

IN THE HIGH COURT OF DELHI: NEW DELHI

+ Crl. L.P. 85/2010, Crl. L.P. 86/2010

Crl. L.P. 87/2010, Crl. L.P. 88/2010

Crl. L.P. 89/2010, Crl. L.P. 90/2010

Crl. L.P. 91/2010, Crl. L.P. 92/2010

Crl. L.P. 93/2010

% Judgment decided on: 11th November, 2010

INCOME TAX OFFICER

.....Petitioner

Through: Ms.Sonia Mathur,
Sr.Standing Counsel with
Mr.Pankaj Prasad, Junior
Standing Counsel & Mr.Rajat
Soni, Adv. with
Mr.H.P.Thakur, Inspector-IT
Department.

Versus

M/S DELHI IRON WORKS (P) LTD. & ORS.Respondents

Through: Mr. Harsh Pandey, Adv.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether the Reporters of local papers
may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be
reported in the Digest? | Yes |

A.K. PATHAK, J. (Oral)

1. By the above petitions, petitioner seeks leave to appeal against the judgment dated 8th September, 2009 passed by Additional Chief Metropolitan Magistrate (ACMM), Delhi

whereby respondent no. 3 i.e. director of the respondent no.1, has been acquitted of the offence under Section 276-B of the Income Tax Act, 1961 (for short hereinafter referred to as “the Act”).

2. These petitions are disposed of together as not only the parties but the facts and the questions of law involved therein are same.

3. Briefly stated, facts of the case are that the petitioner had filed complaints before the ACMM praying therein that the respondent be summoned, tried and punished under Section 276-B of the Act. It was alleged that the respondent no. 1 was a private limited company; while respondent No. 3 was its Director and “Principal Officer” and was responsible for managing the day-to-day affairs of the company. Respondents had failed to deduct the tax at source (TDS) from the interest paid to M/s Bhanamal & Co. (P) Ltd., M/s Banwari Lal & Sons (P) Ltd. and M/s Bhanamal Gulzari Mal (P) Ltd., and deposit the same with the Income Tax Department, within the prescribed period, thus, had committed offence punishable under Section 276-B of the Act. Respondent no. 3 was impleaded as an accused being “principal officer” of the company within the meaning of Section 2(35) of the Act.

4. Charge under Section 276-B IPC was framed against the respondents to which they pleaded not guilty and claimed

trial.

5. After holding trial, while respondent no. 1 was convicted under Section 276-B of the Act, respondent no. 3 has been acquitted on the ground that no notice was served on him under Section 2(35) of the Act treating him as “principal officer”, before launching the prosecution under Section 276-B of the Act, inasmuch as, the notice issued to the company was defective in the sense it was not mentioned therein, that the department intended to treat the directors of the company as “principal officers”. Respondent no. 3 has been acquitted for the non compliance of Section 2(35) of the Act.

6. For the discussions made hereinafter, I do not find the view taken by ACMM to be perverse or suffering from any manifest error, necessitating the grant of leave to appeal to petitioner.

7. Section 194-A of the Act mandates the deduction of tax at source on the credit or payment of interest other than “interest on securities”. Section 194-A (4) uses the expression “the person responsible for making the payment”. Section 204 of the Act defines the expression “person responsible for paying”. Relevant would it be to refer to Section 204 of the Act, which reads as under :-

“Section 204: Meaning of "Person responsible for paying"-

For the purposes of sections 192 to 194, section 194A, section 194B, section 194BB, section 194C, section 194D, section 194E, section 194EE, section 194F, section 194G, section 194H, section 194-I, section 194J and section 194K, 194L sections 195 to 203 and section 285, the expression "person responsible for paying" means –

(i) In the case of payment of income chargeable under the head "Salaries" other than payments by the Central Government or the Government of a State, the employer himself or, if the employer is a company, the company itself, including the principal officer thereof;

(ii) In the case of payments of income chargeable under the head "Interest on securities" other than payments made by or on behalf of the Central Government or the Government of a State, the local authority, corporation or company, including the principal officer thereof;

(iia) In the case of any sum payable to a non-resident Indian, being any sum representing consideration for the transfer by him of any foreign exchange asset, which is not a short-term capital asset, the authorised dealer responsible for remitting such sum to the non-resident Indian or for crediting such sum to his Non-resident (External) Account maintained in accordance with the Foreign Exchange Regulation Act, 1973 (46 of 1973), and any rules made thereunder;

(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.”

8. Perusal of Section 204 (iii) clearly shows that in case of a company, the company itself, including the principal officer

thereof, would be responsible to deduct the tax at source and deposit it with the department.

9. Infringement of Section 194-A (4) is an offence punishable under Section 276-B of the Act. In case an offence is committed by a company, the prosecution for the offence under Section 276-B has to be launched against the company itself and its principal officer.

10. Section 2(35) of the Act defines the expression “principal officer”. Relevant it would be to refer to Section 2 (35) herein which reads as under :-

“(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-

(a) the secretary, treasurer, manager or agent of the authority, company or association, or body, or

(b) 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;”

11. A perusal of the aforesaid provision clearly shows that the director is not included within the ambit of Sub-clause (a) of Section 2(35) of the Act. In case the Income Tax Officer seeks to prosecute the director along with the company for an offence punishable under Section 276-B of the Act, then he has to issue a notice under Sub-clause (b) of 2(35) of the Act

expressing his intention to treat the director as “principal officer” of the company.

12. In this case, admittedly, no notice, as was required under Section 2 (35) of the Act, had been issued to respondent no.3. Only a show cause notice was issued to the company wherein it was not mentioned that Assessing Officer intended to treat the director of the company as “principal officer” for the purpose of launching prosecution under Section 276-B of the Act.

13. In **Greatway (P) Ltd. & Ors. Vs. Asstt. CIT [1993] 199 ITR 391(P&H)**, Punjab & Haryana High Court has held that in the absence of appointment of a principal officer by issuing a notice by the AO, the prosecution, if any, could only be launched against the petitioner-company. Similar is the view expressed in **ITO Vs. Roshini Cold Storage (P) Ltd. and Ors. (2000) 245 ITR 322 (Mad)**. In this case Madras High Court held that in case Income Tax Officer sought to prosecute the director along with company for an offence under Section 276-B of the Act then it was incumbent upon him to issue a notice under sub-clause (b) of 2(35) of the Act expressing his intention to treat the director as “principal officer” of the company and in absence thereof, director shall be entitled to the acquittal.

14. In **Sushil Suri and Ors. Vs. State & Ors. (2008) 303**

ITR 86 (Delhi), a Single Judge of this Court has held that before a prosecution under Section 276-B of the Act can be launched against the director he should have been notified that department/AO has intention of treating him as “principal officer” of the company. In absence of such notice under Section 2(35)(b) of the Act, prosecution against the director cannot be continued and is bound to fail.

15. In **Madhumilan Syntex Ltd. and Others vs. Union of India (2007) 290 ITR 199 (SC)**, the Supreme Court has held as under:-

“To treat the directors of a company as “principal officers” there is no need to issue a separate notice or communication to them that they are to be treated as “principal officers”, before the issuance of the show-cause notice under section 276-B read with Section 278B. It is sufficient that in the show-cause notice under section 276-B read with 278B, it is stated that the directors are to be considered as principal officers of the company under the Act and such a complaint is entertainable by the court provided it is otherwise maintainable.”

(emphasis supplied)

16. Legal proposition which emerges from the above is that before launching a prosecution under Section 276-B of the Act against the directors of a company, Assessing Officer has to issue notice under Section 2(35) of the Act expressing his intention to treat such directors of a company as “principal officers”. However, it may not be necessary to issue a separate

notice or communication to all the directors that they are to be treated as “principal officers”. It would be sufficient compliance if in the show cause notice issued to the company it is mentioned that the directors are to be considered as principal officers of the company under the Act.

17. In this case neither a notice was issued to respondent no. 3 under Section 2(35) of the Act the department intended to treat him “principal officer” nor in the show cause notice issued to the company it was mentioned that department is intended to treat the directors of the company as “principal officers”, for the purpose of launching prosecution under Section 276-B of the Act.

18. For the foregoing reasons, I do not find any justification to grant leave to appeal to the petitioner.

19. All the above petitions are dismissed. Since main petitions have been dismissed all the miscellaneous applications are also disposed of as infructuous.

A.K. PATHAK, J.

NOVEMBER 11, 2010

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