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C.C.No.209/SW/2014.
Judgment.

CNR No. MHMM20-0006059-2014.
Complaint filed on :27.11.2014.
Complaint registered on:27.11.2014.
Decided on :25 .06.2019
Duration : Y. M. D.
04 06 28.

**IN THE COURT OF ADDL. CHIEF METROPOLITAN MAGISTRATE,
38th COURT, BALLARD PIER, MUMBAI
(Presided over by I. R. Shaikh)
C. C.NO.209/SW/2014.**

Exh. – 52.

Income Tax
Through -
Pramoda Natraj,
age-40 yrs,
Income Tax Officer(TDS)-1(2)(4)
Mumbai.

.. Complainant.

V/s.

1. M/s Ichibaan Automobiles Pvt,
9th floor, Grande Palladium,
175 CST Road, Kalina,
Santacruz (E),
2. G.M. Singh,
Principal Officer,
M/s Ichibaan Automobiles Pvt Ltd,
13/A, Nibbana Annexe, Pali Hill,
Bandra (W), Mumbai-50.

.. Accused.

Charge : Under Section 276B r/w sec. 278B of The Income Tax Act,1961.

Appearance : Special Public Prosecutor Mr. Amit Munde for complainant.
Ld. Advocate Mr. V.S.Hadade for accused.

JUDGMENT

(Delivered on 25.06.2019)

1. The complainant Pramoda Natraj, Income Tax Officer(TDS)-1(2)(4) had filed the complaint u/s. 200 of the Cr.P.C. against the accused for committing the offence punishable u/s. 276B of Income Tax Act, 1961 pertaining to financial year 2009-2010 and Assessment year 2010-2011.

2. Brief facts of the complainant's case are as under -

The complainant submitted that accused No.01 is a private limited company and accused No.02 is the principal officer of accused No.01 under obligation u/sec. 192 of Income-Tax Act to deduct the Income-Tax from salary paid/credited. During the period from 01.04.2010 to 31.03.2011 on various dates they deducted tax of Rs. 7,52,076/- but failed to pay or deposit the Income-Tax so deducted to the credit of the Central Government within the prescribed period. He further submitted that accused No.02 being Principal Officer of accused No.01 are also liable for the same.He further submits that after deduction of said amount, instead of depositing such TDS amount to the Government Account within respective dates accused failed, without reasonable cause or excuse, to pay within the prescribe period. He further submits that said amount was paid after a long period of delay beyond 12 months.

3. A show cause notice was issued to all the accused but they did not respond. The complainant submits that accused have committed a default u/sec. 200 and 204 of The Income-Tax Act r/w rule 30 of The Income-Tax Act, 1962 by failing without reasonable cause or excuse to

pay the Income-Tax so deducted to the credit of the Central Government. Hence, he filed present complaint against the accused for the offence punishable u/sec. 278B r/w sec. 278B of The Income-Tax Act, 1961.

4. After filing of the complaint, cognizance was taken and case was registered against the accused for offence punishable under Section 276B r/w sec. 278B of The Income Tax Act. The process was issued u/s. 276B r/w sec. 278B of The Income Tax Act.

5. The complainant complied the formalities u/s. 207 of Cr. P.C. All the documents were furnished to the accused. Thereafter evidence of the complainant and sanctioning authority was recorded before charge and thereafter, after hearing both the sides my Predecessor hold that there is sufficient material to frame the charge and accordingly charge was framed against the accused as per Ex.38 under Section 276B r/w sec. 278B of The Income Tax. Contents of the charge were read over to the accused in vernacular. Accused pleaded not guilty and claimed for trial. The plea of the accused is at Ex.39 and 40.

6. In order to prove the charges leveled against the accused, the complainant has examined two witnesses. These are C.W.1 Vinod Kumar Pande sanctioning authority at Ex.19 and C.W.2 Pramoda Natraj complainant at Ex.24-A and placed number of documents on record. After closer of evidence of the complainant, statement of accused u/s. 313 of Cr. P.C. was recorded at Ex.42 and 43. The accused denied incriminating evidence put to him. The accused submitted that

TDS amount is not deposited within time due to crunches in company. TDS amount not paid within time is not willful/deliberately. He has already filed compounding application to Commissioner of Income Tax and it is under consideration hence prayed that prosecution keep in abeyance till the disposal of the compounding application.

7. The following points arise for my determination and I have recorded my findings against each point with reasons as follows -

Sr.No.	Points	Findings
1	Does prosecution prove that, accused No. 1. M/s Ichibaan Automobiles Pvt. Ltd. and its Director i.e. accused No. 2 are responsible for deduction of Tax at source but accused failed to pay tax TDS of the Financial year 2009-2010 and Assessment year 2010-2011 to the credit of Central Government within time without any justifiable reason and thereby committed an offence P/U/S. 276B r/w 278-B of The Income-Tax Act	..In affirmative.
2	What order ?	As per final order.

REASONS.

As to point No. 1 and 2 :

8. In order to prove the guilt against the accused, complainant has examined Vinod Kumar Pande (C.W.1) sanctioning authority at Ex.19 and Pramoda Natraj (C.W.2).

9. Vinod (C.W.01) deposed that he had passed sanction order for prosecution against the accused on 25.11.2014. He had passed sanction order against accused No.01 Ichibaan Automobile Pvt. Ltd and

its director for the financial year 2009-2010. He gave authority to one Ms. Pramoda Natraj for launching the complaint against the accused.

10. He further deposed that assessee deducted the TDS from various payment made to other but assessee/accused did not deposit TDS with the government within statutory time limit. Therefore accused committed an offence 276 B r/w. 278 B of I. T. Act. On 31.10.2014 accused informed the incharge principal officer of the company.

11. Pramoda (C.W.02) deposed that he was directed for launching complaint against the accused as per sanction order dated 25.011.2014. In this matter, he found that TDS was deduction but not deposited within stipulated time by the assessee i.e. accused. Therefore accordingly income tax accused become a defaulter and he has committed an offence under section 194 C and 192 I. T. Act, which is punishable under section 276 B of I. T. Act. On the basis of traces sheet accused have to pay Rs. 7,52,076/- accused has to pay the said amount in next month, but accused failed to pay within stipulated time. He got traces sheet from Government website traces this is a public website. From traces sheet disclosed the name of accused as Ichibaan Automobile, for the financial year 2009-2010. Accused made correspondence with their department on 31.10.2014. It disclosed that G.M. Singh is responsible principal officer of the Ichibaan Automobile Pvt. Ltd. Accordingly he filed this complaint against accused.

12. Special Public Prosecutor Munde argued that, on perusal of the evidence on record the guilt of accused is proved. The accused

deducted the TDS but failed to deposit the deducted tax to the Government within stipulated period. The accused admitted said fact during recording the statement u/s. 313 of Cr.P.C. as well as in their reply to show cause notice, therefore accused be punished as per law. While advocate for accused submitted that before initiating the prosecution, the accused has deposited TDS amount to the department, therefore the present complaint is not maintainable.

13. It is also submitted that during the stipulated period the condition of the company was not well, the company's economic condition was not so good, therefore accused could not paid TDS amount within stipulated period. Company have already made the payment of sums deducted by them. This is the first time accused defaulted for payment of money.

14. It is also argued on behalf of accused Advocate that sanction for prosecution was issued without applying mind. Defence also relied upon section 278E(1) of The Income-Tax Act. It is also submitted that non production is fatal to prosecution. In his support Advocate for accused relied upon following authorities;

- 1) **Jamshedpur Engineering and V/s Union of India (Uoi) and others.1995 214 ITR 556 Patna.**
- 2) **S.P. Chengalvaraya Naidu (dead) by L.Rs. V/s Jagannath (dead) by L.Rs and others. AIR 1994 Supreme Court 853.**
- 3) **Banwarilal Satyanarain and others V/s State of Bihar and another 1990 (38) BLJR 5, 179 ITR 387 Patna High Court**
- 4) **Bachhaj Nahar V/s Nilima Mandal and another (2008) 17**

Supreme Court Cases 491.

5) Sakatar Singh and others V/s State of Haryana (2004) 11

Supreme Court Cases 291.

6) Ramesh Singh @ Photti V/s State of A.P. (2004) 11

Supreme Court cases 305.

15. It is not disputed that accused had deducted the TDS amount of Rs. 7,52,076/- for the period from 01/04/2009 to 31/03/2010. It is admitted that accused not deposited the said amount within stipulated period i.e. on or before 7th day of next month. It is also admitted position that subsequently out of total amount deducted under sec. 278E and 194H of the Act accused paid all amount with interest and penalty as required u/s. 201(A) of the Act owing to the delay in payment of the aforesaid amount. Accused paid TDS amount after 12 months, therefore, there is delay of more than 12 months.

16. The complainant during his evidence brought on record from Government Web Sites, Traces as per Ex.25 Ex.25 shows that the name of accused mentioned in the report which was for financial year 2009-2010. Ex.25 shows total tax deducted Rs. 7,52,076/- from 01/04/2009 to 31/03/2010 and it was deposited in some cases after period of more than 12 months. It means, accused not deposited TDS amount within stipulated time or deposited beyond the period of 12 months. The accused not denied the same fact. The accused was responsible to deposit deducted TDS amount within stipulated time as per section 200 and 204 of the Act and accused committed default.

17. Section 277AA provides a window for the accused to

escape from the penal consequence by proving that he had reasonable cause for the non-depositing of deducted TDS amount within time limit.

18. As stated above, Advocate for accused pointed out sec. 277 of Act which deals when presumption as to culpable mental state. Advocate for accused submitted that accused have no mental state or have no intention to avoid the payment of TDS, if the defence of the accused about existence of such mental state, then burden lies upon accused to prove that they had no such mental state with respect to the act charged as an offence in that prosecution. In the present case there is no evidence that there is no culpable mental state of mind on the part of accused persons, in the failure deposit TDS amount beyond time limit. There is no evidence at all brought on record, therefore it appears that accused failed to rebut the presumption lies against them u/s. 278E of the Act.

19. I would like to reproduce here **Section 278AA of the Act.** It reads as, “punishment not to be imposed in certain cases - Notwithstanding anything contained in the provisions of sec. 276A, 276AB or 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.

20. Advocate of accused contended that accused has given reason for failure to pay tax in time due to financial crises. But accused during trial not proved the same. The accused taken defence that financial constrains resulted in not depositing of TDS amount but except putting suggestions and say filed on record no material is

produced to substantiate the fact. Mere taking up the contention is not amounting to offering a reasonable cause for failure to remit the deducted TDS. Also during sanction considered and examined carefully all records and thereafter after satisfied adequate ground, grant sanction for prosecution against accused. The accused nor proved that there was reasonable cause for not depositing the aforesaid tax amount within specified time limit.”

21. It is further argued as stated above on behalf of accused that, in the reply to show cause notice the accused gave the reasons for non-payment of taxes but the Principal Commissioner of Income Tax has not go through it and not considered the same as reasonable cause for non paying TDS to the Government. But during granting sanction, the Principal Commissioner of Income Tax as per Ex.21 specifically mentioned that he has gone through the documents and after perusing and examining carefully, he was satisfied that adequate grounds exist to prosecute the accused. Thus, the contention of defence about concerned authority is not considered cause to grant prosecution is not tenable and proper.

22. Hence it clears that accused gave an opportunity for explaining non-payment of tax but accused not availed the same. Therefore accused not given reasonable cause for delayed payment of tax.

23. From the above discussion it is clear that it is admitted by the accused that accused not paid deducted TDS amount within stipulated time. No doubt, in the present case, accused paid the tax

with interest and penalty, but tax was paid after stipulated period. The accused preferred the application for compounding the offence before concern authority where as per act the powers of compounding was only given to Commissioner of Income-Tax, but it is seen that no such compounding order has passed. Also sanction granted by sanctioning authority after considering the documents and applying mind. After considering all the material facts before the court and the defence of the accused about reasonable cause is not probable. The accused has defaulted to pay the tax within stipulated time to the Central Government from the TDS amount for the financial year 01/04/2009 to 31/03/2010 and accused is the only person to pay the said amount. No doubt in the present case the accused has deposited the TDS amount at belated stage.

24. The advocate for the complainant relied on the authority reported in **Madhumilan Syntex Ltd; and Ors. v/s Union of India(UOI) and Ors. AIR 2007 SC (148)**. The Hon'ble Apex Court in para. 37, 40 and 41 held that -

37 - "Once a statute requires to pay tax and stipulates period within which such payment is to be made, the payment must be made within that period. If the payment is not made within that period, there is default and an appropriate action can be taken under the Act."

40 - "It is true that the Act provides for imposition of penalty for non payment of tax. That, however, does not take away the power to prosecute accused persons if an offence has been committed by them."

41 - "Finally, the contention that a civil suit is filed by the complainant and is pending has also not impressed us. If a civil suit is pending, an appropriate order will be passed by the competent Court. That,

however, does not mean that if the accused have committed any offence, jurisdiction of criminal court would be ousted. Both the proceedings are separate, independent and one can not abate or defeat the other.”

25. In view of aforesaid reasons arguments advanced on behalf of defence holds no ground. Defence utterly failed to prove the submissions by leading evidence as stated above. Considering the above referred authority and the present case, it appears that if the payment is made at belated stage then it will be treated as default and appropriate action can be taken under this Act. It also clear that deposit of TDS with delay does not absolve criminal liability. If it is considered that accused paid the amount after period of 12 months, in such circumstance, complaint is maintainable and it does not absolve criminal liability of the accused persons.

26. Nothing has come on record during searching cross-examination of both witnesses. Nothing has brought on record during cross-examination to disbelieve version of above both witnesses. Therefore, considering the evidence available on record, I come to conclusion that the accused is responsible person to pay tax within time and accused failed to deposit TDS within time. Therefore, the complainant has proved the case against the accused beyond reasonable doubt and proved the guilt of the accused u/s. 276B r/w 278 B of I.T. Act. Therefore, I answer point no.1 in affirmative. I heard the accused on the point of sentence.

27. Heard accused, advocate and Special P.P. Shri.

Munde on the point of sentence. Accused submitted that this is their first offence and they have already paid tax amount with interest and penalty. While advocate for accused submitted that this is their first offence and leniency be shown to accused. On the other hand, Ld. Spl.P.P. Munde submitted that accused are the educated persons and they had sufficient amount to pay TDS amount, but they failed to do so and used said amount for any other purpose, therefore this aspect cannot be viewed lightly and prayed for punishment as per law.

28. The offence U/sec. 276B r/w 278B of Income-Tax Act 1961 is punishable with rigorous imprisonment which shall not be less than three months which may extend to 7 years and with fine. The matter is on record not substantiate the contention of accused that due to financial crunches and fund problems constrains resulted in not depositing TDS amount. However, there is no allegation that accused is irregular in paying the tax other than the case in hand. Thus, the Court is of the considered view that accused are liable for possible sentence of 3 months rigorous imprisonment and fine. It is the minimum punishment. The Court is not having discretion in reducing the sentence. Therefore, accused shall undergo imprisonment for a period of 3 months and fine of Rs.5,000/- (Rs. Five Thousand only) each for having committed offence U/sec. 276B r/w sec. 278B of Income-Tax Act. So accused No. 1 should pay fine of Rs.5,000/- (Rs. Five Thousand only). From the above said reasons and discussions, my findings recorded as to point No.1&2 in the affirmative and proceed to pass the following order.

ORDER.

- i. Accused No. 1 and 2 are convicted for the offence punishable U/sec.276B r/w 278 B of The Income-Tax Act, 1961. U/sec. 248(2) of The Code of Criminal Procedure.
- ii. The accused No. 1 M/s. Ichibaan Automobiles Pvt Ltd, is sentenced to pay fine of Rs.5,000/- (Rs. Five Thousand only) for the offence punishable U/sec. 276 B of Income-Tax Act, 1961.
- iii. The accused No. 2 shall undergo rigorous imprisonment for a period of three months and to pay the fine of Rs.5,000/- (Rs. Five Thousand only), in default of payment of fine, the accused No.2 shall undergo simple imprisonment for a period of 30 days for the offence punishable U/sec. 276B of The Income-Tax Act, 1961.
- iv. The accused No. 2 shall pay the fine imposed on accused No.1.
- v. Bail bonds of accused shall stands surrendered.
- vi. Copy of Judgment be provided to the accused on free of costs.
- vii. Dictated and pronounced in open Court, before parties and their counsels.

Sd x.x.x

Date:25.06.2019.

(I.R.Shaikh)
Addl. Chief Metropolitan Magistrate,
38th Court, Ballard Pier, Mumbai.

Dictated on screen on -25.06.2019.
Signed on -25.06.2019.