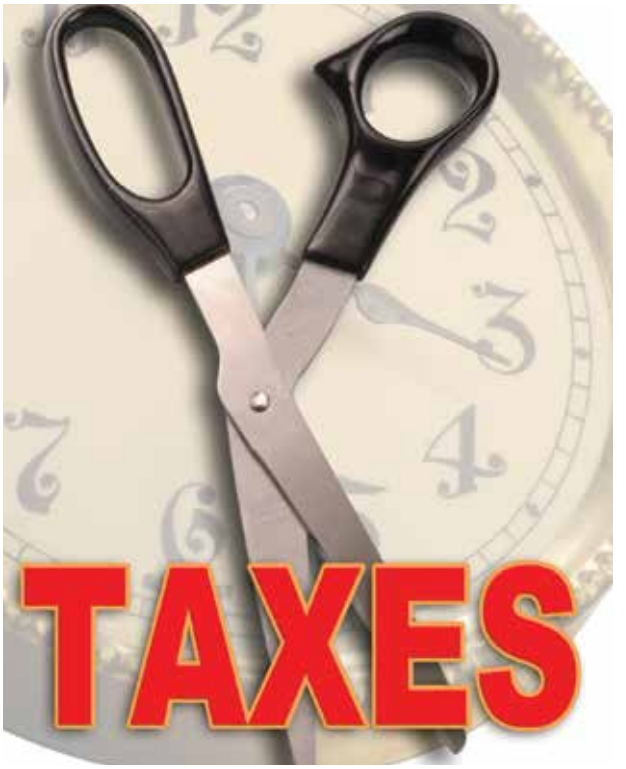
Credit for TDS – Is it no more Tedious?

The computerisation of processing of returns was brought into effect by the Finance Act, 2008 w.e.f. 1st April 2008. The scheme was brought in with a view to correct any arithmetical error in the return and any incorrect claim apparent from the return. Five years down the line, every practicing Chartered Accountant and to a large extent Income Tax Assessees, would by now have been accustomed to receiving the intimation u/s 143(1) from the Central Processing Centre (CPC), Bengaluru, showing the demand/refund for the relevant Assessment Year and in case of Refunds the adjustment of earlier year demand against the said refund u/s 245. Though a step in the right direction, the computerised processing scheme has had its own share of problems. It is in this background that the Hon'ble High Court of Delhi took up the above issues in *Writ Petitions (Civil) 2659/2012 (Court on its own Motion vs. Commissioner of Income Tax) and Writ Petition (Civil) 5443/2012 (All India Federation of Tax Practitioners vs. UOI and Others) [2013] 31 taxmann.com 31 (Delhi)*, and issued directions as discussed and analysed in this article, giving some much needed relief for the assessee. Read on to know more…



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Though a step in the right direction, the computerised processing scheme has had its own share of problems. A few of them are highlighted below –

- ***Credit of TDS:*** During processing, credit of TDS is given only to the extent the same is reflected in the Tax Credit statement Form 26AS issued u/s 203AA and 206C(5). There is a huge mismatch of TDS credit as declared by the assessee and that reflected in Form 26AS primarily due to the fact that Form 26AS is based on the quarterly returns filed by TDS deductors and tax challan details keyed in by Banks. Even a small error committed by the deductor in filing the returns/bank in entering the details would lead to the non–reflection of TDS in the Form 26AS. This ultimately leads to huge demands being raised on the assessees based on the erroneous particulars in Form 26AS.
- ***Rectification of Assessment:*** To rectify the above error in Form 26AS, the assessee is forced to approach the concerned department of the deductor, to file a correction statement and only

after the same is filed by the deductor and reflected in Form 26AS, the assessment is modified to this extent. As one can imagine, filing of the correction statement is not the highest priority of the deductor, who in a lot of cases, takes years to file the same. And filing a correction statement for every intimation received by the hundreds or thousands of his deductees can be at times impractical for the deductor.

- ***Errors in software:*** The intimation generated after computerised processing is in most cases erroneous for reasons like – (a) deductions u/s 80G not considered; (b) Taxes paid by assessee not considered in case of presumptive income assessees; (c) Interest on housing loan not considered (d) Wrong calculation of Interest u/s 234A/B/C etc., This may be due to various bugs in the processing software. The same results in an unfair estimation of the Demand outstanding / Refund due to the assessee and puts him to hassles of pursuing the same for rectification.
- ***Demands confirmed without opportunity:*** In a lot of cases, the Assessing Officer (AO) has communicated the Demands outstanding to the Central Processing Centre, without reconciling the same with the assessee. In a few cases, even the demand has not been communicated to the assessee. The CPC then proceeds to adjust this demand against the refund due for the relevant assessment year u/s 245. This leads to a confirmation of demand even before the assessee has been heard in this regard.

It is in this background that the Hon'ble High Court of Delhi took up the above issues in *Writ Petitions (Civil) 2659/2012 (Court on its own Motion vs. Commissioner of Income Tax) and Writ Petition (Civil) 5443/2012 (All India Federation of Tax Practitioners vs. UOI and Others) [2013] 31 taxmann.com 31 (Delhi)*, and issued directions as discussed below giving some much needed relief for the assessee.

Mandamus Issued in the Writ Petitions

A separate register to be maintained by the Department for rectification petitions for "past period" demands (prior to centralised processing), containing complete particulars of the rectification petitions filed u/s 154. Each application u/s 154 is to be disposed of through a speaking order and communicated to the assessee. This is to ensure that the demands for the said periods are determined in a fair manner before the same is adjusted towards the refunds due to the assessee.

Adjustment of refunds against past outstanding demands without prior intimation to the tax payers as required u/s 245 of the Income-tax Act, 1961 (hereinafter referred to as "the Act"). If refunds have been adjusted without any intimation then the following procedure is to be followed;

(a) All such cases to be transferred to the Assessing Officers
(b) The Assessing Officers will issue a notice to the Assessee which will be served as per the procedure prescribed under the Act
(c) The Assessee will be entitled to file response / reply to the notice seeking adjustment of refund
(d) The Assessing Officer to pass orders u/s 245 considering the above representation of the Assessee.

Interest u/s 244A is to be paid to the Assessee for delayed payment of refunds where the Assessee is not at fault. Wrong uploading of past arrears and failure to follow the procedures before setting off refunds u/s 245 cannot be treated as fault of the Assessee and hence interest is payable for such delay.

If intimation u/s 143(1) is not served on the assessee, then the same in *non est*/invalid and cannot be recovered by the Department by adjustment u/s 245 (unless other proceedings had been initiated). If intimations/ orders for earlier periods (for the periods prior to 31st March, 2010) were not properly communicated to the assessee, they will be treated as invalid since they have not been served within a reasonable time, unless the Department can prove otherwise.

TDS Credit to the account of the Deductee has to be given once the same has been deducted and payment has been received by the Revenue. The instant problem related to the unmatched challan (marked as "U" in Form 26AS) which represent entries, the

As per the *mandamus* issued in the writ petitions, A separate register is to be maintained by the Department for rectification petitions for "past period" demands (prior to centralised processing), containing complete particulars of the rectification petitions filed u/s 154. Each application u/s 154 is to be disposed of through a speaking order and communicated to the assessee. This is to ensure that the demands for the said periods are determined in a fair manner before the same is adjusted towards the refunds due to the assessee.

The *mandamus* of the Hon'ble High Court is welcome considering the long standing practical issues faced by the Assessees pursuant to centralised processing by the Department. The same reinforces the basic principles of the Act, relating to Credit of TDS, ensures that the principles of natural justice are upheld, and also provides reasonable directives to the department, to ensure speedy resolution of issues faced by the Assessees, and relieves him of cumbersome procedural hassles.

challan details of which are not found in the Online Tax Accounting System (OLTAS) for which credit was being denied to the Deductee. The Department has been directed to determine the procedure and the time limit wherein all the unmatched entries are to be rectified by the deductor.

Credit of TDS to be given, where the Assessee furnishes the requisite details and particulars even if the same is not properly reflected in Form 26AS. The Assessing Officer should verify whether or not the deductor has made payment of TDS and if the payment has been made, credit of TDS is to be given. Rectification Orders u/s 154 may be passed to give effect to the same. If the deductor has made mistakes in uploading details, then the department is at liberty to communicate with the deductor through issue of notice under the provisions of Chapter XVII and compel him to upload the correct particulars/details. The assessee cannot be penalized for the fault of the deductor.

The above *mandamus* are comprehensive in nature and cover most of the problems faced by the assessees as highlighted above.

Analysis

A. Allowance of TDS Credit where there is a mismatch between TDS Claimed by Assessee and Form 26AS –

The above directive is more important from the perspective of allowance of TDS Credit as with the issue of the above directive, the onus now shifts to the Department to require the Deductor rectify the TDS returns in case the assessee is able to prove that TDS has been made by the Deductor. Form 26AS can no longer be considered as the only basis for allowing the Credit of TDS to the Assessee. If the Assessee is able to demonstrate that the TDS has been made the deductor, then the demand to this effect would no longer be sustainable.

The directives of the Hon'ble Delgi High Court seem to be in consonance with the principles contained in Section 199 and Section 205 of the Income-tax, Act, 1961.

Section 199 of the Act reads as follows –

> ***"199 – Credit of Tax Deducted***
>
> *(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 (1A) 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 purposes 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."*

Section 199 postulates that any deduction of Tax made under the provisions of Chapter XVII shall considered as *payment of tax on behalf of the deductee* and credit shall be allowable to the assessee. The credit shall be allowed as specified in the Rules made in this behalf. Rule 37BA has been issued in this regard and the same allows for Credit of TDS on the basis of the information relating to deduction of tax furnished by the deductor to the Income Tax authority. This refers to the periodic returns in Form 24Q/26Q/27Q/27EQ to be filed by the Deductor.

However, it is to be noted that such allowance of Credit could lead to the following situations –

(a) The TDS made by the Deductor is *not at all remitted*

(b) The TDS made by the Deductor is *remitted* but *TDS returns are not filed* by the Deductor

(c) The TDS return is filed but the *particulars of*

the Deductees are stated wrongly e.g. PAN wrongly stated, PAN omitted to be quoted etc.,

In all of the above cases, it is possible that the Credit will not be allowed to the Assessee (since the same will not reflect in the Tax Credit Statement Form 26AS), based on the provisions of Section 199. However, a reading of Section 205 of the Act will throw better light on the situation.

Section 205 of the Act reads as follows –

> ***"205. Bar against direct demand on the Assessee*** *Where tax is deductible at the source under the foregoing provisions of this Chapter, the assessee* ***shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income****."*

Section 205 of the Act, postulates that where TDS has been made, then the demand to the extent is *not recoverable from the Assessee. The same does not prescribe filing of returns as a condition for non – recovery of the amount*.

Section 191 of the Act, provides further leverage to this position –

> ***"191. Direct Payment*** *In the case of income in respect of which provision is not made under this Chapter for deducting income-tax at the time of payment, and in any case where income-tax has not been deducted in accordance with the provisions of this Chapter, income-tax shall be payable by the assessee direct.*
>
> *Explanation.—For the removal of doubts, it is hereby declared that if any person including the principal officer of a company,—*
>
> ***(a) who is required to deduct any sum in accordance with the provisions of this Act; or***
>
> ***(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or after so deducting fails to pay, or does not pay****, the whole or any part of the tax, as required by or under this Act, and where the assessee has also failed to pay such tax directly, then, such person shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default within the meaning of sub-section (1) of section 201, in respect of such tax."*

How the department plans to comply with and implement the directives in mandamus of the Hon'ble High Court remains to be seen. A positive move however, has come from the department, vide Letter [F.No.DIT(S)-III/CPC/2012-13/ Demand Management] dated 21.03.2012, wherein the Assessing Officers are required to give the Assessees an opportunity to file replies, and after examining such replies, the Assessing Officers are required to communicate his findings to the CPC, (and the assessee) as per section 245, which will accordingly then process the refund and adjust the demand.

Thus it is only very evident that once the Assessee is able to establish deduction of Tax at source, then he shall not be required to pay the same once again to the Department. *It is also pertinent to note that Section 191 also does not prescribe non–filing/wrong–filing of returns of deductor or non–payment of TDS by the Deductor to the Central Government as a condition for direct payment of tax by the Assessee*.

Thus on a *combined reading of Sec. 199, Sec. 205 and Sec.191 of the Act*, it become clear that once TDS has been made by the Deductor, and the Assessee is able to prove the same (Form 16 and Form 16A issued by the Deductor may constitute valid proof in this regard), then in the situations highlighted above, *even though the Department has ground to deny credit to the Assessee*, the demand to the extent of the same *will not be recoverable from the assessee by virtue of the provisions contained in Section 205 and Section 191*.

In so far as the TDS provisions are concerned, the above Sections envisage two separate events,

(a) Deduction of Tax from the Assessee,

(b) Remittance of the same by the Deductor to the Central Government and filing of returns

Section 191 makes it amply clear that where there is any default by the Deductor *after deduction of Tax*, then the deductor shall independently be considered as an Assessee in Default and shall be independently liable for recovery and penal consequences under 271C, 272B, 272BB, 272A(2), 271H and 220. *The Department does not seem to have the right to recover the same from the Assessee also*.

Hence where the Form 26AS (Tax Credit Statement) which is based on the returns filed by the Deductor, *is erroneous on account of the default of the Deductor/Department (Refer Para 3.4), and the assessee is able to prove tax deduction*, then the Department cannot go on to recover the TDS amounts from the Assessee. This would be contrary to the intentions of the Act and against the principles of natural justice. *The only solution to this situation is that the Department pursues the deductor to get the defaults rectified, and in failure of the same treat him as an assessee in default*. The same is what is prescribed by the Hon'ble High Court of Delhi as well.

It is to be noted that Section 199 of the Act, had been amended by Finance Act, 2008 w.e.f. 1.4.2008, to remove Form 26AS as the basis for allowance of Credit.

The positions as analysed in the above paragraph gain leverage based on ratio of the decision in the case of *Anusuya Alva 278 ITR 206 (Kar.)*, wherein it was held that when the deductor deducts tax he is acting as the agent of Revenue. Hence where there is any default/violation on the part of the deductor, then the consequence would only fall on the Revenue and cannot be foisted on the assessee. The Hon'ble High Court of Karnataka, held that the wordings used in Section 205 is only "deducted" and not "deducted and remitted" and that the word remitted cannot be added on by implication. Hence where once tax has been deducted, the same cannot be recovered from the Assessee even if not remitted by the deductor. Similar principles were also laid down in the following cases –

- *ACIT vs. Om Prakash Gattani* (2000) 242 ITR 638
- *Yashpal Sahni vs. Rekha Hajarnavis*, ACIT (2007) 293 ITR 539
- *J G Joseph vs. Jt. CIT* (2008) 303 ITR (AT) 395, 402 (Mum.)

B. Position post Online issue of Form 16/Form 16A – Circular 03/2011 and Circular 01/2012

Circular 03/2011 dated 13.05.2011 has provided that w.e.f. 01.04.2011 all TDS Certificates u/s 203 (Form 16/Form 16A) can be issued only from the TIN Central System from the Tin Website (www.tin-nsdl.com) by a Corporate Assessee and in particular by a Banking Company. With the introduction of Circular 01//2012 dated 09.04.2012, now all Deductors deducting tax on or after 01.04.2012, shall be required to issue TDS Certificates only from the TIN Website.

Though this move reduces the difference between Form 26AS and Form 16/Form 16A, it is possible that the data uploaded by the Deductor still contains defaults in which case, Form 26AS and Form 16/Form 16A, would be erroneous. In such a case, it would be difficult for the assessee to claim TDS Credit. However, if the Assessee is still able to prove through other means such as Declaration/Affidavit from the Deductor, payment advices etc., that TDS has been made and the default is on the deductor, then the Department would be barred from recovering tax from the Assessee, since it is well established law, that the Circulars of the Board are subject to the provisions of the Act.

C. Adjustment of Refunds against arrears u/s 245

As far as the issue of Adjustment of Refund of the Current period u/s 245 against past period demand, the directives ensure that the principles specifically provided of the Section 245 and the principles of natural justice of giving the Assessee an opportunity of being heard are followed before such adjustment.

Remedies to the Assessees

Based on the above mandamus issued by the Hon'ble High Court of Delhi, the following approaches may be adopted by the Assessees in the situations specified therein:

Receipt of Intimation u/s 143(1) resulting in demand due to non–reflection of TDS in From 26AS –

(a) Para 2.5 and 2.6 highlighted above directly cover this situation.

(b) The Assessee can file a rectification petition u/s 154, explaining the differences between the TDS as reflected in Form 26AS and as disclosed by him. Appropriate evidences substantiating the claim of TDS like Form 16/ Form 16A issued by the Deductors, Payment Advices etc. may be produced to this effect.

(c) The Assessing Officer (AO) is required to verify whether the TDS has in fact been made, and if the same has been made, pass necessary orders u/s 154 modifying the demand to this effect.

(d) With the issue of the above directive, the onus is now on the Department to require the Deductor to rectify the TDS returns. The Assessee per se cannot be compelled to communicate with the deductor for

correction of TDS returns, as a precondition for dropping the demand, though in his interest he may still do so if required.

Intimation received u/s 143(1) proceeds to adjust the Refund due to the Assessee against past period demands *which have not been served on the Assessee.*

(a) Para 2.4 envisages this situation.

(b) As per the directive issued in this regard, the said intimation issued is *non est*/invalid and hence the adjustment also becomes invalid.

(c) The directive is silent on the right of the Assessee/duties of the Department in this situation. Hence the assessee may (a) File a Rectification u/s 154 (b) Make an application to the Board u/s 119 (c) Prefer revision u/s 264 (d) Prefer appeals u/s 246A

Intimation received u/s 143(1) proceeds to adjust the Refund due to the Assessee against past period demands *without prior notice*

(a) Para 2.2 and 2.4 highlighted above cover this situation.

(b) The Assessee is required to first ascertain whether he has received the demand of the relevant past assessment year. If he has not been served with the order u/s 143(3) or intimation u/s 143(1) then the adjustment is not valid.

(c) As per the directive, if the adjustment has been done without giving notice to the Assessee, then the Department is required to follow the procedure as highlighted in Para 2.2 above.

(d) Without prejudice to the above, presently, the Assessees are allowed to approach the jurisdictional AOs with necessary representations for non–adjustment of refund u/s 245. The AO is required to pass a speaking order pursuant to the same.

Intimation received u/s 143(1) proceeds to adjust the Refund due to the Assessee against past period demands *without reference rectification petition filed u/s 154 for the past period demand* –

(a) Para 2.1 covers this situation.

(b) As per the directive, the Department is required to dispose of all rectification petitions for the past period demands through a speaking order.

(c) The Assessee may represent to the jurisdictional AO to dispose of the petition through a speaking order and communicate the same to him before such adjustment.

Receipt of Notice u/s 143(2) due to non–reflection of TDS in From 26AS –

(a) Para 2.5 and 2.6 highlighted above directly cover this situation.

(b) The Assessee can file a written representations, explaining the differences between the TDS as reflected in Form 26AS and as disclosed by him along with appropriate evidence.

(c) The AO is required to verify whether the TDS has in fact been made, and if the same has been made, consider the same during assessment of the Tax payable u/s 143(3).

(d) With the issue of the above directive, the onus is now on the Department to require the Deductor to rectify the TDS returns. The Assessee per se cannot be compelled to communicate with the deductor for correction of TDS returns, as a precondition for considering the same during assessment u/s 143(3).

Conclusion

The above mandamus of the Hon'ble High Court is welcome considering the long standing practical issues faced by the Assessees pursuant to Centralized Processing by the Department. The same reinforces the basic principles of the Act, relating to Credit of TDS, ensures that the principles of natural justice are upheld, and also provides reasonable directives to the department, to ensure speedy resolution of issues faced by the Assessees, and relieves him of cumbersome procedural hassles.

How the department plans to comply with and implement the above directives remains to be seen. A positive move however, has come from the department, vide Letter [F.No.DIT(S)-III/CPC/2012-13/Demand Management] dated 21.03.2012, wherein the Assessing Officers are required to give the Assessees an opportunity to file replies, and after examining such replies, the Assessing Officers are required to communicate his findings to the CPC, (and the assessee) as per section 245, which will accordingly then process the refund and adjust the demand. Letter F.No.1 (164)/DIT/(R)/Demand Management/DOMS/2013-14, dated 29.04.2013, also reiterates the same. Members should also independently, take up the issues discussed herein before with the department and ensure that the assessees are not subject to any further hassles in this regard. ■