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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION (CIVIL) No. 3964/2017**

Date of Decision: 12th March, 2018

**INDO ARYA CENTRAL TRANSPORT
LIMITED & ORS.**

..... Petitioners

Through: Mr. Sachin Datta, Sr. Advocate
with Mr. B.B. Gupta and Ms. Gaytri Verma,
Advocates

Versus

**COMMISSIONER OF INCOME TAX (TDS),
DELHI -1 & ANR.**

..... Respondents

Through: Mr. Zoheb Hossain, Sr. Standing
Counsel for Revenue

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

M/s Indo Arya Central Transport Limited have filed the present writ petition praying for the following reliefs:-

"(a) Issue a writ of certiorari setting aside/quashing the impugned order dated 14.03.2017 passed by the Respondent No.1;

(b) Restrain the Respondent No.1 and the officers of the Respondents from carrying out any act in pursuance of the impugned order dated 14.03.2017 directing launching of criminal prosecution against the Petitioners; and,

(c) Direct the Respondents to release refunds due to the Petitioner No.1, amounting to approximately Rs.5,09,41,361/- (Rupees five crore, nine lac, forty one thousand, three hundred and sixty one only); and

(d) pass such other and/or further orders as this Hon'ble Court may deem fit and proper."

2. Impugned order dated 14th March, 2017 passed by the first respondent namely the Commissioner of Income Tax (TDS) Delhi-1 is the sanction for prosecution issued under Section 279(1) of the Income Tax Act, 1961 (Act, for short).

3. Sanction records that during the financial year 2012-13 relevant to the Assessment Year 2013-14, amount of Rs.3,52,99,059/- was deducted by the petitioner company as tax at source (TDS), but was not deposited in the government treasury within the prescribed statutory time. These defaults were in respect of salary as well as non-salary TDS deductions.

4. Sanction order refers to due date for filing of e-statements in respect of salary or non-salary TDS deductions and the date of actual filing of the statement. Sanction order also refers to the show cause notice dated 5th April, 2016 (sic. 6th April, 2016) issued to the petitioners, as to why they should not be prosecuted under Section 276B and Section 278B of the Act. In response to the notices, authorised representative of the petitioners had appeared and submitted that the petitioner company and his principal officer would opt for compounding. Accordingly, the prosecution proceedings were kept in abeyance subject to the petitioners filing compounding

petition. However, when no compounding application was filed, another show cause notice dated 25th January, 2017 was issued to resume the proceedings. Several adjournments were taken whereafter reply dated 3rd March, 2017 was filed accepting that there were defaults in the deposit of TDS on account of financial crunch due to sluggish business activity. Financial position of the petitioner company was adversely affected by sudden drop in business orders. It was alleged that undisputed income tax refunds constituting 4-5 times the amount of shortfall in TDS had also remained pending.

5. Commissioner of Income Tax (TDS) in the sanction order had observed :-

“3. The reply filed by the deductor company and its director is carefully considered. I am convinced that offence u/s 276B and u/s 278B of the Act have been committed. It is further observed that the explanation offered by the accused are neither tenable nor satisfactory as it is clear from the following facts:

(a) The assessee has a wrong impression that it has compensated the Government by paying interest on delayed deposit of TDS and hence not prosecutable. The utilization of Government money attracts prosecution and not even the penalty. Moreover, Interest is just compensatory in nature.

(b) Further non-deposit of TDS in time due to shortage of funds is not a reasonable and justifiable cause the deductor was just beholder of the tax payable by the deductee which should have deposited in time so that deductee may get the credit of such TDS.

(c) The deductor assessee has taken plea of pending refunds with Income Tax Department. However, it is

silent on the pending scrutiny assessments or appeals, etc and then provisions of law u/s 143(1D) of the Act. Thus refunds if any were lying with the department were under some authority of law. Moreover, refund was its own money and TDS belonged to the Govt. to be deposited on behalf of the deductees. Hence it is not a justifiable ground.

(d) The plea taken by the deductor that it has pan India presence and because of several branches, it takes time to reconcile the accounts and compute TDS liability. A minor delay is understandable on this ground although now-a-days accounting software are such that all the accounts are kept centralized and space does not remain a constraint. However, the delay is much more (from 2 month to 11 months) which is not condonable.

3.1 The details of TDS default show that the company was making defaults on a regular way (the delay extending from 2 months to 11 months). The tax liability had arisen on the day the amount was credited as the company was following mercantile system of accounting. The tax which was deducted by the company out of the various expenses incurred was the Government money and the deductor was merely a custodian of the same and was legally bound to deposit the amount of tax within the time specified in the law. It is the legal responsibility of the Principal Officers/Directors to comply with such legal requirement, which he had failed to do. The various Courts have held that the assessee cannot be granted immunity from prosecution merely on the ground that ultimately TDS was deposited in Govt. account albeit lately. In the case of M/s Rishikesh Balkishandas Vs I.D. Manchanda, ITO [1987] 167 ITR 49, the Hon'ble Delhi High Court held that merely because tax has been deposited to the credit of the Central Government before filing of the complaint, it will not absolve the assessee of the offence under section 276B of the Act. Regarding the culpability of the Principal

Officers/Directors u/s 278B of the Act, reliance is also placed on the judgment of the Supreme Court in the case of M/s Madhumilan Syntex Limited vs. UOI [2007] 160 Taxman 71/290 ITR 199 (SC), wherein it is held that it would be sufficient compliance if in the SCN issued to the concern, it is mentioned that the assessing Officer intends to treat the Directors as Principal Officers of the company under the Act. Further, reliance is placed on the judgment of Hon'ble Punjab and Haryana High Court in the case of Dy. CIT Vs M/s Modern Motor Works [1996] 87 Taxman 182/220 ITR 415 wherein it is held that mens rea is not required to be established in a case under section 276B of the Act. Support is also drawn from the judgment of the Hon'ble Apex Court rendered in the case of M/s Madhumailan Sytnex Ltd Vs UOI [2007] 160 Taxman 71/290 ITR 199 (SC) wherein it is held that prosecution lies if TDS is not paid to Government within the stipulated period. Reliance is also placed on the judgments of Hon'ble jurisdictional High Court in the case of ITO vs. Delhi Iron Works (P) Ltd. 2010 (175) DLT 495 and in the case of ITO vs. Anil Batra & Anr dated 23.09.2014 (CRL.L.P 241, 242, 243 of 2012).

4. As may be seen, in this case, the payment of TDS was not made within the time limit prescribed u/s 200(1) of the Act and the said default attracts the provisions of section 276B of the Act. Shri Ratan Prakash Arya and Shri Yogesh Arya, Directors being the Principal Officers of the company, during the financial year 2012-13 was responsible for and was in charge of conduct of the business of the said company and hence prosecutable u/s 278B of the Act.”

6. During the course of hearing, it was accepted by the Counsel for the petitioners that on the criminal complaint being preferred, the Additional Chief Metropolitan Magistrate ('ACMM') has taken

cognizance and issued summons to the petitioners i.e.: the company and person in charge for appearance and to face trial.

7. Counsel for the petitioners submits that the Sanctioning Authority has failed to consider the requirements of Section 278AA, which states that no punishment would be imposed for offence committed under Section 276A, 278AB or Section 276B if the person being prosecuted proves that there was reasonable cause for such failure. The second contention raised is that the Sanctioning Authority has failed to correctly apply the Press Note dated 6th August, 2013 and Standard Operating Procedure in the form of instruction F.No.285/90/2008-IT(Inv-I)/05 dated 24th April, 2008 modified by the Central Board of Direct Taxes (CBDT) vide instruction F.No. 285/90/2013-IT(Inv.) dated 7th February, 2013 on the ground that the delay in deposit of TDS did not exceed the prescribed period of twelve months. Further, the petitioners had paid interest on late deposit of TDS prior to issuance of the notice. The findings recorded by the Sanctioning Authority are neither fair nor judicious as they do not take into account the provisions of Section 278AA.

8. Petitioners, do not dispute default and delay in deposit of TDS of more than Rs.3.53 crore relating to the four quarters between 30th June, 2012 to 31st March, 2013. TDS was belatedly deposited between 30th June, 2013 to 16th September, 2013. The issues raised by the petitioners are ex-facie factual and could constitute defense of the petitioners, as constituting reasonable cause. Onus to prove reasonable

cause under Section 278AA of the Act is on the person being prosecuted.

9. Similarly, with regard to the Standard Operating Procedure, the contention that default had continued for less than twelve months and effect thereof are aspects which would be considered and decided in the course of criminal proceedings. Late deposit of TDS in gigantic proportions after the end of the financial year, as per the respondents, has huge ramifications and consequences not limited to non-payment of tax, but adverse consequences and sufferance of hundreds of deductee who did not get credit of the tax deducted and had to pay tax and interest. Subsequently, they would have filed revised returns for refund causing harassment and inconvenience. We would accept that grant of sanction could become subject matter of judicial review, albeit in a limited manner to ensure that the authority has acted fairly and reasonably and we do not act as an appellate forum that can substitute the opinion. Necessity of sanction is to filter out frivolous, malafide and vindictive prosecution. It is given on prima facie reaching the result that relevant facts constitute an offence. Technicalities and hyper-technical approach should not be adopted when the sanction order indicates and reflects application of mind.

10. In *The Director, CBI and Others. vs. Ashok Kumar Aswal and Others*, (2015) 16 SCC 163 it was observed that once grant of Sanction by the competent Authority was accepted, the test would be whether prejudice was caused to the accused. This was to be left to be determined during the course of trial. This Judgment refers to *Prakash*

Singh Badal and Another vs. State of Punjab and Others, (2007) 1 SCC 1 and *Chairman, Airport Authority of India and Another*, (2012) 1 SCC 532. Legality or validity of order granting sanction would be the subject matter of the review before the Criminal Court, even if the order was silent and application of mind does not appear from sanction or extrinsic evidence may be placed before the Court. Evidence could be lead.

11. In *State of Maharashtra Through C.B.I. Vs. Mahesh G.Jain*, (2013) 8 SCC 119, it was held;-

"11. In *R. Sundararajan v. State* [(2006) 12 SCC 749 : (2007) 2 SCC (Cri) 563] , while dealing with the validity of the order of sanction, the two learned Judges have expressed thus: (SCC p. 752, para 14)

"14. ... it may be mentioned that we cannot look into the adequacy or inadequacy of the material before the sanctioning authority and we cannot sit as a court of appeal over the sanction order. The order granting sanction shows that all the available materials were placed before the sanctioning authority who considered the same in great detail. Only because some of the said materials could not be proved, the same by itself, in our opinion, would not vitiate the order of sanction. In fact in this case there was abundant material before the sanctioning authority, and hence we do not agree that the sanction order was in any way vitiated."

12. In *State of Karnataka v. Ameerjan* [(2007) 11 SCC 273 : (2008) 1 SCC (Cri) 130] it has been opined that: (SCC p. 277, para 9)

"9. ... an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of

sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not.”

13. In *Kootha Perumal v. State* [(2011) 1 SCC 491 : (2011) 1 SCC (Cri) 418 : (2011) 2 SCC (L&S) 657] it has been opined that the sanctioning authority when grants sanction on an examination of the statements of the witnesses as also the material on record, it can safely be concluded that the sanctioning authority has duly recorded its satisfaction and, therefore, the sanction order is valid.

14. From the aforesaid authorities the following principles can be culled out:

14.1. It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.

14.2. The sanction order may expressly show that the sanctioning authority has perused the material placed before it and, after consideration of the circumstances, has granted sanction for prosecution.

14.3. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it.

14.4. Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

14.5. The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

14.6. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction.

14.7. The order of sanction is a prerequisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hyper-technical approach to test its validity.”

12. At this stage, it will neither be fair nor proper for the writ court to question and decide the question of validity of Sanction Order on merits of reasonable cause etc. as it would amount to a pre trial adjudication. Questions and issues relating to grant and issue of sanction could be raised and decided during trial. We do not think it will be appropriate and proper for the writ Court while examining sanction, examine merits of allegations made in the criminal complaint and act as a fact finding authority.

13. We have merely recorded what has been stated by the counsel for the revenue and not given our pronouncement or judgment in view of the contentions raised in the writ petition or on merits of the criminal complaint which is pending trial. These issues will have to be examined in accordance with law in the criminal proceedings. Of course, in case the petitioners are able to make out that cognizance was not justified and as per law they can challenge and question the summoning order by way of petition under Section 397 read with

Section 401 of the Code of Criminal Procedure, 1973 (Code) or if permissible, by way of a petition under Section 482 of the Code.

14. Some controversy was raised regarding non-payment of refunds. There is difficulty in examining this allegation. Petitioners have not impleaded the jurisdictional Assessing Officer and Commissioner as respondents/parties to the writ petition. The Sanctioning Authority is the first respondent and Directorate of Income Tax, Ministry of Finance is the second respondent. The second respondent is not an authority and does not have any legal existence.

15. As per details ascertained by the counsel for the Revenue refunds for the AY 2005-06 stands paid. There is, however, short of credit on TDS amounting to Rs.8,85,418/- which is under verification on account of old records and non-availability of TDS challans. Petitioners claim that they are entitled to refund of Rs.49 Lakhs for the AY 2005-06. This fact is disputed.

16. With regard to the AY 2009-10, refund of Rs.37,75,750/- was issued on 1st February, 2014. For the balance amount of Rs.14,56,140/-, the matter is under verification and thereafter refund would be issued. Petitioner accepts that refund of Rs.3.05 Crores for the Assessment Year 2010-11 was issued on 27th November, 2012. As per the chart produced by the petitioners, during the period 30th June, 2012 till 31st March, 2013, Rs.85.11 Lakhs was deposited towards TDS, leaving an outstanding balance of more than Rs.2.68

Crores payable as TDS. Entire refund was not paid towards TDS arrears.

17. We would not dwell further on these figures and aspects in the absence of assessing officer being a party to the Writ Petition but give liberty to file an appropriate writ petition in case they feel that refunds have been wrongly withheld and not paid.

18. We clarify that we have not expressed any opinion relating to refund on merits and have only noticed the facts and contentions raised by the respective sides.

19. This order would not prejudice the rights of the petitioners, or as deciding contentions and defenses that the petitioners may raise during the course of criminal prosecution or if they challenge the order passed by the ACMM taking cognizance and issuing summons.

20. Counsel for the petitioners states that they would be moving an application seeking exemption from personal appearance. If any such application is filed, the same would be considered as per law.

21. Recording the above, the writ petition is disposed of. There would be no order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

MARCH 12, 2018
MR/pk/VKR