IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10973 OF 2018

Durgeshwari HI-Rise & Farms Pvt. Ltd. and Ors.	}	Petitioners
versus		
The Chief Commissioner of Income Tax (TDS) and Anr.	}	Respondents

Mr. Jas Sanghvi I/b. M/s. PDS Legal for the petitioners.

Mr. Suresh Kumar for respondent no. 1.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATE :- OCTOBER 23, 2018

P.C. :-

1. We have heard both sides. We have perused the affidavit in reply tendered on behalf of the respondents and affirmed by the Chief Commissioner of Income Tax (TDS).

2. The essential facts in this petition are not disputed. It is evident from the essential facts that the relevant assessment year is 2009-10. The interest payment amounting to Rs.61,90,068/- was made, but the tax deducted at source was withheld on this interest amount. This amount is Rs.12,75,154/-. The due date of depositing the tax withheld was 7th July, 2008. The tax was deposited with the treasury on 29th September, 2009.

There was a delay of 474 days. The interest was also paid for this delay in the sum of Rs.2,04,030/-. The petitioners have deposited in time with the treasury the tax deducted at source for all the assessment years except the year under consideration, namely, 2009-10. Since there was this default, a requisition was served, copy of which is at Exhibit 'D' to the petition. Then, there was a show cause notice, copy of which is at Exhibit 'X' dated 18th November, 2011 duly served and to which a reply was given on 24th November, 2011, copy of which is at Exhibit 'F'.

3. The petitioners were served with another show cause notice calling upon them to show cause as to why prosecution under section 276B read with section 278B of the Income Tax Act, 1961 should not be launched for delay in depositing the tax deducted at source. Then, a show cause notice of 25th September, 2013 followed, to which, on 7th October, 2013 reply was given to all the show cause notices.

4. The essential argument was that the petitioners are not habitual defaulters and the delay occurred on account of mistake of accounting. It was due to wrong entry in the ledger account which was subsequently pointed out by the tax auditor and rectified. The petitioners have stated that they have paid interest for the delayed payment. That is why they prayed that no

prosecution be initiated. The petitioners were served with a letter Exhibit 'J', subsequent to which, an application for compounding of offences was made. That application is dated 19th February, 2014. Though the petitioners were served with letters of intimation informing the date on which they should present themselves and seek relief in terms of the compounding application, they could not depute a representative to remain present.

5. In the meanwhile, the group concern of the petitioners also committed a similar default, but sought compounding of the offences under section 276B read with section 278B of the Income Tax Act, 1961 and those applications have been granted. The petitioners' applications were rejected on the ground that nobody attended the proceedings on the date on which they were scheduled.

6. On 27th March, 2015, a criminal complaint was field in the court of Additional Chief Metropolitan Magistrate, Ballard Pier, Mumbai numbered as CC No. 102/SW/2015. The petitioners prayed that the *ex-parte* order having prejudiced them, relying upon a Central Board of Direct Tax Circular, once again requested that the compounding application be decided afresh. That was rejected without giving an opportunity and by treating it as a

second application. Thus, the restoration request was treated as a fresh or second application for compounding of offences and it came to be rejected on the ground of maintainability.

7. The third application was filed on 11th May, 2018. That application has been rejected on the ground that it is not maintainable once the earlier applications have been rejected.

8. It is in these circumstances that the petitioners, by this petition, pray for the following two reliefs:-

> "a) this Hon'ble Court may be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioners' case and after examining the legality and validity thereof quash and set aside the orders dated 21st May 2018, 31st October 2017 and 26th February 2015 passed by the Respondents.
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> b) this Hon'ble Court may be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing Respondents to accept the compounding application dated 20th April 2018 made by the Petitioners for compounding the offence under section 276B r/w 278B of the Income-tax Act and further direct the Respondents to withdraw the Criminal Case No.102/SW/2015 filed with the Chief Metropolitan Magistrate, Ballard Pier, Mumbai."

9. Having gone through the petition and all the annexures and particularly the impugned letters/communications so also the affidavit in reply, we do not find that the respondents have applied their mind to the compounding applications by dealing with the

merits thereof. The applications have been dismissed only on the ground that nobody attended the proceedings when the first application was being taken up and the subsequent fresh applications cannot be entertained as the first one was rejected. All this hardly indicates any application of mind.

10. It is in these circumstances and in facts peculiar to this case, without this order being treated as a precedent, we allow the writ petition. We direct that the application for compounding the offences made as early as on 20th February, 2014 (Exhibit 'K') be considered and a fresh order be passed thereon as expeditiously as possible and in any event within a period of two months from the date the petitioners pay the requisite fees on that application. The application shall be decided by a speaking order. Needless to clarify that on the date and time fixed for this consideration/hearing the petitioners must remain present or depute their representative and if at the first available opportunity of this nature the petitioners absent themselves, they will not get any benefit of this order. Then, the prosecution launched against them shall proceed on its own merits and in accordance with law.

11. For a period of two months from today and in order to enable the petitioners to present themselves and point out that

the compounding application deserves to be granted on merits, we direct that the concerned criminal court shall not proceed with the criminal complaint. The writ petition is disposed of by clarifying that we have not examined the merits of the compounding application and all contentions in relation thereto are kept open.

(B. P. COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**