

**IN THE COURT OF SH. PAWAN SINGH RAJAWAT:
ADDL. CHIEF METROPOLITAN MAGISTRATE (Spl. Acts):
CENTRAL: TIS HAZARI COURTS, DELHI.**

**ITO vs M/s VCI Hospitality Ltd. & Anr.
U/s 276B & 279(1) r/w Sec. 278-E of the Act
AY 2008-2009
CC No.536181/16**

JUDGMENT

- (a) Date of commission of offence: 08.08.2008
- (b) Name of complainant : Usha Rawat,
Income Tax Officer
- (c) Name, parentage, residence : 1) M/s VCI Hospitality Ltd
of accused BF-77, (LGF), Janak
Puri, New Delhi.
Also at : A-7, 1st Floor,
GK. Enclave-II, New Delhi
- 2) Sh. Vijay Kumar Singh,
Managing Director,
R/o BF-77, (LGF), Janak
Puri, New Delhi.
Also at : A-7, 1st Floor,
GK. Enclave-II, New Delhi
- (d) Offence complained of/ proved: U/s 276B & 279(1)
r/w Sec. 278E of the Act
the AY 2008-09
- (e) Plea of accused : Pleaded not guilty
- (f) Final order : Convicted for the
offence U/s 276B
r/w Section 278B &
278E of Income Tax
Act, 1961.
- (g) Date of such order : 28.08.2018

Date of Institution of complaint : 11.07.2014
Arguments heard/order reserved : 21.07.2018
Date of Judgment : 28.08.2018

Brief statement of the reasons for the decision:-

1. The complainant through Ms. Usha Rawat, the then IT Officer, Ward 51(6), New Delhi filed the present complaint against accused no. 1 company M/s. VCI Hospitality Ltd. and against Sh. Vijay Kumar Singh being its Managing Director and responsible for day-to-day affairs of accused no. 1 alleging offences punishable under Section 276B & 279(1) read with Section 278E of the Income Tax Act for the assessment year 2008-2009.
2. Succinctly, the facts of the case are that accused no. 1 is a private limited company registered with the Registrar of Companies. It is alleged that the accused no. 1 company has deducted TDS amount of Rs. 4,08,838/- during financial year 2008-2009. However, it has not deposited the same with the Government within the stipulated/prescribed period. Notice under Section 2(35) dated 24.05.2012 of the Income Tax Act was served upon the assessee thereby calling upon Accused no. 2 to explain as to why he should not be held as a Principal Officer of accused no. 1. A reply dated 05.06.2012 of the notice was received. After considering the reply, an order under Section 2(35) of the Act was passed on 27.09.2012 holding accused no. 2 responsible for the affairs of the company as principal officer for the relevant period. It is further stated that it was the mandatory duty of the company accused to deposit the TDS amount in the Government Account within the prescribed time but the

accused company failed to do so, hence they committed an offence punishable under Section 276B & 279(1) read with Section 278E of the Income Tax Act as accused No. 2 is Principal Officers of the accused company and thus, were liable for non deposit of TDS amount within stipulated period. Hence, the present complaint.

3. The accused were summoned who appeared before the court and copy of complaint and of documents were supplied and the matter was fixed for pre-charge evidence.
4. In the pre-charge evidence, complainant examined PW-1 Ms. Usha Rawat and PW-2, Sh. S.N. Gaba. Thereafter, arguments on charge heard and charge under Section 276B read with Section 278B & 278E of the Act were framed against the accused no. 1 & 2.
5. Complainant PW-1 Ms. Usha Rawat, ITO deposed the facts as alleged in the complaint. This witness has proved the documents in addition to her oral testimony. The documents are the certified copy of the notice under Section 2(35) of the IT Act dated 24.05.2012 as PW-1/A, certified copy of the reply dated 05.06.2012 as Mark A, order under Section 2(35) of the IT Act dated 27.09.2012 as Ex. PW-1/B, sanction order for prosecution as Ex. PW-1/C and complaint as Ex. PW-1/D.
6. CW-2 Sh. S.N. Gaba deposed that he has issued the show cause notice already Ex. PW-1/A. He further deposed that the ITD generated report detailing the deduction of TDS

amount and its non-deposit as Mark B in respective complaint cases for relevant years.

7. After pre-charge evidence, charge was framed against the accused persons on 16.04.2015 in terms of order dated 24.03.2015 and the matter was fixed for post-charge evidence.
8. After completion of post-charge evidence, statement of accused was recorded on 10.03.2017 wherein accused chose to lead defence evidence but no evidence was led by accused and accordingly, defence evidence was closed on 05.04.2017.
9. In post-charge evidence, CW-1 Ms. Usha Rawat in her cross-examination admitted that Ex. PW-1/C does not bear any official stamp and seal at Point A and there is no authorization letter in her favour to file the present complaint and voluntarily deposed that this fact is mentioned in the sanction letter from Point X to X1. She further admitted that she knows the business detail of any assessee company at the time of framing assessment. CW-1 further admitted that the respondent company deposited the entire TDS amount of year 2008-2009 with interest before filing the complaint but she does not remember the exact date. CW-1 further voluntarily stated that no fact of financial crisis of the accused company was brought to her knowledge in response to the questionnaire sent to the assessee company. After seeing the reply marked A and after going

through the same she stated that from Point A1 to A2, the accused company has mentioned about the reason of financial crisis. She further admitted that the accused company has filed the true copy of the audit report, balance sheet and profit and loss account statement for the Financial Year 2008-09 which shows that the company has suffered a loss of Rs. 82,48,599/- against a profit of Rs. 4,78,67,010/- during the previous financial year i.e. during 2007-2008 and the same is Ex. CW-1/DA (colly). CW-1 denied the suggestion that due to not getting the refund of TDS amount within time, respondent company was facing financial crisis and losses. She admitted that respondent company has claimed the TDS refund claim of Rs. 1,22,90,650/- on 30.09.2009 by virtue of documents marked as D1 but she was not unaware of any such document. CW-1 further admitted that there is a single sanction letter for both the financial years 2008-2009 and 2009-2010.

10. CW-2 Sh. S.N. Gaba in his post-charge cross examination admitted that TDS was deposited but same was deposited late. He stated that charging of interest does not absolve the offence of late deposit. He stated that till he was incharge, there was no refund due to the accused for the relevant year. He specifically stated that the issue of refund by assessing authority has no bearing on deposit of TDS amount.

11. No defence evidence was led, hence final arguments were heard. However, while the matter is fixed for judgment

an application was moved on behalf of accused for bringing on record the demand/traces report for financial years 2008-09 & 2009-10. A reply was filed on behalf of the complainant.

12. Ld. SPP for the complainant argued that offences are proved against the accused persons as by not depositing the TDS on time, the accused persons have committed offence under Section 276B & 279(1) read with Section 278E of the Income Tax Act. It is further argued that the application for bringing on record the latest demand have no bearing on the merits of the case. He prays for conviction of the accused persons.

13. On the other hand, Ld. Counsel for the accused persons argued the matter at length. He argued that accused suffered from severe financial crisis due to global economic recession in 2008 and followed by terror attack in Mumbai in November, 2008 and many debtors of the company turned into bad debt which resulted in a great burden on the company to run its operations to survive and support their employee team and that the overall situation resulted in worsening the financial position of the company. He also pointed out that as per the balance sheet for the year the accused company has suffered losses of Rs. 60.85 lakhs and this was the reason why there was a delay and it is covered U/s 278AA of the Income Tax Act. He prays for acquittal of the accused persons.

14. For ready reference, the provision u/s 278-E of I.T. Act is reproduced as under:-

“278E. Presumption as to culpable mental state.-

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

15. In **Sasi Enterprises Vs. Asstt. CIT, (2014) 361 ITR 163 (SC)**, it was held as under -

“Section 278E deals with the presumptions as to culpable mental state, which was inserted by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986. The question is on whom the burden lies, either on the prosecution or the assessee, under Section 278E to prove whether the assessee has or has not committed willful default in filing the returns. Court in a prosecution of offence, like Section 276CC has to presume the existence of mensrea and it is for the accused to prove the contrary and that too beyond reasonable doubt. Resultantly, the appellants have to prove the circumstances which prevented them from filing the returns as per Section 139(1) or in response to notices under

Sections 142 and 148 of the Act.”

16. Whether accused no. 2 was in-charge and responsible for conduct of affairs of accused no. 1 being principal officer:

17. Section 2(35) of the Act deals with expression 'principal officer'. Relevant para of section 2(35) of the Act is reproduced below:-

“(35) 'principal officer', used with reference to a local authority or a company or any other public body or any association of persons or any body of individuals, means-

the secretary, treasurer, manager or agent of the authority, company or association, or body, or any person connected with the management or administration of the local authority, company, association or body upon whom the [Assessing Officer] has served a notice of his intention of treating him as the principal officer thereof'.

Section 200(1): Any person deducting any sum in accordance with (the foregoing provisions of this Chapter) shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.

(2) Any person being an employer, referred to in sub-section (1A) of Section 192 shall pay, within the prescribed time, the tax to the credit of the Central Government or as the Board directs.

(3) Any person deducting any sum on or after the 1st day of April, 2005 in accordance with the foregoing provisions of this Chapter or, as the case may be, any person being an employer referred to in sub-section (1A) of Section 192 shall, after paying the tax deducted to the credit of the Central Government within the prescribed time, (prepare such statements for such period as may be prescribed) and deliver or cause to be delivered to the prescribed income-tax form and verified in such

manner and setting forth such particulars and within such time as may be prescribed.
Relevant para of section 204 is reproduced as under:-

“Section 204: Meaning of “persons responsible for paying”

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”.

18. CW-1 has stated that show cause notice Ex. PW-1/A was issued to accused no. 2 which was replied i.e. Mark A through their chartered accountant stating that Vijay Kumar Singh was the Managing Director of accused no. 1. CW-1 also proved order under Section 2(35) of the Income Tax Act which is Ex. PW-1/B wherein, accused Vijay Kumar Singh held to be principal officer of accused no. 1 being connected with the management and administration of accused no. 1 for the present prosecution. No suggestion was put to CW-1 that accused no. 2 was not the principal officer of accused no. 1. Hence, the complainant is able to prove that accused no. 2 is the principal officer of accused no. 1 being responsible for deposit of TDS in time.

19. **Whether accused has been able to rebut the culpable mental state as provided under Section 278E of the Act :** The accused has at no point of time claimed that the TDS was deposited in time. It is the stand of accused that the delay occurred due to factors beyond their

control. It was argued that accused suffered from severe financial crisis due to global economic recession in 2008 and followed by terror attack in Mumbai in November, 2008 and many debtors of the company turned into bad debt which resulted in a great burden on the company to run its operations to survive and support their employee team and that the overall situation resulted in worsening the financial position of the company. However, no evidence has been led to show the alleged economic recession despite opportunity. As per balance sheet for the period ending on 31.03.2009, the income from operations was Rs. 123,380,418/- as per compared to income of Rs. 147,335,445/- for the year ending on 31.03.2008 which shows that there was no substantial loss from the income from operations i.e. the core business of marketing five star and seven star hotels. Even the cash and bank balance have not gone down substantially. On the other hand, the net current assets have increased to Rs. 5,06,53,455 from Rs. 4,31,29,880/- between 31.03.2008 and 31.03.2009. Even the current liabilities have gone down by about Rs. Eleven Lacs and the net current assets have shown a jump of about 18%. The only downward end is noted in income from club membership and hotel marketing which has gone down by about Rs. 10 lacs and Rs. 13 lacs.

20. In one breath, accused is claiming that there were business losses which resulted in default in deposit of TDS. However, the salaries paid to Directors in financial year 2008-2009 have increased to Rs. 48,46,852/- from Rs. 21,07,259/- in the financial year 2007-2008. Even the

accused has shown a threefold jump in the provision of depreciation from about Rs. 18 lacs to Rs. 42 lacs. No justification has been given for such high provision for depreciation. The accused has failed to explain why the staff cost has increased by about Rs. 1 crore despite the alleged slowdown. In view of the above figures, the plea of slowdown in business of accused no. 1 is not the reasonable cause for non-deposit of TDS as claimed by the accused. The accused have not disputed the genuineness of document Mark-A which is the details of tax deducted and deposited by the accused.

21. While the matter was at the stage of judgment, an application was moved on behalf of the accused praying for bringing on record the demand/TRACES report for the financial year 2008-2009 and 2009-2010. In the reply it is mentioned that TDS liability has been reduced without payment by the accused company as the accused has filed correction statement on various dates which resulted in the demand being reduced to NIL in respect of FY 2009-10 and in the same fashion the demand has reduced to Rs. 40/- in respect of FY 2008-09. It is further mentioned that there is still unconsumed challan amount of Rs. 1,65,494/- and of Rs. 3,73,703/- in respect of FY 2008-09 and FY 2009-10 respectively. It further mentioned that the correction/unconsumed challan have been adjusted against the demand and the said payments were not made within stipulated time which also include interest payment of belated deposits as is clear from the data below which has

been procured from the ITD system.

22. As per complaint, accused has defaulted in timely deposit of TDS amount. However, the due amount for the year 2008-09 has been reduced to Rs. 40/- only but after filing of various correction statements which are admittedly filed after filing of present prosecution. The Ld. Counsel for accused has failed to explain the unconsumed challan amount of Rs. 1,65,494/- and of Rs. 3,73,703/- in respect of FY 2008-09 and FY 2009-10 respectively. The latest figures nowhere shows that there was no default at all in deposit of TDS amount. It only shows that the demand had been reduced due to filing of correction statements. Ld. Counsel for accused has failed to explain the reason for filing the correction statements that too at belated stage of a trial. The TRACES printout dt. 16.07.18 filed with the application only shows the latest figures. The reply of complainant to the application of accused sufficiently explains the reason for reduction in the demand. I am satisfied that the application is of no help to the accused and the same stands dismissed.

23. The plea of accused that since the complainant department has delayed the refund of TDS, therefore, the default occurred is not maintainable as the amount deducted by way of TDS is to be deposited within prescribed time irrespective of any counter claim of the assessee. CW-1 has stated that the refund takes about six months for processing and accused cannot take benefit of delay in release of the refund amount. Another plea of recession in the hospitality

section is also not maintainable as discussed above.

24. In view of above discussion, the accused has not been able to rebut the presumption U/s 278E of the Income Tax Act or bring their case U/s 278 AA of the Act which provides for reasonable cause for default or failure of the assessee in compliance of provision of the Income Tax Act.

25. In view of the aforesaid discussions and facts and circumstances of the case, it is held that the prosecution has proved its case against accused beyond reasonable doubt. Accordingly, accused no.1 M/s VCI Hospitality and accused no. 2 Vijay Kumar Singh are held guilty for the offence u/s 276B r/w Sec. 278B & 278E of the Act for the financial year 2008-09.

26. Copy of the judgment be given free of cost.

27. Copy of the judgment be also uploaded with digital signature.

**Announced in open
Court on 28th of August, 2018.**

**(PAWAN SINGH RAJAWAT)
ACMM(Special Acts):CENTRAL
TIS HAZARI COURTS:DELHI**