

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.11895 OF 2022

M/s. Silver Oak Motels and Resorts India Pvt. Ltd.

A Private Limited Company,

Incorporated under the Companies Act, 1956

Having its address at:

C/o. Sai Mahal, Opp. Police Guest House,
Nagar-Manmad Road, Shirdi, Ahmednagar

Through its Director, Jitendra Shelke

.. Petitioner

Versus

1. The Principal Chief Commissioner of
Income Tax, Pune.

Having office at Aaykar Bhavan, 12,
Sadhu Vaswani Road, Pune.

2. Additional Commissioner of Income
Tax (HQ)(Coord & Tech)

Having office at Aaykar Bavan, 12
Sadhu Vaswani Road, Pune

3. Commissioner of Income Tax (TDS)

Having office at Room No.123, 1st Floor,
Bodhi Tower, 548/2B, Salisbury Park,
Gultekdi, Pune.

4. Income Tax Officer (TDS)-2, Pune

Having office at Room No. 115, 1st Floor,
Aaykar Sadan, Bodhi Tower, 548/2B,
Salisbury Park, Gultekdi, Pune

5. Union of India,

Through the Secretary, Ministry of Finance
North Block, New Delhi.

.. Respondents.

...

Mrs. Deepa Khare, Advocate h/f. Mr. R.R. Sancheti,

Advocate for the petitioner.

Mrs. Kalpalata Patil Bharaswadkar, Advocate for Respdt Nos.1 to 4
Respondent No. 5 – Served.

**CORAM : NITIN W. SAMBRE AND
S.G. CHAPALGAONKAR, JJ.**

DATE : 09-03-2023

JUDGMENT (PER S.G. CHAPALGAONKAR, J.) :

. The challenge in the petition is to the order dated 12th January, 2021 passed by the Additional Commissioner of Income Tax (HQ) (Coord. & Tech) on behalf of the Principal Chief Commissioner of Income Tax, Pune and the consequential criminal proceedings initiated against the petitioner vide Regular Criminal Case Nos.1467 of 2019 and 1468 of 2019.

The facts necessary for deciding the petition are as under:

2. The petitioner is duly registered and incorporated as per the provisions of the Companies Act, 1956 on 10th November, 2010. The petitioner was in the business of tourism and hospitality. During financial year 2013-14, the petitioner - Company started a resort at Shirdi.

3. During operation of its business, the petitioner - Company continuously incurred losses from 2013 to 2016.

4. For the financial year 2013-14 the amount of TDS payable by the petitioner was Rs.23,03,182/- and for financial year

2014-15 the same was payable Rs.19,63,080/-. As per Rule 30 of the Income Tax Rules, the amount of tax deducted at source should be credited to the Central Government before seven days from end of month in which such TDS was deducted or before 30th April when the income or amount credited is paid in the month of March.

5. It is the case of the petitioner that the petitioner paid TDS belatedly along with the interest as contemplated under Section 201 of the Income Tax Act on the delayed payment of the amount of TDS i.e. Rs.2,73,703.50 ps. for the assessment year 2013-14 and Rs.3,20,250/- for financial year 2014-15 and fees u/Sec.234E of the Income Tax Act for an amount of Rs.3,94,500/-.

6. On 3rd January, 2017 a notice was served to the petitioner by the Officer of TDS, Ward-2, Pune alleging failure of the petitioner to pay TDS to the credit of the Central Government as required under the provisions of Chapter XVII-B for the financial year 2013-14 and 2014-15 within the stipulated period as provided under the Income Tax Act, 1961 and Income Tax Rules, 1962. On 3rd March, 2017 the petitioner was served with the notice thereby providing him opportunity to give explanation before granting sanction for launching prosecution against the person in-charge of the affairs of

the petitioner company for an offence under Section 276B for the financial year 2014-15.

7. On 17th March, 2017 sanction was accorded against the petitioner for launching prosecution for delay in payment of TDS for the financial year 2014-15. As a sequel of above, pursuant to the legal advices extended to the petitioner company, it has sought compounding of the offence under the guidelines for Compounding of Offences under the Direct Tax Laws dated 23rd December, 2014. As such, an application for compounding was moved on 27th March, 2017 under sub-section (2) of Section 279 of the Income Tax Act, 1961 before the Principal Commissioner Income Tax, Pune. The said authority called upon the petitioner through the show cause notice dated 18th April, 2017 as to submit an explanation as to why sanction should not be granted to prosecute the person in-charge of the petitioner company for commission of offence under Section 276B for the year 2013-14. In response to the prayer for compounding referred above, the petitioner was called upon to pay an amount of Rs.6,57,811/- and Rs.5,64,012/- for the assessment year 2014-15 and 2015-16 respectively towards the compounding fees u/Sec. 276B of the Income Tax Act.

8. It appears that the petitioner has failed to deposit the said amount because of its financial difficulty and as such, an order came to be passed on 6th March, 2019 by the Principal Chief Commissioner of Income Tax in exercise of powers under 279 (2) of the Income Tax Act, 1961 thereby rejecting the prayer for compounding with further directions to the Commissioner of Income Tax (TDS) to take cognizance of the aforesaid proceedings by initiating criminal prosecution.

9. It is the case of the petitioner that in view of continues losses suffered by it, it has winded up its business.

10. Accordingly, the petitioner was called upon to explain as to why the prosecution should not be initiated against the petitioner for the delay in payment of TDS for the financial year 2013-2014.

11. Since the petitioner even thereafter failed to submit a proper explanation and failed to pay the compounding charges, the prosecution came to be initiated against the petitioner pursuant to the sanction order dated 17th March, 2017.

12. The said prosecution is pending before the court of

Judicial Magistrate First Class, Pune.

13. It appears that since the petitioner was in a position to pay the amount of compounding fees, it approached before the Central Board of Direct Taxes on 22nd May, 2019 with a prayer for condonation of delay in payment of compounding charges and allowing the petitioner for compounding of offence which prayer was rejected vide order dated 6th March, 2019. It appears that the aforesaid decision of rejection is based on the Circular No.25 of 2019 issued by the CBDT on 9th September, 2019.

14. The CBDT issued aforesaid circular giving exhaustive rules and guidelines for relaxation of time for compounding of the offences under the Direct Tax Laws as one-time measure. The petitioner thereafter moved another application on 27th December, 2019 for compounding of offence pursuant to the Circular No. 25 of 2019. The petitioner was as such called upon to explain as to how the claim for compounding can be considered in the backdrop of the aforesaid Circular No.25 of 2019. As the petitioner on earlier occasion had failed to pay the compounding fees, the order impugned dated 12th January, 2021 came to be passed. As such, this petition has been preferred.

15. The contention of the learned counsel for the petitioner Mrs. Khare is, the right conferred on the petitioner to seek the compounding is a statutory right. According to her, the financial hardships suffered by the petitioner - company due to continuously suffering losses has caused the delay in the matter of not only payment of TDS which is already paid, but also in the matter of payment to deposit the compounding fees. According to learned counsel for petitioner, once a statutory remedy of compounding is provided, the authority ought not to have taken recourse to the penal provision of launching the criminal prosecution against the petitioner particularly when the petitioner is ready and willing to deposit entire amount of compounding fees with penalty etc. The learned counsel as such would urge that once the power of compounding are vested, the authority must construe and exercise such powers liberally.

16. Mrs. Khare would urge that the sub-section (2) of Section 279 of the Income Tax Act does not impose any fetters on the authorities so also powers of the respondent authorities in entertaining the second application for compounding as the provisions of *res judicata* are not applicable particularly when there is no element of adjudication. The learned counsel as such would urge

that even at delayed stage the petitioner has taken out an application for compounding and the same ought to have been granted by the authority. She would urge that the issue is squarely covered by the Division Bench judgment of this Court in the matter of **Footcandles Film Pvt. Ltd. and another vs. Income Tax Officer TDS-1 & Others** in **Writ Petition No. 429 of 2022** delivered on **28th November, 2022** on the original side at the Principal Seat. As such she would urge that not only the impugned order passed against the petitioner is liable to be quashed and set aside by putting the petitioner to the condition of deposit of compounding fees within stipulated period, but also the criminal prosecution initiated against the petitioner pursuant to the rejection of the prayer for compounding is liable to be quashed and set aside.

17. Mrs. Bharaswadkar, the learned counsel for the respondents would oppose the prayer. According to the learned counsel for the respondents, CBDT Circular No. 25 of 2019 provides for relaxation to file compounding application within 12 months from the end of the month in which the complaint was filed and does not confer the authority to grant an application beyond the period of limitation specified therein. It is claimed that the aforesaid circular is issued in exercise of powers under Section 109 of the Income Tax Act

vested in the Central Board of Direct Taxes and such circular is in the form of guidelines which are having statutory force and binding in nature. As such, it is claimed that the petitioner is not eligible for compounding and its prayer for grant of relief in the discretionary jurisdiction is also liable to be rejected.

18. We have appreciated the aforesaid submissions.

19. The fact about default in payment of the TDS within the statutory period is not disputed by the petitioner. The petitioner has rather come out with the case that the liability towards the TDS was duly satisfied with the interest.

20. It appears that the petitioner moved an application for compounding stating that the tax amount is paid, but the interest and penalty is not paid. The petitioner has cited the health reason of the directors and the continuous losses suffered by the petitioner company for not honouring the statutory obligations of the payment of the dues.

21. The authority has granted the request of the petitioner for compounding vide communication dated 06th February, 2018

thereby levying compounding fees for the various years as under:

	‘2014-15	2015-16
Compounding Fee:	Rs. 5,48,175/-	Rs.4,70,010/-
Establishment Exp:	Rs. 54,818/-	Rs. 47,001/-
Director Fee:	<u>Rs. 54,818/-</u>	<u>Rs. 47,001/-</u>
	Rs. 6,57,811/-	Rs. 5,64,012/-’

22. Vide communication dated 16th February, 2018, the petitioner was directed by the authority to pay the compounding charges, compounding fees, establishment expenses and Director fees within a period of 60 days failing which the additional interest at the rate of 2% monthly was to be attracted.

23. The further communication was issued on 15th May, 2018 calling upon the petitioner to pay the amount referred above. As the petitioner has not honoured the said obligation for considering his prayer for compounding, the prayer of the petitioner came to be rejected vide order dated 06th March, 2019 by the Principal Chief Commissioner of Income Tax, Pune. Accordingly, the prosecution came to be initiated against the petitioner by initiating complaint under Section 276 read with Section 278B of the Act of 1961.

24. The aforesaid prosecution vide Regular Criminal Case No.1467 of 2019 was initiated for the default committed by the

petitioner for the financial year 2013-14 i.e. assessment year 2014-15.

25. Subsequent to above, an order came to be passed on 06th March, 2019 thereby communicating the decision of Principal Chief Commissioner of Income Tax, Pune granting permission to launch prosecution against the director of the petitioner for assessment year 2014-15 and 2015-16.

26. As a sequel of above, R.C.C. No.1468 of 2019 came to be initiated against the petitioner.

27. The fact remains that the respondent authorities were of the view that the prayer of the petitioner can be granted for compounding and accordingly Dy. Commissioner of Income Tax on 16th February, 2018 passed an order of compounding. The said order contains a condition that the compounding fees as mentioned therein be paid within the stipulated time failing which the application is liable to be rejected. It also contains a stipulation that in view of the payment subject to approval beyond 60 days will attract additional 2% interest on monthly basis.

28. In this background, even if the petitioner was granted an opportunity to pay the amount of compounding fees which he has failed to pay, subsequent request of the petitioner should have been considered on the same line particularly when the power of compounding are vested with the respondent authorities. At the most, if one goes by the order dated 16th February, 2018 passed by Deputy Commissioner of Income Tax (HQ) (Technical), the respondent can saddle the interest at the rate of 2% as has been mentioned in the said communication while dealing with the prayer of the petitioner for compounding.

29. Rightly so pointed out by the learned counsel for the petitioner, in the matter of **Footcandles Film Pvt Ltd** (*supra*) the Division Bench of this Court had an occasion to consider the applicability of the circular issued under Section 119 of the Act by the Central Board of Direct Taxes.

30. The Division Bench of this Court while dealing with the case of **Footcandles Film Pvt Ltd** (*supra*) wherein the assessee was convicted for non-payment of TDS and his appeal was pending before the Session Court and his prayer for compounding was rejected, this Court in para - 27 to 32 has made following observations:

“27. In our opinion, the orders, instructions or directions issued by the CBDT under Section 119 of the Act or pursuant to the power given under the Explanation will not limit the powers of the authorities specified under Section 279(2) in considering such an application, much less place fetters on the powers of such authorities in the form of a period of limitation. We are, therefore, of the opinion that the guidelines contained in the CBDT Guidelines dated 14th June 2019 could not curtail the power vested in Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General under the provisions of Section 279(2) of the Income Tax Act.

28. In our considered view, to the extent CBDT Guidelines dated 14th June 2019 creates a limitation on the time, within which application under Section 279 (2) of the Income Tax Act is required to be filed, is of no consequence and does not take away jurisdiction of respondent no.3 or the other authorities, referred to in sub-section (2) of Section 279, from entertaining an application for compounding of offence at any time during the pendency of the proceedings, be they before the Magistrate or on conviction of the petitioners, in an appeal before the Sessions Court. As long as a proceeding, as referred to in sub-section (1), is pending, an application for compounding of offence would be maintainable under sub-section (2) of Section 279 and will have to be dealt with by the authorities on its own merits.

29. These Guidelines / Circular of 2019 before us sets out “Eligibility Conditions for Compounding” in para 7 thereof. In paragraph 7 (ii), the guidelines state that no application of compounding can be filed after the end of twelve months from the end of the month in which prosecution complaint has been filed in the court. Guideline 7 (v) prescribes that the person seeking compounding of the offence is required to give an undertaking to withdraw any appeals that may have been filed by him relating to the offences sought to be compounded. Guideline 9.1 contains powers to relax the time period prescribed under para 7(ii) and refers to situations where there is a pendency of an appeal. Conjoint reading of these provisions leaves us with no manner of doubt that the condition specified in clause 7(ii) is not a rule of limitation, but is only a guideline to the authority while considering the application for compounding. It in no manner takes away the jurisdiction of the authority under Section 279(2) of the Act to consider the application for compounding on its own merits and decide the same.

30. Clause (vii) of guideline 8.1, which is referred to in the impugned order, has the basis on which the application can be rejected. It prescribes the offences which are generally not to

be compounded. Clause (vii) refers to offences under any law other than the Direct Taxes Laws. The present case is one where the petitioners have categorically averred that they have not been convicted under any other law other than Direct Taxes Laws, nor is it the case of the Revenue that the petitioners have been convicted under such law other than Direct Taxes Laws.

31. The reason stated by the authority in the impugned order, wherein it proceeds on the erroneous factual assumption that the petitioners have been convicted by a court of law for an offence other than under the Direct Taxes Laws, is unsustainable and on this count alone, the impugned order is required to be set aside.

32. In the present case, we find that this is a classic case for consideration by respondent no.3 for compounding of offence, inasmuch as petitioner no.1-company has deposited the TDS due, though beyond time-limit set down, but before any demand notice was raised or any show cause notice was issued. The Tax Deducted at Source was deposited along with penal interest thereon. A reply setting out detailed reasons for not depositing the same within the time stipulated under the law had been filed in reply to the show cause notice issued earlier. Though the petitioners had been convicted, a proceeding in the form of an appeal is pending before the Sessions Court, which is yet to be disposed of, and in which there is an order of suspension of sentence imposed on petitioner no.2 is operating.”

31. As a sequel of above, this Court having already held that the CBDT guidelines dated 14th June, 2019 create a limitation on the time, within which the application can be preferred and once such application is granted, the petitioner can be dealt with by saddling the interest as has been claimed in the communication dated 16th February, 2018.

32. In this view of the matter and in the light of the aforesaid view already expressed by the Division Bench of this Court

in the matter of **Footcandles Film Pvt Ltd** (*supra*), in our opinion the case of the petitioner is on better footing as the prosecution against the petitioner is still pending and the same has not resulted into his conviction.

33. In this view of the matter, we deem it appropriate to quash and set aside the impugned communication dated 12th January, 2021 issued by the respondent authorities.

34. We hereby direct the respondents authorities to consider and deal with the application of the petitioner with a prayer for compounding in accordance with the observations made by the Division Bench of this Court in the matter of **Footcandles Film Pvt Ltd** (*supra*). We also make it clear that the respondent authorities shall have regard to its earlier order dated 16th February, 2018 and it shall be open for the respondent authorities to levy interest as has been mentioned in the said order in the matter of consideration of the prayer of the petitioner for the compounding of the offence.

35. The writ petition stands allowed in the aforesaid terms.

36. Once the petitioner pays the entire compounding charges as has been ordered by the respondent authorities, it shall be open for the petitioner to move before the Court of the Judicial

Magistrate First Class before whom the prosecutions are pending against him as referred to in the prayer clause for disposal of the said prosecution.

37. Such prayer of the petitioner be considered in accordance with law by the said Court.

(S.G. CHAPALGAONKAR, J.)

(NITIN W. SAMBRE , J.)

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