(1998) 07 MAD CK 0122

In the Madras High Court

Case No : Criminal Appeal No''s. 524 and 525 of 1987 20 July 1998

INCOME TAX OFFICER — APPELLANT

Vs

ROSHNI COLD STORAGE (P.) LTD. — RESPONDENT

Date of Decision : 20-07-1998

Acts Referred:

Citation : (1998) 106 TAXMAN 318

Hon'ble Judges : V. Kanagaraj, J

Bench : Division Bench

Advocate : R. Ashokan,, for the appearing parties;

Judgement

1. The above criminal appeals have been directed against the judgment dated 9-5-1987 made respectively in E.O.C.C. No. 1374 to 1380 of 1985 and E.O.C.C. No. 1381 and 1382 of 1985 by the Court of Additional Chief Metropolitan Magistrate, Egmore, Madras, finding the accused therein not guilty of the offences under sections 276-13, and 276-13, read with section 278-B of the Income Tax Act, 1961 (''the Act'') and under sections 120-13, 420, and 511 of the IPC in the case concerned with the C.A. No. 524 of 1987 and under sections 276-B and 276-13, read with section 278-B regarding the case concerned with the C.A. No. 525 of 1987. Since the parties and the nature of the offences are one and the same, both the above appeals have been jointly heard and common judgment is delivered herein.

2. The charge, as framed by the Trial Court against the respondents/ accused is that A- 1 company failed to deduct the full amount of income tax at source or having deducted failed to remit TDS from the interest amount paid to New India Maritime Agencies (P.) Ltd., represented by the f if the accused as required u/s 194-A of the Act, for the financial years ended with 31-12-1973 to 31-12-1979 (in the case concerned with the C.A. No. 524 of 1987), (Rs. 37,108, Rs. 42,891, Rs. 55,806, Rs. 63,469, Rs. 60,195, Rs. 65,109 and Rs. 68,728, respectively, into the credit of the Central Government) and (in the case concerned with the C.A. No. 525 of 1987) the financial year ended with 31-12-1980 and 31-12-198

1, Rs. 57,338 and Rs. 50,706, respectively, into the credit of the Central Government within the period of two months specified in rule 30(1)(b) of the Income Tax Rules, 1962, read with sections 200 and 204 of Act and thereby committed an offence punishable u/s 276-13(ii) (7 counts) (concerned with C.A. No. 524 of 1987) and (2 counts) (concerned with C.A. No. 525 of 1987) of the Act.

Secondly, that A-2 to A-5 being directors of the first accused company from 1-1-1973 to 31-12-1979 (concerned with C.A. No. 524 of 1987) and I- 1- 1980 to 31-12-1981 (concerned with C.A. No. 525 of 1987) responsible to the first accused company for the conduct of the business, have by their failure to deduct or after deduction failed to remit the tax deducted at source to the credit of the Central Government from the interest amount paid to the New India Maritime Agencies (P.) Ltd., represented by the fifth accused as required u/s 194A, read with section 206, the still) as aforementioned in charge No. 1, thereby committing an offence punishable u/s 276-13(fi) read with 278-B (7 counts) concerned with C.A. No. 524 of 1987 (2 counts) and (C.A. No. 525 of 1987) and

Thirdly, (C.A. No. 524 of 1987 alone) that A2 being the managing director of A- 1 company and A3 to A5 being the directors of A- 1 responsible for its management and A7 being the sister concern of A-] and A-5 being its managing director and A-3 and A-4 being directors of A-7, being responsible for its management between December 1973 to December 1979 agreed to do an illegal act, namely, failing to deduct or having deducted, failed to remit into the credit of the Central Government within two months specified in rule 30(1)(b), read with 200 and 204 and the tax deductible at source on interest for the period from 1973 to 1979, respectively, the sum of Rs. 37,108, Rs. 42,891, Rs. 55,806, Rs. 63,469, Rs. 60,195, Rs. 65,109 and Rs. 68,728 and thereby attempted to cheat tile Income Tax department from levying interest due on the T.D.S. and thereby A-1 to A-5 and A-7 committed an offence punishable u/s 420, read with 511 of the IPC (7 counts).

3. in proof of the case concerned with C.A. No. 524 of 1987, the appellant/ prosecution had examined 5 witnesses for oral evidence as P.W.s 1 to5 and had marked 29 documents for documentary evidence as Ex.P. 1 to P. 29 and the accused named therein are 7 in number, whereas, the case concerned with C.A. No. 525 of 1987. In proof of the above charge the prosecution had examined 4 witnesses for oral evidence as P. W.s 1 to 4 and had marked 18 documents for documentary evidence as Exs. P 1 to P] 8, wherein the accused are 6 in number. The only alteration being the seventh accused, New India Maritime Agencies (P.) Ltd., concerned in C.A. No. 524 of 1987 has not been made an accused in the other case concerned with the C.A. No. 525 of 1987 and all the other 6 accused have been arrayed in the same manner in both the cases.

4. With the above evidence placed before the Trial Court and weighing the same with the legal yardstick and appreciating the said evidence in its own way in the context of the position of law pertaining to the subject, ultimately the Trial Court

had arrived at the conclusion to acquit all the accused therein in both the above matters, challenging which the complainant/ department has come forward to file the two separate memorandums of criminal appeals but in both offering the same grounds which are common to both such as: (I) that the lower court misdirected itself on the question of law relating to section 278-B and its application thereof; (ii) that the Trial Court failed to appreciate the evidence of the prosecution that once the deduction of TDS is done u/s 194-A, it is the duty of [lie company to remit the same to the Government Account within the time prescribed under rule 30; (iii) that the lower court failed to note that section 194-A clearly states that if any interest is paid to any person either in cash or by issue of cheque or by Draft or by any other mode, he shall deduct income tax thereon on rates and its finding that in cases of transferring into the accounts of the persons, the offence is not committed and the company or the director is not liable, is contrary to law; (iv) that the lower court failed to note that any private company with the directors and the managing director who are responsible for the planning of the company are responsible under the statute to carry out the duty to deduct (fie tax at source as required by the law; (v) that the finding of the Trial Court that the directors are riot responsible for the deduction and payment of the tax at source is a complete misunderstanding of the law, especially in view of section 278 -13; (vi) that the lower court holding that in the absence of a notice u/s 2(35) of the Act issued by the 1TO lo [he directors, the '' v cannot be made liable for, the non-deduction is incorrect, especially when the decision on which the Trial Court has been challenged and is pending before the Supreme Court arid especially when a petition for Special Leave has been granted and the case having been admitted and kept pending; (viz) that the lower court was in complete error to state that the company was not in a position to pay because of financial stringency and, hence, the delay is not wilful, is incorrect and is contrary to law; (viii) that the interpretation of without reasonable cause or excuse in section 276B by the lower court is incorrect and is not in consonance with the principle of interpretation of statues; (ix) that the lower court holding that it is for the prosecution to prove there was no reasonable cause or excuse for the non-deduction or after deduction non~ payment within the time, is contrary to the established principle of law; (x) that the lower court has f ailed to note that the circumstances under which the delay in payment has occurred is exclusively within the knowledge of the accused and it is for the accused to prove the said circumstances u/s 106 of the Evidence Act; and (m) that the lower court ought to have held that the accused 1 to 6 clearly conspired to do the postings of the interest due on payment of interest in such a manner as to evade interest payable to the department on the TDS.

5. Prior to entering to dissect the merits of the above appeals it is relevant to note the guidelines provided by the Apex Court as per its judgment in S. Madhavan Nair v. State of Kerala [1975] MU (Cri) 239 , wherein it has been held that 1n an appeal u/s 417 of the Code of Criminal Procedure, against an order of acquittal, the High Court has full power to review at large the evidence on which

the order of acquittal was founded and to reach the conclusion that upon the evidence the order of acquittal should be reversed. No limitation should be placed upon that power unless it be found expressly stated in the code, but in exercising the power conferred by [fie code and before reaching its conclusion upon facts the High Court should give proper weigh land consideration to Slice matters as (1) the view of the trial judge as to the credibility of the, witnesses; (2) the presumption of innocence in layout- of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any real and reasonable doubt; and (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing tile witnesses. The High Court should also take into account the reasons given by the Court below in support of its order of acquittal and must express its reasons in the judgment which led it to hold that the acquittal is not justified. Further, if two conclusions can be based upon the evidence on record, the High Court should not disturb the finding of acquittal recorded by the Trial Court and if acquitting the accused is not unreasonable, the occasion for the reversal of that view would not arise."

6. in the light of the above judgment and in consideration of the arguments advanced on the part of the learned counsel for the respondents/ accused and on a perusal of the judgment of the Trial Court, the grounds of the above appeals and the other facts and circumstances connected to the case and of course the evidence made available before the Trial Court, if this Court is to go into the merits of the case, it is relevant to consider those points brought forth by the respondents in the form of written submissions, wherein it is contended that the Trial Court has based its acquittal judgment mainly on three grounds: They are:

(i) that the department did not issue the statutory notice to the, respondents/ accused 2 to 5 as required u/s 2(35), treating them as the principal officers before launching prosecution for the offence u/s 276B, which requirement is mandatory;

(ii) that the ingredients of section 490 I.P.C. have not been attracted and the prosecution has not let-in any evidence in this regard. None of the prosecution witnesses speaks anything about this aspect; (3) that the respondent /accused-1 company Roshni Cold Storage (P.) Ltd., has been incurring heavy losses from the date of its incorporation arid, hence, there was reasonable cause and excuse for the delayed remittance of the tax deducted at source which fact was admitted by the department.

7. Ground No. 1 - The statutory notice as required u/s 2(35) was not issued to the respondents 2 to 5/accused 2 to 5 treating them as [lie principal officers of the accused-1 company before launching prosecution for an offence u/s 276B. Such a notice as contemplated u/s 2(35)(b) is a mandatory requirement in view of the meaning of ''person responsible for paying'' u/s 204. Section 194A in poses liability to deduct tax at source on the credit or payment of interest other than ''Interest on securities''. Section 194Affl uses the expression ''The person

responsible for making payment'' u/s 204(iii), the expression ''person responsible for paying'' means. . . ''if the palver is company, the company itself including the principal officer thereof. ''The contravention of section 194A is made an offence punishable u/s 27613. If the of fence is committed by the company, the prosecution for the offence u/s 276B has to be launched against the company itself and its principal officer. The expression ''Principal Officer'' is defined u/s 2(35), wherein under sub-clause (a) the persons mentioned therein become liable for any violation as the principal officer. The managing director or director is not included within the ambit of subclause (a) of section 2(35). In the case of the Income Tax Officer seeking to prosecute the managing director or director along with the company for an offence u/s 27613, he has to issue a notice under sub-clause (b) of section 2(35) expressing his intention to treat the managing director or director as the principal officer of the company. It is an admitted fact that no notice at required u/s 2(35)(b) was issued to the respondents/ accused 2 to 5 and their acquittal on this ground is supported by the ruling rendered by this Court in M.R. Pratap Vs. Y.M. Muthuramalingam, Income Tax Officer, Central Circle-III, Madras, , wherein it was held,

"... Consequently, the managing director of a company cannot be held liable u/s 276B unless the Income Tax Officer has served a notice on him u/s 2(35)(b) and informed him of his intention to treat him as the principal officer of the company." (p. 799)

8. The introduction of section 278B into the statute book with effect from 1-10-1975 by the Taxation Laws (Amendment) Act, 1975 does not alter or take away the mandatory requirement of issuing notice as contemplated u/s 2(35)(b) for an offence u/s 27613. While inserting section 27813, no corresponding changes have been introduced either tinder section 2(35)(b) or u/s 204(iii). Thus, such a statutory notice as contemplated u/s 2(35)(b) is mandatory only for offence u/s 276B in view of the meaning'' person responsible for paying'', ''if the payer is a company, the company itself including the principal officer thereof'' in section 204(iii). For other offences under the Act such as under sections 276C, 277t 276CC, etc., such a notice as contemplated u/s 2(35)(b) to either the managing director or director is not necessary as there was no expression akin to the expression used in section 204 in any of the provisions related to those offences under sections 276C, 276CC, 277, etc. This position is made clear in the decision in Geethanjali Mills Ltd. v. V. Thru avenged than [1989] 179 ITR 558:43 Taxman 1 (Mad.) wherein, His Lordship, after taking note of the ruling rendered in M.R. Plata''s case (supra) has ruled that the'' determination of the principal officer is necessary only in the case of deduction of tax at source as in the case of salaries, interest other than interest on securities, etc., and not otherwise. ''In Geetanjali Mills Ltd.''s case (supra), the offence alleged in the complaint is tinder sections 276C(I), 277, and 27813. Relying on this decision in Geethanjali Mills Ltd.''s case (supra) extracting the sections 194A, 200 and 204, his Lordship observed-

"From a cursory perusal of all the sections as extracted above, as rightly pointed out by learned counsel for the Revenue, the determination of'' the ''principal officer'' is necessary in the case of deduction of tax at source as in the case of salaries and interest other than interest on securities, etc., and not otherwise (p. 568)

Further, it was made clear in the above ruling that non-issuance of'' individual notices for other offences such as 276C, 276CC or 277 is of no consequence. Therefore, it is very clear that even after the introduction of section 278B with effect from 1-10-1975, it is mandatory to issue notice tinder section 2(35)(b) in case the prosecution is for the offence u/s 276B and not otherwise.

Endorsing the above view of this Hon''ble Court, the Punjab and Haryana High Court, in the case of Greatway (P) Ltd. and Others Vs. Assistant Commissioner of Income Tax, has ruled that in the absence of appointment of a principal officer by issuing a notice by the assessing officer, the prosecution, if any, could only be launched against the petitioner company.

At page 397 in the ruling, it was observed in para 1,

"The complaint is significantly silent as to whether any person had been appointed as the principal officer of the petitioner company. In the absence of such an appointment, a director or the managing director of the company could not be prosecuted. It appears that the assessing officer was himself at fault and that fault has been tried to be covered by an argument by learned counsellor the respondent that the Managing Director and the directors will be deemed as agents of the company. However, an agent of the company cannot be equated with the principal officer as defined in section 2(35) of the Act. The prosecution of the persons other than the petitioner company, would thus be bad on this short ground alone." In view of the above three rulings, the prosecution of the Managing Director and other directors without issuing notice u/s 2(35)(b) is bad in law.

Ground No. 2 - The Trial Court finding on the other charge u/s 420 I.P.C. is well-founded. It is highly misconceived that the charge u/s 420 I.P.C. could be levelled against the accused in the matter of levying interest, especially when the statute stipulates that such charging of interest is mandatory, and after the collection of such interest, the Trial Court has rightly held that the ingredients of section 420 I.P.C. are not made out. The prosecution has not let-in any evidence to prove the charges u/s 420 I.P.C. The charge is based on mere surmises and not on any evidence. None of the prosecution witnesses speaks anything about this aspect. The charge is very vague and the same is quite contrary to the facts of the case. The Accused-7, company, New India Maritime Agencies (R) Ltd., has been paying its advance tax in huge amounts very promptly. Its contribution by way of payment of tax is enormous. The payment of advance tax during the relevant assessment years is stated as here-under:-

Details of advance tax paid from 1973 to 1982

For the Year ended	Assessment year	Advance tax
30-6-1973	1974-75	1,25,482.00
30-6-1974	1975-76	1,74,147.00
30-6-1975	1976-77	2,38,885.00
30-6-1976	1977-78	4,38,330.00
30-6-1977	1978-79	1,79,106.00
30-6-1978	1979-80	2,86,650.00
30-6-1979	1980-81	2,19,704.00
30-6-1980	1981-82	2,47,135.00
30-6-1981	1982-83	3,01,450.00

30-6-1982

1983-84

2,37,490.00

Levelling a charge u/s 420 I.P.C. against the accused-7 company, and its directors, the respondents/ accused 2 to 5, would amount to killing a goose which lays golden eggs. There is no necessity for the accused 7 company to indulge in any kind of activity as alleged. The payment of tax structure by the accused-7 company as stated above clearly disproves the charge u/s 420 I.P.C. The Trial Courts finding in dismissing the charge u/s 420 I.P.C. is very well-founded.

Ground No. 3 - The Trial Court has found that the accused- 1 company had been incurring heavy losses right from the date of its incorporation, i.e., 10-2-1972 arid, therefore, it had reasonable cause or excuse for the delaved remittance of TDS. On the other hand. the prosecution has riot established that the accused-1 company acted without any reasonable cause or excuse by ex. R-5, P9 and P 12 the accused- 1 company had proved that it has sufficient cause for the delayed remittance of TDS PM. 2 in his cross-examination has admitted that the accused-1 company incurred a loss of Rs. 1,83,397 for the year ending 31-12-1973 relevant for the assessment year 1974-75, loss of Rs. 3,59,041 for the year ending 31-12-1975 relevant for the assessment year 1975-76, loss of Rs. 3,14,013, for the year ending 31-12-1977 for the assessment Year 1977-78, loss of Rs. 4,04,086 for the year ending 31-12-1978 relevant for the assessment year 1978-79.

Thus, the accused--- 1 company had been incurring heavy losses from the assessment year 1974-75 to 1982-83 and the loss carried over every year was assessed to Nil (NA) for the assessment year 1974-75 to 1982-83. Along with written statement, the accused- 1 company has also filed the challans for payment of TDS, interest, etc. Thus, the accused- 1 demonstrated that it had reasonable cause or excuse for the delayed remittance of TDS. The Trial Court has rightly relied upon the decision of P.N.B. Finance and Industries Ltd. Vs. Gita Kripalani, ,ITO v. Taurus Equipment (P.) Ltd. [1979] 1I8 ITR 982 and SEQUOIA CONSTRUCTION CO. P. LTD. AND OTHERS Vs. P. P. SURI, ITO, CENTRAL CIRCLE XX, NEW DELHI., and ruled that 1he accused-1 company had reasonable cause or excuse for the delayed remittance of TDS The decision of the Punjab & Haryana High Court in Greatway (P.) Ltd.''s case (supra) also lends support to the above view.

The prosecution witnesses themselves have admitted that the accused- 1 company was in terrific financial stringency. The Trial Court has rightly come to the conclusion that the accused-1 company has had reasonable cause and excuse in the delayed remittance of TDS For conclusion, the Trial Court has based its reliance on the following three rulings:

(1) PNB Finance & Industries Ltd.''s case (supra)

(2) Taurus Equipment (P.) Ltd.''s case (supra)

(3) Sequoia Construction Co. (P.) Ltd'' case (supra)

The Punjab and Haryana High Court has also held that it is the (lilt '' v oft he prosecution to prove that there was no reasonable cause or excuse in 1 he case in Greatway (P.) Ltd''s (supra). In this regard, the cumulative or over of the accused No. 1 is stated hereunder:

31-12-1975 Loss

Rs. 16,73,264

21-12-1976 Loss

Rs. 18,52,732

31-12-1977 Loss

Rs. 22,91,340

31-12-1980 Loss

Rs. 23,66,138

31-12-1981 Loss

Rs. 16,70,517

31-12-1982 Loss

Rs. 13.74,410

In view of the colossal loss incurred and carried over by the accused- 1 company every year, it made a request to its sister company, New India Maritime Agencies (P.) Ltd., (accused-7) to waive the interest or [lie outstanding amounts. The accused-7 company after some negotiations agreed and waived the interest with effect from 1-1-1982. In the near the accused-1 company had paid and deducted tax on interest erroneously. Further, the assessment of the creditor company New India Maritime Agencies (P.) Ltd., (M) itself for all the assessment years in question have been completed and the Income Tax was paid by the creditor on the whole of its income including ''interest income'' which it had earned from the accused- 1 company at the end of the each accounting year in quest ion.

In Commissioner of Income Tax Vs. Divisional Manager, New India Assurance Co. Ltd., , the Madhya Pradesh High Court has observed (head Note) :

"Where the regular assessment of an employee has been completed and the amount of tax fully paid by him, tile Income Tax Officer salaries circle in Jurisdiction u/s 201 of the Income Tax Act, 1961 to demand further tax from the employer in respect of the tax alleged to have been short deducted in respect of the employee." (p.818)

The Statute requires either the creditor or the debtor should pay the full Income Tax payable on the interest amount. In this case, the creditor, New India Maritime Agencies (P) Ltd., had given certificate that for all the years in question, it had already paid the Income Tax on the whole of its income including the interest income. Hence, the ends of justice require that the whole matter should get extinguished. Therefore, there is no loss to the exchequer caused in any way.

In conclusion, the appeal against acquittal is liable to be dismissed on the following grounds:

(1) No statutory notice as contemplated u/s 2(35),(b) was issued to the accused-2 to 5 as discussed supra and, hence, the acquittal of the accused 2 to 5 relying on this Hon''ble Court''s ruling rendered in M.R. Prataps case (supra) cannot be canvassed;

(2) The accused- 1 company had incurred colossal loss and carryover losses during the relevant years which fact was admitted by the department by itself and the accused-1 company was assessed to ''Nil'' assessment (NA) in the impugned assessment years and, therefore, the accused-1 company had reasonable cause or excuse in the delayed remittance of TDS. Paucity of funds and financial stringency are reasonable causes as ruled in-

(1) PNB Finance & Industries Ltd.s case (supra)

(2) Taurus Equipment (P.) Ltd.''s case (supra)

(3) Sequoia Construction Co. (P.) Ltd.''s case (supra) and

(4) Greatway (P.) Ltd.''s case (supra)

Hence, the acquittal of the accused- 1 is fully justified;

(3) The creditor company, the accused-7, has waived the interest on the outstanding amounts due from the accused- 1 company. Further, in the regular assessment, the creditor company has already paid the Income Tax on the whole of its income including the interest income for relevant assessment years. Therefore,'' When once it was referred by the creditor himself in his regular assessment, the right to recover the same from the debtor who should have deducted the same the lapse of the debtor simply becomes extinguished.''

Further, it is now 23 years from the alleged date of the commission of the offence. In Kuldip Rai Chopra, Income Tax Officer v. Sohan Singh Dhiman [1977] 110 ITR 521 (Punj. & Har.) it has been observed,

"Held further, that in an appeal against acquittal the High Court cannot be called upon to reassess the credibility of the evidence, when the view taken by the trial court was not shown to be so patently erroneous as to cause miscarriage of justice." (p. 522)

In Banwari and Others Vs. Income Tax Officer and Another, , the Supreme Court has ruled by observing,

(i) that, for more than a decade, the proceedings were pending in the Trial Court and no useful purpose would be served by proceeding with the complaint after the lapse of such a long time; the rnatter had become stale;

(ii) that, on the facts, the Magistrate could not be said to have been grossly wrong in inferring that the mention of the wrong date was merely a bona fide mistake." (p. 652)

Relying on the aforesaid ruling of the Apex Court, this Court in Fourth Income Tax Officer v. A.K. Srinivasan [1994] 205 ITR 64 has ruled,

"However, that since the offence was said to have been committed in the year 1976-77 and the order of acquittal was passed in 1984, no useful purpose would be served by ordering re-trial at this length of time especially when the respondent had already undergone imprisonment till the rising of the court and paid the fine in respect of the offences committed in connection with the same transaction.'' (p. 64)

In the case on hand, the first assessment year in which the offences are alleged to have been committed was in 1974-75 and the accused were acquitted by the Trial Court on 18-3-1987. Not only the interest had been waived by the creditor but also the entire tax had been paid by the creditor company in its regular assessment and, hence, there was no loss to the exchequer.

For the aforesaid reasons, the acquittal of the accusee by the Trial Court is based on the sound principles of law and the rulings rendered by various High Courts and Supreme Court.

P.W.3 was the complaint and the 1TO, Head quarters (TDS) from I- 1- 1985, who filed the complaint based on Ex. P.17, authorisation dated 30-10.1985 u/s 279(1) of the Act, passed in his favour by the Chief Commissioner, Madras. P.WA was one, who was the predecessor of P.W.3 and this witness on perusal of the file in respect of A- 1 company submitted Ex. PAS office note, dated 7-12-1984 stating thereby that in spite of repeated correspondence there was no proper response from A- 1 company for which the reply given by A- 1 is in Ex. P. 19, dated 6-4-1984 in respect of TIDS, informing part payment and seeking further time for the balance payment and that after going through the procedures, penalty of Rs. 52,000 for the accounting years ending with 31-12-1973 to 31-12-1981 was levied on 17-9-1984 and that had not been paid by A- 1 company till IS- 1-1985; that on 2-7-1984 he issued Ex.P. 20 show-cause notice to A- 1 company, as to why he should not be prosecuted for contravention of section 276B.

P.W 5, the Income Tax Officer, in his evidence would depose that A-7 company was the Income Tax assessee under his jurisdiction; that for the year ending with 30-6-1974 in the assessment year 1975-76, A-7 company filed the Income Tax returns in respect of the assessment order passed on that return and the matter was pending in appeal before the Tribunal, that A-5 was the managing dirctor of A-7 company and he filed A-7''s Income Tax returns for the year ending with 30-6-1975 showing Rs. 38,497 as Income Tax deducted source and Es. P.21 is the return for the year 1975 that along with Ex.P.21, A-7 company also filed Ex. P. 22 under Form 19-A by A-1 company showing Rs. 38,497 as TDS payable on or before 1-3-1975 and the same had been paid only on 5-8-1977. Hence, the TDS was not given credit for the assessment year 1976-77 for A-7 company, but given credit to only in the actual year of payment of A-1 company. Similarly, A-5 the managing director A-7 company filed for the accounting year ending with 30-6-1976. Assessing the evidence of the prosecution witnesses 1 to 5 who were examined before the Trial Court, PW.1 the Income Tax Officer, headquarters besides stating that A- 1 is a private limited company, of which A-2 is tile managing director, A-3 to A-5 are the directors, A-6 is the manager and A-7 is the private limited company and sister concern of'' A- 1 and ill A-7 company A-3 and A-4 are the directors, and A-5 is the managing director, the officers of both A-1 and A-7 companies are located at one and the same place; that A-7 company had been lending money to A- 1 for which A- 1 had credited annual interest in favour of A-7 company that oil receipt (A EXT. letter from PM. 5 the immediate predecessor he issued EA.P. 2 showcause notice dated 2-3-1983 toA-1 UX.P. 3 notice dated 14-3-1983 had been sent; that A-1 company sent F-\\.P. 5covering letter dated 21-3-1983 enclosing, Ex.P.4and Ex.P.6 series which are the xerox copies of TDS remittances challans for the year ending with 31-12-1977, pleading thereby that want (if liquid funds had the delaved remittance of TDS amounts. Due to borrowings from A-7 company that the secretary of A-7 company appeared as the representative company and inspite of direction to file further details it was not done. Ex. P.7, 7. dated 27-6-1983 was the letter addressed lo the A- 1 company.

PM. 2 was the additional in charge of the office of the ITO, during the relevant period and lie would depose that under Ex. 8 Ietter A-1 company was fixed for hearing on 26-11-1983 and under Ex.P. 9 hence, he requisition dated 24.11.1983 of A-I sought further time and, hence he sent summons to A-1 under Ex.P. 10, dated 16-12-1983 and after more correspondence on 14-1-1984 issued to A-1 company Ex.P. 14 letter/ notice demanding Rs. 2,88,863 as arrears and Rs. 2,84,489 towards Z, interest, thus making a total demand of Rs. 5,74,352 that notice had also been sent A-7 company under Ex.P. 15 Series (8 in number) by his successor confirming his successor confirming his demand/made under Ex.P. 14 Ex.P. 23 is the Income Tax return, dated 21-6-1979 showing Rs. 61,128 as TDS at source and along with Ex.P. 23 Income Tax returns; A-7 company filed Ex.P. 24 TDS certificate dated 27-3-1979 issued by a A-1 company in respect of Rs. 53,128 as TDS at source as not yet paid. Letter on 4-1-1982 this witness requesting to look into the matter A-5 filed for the year ending with 30-6-1977, Ex.P. 25 Income Tax returns dated 11-12-1980 claiming Rs. 1,26,045 as TDS, at source for other interests; that along with Ex.P. 25 Income Tax returns A-7 company filed Ex.P. 26 TDS certificate dated 31-12-1976 for Rs. 64,981 intimating that it would be paid later by A-1 company. A-5 also filed for accounting year ending 30-6-1978 Ex.P. 27, Income Tax returns, dated 17-12-1982 showing Rs. 61,628 as TDS for other interest; that along with Ex.P. 27 Income Tax returns. A-7 company also filed Ex.P. 28 TDS certificate dated 10-12-1978 intmating that this sum would be paid by A-1 company that A-5 also filed for accounting year ending with 30-6-1979 Ex.P. 29 Income Tax return dated 15-12-1982 showing Rs. 1,27,198 as TDS at source for other interests; that u/s 139(8) of the Act, interests can be charged for delayed filing of Income Tax returns and such interest could be charged on balance of Income Tax due that since the Income Tax due on interest was not paid in time in respect of A-7 company by A-1 company, the credit for such TDS was given only for the years of payment by A-1 company, thus, interest section 139(8) charged against A-7 company was reduced giving indirect benefit to A-7 company.

The Trial Court in consideration of the above evidence placed before it and in further consideration of the pleading of the accused during the questioning by the Court u/s 313 of the Code of'' Criminal Procedure Code, and further considering the facts, figures and circumstances of the facts, figures and circumstances of the case as projected 1) '' X the prosecution and ultimately to weigh the evidence in terms of the requirements of law, has frarned five points which arc:

(i) Whether after introduction of section 278-B on 1-10-1975, notice tinder section 2(35)(/,)) to directors ofcompany is necessary ?

(ii) Whether A-2 as managing director and A-3 and A-5 as directors of A- 1 company liable for delayed remittance of Income Tax deducted at source on the interest on borrowings from A-7 company ?

(iii) Whether A-1 to A-5 and A-7 company attempted to cheat from levying interest on TDS ?

(iv) Whether A-1 company''s delayed remittance of TDS was without reasonable cause or excuse ? and

(v) Is Ex.P. 17 authorisation to prosecute valid ?

The Trial Court considering point No. 5, whether the authorisation granted to prosecute the case is valid has cited the case in Swarna Malial v. Central Excise & Customs Department, Bangalore [1977] MLJ Cri 175, wherein it has been held that though for a sanction to prosecute application of mind is necessary, for art authorisation to be granted such application of mind is unnecessary, and has accepted the same considering the other cases in T.S. Balaiah v. TS. Rangachari, Income Tax Officer [1969] MU (cri) 547 , wherein it has been held that the authorising authority need not file the complaint himself, but can dispute subordinates to file the complaint for offence under the Act. The Trial Court would conclude ultimately that in this case the authorisation given under Ex.P. 17 is valid, thus, deciding point No. 5 in favour of the prosecution.

Dealing with point No. 1 citing a decision of this Court in MR. Plata''s case (supra), wherein it has been held that notice u/s 2(35)(b) is necessary for the managing director of a company treating him as principal officer, to make 1 him liable for being prosecuted for an offence u/s 276-B committed by the company. Further, noting that [here is no contra-decision available from any other quarter and inspite of being objected by the other side on ground that the said judgment was on appeal in the Supreme Court, since the Trial Court thought that it was still binding on it, considered the view to decide the said point and after wide discussions would ultimately arrived at the conclusion upholding the ruling of this Court rendered by justice S. Natarajan (as he then was) and would end up saying that as long as section 2(35)(b) is applicable to a company, introduction of section 278-B does not alter the position to get out of the said ruling in respect of an offence u/s 276-B and, thus, deciding point No. 1 against the prosecution.

So far as point No. 2 that TDS deducted for interest on borrowings from A-7 company to A- 1 company were not remitted within the time allowed and, hence, the accused became liable to be dealt with u/s 276B, the Trial Court would further contend in para-24 of its judgment that already under point No. 1 it has been concluded that A-2 to A-5 as managing director''s and directors or A- 1 company cannot be found guilty unless there is allegation in the complaint and established by evidence that they, in respect of this TDS in any way consented, connived, or neglected this statutory obligation of A- 1 company. There is no such allegation in the complaint or any acceptable evidence on this aspect against A-2 to A-5. The further contention of the complainant that section 204 is only an inclusive definition and does not exclude section 278-B by the afore stated decision of Hon''ble Justice S. Natarajan, (as he then was) and it has been concluded that the managing director and directors cannot be made liabIe for the commission of the offence. Further, citing the contention of A-2 that on the death of one P.C. Kachapeswaran 1yer C& P.C.K. lyer, who was the accountant of A- 1 company that he had been caused to attend to the correspondence for the TDS liability to have been shown in the balance-sheet as contingent liability, there is no evidence to that effect. Furthermore, notice u/s 2(35(b) since being held necessary, and further since there is not material to raise the rebuttable presumption either u/s 278. B (1) or (2) against the directors of A- 1 company, section 278-B cannot be invoked against A-2 to A-5 for the first 2 years ending with 31-12-1973 and 31-12-1974, since section 278-B which came into existence on 1- 10- 1975, no being retrospective in operation. The Trial Court would ultimately answer point No. 2 in favour of the accused.

So far as point No. 3 whether A-1 to A-5 and A-7 company attempted to cheat from levying interest on TDS, the Trial Court dealing with the same in para25 of its judgment, would contend that admittedlyA-7 is the sister concern of A-1 and A-3 to A5 are the common directors of both companies; that the allegations in respect of attempt to cheat is itself vague and the evidence of PM. 5 in this regard is not clear. There is not even an allegation for conspiracy or attempt to cheat. It is not only the interest u/s 201 (1 A) for delayed remittance of TDS had been given credit in respect of A-7 company''s assessment only during the years when TD8 amounts were paid, but not in the years when the interest was shown in the income tax return of A-7 company, which is made clear in the evidence of PM. 5. Hence, the TDS amount with A-1 and A-7 was not given credit till the actual payment of TDS by A- 1 company and, hence, in the opinion of the Trial Court the ingredients of section 420 of the I.P.C. could not be appreciated at all either against A- 1 to A-5 or against A-7 company and that at best it would be temporary misappropriation by A-1 company falling u/s 409 I.P.C. But there is no allegation or evidence to that effect. Hence, the Trial Court had concluded thatA-1 to A-5 joining bands with A-5 attempted to cheat the Income Tax department for Ievying 201 (I-A) interest or even penalty due to TDS u/s 221 for the relevant 7 years had not been established, thus, answering this point in favour of the accused.

Ultimately, dealing with point No. 4 whether A-1 company delayed remittance of TDS was without reasonable cause or excuse in Para No. 26 of its judgment, the Trial Court discussing the said point and contending thereby that admittedly A- 1 and A-7 were sister concerns with A-3 too as their common directors and the interest credited had been correctly shown as receipts in A-7''s Income Tax returns though according to the accused it was only mercantile system of credit without actual payment of interest to A~7 company. But the burden of proof, without reaso''nable cause or excuse since cast on the prosecution the burden that AA company acted with reasonable cause or excuse promptly and the delay had occurred on account of reasonable cause or excuse and this proof is not as onerous proof as it has been cast on the prosecution that default for delayed TDS payment should be deliberate and conscious as held by the Delhi High Court in PNB Finance Industries Ltd.''s case (supra), that failure to deduct or failure to pay if deducted has not been by itself made penal and such an act if done without reasonable cause or excuse alone can be made penal.

Further, stating that there was no evidence of record as to whether the accused acted without reasonable cause or excuse and the Trial Court ultimately arrived at the conclusion that the prosecution had failed to prove this aspect of the case also beyond reasonable doubt. The Trial Court would ultimately arrive at the conclusion to decide this point also in favour of the accused. Ultimately the Trial Court finding that none of the accused had been found guilty of any of the offences that they were charged under, would order their acquittal.

It cannot be denied that the general provisions of'' criminal law and the norms of criminal jurisprudence the rules and procedures that are adopted are the same for the case arising on violation of the provisions of the Income Tax laws and any case put up in every other criminal case, a case arising out of the act is also subject to the rule that the accused is presumed innocent and that the burden to discharge the said innocence is paramountly on the prosecution. However, strong the suspicion against the accused, if every reasonable possibility of innocence has not been excluded, he is entitled to acquittal. Whenever circumstances arise, they must be proved and riot by themselves presumed. No single item of evidence can be singled out and given prominence nor the accused''s theory of the case can be withdrawn from consideration. What constitutes failure or causing delay or evasion in the payment of Income Tax is a question of law, whether on evidence the particular crime has been committed is aquestion of fact. If, therefore, the evidence regarding either failure or causing delay or evasion in payment of the Income Tax leaves room for doubt and does not dispkce the presence of innocence wholly, the charge cannot be said to have been established. On because innocent and honest Government servants should not be made scapegoats on baseless arid make-believe allegations or charges of the prosecuting officials to make out a case for reasons many, the law as laid down by various judicial pronouncements requires strong corroborative evidence that could be gathered either from oral or documentary evidence or even from the circumstances evidence the whole case. The standard of evidence and [lie proof required by law from the department being proof beyond reasonable doubt, unless each and every aspect of the case is proved with such abundant arid overwhelming evidence, [lie case cannot be said to have been proved to sustain a conviction.

Hence, for- all the above discussions held scrutinising carefully the reasons assigned by the Trial Court for each and every point of which the Trial Court has appreciated the evidence in the context of the position of law based on the propositions arrived at by different Courts, this court does not set, any reason to intefere with the well-considered and well-merited judgment passed by the Trial Court.

No patent errors of law nor perversity in approach by the trial Court in any manner has been brought forth by the appellant/department so as to make this Court reasonably to interfere with the decision of theTrial Court.

In result, the above Criminal Appeals in Crl. Appeal No. 524 of 1987and 525 of 1987 fail arid the same are dismissed. The judgment dated 18-3-1987, respectively, made in E O.C.C, Nos. 1347 to 1380 of 1985 and E.O.C.C. Nos. 1381 arid 1382 of 1985, by [lie Court of Additional Chief Metropolitan Magistrate, Egmore, Madras - 8, are hereby confirmed.

