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**(2002) 03 MP CK 0056**

**In the Madhya Pradesh High Court**

**Case No :** Miscellaneous Criminal Case No. 4703 of 2001

Kaushal Kishore Biyani

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

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**Date of Decision :** 18-03-2002

**Acts Referred:**

Income Tax Act, 1961 — Section 271C, 276B

**Citation :** (2002) 256 ITR 679 : (2002) 2 MPHT 512 : (2002) 3 MPLJ 297

**Hon'ble Judges :** S.L. Kochar, J

**Bench :** Single Bench

**Advocate :** S.C. Bagadiya and Chhabra, for the Appellant; Patankar, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

S.L.Kochar, J.

This is an application filed by the applicant u/s 482 of the Code of Criminal Procedure for quashment of Criminal Case No. 10/92 pending before the Addl. Chief Judicial Magistrate (Economic Offences), Indore.

The non-applicant-Income Tax Department filed a criminal complaint on 14-2-92 alleging that for the assessment year 1987-88 corresponding to the previous year ending 30th June, 1987, the firm M/s Shrinath Drillers did not deduct TDS at 1 %. The applicant Kaushal Kishore was the acting partner of the firm. After the default was pointed out to the firm and its partner by the non-applicant-Department, they deposited the amount of TDS from their own account and submitted that this was the first year of their business, they were not aware of the statutory requirement in this regard under the Income Tax Act.

It appears that the learned Trial Court has taken cognizance only against Kaushal Kishore, the applicant and framed the charge punishable u/s 276B of the Income Tax Act.

The submission of the learned counsel for the applicant is that prior to 1-4-89, the provision u/s 276B was prescribing that if a person fails to deduct or after deducting fails to pay the advance, as required by or under the provisions of Sub-section (9) of Section 80E or Chapter 17-B shall be punishable. The aforesaid provision of Section 276B was amended by the Direct Tax Laws (Amendment) Act, 1987 with effect from 1-4-1989 which prescribes punishment for failure to pay tax deducted at source. Thus, upto 1-4-1989, failure to deduct TDS was also an offence but after 1-4-1989, only if a person deducted the TDS, but did not pay the tax then it was an offence.

He further contended that the new Section 271C was introduced with effect from 1-4-89 to provide for penalty imposable on persons who fail to deduct the TDS as required by law. Because of this amendment after 1-4-1989, failure to deduct TDS cease to be an offence, but was liable for penalty under the Act and this has been explained by the respondent-Department Circular No. 551, dated 23-1-90 which reads as under :--

"17.2. Substitution of a new section for Section 276B to exclude failure to deduct tax at source from prosecution provisions and to provide prosecution only for failure to pay tax deducted at source to the Government. Under the old provisions of Section 276B, the following defaults were liable to prosecution :--

(i) failure to deduct tax at source under the provisions of Chapter XVII-B.

(ii) failure to pay to the Government the Tax so deducted at source."

He further contended that Section 80E has been omitted by the Amending Act of 1987, reference to the said Section 276B is no longer necessary. Failure to deduct tax at source now attracts penalty under the new Section 271C. In view of the aforesaid changed law that on the date when the complaint was filed, failure to deduct tax was no more an offence. Only if the tax was deducted, but not paid, then it was an offence and for this the law has provided for imposition of penalty. In the case of petitioner's firm, it did not deduct TDS, but had still deposited it. Therefore, no offence can be made out against the accused and the complaint was liable to be quashed by the learned Magistrate. He relied on the judgments reported in (2001) 29 ITR 287 ( Salwan Construction Co. and Others Vs. Union of India and Others, (Salwan Construction Co. and others v. Union of India and others). Both these judgments have been pronounced by the Madhya Pradesh High Court and Delhi High Court relying on the Supreme Court judgment rendered in Kolhapur Canesugar Works Ltd. and Another Vs. Union of India and Others, .

Learned counsel for the non-applicant has submitted that there is no saving clause in the Amendment Act about retrospective applicability of Amendment Act. Therefore, the complaint was filed well within the ambit of old law because, the incident had taken place when the old law was prevalent. But, he has not answered the question that the complaint was filed after 1-4-1989 i.e., on 14-2-92 after the new Amended Act came into force, and the Supreme Court in

para 38 has held that:--

"At common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute book as completely as if it had never been passed, and the statute must be considered as a law that never existed. To this rule, an exception is engrafted by the provisions of Section 6(1). If a provision of a statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them, and if final relief has not been granted before the omission goes into effect, it cannot be granted afterwards. Savings of the nature contained in Section 6 or in special Acts may modify the position. Thus the operation of repeal or deletion as to the future and the past largely depends on the savings applicable. In a case where a particular provision in a statute is omitted and in its place another provision dealing with the same contingency is introduced without a saving clause in favour of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue, but a fresh proceeding for the same purpose may be initiated under the new provision."

In the present matter, there is no saving clause for applicability or inapplicability of the Amended Act. This is the general rule of provision of interpretation of statute that in procedural law if no saving clause, prescribing its retrospective or prospective effect, is given, then the procedural law will have retrospective effect. But for penal law, the position is vice versa. In the present matter, there is no saving clause prescribing applicability of old penal law for a pending case. Therefore, since the Amended Act has come into force on 1-4-1989 and the complaint was filed on 14-2-92, the complaint will be governed by the Amended Act and according to the Amended Act, Section 276B of the Income Tax Act for failure to deduct the tax at source only penalty is prescribed by the department and not the prosecution.

In view of the aforesaid analysis this Court is of the view that the complaint pending against the applicant before the Addl. Chief Judicial Magistrate (Economic Offences), Indore vide Cr. Case No. 10/92 is not tenable. Consequently the same is dismissed.