the Act in this respect, the delay of 320 days in filing these appeals is condoned.

3. The assessee has raised common grounds of appeal. The grounds of appeal raised for Assessment Year 2013-14 are reproduced as under:

"1. That on the facts and in the circumstances of the case the learned Commissioner of Income Tax (Appeals) [CIT(A)] erred in facts and in law in dismissing the appeal.

2. That on the facts and in the circumstances of the case the CIT(A) erred in facts and in law in dismissing the appeal as there is contradiction in the order passed by assessing officer regarding amount of payment made to Bhopal Development Authority. At one place of order, it is 157,22,600/- whereas as per list, it is 231,38600/-. Thus, the basis for calculating tax demand is not confirmed.

3. That on the facts and in the circumstances of the case the learned CIT(A) erred in facts and in law in dismissing the appeal as payee, Bhopal Development Authority, has included all payments in its income and filed return of income.

4. *That on the facts and in the circumstances of the case the learned CIT(A) erred in facts and in law in dismissing the appeal as I'd assessing officer has included many payments to Bhopal Development Authority in his order which were not made by appellant. Hence the order passed by the Income Tax Officer is arbitrary and bad in law as proper verification of records has not been done.*

5. *That on the facts and in the circumstances of the case the learned CIT(A) erred in facts and in law in dismissing the appeal as interest has been wrongly charged.*

6. *That on the facts and in the circumstances of the case the learned CIT(A) erred in facts and in law in in dismissing the appeal as appellant tried its best to collect Form 26A from Bhopal Development Authority but could not succeed. The appellant could not furnish its submissions before learned CIT(A) in absence of Form 26A.*

7. *That proper opportunity of hearing was not granted to appellant as appeal order has been passed ex-parte which is in violation of principle of natural justice.*

8. *As per portal, the appeal order was passed on 13.12.2022 but physical order was not served on appellant. The appellant is the State Govt. Department and usually works on physical documents hence the appeal order remained unnoticed. When summon u/s 131 of the Income Tax Act was issued for the recovery of demand to appear on 31.10.2023, the appellant came to know that this appeal has been dismissed on 13.12.2022. The Assistant Commissioner and other staff of the appellant were engaged in the election of State Legislative Assembly and due to this reason, delay occurred in filing appeal. The delay in filing appeal is unintentional.*

9. *The appellant prays to seek leave to add or amend any grounds of appeal, if necessary, in the interest of justice under law.*

10. *The appellant prays to condone the delay in filing appeal.*

11. *The appellant prays to delete the demand of tax and interest or to remand the case in the interest of justice."*

4. The Ld. AR of the assessee has submitted that the assessee acts as a Drawing & Disbursing Officer (DDO) and oversees the welfare programme undertaken by Govt. of Madhya Pradesh in the

field of health, education, economic, social and human resource development of the members of Scheduled Tribes and Scheduled castes. These welfare programmes includes interalia construct and maintaining schools, special institutions, playgrounds, sports complexes and hostels. They also includes providing accommodation, coaching and other facilities for all levels of education for the students of these communities. The assessee receives the fund from the Government for the welfare schemes including acquiring, maintaining hostels and schools buildings and therefore, the assessee being DDO transfers these funds to BDA which is the nodal agency for the said work. The BDA in turn invites the tenders from the contractors and awards the work to the contractors. The BDA made the payments to the contractors as per their bills and execution of work after deducting the tax at source (TDS) u/s 194C of the Act which was also credited to the account of the Central Government. He has further submitted that the assessee has explained before the A.O that the BDA has considered these payment as part of their income and also issued a declaration u/s 26A issued by the Accountant placed at page 77 to 92 of the paper book. Therefore, the Ld.AR has submitted that once the BDA has considered this amount as part of their income then in view of the first provisio to Section 201(1) of the Act the assessee cannot be held as assessee in default. In support of this contention he has relied upon the judgment of **Hon'ble Supreme Court in case of Hindustan Coca Cola Beverages P. Ltd vs. CIT 293 ITR 226** as well as the decision of this **Tribunal in case of District**

Organiser Tribal Welfare, Ujjain vs. ITO 51 ITJ 485. The Ld. AR has also relied upon the **Instruction No.275/95 dated 29.01.1997 issued by CBDT** and submitted that the board has issued the instructions that no demand visulaised under section 201(1) of the Income Tax Act should be enforced after the tax deductor has satisfied the officer in charge of TDS that taxes have been paid by the deductee-assessee. The Ld. AR has further pointed out that the total amount was paid by the assessee during the year was only Rs.1,57,22,600/- however, the A.O has calculated the TDS default on the amount of Rs.2,31,38,660/- for Assessment Year 2013-14. Therefore, there are erroneous calculations made by the A.O while passing the orders u/s 201(1) of the Act. Similarly for the Assessment Year 2014-15 to 2017-18 the A.O has committed the same calculation mistakes. The Ld. AR has further pointed out that for the assessment year 2012-13 the CIT(A) fixed the date of hearing for 15.12.2022 whereas the impugned order was passed on 13.12.2022. In any case the appeal of the assessee were dismissed for non-prosecution by ex-parte order because the assessee did not received the notice which were sent only on the electronic mode. Hence, the Ld. AR has prayed that the impugned order of CIT(A) be set aside and the matter may be remanded to the record of the A.O for fresh adjudication after considering the relevant details and particularly the certificate issued u/s 26A of the Act. On the other hand Ld. DR has relied upon the orders of authorities below.

5. We have considered the rival submissions as well as relevant material placed on record. The CIT(A) has passed identical orders for all 6 years involving the common issue holding the assessee as assessee in default in respect of the payments made by the assessee to BDA without deducting TDS. The A.O has recorded the findings in para 5 of the impugned order as under:

"5. I have carefully considered the submissions/replies made by or on behalf of the assessee and the same are not found to be acceptable on account of the following reasons.

(a). The fund was given by the assessee-deductor to BDA for various construction work. The assessee tax deductor accepted in its reply that the BDA was appointed as construction agency.

The Bhopal Development Authority has submitted vide letter dated 01.03.2017 that the said fund was received from the assessee tax deductor for various construction work like CC road construction, Naali construction, community hall construction, construction and repairing work of various hostel at different place etc.; which were clearly contractual in nature within the meaning of section 194C of the Act. The BDA has also deducted TDS from payment made to sub-contractor as per the reply furnished. Thus, there exist contract between BDA and assessee tax deductor in furtherance which he has made the payments and the provisions of TDS u/s.194C are clearly attracted in respect of payment to BDA.

(b). Though, it has been submitted by the assessee tax deductor that BDA have considered the said payments made to them in their total income and have filed their returns of income, yet no any evidence as to furnishing of returns of income by them was furnished. Also, no any certificate in form no. 26A as prescribed as per rule 31ACB of IT rules 1962 was furnished from an accountant to the effect to proviso to section 201(1) of the Act."

5.1 Thus in sub-para (b) the A.O has clearly mentioned that the assessee has submitted that BDA has considered the same payment made to them in their total income and also filed the

return of income. However, in the absence of certificate in Form No.26A the A.O did not accept this explanation and reply of the assessee. Further the assessee has pointed out that there are computation/calculation mistakes committed by the A.O which are stated as under:

- “(1) For the assessment year 2013-14, Para 4 of the assessment order states that the payment made to BDA amounts to Rs. 1,57,22,600/-. However, t alleged TDS default is erroneously calculated based on Rs. 2,31,38,600/-.*
- (ii) For the assessment year 2014-15, Para 4 of the assessment order states that the payment made to BDA amounts to Rs. 4,25,91,150/-. However, the alleged TDS default is erroneously calculated based on Rs. 6,18,13,350/-.*
- (iii) For the assessment year 2015-16, the alleged interest liability u/s. 201(1 has been incorrectly calculated as Rs. 61,86,081/- based on an alleged T default amount of Rs. 22,17,620/-, which is not mathematically possible indicating a calculation error by the Ld. AO.*
- (iv) For the assessment year 2016-17, Para 4 of the assessment order states that the payment made to BDA amounts to Rs. 4,49,30,940/-. However, alleged TDS default is erroneously calculated based on Rs.4,89,30,940/-.”*

5. Primafacie it appears that the A.O has taken into consideration some amounts received by the BDA from the departments other than the assessee and therefore, the calculation mistakes/errors cannot be ruled out. The assessee has now filed the certificate in Form No.26A placed at page 77 to 92 of paper book. Thus, all these factual aspects of the matter are required to be properly verified while computing the quantum of default if any

made by the assessee. The assessee has relied upon the order of the **Co-ordinate Bench in case of District Organisr Tribal Welfare, Ujjain Vs ITO(supra)** for the assessment year 2008-09 however, it is pertinent to note that the factual point that the BDA is also retaining some percentage on account of supervision charges was not brought to the notice of the Tribunal in the said case. Since the impugned orders were passed by the CIT(A) ex-parte therefore, these relevant details as well as the certificate in Form No.26A were not produced before the CIT(A) and consequently the same remained unexamined. Hence, in the facts and circumstances of the case and in the interest of justice the impugned orders of CIT(A) are set aside and the matters are remanded to the record of the A.O for fresh adjudication after considering the relevant details as well as certificates issued u/s 26A and verification of the factual mistake as pointed out by the assessee. Needless to say the assessee be given an appropriate opportunity of hearing before passing the fresh order.

6. In the result appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 23.07.2024.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore,_ 23.07.2024

Dev/Sr. PS

*Copies to: (1) The appellant
(2) The respondent
(3) CIT
(4) CIT(A)
(5) Departmental Representative
(6) Guard File*

By order

*Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore*