

TAX FLASH NEWS

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Prosecution proceedings can be initiated for failure to deposit the TDS amount with the Government within the stipulated time

Recently, the Mumbai District Court in the case of Firoz Nadiadwala¹ (the taxpayer) dealt with the issue of initiation of prosecution proceedings for an offence under Section 276B of the Income-tax Act, 1961 (the Act) on account of failure to pay the Tax Deducted at Source (TDS) amount within the stipulated time.

During the Financial Year 2009-10, the taxpayer had deducted tax under various provisions of the Act (i.e., Section 194A, 194C, 194H and 194J of the Act) but failed to pay or to deposit the tax so deducted to the credit of the central government. In view of the default committed by the taxpayer, the Income Tax Officer (ITO) issued a show cause notice to give an opportunity to the taxpayer. However, the taxpayer did not comply with the same. The taxpayer failed to show reasonable cause or excuse to pay the deducted tax within the prescribed period to the credit of central government. The said amount was paid after a long period of delay beyond 12 months. Thus, ITO held that the taxpayer committed default under Section 200² and 204³ of the Act read with Rule 30 of the Income-tax Rules, 1962 (the Rules). The ITO held that the said default amounts to an offence punishable under Section 276B of the Act. Subsequently, under the provisions of Section 279 of the Act, prosecution launched against the taxpayer as the taxpayer had failed to comply with the statutory provisions without reasonable cause.

The tax department contended that the taxpayer is duty bound to remit the deducted tax amount within a stipulated period of time. The deducted tax amount belongs to the government, and the payer acts in a fiduciary capacity. Thus, it was duty bound to remit the TDS amount to the government account, and no amount of helplessness and financial difficulty will

come in the rescue of the payer. Thus, the taxpayer has failed to comply with the statutory provisions without reasonable cause, hence committed an offence punishable under Section 276B of the Act.

The taxpayer contended that the taxpayer had deposited all the TDS amount to the tax department. The economic condition of the taxpayer was not well, and the business was not in a good condition. In view of the CBDT instruction, dated 28 May 1980, the prosecution under Section 276B of the Act was not expected when the amount involved and period of default was not substantiated and the amount in default has also been deposited. In view of provisions under Section 278AA⁴ of the Act, when there is a reasonable cause, no penalty should be imposed.

Mumbai District Court's decision

The Court observed that the taxes were deducted and the same were deposited but it was delayed. However, during the trial, the taxpayer did not produce any material to substantiate the contentions. Mere taking of the contentions before the Court was not amounting to offering a reasonable cause for the failure to remit the deducted TDS. *Mens rea* is not a requisite ingredient of the offence under Section 194A, 194C, and 276B of the Act. If the taxpayer failed to make a deduction of tax at source, he is liable to be punished for the said offence. Section 276B of the Act does not contain the word 'knowingly'. It provides punishment for contravention of the provisions contained in Section 194A of the Act. Section 194A of the Act requires the person making any payment of interest to deduct the tax at the rate in force. This liability is an absolute liability.

¹ ITO v. Firoz Abdul Gafar Nadiadwala (Court Case No. 95/SW/2014) – Taxsutra.com

² Any person deducting any sum in accordance with [the foregoing provisions of this Chapter] shall pay within the prescribed time, the sum so deducted to the credit of the central government or as the CBDT directs

³ Meaning of 'person responsible for paying'

⁴ Punishment not to be imposed in certain cases - Notwithstanding anything contained in the provisions of Section 276A, Section 276AB or Section 276B, no person shall be punishable for any failure referred to in the said provisions if he proves that there was reasonable cause for such failure

Deficit deduction or non-deduction was a conscious act; therefore in a case under Section 276B read with Section 194A of the Act *mens rea* is not required. The offence punishable under Section 276B of the Act was complete when the tax deducted at source was not deposited within given time and the late deposit will not absolve the taxpayer. Once 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 defence of the accused about the existence of mental state, then burden lies upon the accused to prove that he had no mental state with respect to the Act charged as an offence in that prosecution. In the present case, there is no evidence that there is no culpable mental state of mind from the part of the accused person if the failure to deposit TDS amount beyond the time limit.

The main objectives of prosecution provisions contained in Chapter XXII of the Act are to punish the offenders found guilty of the tax evasion and other tax-related offence and to instill fear of 'law' in the minds of those, who may even contemplate evading payment of legitimate taxes. The scope and purport of penalty proceedings and prosecutions are separate and independent. No doubt the taxpayer has paid all the tax amount. It was not paid within the stipulated period, but it was paid after delay and said fact was not disputed by the taxpayer. The taxpayer has not explained as to what has prevented or under which circumstances TDS could not be deposited in time. It was the contention of the taxpayer that it had paid all TDS with interest and penalty. In spite of that, sanction was granted by Commissioner of Income Tax (CIT) under Section 279(1)⁵ of the Act. However, the taxpayer did not apply for compounding of offence⁶. Therefore, the taxpayer has a number of defences but had not brought on record that there was a reasonable cause, and he had not followed proper procedure and not availed opportunity given to them.

The Court relying on the decision of the Supreme Court in the case of Madhumilan Syntex Ltd⁷ observed that if the payment is made at the belated stage, then it will be treated as default and appropriate action can be taken under the Act.

Deposit of TDS with delay does not absolve criminal liability. If it is considered that the taxpayer paid the amount after a period of 12 months, in such circumstance, the complaint is maintainable, and it does not absolve criminal liability of the accused persons. The taxpayer cannot be allowed to use the tax amount, so deducted for any other purpose. The deductor is not supposed to finance their business through government money.

In view of the above, it has been held that the taxpayer is convicted for the offence punishable under Section 276B of the Act. The taxpayer shall undergo rigorous imprisonment for a period of 3 months and fine. It is the minimum punishment. The Court was not having discretion in reducing the sentence. Therefore, the taxpayer shall undergo rigorous imprisonment for a period of 3 months and a fine of five thousand for default of payment and the taxpayer shall undergo simple imprisonment for a period of 30 days for the offence punishable under Section 276B of Act.

Our comments

The issue with respect to the applicability of prosecution proceedings for failure to pay the TDS amount within the stipulated time has been a subject matter of debate before the Courts.

Some of the Courts⁸ have held that prosecution proceedings under Section 276B of the Act can be initiated for failure to pay the TDS amount. However, in few cases⁹, Courts have quashed the prosecution launched for an offence under Section 276B of the Act for delay in depositing the amount of TDS.

The act of non-deduction or non-payment is an offence only if such act was done without any reasonable cause or excuse. The Patna High Court in the case of Banwarilal Satyanarain and Ors¹⁰ observed that the initial onus remains on the prosecutor to establish all the ingredients of an offence and for charge under Section 276B of the Act. In case the prosecution is able to discharge the initial onus, then the onus will shift on to the accused person to show that they had a reasonable cause for failure to deduct or to deposit the tax.

⁵ Section 279(1) of the Act – A person shall not be proceeded against for an offence under various provisions of the Act (i.e., Section 275A, 276B, 276BB, 276C, etc.) except with the previous sanction of the Principal Commissioner or Commissioner or Commissioner (Appeals) or the appropriate authority

⁶ Under the Act, all the powers are vested with the tax department about compounding. However, the taxpayer not availed the remedy.

⁷ Madhumilan Syntex Ltd; and Ors. v. Union of India(UOI) and Ors. (AIR 2007 SC 048)

⁸ Kingfisher Airlines Ltd v. ITO [2014] 265 CTR 0240 (Kar), ITO v. Rayala Corpn. (P.) Ltd. [1994] 206 ITR 381 (Mad), Laxmandas Pranchand v. UOI [1998] 98 Taxman 203 (MP)

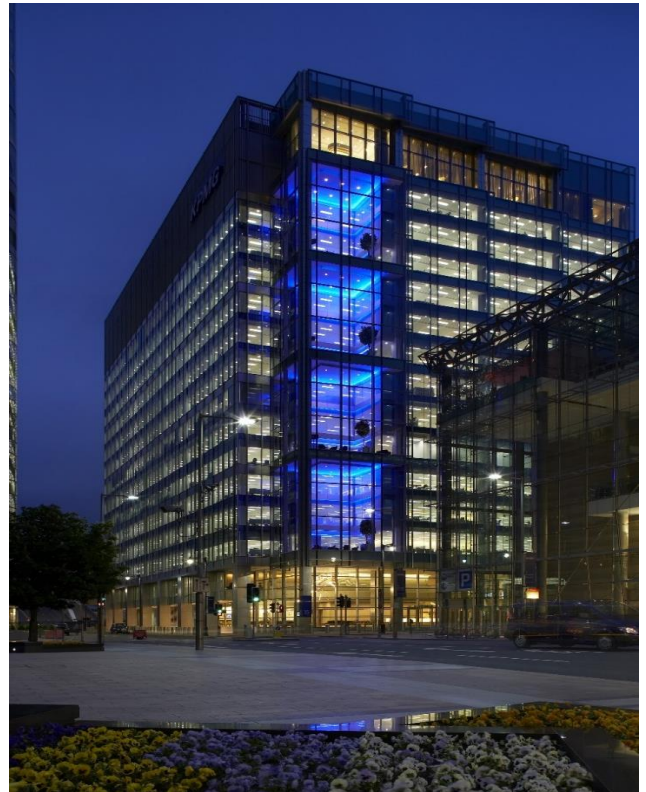
⁹ Sequoia Construction Co. (P.) Ltd. v. ITO [1986] 158 ITR 496 (Del).

¹⁰ Detecon Indian Project Office v. ITO [1995] 83 Taxman 279 (Del)

¹⁰ Banwarilal Satyanarain v. State of Bihar [1989] 179 ITR 387 (Pat)

The Delhi High Court in the case of Sequia Construction Co. Ltd & Ors.¹¹ observed that there was a delay in deposit of TDS. In view of reasonable cause shown by the taxpayer, penalty proceedings were dropped. The Court held that dropping of penalty proceedings must weigh with trial Court while judging the reasonable cause prevailing with the taxpayer. Milder proof of reasonable cause must be taken to have been established. Continuance of prosecution proceedings would be a sheer exercise in futility and harassment to the taxpayer and thus the prosecution was quashed.

The Mumbai District Court in the instant case has held that prosecution proceedings were to be launched against the taxpayer as the taxpayer had failed to comply with the statutory provisions without reasonable cause. The taxpayer did not pay the TDS amount within the stipulated period, but it was paid after a delay and said fact was not disputed by the taxpayer. Accordingly, the taxpayer has been convicted for the offence punishable under Section 276B of the Act.



¹¹ Sequia Construction Co. Ltd & Ors. v. ITO [1985] 47 CTR 277 (DEL)

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