

(2001) 03 RAJ CK 0043
In the Rajasthan High Court
Case No : Civil Writ Petition No. 232 of 1995

S.G. Kale

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 19-03-2001

Acts Referred:

Income Tax Act, 1961 — Section 201, 276B, 278AA, 279(1)

Citation : (2002) 256 ITR 148 : (2001) 4 WLC 802 : (2001) 4 WLN 285

Hon'ble Judges : Rajesh Balia, J

Bench : Single Bench

Advocate : Vineet Kothari, for the Appellant; Sandeep Bhandawat, for the Respondent

Final Decision : Allowed

Judgement

Rajesh Balia, J.—Heard learned counsel for the parties. By this petition, the assessee challenges the authorisation issued by the Commissioner of Income Tax on January 20, 1992, to include the name of the petitioner who was then an accountant engaged in Jodhpur Woolen Mills in the order u/s 279(1) for the assessment year 1982-83 passed by his predecessor in the office on March 13, 1991, for prosecuting the petitioner u/s 276B of the Income Tax Act, 1961.

The petitioner is an officer of a company known as Jodhpur Woolen Mills Ltd. The facts of the case as emerge from the record of this case are that by communication dated August 3, 1989, the then Commissioner of Income Tax, Jodhpur, issued a notice to the company to show cause against a proposal to launch prosecution u/s 276B of the Income Tax Act for the assessment years 1982-83 to 1985-86. After receiving the reply of the company, the Commissioner of Income Tax vide his order dated March 13, 1991, sanctioned the prosecution of the company and its two joint managing directors and two directors named in the order to be prosecuted u/s 276B and directed the Deputy Commissioner of Income Tax (Assessment) to file a complaint in the court of the special judge for economic offences. In furtherance of this order issued u/s 279(1) of the Income

Tax Act, 1961, the successor-in-office of the then Commissioner of Income Tax, authorised inclusion of the name of the petitioner also in the order dated March 13, 1991, for being prosecuted u/s 276B of the Income Tax Act, 1961, for the alleged default for the assessment year 1982-83. As they would be relevant for the purpose of the present case, the two orders are produced hereinbelow :

ANNEXURE 3

Order u/s 279(1), dated March 13, 1991 :

Name and address of the assessee: Jodhpur Woollen Mills Ltd. along with its joint managing directors/directors: 1. Shri S.M. Kankaria, Jt. MD. 2. Shri S.C. Kankaria, Jt. MD. 3. Shri P.M. Kankariya, Director. 4. Shri L.K. Kankariya, Director, Status: Limited company. Assessment year: 1982-83.

Order u/s 279(1) of the Income Tax Act, 1961 :

"The above named assessee is a limited company being assessed to tax with the Deputy Commissioner of Income Tax (Assessment), Special Range, Jodhpur, and controlled by the managing directors, Svs. S.M. Kankaria and S.C. Kankaria, and directors, Svs. P.M. Kankaria and L.K. Kankaria who were in charge of and responsible to the company for the conduct of the business. It was carrying on business of woolen mill and gwar gum during the material period relevant to the assessment year.

2. On going through the details available on record it was noticed that the assessee had deducted at source (TDS) of Rs. 1,38,197 for the assessment year 1982-83 from the payment of interest to various parties, but failed to deposit the amount of tax so deducted to the credit of the Central Government within the prescribed time limit u/s 80 (sic) of the Income Tax Act, 1961, read with Rule 30 of the Income Tax Rules, 1962. Thus, the company as well as its directors are liable for prosecution u/s 276B read with Section 278B(1) of the Income Tax Act, 1961.

3. A show-cause notice was issued from this office dated August 3/4, 1989, to the assessee-company in response to which the company filed its written reply dated September 15, 1989, through its authorised representative. The explanation put forth by the company is not tenable.

4. In view of the above facts it is evident that the assessee-company and its abovenamed joint managing directors and directors have committed an offence u/s 276B of the Income Tax Act read with Section 278B(1) of the Act.

5. I have gone through the entire facts and seen the relevant records of the assessee-company placed before me and am satisfied that the assessee-company committed offence punishable u/s 276B of the Income Tax Act for the assessment year 1982-83. Therefore, I, S.S. Ruhela, Commissioner of Income Tax, Jodhpur, hereby accord sanction to prosecute the abovenamed assessee-company and its joint managing directors and directors for the aforesaid offence.

6. I, S.S. Ruhela, Commissioner of Income Tax, Jodhpur, hereby direct the Deputy Commissioner of Income Tax (Assessment), Special Range, Jodhpur, to file complaint u/s 276B read with Section 278B(1) of the Income Tax Act against the joint managing directors, Svs, S.M. Kankaria, and S.C. Kankaria and directors, Svs. P.M. Kankaria and L.K. Kankaria, for the assessment year 1982-83 in the competent court of law at Jaipur.

(Sd.) S.S. Ruhela, Commissioner of Income Tax, Jodhpur.

ANNEXURE 3A, DATED JANUARY 20, 1992

Office of the Commissioner of Income Tax, Jodhpur.

Dated : January 20, 1992.

Authorisation With reference to the order u/s 279(1) passed in the case of Jodhpur Woolen Mills Ltd., Jodhpur, for the assessment year 1982-83 on March 13, 1991, by my predecessor, Shri S.S. Ruhela, the then Commissioner of Income Tax, Jodhpur, I, Panna Lal, authorise the name of Shri S.G. Kale, principal officer of the company, to be included in the order u/s 279(1) for the assessment year 1982-83.

(Sd.) Panna Lal, Commissioner of Income Tax, Jodhpur."

7. In pursuance of these two orders, a complaint was lodged against the company, two of its joint managing directors and two directors and the petitioner (who was then accounts officer of the company) before the Special Court for Economic Offences, Jaipur, which, it is now informed, stands transferred to Jodhpur on establishing a court at Jodhpur also.

8. The other facts relevant for the present purpose in order to appreciate the contentions raised by the parties are that these proceedings relate to the failure on the part of the company--Jodhpur Woolen Mills Ltd., Jodhpur, to deduct and pay tax to be deducted at source from the interest payments made to its creditors within one month in the treasury of the Central Government as required u/s 200 of the Income Tax Act. Consequent thereto, proceedings for levy of penalty on failure to deposit the tax deducted at source within the time prescribed, were initiated against the company of which the petitioner was an accountant. In the said proceedings, the Inspecting Assistant Commissioner of Income Tax (Assessment), Jodhpur, made the following order :

"So far as penalty is concerned, in view of the explanation of the asses-see the same is not imposed as there was no deliberate attempt on the part of the assessee to avoid payment of tax deducted at source but it failed to deposit the same because of financial difficulties."

9. Thus penalty for breach of Section 200 was not found imposable and no penalty for such breach was imposed. This order was made on May 21, 1985, and related to the assessment year 1982-83 for which the impugned sanctioned/authorisation has been made by the Commissioner of Income Tax in exercise of

its powers u/s 279(1) of the Income Tax Act, 1961.

10. The petition had been admitted on January 24, 1995, and further proceedings were stayed. The respondents were served prior to April 7, 1995, and put in appearance. On counsel's request, four weeks time was allowed for filing reply. On a report having been made by the Registry that no reply has been filed on April 10, 1996, an order was made by the court that filing of reply is not compulsory, nor the respondents can be compelled to file reply and directed the case to be listed for further hearing. Since then almost five years have elapsed, yet no reply has been filed so far. In these circumstances, the matter is being heard without any reply from the respondents. In fact the above facts emerge from the record and are not disputed.

11. The first contention of learned counsel for the petitioner in this regard is that no notice to show cause before issuing sanction was given to the petitioner and therefore the sanction accorded without affording an opportunity of hearing is invalid.

12. This contention does not appear to be valid. According to sanction is an administrative function and is only to see that frivolous or avoidable trials do not take place notwithstanding that it is an objective exercise by the sanctioning authority to consider the material on record to satisfy himself whether a case fit for launching prosecution exists. On such satisfaction, the sanction can be accorded and thereafter the trial proceedings in which the person proceeded against has ample opportunity to defend himself against the allegations made against him and to meet the evidence led to substantiate those allegations by the prosecution. There is no provision for pre-hearing before according of sanction. There is a catena of decisions of various High Courts almost with unanimity that before launching prosecution there is no need to give hearing to the person concerned. Illustratively, reference in this connection may be made to *Nirmala Kapur Vs. Commissioner of Income Tax and Another*, *Universal Supply Corporation and Others Vs. State of Rajasthan and Another*, *K. BALAKRISHNAN NAIR AND ANOTHER Vs. ASSISTANT COMMISSIONER OF Income Tax AND ANOTHER.*, *Laxmandas Pranchand and Others Vs. Union of India (UOI) and Others*, *Dr. (Mrs.) M.S. Dhowani Vs. J. Ranganathan Second Income Tax Officer, City Circle-V*, I am not taking into account at this stage the decisions which deal with the question where the issue was raised that before grant of sanction, an opportunity ought to be given by issuing notice to the assessee either to avail the benefit of the provisions contained in Section 279(2) for compounding the offence or to obtain the orders u/s 273A from the Commissioner for reducing or waiving the penalty which is imposed or imposable for the alleged offences, in which contingency no prosecution can take place.

13. Moreover, it has to be taken note of that the petitioner is being prosecuted only as an officer of the company, the alleged defaulter. The company was in fact given a notice before issuing sanction, to which reply was also filed by the company. Therefore, the question of breach of principles of natural justice on the

basis that no opportunity of hearing was given before issuing sanction does not arise to the petitioner either in fact or in law.

14. It is next contended by learned counsel for the petitioner that even if prior hearing is not necessary, or it is held that opportunity of hearing given to the company fulfils the requirement of such opportunity, the grant of sanction does not depend on subjective satisfaction, but can only be granted after taking into account all relevant material and satisfying about prima facie case for launching prosecution against the person. The impugned order annexure 3-A by which authorisation has been issued against the petitioner does not disclose any such application of mind to the relevant material.

15. In this connection, it was contended by Mr. Bhandawat that the reasons were already given for issuing sanction for prosecution against the company u/s 276B by the Commissioner in his order dated March 13, 1991, and the order of authorisation being merely an amendment of that order by including the name of the petitioner who was responsible for deducting the amount from the interest payable by the company and depositing the same with the Central Government. He further submits that such satisfaction of the authority even if does not appear from the order, can still be established from the other materials by showing that those materials were before the sanctioning authority and by application of mind to that material he could reasonably reach a satisfaction about according sanction for prosecuting a person.

16. In this connection, it was also contended by learned counsel for the petitioner, Mr. Kothari, that annexure 3-A is not an order of sanctioning prosecution, but merely an order of modification or rectification of sanction already issued against the company and its directors vide order dated March 13, 1991, u/s 279(1). There is no authority under the Act which empowers the Commissioner to make a rectification of the sanction without application of mind in respect of the person who has to be added as an accused in a prosecution already sanctioned, merely on the basis of satisfaction recorded in respect of some other person.

17. The object and the requirement of a valid sanction is no more *res Integra* and is well established under various pronouncements of the court echoing from the past under different provisions requiring such sanction of the competent officer before launching of the prosecution. Reference in this connection may be made to one of the earliest decisions in AIR 1945 16 (Federal Court) In that case it was held that the sanction under the Act is not intended to be nor is an automatic formality and it is essential that the provisions in regard to the sanction should be observed with complete strictness.

In AIR 1948 82 (Privy Council) the Privy Council emphasised the need to apply mind to the facts of the case before discharging the obligation of deciding whether to give or withhold a sanction. The board opined (page 84) :

"The sanction to prosecute is an important matter ; it constitutes a condition

precedent to the institution of the prosecution and the Government have an absolute discretion to grant or withhold their sanction. They are not as the High Court seem to have thought, concerned merely to see that the evidence discloses a prima facie case against the person sought to be prosecuted. They can refuse sanction on any ground which commends itself to them, for example that on political or economic grounds they regard a prosecution as inexpedient. Looked at as a matter of substance it is plain that the Government cannot adequately discharge the obligation of deciding whether to give or withhold a sanction without a knowledge of the facts of the case."

18. Post independence, the matter came up before the apex court in *Jaswant Singh Vs. The State of Punjab*, . The court was considering the requirement of sanction as a condition precedent for prosecution under the Prevention of Corruption Act, 1947. Approving the opinion expressed by the Privy Council in AIR 1948 82 (Privy Council) the court laid bare the object and purport of the provision of sanction and the requirement of a valid sanction. The court said (page 126) :

"The sanction under the Act is not intended to be nor is an automatic formality and it is essential that the provisions in regard to sanction should be observed with complete strictness ... The object of the provision for sanctions is that the authority giving the sanction should be able to consider for itself the evidence before it comes to a conclusion that the prosecution in the circumstances be sanctioned or forbidden.... It should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case sanctioned the prosecution, and therefore unless the matter can be proved by other evidence, in the sanction itself the facts should be referred to to indicate that the sanctioning authority had applied its mind to the facts and circumstances of the case."

19. Again, when the matter arose under the Prevention of Corruption Act, 1947, concerning the validity of a sanction, the court said in *Mohd. Iqbal Ahmed Vs. State of Andhra Pradesh*, , as to the proof of the valid sanction (page 679) :

"It is incumbent on the prosecution to prove that a valid sanction has been granted by the Sanctioning Authority after it was satisfied that a case for sanction has been made out constituting the offence. This should be done in two ways ; either (1) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction, and (2) by adducing evidence aliunde to show that the facts placed before the Sanctioning Authority and the satisfaction arrived at by it. It is well settled that any case instituted without a proper sanction must fail because this being a manifest defect (sic-defect) in the prosecution, the entire proceedings are rendered void ab initio."

20. The principle was reiterated as late as in *Mansukhlal Vithaldas Chauhan Vs. State of Gujarat*, in which the question arose in connection with the sanction required for prosecution of a public servant u/s 197 of the Criminal Procedure

Code, 1973. The court said (headnote) :

"The validity of the sanction would, therefore depend upon the material placed before the sanctioning authority and the fact that all the relevant facts, material and evidence have been considered by the sanctioning authority. Consideration implies application of mind. The order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material collected during investigation and placed before it. This fact can also be established by extrinsic evidence by placing relevant files before the court to show that all relevant facts were considered by the sanctioning authority."

21. Since the validity of the sanction depends on the application of mind by the sanctioning authority to the facts of the case as also the material evidence collected during the investigation, it must follow that the sanctioning authority has to apply its own mind for generation of genuine satisfaction whether the prosecution has to be sanctioned or not. Thus, the principle being well settled, the reason which prevailed with the sanctioning authority having been documented in annexure 3, if the case on the present facts is analysed, it leaves but one impression in the mind that the sanction has been accorded without due application of mind to the relevant facts which were existing and had vital bearing on the question of according or not according of sanction for prosecution after almost a decade of the alleged default.

22. The sanction has been accorded for prosecuting the company and its four directors vide annexure 3 in relation to breach committed by the company for the assessment year 1982-83 in deducting and paying the tax required to be deducted at source on payment of interest by the company to its creditors in the treasury of the Central Government within the prescribed time. The relevant provisions of the Act which cast an obligation and in consequence form the necessary relevant provisions of law for the sanctioning authority to bear in mind, the scheme of the Act for collection of tax at source not from the recipient of income but from the person paying the money is housed in Chapter XVII titled as "Collection and recovery of tax". Section 190 envisages that notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction or collection at source or by advance payment, as the case may be, in accordance with the provisions of the said Chapter. Under the various provisions of the said Chapter, of which Sections 193 and 194A form part, require deduction at source on payment of interest on securities or interest other than interest on securities, respectively. Section 200 obligates a person deducting any sum in accordance with the various provisions under the Chapter to pay within the prescribed period time in the treasury of the Central Government the sum so deducted to the credit of the Central Government or as the Board directs. In this case breach of this provision of Section 200 has been alleged against the petitioner for which a sanction for prosecution has been granted u/s 279* of the Act. However, for the breach, one of consequences is to levy penalty as provided u/s 201 which reads

as under :

"201. Consequences of failure to deduct or pay.--(1) If any such person and in the cases referred to in Section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax :

23. Provided that no penalty shall be charged u/s 221 from such person, principal officer or company unless the Assessing Officer is satisfied that such person or principle officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of Sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at eighteen per cent. per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid ..."

24. From the aforesaid provision, it is apparent that notwithstanding treating a company which has not deposited the tax to the credit of the Central Government within the prescribed time as an assessee in default to be liable to penalty, it further makes it clear that such penalty is not to be imposed on any person, whether in his own capacity as a company or as principal officer of the company unless the Assessing Officer is further satisfied that such person or principal officer or the company, as the case may be, has failed to deduct and pay the tax without any good and sufficient cause. Therefore, a bona fide default with good and sufficient reasons in payment of tax required to be deducted at source to the treasury within the prescribed time mitigates the gravity of the offence to an extent that even penalty for such breach cannot be imposed. In the present case, the Assessing Officer after initiating proceedings u/s 201 has recorded a finding that there has been sufficient and good reasons for the assessee not to have deposited the amount deducted at source within time and it was not a case on which penalty at all be imposed and has not imposed the penalty. If read in this light the order of sanction in which only the name of the petitioner has been added subsequently, it is conspicuously silent about the order passed by the assessing authority u/s 201 absolving the company, whose officer the petitioner is, and his inclusion in the order of sanction has been authorised only as an accountant of the defaulting company. It is a relevant factor to be considered by the sanctioning authority who is not to grant sanction automatically on being satisfied about the breach but satisfaction has also to be on the question whether on the material disclosed a case for sanctioning prosecution or withholding such sanction has been made out. If material is to the effect that the assessing authority had not even thought it a fit case in which penalty could be imposed at all, it is highly improbable that it is still to be

considered a fit case for visiting the defaulter with harsher consequence of subjecting him to criminal trial and punishment which may include imprisonment and levy of fine. Ordinarily, such a satisfaction cannot reasonably be arrived at in a case when the case is not found even good enough for imposing penalty.

25. This shows total lack of application of mind on the part of the sanctioning authority to the relevant facts which had come to exist way back in 1985 and to law providing consequence of breach of Section 200 to order prosecution for such default six years later without taking note of that order.

26. It is of some significance that, it is not left at the discretion of the Assessing Officer to levy or not to levy penalty for the breach of obligation u/s 200 of the Act. But it is a statutory mandate that unless the Assessing Officer is satisfied about want of good and sufficient cause in making default, no penalty can be imposed. The mandate in the proviso to Section 201 is couched in negative expression and must be held to be mandatory and not directory. With such provision it is reasonable to infer that in cases where for the reason stated in the proviso to Section 201 no penalty is imposable, for the default of obligation u/s 200, then no prosecution can also be launched. It will be highly discordant to attribute to legislation that while it took care not to visit with penal consequence envisaged u/s 201 for breach of Section 200 without satisfaction about the absence of good and sufficient cause for non-compliance with the provision, and it has been found that penalty is not imposable for that reason, still such person can be subjected to prosecution and visited with punishment of imprisonment and penalty. In this connection, it may further be noticed that while levy of penalty is inhibited by the condition discussed above, specific provision was also made under Sub-section (1A) of Section 200 to hold the defaulter liable for running interest on delayed payment. ,

27. It is pertinent to notice that while no reference has been made to the order dated May 21, 1985, passed by the Assessing Officer u/s 201, in the complaint lodged pursuant to sanction u/s 279(1) an apparently erroneous statement of fact has been made about the order dated May 21, 1985. The complaint alleges :

* * *

28. As discussed above, in the light of the provisions of Section 201(1), no penalty was imposed because the officer has found the case falling within the proviso to Sub-section (1) of Section 201. Levy of interest u/s 201(1A) is envisaged and the absence of reasonable cause to deduct and/or deposit the amount deductible at source is not the ingredient for levy of interest. The liability to pay interest is irrespective of the fact, whether failure to deposit the tax deducted at source in the treasury is with or without satisfactory explanation. This is so because while Sub-section (1) envisages a penal consequence for default and deliberate flouting of law is an essential ingredient of it, the obligation to pay interest under Sub-section (1A) flows from principle "He who has the plaintiff's money for his own use, must reimburse or compensate the

rightful owner of money for such use". Apparently, allegations made in para 5 of the complaint are contrary to the record.

29. Another circumstance which goes to show non-application of mind on the part of the prosecution in lodging complaint is that the complaint alleges that none of the five accused have claimed himself "to be a sleeping partner of the firm", forgetting that the alleged default is not committed by the firm as an assessable entity but by a company which is a juristic person and the concept of sleeping partner is alien thereto.

30. It is relevant to notice that until an amendment was effected in Section 276B with effect from September 10, 1986, Section 276B read :

"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."

31. By the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, which came into force with effect from September 10, 1986, the words "without reasonable cause or excuse" were omitted from Section 276B.

32. Then existing Section 276B was substituted by the Direct Tax Laws (Amendment) Act, 1987, with effect from April 1, 1989, and reads as under :

"276B. Failure to pay the tax deducted at source.--If a person fails to pay 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."

33. Simultaneously with effect from April 1, 1989, in Section 278AA reference to Section 276B was also added. Section 278AA was inserted with effect from September 10, 1986, vide the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. With effect from April 1, 1989, Section 278AA reads as under:

"278AA. Notwithstanding anything contained in the provisions of Section 276A, Section 276AB, or Section 276B, no person shall be punishable for any failure referred to in the said provisions if he proves that there was reasonable cause for such failure."

34. Thus, the absence of reasonable cause for such failure became an essential ingredient of the guilt of the accused. It may be noticed that when the alleged offence was committed in 1982-83, the expression "failure without reasonable cause or excuse" was an essential ingredient of Section 276B and this essential ingredient again came into existence by insertion of Section 276B in Section 278AA with effect from April 1, 1989, which provision was in force when the impugned sanction was granted. Therefore, if the provisions of Section 276B read as on the date the offence was committed or read as on the date when the sanction was granted along with Section 278AA, the absence of reasonable cause or excuse on the part of the assessee became an essential ingredient of the offence for which he could be punished. Notwithstanding the shift of burden of proof, if the material available on record about such sufficient and reasonable cause for the default is already on record as a part of the finding in proceedings u/s 201, the same becomes an integral part of the record to be considered before sanction could have been issued.

35. The existence of sufficient and reasonable cause for non-payment of tax deductible at source within the prescribed time is also an essential ingredient of levy of penalty u/s 201 read with Section 221 of the Income Tax Act as discussed above. The conclusion is therefore not far to reach that where proceedings for penalty have been initiated and the same has not been found imposable because of the existence of sufficient and reasonable cause for failure to comply with the provisions of Section 200, this finding coming from a competent officer became relevant and weighty material to be considered before sanction could be accorded because in view of such finding ordinarily it is not, possible to sustain the prosecution particularly if the finding in the proceedings u/s 201 has become final.

36. Like view was expressed by the Patna High Court in *Banwarilal Satyanarain and Others Vs. State of Bihar and Another*, . In that case, the question that arose before the court was (page 398): "whether, in a penalty proceeding, where an authority under the Act who has expert knowledge of the subject has recorded a finding that the assessee had furnished good and sufficient reasons for failure to deduct and/or pay the tax, within time, and dropped the penalty proceeding or deleted the same, as the case may be, it can be said that he is still liable to be prosecuted u/s 276B of the Act ?" The question was answered in the negative by the Patna High Court. It observed (page 409) :

"Now, it has to be seen as to what is the effect of the amendment. Can it be said that, after the amendment, the question whether an accused had any reasonable cause or not for not deducting and paying tax within time is only of academic importance and not relevant for a criminal court ? My answer is emphatically in the negative. Section 278AA is nothing else but a proviso to Section 276B of the Act, but a separate section has been inserted in the Act, as similar provisions have been made with respect to prosecution under Sections 276A, 276AB, 276DD and 276E. The cumulative effect of the amendment, in my view, is that in

case of prosecution u/s 276B of the Act, two things have to be shown : firstly, that there was failure on the part of the assessee in deducting or paying the tax within time and, secondly, that the failure was without any reasonable cause."

37. This view also finds support from the observations made by the apex court in P. Jayappan Vs. S.K. Perumal, First Income Tax Officer, Tuticorin, . The court while referring to the earlier decision of the Supreme Court in Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, in which the prosecution which was initiated against the assessee was quashed by the Supreme Court in the light of a finding favourable to the assessee recorded by an authority under the Act subsequently in respect of the relevant assessment proceedings. Relying on the said principle, it has been contended before the court that where proceedings were pending before the competent officer under the Act, it had a chance of success in favour of the assessee, the prosecution ought not be sanctioned. Repelling this contention, the court said (page 700) :

"It is true that, as observed by this court in Uttam Chand and Others Vs. Income Tax Officer, Central Circle, Amritsar, , the prosecution once initiated may be quashed in the light of a finding favourable to the assessee recorded by an authority under the Act subsequently in respect of the relevant assessment proceedings but that decision is no authority for the proposition that no proceedings can be initiated at all u/s 276C and Section 277, as long as some proceedings under the Act in which there is a chance of success of the assessee is pending. A mere expectation of success in some proceeding in appeal or reference under the Act cannot come in the way of the institution of the criminal proceedings u/s 276C and Section 277 of the Act. . . . The criminal court, no doubt, has to give due regard to the result of any proceeding under the Act having a bearing on the question in issue and, in an appropriate case it may drop the proceedings in the light of an order passed under the Act. It does not, however, mean that the result of a proceeding under the Act would be binding on the criminal court. The criminal court has to judge the case independently on the evidence placed before it."

38. From the above, it is apparent that while the court made it clear that mere pendency of the proceedings in which the assessee has a chance of success cannot affect either sanctioning prosecution or continuance of the prosecution but a favourable termination of the proceedings having relevant bearing on the issue is certainly relevant for considering whether to grant sanction for prosecution or even continue the prosecution after such favourable finding has been recorded in favour of the assessee by any competent authority under the Act.

39. As discussed above, the absence of reasonable and sufficient cause for failure is an essential ingredient of the default u/s 200 either for levy of penalty u/s 201 or for making out a case for punishment u/s 276B read with Section 278AA, the order of the Assessing Officer u/s 201 finding the penalty not imposable because the default was not held to be deliberate, was existing

material to which no mind was applied by the sanctioning authority.

40. The distinction which exists between a case in which no proceedings at all has been initiated u/s 201 for levy of penalty before sanctioning the prosecution and a case where the penalty proceedings have been initiated and terminated favourably in favour of the assessee by recording a finding of existence of reasonable and sufficient cause and not imposing penalty in terms of the proviso to Section 201 also finds favour from a decision of this court in *Universal Supply Corporation and Others Vs. State of Rajasthan and Another*, in which the court observed after considering the scheme of Sections 200, 201, 276B and 278AA that non-initiation of penalty proceedings in a case cannot be equated with a case where the penalty proceedings were initiated and a finding is recorded by the competent authority that there were good and sufficient reasons for the delay in payment.

41. A similar view was expressed by the Delhi High Court in *SEQUOIA CONSTRUCTION CO. P. LTD. AND OTHERS Vs. P. P. SURI, ITO, CENTRAL CIRCLE XX, NEW DELHI.*, wherein the court held that where penalty imposed on the assessee u/s 201(1) read with Section 221 of the Income Tax Act, 1961, for failure to deposit tax deducted at source to the credit of the Central Government within the prescribed time is cancelled on the merits after acceptance of the case of the assessee that there was good and sufficient reason for not depositing that tax within time, the milder proof of "reasonable cause", contemplated by Section 276B for an offence for the same default, should be taken to have been established and it would be a sheer exercise in futility and harassment of the accused assessee to allow criminal prosecution to proceed against him.

42. It may be noticed that it was a case prior to the amendment in Section 276B in 1986 and as noticed above, since the Direct Tax Laws (Amendment) Act came into force with effect from April 1, 1989, the requirement of absence of reasonable cause has continued to remain an ingredient of offence u/s 276B. The principle fully governs the facts of the present case. The SLP against *Sequoia Construction Co. Pvt. Ltd.* has since been dismissed by the Supreme Court as reported in [1988] 171 ITR 257, thus, the conclusion which I have reached is fully supported by *stare decisis*.

43. A case has been made out by the petitioner in the instant case that sanction has not been accorded by the sanctioning authority after due application of mind to the relevant material and the order of sanction dated March 13, 1991, has been made by keeping out of consideration the relevant facts which had come into existence and were on record since 1985 and has not at all considered that in the aforesaid circumstances whether it is a fit case in which sanction for prosecution ought to be accorded at such a later stage, or should be withheld.

44. A sanction granted without application of mind to necessary facts, as held by the courts consistently, cannot lay the foundation for a valid prosecution.

45. This is apart from the fact that so far as the petitioner is concerned, even no

material is available where authorising authority has at all applied his mind to the relevant facts for extending sanction of prosecution in the case of the petitioner. The order itself shows that it has been made only with reference to an order dated July 13, 1999, by stating that "in view of the order passed by his predecessor in the office, the Deputy Director is authorised to include the name of the petitioner". That also goes to show that the authorisation was made not by application of independent mind by the officer issuing authority to the relevant facts with an object to consider whether a sanction has to be issued for prosecuting the petitioner also for prosecution u/s 276B or not. It has been made mechanically by inserting the name of an additional accused without considering whether such addition is warranted in the facts and circumstances of the case.

46. Such a sanction cannot be considered to be a valid sanction which could provide valid foundation for prosecuting the persons named therein.

47. Accordingly, this petition is allowed. The order annexure 3-A read with annexure 3 so far as sanctioning prosecution of the petitioner is concerned, is quashed and consequently further proceedings in pursuance thereof are also quashed.

48. There shall be no order as to costs.