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* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **W.P.(C) 4905/2021**

B R DHAWAN MEMORIAL CHARITABLE TRUST ..... Petitioner
Through: Mr. S. Krishnan, Adv.

versus

INCOME TAX OFFICER & ORS. ..... Respondents
Through: Mr. Ajit Sharma, Sr. Standing Counsel for revenue.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE TALWANT SINGH

O R D E R

% **20.04.2021**

[Court hearing convened via video-conferencing on account of COVID-19]

CM APPL. No.15071/2021

1. Allowed, subject to just exceptions.

W.P.(C) No.4905/2021

2. In effect, the petitioner-assessee seeks refund of withholding tax concerning the assessment year (in short ‘AY’) 2013-2014. The record shows [and there appears to be no dispute *qua* the same] that the petitioner is involved in charitable activities as defined under Section 2(15) of the Income Tax Act, 1961 [in short ‘the Act’].

2.1 There is also no dispute that the petitioner is exempt from tax by virtue of registration granted under Section 12AA (1) of the Act. It also appears that donations made to the petitioner are amenable for deduction under Section 80G of the Act.

3. Concededly, neither qua the AY involved in the instant petition, i.e., AY 2013-2014 or AYs 2012-13 and 2014-15 [which are mentioned in the impugned communication] income tax returns, as required under Section 139 of the Act, were filed.

3.1 Consequently, notices under Section 148 of the Act were issued. Assessment proceedings were initiated under Section 147 of the Act, and assessment orders were passed, as regards the AY in issue, i.e., AY 2013-14 and other two AYs referred to above.

3.2. Insofar as the subject AY, i.e., 2013-2014 is concerned, the assessment order was passed on 29.12.2018. The assessing officer *via* the said order, after noticing the fact that the objects and the activities of the petitioner were charitable and that the petitioner would be entitled to exemption under the provisions of Sections 11 and 12 of the Act, assessed its income as 'NIL'. Furthermore, the assessing officer went on to observe that the credit should be given to the petitioner for prepaid taxes after due verification.

3.3. The petitioner, thereafter, approached the Deputy Commissioner of Income Tax, Circle 1(1) (Exemption) *via* a communication dated 11.03.2019 seeking refund of the amount mentioned therein, i.e., Rs.33,73,608/-. The request made was, however, declined *vide* the impugned communication dated 20.01.2020, wherein the following observations were made:

> "*In this regard, it is submitted that your request to issue income tax refund for the cases assessed under section 147 r.w.s.*

> *143(3) of the Income Tax Act, 1961 for A.Y. 2012-13, A.Y 2013-14 and A.Y. 2014-15, is hereby rejected in view of the provisions contained in section 239(2)(c) of the I.T. Act, 1961."*

3.4. The impugned communication, as noticed above, not only concerns the AY in issue, i.e., AY 2013-2014, but also concerns the AYs 2012-13 and 2014-15. Furthermore, while declining the petitioner's request, the concerned officer has relied upon the provisions of Section 239(2)(c) of the Act.

3.5. It would be relevant to note that Section 239 of the Act was amended *via* Finance (No.2) Act, 2019 with effect from 01.09.2019.

4. Mr. S. Krishanan, who appears on behalf of the petitioner, says that on the date, when the petitioner's request for refund was declined, i.e., 20.01.2020, sub-section (2) of Section 239 of the Act did not subsist on the statute book, i.e., the Act.

4.1. It is Mr. Krishnan's submission that, in essence, withholding tax, is not a tax, but only a mechanism for collection which, ultimately, is adjusted against the tax as assessed by the revenue.

4.2. It is, therefore, contended that the revenue cannot retain the amount, which is available by way of withholding tax, as it would violate the provisions of Article 265 of the Constitution.

5. Mr. Ajit Sharma, learned senior standing counsel, who appears on advance notice on behalf of the respondent/revenue, on the other hand, says that even if the amended provision of Section 239 of the Act were to be applied, it will not help the cause of the assessee as sub-section (1) of

very same section requires the assessee, claiming refund under Chapter XIX of the Act, to file a return, in that behalf, in accordance with Section 139 of the Act. In this case, according to Mr. Sharma, as no return was filed under Section 139 of the Act, refund, as sought, would not be available to the petitioner.

5.1. According to Mr. Sharma, given the period in issue, the unamended provisions of Section 239 of the Act would apply, as subsisting on the statute book, in the relevant AY, *qua* which refund is sought.

6. Therefore, the question that arises for consideration, before us, is: as to whether Section 239 of the Act, as it obtained prior to its amendment, would apply in this case?

6.1. According to Mr. Krishnan, the provision which obtained, on the statute book, as on the date of the issuance of the impugned communication, should apply and not the unamended provision.

7. Given the aforementioned submissions, made by the counsel for the parties, we are, presently, of the view that even if the stand taken by Mr. Sharma is presumed to be correct, the petitioner could, perhaps, seek condonation of delay in failing to move for refund, within time, in the manner prescribed by law by triggering the provisions of Rule 41 of the Income Tax Rules, 1962 ("Rules").

7.1. Therefore, for the moment, we are inclined to grant liberty to the petitioner to file an application under the aforesaid Rule, before the concerned officer of the Income Tax Department, to seek condonation of delay.

7.2. The concerned officer will deliberate on the said application, and dispose of the same, as per law, after giving an opportunity of personal hearing to the authorized representative of the petitioner.

7.3. Mr. Krishnan says that he will move such an application, for the said purpose, within 10 days from today.

7.4. The concerned officer will be at liberty to hear the authorized representative of the petitioner, *via* the videoconferencing mechanism, given the fact that the Union Territory of Delhi is reeling under the pressure of the coronavirus cases.

7.5. Thereafter, the concerned officer will pass a speaking order *qua* the application moved by the petitioner. The decision rendered in the petitioner's application will be transmitted to the petitioner.

7.6. The entire exercise will be completed within three weeks of the petitioner moving such an application.

8. List the matter on 02.06.2021.

RAJIV SHAKDHER, J

TALWANT SINGH, J

APRIL 20, 2021/pmc

Click here to check corrigendum, if any