

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.09.2016

Coram

The Hon'ble Mr. Justice T.S. Sivagnanam

Writ Petition No.32731 of 2015

M/s. V.A.Haseeb and Co. (Firm)
rep. by its Partner,
Shri. Mohammed Anwarullah.

...Petitioner

Vs

The Chief Commissioner of Income Tax TDS
Aayakar Bahaman,
Main Building, III Floor
No.121, Mahatma Gandhi Salai,
Nungambakkam, Chennai - 600 034.

...Respondent

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified Mandamus to call for records, pertaining to the impugned order, being F.No.Compounding/E.O.C.C.No.268 to 291/2015-16, dated 10.08.2015, issued by the respondent, and to quash the same, and consequently, to direct the respondent to allow the application, dated 20.11.2014, and to compound the offences.

For Petitioner : Mr.R.Narendran

For Respondent : Mr.T.Pramod Kumar Chopda
Senior Standing Counsel

O R D E R

Heard Mr.R.Narendran, learned counsel appearing for the petitioner, and Mr.T.Pramod Kumar Chopda, learned Senior Standing Counsel for the respondent/Income Tax Department.

2. This Writ Petition has been filed to quash the order passed by the respondent/Chief Commissioner of Income Tax-TDS, dated 10.08.2015.

3. The abovesaid order was passed under Section 279 (2) of the Income Tax Act, 1961 (hereinafter, referred to as 'the Act'), whereby the Chief Commissioner of Income Tax TDS has

rejected the petitioner's Application for compounding the offence committed by the petitioner under Section 276 B (at 5% per month for the period of default) and under Section 278 B read with Section 278 B (at 10% of the main offence) of the Act, for the assessment year 1983-84.

4. From the statement of facts, which is appended as Annexure-A to the impugned order, the Chief Commissioner has perused the guidelines given by CBDT, dated 16.05.2008, and stated that, considering the nature, magnitude and conduct of the assessee, and that Non Bailable Warrant was issued to the assessee, and the assessee has been convicted by the Criminal Court, and when there is conviction by the competent Criminal Court, the question of compounding the offence does not arise. Accordingly, the Chief Commissioner rejected the Application.

5. To decide the correctness of the impugned order, it would be necessary to take note of the following facts:-

i) The petitioner/Firm consists of two Partners, viz., M/s.V.Mohammed Athaullah. and his son M/s.Mohammed Anwarullah. The petitioner paid interest to its depositors without deducting TDS for the years 1981-82, 1983-84 and 1984-85, and for the failure to deduct TDS and remit it to the Government of India, which was criminal offence under Sections 276 B and 278 B of the Act, 24 complaints were filed against i) the Firm/accused No.1, and its partners, viz., ii) Mohammed Athaullah/accused No.2, and iii) V.Mohammed Anwarullah/accused No.3 before the Additional Chief Metropolitan Magistrate, Economic Offences-I, Chennai, in E.O.C.C.No.268 to 291/1997, by the Income Tax Officer, Headquarters, Chennai. During the course of trial, accused No.2, Mohammed Athaullah died, and charges against him stood abated.

ii) The Trial Court, by a judgement, dated 06.02.1999, convicted Firm/accused No.1 and V.Mohamed Anwarullah/accused No.3, imposing sentence of rigorous imprisonment for three months and also fine, and in default, to undergo rigorous imprisonment for one month. As against the said conviction and sentence, accused No.1/Firm and Accused No.3 filed Criminal Appeals, in CrI.A.Nos.48 to 71 of 1999, before the Principal Sessions Judge, Chennai. It appears that the surviving partner of the Firm, viz., accused No.3, Mohammed Anwarullah, was absconding, and he did not appear before the Appellate Court, and for almost 15 years, the Criminal Appeals are pending.

iii) Whiles, in 2014, the petitioner filed an Application before the Chief Commissioner of Income Tax TDS for compounding the offence. This Application was filed, without

obtaining leave of the Court. At that juncture, the prosecution/Income Tax Department thought fit to file a memo before the Principal Sessions Judge, Chennai, dated 28.04.2015, wherein, they prayed to grant leave to the petitioner under Section 320 (5) of the Code of Criminal Procedure for compounding the offence to enable the competent Authority to dispose of the compounding Application in accordance with law. This request was acceded to, by the Principal Sessions Court, by its order, dated 28.04.2015, wherein, while granting permission, the Principal Sessions Judge pointed out that the offences are compoundable, hence, leave is granted to the competent Authority, i.e., Chief Commissioner of Income Tax-TDS for compounding the offences. Thereupon, the application has been taken up and rejected by the Chief Commissioner, by the order impugned herein, on the ground that the conduct of the assessee/petitioner as well as the conviction would dis-entitle the petitioner for compounding the offences.

6. As admitted by the respondent, in the counter affidavit, cases have been pending since 1999. One of the partners of the Firm, viz. Mohammed Athaullah passed away during the pendency of the proceedings and the charges against him stood abated. In such circumstances, it is to be seen as to whether, merely because there is conviction against the petitioner, does it prevent the Chief Commissioner from exercising his power to compound the offences.

7. This Court had an occasion to consider somewhat an identical issue, in the case of (R.Inbavalli Vs. The Government of India, Ministry of Finance, and another) in W.P.No.24588 of 2016, dated 18.08.2016. In the said case, the assessee was convicted on account of the fact that she filed returns belatedly, and the compounding application was pending before the Principal Chief Commissioner, and in the meantime, the assessee approached the Hon'ble Finance Minister, Government of India, who rejected the application for compounding her case. This Court was called upon to decide the question as to how the power of compounding of offence should be exercised by a Chief Commissioner, and this Court took note of the decision of the Hon'ble Division Bench of this Court, in the case of (Chairman, Central Board of Direct Taxes and others Vs. Umayal Ramanatha) reported in (2009) 313 ITR 59 (Mad), and disposed of the said Writ Petition. At this stage, it would be apposite to refer to the operative portion of the said order, which reads as follows:-

"5.The issue as to how the the power of compounding of offences should be exercised had come up for consideration before the Hon'ble Division Bench of this court in an

appeal filed by the Revenue in the case of Chairman, Central Board of Direct Taxes and others vs. Umayal Ramanathan reported in (2009) 313 ITR 59 (Mad). In the said case also there was a conviction of the assessee by the Criminal Court and revision petition challenging the conviction was pending. The counsel for the assessee therein pointed out that section 279 (2) of the Act is provided to facilitate Compounding of offence, either before or after institution of the proceedings and in another case where the trial court has convicted a similarly placed assessee whose appeal was also dismissed and pending revision, the said assessee had filed a petition for compounding the offence invoking section 279 (2) of the Act and in that case, the Revenue accepted the plea of the said assessee and went to the extent of filing a petition before the court to permit them to entertain the application under Section 279 (2) and ultimately compounded the offence. Thus a plea of discrimination was raised before the Honble Division Bench. The Court after considering the factual matrix and taking note of the decision in the case of Babu Lal vs. Hazari Lal Kishori Lal reported in AIR 1982 SC 818 and P.L. Kantha Rao vs. State of Andhra Pradesh reported in AIR 1995 SC 807, dismissed the appeal filed by the Revenue. At this stage it would be beneficial to quote the relevant paragraphs of the judgement of the Hon'ble Division Bench, which reads as follows:-

"This Court carefully considered the submission of counsel for both sides. The plea of the respondent is that Section 279 (2) of the Act permits the appellants to compound the offence either before or after institution of the proceedings, which power is not exercised without any valid reasons; that when similarly placed person was convicted and whose conviction was confirmed by the appellate court and pending revision before this Court in CrI.R.C. No. 588 of 1996, the

assessee has filed similar petition for compounding the offence, which was entertained by the appellants after obtaining leave by filing Crl.M.P. No. 984 of 2000 in Crl.R.C. No. 588 of 1996, while so, refusing the same relief to the respondent, where the trial court alone convicted her and the appeal is pending, is discriminatory.

Now we look into Section 279 (2) of the Act, which reads as under:-

"279. Prosecution to be at instance of Chief Commissioner or Commissioner.

(1)

(2) Any offence under this Chapter may either before or after the institution of proceedings, be compounded by the Chief Commissioner or a Director General...."

It is evident from Section 279 (2) of the Act that any offence under this Chapter may either before or after the institution of proceedings, be compounded by the Chief Commissioner or a Director General.

The term 'proceedings' is not defined in the Income Tax Act, 1961. The term 'proceedings' is a term of wide amplitude and comprehensive and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning would be governed by statute. In this context, it is useful to refer to the below mentioned decisions of the Honourable Supreme Court.

i) Babu Lal vs. M/s. Hazari Lal Kishori Lal and others, AIR 1982 SC 818, 824, it was held thus:-

"17.The word 'proceeding' is not defined in the Act. Shorter Oxford Dictionary defines it as carrying of an action at law, a legal action or process; any act done by authority of a Court of law; any step taken in a cause by either party. The term 'proceeding' is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it , but one the ambit of whose meaning would be governed by statute. It indicates a prescribed mode in which judicial business is conducted. The word 'proceeding' in S.22 includes execution proceedings also".

ii) P.L. Kantha Rao and others vs. State of Andhra Pradesh and others, AIR (1995) SC 807 wherein in Paragraph 3, it was held thus (page 809):-

".....Therefore, the term 'proceeding' in S.29 is a very wide term to mean a prescribed course of action to enforce the legal right. It indicates the prescribed mode in which the judicial business is conducted. The execution is a step in the judicial process. It seeks to enforce the final order to realise the result of the adjudication."

The term proceeding shall also include the proceedings at the appellate stage. In (Lachhman Dass Vs. Santokh Singh) (1995) 4 SCC 201 in para-7, it was held by the Honourable Supreme Court thus:-

".....Precisely stated, an appeal is a continuation of a suit or proceedings wherein the entire proceedings are again left open for

consideration by the appellate authorities which has the power to review the entire evidence subject, of course, to the prescribed statutory limitations. But in the case of revision whatever powers the revisional authority may have, it has no power to reassess and reappreciate the evidence unless the statute expressly confers on it that power. That limitation is implicit in the concept of revision. In this view of the matter we are supported by a decision of this Court in State of Kerala vs. K.M. Charia Abdullah and Co."

In the case on hand, against the conviction and sentence passed by the trial court, on the complaint preferred by the appellants, the respondent has filed an appeal and the same is pending, which is a prescribed course of action for enforcing a legal right. The said appeal is also a proceeding as contemplated under Section 279 (2) of the Act.

For the discussions above, this Court is of the considered view that pending appeal, the appellants can very well compound the offence sought for by the respondent, which they failed. It is not out of context to mention that in earlier occasion, the appellants have allowed the application for compounding of offence filed by similarly placed assessee, who was convicted by trial court, his appeal was also dismissed, he filed revision and in the said revision, the appellants have filed Crl.M.P. No. 984 of 2000 in Crl.R.C. No. 588 of 1996 and obtained leave from the Court to consider it. While so, the appellants have refused to exercise such power in the case on hand by misinterpreting Section 279 (2) of the Act, which is unfair. The learned single Judge considered the above said facts and rightly set aside the order passed by the third appellant, hence, the writ appeal

is dismissed. No Costs. Consequently, connected W.A.M.P. No. 540 of 2003 is closed.

In view of the fact that the respondent is aged about 83 years, who has filed the petition for compounding as early as on 09.04.2001, which was rejected by the third appellant on 02.08.2002, to meet the ends of justice, it is warranted to direct the parties as follows:-

i) The respondent is permitted to pay the amount demanded by the appellants for compounding of the offence within a period of four weeks from the date of receipt of a copy of this judgment

ii) On such payment, the appellants are directed to receive it, compound the offence and inform the same to the Principal Sessions Judge, Chennai where the appeal in C.A. No. 250 of 1998 preferred by the respondent is pending, within a period of six weeks thereafter."

6. Thus, in the light of the above decision, the power of compounding is exercisable when proceedings are pending. In the case on hand, the sentence imposed on the petitioner has been suspended by the Appellate Court and the appeal is still pending. Therefore, it has to be seen as to whether that conviction by the Criminal Court should be the only reason for rejecting the petitioner's application for compounding the offence. Clause 4.4 of the guidelines states that cases not to be compounded. It commences with a non obstante clause stating that notwithstanding anything contained in the guidelines, the category of cases mentioned in clauses (a) to (g) should normally not be compounded. Thus, the guidelines does not specifically place an embargo on the competent authority to consider the application for compounding merely on the ground when the assessee has been convicted by a court of law.

7. The expression used in the guidelines "should normally not be compounded", as pointed out earlier Clause 4.4 commences with a non obstante Clause. Therefore, the competent authority is entitled to examine the merits of each matter and to take a decision as to whether the facts make out a case for compounding even in cases where there is a conviction by a Court of law. Thus the guidelines did not place any fetters on the power of the competent authority to examine cases for compounding."

8. The above decision rendered by this Court, was based upon the decision of the Hon'ble Division Bench of this Court, which is the jurisdictional High Court, so far as the respondents are concerned. The Hon'ble Supreme Court in the case of (M/s. East India Commercial Co. Ltd., and another Vs. Collector of Customs, Calcutta) reported in A.I.R. (1962) S.C. 1893, held that the law declared by the highest court in the State is binding on authorities, or tribunals under its superintendence, and that they cannot ignore it, either in initiating a proceeding or deciding on the rights involved in such a proceeding. Taking note of the scope of the guidelines, this Court was of the view that the competent Authority was entitled to examine the merits of each matter, and to take decision as to whether the facts make out a case for compounding the offence, even in cases, where there is conviction by a Court of law.

9. In the instant case, the matter has been pending since 1999, and there has been no progress. The respondent/Department stated that the petitioner/Firm was an accused. Furthermore, the Principal Sessions Court, while granting permission to the respondent to consider the petitioner's Application for compounding the offence, in its order, dated 28.04.2015, observed that the offences are compoundable in nature, therefore, leave is granted to the competent Authority to compound the offence.

10. Though Mr.T.Pramodkumar Chopda, the learned Standing Counsel for the respondent/Department contended that the Hon'ble High Court of Delhi, in the case of (Anil Batra Vs. Chief Commissioner of Income Tax) reported in [(2011) 337 ITR 251 (Delhi)] pointed out that, when, in any two, out of three cases, the petitioner stood convicted by the Court, the competent Authority was not bound to effect compounding in

violation of mandatory prohibitions prescribed thereto, the said contention is not tenable.

11. As pointed out by this Court, in the preceding para, the jurisdictional High Court for the respondent, is this Court, and this Court has followed the judgment of the Hon'ble Division of this Court in the case of Umayal Ramanathan (supra) and in such circumstances, the decision of the Hon'ble Division Bench of this Court will bind the Single Judge, and accordingly, this Court proposes to follow the judgment of the Hon'ble Division Bench in Umayal Ramanathan's case (supra).

12. Thus, this Court is of the view that the respondent can examine the matter afresh without being, in any manner, influenced merely because of the conviction passed against the petitioner by the Criminal Court.

13. In the result, the Writ Petition is allowed, and the impugned order is set aside, and the matter is remanded to the respondent for fresh consideration, in terms of the observations made in the preceding paras. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

The Chief Commissioner of Income Tax TDS
Aayakar Bahaman,
Main Building, III Floor
No.121, Mahatma Gandhi Salai,
Nungambakkam, Chennai - 600 034.

1 cc to Mr.T.Pramodkumar Chopda, Advocate, sr.50749
1 cc to Mr.R.Narendran, Advocate, sr.50078

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