

* **HIGH COURT OF DELHI : NEW DELHI**

W.P.(C) No.2848/2008

% Judgment reserved on: 8th April, 2008

Judgment delivered on: 23rd April, 2008

1. M/s. Sangeeta Exports (P) Ltd.
D-402, Defence Colony
New Delhi
 2. Shri Rajeev Tulsian
D-402, Defence Colony
New Delhi
 3. Smt. Rachna Tulsian
D-402, Defence Colony
New Delhi
- ...Petitioners.
Through: Mr. R.K. Singh with
Ms. Himalyani Gupta and
Ms. Deepa Rai, Advs.

Versus

1. Union of India
Through the Secretary
Ministry of Finance,
Govt. of India
New Delhi
2. Central Board of Direct Taxes
Department of Revenue, Govt. of India
Ministry of Finance
New Delhi
3. The Chief Commissioner of Income Tax,
Delhi-III,

C.R. Building,
Indraprastha Marg,
New Delhi

....Respondents

Through: Ms. Sonia Mathur, Adv.
Mr. Sanjeev Sabharwal, Adv.

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

By way of present writ petition, the petitioners have challenged the impugned order dated 2nd November, 2007 passed under Section 279 of the Income Tax Act, 1961 (for short as 'Act') passed by the Chief Commissioner of Income Tax, Delhi-III, vide which the petition filed by the present Petitioners for compounding the offence under Section 271C(1)/277 of the Act was rejected. It has been prayed in the present writ petition that this Court should issue writs/orders/directions in the nature of certiorari quashing the impugned order and also issue

appropriate writs/orders/directions in the nature of mandamus directing the Respondent-Chief Commissioner of Income Tax, Delhi-III to pass final orders for compounding the offence, subject to the petitioners depositing the composition fee of Rs.3,98,830/- in terms of the Respondent's own order dated 13th February, 2007.

2. The brief facts leading to dispute are that the petitioner company (which is a registered private limited company and which since 1984 has stopped functioning) filed its Income Tax Return on 16th August, 1984, claiming a loss of Rs.69,402/-. The said return was verified by petitioner No.2 in his capacity as its Director. The return was accompanied by Profit and Loss Account and Balance-sheet as on 30th June, 1982. In the P & L Account, the accused company declared a gross income of Rs. 4, 01,775/- and claimed expenses under various heads totaling Rs. 4, 71,177/-.

3. Upon scrutiny, it was alleged by the Income Tax Officer that the petitioner no. 1 had mis-declared a sum of Rs. 11,00,000/- received as “sub commission” for sales as “advances” against certain contracts amounting to Rs. 7,33,334/-. The Income Tax Officer summoned the petitioners and directed them to produce books of account, receipts and other documents. The books of account were produced and examined by the Income Tax Officer (which he admits in his cross-examination). Some other documents demanded by him were also produced, but since on 3rd January, 1986, the car in which the said documents, including books of account, were lying was stolen from the Connaught Place parking lot (the FIR lodged by the petitioners was shown to the Income Tax Officer and brought on record), the accused petitioner failed to produce them again.

4. Thereupon, the Income Tax Officer passed assessment orders adverse to the petitioner holding the total income of the petitioner to be Rs. 10, 40,000/-

and disallowed the expenses claimed by the assessee-petitioner and filed a complaint for the assessment year 1983-84 under sections 276C (1) & 277 of Income Tax Act, on 23rd March, 1987 before the Court of Chief Metropolitan Magistrate, Delhi, against the petitioners.

5. The learned Trial Court vide judgment and order dated 12th March, 2003 convicted the petitioners and sentenced them to rigorous imprisonment for 6 months as well as imposed a fine of Rs. 50,000/- on the company and Rs. 20,000/- on the petitioners no. 2 & 3 separately. The fines have been paid in the Trial Court.

6. Aggrieved thereby, the appeal preferred by the petitioners before Additional District & Sessions Judge. The appeal was rejected vide judgment and order dated 23rd April, 2004, and sentence of rigorous imprisonment for 6 months has been confirmed. However, the fine of Rs. 50,000/- imposed on the company has been cancelled.

7. On 24th April, 2004, petitioners preferred Criminal Revision Petition challenging above said judgment and order of the Additional Sessions Judge, Delhi, before the High Court of Delhi, which is pending for final disposal.

8. The petitioners had deposited a sum of Rs. 14,63,028/- along with application for compounding under section 279(2) of the Act, with the income tax department on 27th April, 2004, as per the demand raised and had also moved an application for compounding which is pending for disposal.

9. While considering the above Criminal Revision Petition, the Court issued the notice and on 28th April, 2004 after hearing both the parties, the Court suspended the sentence of imprisonment and granted bail to the petitioners till the next date of hearing. Further, the income tax department sought time to inform Court as to whether the Department was willing to compound.

10. The department responded vide orders dated 11th June, 2004 and 7th July, 2004 by directing the petitioners to liquidate pending demand as a “pre-requisite” condition for compounding of offences under the Income Tax Act, 1961 (for short as ‘Act’).

11. On 18th November, 2004 the petitioners submitted a detailed application to the Chief Commissioner of Income Tax (for short as ‘CCIT’) and again requested to consider the application for compounding filed by them.

12. Initially, the department computed and determined the total liability of the petitioners at Rs. 78, 91,495/- towards tax demands, interest and penalty. Since the computation done by the Department was wrong and incorrect and not based on records(which they admittedly did not have), the petitioners helped the Department reconstruct the entire file and accordingly asked them to correctly compute the arrears of tax, interest, penalty, etc.

13. Vide OM No. 285/26/2002-IT (Inv.)/132 dated 30th November, 2004/ 1st December, 2004 the Addl. Director of Income Tax(Pros) communicated the order of the Central Board of Direct Taxes to the CCIT-III, Delhi, wherein the Board directed the CCIT-III to consider the compounding application of the petitioners on merits if the appellate or the revisional court allows the accused to apply for the same.

14. Subsequent to the above said order, the department asked the petitioners to seek clarifications from the Court as to whether the Court was willing to permit compounding of the offences. The Court vide order/directions dated 14th February, 2005 issued clarifications/further directions as:

“In case, it is necessary to make an express opinion about the position in respect of the petitioners’ right to compound the offence, it is clarified that the pendency of the criminal revision of this Court will not stand as a bar for compounding the offence. It is also clarified that the Income Tax Department or authorities’ under the Income Tax Act will be entirely at liberty to

consider the application for compounding according to its merit.”

15. Pursuant to the above directions, the petitioners made representations dated 21st March, 2005, in response to which the office of CCIT-III dated 24th October, 2005, directed the petitioners to pay the outstanding demand forthwith before the application for compounding could be considered.

16. Finally, vide two separate orders No. 686 & 687 dated 30th June, 2006 and 07th July, 2006, the office of the CCIT-III, Delhi directed the petitioners to deposit a penalty sum of Rs. 11,83,103 (u/s. 273A (4A) of the Income Tax Act), and interest sum of Rs. 8,00,000/- (total sum of Rs. 19,83,103/-).

17. Pursuant to these directions the petitioners deposited the above said amount. Vide application dated 14th July, 2006 requested the CCIT-III to pass the order for compounding of the offences u/s. 279(2).

18. Vide letter/order dated 13th February, 2007, the office of the CCIT-III issued to the petitioner, composition fee for compounding the offence was quantified by the department at Rs. 3,98,830/-, and the petitioner was directed to convey his willingness to pay the composition fee. Immediately on 15th February, 2007, the petitioner communicated his “willingness”.

19. A communication dated 2nd November, 2007 was sent to petitioners stating that since the Central Board of Direct Taxes has rejected the application for compounding, hence the CCIT is rejecting the application of the petitioners for compounding.

20. Aggrieved thereby, the petitioners have filed the present petition under Article 226 of the Constitution of India read with section 151 CPC for issuance of appropriate writs/orders/directions in the nature of Certiorari quashing the impugned order dated 2nd November, 2007 and for Mandamus directing the Income Tax Department to pass final orders for

compounding the offence, subject to the petitioners depositing the composition fee of Rs. 3, 98, 830/- in terms of the respondent's own order dated 13th February, 2007.

21. Thus, the question arises for determination in the present petition is, "Whether the Central Board of Direct Taxes can issue instructions to control the discretion of the Commissioner of Income-tax under Section 279(2) of the Act, to compound the offences?"

22. It has been contended by the petitioner that the power to compound an offence is specifically vested in the Chief Commissioner of Income Tax under Section 279 (2) of the Act, who alone has the discretion to accept or reject. The Board is only invested with the authority to issue general directions or instructions or devise a policy decision with regard to composition of offences. CCIT had already determined the composition fee at Rs. 3, 98,830/- and thus, the rejection of the application, at the sole instance of the

Board without any reason, is wholly arbitrary, unreasonable, unjust. It is further submitted that the petitioners fulfilled all the necessary pre-requisite conditions for compounding. The impugned order is hit by doctrine of estoppel and legitimate expectation, therefore, the Board as well as the CCIT is clearly stopped from turning around, in a volte face, and rejecting the application.

23. It is relevant to note here the relevant provisions of the law. Section 279(1) of the Act lays down “A person shall not be proceeded against for an offence under Sections 275A, 276A, 276B, 276C, 276D, 277, 278 or Section 278A except at the instance of the Commissioner”.

24. Section 279 (2) of the Act lays down “Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by the Chief Commissioner or a Director General.”

25. The Finance (No.2) Act, 1991, has inserted an Explanation giving it retrospective operation with effect from April 1, 1962, which reads as under:

“For the removal of doubts, it is hereby declared that the power of the Board to issue orders, instructions or directions under this Act shall include and shall be deemed always to have included the power to issue instructions or directions (including instructions or directions to obtain the previous approval of the Board) to other income-tax authorities for the proper composition of offences under this section.”

26. As held by this Court in **Dr. K.JagaDessan v. Central Board of Direct Taxes and others (1998) 231 ITR 755 (Delhi):-**

“The background in which the Explanation above said came to be appended to section 279 is not clear. However, the very language employed in explanation reveals that the amendment is clarificatory and declaratory in nature. Some doubts must have been expressed if the power of the Board to issue orders, instructions, or directions under the Act (obviously referable to section 119 (1) of the Act), included the power to issue instructions or directions for the proper composition of offences under section 279. The doubts have been removed by declaring that such power was so included and thereby

setting at rest the doubts, if any. The Explanation is thus in the nature of a proviso to Section 279(2) as held in ***Y.P.Chawla v. M.P.Tiwari (1992) 195 ITR 607 (SC)*** and has also to be read as clarificatory and declaratory of the scope of the power of the CBTD emanating from section 119 of the Act.”

27. As held in **M.P. Purusothaman and Ors. v. Assistant Director of Income Tax (Prosecution) and Ors., (2001) 252 ITR (Mad.):**-

“ The prosecution once launched is to continue before the Court in which the prosecution was initiated and in which the accused would have all the protection available to him under the ordinary law of the land. The provision permitting the compounding of the offence and thereby bringing the prosecution to an end is a provision which vests a discretion in the authority at a high level, namely, the Chief Commissioner or the Director-General who may act only after securing the prior approval of the Central Board. The provisions requiring the consideration of any proposal for compounding at that level would indicate that it is not the policy of the law to permit compounding as a matter of course but that the compounding would be permitted only where the Chief Commissioner or the Director-General and also the Central Board are of the view that the facts and circumstances of the case are

such that the compounding may be permitted”.

28. As clear from the facts of the case, the Central Board of Direct Taxes has rejected the application for compounding, hence the Chief Commissioner of Income Tax is rejecting the application of the petitioners for compounding. Reading section 279 (2) of the Act along with the Explanation, there is no manner of doubt that the Commissioner has to exercise the discretion in conformity with the instructions issued by the Board from time to time. Therefore, the contention taken by the petitioners is not acceptable.

29. Further, Section 119(1) of the Act which empowers the Board to issue orders, instructions and directions for the proper administration of the Act is reproduced hereunder:

(1) The Board may, from time to time, issue such orders, instructions and directions to other income-tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall

observe and follow such orders, instructions and directions of the Board:

Provided that no such orders, instructions of directions shall be issued-

(a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Deputy Commissioner (Appeals) or the Commissioner (Appeals) in the exercise of his appellate functions.

30. The Board issued instruction No. 1317 dated March 11, 1980 under Section 119(1) of the Act providing guidelines for the exercise of power under Section 279(2) of the Act. The relevant part of the instructions is as under:

B. CASES WHICH SHOULD NOT BE COMPOUNDED:

1. No compounding will be done if the assessee belongs to a monopoly or large industrial house or is a director of a company belonging to or controlled by such house.

2. Cases in which the prospects of a successful prosecution are good should not ordinarily be compounded.

3. Compounding will not be done in case of second and sub-subsequent offences.

31. From the perusal of section 119(1) of the Act, it is clear that the section provides in unmistakable terms, that every officer and person employed in the execution of the Act shall observe and follow the orders, instructions and directions of the Board. Circulars issued by the Board are generally binding on officers and persons employed in the execution of the Act.

32. From the perusal of Sections 276C & 277 of the Act, it is clearly evident that the prosecution is required to establish that the accused willfully attempted in any manner, to evade any tax penalty or interest chargeable or imposable under the Act. It is also culled out from the provisions of Section 277 of the Act that the prosecution is required to establish that the accused made a statement in any verification

under the Act, which he either knows or believes to be false or does not believe to be true.

33. In the present case, the petitioners are the directors of the company and the prosecution before Additional Sessions Judge has successfully established that there was an act of concealment on the part of the petitioner and had filed its return by concealing facts. Therefore, it is a clear case of well thought out strategy of tax evasion.

34. In view of the above discussion, the present petition is, hereby, dismissed.

V.B. GUPTA, J

MADAN B. LOKUR, J

APRIL 23, 2008
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