

(2000) 04 DEL CK 0011

In the Delhi High Court

Case No : Crl Misc. (Main) No.1155/98

Salwan Construction Co. and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 26-04-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Income Tax Act, 1961 — Section 201, 245(2), 276B, 279(1)

Citation : (2000) 5 AD 786 : (2000) 161 CTR 300 : (2000) 85 DLT 821 : (2000) 54 DRJ 40 : (2000) 245 ITR 175 : (2000) 3 RCR(Criminal) 565 : (2001) 116 TAXMAN 589

Hon'ble Judges : D.K. Jain, J

Bench : Single Bench

Advocate : Mr. O.S. Bajpai, for the Appellant; Mr. R.D. Jolly, Senior Standing Counsel and Ms. Prem Lata Bansal Jr. Standing Counsel, for the Respondent

Judgement

D.K. Jain, J.

ADMIT

1. With the consent of counsel for the parties, I proceed to decide the petition finally at this stage itself.

2. The petitioners - a firm and its three partners, impugn in this petition, u/s 482 of the Code of Criminal Procedure, 1973, the legality and validity of the authorisation issued by the Commissioner of Income tax- respondent No.3 herein, u/s 279(1) of the Income Tax Act, 1961 (for short "the Act") sometime in March, 1992 for filing complaint against the petitioners u/s 276B of the Act, as it stood prior to the insertion of amended Section 276B with effect from 1 April 1989, in respect of assessment years 1986-87 and 1987-88; consequent filing of the complaints under the said Section by the Assistant Commissioner, income tax-respondent No.2 herein, in the Court of the Additional Chief Metropolitan Magistrate, New Delhi on 31st March 1992 and the order 2 March, 1998 passed by the learned "ACMM dismissing the petitioner"s application u/s 245(2) Cr.P.C.

seeking discharge. Besides the said two respondents, the Union of India has also been imp led as proforma respondent No.1.

3. The petitioner firm was awarded two contracts, one by the Air India and another by one M/s. Modipon. The petitioners, in turn, assigned the contract awarded by Air India to one M/s. Salwan Construction Company Private Limited, against which it was entitled to receive commission @ 2.5% of the receipts. The other contract was also assigned in favor of one Amarjit Singh HUF and the petitioner firm was entitled to receive commission at 5% from the said concern. The gross receipts from contracts assigned by Air India and Modipon were respectively Rs.2,93,61.361/- and Rs.4,37,520/-. According to the Assessing Officer, the petitioner, being the contractor, was required to deduct u/s 194C(1) of the Act tax at source on the said amounts received by the said assignees as sub-contractors, which it failed to do. Rejecting the stand of the petitioner firm that the contracts having been assigned in entirety, there was no relationship of contractor and sub-contractor and, Therefore, the provisions of the said Section were not attracted, the Assessing Officer levied penal interest u/s 201(IA) of the Act, amounting to Rs. 1,88,270/-, on the petitioner vide order dated 20th January, 1992.

4. A notice was issued on 28 January 1992 calling upon the petitioners to show cause why prosecution proceedings be not initiated against them u/s 276B of the Act for failure to deduct and pay tax as per the provisions of Section 194C of the Act. The petitioner reiterated its aforementioned plea, which again was found to be unconvincing by the Assessing Officer and this led to grant of sanction by respondent No.3 u/s 279(1) of the Act and filing of complaints by respondent No.2 in the Court of the ACMM.

5. During the pendency of proceedings before the ACMM, in the petitioner firm's second appeal before the Income Tax Appellate Tribunal (Tribunal for short), by its order dated 23 February 1995, the Tribunal came to the conclusion that since no Income Tax was ultimately payable by both the payees namely, M/s. Salwan Construction Company Private Limited and M/s. Amarjit Singh HUF, one being the case of loss and the other of refund, no interest could be recovered from the petitioners for not deducting the same amount of tax at source. The Tribunal also felt that since two views were possible on the interpretation to Section 201(1A) the one favourable to the assessed should be adopted. Accordingly, the Tribunal deleted the interest charged by the Assessing Officer. It is not in dispute that the Tribunal's order has attained finality.

6. Armed with the Tribunal's order, the petitioner filed an application u/s 245(2) Cr.P.C. for discharge, inter alia, on the ground that :(1) non-deduction of tax at source having ceased to be a criminal offence with effect from 1 April 1989, be virtue of Direct Tax Laws (Amendment) Act, 1987, the issue of authorisation by the Commissioner in March 1992 and filing of complaints in pursuance thereof was per se illegal and invalid and (ii) in view of the finding of the Tribunal that the petitioner firm was not liable to pay interest u/s 201(IA) for failure to deduct

tax at source, the petitioner could not be made liable for parallel criminal proceedings on the same set of facts. However, these pleas did not find favor with the learned ACMM, who accordingly dismissed the application. Hence this petition.

7. I have heard Mr. O.S. Bajpai, learned counsel for the petitioners and Mr. R. D. Jolly, learned counsel for the respondents.

8. It is strenuously contended by learned counsel for the petitioners that after the insertion of new Section 276B with effect from 1 April 1989, irrespective of the period of default, no complaint for failure to deduct tax at source could be filed under the said Section, especially when there is no saving clause even to sustain the pending prosecutions. In support of the argument, reliance is placed on the decisions of the Supreme Court in *M/s. Rayala Corporation (P) Ltd. & Anr. Vs. The Director of Enforcement*. New Delhi AIR 1970 SC 494, *T. Barai Vs. Henry Ah Hoe and Another*, and the decisions of the Madhya Pradesh and Andhra Pradesh High Courts respectively reported as *Harikishan Vs. Union of India (UOI)*, , *Patiram Jain and Others Vs. Union of India (UOI) and Others*, , *Assistant Commissioner of Income Tax Vs. Vijaya Finance and Others*, . On merits it is urged that the interest levied u/s 201(IA) having been deleted by the Tribunal, prosecution u/s 276B is no longer maintainable. To substantiate the proposition, learned counsel has placed reliance on certain decisions and in particular on the decisions of this Court in *DETECON INDIAN PROJECT OFFICE Vs. Income Tax OFFICER AND OTHERS.*, and *SEQUOIA CONSTRUCTION CO. P. LTD. AND OTHERS Vs. P. P. SURI, ITO, CENTRAL CIRCLE XX, NEW DELHI.*, .

9. On the other hand Mr. Jolly learned counsel for the respondents has vehemently contended that the complaints filed against the petitioners are saved by Section 6 of the General Clauses Act, 1897. In support he has relied upon the decisions of the Supreme Court in *T.S. Baliah Vs. T.S. Rengachari*, , *Tiwari Kanhaiyalal and Others Vs. The Commissioner of Income Tax, Delhi*, , *G.P. Nayyar Vs. State (Delhi Administration)*, and *M/s. P.V. Mohammad Barmay Sons Vs. Director of Enforcement*, .

10. Thus, the main question that arises for consideration is whether on the substitution of a new Section for Section 276B, with effect from 1 April 1989, omitting the default of non-deduction of tax at source from the ambit of the said section, a complaint for failure to deduct tax at source during the period prior to 1 April 1989 could still be filed after the said date?

11. The complaints filed after the insertion of the new section, which no longer treats the default of non-deduction of tax at source as a criminal offence, are sought to be supported on the basis of the provisions of law contained in Section 6(e) of the General Clauses Act, which provides that where any Central Act repeals an enactment previously made, then unless a different intention appears, the said repeal shall not affect any right, privilege, obligation or liability acquired or incurred under any enactment so repealed.

12. The question of application of Section 6 of the General Clauses Act came up for consideration before the Constitution Bench of the Supreme Court in Rayala Corporation's case (supra), wherein, while dealing with Rule 132 A of the defense of India Rules, 1962, promulgated under the defense of India Act, which rules ceased to exist on the issuance of a notification by the Ministry of Home Affairs on 30 March 1965, by which the defense of India (Amendment) Rules 1965 were promulgated, it was held that language contained in clause 2 of the said rules can only offer protection to action already taken while the rule was in force, but cannot justify initiation of new proceedings, which will not be thing done or omitted to be done under the rule but a new act of initiating a proceeding after the rule has ceased to exist. It was also held that Section 6 of the General Clauses Act could not apply on the "omission" of rule 132A of the defense of India Rules for the obvious reason that Section 6 only applies to "repeals" and not to "omissions".

13. The scope and effect of Section 6 of the General Clauses Act recently came up for consideration before the Constitution Bench of the Supreme Court in Kolhapur Canesugar Works Ltd. and Another Vs. Union of India and Others, . In that case the Court was considering the question whether after the omission of old Rule 10 and 10A of the Central Excise Rules and their substitution by new Rule 10 vide notification dated 6 August 1977, the proceedings initiated by notice dated 27 April 1997 could be continued in law. While holding that Section 6 was not applicable in that situation, their Lordships, while affirming the principles of law laid down in Rayala Corporation's case (supra) and reiterating that "Section 6 only applies to repeals and not to omissions", observed as follows:

"It is not correct to say that in considering the question of maintainability of pending proceedings initiated under a particular provision of the rule after the said provision was omitted the Court is not to look for a provision in the newly-added rule for continuing the pending proceedings. It is also not correct to say that the test is whether there is any provision in the rules to the effect that pending proceedings will lapse on omission of the rule under which the notice was issued. It is our considered view that in such a case the court is to look to the provision in the rule which has been introduced after omission of the previous rule to determine whether pending proceedings will continue or lapse. If there is a provision therein that pending proceedings shall continue and be disposed of under the old rule as if the rule has not been deleted or omitted then such proceedings will continue. If the case is covered by Section 6 of the General Clauses Act or there is pari material provision in the statute under which the rule has been framed, in that case also the pending proceedings will not be affected by omission of the rule. In the absence of any such provision in the statute or in the rule the pending proceedings would lapse on the rule under which the notice was issued or proceedings were initiated being deleted/omitted.

The Apex Court further held as under:

"The position is well known 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 favor 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 saving 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 favor of pending proceedings then it can be reasonably inferred that the intention of the legislature is that the pending proceedings shall not continue but fresh proceedings for the same purpose may be initiated under the new provision."

14. In the light if the aforementioned settled legal position with the regard to the applicability of Section 6 of the General Clauses Act to a provision which has been omitted, it is evident from the plain language of the old and new Section 276B, extracted below that the amended section "substituted" by the Direct Tax Law (Amendment) Act, 1987 is not by way of a repeal of the old section. The term "repeal" connotes the abrogation of one Act by another, whereas the "amendment" of a statute means an alteration in the law existing, leaving some part of the original still standing. As noted above, in the present case, it is merely an omission of a part of the old Section in the newly substituted provision.

Old Provision:

"276B. Failure to deduct or pay tax:- If a person, without reasonable cause or excuse, fails to deduct or after deducting, fails to pay the tax as required by or under the provisions of sub-section (9) of section 80E or Chapter XVII-B, he shall be punishable:-

(i) in a case where the amount of tax which he has failed to deduct or pay exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) In any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine."

New Provision:

"276B Failure to pay the tax deducted at source - If a person fails to the credit of the Central Government, the tax deducted at source by him as required by or under the provisions of Chapter XVII-B, he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine."

15. In this view of the matter I am of the considered opinion that Section 6 of the General Clauses Act will not be attracted in present case and thus cannot be pressed into service to sustain the prosecution proceedings initiated only after the omission of old Section 276B and insertion of new Section 276B with effect from 1 April 1989.

16. In the light of the recent decision of the Supreme Court in Kolhapur Cane sugar Works case (supra) and the view I have arrived at in the instant case, I deem it unnecessary to deal with the aforementioned cases cited by both the counsel.

17. Having held so, the next question to be examined in the light of the observation of the Apex Court in Kolhapur Cane sugar Works case (supra) is whether in the newly introduced provision there is a saving clause in favor of pending proceedings or is it just an unconditional omission. A bare perusal of the aforementioned provisions read with the object behinds the amendment of Section 276B and simultaneous introduction of new Section 271C in the Act, providing only for levy of penalty on failure to deduct tax at source, makes it clear that with effect from 1 April 1989, the Legislature intended to treat the default of failure to deduct tax at source not as seriously as a default of deducting the tax and not paying the same to the credit of the Central Government. From the contents of the aforementioned two provisions of law it is evident that it does not contain any saving clause for initiating proceedings under the old Section after it has been amended/omitted for the default of failure to deduct tax at source. Besides, it could be reasonably inferred from the intention behind the new provision, that fresh proceedings, if any, u/s 276B of the Act after 1 April 1989 have to be initiated only in accordance with the new provision.

18. In view of the foregoing discussion, I have no hesitation in holding that the complaints filed on 31 March 1992 u/s 276B of the Act for failure on the part of the petitioner firm to deduct tax at source are clearly not maintainable and deserve to be quashed. I order accordingly.

19. I may, however, hasten to add that in this judgment I have not examined the question of survival of those prosecution proceeding which were already initiated before the insertion of new Section, because that issue does not arise in present case.

20. Since the petitioners succeed on the aforementioned main ground, it is not necessary to go into the question whether the petitioners otherwise deserve to be discharged on the basis of the order of the Tribunal, deleting the interest charged u/s 201(A) of the Act.

21. In the result, the petition is allowed; the complaints in question are quashed and the petitioners are discharged. There will, however be no order as to costs.