VINAR AND CO. AND ANOTHER Vs Income Tax OFFICER AND OTHERS.

Court: Calcutta High Court

Date of Decision: Aug. 17, 1990

Acts Referred: Income Tax Act, 1961 â€" Section 194A, 276B

Citation: (1992) 193 ITR 300 : (1992) 65 TAXMAN 338

Hon'ble Judges: Shyamal Kumar Sen, J

Bench: Division Bench

Judgement

SHYAMAL KUMAR SEN J. - It is the contention of the writ petitioners that, until the death of its partner, Sri. H. P. Nevatia, on October 15,

1977, the business and the accounts of petitioner No. 1 firm were solely looked after and maintained by and under the instructions of the said Sri.

H. P. Nevatia. Other partners of the said firm did not at any time have any significant participation in the activities of petitioner No. 1. Petitioner

No. 1, at all material times, maintained and still maintains its accounts in accordance with the mercantile system of accountancy. This application

relates to purported criminal proceedings sought to be initiated by respondent No. 1 against the petitioners for alleged failure to pay the tax

deducted at source u/s 194A of the said Act within time, u/s 276B of the said Act, for the assessment years 1970-71 to 1976-77. The previous

years of petitioner No. 1 were the relevant financial years. During the course of its business, petitioner No. 1 raised and/or received loans and/or

advances from different persons on interest. The accounts of the said creditors in the books of petitioner No. 1 used to be credited with the

amount of accrued interest in every accounting year on the basis of the mercantile system of accountancy. On such credit for interest made in the

accounts of the creditors, the petitioner-firm was required to deduct Income Tax at source u/s 194A of the said Act at the rate prescribed therein.

In accordance with the mercantile system of accountancy, simultaneously with the crediting of interest to the accounts of the creditors, the

petitioner-firm used to credit the Central Government with the amount of tax notionally deducted at source thereon every accounting year. The

petitioner-firm was always in financial stringency. The balance-sheet of the petitioner-firm always showed debit balance in the capital accounts of

its partners. In the premises, the petitioner-firm, as and when liquid funds were available with it, used to pay the tax deducted at source u/s 194A

of the said Act to the Central Government as follows :

Details of tax deducted at source on interest payable to creditors.

Assessment Name of the creditor Amount of TDS Date of Tax paid

year interest Amount deductionof on

credited in tax credited

the account

Rs. P. Rs. P.

1970-71 Hindusthan Sugar 1,76,319.00 35,264.00 31-03-70 29-01-

Mills Ltd. 73

1971-72 do. 91,763.84 18,352.75 31-08-70 29-01-

73

(BOM)bay Oxygen 39,876.79 7,975.40 30-12-70 29-01-

Corpn. Ltd. 73

1972-73 Hindusthan Sugar 61,035.85 12,207.00 31-03-72 27-08-

Mills Ltd. 74

Auto Centre 10,551.50 1,055.00 30-06-71 27-08-

74

29,550.56 2,955.00 31-03-72 27-08-

74

1973-74 Hindusthan Sugar 24,821.00 5,252.00 31-03-74 14-08-

Mills Ltd. 75

Arvind and Co. 46,005.90 4,601.00 31-12-73 14-08-

75

do. 11,991.59 1,199.00 31-03-74 14-08-

75

1975-76 Hindusthan Sugar 8,141.92 1,709.82 31-07-74 22-04-

Mills Ltd. 76

do 18,247.24 3,831.92 31-03-92 22-04-

76

In the accounting year relevant to the assessment year 1976-77, Messrs. Hindustan Sugar Mills Ltd., by a letter, informed the said firm that, on

and from April 1, 1975, no interest is chargeable on their loan. In the premises, the said firm, although initially credited interest on the said account

for the said accounting year, later on, after the receipt of the said letter, wrote back the interest credited and thus filed a revised return under the

said Act and, therefore, no tax was deductible at source for the said assessment year 1976-77. The amount of tax required to be deducted at

source on interest payable u/s 194A of the said Act could not be deposited or paid to the credit of Central Government within the time specified in

rule 30 of the Income Tax Rules, 1962, i.e., within two months from the date of such credit due to paucity of funds. The accounts of the creditors

used to be credited with accrued interest thereon under the mercantile system of accountancy whereas the tax deducted at source thereon could be

paid only on the basis of cash funds available with the petitioner-firm. As and when the said cash funds were available, the petitioner-firm duly paid

the said tax deducted at source. In the premises, the petitioners submitted that the delay in depositing the tax deducted at source was due to the

difference in the mercantile system of accountancy and payments being made on cash basis as and when liquid funds were available. In the

premises, the petitioners alleged that there was a reasonable and bona fide cause for the delay in depositing the tax deducted at source on the said

interest which was created to the accounts of the creditors in the mercantile system of accountancy. The said delay was bona fide. For the

assessment years 1970-71 up to 1976-77, the petitioner-firm filed its returns on January 1, 1971, March 9, 1972, December 4, 1972, January

13, 1975, January 31, 1975, June 6, 1976 and March 30, 1977, respectively. Particulars of tax required to be deducted at source u/s 194A of

the said Act and credited to the Central Government were duly furnished by the petitioner-firm to the said Income Tax Officer, G-Ward District V

(1), Calcutta, and/or respondent No. 1 herein in the course of the assessment proceedings for the relevant assessment year under the said Act. The

said Income Tax Officers were also furnished with the particulars of the payments of the said tax deducted at source by the petitioner-firm for the

aforesaid years u/s 194A of the said Act in the course of the relevant assessment proceedings. In the premises, the petitioners alleged that the said

Income Tax Officers were all along aware of the said particulars and details regarding the deduction or regarding the crediting of the accounts of

the creditors with accrued interest every year and the tax required to be deducted at source thereon and the dates of payment of such tax by the

petitioner-firm for the said assessment years 1970-71 to 1976-77. The petitioner-firm was assessed under the said Act by orders of assessment

dated March 17, 1973, April 8, 1974, December 2, 1974, August 22, 1975, March 10, 1976, May 28, 1977, and March 31, 1979,

respectively. The assessments for the assessment years 1970-71 and 1976-77 were made afresh by orders dated May 28, 1977, and July 1,

1983 respectively. It has also been alleged that respondent No. 1 was duly satisfied as regards the reason for the delay in payment of the tax

required to be deducted at source on the accrued amount of interest credited to the accounts of the creditors in the mercantile system of

accountancy and, therefore, respondent No. 1 did not at any time initiate any proceeding or pass any order imposing penalty u/s 221 read with

201 (1) of the said Act for any of the aforesaid assessment years. In the course of the said assessment proceedings, respondent No. 1 also did not

charge any interest whatsoever u/s 201 (1A) of the said Act. Thereafter, all of a sudden, petitioner No. 1 received on December 7, 1983, a bunch

of orders all dated July 1, 1983, for the assessment years from 1968-69 to 1976-77 imposing interest u/s 201 (1A) of the said Act on the said

firm. Petitioners further state that all the said orders were passed on one day, i.e., July 1, 1983, for several years at a time. The order for the

assessment year 1968-69 has been made after 14 years and the order for the last assessment year, i.e., 1976-77, has been made after 6 years

from the end of the relevant assessment year. By the said several orders u/s 201 (1A) of the said Act, all dated July 1, 1983, respondent No. 1,

for the assessment years from 1968-69 to 1976-77, sought to levy and demand interest for delayed payment of tax deducted at source. It has

been submitted that there is no reason whatsoever before respondent No. 1 for the aforesaid inordinate delay in passing the said order. All the

relevant information relating to deduction of the tax at source and payment thereof were furnished by the petitioner-firm to the said respondent No.

1 in the course of the assessment proceedings and the said firm had also explained to the said respondent the reasons for the delayed payment. In

the circumstances, the petitioners all along, bona fide and reasonably, believed that the said firm was not liable to pay any interest u/s 201 (1A) of

the said Act. After a lapse of 14 years, it was not reasonably possible for the petitioners to recollect the circumstances which caused delay in

payment of the tax deducted at source. No opportunity of being heard was given before passing the said orders dated July 1, 1983. In the

premises, passing of the said orders all dated July 1, 1983, beyond reasonable time extending from 6 years to 14 years and exercise of such

powers was not bona fide and was an abuse of power and not reasonable and could not be sustained in law. The delay in passing the said orders

u/s 201 (1A) of the said Act could not be attributable to the petitioners and there is and could not be any explanation for the said delay on the part

of the said respondent No. 1. It has been submitted that the said orders all dated July 1, 1983, made u/s 201 (1A) of the said Act are bad in law

without and/or in excess of jurisdiction and authority of law. Being aggrieved by the said orders all dated July 1, 1983, u/s 201 (1A) of the said

Act, the said firm preferred appeals before the Appellate Assistant Commissioner of Income Tax, Range VI, Calcutta, on the ground, inter alia

that, before passing the said order, the Income Tax Officer did not give the petitioners any opportunity of being heard in the matter and exercise of

power u/s 201 (1A) of the said Act by respondent No. 1 in the instant case had not been made within a reasonable time and the imposition of

interest u/s 201 (1A) of the said Act for the aforesaid periods was wholly unreasonable, unjust and improper, illegal and unsustainable and there

was sufficient reason for the delayed payment. The Appellate Assistant Commissioner of Income Tax, Range VI, Calcutta, by a consolidated

appellate order dated September 27, 1985, dismissed all the said appeals. The said firm preferred appeals from the said appellate order dated

September 27, 1985, before the Income Tax Appellate Tribunal, Calcutta, which are still pending. One of the grounds of appeal therein is that

there was a reasonable cause for the delay in payment of the tax deducted at source and that no interest is leviable u/s 201 (1A) of the said Act.

The said issue, therefore, is sub-judice. On December 8, 1986, seven show-cause notices all dated November 20, 1986, were received from

respondent No. 1 for the assessment years 1970-71 to 1976-77 directing the said petitioner-firm to show cause why prosecution u/s 276B of the

said Act should not be initiated against the said petitioner-firm for failure to pay the tax deducted at source u/s 194A of the said Act read with

section 200 of the said Act within the stipulated time as per rule 30 of the Income Tax Rules, 1962. The petitioners thereafter by letters dated

December 17, 1986, and December 22, 1986, requested the said respondent No. 1 to allow some time to the petitioners to reply in the matter.

Copies of the said seven show-cause notices u/s 276B of the said Act all dated November 20, 1986, and the said letter dated December 17,

1986, and December 22, 1986, have been annexed and collectively marked with the letter ""A"" to the writ petition. Similar notices all dated

December 1, 1986, issued by respondent No. 1 for the assessment years 1970-71 to 1976-77 were also received by petitioner No. 2 to show

cause why prosecution u/s 276B (ii) should not be initiated. In this writ petition, the petitioners have challenged all the aforesaid show-cause

notices.

No affidavit in opposition has been filed disputing the aforesaid allegations and, as such, the allegations contained in the petition remain

uncontroverted.

It has been submitted on behalf of the writ petitioners that the alleged dues have all been paid although the said payments may have been delayed.

It is the contention of the petitioners that, because of delayed payment of tax, there cannot be any criminal liability for prosecution. Moreover, both

the firm and the partners cannot be prosecuted. If there be any liability at all, the same is for penalty and interest. But the Tribunal has quashed the

proceedings for interest initiated by the authority concerned and no penalty proceeding has yet been initiated.

In the instant petition, the petitioners challenged the said show-cause notices on various grounds. It was submitted that the said show-cause notices

were issued under a misconceived notion of law and moreover the said notices were issued after a long lapse of 10/15 years. The learned

advocate for the respondent, however, submitted that it was open to the petitioners to give reply to the show-cause notices and, in case the

petitioners still give reply to the show-cause notices, they will be duly considered and disposal of in accordance with law. Accordingly, after

hearing the respective submissions of the parties on December 13, 1988, an order was passed by me directing the respondents-authorities to

consider the representations of the petitioners which would be submitted within a week from date. It was also provided in the said order that the

authorities would give a hearing to the writ petitioners and would dispose of such representations within four weeks after the date of receipt of such

representations. The authorities were further directed to pass a speaking order.

Pursuant to the said order dated December 13, 1988, a written representation was submitted on behalf of the petitioners on December 19, 1988.

Thereafter, on February 16, 1989, the said representation was considered by the Income Tax Officer, Ward-IV (7), Calcutta, and the writ

petitioners were duly given hearing. On February 17, 1989, the Income Tax Officer passed an order rejecting the contentions of the writ

petitioners. There after, on September 15, 1989, the following order was passed :

Leave is granted to the writ petitioner to file supplementary affidavit challenging the order dated February 17, 1989. Such affidavit to be filed by

September 27, 1989. A/O if any by November 23, 1989. Matter be treated as part heard. Liberty to mention.

Accordingly, the petitioners filed a supplementary affidavit challenging the said order. No affidavit-in-opposition, however, has been filed by the

respondent dealing with the said supplementary affidavit.

It is the contention of the writ petitioners that the said finding of the Income Tax Officer is perverse and there is an error apparent on the said

finding for which the said finding should be set aside and the said show-cause notices should be quashed.

Mr. Murarka, learned advocate for the petitioners, submitted that there cannot be any criminal liability for delayed payment. The Income Tax Act

provides for imposition of penalty and interest u/s 201 (1A) of the Income Tax Act. In this connection, he referred to section 271 (1) (a) and

section 276 (c) of the Income Tax Act. He also submitted that, u/s 276B, delay in payment is not an offence. In support of his contention, learned

advocate relied upon the following decisions :

Calcutta Chromotype Pvt. Ltd. Vs. Income Tax Officer and Others, Commissioner of Income Tax (Central) Vs. Anchor Pressing (P.) Ltd., and

Commissioner of Income Tax, Delhi-II Vs. Triveni Engineering Works Ltd.,

It was contended on behalf of the petitioners that, for the assessment years 1970-71 to 1976-77, the provisions of section 276B were not

available and, therefore, a partner of the firm could not be prosecuted for a default of the firm. He also referred to the decision in the case of

Parameet Singh Sawney Vs. Dinesh Verma and Another, In support of his contention as to whether the firm can be prosecuted, Mr. Murarka also

relied upon the following decisions :

Kusum Products Ltd. Vs. S.K. Sinha, ITO, Vijaya Commercial Credit Ltd. Vs. Sixth Income Tax Officer, and D.C. Goel and Others Vs. B.L.

Verma and Others,

He also referred to the judgement and decision in the case of S.M. Badsha Vs. Income Tax Officer, He further submitted that the show-cause

notice issued after such a long lapse of time cannot be held to be valid. In support of his contention, he relied upon a judgement in the case of Amin

Chand and Sons v. State of Punjab, AIR 1965 P&H 441.

Learned advocate for the respondent, on the other hand, contended that rule 30 of the Income Tax Rules provides for the time limit for payment of

taxes deducted which is two months from the date of deduction. In view of the fact that the tax deducted was not paid to the Income Tax

Department within the said period of two months, section 276B of the Income Tax Act, 1961, applies. Learned Advocate also referred to section

194A(4) of the Income Tax Act and the time limit mentioned therein. In this connection, learned advocate also relied upon the judgement and

decision in the case of RISHIKESH BALKISHANDAS AND OTHERS Vs. I. D. MANCHANDA, Income Tax OFFICER, DIST. II(1), D-

BLOCK, NEW DELHI., wherein it was held that the payment of taxes has to be made during the financial year. Learned advocate also relied

upon the judgement and decision in the case of Rayala Corporation P. Ltd. and Another Vs. V.M. Muthuramalingam, Income Tax Officer,

wherein it was held that even in a case of delayed payment of tax already deducted and paid before initiation of proceedings, although not in time,

the Department can take action u/s 276B of the Income Tax Act. Learned advocate, accordingly, submitted that the prosecution u/s 276B of the

Income Tax Act is, therefore, possible and valid even in the case of delayed payments as well. Learned advocate for the respondent further

submitted that the contention of the petitioners to the effect that section 276B of the Income Tax Act, 1961, does not apply in respect of the firm

and that the firm cannot be prosecuted even in case of non-payment of tax deducted at source is not correct. In this connection, learned advocate

for the respondent made the following submissions :

The word person (appearing in section 276B of the Income Tax Act, 1961) has been defined in the Income Tax Act, 1961, in section 2 (31) so as

to include a firm. The first is an assessee u/s 2 (7) of the Income Tax Act, 1961. A partnership-firm as distinguished from a company is not a legal

or juristic entity but it is an amalgamation of individual partners who constitute a firm. Therefore, notices issued to a firm as well as to the managing

partner of the firm to show cause as to why action u/s 276B of the Income Tax Act, 1961, should not be initiated, as in this case, are valid notices.

In the instant case, show-cause notices were issued only against the firm and the managing partner thereof being writ petitioners Nos. 1 and 2

above-named. In this connection, learned advocate for the respondent referred to the decision in the case of RISHIKESH BALKISHANDAS

AND OTHERS Vs. I. D. MANCHANDA, Income Tax OFFICER, DIST. II(1), D-BLOCK, NEW DELHI., and the case of Municipal

Corporation of Delhi v. J. B. Bottling Co. P. Ltd. [1975] Cr. LJ. 1148, in which it was held that proceedings u/s 276B of the Income Tax Act,

1961, can be initiated against a firm. The punishment against the firm may be by way of fine and against the managing partner by way of

imprisonment.

According to learned advocate for the respondent, an individual partner can also be proceeded against u/s 276B of the Income Tax Act, 1961,

and penalty/imprisonment can be imposed. In the instant case, show-cause notices have only been issued against the petitioner-firm (petitioner No.

1) and petitioner No. 2, V. K. Nevatia, as managing partner of the firm, has verified all Income Tax returns of the firm for 1970-71 and 1976-77.

It has been contended that, u/s 276B of the Income Tax Act, 1961, which came into force from October 1, 1975, initiation of proceedings against

the director of a company or a partner of a firm is possible but, in this case, the default has been committed prior to October 1, 1975, and as such

the said amended section 276B will have no application. Such contention, it has been submitted, is not tenable. It has further been submitted that a

company is a juristic entity but a firm is not. In any event, some of the offences have been committed by the petitioners after coming into force of

the amended section, as the default continued until the date of payment (i.e., in case of deduction at source in March, 1975, and payment thereof

being made in April, 1976, the default continued till April, 1976). Learned advocate, in this connection, referred to the judgement and decision in

the case of Jagannath Prasad Jhalani and others Vs. Regional Provident Fund Commissioner (Haryana) and others, It has been submitted that the

default continues and terminates only when the tax deducted is paid.

It has also been submitted that liability u/s 276B is an absolute liability and a partner in charge of affairs/business of the firm is liable in law for the

defaults of the firm. It has also been submitted by learned advocate for the respondent that it is settled law that, by filing a writ petition, criminal

proceedings should not be stopped or prevented unless the said notices are ipso facto mala fide or there is inherent lack of jurisdiction. According

to learned advocate, in the instant case, admittedly, the petitioners have failed to pay taxes deducted at source within time as required u/s 194A of

the Income Tax Act read with rule 30 of the Income Tax Rules although they have paid the said sums later on and thereby an offence u/s 276B has

been committed. In the circumstances, it is apparent that there is no inherent lack of jurisdiction nor any mala fides in the issuance of show-cause

notices and as such the said notices should not be quashed in this writ petition. It has further been submitted that although the writ petitioners have

filed a petition pursuant to the order of this court in reply to the show-cause notices and the concerned officer dealt with the same and passed an

order on February 17, 1989, it is open to the petitioner in case of conviction in the said criminal proceedings, if initiated, to prefer appeal or

revision to this court. It was, accordingly, urged that, in view of the alternative legal remedy available to the petitioners, the writ petition should be

dismissed.

I have considered the respective submissions of the parties and decisions cited from the Bar.

In the case of Vijaya Commercial Credit Ltd. Vs. Sixth Income Tax Officer, it was held that the expression ""person"" as defined u/s 2 (31) is wide

enough to include a company or other juristic person. Having regard to the fact that a sentence of imprisonment has been made compulsory, it

cannot be said that the expression ""person"" has been used in section 276B. In that sense, inasmuch as it is not possible to impose a sentence of

imprisonment on a company, since there is no statutory compulsion to prosecute a company alongside of the officers or persons in charge of and

responsible to the company and such officers or the persons responsible to the company may be prosecuted without prosecuting the company,

criminal proceedings instituted against a company u/s 277 are futile and should be quashed.

In the case of Kusum Products Ltd. Vs. S.K. Sinha, ITO, considering the provision, the Division Bench of the court observed as follows :

That mens are is an essential ingredient of an offence u/s 277 of the Act is clear from the section itself and only an actual person who does any of

the acts indicated therein with a specific knowledge or intent can be made liable. Although, u/s 2 (31) of the Act, the definition of a person is wide

enough to include a company or any juristic person, the word ""person"" could not have been used by Parliament in section 277 of the Act in the

sense given in the definition clause. That this was the intention of Parliament is clear because imprisonment has been made compulsory for an

offence u/s 277 of the Act. A company or a juristic person cannot possibly be sent to prison, and it is not open to a court to impose a sentence of

fine or not award any punishment if the court finds a company guilty under the said section. If the court does so, it would be altering the very

scheme of the Act and usurping the legislative function.

The petitioner-company filed a return of income for the assessment year 1974-75 under the signature of its accountant who was also the

constituted attorney of the company. The Income Tax Officer filed a petition of complaint in the court of the Chief Metropolitan Magistrate against

the company and the accountant, alleging the commission of an offence punishable u/s 277 on the grounds that, in the return, the company had

shown a total profit from its business amounting to Rs. 66,62,114 from which a total deduction amounting to Rs. 12,89,107 was claimed. The

deduction included a sum of Rs. 1,14,212 which was received by the company as interest on advance tax paid for the assessment year 1967-68.

In claiming the deduction, it was stated in the return that it had already been assessed in an earlier year although there was no evidence to show

that the amount had been assessed to tax in any previous year and that when this sum of Rs. 1,14,212 was added to the assessable income in the

final assessment, the company did not prefer any objection to the inclusion of the amount. Therefore, the accused persons had made a false

verification in the return knowing or believing it to be false or not believing it to be true. The petitioner-company filed an application before the High

Court for quashing the proceedings pending against the company in the Court of the Chief Metropolitan Magistrate.

It was held that, as the petitioner-company could not be attributed with the requisite mens rea, its prosecution in the court of the Metropolitan

Magistrate for an offence u/s 277 would tantamount to an abuse of the process of the court. Therefore, the proceedings pending against the

petitioner-company were quashed.

In the case of D.C. Goel and Others Vs. B.L. Verma and Others, it was held by the Delhi High Court that section 276B of the Act provides that a

person failing without reasonable cause or excuse to deduct or after deducting to pay the tax as required by the provisions mentioned therein shall

be punishable with rigorous imprisonment for a term which may extend to six months, and shall also be liable to fine which shall not be less than the

sum calculated at the rate of 15% per annum on the amount of such tax from the date on which such tax was deductible to the date on which such

tax is actually paid. It was also held that a company or a firm being a juridical person is not liable to be prosecuted u/s 276B inasmuch as it could

not have been imprisoned. The provision left no discreation to the court to impose the fine contemplated by it as an alternative to imprisonment for

a term which could extend to six months. A juridical person could not have been imprisoned and could not have been prosecuted for the purpose

of being prosecuted u/s 276B of the Act.

It was further held that where a company and its managing directors are accused of the offences u/s 276D and section 276B, the court cannot

impose a sentence of fine or an alternative sentence of simple imprisonment on both the accused.

In the case of Commissioner of Income Tax (Central) Vs. Anchor Pressing (P.) Ltd., it was held by the Division Bench of the Allahabad High

Court, inter alia, as under (headnote) :

The Companies (Profits) Surtax Act, 1964, envisages a levy of surtax on the excess profits of companies, other than those which have no share

capital over and above a certain figure. Such a company has to file its return for purposes of assessment to Income Tax under sub-section (1) or

sub-section (2) of section 139 of the Income Tax Act, 1961, as the case may be. u/s 271 (1) (a) of the Income Tax Act, 1961, penalty is leviable

on the failure, without reasonable cause, to furnish a return of total income under sub-section (1) of section 139 or by notice given under sub-

section (2) of section 139 or section 148 or within the time allowed and in the manner required by sub-section (1) of section 139 or by such

notice, as the case may be. Under the Wealth-tax Act, 1957, also, for failure to furnish a return under sub-section (1) of section 14 as required or

under sub-section (2) of section 14, if notice is given, penalty is provided for in section 17 of that Act. In section 9 of the Companies (Profits)

Surtax Act, 1964, however, the levy of penalty has been provided only for failure to furnish a return, without reasonable cause, as required u/s 5 of

the Companies (Profits) Surtax Act, 1964. It does not include the failure to furnish the return within the time allowed and in the manner prescribed

under sub-section (1) of section 5 or within the time allowed in the notice issued under sub-section (2) of section 5. It envisages a levy of penalty

only for the failure to furnish a return as required u/s 5. If no return has been filed as stipulated under sub-section (1) or within the time given by the

notice issued under sub-section (2) of section 5 but is filed under sub-section (3) of section 5, before the assessment is made, there will be no

default.

If an assessee filed a return under sub-section (3) of section 5 of the Companies (Profits) Surtax Act, 1964, it would also be a return ""required"" by

the provision. Simply because the words ""required"" does not occur in sub-section (3) it does not mean that it is only an enabling provision. The

word ""required"", therefore, does not necessarily mean an imperative or authoritative demand to file the return. It can be equated with ""authorised

as well. In sub-section (3) of section 5, therefore, if a company liable to tax under the Surtax Act has not furnished a return during the time allowed

under sub-section (1) or sub-section (2) of section 5, it may furnish a return at any time before the assessment is made. Therefore, section 9

provides for a levy of penalty only on failure to furnish the return required u/s 5 and not for the default in the filing of the return within the time

allowed under sub-section (1) of section 5 or by notice under sub-section (2) of section 5.

Moreover, u/s 9 of the Surtax Act, 1964, the penalty is leviable of a sum not exceeding the amount of surtax while for a default u/s 271 (1) (a) of

the Income Tax Act, 1961, the penalty leviable is the sum equal to two per cent of the assessed tax for every month during which the default

continued. Further, Chapter XXII of the Income Tax Act, 1961, provides for offences and prosecutions. Failure to furnish returns of income is one

such offence. Similarly, sections 20 to 22 of the Companies (Profit) Surtax Act, 1964, make provision for offences and prosecutions. These

offences are failure to deliver returns, etc., furnishing of false statements and abatement of false returns, etc. Section 20 of the Surtax Act, 1964,

which governs the case of a failure to furnish returns, etc., specifically makes the failure without reasonable cause ""to furnish in due time any return

under sub-section (2) of section 5"", a default. It is, therefore, evident that the legislature intended to penalise only a default in filing the return.

Therefore, looking to the scheme of the Companies (Profits) Surtax Act, 1964, the purpose which it was intended to serve and the clear language

used in the relevant provisions, section 9 of the Surtax Act, 1964, envisages a levy of penalty for the failure to file a return u/s 5 without reasonable

cause and not for the failure to file a return within the time prescribed under sub-section (1) or sub-section (2) of section 5. The Income Tax

Officer is not entitled to impose to penalty on the ground of failure to file a return within the time prescribed under sub-section (1) or sub-section

(2) of section 5 when the return is filed before the assessment is made and the Income Tax Officer accepts it and completes the assessment on the

basis of such a return.

In such case of Commissioner of Income Tax, Delhi-II Vs. Triveni Engineering Works Ltd., which was relied upon by the petitioner, the facts

were, inter alia, that the petitioner had to file a return under the Companies (Profits) Surtax Act, 1964, for the relevant year by September 30,

1969, but it actually filed it on January 31, 1970. The Income Tax Officer rejected the assessees plea that the delay was on account of the fact that

there were no chargeable profits and imposed a penalty of Rs. 1,02,765. The Appellate Assistant Commissioner cancelled the penalty following

the decision of this court in Calcutta Chromotype Pvt. Ltd. Vs. Income Tax Officer and Others, and this was upheld by the Tribunal. On an

application to direct reference, it was held that u/s 9 of the Companies (Profits) Surtax Act, 1964, penalty could be imposed only for the failure to

file the return and not for late filing of the return.

In the case of Calcutta Chromotype Pvt. Ltd. Vs. Income Tax Officer and Others, it was held that the Income Tax Officer is not entitled to

imposed a penalty on an assessee on the ground of failure to file a return under sub-section (1) of section 6 of the Super Profits Tax Act, 1963

(since superseded by the Companies (Profits) Surtax Act, 1964), within the time prescribed under that sub-section, when the return is filed before

the assessment is made, as permitted by sub-section (3) of section 6. There are no specific words in section 10 imposing penalty in such cases as

there are in the corresponding provisions of the Income Tax Act.

In the case of Amin Chand and Sons v. State of Punjab, AIR 1965 P&h 441, levy of damages were imposed up to six years upon an employer

for not making payment in the scheduled time in terms of the Employees Provident Funds Act. It was held that levy of damages not immediately

after default but after allowing accumulation of defaults for years together is arbitrary exercise of discreation.

It may be worthwhile to consider in this connection section 276B of the Income Tax Act, both before and after amendment. Section 276B of the

Income Tax Act originally provided as follows :

If a person, without reasonable cause or excuse, fails to deduct or after deducting, fails to pay the tax required by or under the provisions of sub-

section (9) of section 80E or Chapter XVII-B, he shall be punishable :-

(i) in a case where the amount of tax which he has failed to deduct or pay exceeds one hundred thousand rupees, with rigorous imprisonment for a

term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with

fine.

Section 276B which provides that for failure to deduct and to pay tax as required under the provision of sub-section (9) of section 80E as

punishable was introduced with effect from 1st October, 1975 (sic). The relevant period for alleged was earlier to October 1, 1975, and as such

the said provisions of section 276B cannot be made applicable there to the case of the petitioner. (sic).

It appears to me on a proper construction of section 276B of the Income Tax Act that the word ""person"" referred to in the section does not mean

to include either a partnership firm or any partner thereof and the meaning of the word ""person"" in section 2 (31) of the said Act has no application

to section 276B of the said Act. In this connection, I take note of the judgment and decision of the Supreme Court in the case of Kapurchand

Shrimal Vs. Tax Recovery Officer, Hyderabad and Others, of the said report, the Supreme Court observed as follows :

Section 276, 276A, 277 and 278 on which reliance was placed by counsel for the Revenue in support of his argument also do not assist him.

These section occur in a chapter relating to penalties, and they seek to penalise failure to carry out specific provisions mentioned therein. We are

unable to hold the expression person in sections 276, 276A and 277 is used in the sense in which it is defined in section 2 (31) of the Act. For

each specific act which is deemed to be an offence under those provisions, an individual who without reasonable cause or excuse fails to do the

acts prescribed by statute or act in a manner contrary to the statute or makes a declaration on oath which he believed to be false or does not

believe to be true, is made liable to be punished. Section 278 penalises the abetment or inducing any person to make and deliver an account,

statement or declaration relating to any income chargeable to tax which is false and which he either knows to be false or does not believe to be

true. In the context in which the expression person occurs in sections 276, 276A, 277 and 278, there can be no doubt that it seeks to penalise only

those individuals who fail to carry out the duty cast by the specific provisions of the statute, or are otherwise responsible for the acts done. For the

default of the Hindu undivided family, therefore, in payment of tax, the karta cannot be arrested and detained in prison.

The High Court, we think, took a somewhat technical view in declining to allow the contention raised by the appellant in the first writ petition

presented before the High Court that he was not liable to be arrested and imprisoned for non-payment of the tax arrears, since he was not an

assessee, and then in treating the judgment of the High Court in the first writ petition as operating constructively as res judicata in the second

petition.

Section 276B of the Income Tax Act, as originally provided, has been substituted by a subsequent amendment to the following effect :

Amended section 276B. - ""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 XVII-B, 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.

It appears to me that there is no provision in the Income Tax Act imposing criminal liability for delay in deduction or for non-payment in time. u/s

276B, delay in payment of Income Tax is not an offence. There is, however, provision for penalty as a consequence of failuar to deduct or pay u/s

201 (1) of the Income Tax Act. Section 200 of the Income Tax Act provides as follows :

Any person deducting any sum in accordance with the provisions of section 192 to 194, section 194A, section 194B, section 194C, section

194D and section 195 shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.

Section 201 provides as follows :

If any such person and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not

deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he

or it may incur, be deemed to be an assessee in default in respect of the tax :

Provided that no penalty shall be charged u/s 221 from such person, principal officer or company unless the Assessing Officer is satisfied that

person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

Prior to the insertion of section 278B, a partner of a partnership firm could not be prosecuted u/s 276B of the Act. In the case of RISHIKESH

BALKISHANDAS AND OTHERS Vs. I. D. MANCHANDA, Income Tax OFFICER, DIST. II(1), D-BLOCK, NEW DELHI., it was held

that a firm, though a legal entity for purpose of tax laws, is liable to be prosecuted section 276B of the Income Tax Act, 1961, for failure to deduct

tax at source from interest paid or credited even though the section provides a minimum punishment of imprisonment. In the case of conviction,

sentence of fine only can imposed on a firm. It was also held by the learned single judge of the Delhi High Court in the aforesaid decision that

section 194A of the Income Tax Act, 1961, which requires the person making any payment of interest to deduct the tax at the rates in force an

absolute liability and, an offence u/s 276B read with section 194A of deficient deduction or non-deduction which is a conscious act, mens rea is

not required for constituting such an offence. The learned single came to the aforesaid conclusion relying upon the decision of the Supreme Court in

the case of State of Maharashtra v. Mayor Hans George [1965] 35 Comp Cas 557 . The decision in the case of Kapurchand Shrimal Vs. Tax

Recovery Officer, Hyderabad and Others, was not considered in the aforesaid decision by the Delhi High Court probably because the courts

attention was not drawn to the said decision and as such the principles decided in that decision of the Delhi High Court cannot have binding effect.

It may be noted that subsequently, the Delhi High Court, in the case of Parameet Singh Sawney Vs. Dinesh Verma and Another, after considering

the provisions of section 276B and section 278B, held that partners of a firm could not be prosecuted. A SLP of the Department against the said

aforesaid decision was rejected by the Supreme Court as appears from [1988] 171 ITR 257 . It appears to me that the provisions of section

276B of the said Act cannot have ex post facto application and, therefore, the partner of a firm could not be prosecuted. There is no justifiable

cause shown for such unreasonable delay in issuing the aforesaid show-cause notices. The order dated February 17, 1989, also does not furnish

any explanation for the delay. Although the Income Tax Act did not prescribe any limitation for initiating the proceedings, it is well settled by

numerous judicial decisions already noted that such proceedings have to be initiated within a reasonable time and a lapse of 10 to 16 years could

not be said to be reasonable and initiation of proceedings after a lapse of such a long time would be contrary to public and abuse of process of law

for the obvious reason that, after lapse of such a long time, the evidence, facts and other materials could not be available. Therefore, proper justice

could not be rendered. Therefore, such delayed proceedings should not be allowed. It is also a well established principle of criminal law that,

without mens rea, there cannot be criminal liability. The payments in this case have all been duly made although such amounts were deducted out of

time. But no mens rea could have been proved or established. It may be noted that a partnership firm is not natural person and, therefore, cannot

be prosecuted u/s 276B of the Act inasmuch as punishment by way of imprisonment is compulsory thereunder during the relevant year. In the

instant case the essential ingredient of an offence u/s 276B of the Act is wholly absent. The judgment and decision in the case of Kusum Products

Ltd. Vs. S.K. Sinha, ITO, and the case of Adding Machines (India) Private Limited Vs. The State, may be taken note of. The order dated

February 17, 1989, passed by the Income Tax Officer did not consider or dispute the explanation given by the petitioner for the delay in

depositing the tax.

In the case of Adding Machines (India) Private Limited Vs. The State, it was held by the learned single judge of this court that though the word

person"" as defined in section 2 (31) of the Income Tax Act, 1961, includes a company, a company cannot be prosecuted for an offence u/s 276B

because a company cannot be committed to prison. However, the principal officer of a company can be prosecuted for as offence punishable u/s

276B and in case he is found guilty, he has to suffer imprisonment but only for the offence committed by himself and not for any offence committed

by the company.

In the case of Parameet Singh Sawney Vs. Dinesh Verma and Another, the facts, inter alia, are that the petitioner (including a person who was a

minor at the time of the alleged offence) who were partners of a firm, were charged, along with the firm, for the failure to deduct Income Tax at

source from interest paid by the firm to certain parties and deposit it within time. The failure related to the accounting years 1970-71 and 1973-74,

when the minor was 6 and 9 years of age respectively. The prosecution was actually initiated on March 29, 1984. The petitioners, i.e., the

partners, applied to the High Court u/s 482 of the Code of Criminal Procedure, 1898, for having the prosecution quashed. It was held by the Delhi

High Court that the prosecution ought to be quashed for two reasons : firstly, because, prior to section 278B of the Income Tax Act, 1961,

coming into force, i.e., on October 1, 1975, the firm alone could have been proceeded against and the partners could not be prosecuted.

Secondly, it was held that there was non-application of mind because even a six-year old boy was, according to the complaint, in charge and

responsible for the conduct of the firms business. As already noted, the SLP against the said judgment stands dismissed.

In the instant case, it appears from the order dated February 17, 1989, passed by Income Tax Officer, Ward 4 (7), Calcutta, that the first show-

cause notice contemplating prosecution was issued on November 8, 1976, for the assessment years 1968-69 to 1974-75. Relevant portion of the

said order in this connection is set out hereinbelow :

Next issue raised by the assessee was that proceedings for launching prosecution have been initiated after more than 10 to 16 years and that there

was no lawful justification for initiating such proceedings after such a long lapse of time. Firstly, in this regard, I have to state that there is no

question of any limitation for launching of prosecution under the Income Tax Act. The last payment was made as late as on April 22, 1976 and the

first show-cause notice contemplating prosecution was issued as far back as on November 8, 1976, for the assessment years 1968-69 to 1974-

75. Hence, the assessees contention in this regard is not accepted.

It has been submitted by learned advocate for the petitioner that as no steps were taken pursuant to the aforesaid show-cause notice the

proceedings relating therein were ultimately dropped or lapsed. It appears to me that once a show-cause notice was already issued which was not

given effect to ultimately, there is no reason again to issue a fresh show-cause notice on the same cause of action and the fresh show-cause notice

issued for the same assessment year on the same ground after 10 years cannot have any basis whatsoever.

For the reasons aforesaid, the petitioners succeed in this writ petition.

Accordingly, the rule issued herein should be made absolute and the impugned show-cause notices dated November 20, 1986, and December 1,

1986, and also the order dated February 17, 1989, passed by the Income- tax Officer, Ward 4 (7), Calcutta, stand quashed and set aside and

appropriate writ of mandamus to issue accordingly. There will be no order as to costs.