
(2022) 09 DEL CK 0104

In the Delhi High Court

Case No : Civil Writ Petition No. 2560 Of 2014, Civil Miscellaneous No. 5300 Of 2014

Mizpah Charitable Trust

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 15-09-2022

Acts Referred:

Foreign Contribution (Regulation) Rules, 2011 — Rule 17, 21
Foreign Contribution (Regulation) Act, 2010 — Section 18, 37, 41, 41(1)

Citation : (2022) 09 DEL CK 0104

Hon'ble Judges : Vibhu Bakhru, J; Amit Mahajan, J

Bench : Division Bench

Advocate : Manoj V. George, K.M. Vignesh Ram, Shilpa Liza George, Ranjit V. Philip, Anil Soni, Rahul Mourya

Final Decision : Disposed Of

Judgement

Vibhu Bakhru, J

Introduction

1. The petitioner impugns the Notification bearing No.S.O. 1070(E) dated 26.04.2013 (hereafter the 'impugned notification') issued by the respondent under Section 41 of the Foreign Contribution (Regulation) Act, 2010 (hereafter the 'FCR Act'). The petitioner claims that the impugned notification is ultra vires of the provisions of the FCR Act. In addition, the petitioner also impugns an order dated 12.03.2014 (hereafter 'the impugned order') issued by the respondent, whereby the petitioner was advised to pay a penalty of ₹11,78,260/- (Rupees Eleven Lakhs Seventy-eight Thousand Two Hundred & Sixty Only) for compounding the offence of delay in filing of the annual returns under the FCR Act, for the financial years 2009-10, 2010-11 and 2011-12. The petitioner contends that the delay in filing an annual return is not an offence punishable under the FCR Act. It is also contended that since the FCR Act came into effect on 01.05.2011, the same cannot be applied to impute commission of an offence

prior to that date.

Controversy

2. The questions that fall for consideration before this Court are:

(a) whether the impugned notification is violative of the provisions of the FCR Act;

(b) whether the delay in filing of the returns is an offence punishable under the FCR Act;

(c) whether the impugned order to the extent it advises the petitioner to pay the penalty for the financial years 2009-10, 2010-11 and 2011-12 is beyond out the scope of the FCR Act; and

(d) if the answer to the aforesaid question is in affirmative, whether the impugned order to that extent it calls upon the petitioner to pay the penalty for a period prior to 01.05.2011 is sustainable.

Context

The relevant facts necessary to address the aforesaid controversy are as under:

2.1 The petitioner, a charitable trust, has filed the present petition through its Managing Trustee, who is 85 years of age.

2.2 The petitioner trust was formed for various charitable objectives including to establish orphanages.

2.3 The petitioner claims that it operates an orphanage, housing around fifty children.

2.4 The petitioner trust was registered under the Foreign Contribution (Regulation) Act, 1976 on 01.04.2007. In furtherance of its objectives, the petitioner trust established a mercy home, which housed around fifty orphans and the requisite Certificate of Registration from the Board of Control of Orphanages and other charitable homes from the State Government had been received.

2.5 The petitioner contends that it has been regularly filing the Income Tax Returns (ITRs) along with its accounts, duly certified by the Chartered Accountant, in compliance with the provisions of the FCR Act.

2.6 The petitioner claims that it received a letter dated 21.09.2011 from the respondent calling upon the petitioner to explain within a period of fifteen days of the receipt of the letter as to why it should not be directed to not accept foreign contribution without prior permission of the Central Government. This was in context of the allegation that the petitioner had failed to file the returns under the Foreign Contribution (Regulations) Act, 1976 for the financial year 2006-07.

2.7 The petitioner claims that he was informed by the Chartered Accountant that

he was unable to file the returns (in Form FC-6) as he was unable to create a Login ID. It is claimed that this was because the petitioner's Login ID for filing the online returns under the FCR Act had already been created by the Chartered Accountant engaged earlier by the petitioner, who had since expired.

2.8 The petitioner claims that the Login ID and password necessary to file the online forms were only in the knowledge of the deceased Chartered Accountant and therefore, the petitioner could not file the requisite returns within the prescribed time. The petitioner claims that it had also informed the respondent about its predicament and had further, requested the respondent to furnish the requisite details so as to enable the petitioner to file the relevant return.

2.9 The respondent issued the impugned notification, which was published on 26.04.2013. The respondent issued the impugned order computing the penalty payable by the petitioner in terms of the impugned notification.

Submissions

3. Mr Manoj V. George, learned counsel appearing on behalf of the petitioner, contended that Chapter-VIII of FCR Act contains provisions relating to 'Offences and Penalties' and there is no provision in the said chapter, which stipulates that the delay in filing an annual return is an offence. Section 41 of the FCR Act provides for compounding of certain offences. Since delay in filing the annual return is not an offence, the question of compounding the same does not arise.

4. Next, he submitted that the effect of the impugned notification was to treat non-filing of the annual return as an offence. Thus, applying the impugned notification to cover a period prior to its issuance is unconstitutional. He contended that an offence could not be created with retrospective effect and if the impugned notification was so construed, it was liable to be set aside as ultra vires to the Constitution of India.

Reasons and Conclusion

5. The principal question to be addressed is whether the impugned notification violates the provisions of the FCR Act and / or is ultra vires the Constitution of India.

6. The petitioner's challenge to the impugned notification rests on two assumptions. First, that the delay in filing the return is not an offence under the FCR Act; and second, that the impugned notification, in substance, creates an offence with retrospective effect. The question whether these assumptions are correct is a contentious one.

7. The contention that non-filing of an annual return within the prescribed time is not an offence under the FCR Act is without merit. Section 18 of the FCR Act mandates that every person, who has been granted a Certificate of Registration or prior approval under the FCR Act, shall file an intimation to the Central Government disclosing as to the amount of foreign contribution received, the

source from which and the manner in which the foreign exchange was received, and the purpose for which and the manner in which the same was utilized. Section 18 of the FCR Act is set out below:

“18. Intimation.—(1) Every person who has been granted a certificate or given prior approval under this Act shall give, within such time and in such manner as may be prescribed, an intimation to the Central Government, and such other authority as may be specified by the Central Government, as to the amount of each foreign contribution received by it, the source from which and the manner in which such foreign contribution was received, and the purposes for which, and the manner in which such foreign contribution was utilised by him.

(2) Every person receiving foreign contribution shall submit a copy of a statement indicating therein the particulars of foreign contribution received duly certified by officer of the bank or authorised person in foreign exchange and furnish the same to the Central Government along with the intimation under sub-section (1).”

8. Rule 17 of the Foreign Contribution (Regulation) Rules, 2011 (hereafter the ‘FCR Rules’) provides the manner in which the annual return is required to be filed. Rule 17 of the FCR Rules, as was in force prior to 14.12.2015, reads as under:

“17. Intimation of foreign contribution by the recipient – (1) Every person who receives foreign contribution under the Act, shall submit a signed or digitally singled report electronically online in Form FC-6 with scanned copies of income and expenditure statement, receipt and payment account and balance sheet for every financial year beginning on the 1st day of April within nine months of the closure of the financial year.

(2) The annual return in Form FC-6 shall reflect the foreign contribution received in the exclusive bank account and include the details in respect of the funds transferred to other bank accounts for utilisation.

(3) If the foreign contribution relates only to articles, the intimation shall be submitted in FC-7.

(4) If the foreign contribution relates to foreign securities, the intimation shall be submitted in form FC-8.

(5) Every report submitted under sub-rules (2) to (4) shall be duly certified by a chartered accountant.

(6) Every such return in Form FC-7 shall also be accompanied by a copy of a statement of account from the bank where the exclusive foreign contribution account is maintained by the person, duly certified by an officer of such bank.

(7) The accounting statements referred to above in the preceding sub-rule shall be preserved by the person for a period of six years.

(8) A 'NIL' report shall be furnished even if no foreign contribution is received during a financial year."

9. It is clear from the above that the petitioner was required to furnish the annual returns in Form FC-6 along with its final accounts (income and expenditure statement, receipt and payment account and balance sheet) within nine months of the end of the relevant financial year. Therefore, the petitioner was required to file the annual return for the financial year ending on 31st March of any year on or before 31st December of that year.

10. There is no ambiguity that the petitioner was required to file the annual returns within the prescribed period in compliance with the provisions of the FCR Act.

11. Chapter-VIII of the FCR Act contains provisions regarding 'Offences and Penalties'. Section 37, which falls within Chapter-VIII of the FCR Act, is relevant and set out below:

37. Penalty for offences where no separate punishment has been provided.—Whoever fails to comply with any provision of this Act for which no separate penalty has been provided in this Act shall be punished with imprisonment for a term which may extend to one year, or with fine or with both

12. Section 37 of the FCR Act is a residuary clause and its import is that whoever fails to comply with the provisions of the FCR Act, for which no separate penalty is provided, is liable to be punished with imprisonment for a term, which may extend to one year or with fine or with both.

13. Mr George, learned counsel appearing on behalf of the petitioner, contended that the heading of Section 37 of the FCR Act, indicates that the provisions of Section 37 of the FCR Act would be applicable only in circumstances where an offence is specified under Chapter-VIII of the FCR Act but no punishment has been prescribed.

14. The said contention is unmerited. It is not necessary that all offences be separately listed out in Chapter-VIII of the FCR Act. The plain language of Section 37 of the FCR Act clarifies that the punishment, as specified, would be applicable in case of non-compliance of any provision of the FCR Act for which no specific punishment is prescribed. Thus, violation of any provision of the FCR Act would attract punishment, as specified.

15. The heading of a section of an enactment may be used as an aid for interpretation of that section but does not control the meaning or import of the section where the language of the section is free from ambiguity.

16. In view of the above, the contention that delay in filing of the annual return under the FCR Act is not an offence, is rejected. The question as noted in paragraph 2(b) is answered in the affirmative.

17. The next aspect to be examined is regarding challenge to the validity of the

impugned notification. It is relevant to refer to Sub-section (1) of Section 41 of the FCR Act. The same reads as under:

"41. Composition of certain offences.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any offence punishable under this Act (whether committed by an individual or association or any officer or employee thereof), not being an offence punishable with imprisonment only, may, before the institution of any prosecution, be compounded by such officers or authorities and for such sums as the Central Government may, by notification in the Official Gazette, specify in this behalf."

18. Section 41 of the FCR Act expressly provides that any offence, other than an offence, which is punishable by imprisonment only, made prior to institution of any prosecution be compounded for such sums as the Central Government may specify.

19. The impugned notification has been issued by the Central Government in exercise of powers under Section 41 of the FCR Act. It does not fall foul of any provision of the FCR Act.

20. We are unable to accept that the impugned notification is ultra vires to the Constitution of India. It merely stipulates the terms on which given offences can be compounded.

21. In view of the above, the question as noted in paragraph 2(a) is answered in the negative.

22. The next question to be addressed is whether the impugned order is sustainable. Admittedly, the petitioner had failed to file the annual return within the time prescribed and thus, had failed to comply with the provisions of Section 18 of the FCR Act read with Rule 17 of the FCR Rules.

23. In terms of the impugned notification, the delay in filing of the annual return would be compounded by payment of penalty as stipulated therein. The tabular statement specifying the offences, the amount of penalty and the officer competent to compound the same, as set out in the impugned notification, is reproduced below:

"Sl.

No.

Offences

Amount of penalty

Officer competent for compounding

(1)

(2)

(3)

(4)

1

Non-furnishing of return upto ninety days after 31st December every year

Penalty of two per cent of the amount received during the Financial year or rupees ten thousand, whichever is higher.

The Director or Deputy Secretary in charge of the Foreign Contribution (Regulation) Act Wing of Foreigners Division in the Ministry of

Home Affairs.

2

Non-furnishing of return after ninety one days upto one hundred and eighty days after 31st December every year

Penalty of three per cent of the amount received during the Financial year or rupees twenty thousand, whichever is higher.

The Director or Deputy Secretary in charge of the Foreign Contribution (Regulation) Act Wing of Foreigners Division in the Ministry of

Home Affairs.

3

Non-furnishing of return after one hundred and eighty days after 31st December every year.

Penalty of five per cent of the amount received during the Financial year or rupees fifty thousand, whichever is higher with rupees five hundred per day of delay after one hundred and eighty days

The Director or Deputy Secretary in charge of the Foreign Contribution (Regulation) Act Wing of Foreigners Division in the Ministry of Home Affairs.”

24. The respondent had issued the impugned order applying the impugned notification. The impugned order is set out below:-

“Dated 12.3.2014.

To

MIZPAH CHARITABLE TRUST

NALLUR, KAZGHIPPARA POST

PALAKKAD

PALLAKKAD (PALIGHAT)

KEARALA-678557

SUBJECT:- Submission of annual reports under Foreign Contribution (Regulation) Act, 2010 for acceptance of foreign contribution.

Sir,

Your organisation is registered with us bearing No.052890090 has submitted your annual return for the financial years mentioned below with the following details:-

Financial

Date of filing Return

Foreign contrib. received.

Delay Period in

days

Covered under Para

Penalty Proposed.

2009-10

11.11.2013

2675838

180+866

3

566792

2010-11

11.11.2013

2648525

180+501

3

392926

2011-12

11.11.2013

3220844

180+135

3

228542

Total

1178260

Late submission of Annual Return is violation of the provisions of the foreign contribution (Regulation) Act, 2010. Thus, in terms of Rule 21 of the Foreign Contribution (Regulation) Act, 2011, you are advised to submit an application for compounding the offence under Section 41 of the FCRA, 2010 on a plain paper accompanied by a fee of Rs.1000/- (Rupees one thousand only) in the form of a demand draft of Banker's cheque in favour of the pay and accounts officer, Ministry of Home Affairs' Payable at New Delhi.

You may please note that in terms of Gazette Notification S.O.1970(E) dated 26.4.2013 (copy enclosed), you are liable to pay penalty covered under para mentioned above. Therefore, you are liable to pay a penalty of Rs.1178260/- for compounding the offence. The peanty is to paid in the form of a Demand draft of Banker's Cheque in favour of the Pay and Accounts Officer.

Annual Returns for 2006-2007 and 2012-2013 has also not been received in this office till date. If already submitted with RCRA Wing, MHA, you are advised to submit the proof of submission along with copies of the said annual report.

In view of the above you are hereby directed to submit your application for compounding the offence along with the prescribed fee as also the amount of penalty, as indicated above by 01/04/2014 failing which action as deemed fit as per provision of FCRA, 2010 would be taken against your association.

There is no provision for relaxation or waiver of the penalty. Therefore no application for relaxation or waiver of the penalty will be considered. No extension of time for the payment of penalty will be considered. No extension of time for the payment of penalty will also be allowed.

Yours faithfully,

Sd/- JOSEPH LUIKHAM

DEPUTY SECRETARY TO GOVERNMENT OF INDIA"

25. It is seen that the penalty for delay in filing the returns have been separately computed for the three financial years being financial years 2009-10, 2010-11 and 2011-12.

26. It is relevant to note that the FCR Act and FCR Rules came into force with effect from 01.05.2011. Failure to file annual returns in terms of Rule 17 of the FCR Rules prior to 01.05.2011 cannot be construed as an offence under the FCR Act. Clearly, the petitioner could not be held guilty of an offence of not filing the returns under the FCR Act, prior to it coming into force.

27. Mr Soni, learned counsel for the respondent, was also not able to point out any statutory provision for initiating prosecution of any offence under the earlier enactment – Foreign Exchange (Regulation) Act, 1976. Concededly, the petitioner cannot be penalised or prosecuted for committing an offence under the FCR Act or for not complying with any provisions of the FCR Act, prior to the same coming into force. Thus, clearly, the impugned order to the extent it calls upon the petitioner to pay the penalty for the delay in filing the Income Tax Return for the financial year 2009-10, is unsustainable. However, this Court finds no infirmity with the penalty stipulated for compounding the offence of failure to file the annual returns for the financial years 2009-10 and 2010-11.

28. It was contended on behalf of the petitioner that the financial year 2010-11 would not be covered under the FCR Act as the said financial year ended prior to 01.05.2011. However, the said contention is unmerited. It is relevant to bear in mind that the offence in question is of non-filing of an annual return. The FCR Act came into force on 01.05.2011. In terms of Rule 17 of the FCR Rules, the petitioner was required to file the return for the financial year 2010-11 on or before 31.12.2011 (which was after the FCR Act and the FCR Rules came into force). Thus, the petitioner's first default under the FCR Act occurred on account of its failure to file the returns within the stipulated period; that is, prior to 31.12.2011. This default cannot be construed to have been committed prior to 01.05.2011 merely because it stems from not filing the returns for the period prior to that date.

29. In *The Queen v. The Inhabitants of St. Mary, Whitechapel* (1848) 12 QB 120, the Court pointed out that "The Statute which in its direct operation of prospective cannot be properly be called a retrospective statute because a part of the requisites for that action is drawn from the time antecedent to its passing".

30. The obligation to file the annual return for the financial year 2010-11 had arisen on 01.05.2011 and the same was required to be filed before 31.12.2011. Failure to do so is failure to comply with the provisions of the FCR Act. This does not amount to imputing any act committed prior to the FCR Act coming into force as an offence under the said Act.

31. In view of the above, the impugned order to the extent it stipulates payment of penalty for the delay in filing the annual return for the financial year 2009-10, is set aside.

32. The questions, as noted in paragraph 2(c) and 2(d), are answered accordingly.

33. Considering the mitigating circumstances, this Court also considers it apposite to grant the petitioner further four weeks' time from today to deposit the penalty, as stipulated, for the financial years 2010-11 and 2011-12 along with the requisite application for compounding the offence.

34. Before concluding, it would also be relevant to clarify that the impugned

order enables the petitioner to compound the offence of non-filing of the annual return within the stipulated time. However, the petitioner is not compelled to pay the penalty and apply for compounding of the offences, if he does not wish to do so. The only consequence of not availing the opportunity to compound the offence is to run the risk of prosecution that may be instituted. Needless to state, if such a prosecution is initiated, the petitioner is not precluded from raising such defences as may be available in law.

35. The petition is disposed of in the aforesaid terms. All pending application(s) is/are also disposed of.

36. The parties to bear their own costs.