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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.REV.P. 340/2018 & Crl. M. (Bail ) No. 641/2018**

+ **CRL.REV.P. 341/2018 & Crl. M. (Bail ) No. 642/2018**

+ **CRL.REV.P. 342/2018 & Crl. M. (Bail ) No. 643/2018**

VIRAJ EXPORTS P.LTD. .... Petitioner

Through: Mr. Kapil Goel and Mr. Amit Gupta,  
Advocates.

Versus

INCOME TAX OFFICE (ITO) THR. NARINDER JUYAL

.... Respondent

Through: Mr. Zoheb Hossain, Senior Standing  
Counsel for Respondent.

**CORAM:**

**HON'BLE MR. JUSTICE NAJMI WAZIRI**

**ORDER**

% **15.10.2018**

These petitions impugn an order holding the petitioner guilty under section 276-B of the Income Tax Act 1961 (hereinafter to be referred as 'the Act'). The petitioner deducted tax at source, which was payable into the Government Treasury. In other words till deposit, the petitioner held Government/public monies in trust. This money ought to have been deposited in the Treasury, as per the statutory procedure. It was not so done. There was a lapse of over 12 to 17 months. The petitioner retained and misappropriated the monies for that period and illegally enjoyed the benefits therefrom.

The learned counsel for the petitioner submits that upon the petitioner realising its mistake, on its own it paid all the monies into the Treasury. Therefore, the expression 'reasonable cause' used in section 278AA of the Act, should be so read as to accord benefit to the petitioner. He submits that

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there was no *mens rea* to deprive the State or to withhold public monies for private good. He submits that the impugned order suffers from a fundamental error, because it proceeds on the notion that that there is an element of criminality in the petitioner's failure to deposit the entire TDS amount. He relies upon the decision of the *Sequoia Construction Co. P. Ltd. vs. P.P.Suri, Ito, Central Circle XX, 1986 158 ITR 496 Delhi* that:-

“ However, the question arises in cases where penalties have been quashed on the same facts and circumstances and the gravamen of the criminal charge is the same which was under purview in penalty proceedings. Can a finding given on those very facts by specialised bodies who have the technical expertise of the particular branch of law and are accustomed to administer the same everyday should be entirely ignored? It is more in the context of the present cases, where the primary consideration is whether the petitioners had without reasonable cause failed to effect the deposits of tax deducted at source with the Government. The corresponding provisions under section 201(1) of the Income-tax Act are rather somewhat stringent when they speak of "without good and sufficient reasons". Section 276B, however, speaks of "without reasonable cause excuse". A cause may appear to be "reasonable", though still may not be good and sufficient". Sufficiency goes farther than mere reasonableness. The distinction is of course thin. The Legislature has rather, apart from sufficient cause, now enjoined that it should also be good cause for not depositing the money where defaults have occurred. The standard of proof and explanation and the onus to be discharged by the assessed is much higher and heavy. In a criminal case, however, the dictates of law just demand the requirement of reasonable cause, i.e., what appears *ex facie* to be reasonable, which is much more milder.

Moreover, penalty proceedings under the income tax law are primarily quasi-criminal in nature. During their course, the rigour of the criminal law that a prosecution case

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*must entirely stand on its own legs and not on the weakness of the defense version does not essentially operate with the infallibility. However, the onus on the prosecution in criminal matters far rigorous and must be proved beyond reasonable doubt. The defense version to be satisfactory and plausible in criminal trial is much lighter and is just weighed in the realm of preponderance of probability. In case therefore, in any penalty proceedings under the income-tax law, an assessed has been able to establish "good and sufficient reason" for the default before the Commissioner. and then before the Tribunal, can it not be said that qua the criminal trial at least on the same facts and circumstances, "reasonable cause" should be treated to exist ? I am making these observations in the context of those provisions, where the provisions of law both under the penalty provisions and prosecution are similar.*

*The observations of the learned trial court in the present case that there was no clear finding by the Commissioner of Income tax that there was sufficient and good cause with the assessed not to effect deposits is plainly not borne out. Rather, a perusal of that order brings out that he was satisfied that there existed sufficient and good cause with the assessed. The two reasons which prevailed with him were the financial stringency of the assessed and that the interest payments were not in cash but merely national by way of credit entries in their accounts.*

*From the side of the complainant in the present cases, it has been urged that the balance-sheet of the company showed that the current liabilities were reduced by about Rs. 3.6 lakhs as compared to the preceding year. From this circumstance, it was urged that the company was not lacking in funds and if it could eliminate part of those liabilities, it could have as well paid the dues of the Revenue. However, the reduction of those liabilities were at different stages in the year and do not essentially reflect the state of affairs at the time when deposits were to be effected with the Revenue. In any case, the entire conspectus of facts and circumstances were before the*



*Commissioner and the Appellate Tribunal and if they have after consideration come to the view that good and sufficient reason existed with the assessed not to make deposits with the Revenue within time, that finding cannot be lightly ignored and even though strictly may not be res judicata, is a valuable piece of evidence and overwhelming circumstances and a consideration which must weigh with the criminal court while assessing the reasonable cause prevailing with the assessed.”*

Mr. Zoheb Hossain, the learned Senior Standing Counsel for the Income Tax Department refutes the aforesaid contentions. He submits that wilful default of payment of TDS into government offices, is sufficient proof of criminality; that there is no supervening or major reason pleaded to deduce lack of *mens rea*; that in any case, the statutory stipulations are clear, unambiguous and require strict compliance; failing which the prescribed penalties would be payable. In support of his contentions, he refers to the decision of the Supreme Court in *Madhumilan Syntex Ltd. & Anr. Vs. Union of India & Anr. AIR 2007 SC 1481*, which, *inter-alia*, held as under:-

*“47. The next contention that since TDS had already been deposited to the account of the Central Government, there was no default and no prosecution can be ordered cannot be accepted. Mr. Ranjit Kumar invited our attention to a decision of the High Court of Calcutta in Vinar & Co. & Anr. v. Income Tax Officer & Ors., (1992) 193 ITR 300. Interpreting the provisions of Section 276B, a Single Judge of the High Court observed that "there is no provision in the Income Tax Act imposing criminal liability for delay in deduction or for non-payment in time. Under Section 276B, delay in payment of income tax is not an offence". According to the learned Judge, such a provision is subject to penalty under Section 201(1) of the Act.*



48. *We are unable to agree with the above view of the High Court. Once a statute requires to pay tax and stipulates period within which such payment is to be made, the payment must be made within that period. If the payment is not made within that period, there is default and an appropriate action can be taken under the Act. Interpretation canvassed by the learned counsel would make the provision relating to prosecution nugatory.*”

In view of the above dicta, the Court is not persuaded by the petitioner's arguments, because the monies belong to the Government, and the petitioner could not have held on it because it knew fully well of the imperative to deposit it as per statutory requirements. Instead, it misused the government monies for its private benefits. If it had discovered that it had to pay the monies after 6 months or 8 months or 12 months or 17 months or whenever the “so-called” realization dawned upon it, it should have explained the same to the Income Tax Department, prior to the issuance of the show-cause notice. It is only upon the petitioner's taking such action, its plea of *bona fides* may have been considered. There could be no *bona fides* when a petitioner is issued a show-cause notice after 4 or 5 years of such default. The Court would note that the monies were due in the Government Treasury in the year 2009, which was offered in the year 2011 or so. The Income Tax Department noticed the anomaly in the refund of monies much later. If the petitioner raises the plea of financial inability as a constraint for not paying the collected TDS earlier on account of bankruptcy of his importers, then the submission implies that it surely was aware of its statutory liability to deposit the TDS with the Income Tax Department. The argument of absence of *mens rea* is untenable, in view of the conflicting pleas of inadvertent lapse and simultaneous financial hardship. Hence, a show-cause notice was issued on 28.07.2014. It was open to the petitioner

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to have intimated the Income Tax Authorities about his alleged lapse and the difficulties in recovering such monies from his importers, who had become bankrupt.

Be that as it may, the bankruptcy of a foreign company has nothing to do with the TDS in India. The impugned order has rightly reasoned as under:-

*“21. It is further argued that the delay in deposit of tax deducted at source by the company was caused due to financial crises being faced by the company and this fact was already explained to the complainant department through reply dated 26.08.14 and the delay was neither intentional nor deliberate on the part of the company, and therefore, the company is not liable to be prosecuted for the said offence. It was further argued that the company has already deposited the TDS amount with the government treasury without any notice or reminder from the department and therefore, accused I company is liable to be acquitted. The plea of reasonable cause in terms of 278 AA of Income Tax Act is also not made out in the facts and circumstances of this case as admittedly the accused company is having good amount of turnover. The administrative and other expenses running into Rs. 10.50 Crores for the year ending 31.03.2010, whereas the TDS amount is much less. It is not the plea of the accused company that they were not aware about the requirement of deposit of TDS amount in permitted time. The accused has filed the ledger accounts showing the details of outstanding payment from M/s Quella GmbH, Germany. However, it is to be noted that in the said ledger of the bills were initiated through Canara Bank which time and again being discounted as reflected in the said ledger. The loss suffered by accused company is therefore not reasonable cause unless the losses are such that company become in-operational in itself. When the company is having expenses running into crores of rupees they could have very well manage to deposit the TDS in time. Accordingly, the plea of reasonable cause U/s 278 AA is not*



*applicable in the present case.”*

In view of the above, the Court finds no infirmity in the aforesaid reasoning. There is no merit in the petitions. Accordingly, the petitions, alongwith pending applications, stand dismissed.

**OCTOBER 15, 2018**

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**NAJMI WAZIRI, J.**