IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.03.2023

CORAM :

The HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.Nos.20405 & 20406 of 2020
and W.M.P.Nos.25183 to 25186 of 2020

M/s Bohemain Destinations Pvt Ltd.,
Rep. By its Managing Director
Mr.N.G.George,
having office at no.7,
Khader Nawaz Khan Road,
Chennai – 600 006. .. Petitioner
in both writ petitions

vs

1.Commissioner of Income Tax (TDS)
Office of the Commissioner of Income Tax (TDS)
BSNL Building, Tower I, 1st Floor,
Greams Road, Thousand Light,
Chennai - 600 006.

2.The Income Tax Officer,
TDS Ward-I(2), Chennai – 600 006. .. Respondents
in both writ petitions

Prayer in W.P.No.20405 of 2020: Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified mandamus calling for records placed before the 1st respondent by the 2nd respondent for sanction for prosecution and quash the impugned sanction for prosecution in Proceedings C.No.CIT(TDS)/CHE/Person.24/2017-18 dated 30.01.2018 for the Financial Year 2009-10 issued by the 1st respondent and direct the

1st respondent to consider the representations dated 12.02.2012, 14.12.2012 and 23.05.2015 of the petitioner.

Prayer in W.P.No.20406 of 2020: Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified mandamus calling for records placed before the 1st respondent by the 2nd respondent for sanction for prosecution and quash the impugned sanction for prosecution in Proceedings C.No.CIT(TDS)/CHE/Person.24/2017-18 dated 30.01.2018 for the Financial Year 2010-11 issued by the 1st respondent and direct the 1st respondent to consider the representations dated 12.02.2012, 14.12.2012 and 23.05.2015 of the petitioner.

| | | |
|---|---|---|
| For Petitioner | : | Mr.George Cheriyan<br>(in both writ petitions) |
| For Respondents | : | Dr.B.Ramaswamy<br>Senior Standing Counsel<br>(in both writ petitions) |

COMMON ORDER

The petitioner is a Company and challenges an order passed by the first respondent sanctioning prosecution under Section 276B read with Section 278B of the Income-Tax Act, 1961(in short, 'the Act') dated 30.01.2018.

2. The proceedings relate to the period April, 2009 to February, 2010 and the prosecution proposed is for the reason that,

according to the respondent, rental and other payments made by the petitioner were subject to tax deduction but the tax deducted had not been deposited into the treasury as statutorily required.

3. At paragraphs 7 and 12 of the counter filed by the respondents, they refer to their system database that, according to them, establishes the position that the tax was deducted but failed to be deposited within the prescribed period.

4. Per contra, the argument of the petitioner is that while admittedly there was some delay in remitting of taxes deducted in a significant number of instances, the rental and other amounts had been outstanding in some cases and in such an instance, the question of tax deduction does not arise. This position has been tentatively enunciated by the petitioner in its only reply filed before the second respondent on 23.03.2015 that reads thus:-

> *"Sub: Prosecution proceedings u/s276B.*
> *Ref: C.No:24/CIT(TDS)/PROSN/2014-15-Ref.20/155*
>
> *I was unable to represent myself with you as requested on 6/3/2015.*
>
> *However we wish to make the following submissions.*
>
> *1.For Fy2009/10, we had remitted the TDS up to date with interest and penalty payable and*

*filed the returns of our own accord prior to receiving any intimation from the department.*
*2.We as a company have been incurring huge losses and the delay was neither wilful nor wanton.*
*3.Several of the delayed TDS remittances are for payments only being accounted but not actually paid, due to the accrual method of accounting.*
*4.We wish to once again submit that all these TDS amounts have been remitted with interest and penalty for the delay.*

*We request you to kindly acknowledge our genuine request and not initiate any action against us.*

*Thanking you,*
*Yours faithfully,*
*for Bohemain Destinations Pvt Ltd.,"*

5. While in the impugned order, the officer refers to the explanation given for delay in remittance of TDS, he has not referred to the specific submission that there was no deduction in several cases as the payments itself were not made. The officer concludes in the impugned order that there has been no explanation put forth from the assessee, which statement is not correct in view of the explanation advanced on 23.03.2015.

6. The legal submission made finds support from the provisions of Section 276B of the Act dealing with *'failure to pay taxes to the credit of Central Government under Chapter XIID or*

*XVIIB'* and states that if a person fails to pay to the credit of the Central Government tax deducted at source by him as referred under the provisions of Chapter VIIB then he shall be punished with rigorous imprisonment for a period not less than three months which may extend upto seven years and with fine.

7. Prior to 01.04.1969, exposure to prosecution under Section 276B included both the failure to deduct, or to pay tax. With the amendment to Section 276B effective 01.04.1968 vide Finance Act, 1968, the 'failure to deduct' was deleted from the ambit of prosecution under that provision. A clear distinction recognized and made between the factum of 'deduction' and that of 'remittance'. The assessee had been given multiple and more than sufficient opportunities to explain its case before the authorities which were not assailed. It is only now, before this Court, that the petitioner pursues the explanation tendered in reply dated 23.03.2015.

8. Learned Standing Counsel for the Revenue points out that there are admitted instances of delay and also that he is right. However, it is also a fact that the legal argument put forth by the petitioner in response dated 23.03.2015 has not been taken note of by the respondents.

9. Thus, to balance the interest of both parties, I permit the petitioner to appear before the respondent on Friday i.e., 24.03.2023, without awaiting any further notice, on which date the respondents shall be heard on the legal submission. The impugned orders are set aside. Orders, as above shall be passed within a period of two weeks from 24.03.2023 after hearing the petitioner and considering evidences, if any, filed by it in support of its submissions, in accordance with law.

10. Writ petitions stand allowed in terms of the above order. No costs. Consequently, connected miscellaneous petitions are closed.

10.03.2023

Index:Yes/No
Neutral Citation:Yes
ssm

To

1.The Commissioner of Income Tax (TDS)
Office of the Commissioner of Income Tax (TDS)
BSNL Building, Tower I, 1st Floor,
Greams Road, Thousand Light, Chennai - 600 006.

2.The Income Tax Officer,
TDS Ward-I(2), Chennai – 600 006.

DR. ANITA SUMANTH,J.

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