

(1990) 11 DEL CK 0002

In the Delhi High Court

Case No : Criminal Writ Appeal No. 348 of 1987

M.P. Tewari

APPELLANT

Vs

Y.P. Chawla (ITO) and Others

RESPONDENT

Date of Decision : 30-11-1990

Acts Referred:

Income Tax Act, 1961 — Section 279(2)

Citation : (1991) 2 Crimes 241 : (1991) 43 DLT 23 : (1991) RLR 79 : (1991) 58 TAXMAN 182 : (1991) 91 CTR 228 : (1990) 2 ILR Delhi 417 : (1991) 187 ITR 506????

Hon'ble Judges : M.K. Chawla, J;Arun Kumar, J

Bench : Division Bench

Advocate : P.C. Khanna, Reva Khetrapal, Ruchi Khanna, Sadhana Sharma, Satpal Arora and Meena Chaudhary, for the Appellant;

Judgement

This Judgment has been overruled by : Y.P. Chawla and others Vs. M.P. Tiwari and another, AIR 1992 SC 1360 : (1992) 2 CompLJ 36 : (1992) 103 CTR 400 : (1992) 195 ITR 607 : (1992) 2 JT 429 : (1992) 1 SCALE 760 : (1992) 2 SCC 672 : (1992) 2 SCR 440 : (1992) 63 TAXMAN 538

M.K. Chawla, J.

(1) The petitioner was working as Secretary of M/s. Hans Raj Gupta & Company (P) Ltd. (hereinafter referred to as the Company), for the last more than 40 years at a monthly salary of Rs. 1100. He was only looking after the clerical and routine matters and was not at all concerned with the payment of salaries to the other employees or with the deduction of tax at source. In fact, Shri Hans Raj Gupta was holding /controlling over 70 per cent of share capital of the company and was the real person who was emanating the company and was responsible for the conduct of the affairs of the company.

(2) The company is carrying on the business of hiring agricultural machinery and equipment like Kolhus and Pans for cane crushing to the farmers and other

persons. In the year 1979-80, the business of the company suffered extreme slump due to severe draught condition in the country which caused heavy damage to the crops. .During that period the company's income suffered losses to the tune of more than Rs. 8 lakhs. Due to the extreme financial difficulties and absence of liquidity. the tax deducted at source though was deposited by the company with the income Tax Department but with some delay.

(3) The Income Tax Officer served a notice dated 25-1-82 in respect of the years 1979-80 and 1980-81, requiring the company to show cause why penalty u/s 221 of the Income Tax Act (hereinafter referred to as the Act) should not be imposed, as the company had either failed to deduct the income tax at the time of payment of salaries and/or after deducting had failed to pay the same within time. The company submitted the reply on 10-2-1982 inter-alia, stating that on account of abnormal conditions, as a result of which the company suffered heavy losses, there was some delay in the payment of tax deducted at source. Subsequently, the Income Tax Officer sent repeated show cause notices for the subsequent years threatening prosecutions for the same default for which suitable replies were sent. The company also made representations that since they have already made payments voluntarily to the Department and have also paid interest in accordance with the provisions of section 201(1A) of the Act, the delay may be condoned without further penalty of any kind. It was also submitted that if it is considered absolutely necessary to levy some penalty in addition to the interest which had already been paid, the maximum penalty amounting to Rs. 5000 be levied for all these 4 years and the proceedings be dropped by condoning the delay. No action on these representations has been taken.

(4) On or about 14-12-84, the Income Tax Officer on behalf of the Commissioner of Income Tax filed as many as 59 complaints each comprising of 3 offences in respect of 4 years of default in the court of the Addl. Chief Metropolitan Magistrate, Delhi. The method of instituting the prosecutions was to convert each deposit into separate complaint, against the company, its three directors and the petitioner being the Secretary and Principal Officer, in respect of continuous default of 4 years.

(5) The petitioner has come to this court under Articles 226 and 227 of the Constitution of India, inter alia, seeking the issuance of a writ of mandamus and/or any other writ, order or direction that respondent No. 3, the Central Board of Direct Taxes is not entitled to issue any instructions u/s 119 of the Act, to take away the powers of the Commissioner of Income Tax in the matter of compounding of offences.

(6) The contention of the learned counsel for the petitioner is that u/s 279 of the Act, the Commissioner of Income Tax or any person authorised by him can file a complaint u/s 276B of the Act Under subsection (2) of Section 279, the Commissioner has been given an express power to compound the offences either before or after the institution of the proceedings. This power, according to

learned counsel cannot be regulated, dictated or circumscribed by another authority, however, high it may be. The further submission of the learned counsel for the petitioner is that the respondent No. 3 has issued various instructions, the last being instruction no. 1317 of 1980, under which the power which bested in the Commissioner of Income Tax under sub-section (2) of Section 279 of the Act, has been completely taken away by the Central Board of Direct Taxes and partly vested in the Finance Minister. The instructions contained in the said circular issued by respondent no. 3 are wrong, unjust, arbitrary and oppressive beside being in violation of the statutory provisions and are as such liable to be quashed.

(7) The case of the respondents as disclosed in the affidavit of Shri M C. Pindwal, Income Tax Officer, in brief, is that the petitioner was the in charge of and responsible to the company for the conduct of its business and as such has rightly been arrayed as an accused in the complaint. The amount of tax deducted at source was the government money lying in trust with the company and the company was required to deposit the same within the stipulated period. Its non-deposit in respect of each employee every month is a distinct offence. It is further alleged that even though respondent no. 2 i.e. the Commissioner or Income Tax, has been given the power to compound the offence u/s 279(2) of the Act, but this power is executive in nature and is, Therefore, subject to the guidelines issued by the Central Board of Direct Taxes in exercise of its powers u/s. 119 of the Act.

(8) In order to appreciate the rival contentions of the parties, it is relevant to keep in mind Section 279 of the Income tax Act and the instruction no. 1317 of 1980 issued by the Central Board of Direct Taxes on 11-3-80. Section 279(1) lays down :-

A person shall not be proceeded against for an offence under sections 275A, 276A, 276B, 276C, 276D, 277, 278 or Section 278A except at the instance of the Commissioner. (2) The commissioner may either before or after the institution of proceedings compound any such offence. (3)..... "

The bare reading of this provision shows that it gives the Commissioner the right to compound any offence under sections 275A to 278, either before or after the institution of proceedings. The sanction of the court or any authority under the Act is not at all necessary for compounding the offence. The section does not say that the offence can be compounded only if it is proved to have been actually committed. If there is a proceeding on a charge, it would come within the purview of section 279 and a compounding of the offence would be within the section, and the assessed cannot claim a refund of the composition fee on the ground that he had really committed no offence. However, this provision of compounding is not intended to confer on the department the power to extract as much money as possible by holding out a threat of prosecution.

(9) We need not go into the entire instructions contained to the circular no. 1317 of 1980 but only refer to the offending clauses which prima facie impinge upon

the statutory power of the Commissioner to compound an offence.

(10) Clause (B) of the circular enumerates certain cases which should not be compounded :-

1. No compounding will be done if the assessed belongs to a monopoly or large industrial house or is a director of a company belonging to or controlled by such house; 2. Cases in which the prospects of a successful prosecution are good should not ordinarily be compounded 3. Compounding will not be done in cases of second and subsequent offences. Clause (C) of the instructions enumerates cases which may be compounded 1. Except in cases falling within category (1) and (3) of B above, compounding of an offence can be done with the consent of the Board, if the amount involved in the offence/ default is less than Rs. 1 lakh. 2. Except in cases falling under categories (1) and (3) of (B) above, and category of (1) of (C) compounding may be done with the approval of the Minister if, in view of the developments taking place subsequent to the launching of the prosecution it is found, after consultation with the Ministry of Law, that chances of conviction are not good.

(11) Clause (D) of these instructions lays down that notwithstanding anything stated in (B), the Board may approve compounding in deserving and suitable cases involving hardship with the approval of the Minister. Section 6 of these instructions read as under :---

"WHILE the above are only intended to provide broad guidelines to be followed before sending a proposal for compounding, the previous approval of the Board should always be obtained before deciding the compounding of an offence. No assurance of any kind should be given to the assessed before obtaining the Board's approval"

The above said provisions of the instructions prima facie, if not completely, partially take away the powers of the Commissioner of Income Tax to use his discretion vested in him u/s 279(2) of the Act to compound the offence, if any application is made before him for this purpose. Under the impugned instruction he is required to obtain "the previous approval of the Board before deciding to compound an offence." Once the legislature has vested in the Commissioner a discretion to compound a particular offence, the same cannot be set at naught to curtailed substantially and/or materially by issuing the offending instructions which we hold are in direct contravention of the statutory provisions conferring the power to compound offences on the Commissioner.

(12) The submission of the learned counsel for the respondent is that the Central Board of Direct Taxes is the highest executive authority of the department. Its power of administration, supervision and control extend over the whole of the department. It has also the power to make rules and to issue orders, instructions and directions to all the concerned officers, in the execution of provisions of this Act. These instructions) directions have the statutory force and are of binding nature. This has, however, two exceptions

(a) it cannot interfere with the discretion of the Aac in the exercise of his appellate functions proviso (b) to section 119(1); and (b) it cannot direct the Ito or any other Income tax authorities to make a particular assessment or to dispose of a particular case in a particular manner.

(13) In support of his submission, learned counsel for the respondent placed reliance on a Judgment reported as Navnitlal C. Javeri Vs. K.K. Sen, Appellate Assistant Commissioner of Income Tax, "D" Range, Bombay, , holding that u/s 5(8) of the Act the circulars issued by the Central Board of Revenue are binding on all the officers and persons employed in the department.

(14) In this case, we may note that one such circular, was issued after some amendments in the Act were introduced in the Parliament. At that time, the Hon"ble Minister for Revenue and Civil Expenditure gave an assurance that outstanding loans and advances which are otherwise liable to be taxed as dividends in the assessment year 1955-56, will not be subject to tax, if it is shown that they had been genuinely refunded to the respective companies before 31-6-55. It was realised by the Government that unless such a step was taken, the operation of Section 12(IB) would lead to extreme hardship, because it would have covered the aggregate of all outstanding loans of past years and it would have imposed an unreasonable high liability on the respective shareholders, to whom the loans might have been advanced. It was only on the assurance given by the Minister in Parliament that circular No. 20(XI-6) /55 was issued.

(15) This case. in our opinion, is quite distinguishable inasmuch as the instructions were in the nature of an Explanation as to how section 12(IB) is to operate with minimum hardship to the genuine shareholders of the companies.

(16) This very ratio was approved, in the case reported as M/s. Ellerman Lines Limited vs. Commissioner of Income Tax, West Bengali-1, Calcutta, Air 1972 524(2). In this case, the instructions were in the following terms :-

"THE Central Board of Revenue had issued the notification dated February 10, 1942. Under that notification, instructions have been issued to the assessing authorities laying down the principles to be applied in assessing the foreign shipping companies. As regards the British shipping companies, they were directed to permit those companies, to elect to be assessed on the basis of a ratio certificate granted by the U.K. authorities regarding the income or loss and the wear and tear allowance."

(17) The necessity for issuing such instructions was felt when the Board came across a letter wherein the Income Tax Officers were instructed to take into consideration the investment allowance granted by the U.K. Authorities in computing the taxable income of the British Shipping Companies.

(18) The learned Solicitor General appearing for the Revenue pad at one stage of his arguments contended that the instructions issued by the Board of Revenue

cannot have any binding effect and those instructions cannot abrogate or modify the provisions of the Act. But he did not content that Rule 33 was ultravires of the Act Relying on the case of Navneet Lal C. Jaweri (supra), the court observed :-

It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act u/s 5(8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans and the idea was not to affect such transactions and not to bring them within the mischief of the new provision."

(19) In this judgment, it was observed that as learned Solicitor General has not challenged the virus of Rule 33 of the Act, the so called instructions in question merely lay down the manner of applying this Rule. Even this case does not help the respondents.

(20) Lastly, learned counsel for the respondent relied upon the judgment of K. P. Vergese vs. Income tax Officer, Ernakulam and another. 1981 Sc 1922. In this case also, the observations made in the case of Navneet Lal C. Jaweri (supra) were relied upon and approved. In this case, soon after the introduction of Sub-section (2) of Section 52 of the Act, the Central Board of Direct Taxes in exercise of the power's conferred u/s. 119 of the Act, issued a circular dated 7-7-64, explaining the scope and object of sub-section (2) and the conditions, under which it is to be applied. With a view to protect the honest and bona fide transactions where the consideration in respect of the transfer was correctly disclosed or declared by the assessed. Later on, it came to the knowledge of the higher authorities that the Income Tax Officers in several cases have levied tax by invoking prosecutions under sub-section (2) even in cases where the transactions were perfectly honest and bona fide and there was no under statement of the consideration. Under these circumstances, the court observed that as the income tax Officers were interpreting sub-section (2) quite contrary to the instructions issued in the circular, which was binding on the tax department, the Central Board of Direct Taxes was, Therefore constrained to issue another circular on 14-1-74. explaining the circumstances under which this provision is to be invoked.

(21) We have carefully gone through the judgments relied upon by the learned counsel for the respondents but we are constrained to hold that in none of these cases, the powers of the Commissioner u/s 279(2) of the Act were watered down, abrogated or restricted. The instructions in all the cases were in the nature of explaining the correct implications of a particular provision, to the Income tax Officers and, how the same is to be interpreted and followed. In our opinion, there is no harm in issuing such like instructions of a binding nature, as the intention was for the proper administration of the provisions of the Act or the amendments made therein. However, in exercise of its powers to issue orders and circulars, u/s 119 of the Act. the Board cannot take away the Judicial or

quasi-judicial functions of the Commissioner and vest the same to itself or put them under the overall supervision of the Minister. The Board can relax the rigour of the laws or grant relief to the tax-payers which is not to be found in the statute but cannot be allowed to dilute the discretion of the Commissioner which has been conferred by the statute. Normally, such circulars are issued for the benefit of the assessed "or" for a just and fair administration of the various provisions of the Act.

(22) In the recent judgment of the Supreme Court reported as State of Madhya Pradesh and another vs. M/s. G. S. Dal and flour Mills, 1990(4) J T 430, in similar circumstances, it was held, "Executive instructions can supplement the Statute or cover areas at which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect." This Judgment supports the view which we have taken in the present case.

(23) We have already reproduced some of the clauses of the instructions which on the face of it run counter to the provisions of the Act- This circular in our opinion has substantially curtailed the powers of the Commissioner of income Tax, which are vested in him under Sec. 279 of the Act. In fact the decision of the Commissioner has ceased to be his decision and has become the decision of the Board and/or that of the Minister, in view of the instructions that, "the previous approval of the Board should always be obtained before deciding to compound an offence". ".....No assurance of any kind should be given to the assessed before obtaining Boards approval".

(24) This was not the intention of the legislature when section 279 of the Act was incorporated.

(25) In the result, we allow the petition and quash that part of the instructions referred to above being clauses (B)(C)(D) and Section 6 which arbitrarily take away the powers of the Commissioner to compound the offences. We direct the Commissioner of Income Tax to consider the question of compounding the offence, if any allegedly committed by the petitioner as per the powers conferred on him by Section 279(2) of the Act independently and without reference to the illegal instructions contained in the circular No. 1317 dated 11-?-3980. The writ petition stands disposed of. There will be no order as to costs.