(2017) 03 MP CK 0093

MADHYA PRADESH HIGH COURT

Case No: 12192 of 2016

Bhanu Kumar Jain s/o Late Shri Mohan Lal Ji Jain		APPELLANT
	Vs	
The State of Madhya Pradesh & Ors.		RESPONDENT

Date of Decision: March 27, 2017

Acts Referred:

- Code of Criminal Procedure, 1973, Section 482 - Saving of inherent powers of High Court
- Income Tax Act, 1961, Section 200, Section 200, <a href=15

Hon'ble Judges: Rajeev Kumar Dubey

Bench: Division Bench

Advocate: Nitin Singh Bhati

Final Decision: Dismissed

Judgement

1. Heard.

2. This petition has been filed under Section 482 of Cr.P.C. for quashing of Cri.Complaint No.7/2013 pending before ACJM, Indore for the offences under Section 279(1) of Income Tax Act, 1961 (hereinafter referred to as The Act).

3. Brief facts of the case are that non-applicant filed a complaint against applicants before ACJM, Indore alleging that applicant No.1 is the Director and applicant No.2 is the company. For the financial year 2008-2009 the accused company deducted tax at source amounting to Rs.1,90,956/. As per provisions of Section 200 of Income-tax Act, 1961 the accused No.1 was required to pay the sum so deducted to the credit of the Central Government within the prescribed time. Under Rule 30 of the

Income-tax Rules, 1962 the time limit prescribed for payment of this tax to the credit of Central Government is one week from the last day of the month in which the deduction is made. The tax was deducted during the Fourth quarter of the financial year 2008-2009. Therefore, the accused No.1 was required to make payment of the tax which was deducted to the credit of Central Government upto the 7 th day of very next month. However, the accused No.1 did not deposit this tax to the credit of Central government within the prescribed time. So cognizance be taken against applicants under Section 276B of "The Act". On that complaint learned ACJM after taking cognizance against the applicants for the offence under Section 276B of "The Act" issued notice to the applicants and after appearance of the applicants in the complaint, recorded the evidence before charge and after that on the basis of allegation of complaint and before charge by order dated 13.3.2016 observing that from the complaint prima facie charge under Section 276B of the Income-tax Act is made out against the applicants framed charge against them for the aforesaid offence. Being aggrieved by the same applicants filed Cri.Rev.No.288/2016 which was also dismissed by 5th Addl.Sessions Judge, Indore. By order dated 29.7.2016 Being aggrieved from the order applicants filed this petition.

4. Learned counsel for the applicants submitted that in lieu of obtaining franchise from F2 Fun-n-Fitness (I) Pvt.Ltd. (Master franchisee of Gold"s Gym in India) a payment was made to it on 4th April, 2008 in the sum of Rs.16,85,400/- (Rs.15,00,000/- plus service tax of Rs.1,85,400/-) vide cheque No.054076 drawn on Canara Bank Khajrana Main Road, Indore. The cheque got cleared from the bank account of the company on 7th April, 2008 as duly reflected in its bank statement. While making the said payment towards franchisee agreement the company and its Directors did not deduct tax at source (TDS), considering it as a capital expenditure. When the Auditor brought it to the knowledge of the Board of Directors of the company about applicability of TDS provisions applicant/company deducted TDS on this franchisee payments and deposited the same. The company complied with TDS provisions and deposited the TDS amount. Quarterly e-TDS statement of Q4 of 2008-2009 was filed on 28 th May, 2009 incorporating the impugned payment. Under the said Q4 e-TDS return, total amount paid was Rs.37,97624/- and total TDS (deducted and deposited) Rs.3,48,299/-. It is not the case that the company has evaded the TDS or failed deliberately to comply with the TDS provisions.

5. Learned counsel for the applicants further submitted that the non-applicant filed complaint against the applicants presuming that applicants had deducted TDS and did not deposit the same within prescribed period. But applicants did not deduct the TDS so no question of depositing the TDS within stipulated period arises. Learned trial Court wrongly registered the complaint against the applicants. The provisions of Section 276-B of the Act are only attracted when person deducted TDS but did not deposit within stipulated period while in the applicant"s" case they did not deduct the TDS, so no question of depositing the TDS within stipulated period arises . Not

deducting TDS is not an offence. Learned trial Court without appreciating the fact wrongly registered complaint against the applicants and wrongly framed charge against the applicants for the offence under Section 276-B of the Act.

6. In this regard he placed reliance on the judgment of this Court in the case of Narendra Kumar Khandelwal Vs Union of India, reported in 2003(1) MPHT 445 in which this Court held that before amendment failure to deduct TDS was an offence - after amendment, if a person deducted TDS but did not pay tax then it was offence - provision of Section 276-B omitted - judgment was delivered by trial Court on 12.4.1996 - on that date not deducting and not deposit - TDS was not offence and for this only penalty was prescribed - hence applicants could not be held guilty. He also placed reliance on Bombay High Court judgement A.Shenoy and Company Vs N.D.Kadma (Bombay) reported in 2007(6) Mh.LJ 211,

7. Although from the above pronouncement it is clear that after amendment in section 297 of "The act" The provisions of Section 276-B of "The Act" are only attracted when person deducted TDS but did not deposit it within stipulated period. Not deducting TDS is not an offence.But in the complaint it is also mentioned that the accused No.1 after deducting the tax did not deposit the same to the credit of Central government within the stipulated period.Whether applicants deposited the tax after deducting it within stipulated period or not requires evidence to decide and can not be decided at this stage because applicant filed this petition against the order of framing charge against them. That order was passed by the trial court on the basis of averment of complaint and evidence before charge.It appears from the record that before charge non applicant produced only one witness Ajay Tiwari PW1 whose statement is unchallenged. Applicants did not challenge his statement during before charge evidence. Even in para 8 of the complaint it is mentioned that applicant no. 1 deducted the tax at source amounting it to be Rs. 26040/- u/S 201(1) of "The Act" and Rs. 11,269/- u/S201(1A) of "The Act" as Tax and interest respectively and had not deposited it till 14/12/11.So at this stage, it can not be said that no offence is made out against accused from complaint or that learned A.C.J.M. committed mistake in framing charge against applicant.Hence the complaint can not be quashed at this stage.

8. Thus, the petition is dismissed. Applicant is free to raise his all objections before trial court at appropriate stage.