

(1999) 11 DEL CK 0112

In the Delhi High Court

Case No : Criminal R. No. 210/91 and Criminal R. No. 211/91

Engineers Impex Pvt. Ltd.

APPELLANT

Vs

D.D. Sharma

RESPONDENT

Date of Decision : 12-11-1999

Acts Referred:

Citation : (2000) 161 CTR 25 : (2000) 86 DLT 238 : (2000) 244 ITR 247 :
(2002) 125 TAXMAN 1047

Hon'ble Judges : J.B. Goel, J

Bench : Single Bench

Advocate : Mr. Shridhar Y. Chitale, for the Appellant; Mr. R.D. Jolly and Ms. Prem Lata Bansal, for the Respondent

Judgement

J.B. Goel. J.

1. These two criminal revision Petitions involving the same common question challenge the legality and propriety of common order dated 18.7.1991 passed by learned Addl. Chief Metropolitan Magistrate (ACMM) rejecting the applications of the petitioners u/s 245 of the Code of Criminal Procedure (for short "the Code") for discharge.

2. The petitioners are being prosecuted by the respondent Income Tax Officer u/s 276-B of the Income Tax Act (for short "the Act") in two cases for two different assessment years 1985-86 and 1986-87 for alleged violation of Section 194-A of the Act for which two complaints registered as Criminal Complaint No. 808-A/1 of 1987 and 808-B/1 of 1987 were lodged by the Income Tax Officer. The petitioner No.1 is a company while petitioners No.2 and 3 are its Managing Director and Director. The grounds for prosecution are that the petitioner had taken certain amounts as loans from (1) its Managing Director, (2) M/s. Marudhar Investment Pvt. Ltd. and (3) M/s. Jupiter Enterprises. During the assessment years 1985-86 and 1986-97, interest amounts of Rs.18,000/-, Rs. 3,600/- and Rs.1,140/- accrued due thereon had been credited to the interest accounts without deducting and paying to the Government Tax (TDS) as required u/s 194-A of the

Act and thereby having committed offence punishable u/s 276-B of the Act. In reply to the show cause notice served on it the petitioner took the plea that interest was neither paid nor credited to the accounts of the creditors but credited in the "Interest payable Account". This Explanation was not found valid by the ITO on the ground that it was a device to avoid payment of the Tax as according to him the crediting of interest in the "interest payable account" amounts to credit of interest to the account of the person concerned. These complaints have been filed by the Income Tax Officer having been authorised by the Commissioner of Income Tax u/s 279(1) of the Act.

3. The Income Tax Officer on assessment held against the petitioner assessed and imposed a penalty of Rs. 3,366/- besides interest u/s 201 of the Act each for the two years and also filed aforesaid two complaints. On appeal, the Commissioner of Income Tax (Appeals) took a contrary view and set aside the order levying/imposing interest and penalty. That order was later on also affirmed by the Income Tax Appellate Tribunal (for short "the Tribunal") in its order dated 29th May 1992. After the first appellate order was passed, the petitioners had filed an application before the ACMM u/s 245(2) of the Code for their discharge and dismissing the two complaints which was not accepted and the applications were dismissed on 18.7.1991. These two revision petitions are directed against that common order.

4. It may, however, be mentioned that the two complaints were filed before 1.6.1987 when an Explanation was inserted after sub Section (1) of Section 194-A of the Act.

5. I have heard learned counsel for the parties. Learned counsel for the petitioners has raised four contentions : (1) the Commissioner of Income Tax in appeal and later the Appellate Tribunal have held that there is no violation of Section 194-A, as such prosecutions could not be continued and the complaints should have been quashed as the very basis of prosecution has been knocked down: (2) the case did not fall u/s 194-A of the Act as before the Explanation was inserted, the interest credited in "Interest payable Account" did not amount to payment to the creditors nor "credited to their accounts"; (3) the Explanation to Section 194-A has been added w.e.f. 1.6.1987 and retrospective effect could not be given to it; and (4) reasonable cause was shown for not deducting and paying TDS to the Government account. He has placed reliance on certain case law.

6. Whereas, the learned Government Counsel has contended that the decision of the departmental adjudicating authorities is not binding on the criminal courts inter alia on the question of law and a question of law arises in the case. He has relied on P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, . He has further contended that the petitioner No.1 in its Balance Sheet and profit & Loss Accounts has shown these payments as its liabilities and expenses incurred and the credit of the interest amount in the "Interest Payable Account" was a camouflage to evade tax to Government in collusion with the creditors, one of

whom is its Managing Director and two others are its sister concerns and the case squarely falls in the letter and spirit of Section 194-A of the Act.

7. The petitioner had filed income tax returns for the assessment years 1985-86 and 1986-87 comprising of accounting years ending on 30.6.1984 and 30.6.1985 and had debited Rs. 18,000/-, Rs.3,600/- and Rs. 1,140/-, i.e., in all Rs. 22,740/- on account of interest for each year payable to the aforesaid three persons in the "Interest Payable Account". The assessed did not deduct tax at source u/s 194-A of the Act. Its stand is that interest has neither been paid in cash or by draft or by cheque to the creditors nor was credited to the account of the payee and as such section 194-A of the Act was not applicable. This was not accepted by the Income Tax Officer who treated the assessed in default and u/s 201(1A) of Section 221 of the Act, penalty and interest were levied and demand of TDS with interest and penalty was raised. He filed two complaints for criminal prosecution u/s 276-B of the Act. The Commissioner of Income Tax (Appeals) in appeal vide his order dated 15.12.1988 held that Section 194-A was not attracted and set aside the order of the Income Tax Officer imposing penalty, interest and raising the amount. He held that the circular dated 22.12.1980 of the CBDT would not override the clear provisions of Section 194-A. In view of this order, petitioners filed applications before the learned ACMM u/s 245(2) of the Code for their discharge. The learned ACMM, however, dismissed the application holding that the matter has not been decided by the Income Tax Authorities finally and the appeal of the complainant was still pending and further that new material was brought on the record which might warrant discharge at that stage. The petitioners have filed two revision petitions against two separate orders in two cases. As already noticed, the appellate order of the learned Commissioner has also been affirmed by the Tribunal on 29.5.1992. The Tribunal has followed the judgment of Punjab & Haryana High Court in the case of Punjab Business and Supply Co. Pvt. Ltd. and Another Vs. Income Tax Officer and Another, .

8. In Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, , the assessed firm was granted registration by the Income Tax Officer but one of the partners of the firm Janak Rani asserted before the Income Tax Officer that the assessed firm was not a genuine firm and she was not its partner. She also denied her signatures on the partnership deed. The Income Tax Officer accepted this assertion and held that the petitioner was not a genuine firm and accordingly he canceled the registration of the firm. That cancellation was affirmed by the Appellate Asstt. Commissioner in appeal but on further appeal being taken, the Tribunal set aside the orders of the Income Tax Officer and of the Appellate Asstt. Commissioner and held that the firm was a genuine one. In the meantime, the Revenue had filed a complaint case against the partners of the assessed firm for their prosecution u/s 277 of the ct. After the order of the Tribunal, the accused persons moved the learned Magistrate for discharging them from the criminal case which prayer was rejected, where after the matter was taken to the High court of Punjab & Haryana for quashing prosecution in the exercise of the

inherent powers of the Court u/s 482 of the Code. The High Court refused to quash the prosecution on the ground that a criminal court is to independently go into the allegations mentioned in the complaint on the basis of evidence to be adduced before it by the Revenue as prosecutor and it is open to the accused persons to take any defense to prove their case. The matter was taken to the Supreme Court in SLP. The SLP was allowed and the prosecution of the accused persons was quashed. The Supreme Court held that on the appraisal of the entire material on the record, the said Smt. Janak Rani was found to be a partner of the assessed firm and the firm was a genuine one and as such the assessed could not be prosecuted for filing false return. The Principle thus laid down in that case is that the prosecution once initiated may be quashed in the light of a finding favourable to the assessed recorded by an authority under the Act subsequently in respect of the assessment proceedings. This principle has been followed in *S.P. Sales Corpn. & Ors. Vs. S.R. Sikdar*, (1993) 113 Taxation 203 (SC). In that case, the assessed had made purchases of Rs. 20,015/- during the assessment year 1985-86 from two named firms. The Assessing Officer held that the purchases had not been accounted for by supporting relevant documents and were thus made outside the books of accounts and penalty was imposed. A complaint was laid u/s 276-C, 277, 278 read with Section 278-B of the Act by the Assessing Authority. On consideration of the material, the Commissioner in Appeals held that the purchases were duly accounted for and the penalty was set aside. This order was affirmed in appeal by the Tribunal. In further appeal, the Supreme Court upheld it and held that the foundation for prosecution had been knocked off its bottom and the complaint laid against the assessed no longer survived and accordingly quashed it. Again in *K.T.M.S. Mohd. and another Vs. Union of India*, Rs. 6.00 lakhs was seized from the assessed appellant and the Income Tax Officer not being satisfied for its lawful possession treated it as the income of the assessed from undisclosed sources and included in his taxable income. A criminal complaint was also filed for various offences on the ground that the appellants had conspired together to give false evidence and fabricated false evidence. The Appellate Asstt. Commissioner agreed with the Income Tax Officer but the Tribunal on appreciating of evidence set aside the order of assessment and referred the case back to the Income Tax Officer to make a fresh assessment. But the Income Tax Officer again made the same type of assessment. The Tribunal again allowed the appeal of the assessee. In the meantime, in the criminal proceedings, the appellant along with his two other co-accused were convicted and fine was imposed on them. Conviction and sentences were confirmed in appeal by the High Court in revision. The Supreme Court, inter alia, relying on *Uttam Chand's* case held that in view of the findings of the Tribunal that the amount of Rs.6.00 lakhs did not belong to the first appellant, the very basis of prosecution having been nullified by the order of the Tribunal that fact can be given due regard in deciding the question of Criminal liability of the appellant.

9. Learned Government counsel has placed reliance on *P. Jayappan Vs. S.K.*

Perumal AIR 1984 SC 1963 and particularly on para 5 thereof where it was laid down as under :-

"The Criminal Court no doubt has to give due regard to the result of any proceeding under the Act having a bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act. It does not, however, mean that the result of a proceeding under the Act would be binding on the Criminal Court. The Criminal Court has to judge the case independently on the evidence placed before it."

In para 6 it was further observed that:-

"It may be that in an appropriate case, the Criminal Court may adjourn or postpone the hearing of a Criminal case in exercise of its discretionary power u/s 309 of the Code if the disposal of any proceedings under the Act which has a bearing on the proceedings before it is imminent so that it may take into consideration the order to be passed therein. Even here the discretion should be exercised judicially and in such a way as not to frustrate the object of the criminal proceedings. There is no rigid view which makes it necessary for a criminal Court to adjourn or postpone the hearing of a case before it indefinitely or for an unduly long period only because some proceedings which may have some bearing on it is pending else."

10. After considering Uttam Chand and the aforesaid observations made in P. Jayappan, the Supreme Court in K.J.M.S. Mohd."s case held as under:-

"The above principle of law laid down by this Court gives an indication that the result of the proceedings under the Income Tax Act is one of the major factors to be considered and the resultant finding in the said proceedings will have some bearing in deciding the criminal prosecution in appropriate cases."

And it further held that:-

"..... Though as held in P. Jayappan"s case that a Criminal Court has to judge the case before it independently on the material placed on which there is no legal bar in giving due regard to the result of the proceedings under the Income Tax Act."

11. The law thus is clear that the authorities constituted under the Act are final authorities on facts and unless the findings of facts suffer from any error of law or give rise to any question of law, the said finding of fact recorded by the Appellate Tribunal is unassailable and when those authorities did not find a case for sustenance of penalty under the Act and the penalty is set aside, criminal complaint against the assessed on the same facts also would not be sustainable and continuance thereof will be misuse of the process of the court. Hence in such cases criminal prosecution would be liable to be quashed. However, it is also well settled that the opinion of the authorities constituted under the Act on the interpretation of the statutory provisions of law is not binding on the criminal courts and in such a case the latter has to consider the matter independently.

12. In the present case, what is in issue is the construction of Section 194-A of the Act breach of which entails liability for criminal prosecution. Sub section(1) of Section 194-A and the Explanation thereto read as under :-

194-A. Interest other than "Interest on Securities".- (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than in come by way of interest on securities, shall at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force.

Explanation _ For the purposes of this section, where any income by way of interest as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this Section shall apply accordingly.

13. This Explanation was inserted by the Finance Act,1987 with effect from 1.6.1987.

14. Para 38.2 of the Explanatory Note for inserting this Explanation reads as under:-

"38.2. Under the existing provisions, deduction of tax at source from interest is to be made at the time of payment or credit to the account of the payee. With a view to prevent postponement of liability relating to such deductions of tax at source, Section 194-A has been amended to provide that tax will be deducted at source, on accrual of interest at the end of the accounting year or at the time of credit to the account of a payee or at the time of payment, whichever is earlier Any sum credited to the "Suspense Account" or "Interest Payable Account" shall be deemed to be credited for the shall be deemed to be credited for the purpose of tax deduction at source."

15. It has been laid down in Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, that fiscal laws must be strictly construed words must say what they mean, nothing should be presumed or implied. The true test must always be the language used.

16. Penal provisions in the statutes have to be considered strictly in the sense that if there is a reasonable interpretation which would avoid the penalty, that interpretation ought to be adopted. When the Legislature imposes a penalty, the words imposing it must be clear and distinct. (Commissioner of Income Tax Vs. M/s. T.V. Sundaram Iyenger & Sons Pvt. Ltd.. Madras AIR 1976 SC 255).

17. If by an amendment in an existing statute or by an enactment an ex post facto offence is created, it will be vocative of Article 20(1) of the Constitution .

Article 20(1) is designed to prevent a person from being prosecuted for an act or omission which was considered innocent when done. [G.P. Nayyar Vs. State (Delhi Administration),]. An Explanation is appended to a Section to explain the meaning of the words contained in the Section and normally is to be read to harmonies with and to clear up any ambiguity in the main Section. However, in the present case, the Explanation inserted has widened the scope of the main section and has created an obligation breach of which entails penalty and subjects to criminal prosecution. This Explanation to Section 194-A has been inserted with effect from 1.6.1987 and obviously is prospective and not retrospective. In case, it was to have the retrospective effect, it would be violative of Article 20(1) of the Constitution. As the Explanatory Note noticed above itself states, the liability for deduction of tax at source from the interest payable under the existing provisions arises only if interest was actually paid or credited to the "account of the payee". This also clarified the correct scope of Section 194-A as existed before the Explanation was inserted and that the scope of this Section has been widened by the insertion of the Explanation w.e.f. 1.6.1987 which has created liability and obligation to deduct tax on interest even where the interest income is credited to any account in the books of account of the payee including credit given in the account called "Interest payable Account" or "Suspense Account".

18. This obligation and liability to deduct and pay TDS has thus been created from 1.6.1987. The amount of interest in question was credited to the "Interest Payable Account" Prior to 1.6.1987. It did not attract provisions of Section 194-A as existing before the insertion of this Explanation and as such no criminal liability u/s 276-B of the Act also arises. This is also the view taken by Punjab & Haryana High Court in the case of Punjab Business & Supply Co. Pvt. Ltd. (supra) to which I with respect agree.

19. The First Appellate Authority as also the Tribunal constituted under the Act have also taken the same view so far as liability for penalty is concerned. It is now settled law that where the allegations set out in the complaint or chargesheet do not constitute any offence, the High Court in exercise of inherent power u/s 482 of the Code would be competent to quash such FIR/chargesheet. This Court under revisional power would also be competent to quash the order passed by the Magistrate taking cognizance of the offence or the Magistrate failing to exercise jurisdiction vested in him u/s 245 of the Code. The Criminal prosecutions launched against the petitioners thus are not sustainable.

20. In the result, both Crl. R. Nos. 210/91 and 211/91 are allowed and the impugned order passed by learned ACMM is set aside. The petitioner's applications u/s 245 of the Code are also allowed and the criminal complaints No.808-A/1 and 808-B/1 of 1987 giving rise to the prosecution of the petitioners for offence u/s 276-B of the Act are hereby quashed.