**(2014) 07 P&H CK 0863**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Civil Writ Petition No. 10216 of 2000

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| Om Parkash | | APPELLANT |
| | Vs | |
| The Commissioner of Income Tax | | RESPONDENT |

**Date of Decision:** July 17, 2014

**Acts Referred:**

- Constitution of India, 1950 - Article 14, 226, 227
- Income Tax Act, 1961 - Section 201(1A), 276B, 278B, 278B, 279(2)

**Citation:** (2014) 176 PLR 690

**Hon'ble Judges:** Jaspal Singh, J; Ajay Kumar Mittal, J

**Bench:** Division Bench

**Advocate:** K.L. Goyal, Senior Advocate and Sandeep Goyal, Advocate for the Appellant; G.S. Hooda, Advocate for the Respondent

**Judgement**

Ajay Kumar Mittal, J.

Prayer in this petition filed under Articles 226/ 227 of the Constitution of India is for a direction to the respondents for compounding of offence under section 279(2) of the Income Tax Act, 1961 (in short, "the Act"). A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. Petitioner No. 1 was partner of firm M/s. Roshan Lal Om. Parkash (petitioner No. 2) upto 31.3.1985. From 1.4.1985, the partnership firm was dissolved due to financial problem on account of a fraud committed before that date by a third party against whom criminal complaint was duly lodged. The firm petitioner No. 2 was responsible for deduction of income tax @ 10% of the amount payable to any person on account of interest during the accounting year 1984-85. Therefore, certain deductions of income tax were made on different dates. The deducted amounts were liable to be deposited in appropriate bank on different dates and there was slight delay in making the said payments. These amounts were deposited voluntarily in the treasury without any notice from the department. There were two reasons for the

delay i.e. firstly there was a fraud committed with the petitioners by a third party and therefore there were financial constraints on account of which the firm had to close down its business w.e.f. 1.4.1985 and secondly on account of closure of business, day to day affairs of the business could not be attended properly. After the filing of the return, when the matter came to the notice of the Income Tax Officer, the said authority calculated interest of Rs. 426/- under Section 201(1A) of the Act vide order dated 7.3.1998, Annexure P.1 for this default. The assessee also deposited that amount in the treasury. The petitioners were not aware of the fact that payment of tax deducted at source was to be made within seven days. They were under the impression that the amount could be deposited in the treasury at the time of filing of return. The Income Tax Officer on instructions from Commissioner of Income Tax, Jalandhar (CIT) filed a criminal complaint dated 24.4.1989 in the court of Chief Judicial Magistrate, Bathinda under section 276B read with section 278-B of the Act on the ground that petitioner No. 2 had committed a default in not depositing the tax in time. According to the petitioners, as per departmental instructions, no complaint could be filed under the provisions of the Act if the total amount of tax involved was small/negligible. In the present case, the interest payable for default in making payment was Rs. 426/- only. On 13.3.1996, the complaint was transferred to the court of Chief Judicial Magistrate, Mansa in view of the reorganization of Bathinda district. Meanwhile, the petitioner No. 1 was suffering mental agony on account of criminal trial. He had undergone cardiac bypass surgery and was aged 62 years. On 21.9.1999, he moved an application to the CIT for compounding the offence under section 279(2) of the Act on the ground that he had been dealing with the department since 1956 and was never penalised for any kind of offence. Thereafter, petitioner No. 1 was orally summoned by the Income Tax officer, Mansa asking him to give his consent to agree to pay fee of Rs. 2192/- as a condition for compounding the case to which he agreed. The matter remained pending for decision with the CIT till 29.11.1999 when the complaint matter was taken up for decision by Chief Judicial Magistrate, Mansa. It was brought to the notice of the trial court that since the matter regarding compounding of offence was pending before the authorities, the decision in the complaint be deferred. However, the Chief Judicial Magistrate declined the request and decided the matter holding the petitioner guilty of offence and awarding a punishment of one year six months plus a fine of Rs. 4000/- vide order dated 29.11.1999, Annexure P.4. Aggrieved by the order, the petitioners filed appeal before the Sessions Court, which is stated to be pending. Meanwhile it came to the notice of the petitioners that on the date of the decision dated 29.11.1999, by the trial court, the Chief Commissioner of Income Tax (COT) wrote a letter Annexure P.6 to the CIT asking him to compound the offence after deposit of Rs. 2192/- by the petitioners. The petitioners were never communicated this decision. The petitioners have been given to understand that the departmental authorities are not compounding the offence only for the reason that they have already been convicted and as per CBDT directions, the case cannot be compounded. On 3.7.2000, the petitioners

approached the Central Board of Direct Taxes with a prayer to compound the offence on deposit of Rs. 2192/- but no action has been taken so far. Hence the instant petition by the petitioners.

2. Learned counsel for the petitioners submitted that there was delay in deposit of tax deducted at source amounting to Rs. 4870/- for which the petitioners had deposited the interest as well under Section 201(1A) of the Act. It was argued that the petitioners had filed an application ''for compounding under section 279(2) of the Act which was approved by the CCIT on payment of compounding fee of Rs. 2192/-. However, subsequently, the same was declined on 16.3.2000 vide Annexure P.8. It was urged that Petitioner No. 1 is 75 years of age and has been facing the agony for the last more than 25 years and the default relates to the year 1985 whereas the prosecution itself was filed by way of a complaint on 24.4.1989. The default was for a short period upto maximum of six months for delay in depositing the amount and in such circumstances, Annexure P.8 be quashed and compounding in terms of Annexure P.6 be allowed. Reliance was placed on following judgments:--

"i) The Chairman, Central Board of Direct Taxes, The Chief Commissioner of Income Tax and The Joint Director of Income Tax (Prosecution) Vs. Umayal Ramanathan,

ii) Income Tax Officer Vs. Dr. K. Jagadeesan,

iii) Y.P. Chawla and others Vs. M.P. Tiwari and another, ,

iv) Bee Gee Motors and Tractors and Another Vs. Income Tax Officer, ,

v) Puskar Sharma and Others Vs. Smt. Sudha Mishra,

vi) Vijay Singh Vs. Union of India (UOI) and Another, vii) Commissioner of Income Tax Vs. D. RM. M. SP. SV. A. Annamalai Chettiar,

viii) Anil Tools and Forgings Vs. Chief Commissioner of Income Tax, ."

3. On the other hand, learned counsel for the respondents submitted that the case of the petitioners was not covered by the CBDT instructions and compounding had been rightly declined.

4. After hearing learned counsel for the parties, we find merit in the contentions of learned counsel for the petitioners.

5. It would be expedient to reproduce Sections 276B and 279(2) of the Act, which read thus:--

"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 XVIIB, 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."

"279. Prosecution to be at the instance of Chief Commissioner or Commissioner.

(1) xxxx xx xx xx xx xx xx

(2) Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by the Chief Commissioner or Director General."

Under Section 276B, prosecution can be launched by the revenue where the assessee defaults or there is delay in deposit of tax deducted at source. However, it is evident from section 279(2) of the Act that any offence under Chapter XXII may either before or after the institution of proceedings be compounded by Chief Commissioner or Director General.

6. In the present case, the application of the assessee for compounding under Section 279(2) of the Act was accepted by the CCIT on 29.11.1999 vide Annexure P.6 whereby compounding was accepted on payment of compounding fee of Rs. 2192/-. However, the same was subsequently reviewed on 16.3.2000. It was not disputed by learned counsel for the respondents that the amount of Rs. 4870/- alongwith interest of Rs. 426/- under Section 201(1A) of the Act has already been deposited.

7. The Government of India, Ministry of Finance, Central Board of Direct Taxes has issued instructions dated May 28, 1980 which read thus:--

"The prosecution under section 276B should not normally be proposed when the amount involved and/or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of the Government. No such consideration will, of course, apply to levy of interest under Section 201(1A)."

The amount of default of Rs. 4870/- alongwith interest of Rs. 426/- under Section 201(1A) of the Act stood paid and, therefore, case of the assessee fell within the parameters laid down in the instructions issued by the Board.

8. This Court in Bee Gee Motors and Tractors''s case (supra) wherein the default was of deposit of tax deducted at source amounting to Rs. 9428/-, while quashing the complaint, had recorded as under:--

"3. Mr. Mittal, learned counsel appearing, for the petitioners, vehemently contends that in view of the instructions (annexure ''P-3'') issued by the Government of India, Ministry of Finance, Central Board of Direct Taxes, dated May 28, 1980, the prosecution under Section 276B should not normally be proposed when the amount involved and/or the period of default, is not substantial and the amount in default has also been deposited in the meantime to the credit of the Government. He contends that these instructions are binding and in view thereof, the petitioners are entitled to acquittal and that being so, it shall be an exercise in futility to carry on with the trial, the conclusion and result whereof is obvious.

4. Mr. Sawhney, learned senior standing counsel for the Department, has, however, joined issue with the petitioners'' counsel and contends that the instructions in question cannot possibly replace the provisions of the statute and once the relevant provisions of the statute provide punishment, the Departmental instructions have to give way. He further contends that it is in the discretion of the officer concerned depending upon the facts and circumstances of each case whether the prosecution should be launched or not.

5. Before any comments on the merits of the points canvassed by learned counsel for the petitioners are made, it shall be useful to see the relevant instructions. The same read thus:

"The prosecution under Section 276B should not normally be proposed when the amount involved and/or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of the Government. No such consideration will, of course, apply to levy of interest under Section 201(1A)."

The words "not normally" precede the words "be proposed when the amount involved and/or the period of default is not substantial and the amount has also been deposited in the meantime to the credit of the Government". It is true that the word "normally" does not mean that it is necessary or incumbent upon the authorities concerned so as not to launch proceedings under Section 276B but when the conditions for exempting the assessee from prosecution as spelled out in the instructions are available, in the considered view of this court it will not be open for the authorities then also to have discretion in the matter as otherwise, the authorities concerned may exempt an assessee from prosecution in one set of circumstances and to prosecute another assessee in the same or identical facts. That would undoubtedly be violative of Article 14 of the Constitution of India. The argument of Mr. Sawhney with regard to discretion of the officer concerned can be accepted only to the extent that as to what facts constitute the discretion for launching the prosecution and what facts would entail exemption from prosecution shall always depend upon the facts of each case with regard to the amount involved or the period of default. That is always in the discretion of the authorities concerned which, of course, again is to be used in a judicious manner. In so far as the first contention of Mr. Sawhney that it is the provisions of the statute which shall have precedence and not the instructions is concerned, suffice it to say that the court does not find any inconsistency or contradiction in the relevant provisions of the statute and the instructions quoted above. The relevant provision of the statute no doubt talks of prosecution but the instructions in the considered view of the court provide an exception in limited matters and that too where the conditions precedent in the instructions are available or in existence. Mr. Sawhney relied upon Jagmohan Singh Vs. Income Tax Officer, A-Ward, ; Controller of Estate Duty Vs. Smt. G. Dhanamani, and Kerala Financial Corporation Vs. Commissioner of Income Tax, .

These judgments are for the proposition that where there is conflict between the provisions of the statute and the rules or the rules and the instructions, it is provisions of the statute and the rules that would prevail and not the instructions. There cannot be any quarrel with the proposition as enunciated in the aforementioned judgments. It is no doubt true that the assessee is liable for punishment if he makes a default in deposit of tax. As mentioned above, the instructions deal with the situation in which the Department in its discretion may not launch the prosecution.

Having held that even on the facts and circumstances of this case, it is the discretion of the authorities to apply the instructions quoted above this court would have normally sent this case to the authorities concerned for consideration but the fact that a very insignificant amount of Rs. 9,428/- in one case and an even lesser amount in another case is involved as also that the prosecution came to be launched after a number of years when the default was committed or even from the date when the tax was deposited as also that the matter is pending since 1993 in this court only it will serve no useful purpose in remitting the case to the authorities concerned."

Similar view has been expressed by different High Courts in the judgments relied upon by learned counsel for the petitioners.

9. Ordinarily, the power to compound vests with the authorities under the Act. It will not serve any useful purpose in referring back the matter to the competent authority particularly keeping in view the fact that the very insignificant amount of Rs. 4870/- is involved which also stood paid and even interest under Section 201(1A) of the Act was paid by the assessee. Accordingly, letter dated 14.3.2000 withdrawing the compounding is hereby quashed. As a necessary corollary, the Annexure P.6 whereby the CCIT had agreed for compounding of the offence on payment of compounding fee of Rs. 2192/- shall stand revived. Learned counsel for the petitioners submitted that though the CCIT had determined the compounding fee at Rs. 2192/-, however, the assessee shall deposit an additional amount of Rs. 5000/- to show his bonafides. It is directed that the petitioners shall deposit Rs. 5000/- in addition to the compounding fee of Rs. 2192/- in order to avail the benefit of compounding vide order dated 29.11.1999 (Annexure P.6) passed by CCIT. It has been pointed out by the learned counsel for the petitioners that the complaint filed by the revenue had been decided holding the petitioners guilty under section 276B read with section 278B of the Act and had sentenced petitioner No. 1 to undergo RI for one year and six months and to pay fine of Rs. 4000/- and in default of payment of fine to undergo RI for three months. Further, petitioner No. 2 has also been sentenced for offence under Section 276B read with Section 278B of the Act for which fine of Rs. 4000/- has been imposed. This Court vide order dated 9.8.2000 restrained the appellate court from passing final judgment. In view of our above order, the appellate authority shall pass order on the appeal accordingly in

accordance with law. The petition stands allowed.