

(2014) 09 DEL CK 0187

In the Delhi High Court

Case No : Crl.L.P. 241, 242 and 243 of 2012

Income Tax Officer

APPELLANT

Vs

Anil Batra

RESPONDENT

Date of Decision : 23-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 305
Income Tax Act, 1961 — Section 194A, 2(35), 200, 276B, 276-B

Citation : (2014) 09 DEL CK 0187

Hon'ble Judges : S. Muralidhar, J

Bench : Single Bench

Advocate : P. Roy Chaudhuri and Rohit Madan, Advocate for the Appellant; Jeevesh Mehta, Kapil Gulati, Advocates and Proxy counsel for P.K. Sharma, Advocate for the Respondent

Judgement

Dr. S. Muralidhar, J.—These petitions raise an important question of law concerning the liability of the Director of a company which has been proceeded against by the Income Tax Department ("ITD") u/s 276-B of the Income Tax Act, 1961 ("IT Act"). The Court is of the view that there are sufficient grounds for grant of leave to appeal. Accordingly, these three petitions are allowed and the cases are directed to be registered as criminal appeals and numbered as such by the Registry.

Criminal Appeal No. of 2014 (to be numbered by the Registry)

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2. With the consent of learned counsel for the parties, the appeals are taken up for final hearing.

3. The issue pertains to the assessment years ("AYs"), i.e., AY 1982-83, 1983-84, and AY 1984-85. With respect to the three AYs, show cause notices

("SCNs") u/s 276-B read with Sections 194A and 200 of the IT Act were issued by the Inspecting Assistant Commissioner, Income Tax (Assistant), Range XV, New Delhi addressed to "The Principal Officer, M/s. Anil Batra & Associates (P) Limited, Batra Cinema, Dr. Mukherjee Nagar, Delhi" regarding failure to pay the tax deducted at source u/s 276B of the IT Act.

4. As regards AYs 1983-84 and 1984-85 the trial Court by its judgment dated 9th August 1995 convicted the company and its two directors, i.e., Mr. Anil Batra and Mr. C.L. Batra, Accused Nos. 2 and 3 ("A-2 and A-3") respectively. While all the three accused were directed to pay Rs. 7,000 each as fine, A-2 and A-3 were sentenced to undergo simple imprisonment ("SI") for three months each and in default of payment of fine, A-2 and A-3 were to undergo SI for a further period of three months each by an order on sentence dated 11th August 1995.

5. Aggrieved by the above orders dated 9th and 11th August 1995, the three accused filed Criminal Appeal Nos. 31-34 of 2007 and the ITD filed Revision Petitions Nos. 55 and 56 of 2007 for enhancement of sentence. The aforementioned appeals and revision petitions were disposed of by the judgment dated 24th September 2011 by the learned District Judge and Additional Sessions Judge (Incharge) (West) /ARCT, Delhi ["DJ&ASJ"] maintaining the conviction of the company (A-1) but enhancing the fine to Rs. 50,000 for each of the assessment years. The appeals by A-2 and A-3 were allowed and their convictions were set aside.

6. As regards the AY 1982-83 the learned Additional Chief Metropolitan Magistrate ("ACMM") has by an order dated 3rd December 2011 in CC No. 7/4/09 acquitted A-2 and A-3 while convicting the company (A-1) for the offence u/s 276-B of the IT Act and by an order of the same date the company (A-1) was sentenced to pay a fine of Rs. 50,000. Aggrieved by the aforementioned orders dated 24th September 2011 of the learned ASJ and order 3rd December 2011 of the learned ACMM, the ITD has filed the present appeals.

7. The main ground on which A-2 and A-3 were acquitted is that the SCNs issued by the ITD were only to the "principal officer" of the company and not to the individual directors, i.e., A-2 and A-3. In both the impugned judgments, reliance has been placed on the decision of this Court in Income Tax Officer Vs. Delhi Iron Works (P.) Ltd., . Before the learned DJ-ASJ the ITD had also placed reliance on the decision of the Division Bench of the Madras High Court in Income Tax Officer Vs. Dinesh K. Shah and Others, . However, following the decision in Premwati Vs. Raghubans and Another, the learned ASJ held that it was the decision of the Delhi High Court in Income Tax Officer v. Delhi Iron Works (P) Limited (supra) which had to be followed. It is seen that even the learned ACMM in the impugned order dated 3rd December 2011 adopted the same approach.

8. This Court has perused the judgment in Income Tax Officer v. Delhi Iron Works (P) Ltd. (supra) which in turn referred to the decision of the Supreme Court in Madhumilan Syntex Ltd. and Others Vs. Union of India (UOI) and Another, . The

Supreme Court has in the said decision held that before launching a prosecution u/s 276B IT Act against the directors of a company, the Assessing Officer has to issue notice u/s 2(35) of the IT Act expressing his intention to treat such directors of a company as "principal officers". It was held that it would be sufficient compliance if in the SCN issued to the company it is mentioned that the Assessing Officer intends to treat the directors as principal officers of the company under the IT Act.

9. A careful reading of the decision of the Supreme Court in Madhumilan Syntex Limited (supra) reveals that it had arisen in identical circumstances where the ITD had prosecuted a company u/s 276B read with Section 278B IT Act. The only distinction between the case of Madhumilan Syntex Limited (supra) and the case on hand is that in that case the SCN issued expressly stated that the directors were considered to be treated as "principal officers". However, it appears that the Supreme Court also perused the complaint filed by the ITD in which it was stated that the directors were considered as principal officers. The relevant paragraphs of the decision in Madhumilan Syntex Limited (supra) read as under:

"44. In the case on hand, in the show cause notice dated March 11, 1991 issued u/s 276B read with Section 278B of the Act, it was expressly stated by the Income Tax Officer, TDS, Bhopal that the Directors were considered to be Principal Officers u/s 2(35) of the Act. In the complaint dated February 26, 1992 filed by Respondent No. 2-Commissioner also, it was stated that Appellants were considered as Principal Officers. In the above view of the matter, in our opinion, contention of the learned counsel for the Appellants cannot be accepted that the complaint filed against the Appellants, particularly against Appellant Nos. 2-4 is ill-founded or not maintainable.

45. It was argued that a separate notice and/or communication ought to have been issued before issuance of show cause notice u/s 276B read with Section 278B of the Act that the Directors were to be treated as Principal Officers under the Act. In our opinion, however, no such independent and separate notice is necessary and when in the show cause notice it was stated that the Directors were to be considered as Principal Officers under the Act and a complaint was filed, such complaint is entertainable by a Court provided it is otherwise maintainable."

10. As far as the present case is concerned, in the complaint filed before the learned ACMM it is stated by the ITD as under:

"1. That the Complainant is an Inspecting Assistant Commissioner of Income Tax (Assessment) In Charge of the assessment of Accused No. 1 which is a private limited company. Accused Nos. 2, 3 and 4 are the Directors/Principal Officer of the said company and were in charge and responsible to Accused No. 1 for the conduct of its business at the time when the offence, which is the subject matter of this complaint, was committed. The Complainant has been authorized and directed by the Commissioner of Income Tax, Delhi-III, New Delhi, Shri R.S.

Aggarwal, u/s 279(1) of the Income Tax Act (hereinafter to be referred to as the Act) to file the present complaint at his instance against the Accused. The authorization of the Commissioner of Income Tax, Delhi-III, New Delhi, is attached herewith and marked as Annexure-A. In instituting this complaint, the Complainant is also acting in the discharge of her official duties being a public servant."

11. For the purpose of Section 278B of the IT Act, the company can be proceeded against by issuing a notice to the "principal officer" of the company as defined u/s 2(35) of the IT Act, which reads as under:

"Section 2(35) "principal officer", used with reference to a local authority or a company or any other public body or any association of persons or anybody of individuals, means

(a) the secretary, treasurer, manager, or agent of the authority, company, association or body, or

(b) any person connected with the management or administration of the local authority, company, association or body upon whom the Assessing Officer has served a notice of his intention of treating him as the principal officer thereof;"

12. The term "principal officer" is also mentioned u/s 305 of the Code of Criminal Procedure 1973 ("Cr PC") which prescribes the procedure to be followed where a company is an accused. It is possible that at that stage of issuance of the SCN the ITD may not be aware who are the directors in-charge of the company. That requirement flows from Section 278B of the IT Act which is a deeming provision and is attracted when the offence is committed by a company. Section 278B reads as under:

"278B. Offences by companies

(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub- section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against

and punished accordingly. Explanation.- For the purposes of this section,-

(a) "company" means a body corporate, and includes-

(i) a firm; and

(ii) an association of persons or a body of individuals whether incorporated or not; and

(b) "director", in relation to-

(i) a firm, means a partner in the firm;

(ii) any association of persons or a body of individuals, means any member controlling the affairs thereof

13. Section 278B of IT Act makes the directors of the company in charge of its affairs liable for the offence committed by it unless the presumption is able to be rebutted by such director. This explains why the Supreme Court in *Madhumilan Syntex Limited* (supra) expressly rejected the arguments advanced on behalf of the directors in that case that the complaint filed against the company was not maintainable against the directors as well. It was further explained that "when in the show cause notice it was stated that the directors were to be considered as Principal Officers under the Act, and a complaint was filed, such complaint is entertainable by a Court provided it is otherwise maintainable." What was considered by the Supreme Court was not only the wording of the SCN but also the wording of the complaint filed by the ITD. The purpose of making explicit either in the SCN or in the complaint, the intention of the ITD that it was proceeding against the directors was to enable the directors to explain why they should not be proceeded against. Even if in the SCN there was no express mention that the directors were considered as "principal officers", in the complaint filed by the ITD it was clearly stated that "Accused Nos. 2, 3 and 4 are the directors/principal officer of the said company and were in charge and responsible to Accused No. 1 for the conduct of....."

14. In *Madhumilan Syntex Limited* (supra) it was held that the proceedings against the Directors would be maintainable as long as the complaint clearly stated that they were being treated as principal officers of the company. Even otherwise for the purpose of Section 278B of the IT Act, once the offence is shown to have been committed by the company, then the liability of the directors in charge of its affairs is attracted. The burden then shifts to such directors to show that the offence occurred without their knowledge or that they had exercised all due diligence to prevent the commission of such offence. The law as explained by the Supreme Court in *Madhumilan Syntex Limited* (supra) has not been noticed by the DJ&ASJ or the ACMM in the present case even while reference was made to the decision of this Court in *Income Tax Officer v. Delhi Iron Works (P) Limited* (supra).

15. Consequently, this Court is of the view that both Courts erred in acquitting

A-2 and A-3, the directors of the company only because they were not issued separate notices.

16. As far as the merits of the matter are concerned, it is seen that both directors have signed the Company's balance sheets. Their defence that they were not in charge of the affairs of the company is, therefore, untenable.

17. Accordingly, this Court sets aside the impugned judgment dated 24th September 2011 of the learned DJ&ASJ and the impugned judgment dated 3rd December 2011 of the learned ACMM and convicts the Respondents, i.e., A-2 and A-3 for the offence u/s 276B of the IT Act for the aforementioned three assessment years.

18. The punishment for the offence u/s 276B of the IT Act is a minimum sentence of three months rigorous imprisonment with fine. Considering that these matters pertain to AYs 1982-83 to 1984-85 and given the long pendency of matters, the Court is of the view that A-2 and A-3 should be given the benefit of probation.

19. Accordingly, while sentencing A-2 and A-3 to pay a fine of Rs. 50,000 each for the offence u/s 276B IT Act for each of the AYs, and in default to undergo simple imprisonment for seven days, the Court grants both A-2 and A-3 the benefit of probation and directs each of them to file bond of good behaviour in the trial Court in the sum of Rs. 10,000 each for the period of six months.

20. The appeals are disposed of in the above terms. The trial Court record along with a certified copy of this order be delivered forthwith to the concerned learned ACMM for further steps.

21. Order be given dasti.