(2006) 11 DEL CK 0173

In the Delhi High Court

Case No : Criminal Revision Petition No''s. 323 to 328 of 2005

Sushil Suri and Others — APPELLANT

Vs

State and Others — RESPONDENT

Date of Decision : 06-11-2006

Acts Referred:

Foreign Exchange Regulation Act, 1973 — Section 2
Income Tax Act, 1961 — Section 192, 194A, 194A(4), 2(35), 200

Citation : (2007) 207 CTR 662 : (2008) 303 ITR 86 : (2007) 160 TAXMAN 31

Hon'ble Judges : Badar Durrez Ahmed, J

Bench : Single Bench

Advocate : O.P. Dua, Rajiv Saxena and Babita, for the Appellant; Rajiv Awasthi, for the Respondent

Final Decision : Disposed Off

Judgement

Badar Durrez Ahmed, J.—These revision petitions are taken up together as they arise from the same proceedings. Out of the petitioners, only Mr. Neeraj Jain is not a director in the company known as Dr. Morepen Ltd. The petitioners are aggrieved by the summoning order dt. 30th March, 2005, passed by the learned Addl. Chief Metropolitan Magistrate, Delhi, after cognizance has been taken of the offence punishable u/s 276B r/w Section 279 of the IT Act, 1961 in respect of the financial years 2002-03, 2003-04 and 2004-05.

2. The short point raised by the learned Counsel appearing for the petitioners is that Section 276B is the punishing section for, inter alia, default in depositing the tax deducted at source under various provisions contained in Chapter XVII-B of the IT Act. Essentially, when a "person" fails to pay to the credit of the Central Government, the tax deducted at source by him then he is, by virtue of Section 276B, 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. The reference to "person" in Section 276B is with regard to the requirement of such person to pay to the credit of the Central Government the tax deducted at source

collected by him. Section 192, which falls under Chapter xviii-B relates to tax deducted at source in respect of Income Tax chargeable under the head "Salaries". There are other similar provisions in respect of dividends (s. 194), rent (s. 194-I) and other such provisions for different kind of payments. In all these provisions, the reference is to "a person responsible for paying". This expression is defined in Section 204 which also falls under Chapter xviii-B as under:

204. For the purposes of the foregoing provisions of this Chapter and Section 285, the expression ''person responsible for paying'' means-

(i) in the case of payments of income chargeable under the head ''Salaries'', other than payments by the Central Government or the Government of a State, the employer himself or, if the employer is a company, the company itself, including the principal officer thereof;

(ii) in the case of payments of income chargeable under the head ''Interest on securities'', other than payments made by or on behalf of the Central Government or the Government of a State, the local authority, corporation or company, including the principal officer thereof;

(iia) in the case of any sum payable to a non-resident Indian being any sum representing consideration for the transfer by him of any foreign exchange asset, which is not a short-term capital asset, the authorized dealer responsible for remitting such sum to the non-resident Indian or for crediting such sum to his non-resident (external) account maintained in accordance with the Foreign Exchange Regulation Act, 1973 (46 of 1973) and any rules made there under;

(iii) in the case of credit or, as the case may be, payment of any other sum chargeable under the provisions of this Act, the payer himself, or, if the payer is a company, the company itself including the principal officer thereof.

Explanation-For the purposes of this section,-

(a) ''non-resident Indian'' and ''foreign exchange asset'' shall have the meanings assigned to them in Chapter XII-A

(b) ''authorized dealer'' shall have the meaning assigned to it in Clause (b) of Section 2 of the Foreign Exchange Regulation Act, 1973 (46 of 1973).

3. A reference to the provisions of Section 204(i) and (iii) would make it clear that in case the payments are to be made by a company, then the expression "person responsible for paying" shall include the "principal officer" thereof.

4. The learned Counsel for the petitioners, Therefore, submitted that the liability lies only on the company and the principal officer thereof. The expression "principal officer" has been defined in Section 2(35) of the IT Act, to read as under:

(35) ''principal officer'', used with reference to a local authority or a company or

any other public body or any AOP or any BOI, means-

(a) the secretary, treasurer, manager or agent of the authority, company, association or body, or

(b) any person connected with the management or administration of the local authority, company, association or body upon whom the AO has served a notice of his intention of treating him as the principal officer thereof;

Consequently, relying upon Section 2(35)(b), the learned Counsel for the petitioners submitted, only that person can be regarded as a principal officer who is not only connected with the management or the administration of the company but upon whom the AO has served a notice of his intention of treating him as the principal officer thereof. The learned Counsel for the petitioners pointed out that no such notice has been served on the petitioners indicating the AO''s intention of treating any one or more of them as the principal officer(s) thereof. He referred to the decision of Madras High Court in the case of Income Tax Officer Vs. Roshni Cold Storage (P.) Ltd. and Others, as well as to the Punjab & Haryana High Court decision in Greatway (P) Ltd. and Others Vs. Assistant Commissioner of Income Tax, The learned Counsel for the petitioners referred to the following passages contained in the decision of Madras High Court to submit that unless and until the mandatory notice u/s 2(35)(b) of the IT Act is served on a person, he cannot be prosecuted merely because he happens to be a director:

Ground No. 1 : The statutory notice as required u/s 2(35) of the IT Act, 1961, was not issued to respondent Nos. 2 to 5/accused Nos. 2 to 5 treating them as the principal officers of the accused No. 1-company before launching the prosecution for an offence u/s 276B of the IT Act, 1961. Such a notice as contemplated u/s 2(35)(b) of the IT Act, 1961, is a mandatory requirement in view of the meaning of ''person responsible for payment'' u/s 204. Section 194A imposes liability to deduct tax at source on the credit or payment of interest other than ''interest on securities''. Section 194A(4) uses the expression ''the person responsible for making payment''. u/s 204(iii), the expression ''person responsible for paying'' means-...''if the payer is a company, the company itself including the principal officer thereof. The contravention of Section 194A is made an offence punishable u/s 276B. If the offence is committed by the company, the prosecution for the offence u/s 276B has to be launched against the company itself and its principal officer. The expression ''principal officer'' is defined u/s 2(35) wherein under Sub-clause (a), the persons mentioned therein become liable for any violation as the principal officer. The managing director or director is not included within the ambit of Sub-clause (a) of Section 2(35). In the case of the ITO seeking to prosecute the managing director or director along with the company for an offence u/s 276B, then he has to issue a notice under Sub-clause (b) of Section 2(35) expressing his intention to treat the managing director or director as the principal officer of the company. It is an admitted fact that no notice as required u/s 2(35)(b) was issued to respondents/accused Nos. 2 to 5 and their acquittal on this ground is supported by the ruling rendered by this

Court in M.R. Pratap Vs. Y.M. Muthuramalingam, Income Tax Officer, Central Circle-III, Madras, wherein it was held (headnote):

Consequently, the managing director of a company cannot be held liable u/s 276B unless the ITO has served a notice on him u/s 2(35)(b) and informed him of his intention to treat him as the principal officer of the company.

The introduction of Section 278B into the statute book w.e.f. 1st Oct., 1975, by the Taxation Laws (Amendment) Act, 1975, does not alter or take away the mandatory requirement of issuing notice as contemplated u/s 2(35)(b) for an offence u/s 276B. While inserting Section 278B, no corresponding changes have been introduced either u/s 2(35)(b) or u/s 204(iii) of the IT Act, 1961. Thus, such a statutory notice as contemplated u/s 2(35)(b) is mandatory only for offence u/s 276B in view of the meaning of ''person responsible for paying'', ''if the payer is a company, the company itself including the principal officer thereof in Section 204(iii). For other offences under the IT Act, 1961, such as under Sections 276C, 277, 276CC, etc., such a notice as contemplated u/s 2(35)(b) to either the managing director or director is not necessary as there was no expression akin to the expression used in Section 204 in any of the provisions related to those offences under Sections 276C, 276CC, 277, etc. This position is made clear in the decision reported in Geethanjali Mills Ltd. and Others Vs. V. Thiruvengadathan, : Geethanjali Mills Ltd. and Others Vs. V. Thiruvengadathan, wherein, his Lordship, after taking note of the ruling rendered in MR Pratap v. V.M. Muthuramalingam, ITO (supra), has ruled that the (p. 568) ''determination of the ''principal officer'' is necessary only in the case of deduction of tax at source as in the case of salaries and interest other than interest on securities, etc., and not otherwise.'' In the case reported in Geethanjali Mills Ltd. v. V. Thiruvengadathan (supra), the offence alleged in the complaint is under Sections 276C(1), 277 and 278B of the IT Act, 1961. Relying on this decision in Geethanjali Mills Ltd. v. V. Thiruvengadathan (supra), extracting the Sections 194A, 200 and 204, his Lordship observed in para 2 at p. 568:

From a cursory perusal of all the sections extracted above, as rightly pointed out by learned Counsel for the Revenue, the determination of the ''principal officer'' is necessary only in the case of deduction of tax at source as in the case of salaries and interest other than interest on securities, etc., and not otherwise.

Further, it was made clear in the above ruling that non-issuance of individual notices for other offences such as Section 276C, 276CC or 277 is of no consequence. Therefore it is very clear that even after the introduction of Section 278B w.e.f. 1st Oct., 1975, it is mandatory to issue notice u/s 2(35)(b) in case the prosecution is for the offence u/s 276B and not otherwise.

Endorsing the above view of this Court, the Punjab & Haryana High Court, in the case reported in Greatway (P) Ltd. and Others Vs. Assistant Commissioner of Income Tax, ''that in the absence of appointment of a principal officer by issuing a notice by the AO, the prosecution, if any, could only be launched against the petitioner-company.''

At p. 397 in the ruling, it was observed in para 1:

The complaint is significantly silent as to whether any person had been appointed as the principal officer of the petitioner-company. In the absence of such an appointment, a director or the managing director of the company could not be prosecuted. It appears that the AO was himself at fault and that fault has been tried to be covered by an argument by learned Counsel for the respondent that the managing director and the directors will be deemed as agents of the company. However, an agent of the company cannot be equated with the principal officer as defined in Section 2(35) of the Act. The prosecution of the persons other than the petitioner-company, would, thus, be bad on this short ground alone.

In view of the above three rulings, the prosecution of the managing director and other directors without issuing notice u/s 2(35)(b) is bad in law.

5. On the other hand, the learned Counsel for the respondent submitted that the present petition is at the stage after the summoning order has been passed and in such a case no notice asking the petitioners to show cause is necessary. He submits that the provisions of Section 2(35)(b) of the IT Act would have applicability only in the cases of regular assessments. He also submitted that notice to show cause was, in fact, issued on 12th Dec, 2004 asking the company to explain by 27th Dec, 2004, which the company failed to do. A reply was filed on 17th Jan., 2005 without giving an appropriate answer and that is the reason why the prosecution was launched. It is the contention of the learned Counsel for the respondent that they shall establish before the Court as to who are the persons responsible and who are the principal officers.

6. Considering the arguments advanced by the counsel for the parties and the decisions of the Madras High Court and that of the Punjab & Haryana High Court, I am not inclined to take a different view as taken by these two High Courts insofar as the interpretation to Section 2(35)(b) of the IT Act, 1961 is concerned. Though, with regard to Section 2(35)(a), I have a different view as will be clear hereinbelow. As regards cases falling u/s 2(35)(b), there is no doubt that before a prosecution u/s 276B of the said Act can be launched against such a person, he should be notified that the Department/AO has the intention of treating him as the principal officer thereof. No such notice was issued to any person. However, I am of the view that the managing director of a company, by the very nature of his office, would be a principal officer of the company. An examination of the definition in Section 2(35)(a) of the IT Act, 1961 would make this clear. It has reference to "manager...of the...company". A managing director would fall within this expression. Therefore, the managing director would be a "principal officer" of the company in view of Section 2(35)(a) and not by virtue of Section 2(35)(b) which would apply to other persons connected with the administration or management of the company. Thus, insofar as the managing director is

concerned, no notice would be necessary as his case does not fall u/s 2(35)(b) but, u/s 2(35)(a).

7. It would be pertinent to point out that in M.R. Pratap Vs. V.M. Muthukrishnan, Income Tax Officer, Central Circle-III, Madras, , the Supreme Court categorically observed:

In the present case the appellant admittedly was the managing director of the company and he was thus the principal officer thereof.

The Court was considering the meaning of the word "person" u/s 277 of the IT Act, 1961. It held that a managing director was a principal officer of a company and that if he signs and verifies a return on behalf of the company which later turns out to be false, he would be liable as he would be covered by the word "person" appearing in Section 277. In Rama Narang Vs. Ramesh Narang and Others, , the Supreme Court, inter alia, pointed out the distinction and difference between a managing director and a director of a company. It observed:

The Companies Act has, Therefore, drawn a distinction between a director and a managing director; the provisions in the case of the latter are more stringent as compared to that of the former. And so it should be because it is the managing director who is personally responsible for the business of the company....

...In the case of a director, who is generally not in charge of the day-to-day management of the company affairs, the law is not as strict as in the case of a managing director who runs the affairs of the company and remains in overall charge of the business carried on by the company.

These decisions fortify the view that I have taken with regard to the managing director, by the very nature of his office, being a principal officer within the meaning of Section 2(35)(a) of the said Act. So, while a notice as contemplated u/s 2(35)(b) would be a condition precedent for launching prosecutions against other directors and personnel connected with the management or administration of the company, no such notice would be necessary in respect of a managing director.

8. In this case, the petitioner No. 1 in Criminal Revn. Petn. No. 337 of 2005 (Sanjay Suri) is the managing director. As such, the prosecution can continue in respect of the petitioner, Sanjay Suri and the company. But, insofar as the other petitioners are concerned, the summoning order is set aside. If the Department is otherwise permitted to do so under law, the Department may proceed against any other person whom it considers to be a principal officer, but, only after complying with the provisions of Section 2(35)(b) of the IT Act, 1961.

These revision petitions stand disposed of in the aforesaid manner.

