आयकर अपीलीय अधिकरण, दिल्ली न्यायपीठ "आई-1", नई दिल्ली में

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'I-1', NEW DELHI

सुश्री सुषमा चावला, न्यायिक सदस्य एवं डॉ. बी. आर. आर. कुमार, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM & DR.B.R.R.KUMAR, AM

आयकर अपील सं./ITA No.5708/Del/2019
निर्धारण वर्ष / Assessment Year: 2015-16

Aricent Technologies Holdings Ltd.,
5, Jain Mandir Marg (Annex),
Connaught Place, New Delhi-110001.
PAN-AACCK8280B .....**अपीलार्थी**/Appellant

vs

The Addl. CIT,
Special Range-1, New Delhi. ..... **प्रत्यर्थी** / Respondent

अपीलार्थी की ओर से / Appellant by : Sh. Ajay Vohra, Sr.Adv.,
Sh. Neeraj Jain, Adv. & Sh. Anshul Sachar, Adv.
प्रत्यर्थी की ओर से / Respondent by : Sh. Sanjay I.Bara, CIT DR

सुनवाई की तारीख / **Date of Hearing : 26.09.2019**		**घोषणा की तारीख /** **Date of Pronouncement: 23.12.2019**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

The appeal filed by assessee is against order of Assessing Officer dated 30.05.2019 relating to assessment year 2015-16 under section 144 r.w.s. 143(3) of the Income-tax Act, 1961 (in short "Act").

2. The assessee has raised following grounds in this appeal:-

1. That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer ("Ld. AO") is barred by limitation in terms of section 153 r.w.s 144C of the Act and therefore, is liable to be quashed.

2. That the Ld. AO/ DRP erred on facts and in law in not allowing depreciation of Rs. 89,28,64,060/- claimed under section 32(1)(i) of the Act on written down value of Goodwill of Rs. 357,14,56,239 arising out of amalgamation of Flextronics Software Limited (Flextronics) and Futures Software Limited (FSL) into the appellant on the ground that appellant has not assigned fair value to other assets while computing Goodwill.

2.1 That the Ld. AO/ DRP erred on facts and in law in not appreciating that the Goodwill represents difference between the aggregate book value of investment in the equity shares of Flextronics in the books of the appellant and FSL in the books of Flextronics and the aggregate face value of share capital of Flextronics held by the appellant and FSL held by Flextronics accounted as goodwill amounting to Rs.26,75,57,10,570/- pursuant to amalgamation of Flextronics and FSL with the appellant.

2.2 That the Ld. AO/ DRP erred on facts and in law in alleging that the valuation of goodwill is unclear and the assessee had failed to ascribe a correct value to goodwill, i.e. the fair value of net assets.

2.3 That the Hon'ble DRP/ Ld. AO erred on facts and in law in relying on the ITAT Ruling of DCIT vs. Toyo Engineering Ltd., ITA No. 3279/ Mum/2008 without appreciating that the same was reversed by the Hon'ble Mumbai Bench of the Tribunal.

2.4 That the learned AO, erred, in law and on facts and circumstances of the case in proposing to disallow depreciation on Goodwill by alleging that the Supreme Court in the case of CIT vs. Smits Securities Ltd.: 348 ITR 302 does not give any clarity on the aspect related to valuation of 'Goodwill'.

3. That the Ld. AO/ DRP erred on facts and in law in not allowing the deduction of Rs. 14,99,05,312 claimed on account of reimbursement paid to the parent company towards ESOP for granting stock options to employees of the appellant.

3.2 That the Ld. AO/ DRP erred on facts and in law in proposing to hold that employees compensation expense claimed by the appellant was not allowable under section 37 of the Act alleging that the same was not incurred wholly and exclusively for the purpose of the business of the appellant company.

3.3 That the Ld. AO/ DRP erred on facts and in law alleging that the expenditure claimed did not represent a crystallized liability and being without any objective evidence for justification, the same was not allowable as deduction.

3.3 That the Ld. AO/ DRP erred on facts and in law in holding that ESOP is a part of salary and since the appellant did not deduct any tax at source on payment to the group company, the amount claimed was disallowable under section 40(a) of the Act.

3.4 Without prejudice, that the Ld. AO/ DRP failed to appreciate that: (a) tax was not deductible on mere issuance of options and (b) no disallowance, in any case, can be made under section 40(a) of the Act on account of alleged non-deduction of tax on payments made in the nature of 'emoluments' to employees.

3.5 That the Ld. AO/ DRP erred on facts and in law in failing to appreciate that the appellant had merely reimbursed the expenses to its group company and the same was not subject to deduction of tax at source.

3.6 That the Ld. AO/ DRP erred on facts and in law in treating the amount of discount a short capital receipt and the entire expenditure to be in the nature of capital expenditure.

4. That the Ld. AO erred on facts and in law in not granting Foreign Tax Credit (FTC) amounting to Rs. 4,51,62,275 claimed by the appellant in its return of income.

5. That the Ld. AO erred on facts and in law in not granting Minimum Alternate Tax (MAT) credit amounting to Rs. 21,22,53,782, claimed by the appellant in its return of income.

6. That the Ld. AO erred on facts in allowing credit of the tax deducted at source of Rs. 16,57,18,029, as against Rs. 18,79,68,945 claimed by the appellant in its return of income, resulting in short TDS credit amounting to Rs. 2,22,50,916.

7. That the Ld. AO erred on facts in allowing credit of the self-assessment tax of Rs. 21,54,42,020, as against Rs. 23,08,43,470 claimed by the appellant in its return of income, resulting in short credit of self-assessment tax of Rs. 1,54,01,450.

8. That the Ld. AO erred on facts and in law in charging interest of Rs. 84,89,450 under section 234A of the Act without appreciating that the appellant had duly filed its return before the due date of filing the return of income under section 139 of the Act.

9. That the Ld. AO erred on facts and in law in charging interest under sections 234B and 234C of the Act"

3. The Ld.AR for the assessee at the outset pointed out that the issues raised in the present appeal are similar to the issues raised in the earlier years and are squarely covered by the order of the Tribunal in earlier years.

4. The Ld. DR for the Revenue placed reliance on the orders of the authorities below.

5. We have heard the rival contentions and perused the record. Ground of appeal Nos. 1 & 7 raised by the assessee are not pressed and the same are dismissed as not pressed.

6. Ground of appeal Nos. 2 to 2.4 are against the disallowance of depreciation on goodwill. The Tribunal has already adjudicated this issue in the bunch of appeals with the lead appeal in ITA No.1308/Del/2015 relating to Assessment Year 2010-11, order dated 29.11.2019 and have decided the issue in line with ratio laid down by the Tribunal in assessee's own case relating to Assessment Year 2009-10. The relevant findings of the Tribunal are in paras 27 to 34. Reference is being made to the said paras but the same are not being reproduced for the sake of brevity. Following the same

parity of reasoning, we allow the claim of the assessee of depreciation on goodwill. Hence, Ground of appeal Nos. 2 to 2.4 are thus allowed.

7. The issue raised by the assessee in Ground of appeal Nos. 3 to 3.6 is against the disallowance of ESOP expenses. Similar disallowance was made by the Assessing Officer in Assessment Year 2014-15. The Tribunal have decided the issue in ITA No.7637/Del/2018 Assessment Year 2014-15, in bunch of appeals with the lead appeal in assessee's own case vide consolidated order dated 29.11.2019 of even date vide paras 102 to 120, which are reproduced hereunder:-

> *102. The Ground of appeal Nos.1 & 1.1 raised by the assessee are general in nature and do not require any adjudication. Hence, the same are dismissed.*
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> *103. The Ground of appeal Nos. 2 to 2.6 raised by the assessee is against the disallowance of depreciation on goodwill. We have already adjudicated this issue in paras above while deciding Ground of appeal Nos.5 to 5.1 in Assessment Year 2010-11 and following the same parity of reasoning, we allow Ground of appeal Nos. 2 to 2.6 raised by the assessee.*
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> *104. The issue raised in Ground of appeal Nos. 4 to 4.6 is against the disallowance of ESOP expenses of Rs.6.58 crores.*
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> *105. Briefly in the facts of the issue raised, the assessee had claimed sum of Rs. 6.58 crores as deduction on account of reimbursement of ESOP expenses to the parent company. The assessee was asked to provide the details of tax deducted at source and proof of deposit of the same. The assessee in reply pointed out that the said amount was paid towards ESOP, on which no tax was deducted. The Assessing Officer show-caused the assessee to explain why the deduction on account of salary may not be disallowed, since it was not an allowable expenditure. The explanation of the assessee in this regard was as under:-*
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> *I. "ESOP expense represents revenue cost paid by the assessee to its parent company in relation to the award of shares to its employees. Employees covered under the Restricted Stock Units and stock options have been granted the award, which entitles*

them to receive shares of Aricents (the ultimate holding company of assessee company) after completion of the vesting period.

II. It is a mere reimbursement which the assessee compensated the parent company for granting the stock options or RSU to the assessee's employees.

III. It is an alternative to direct incentive in cash to the employees and is intended for achieving increased level of participation and retention.

IV. It is an expenditure incurred to compensate employees in lieu of services rendered.

V. It is a perquisite.

VI. It is a deductible business expenditure u/s 37(1)."

106. The Assessing Officer on the other hand did not allow the claim of the assessee alleging as under:-

(a) "Employees compensation expense claimed by the appellant was not allowable under section 37 of the Act since the same was not incurred wholly and exclusively for the purpose of the business of the appellant company.

(b) Expenditure claimed did not represent a crystallized liability and being without any objective evidence for justification, the same was not allowable as deduction.

(c) ESOP is a part of salary and since the appellant did not deduct any tax at source on payment to the group company, the amount claimed was disallowable under section 40(a) of the Act."

107. The Assessing Officer thus disallowed the said expenditure in the hands of the assessee, which disallowance was confirmed by the DRP and by the Assessing Officer in the final assessment order.

108. The assessee is in appeal against the order of the Assessing Officer.

109. It was pointed out by the Ld.AR for the assessee that the fair market value of the shares was USD 0.77 dollars per share and options were exercised at USD 0.01 per shares. The difference was reimbursed to the AE in Cayman Island. Since the liability accrued /crystallized during the year and as the assessee was following mercantile system of accounting then the same is to be

allowed as a deduction u/s 37(1) of the Act. In this regard reliance was placed on the following decisions:-

[i] CIT vs M/s PVP Ventures Ltd. 211 Taxman 554 (Madras High Court);

[ii] CIT vs Lemon Tree Hotels Ltd. 104 taxmann.com 26 (Delhi High Court); and

[iii] Biocon Limited vs DCIT 155 TTJ 649 (Banglore) (Special Bench)

110. It was also pointed out that the Assessing Officer has placed reliance on the decision of Special Bench but u/s 192 r.w.s 17(2), when the option is exercised by the employee, then tax is to be deducted at source.

111. The Ld.DR for the Revenue placed reliance on the order of the Assessing Officer and DRP with special reference to page 24 of the order of the DRP.

112. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is with regard to claim of the expenses on account of reimbursement paid to the parent company towards ESOP for granting stock auctions to the assessee's employees. Share incentive plan for the employees of Aricent Group was floated and under the scheme, as part of the employee compensation measure, an option to purchase the shares after the completion of the vesting period was granted to the employees of the company at a discounted price to the fair market value of the share. The difference between the fair market value of the shares and the amount paid by the employee on actual exercise of option represented employee compensation expenses. Since the option was granted to the employees during the relevant assessment year and assessee reimbursed the said amount to the group company, as the liability had accrued/crystallized and the same was recognized in the year itself as the assessee was following mercantile system of accounting. The aforesaid expense was claimed as deduction u/s 37(1) of the Act. It may be pointed out herein itself that the aforesaid payment to the Aricent Cayman has been accepted by the TPO to be at arms length.

113. We hold that the aforesaid payment under the ESOP scheme wherein the reimbursement was paid to the parent company, towards ESOP for granting stock options to assessee's employees is in the nature of employees compensation and is deductible as the expenditure incurred was wholly and exclusively for the purposes of business.

114. We further find that the issue stands covered by the decision of Hon'ble Madras High Court in CIT vs M/s PVP Ventures Ltd. (supra) wherein it was held that the amount of difference between the market value of the shares issued under Employees Stock Option Scheme and the value at which they were allotted to the employees, which was debited to the P&L account in accordance with SEBI Guidelines, is an ascertained liability, and thus, allowable as revenue expenditure under section 37(1) of the Act.

115. The said proposition has been applied by the Hon'ble High Court in CIT vs Lemon Tree Hotels Ltd. (supra) and the claim of ESOP expenditure has been allowed as expenditure u/s 37 of the Act.

116. Further, the Special Bench in Biocon Ltd. vs DCIT (supra) held that discount on issue of ESOP, i.e. the difference between the market price of shares on date of exercise was deductible as business expenditure, since the same represents consideration/compensation for services rendered by employees. The Special Bench observed that the company incurs obligation of issuing shares at a discounted price on a future date in lieu of services rendered by the employees, which is allowable as deduction under section 37(1) of the Act. The Special Bench further held that the said discount was an ascertained liability, since the employer incurred obligation to compensate the employees over the vesting period, notwithstanding the fact that the exact amount of discount which is quantified only at the time of exercising the options.

117. Following the same parity of reasoning, we hold that the said expenses are allowable as a business expenditure in the hands of the assessee.

118. Now coming to the second aspect of the case that whether aforesaid payment requires tax deduction or not. The requirement to deduct tax would arise when the employee exercises the option granted under ESOP and it would be treated as perquisite in the hands of the employee on actual allocation/transfer of such shares, which is provided u/s 17(2)(vi) of the Act. Further, even the provision of section 192 of the Act mandate the deduction of tax at source on actual payment which is allotment of shares in the case of ESOP and not prior to that. Hence, there was no requirement to deduct tax at source by the assessee while reimbursing the amount to its AE during the year under consideration. Accordingly, we direct the Assessing Officer to allow the said expense totaling to Rs.6.58 crores. Ground of appeal Nos. 4 to 4.6 are thus allowed.

> *119. The issue raised in Ground of appeal No.5 by the assessee is against the transfer pricing adjustment of Rs.3.90 crores on account of interest on receivables. The said issue is similar to Ground of appeal Nos. 4 to 4.6 of Assessment Year 201-111. Following the same parity of reasoning, we delete the transfer pricing adjustment and allow the claim of the assessee. Ground of appeal No.5 raised by the assessee in this appeal is thus allowed.*
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> *120. The issue raised in Ground of appeal No.6 is against incorrectly allowing credit of TDS. The Assessing Officer is directed to verify the claim of the assessee after allowing reasonable opportunity of hearing to assessee. Hence, Ground of appeal No.6 raised by the assessee is allowed."*

8. Relying on the same parity of reasoning, we allow the claim of the assessee in Assessment Year 2015-16 also. Ground of appeal Nos. 3 to 3.6 raised by the assessee are thus allowed.

9. The limited issue raised in Ground of appeal No.4 is against non-grant of foreign tax credit (partly) by the Assessing Officer. The Ld.AR for the assessee had stressed that out of total claim of Rs.4.52 crores of foreign tax credit, the Assessing Officer in the order passed u/s 154 of the Act allowed the claim at Rs.3.58 crores. The balance foreign tax credit which has not been allowed is Rs.88,67,811/-. The Ld.AR pointed out that the details are placed at page 39; however, till date the assessee has not received the certificate for the balance foreign tax credit, which is not allowed to the assessee.

10. The Ld. DR for the Revenue strongly opposed as the assessee had failed to file any evidence in this regard.

11. We find no merit in the plea of the assessee especially where the assessee has failed to produce the certificates till the date of hearing before us. In such facts and circumstances, there is no merit in issue raised vide Ground of appeal No.4 and the same is dismissed.

12. Now coming to next issue on the ground of MAT credit raised vide Ground of appeal No.5. In the facts relating to the issue, the assessee claimed MAT credit of Rs.21.22 crores in its return of income. The Assessing Officer vide order passed u/s 154/143(3) of the Act, dated 04.09.2019, had allowed MAT credit of Rs.18.71 crores. The limited issue which is raised before us is that after the appeal effects are given by the Assessing Officer for earlier years, the balance MAT credit may be allowed in the hands of the assessee. We find merit in the claim of the assessee and direct the Assessing Officer to allow the MAT credit, if any, determined after giving appeal effect in earlier years. The Ground of appeal No.5 is thus allowed.

13. Now coming to the Ground of appeal No.6 where the assessee is aggrieved by the orders of the authorities below in non-allowance of credit of tax deducted at source. The assessee in its return of income had claimed the credit to the extent of Rs.18,79,68,945/- and the Assessing Officer had allowed the credit of TDS of Rs.16,57,18,029/-. Hence, short TDS credit amounting to Rs.2,22,50,916/- was allowed to the assessee.

14. The case of the assessee before us is that complete details including name of the parties, amount paid by the parties and tax deducted at source and TDS claimed of Rs.18.79 crores were furnished alongwith the return of

income. The details of TDS are placed at pages 33 to 37 of the Paper Book. The first plea raised by the Ld.AR in this regard that where the TDS claimed by the assessee, was already reflected in the records of Tax Department, the Assessing Officer be directed to give credit of TDS claimed by the assessee. It was further pointed out that if tax had been deducted at source in accordance with the provisions of the Act and the same had been paid to the credit of Central Government, then as per section 199(1) of the Act, the same is to be treated as payment of tax on behalf of the person from whose income, such deduction was made. Further, in terms of section 205 of the Act, the assessee could not be held liable for payment of tax which was deducted at source by the deductor. In other words, once the tax has been deducted at source by the deductor, the tax could not be collected from the deductee and it was immaterial whether the deductor had deposited the tax so deducted to the credit of Central government or not. It was further stressed that since elaborate provisions are enshrined in the Act, for recovery of tax deducted at source from the person who had deducted such tax, then necessary credit should be allowed to the deductee. Reliance was placed on various decisions in this regard. It was further stressed that where the parties who had deducted tax at source, at the time of making payment to the assessee, had deducted and deposited tax at source and TDS certificates evidencing the same were furnished to the assessee; merely because credit of the said amount was not reflected in the records of the Tax Department, the assessee could not be denied the TDS credit claimed by it.

15. The Ld. DR for the Revenue pointed out the while allowing the credit for tax deducted at source, the Assessing Officer was bound by the details uploaded in Form No.26AS. However, in case, there is any mistake then the Assessing Officer can rectify the same, if applied by the assessee.

16. We have heard the rival contentions and perused the record. The issue which arises in the present Ground of appeal is against the short credit of tax deducted at source. The assessee had furnished the details party-wise of the amounts deducted out of payments due to the assessee, which are placed at pages 33 to 37 of the Paper Book. The details of tax deducted at source totals to Rs.18.79 crores, which was claimed by the assessee as part of taxes paid for the year under consideration. The Assessing Officer as against the claim of Rs.18.79 crores has allowed credit for 16.57 crores. The grievance of the assessee is two fold before us. First of all, it points out that in case subsequent to the processing of the assessment order, if changes are made in the Form No.26AS by the parties, who had deducted tax at source, out of the payment made to the assessee, then the credit of the same should be allowed to the assessee. We find merit in the plea of the assessee though the Ld.AR for the assessee however, before us has not filed any evidence in this regard. But in case, necessary evidence is available then it is duty of Assessing Officer to allow the claim as per Revised Form No.26AS.

17. Now, coming to the next stand of the assessee wherein it has been pointed out that in case deductor deducts tax at source i.e. withholds tax,

out of payments due / paid to the assessee; but does not deposit the tax withheld by it, then why should the assessee suffer?

18. Under section 199(1) of the Act, it is provided that if tax has been deducted at source in accordance with the provisions of the Chapter XVII and paid to the Central Government, the same shall be treated as payment of tax on behalf of the person, from whose income, the deduction was made.

19. Further section 205 of the Act reads as under:-

> ***205.*** *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."*

20. Under section 205 of the Act, it is further provided that where the tax had been deducted at source by the deductor out of payments due to the deductee, then such deductee cannot be held liable for payment of such tax which was deducted at source by the deductor. In other words, under the provisions of the Act, it is provided that there is liability upon the person making the payments, to deduct tax at source in line with the provisions of Chapter XVII of the Act. Once such tax had been deducted then the deductor is liable to deposit the same into the credit of the Central Government. Such amount which is withheld by the deductor out of the amount due to the deductee i.e. person to whom the payments are made, then the said deduction shall be treated as payment of tax on behalf of the person from whom such deductions was made, as per the provisions of section 199(1) of the Act. Further there are provisions under the Act dealing

with the recovery of tax at source from the person who have withheld the same. In terms of section 205 of the Act, the assessee/deductee cannot be called upon to pay tax, to the extent to which tax had been deducted from the payments due. Consequently, it follows that credit for such tax deducted at source, which is deducted from the account of the deductee, by the deductor, is to be allowed as taxes paid in the hands of the deductee, irrespective of the fact whether the same has been deposited by the deductor to the credit of the Central Government or not. The deductee in such circumstances cannot be denied credit of tax deducted at source on its behalf. Under the Act, the provisions are enshrined under which recovery of tax from the account of the person, who had deducted the such tax, are provided. Accordingly, we hold that where the assessee is able to furnish the necessary details with regard to tax deduction at source out of the amounts due to it, then the action which follows is allowing the credit of such tax deducted at source to the account of the deductee. In case where the deductor deposits the tax deducted at source to the credit of the Central Government and the deduction reflects in Form No.26AS may be on a later date, then it is incumbent upon the assessee to produce the necessary evidence in this regard and it is also the duty of the Assessing Officer to allow such credit of tax deducted at source, as taxes paid in the hands of the deductee assessee.

21. We find support from the ratio laid down by the Hon'ble Bombay High Court in Yashpal Sahani vs. Rekha Hajarnavis, Assistant Commissioner of Income-tax [2007] 165 taxman 144 (Bom.) and Hon'ble Gujarat High Court

in the case of Sumit Devendra Rajani vs. Assistant Commissioner of Income-tax [2014] 49 taxmann.com 31 (Gujarat).

22. The Hon'ble High Court in latest decision dated 30.01.2019 in Pushkar Prabhat Chandra Jain vs. Union of India [2019] 103 taxmann.com 106 (Bombay) has held as under:-

> *7. Section 205 of the Act carries the caption "Bar against direct demand on assessee". The section provides that where tax is deducted at the source under the provisions of Chapter XVII, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income. This provision came up for consideration before division bench of this Court in case of Yashpal Sahni Vs. Rekha Hajarnavis and ors. It was a case where the employer while paying salary to the employee had deducted tax at source Rs.6.66 lakhs. Subsequently, disputes arose between the employer and employee due to which service of the employee was terminated. The employee filed the return of income claiming credit of TDS of Rs.6.66 lakhs. The Assessing Officer issued intimation under Section 143(1)(a) of the Act denying credit of TDS of Rs.6.66 lakhs on the ground that such amount was not deposited by the employer. This Court in such background after referring to Section 205 of the Act held and observed as under:"*
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> > *20. From the language of Section 205, it is clear that once the tax is deducted at source, the same cannot be levied once again on the assessee who has suffered the deduction. Once it is established that the tax has been deducted at source from the salary of the employee, the bar under Section 205 of the Act comes into operation and it is immaterial as to whether the tax deducted at source has been paid to the Central Government or not, because elaborate provisions are made under the Act for recovery of tax deducted at source from the person who has deducted such tax.*
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> > *21. In the present case, the petitioner assessee has furnished monthly pay slips and bank statements to show that from his salary tax was deducted at source by the employer respondent No. 6. Authenticity of the said pay slips and bank statements have not been disputed by the revenue. Thus, it is clear that the tax has been deducted at source by the respondent No. 6 from the salary paid to the petitioner. Therefore, the only question to be considered is, if the employer respondent No. 6 has failed to deposit the tax deducted at source from the salary income of the petitioner to the credit of the Central Government, whether the revenue can recover the TDS amount with interest once again from the petitioner?*
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> > *22. In the present case, though the respondent No. 6 has deducted the tax at source from the salary income of the petitioner, the respondent*

No. 6 has not issued the TDS certificate in Form No. 16 to the petitioner. As a result, the petitioner is not entitled to avail credit of the tax deducted at source. However, once it is established that the tax has been deducted at source, the bar under Section 205 of the Act comes into operation and the revenue is barred from recovering the TDS amount once again from the employee from whose income, TDS amount has been deducted. It is pertinent to note that the purpose of issuing TDS certificate under Section 203 of the Act is to enable the assessee to avail credit of the tax deducted at source in the relevant assessment year. If the TDS certificate is not issued, then under Section 199 of the Act, the assessee from whose income, tax has been deducted at source will not be entitled to take credit of the said amount. In that event, on account of the non availability of the credit, the assessee would be liable to pay tax once again even though the tax was deducted at source. Thus, it would be a case of double taxation which is not permissible in law. To avoid such anomaly, Section 205 has been enacted, to the effect that, once the tax is deducted at source by the employer company, then, the person from whose income, the tax has been deducted at source shall not be called to pay the said tax again. From the language of Section of 205 of the Act, it is clear that the bar operates as soon as it is established that the tax has been deducted at source and it is wholly irrelevant as to whether the tax deducted at source is paid to the credit of Central Government or not and whether TDS certificate in Form No. 16 has been issued or not. Also the mere fact that the employer may not issue TDS certificate to the employee does not mean that the liability of the employer ceases. The liability to pay income tax if deducted at source is upon the employer.

23. As held by the Gauhati High Court in the course of Omprakash Gattani (supra), once the mode of collecting tax by deduction at source is adopted, that mode alone is to be adopted for recovery of tax deducted at source. Although it is obligatory on the part of the person collecting tax at source to pay the said TDS amount to the credit of the Central Government within the stipulated time, if such person fails to pay the TDS amount within the stipulated time, then, Section 201 of the Act provides that such person shall be deemed to be an assessee in default and the revenue will be entitled to recover the TDS amount with interest at 12% p.a. and till the said TDS amount with interest is recovered there shall be a charge on all the assets of such person or the company. Penalty under Section 221 of the Act and rigorous imprisonment under Section 276B of the Act can also be imposed upon such defaulting person or the company. Thus, complete machinery is provided under the Act for recovery of tax deducted at source from the person who has deducted such tax at source and the revenue is barred from recovering the TDS amount from the person from whose income, tax has been deducted at source. Therefore, the fact that the revenue is unable to recover the tax deducted at source from the person who has deducted such tax would not entitle the revenue to recover the said amount once again from the employee assessee, in view of the specific bar contained in Section 205 of the Act.

> *24. As stated earlier, in the present case the petitioner assessee has established that from his salary income, tax has been deducted at source by the employer respondent No. 6 and, therefore, the revenue has to recover the said TDS amount with interest and penalty from the respondent No. 6 alone and the revenue cannot seek to recover the said amount from the petitioner assessee in view of the specific bar contained under Section 205 of the Act. The fact that the petitioner is not entitled to the credit of the tax deducted at source for the non issuance of the TDS certificate by the respondent No. 6, cannot be a ground to recover the amount of tax deducted at source from the petitioner. In other words, even if the credit of the TDS amount is not available to the petitioner assessee for want of TDS certificate, the fact that the tax has been deducted at source from salary income of the petitioner would be sufficient to hold that as per Section 205 of the Act, the revenue cannot recover the TDS amount with interest from the petitioner once again."*
>
> *8. The situation arising in the present petition is similar. The department does not contend that the petitioner did not suffer deduction of tax at source at the hands of payer, but contends that the same has not been deposited with the Government revenue. As provided under Section 205 of the Act and as elaborated by this Court in case of Yashpal Sahni (supra) under such circumstances the petitioner cannot be asked to pay the same again. It is always open for the department and infact the Act contains sufficient provisions, to make coercive recovery of such unpaid tax from the payer whose primary responsibility is to deposit the same with the Government revenue scrupulously and promptly. If the payer after deducting the tax fails to deposit it in the Government revenue, measures can always be initiated against such payers."*

23. Applying the same parity of reasoning, we direct the Assessing Officer to allow the credit of tax deducted at source in the hands of the assessee, where the assessee produces the primary evidence of same being deducted tax at source out of the amount due to it. The ground of appeal no. 6 is thus allowed.

24. Now, coming to the next issue raised in Ground of appeal No.8 which is against the charging of interest u/s 234A of the Act.

25. The Ld.AR for the assessee pointed out that the assessee had filed the return of income on 30.11.2015 which was the prescribed due date for filing the return of income by the assessee u/s 139(1) of the Act.

26. We find merit in the plea of the assessee that where the due date of filing return of income was 30.11.2015 and since the assessee had filed return of income on 30.11.2015, then there was no merit in charging of interest u/s 234A of the Act. The ground of appeal no. 8 is thus allowed.

27. The Ground of appeal No.9 is raised against charging of interest u/s 234B and 234C of the Act.

28. The Ld.AR pointed out that the interest levied u/s 234B of the Act is consequential. Hence this part of Ground of appeal is dismissed.

29. Now coming to charging of interest u/s 234C of the Act then the said interest is to be computed on the returned income of the assessee and not the income assessed by the Assessing Officer. The Assessing Officer may verify the stand of the assessee in this regard and re-compute the interest chargeable u/s 234C of the Act. Thus, Ground of appeal No.9 is partly allowed.

30. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 23rd day of December, 2019.

Sd/- **Sd/-**

(B.R.R.KUMAR) **(SUSHMA CHOWLA)**
लेखा सदस्य/ACCOUNTANT MEMBER **न्यायिक सदस्य/JUDICIAL MEMBER**

दिल्ली / दिनांक Dated : 23rd December, 2019.
** Amit Kumar **

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. **अपीलार्थी** / The Appellant
2. **प्रत्यर्थी** / The Respondent
3. **आयकर आयुक्त(अपील)** / The CIT(A)
4. **मुख्य आयकर आयुक्त** / The Pr. CIT
5. **विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, दिल्ली** / DR, ITAT, Delhi
6. **गार्ड फाईल** / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

सहायक रजिस्ट्रार, **आयकर अपीलीय अधिकरण ,दिल्ली**
Assistant Registrar, ITAT, Delhi