IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 26TH DAY OF APRIL, 2019

BEFORE

THE HON'BLE MR. JUSTICE JOHN MICHAEL CUNHA

Criminal Petition No.868/2014

BETWEEN:

1. M/s. Golden Gate Properties Ltd.,
820, Golden House, 80 feet Road,
8th Block, Koramangala,
Bengaluru – 560 095.
(A Company registered under Companies
Act, represented by its Director)

2. Sri. Pratap,
S/o Kundu Satyanaryana,
Ex-Director, M/s Golden Gate Properties Ltd.,
R/o 8-2-703/4/P, Street No.2,
Avenue-1, Road No.13,
Banjara Hills,
Hyderabad.

3. Sri. Sanjay Raj,
Director, M/s Golden Gate Properties Ltd.,
820, Golden House, 80 Feet Road,
8th Block, Koramangala,
Bengaluru – 560 095 . ... Petitioners
(By Sri. Muniyappa, Advocate)

AND:

The Income-Tax Department,By Deputy Commissioner of Income Tax,TDS Circle-16(2), H.M.T. Bhavan,Bengaluru – 560 032.

... Respondent

(By Sri. Jeevan J. Neeralgi, Advocate)

This Criminal Petition is filed u/s.482 of Cr.P.C. praying to quash the entire proceedings initiated by the respondent department against the petitioners which is pending before the Spl. Court for economic offences, Bengaluru in C.C.No.209/2013 at Annexure-A1.

This Criminal petition coming on for *Admission,* this day, the Court made the following:

ORDER

Prosecution has been launched against the petitioners by the Income Tax Department for the alleged offences punishable under Sections 276B read with Section 278B of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Briefly stated, facts of the case are that petitioner No.1 - Company was engaged in the business of real estate and property development. Complainant-Department conducted a survey under Section 133A of the Act in the premises of accused No.1-Company on 27.09.2011. During the course of survey, it was detected that accused No.1-Company had deducted tax at source for the Financial Years 2010-2011 and 2011-2012, but had failed to remit the same to the Central Government account as per the provisions of Chapter XVII-B of the Act. Assessing Officer issued show cause notice dated 03.11.2011 (Financial Years from 2010-2011 to 2011-2012), calling upon accused No.1-Company to show cause as to why prosecution should not be launched against them. Reply was submitted by accused No.1-Company on 14.11.2011 admitting default and sought time to remit the admitted TDS liability, but remitted tax amount partially and failed to discharge the entire liability as undertaken. Hence, the Assessing Officer issued letter dated 16.03.2012 directing accused No.1-Company to remit the outstanding TDS liability on or before 25.03.2012. The accused filed online quarterly TDS statement and after verification of online payment system, it was found that accused No.1-company had remitted TDS deducted by it after considerable delay

of more than one year, that too, in consequence of survey conducted by the Department and repeated reminders. For delay in remitting the TDS, accused No.1-company had not paid any interest which is mandatory under Section 201(1A) of the Act. The
Assessing Officer noticed that even for the Financial Year 2009-2010 and 2010-2011, the accused had committed similar default. Hence, on 08.04.2013 an order came to be passed under Section 201(1A) quantifying the interest for delayed remittance of TDS for both the financial years (2009-2010 and 2010-2011). Since, the explanation given by the accused for delay in remittance of TDS was not acceptable, the Commissioner of Income Tax (TDS) after giving sufficient opportunity to the accused, passed an order under Section 279 of the Act authorizing the complainant-Deputy Commissioner of Income Tax, TDS Circle 16(2), H.M.T Bhavan, Bengaluru, to prosecute the accused for the offence punishable under Section 276B read with Section 278B of the Act.

3. Heard learned counsel for the petitioners and the learned Standing counsel appearing for the respondent.

4. Learned counsel for the petitioners has urged three fold contentions. First, placing reliance on Section 201(1A) of the Act, learned counsel would submit that without determining the liability of the accused in an adjudication proceedings and without quantifying the penalty, respondent-complainant should not have resorted to prosecute the petitioners for the alleged offence. In support of this submission, learned counsel has placed reliance on the decisions of the Delhi High Court in the case of ***Sequoia Construction Co. P. Ltd and Others vs. P.P.Suri, ITO, Central Circle, XX, New Delhi*** *reported in* ***1986 (158) ITR 496*** and in the case of ***Indo Arya Central Transport Limited & Others vs. Commissioner of Income Tax (TDS), Delhi-1 and Another*** reported in ***2018 SCC Online Del 7995***. Second, the TDS deducted by the petitioners was deposited with interest with the Department within 12 months from the respective dates of the deductions. The said deposit was made in accordance with the circular/instruction issued by the Central Board of Direct Taxes (CBDT) dated 24.04.2008 in F.No.285/90/2008-IT (Inv.)/05. Under the said circular/instruction, the assessee was permitted to deposit the tax deducted at source within 12 months from the date of deductions to obviate any penal consequences.

5. Further, placing reliance on the decision of the Delhi High Court in Indo Arya's case referred to supra, with reference to para No.7 thereof, learned counsel would submit that the said circular/instruction has binding effect and this view is also affirmed by the Hon'ble Supreme Court in the case of ***State of Kerala and Others vs. Kurian Abraham (P) Ltd., and Another*** reported in ***(2008) 3 SCC 582***. In view of this circular/instruction, the petitioners having made the deposits within the prescribed time limit, no offences have been committed by the petitioners entailing their prosecution under Section 276B of the Act.

6. Third, by a subsequent circular dated 07.02.2013, paragraph Nos.3.1(i) and (ii) of the earlier guidelines were amended and a time limit of 60 days was prescribed to make the deposit from the date of said deduction and the deduction of the said amount could not have been retrospectively made applicable to the petitioners since the violations are alleged to have been committed in the previous assessment years commencing from 2010-2011 to 2013-2014. Therefore, the prosecution initiated against the petitioners being wholly illegal and an abuse of process of Court cannot be sustained.

7. Refuting the above contentions, learned Standing Counsel appearing for respondent/complainant would however submit that Section 200 of the Act read with Rule 30 of the Income Tax Rules, 1962 contemplate deposit of the TDS deducted within the prescribed time limit and failure to deposit would entail the prosecution of the assessee in terms of Section 276B of the Act. In the instant case, the petitioners do not dispute the fact that the tax deducted at source was not credited to the Complainant-Department within the prescribed period of time. As held by the Hon'ble Supreme Court of India in ***Madhumilan Syntex Ltd., and Others vs. Union of India and Another*** reported in ***(2007) 11 SCC 297*** *" wherever a company is required to deduct tax at source and to pay it to the account of the Central Government, failure on the part of the company in deducting or in paying such amount is an offence under the Act and has been made punishable. It, therefore, cannot be said that the prosecution against a company or its Directors in default of deducting or paying tax is not envisaged by the Act."*

8. Further referring to the very same decision relied to by learned counsel for the petitioners in Indo Arya's case referred to supra, with reference to para Nos.8 and 9 thereof, learned standing counsel has emphasized that

"the issues raised by the petitioners are ex-facie factual and could constitute defence of the petitioners, as constituting reasonable cause". In view of Section 278AA of the Act, the onus of proving the said defence is on the accused and therefore, on this score also, the impugned proceedings cannot be quashed.

9. On the question that the prosecution of the accused could not have been launched without conducting adjudication proceedings to determine the penalty is concerned, the learned standing counsel has referred to the decision of the High Court of Madras in the case of ***Rayaal Corporation (P) Limited vs. V.M.Muthuramalingam, ITO*** reported in ***(1980) 4 Taxman 346 (Madras)***, wherein it has held that "so far as prosecution under Section 276B is concerned, it is not controlled either by Section 201(1A) or Section 221. All that the Section says is that if a person, without reasonable cause or excuse, fails to deduct or after deducting, fails to pay the tax, as required by or under the provisions of Sub-Section (9) of Section 80E or Chapter XVII-B, he shall be punishable with rigorous imprisonment and shall also be liable to fine".

10. Insofar as the circular/instruction relied on by learned counsel for the petitioners is concerned, learned standing counsel for the respondent would submit that the said circular deals only with the Standard Operating Procedure and does not extend the time limit for deposit of TDS deducted nor does it absolve the accused from criminal proceedings and thus, he seeks to dismiss the petition.

11. Having heard the learned counsel for the parties and on considering the materials on record, the question that arises for consideration is whether the prosecution of the petitioners for the offence punishable under Section 276B of the Income Tax Act could be sustained without determination of the liability of the petitioners under Section 201 of the Act?

12. Section 201 of the Act deals with the consequences of failure to deduct or pay. The Section reads as under:-

"Consequences of failure to deduct or pay.

201. *[(1) Where any person, including the principal officer of a company,* -

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

*[**Provided** that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident-*

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income; and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:]

***Provided** (**further**) that no penalty shall be charged under section 221 from such person, not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax]*

unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax]

[(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any pat of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,-

(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,

and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200:]

*[**Provided** that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso to sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident.]*

(2) Where the tax has not been paid as aforesaid after it is deducted, (the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A) shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1).

[(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given.]

(4) The provisions of sub-clause (ii) of sub-section

(3) of section 153 and of Explanation 1 to section

153 shall, so far as may, apply to the time limit prescribed in sub-section (3).]

[Explanation – For the purposes of this section, the expression "accountant" shall have the meaning assigned to it in the Explanation to sub-section (2) of section 288.]"

13. A bare reading of the aforesaid Section makes it clear that without prejudice to any other consequences, which the accused may incur, he is deemed to be "an assessee in default" in respect of such deduction. Therefore, it follows that in case of failure to deduct or to pay the tax deducted at source, accused may invite penalty consequent upon the adjudication or it may also "without prejudice to any other consequences", lead to prosecution of the accused. This view is expounded by the Hon'ble Supreme Court in Madhumilan's case referred supra, wherein while dealing with identical set of facts in para Nos.47 and 48, the Apex Court has observed 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.Ranjith Kumar invited our attention to a decision of the High Court of Calcutta in Vinar & Co. v. ITO. Interpreting the provisions of Section 276-B, a Single Judge of the High Court observed that: (ITR p.135)*

"[T]here is no provision in the Income Tax Act imposing criminal liability for delay in deduction or for non-payment in time. Under Section 276-B, 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."*

14. Similar preposition is laid down in Rayala Corporation's case referred supra, wherein it is held that *"So far as prosecution under section 276B is concerned, it is not controlled either by section 201(1A) or section 221. All that the section says is that if a person, without reasonable cause or excuse, fails to deduct or after deducting fails to pay the tax, as required by or under the provisions of sub-section (9) of section 80E or Chapter XVII-B, he shall be punishable with rigorous imprisonment and shall also be liable to fine. If it was the intention of the legislature, that prosecution*

can be resorted to only in respect of those cases where charging of interest or levy of penalty will not meet the ends of justice, then the legislature would have indicated its intention in the section. On the other hand, what we find is that the power of prosecution given under section 276B is not restricted to a particular type of cases alone".

15. In this context, it may also be beneficial to refer Section 278AA of the Act. The Section opens with non-obstante clause and reads as under:-

[Punishment not to be imposed in certain cases.

*"**278AA**. 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.]*

16. This provision makes it clear that in order to get over the penal consequences that follow on account of non-payment of tax deducted at source, it is open for the accused persons to come clean of the said charge by showing reasonable cause for failure to deposit the said amount. In the light of this provision, contentions urged by the learned counsel for the petitioners cannot be accepted. Since the material placed on record *prima facie* discloses that the petitioners have deducted tax at source but failed to credit the same to the account of the Central Government within the prescribed time, the petitioners cannot escape from the rigour of Section 276B of the Act.

17. The alternative argument canvassed by the learned counsel for the petitioners that without determining the penalty, the respondent was not entitled to resort to criminal prosecution of the petitioners under Section 276B of the Act, also cannot be accepted for the reason that the petitioners/accused have not disputed their liability. The question of determining the liability and consequent imposition of penalty would arise only in case of dispute with regard to the liability to remit the deducted tax. In the instant case, the facts alleged in the complaint clearly indicate that the amount was credited subsequent to the survey. As a result, even this defence is not available to the petitioners.

18. Lastly, the contention urged by the petitioners that the circular/instruction issued by the department have binding force though needs to be accepted as a principle of law, but in the instant case, none of

the parties have placed the said instruction or circular for perusal of this Court. No material is available to show that the petitioner No.1-Company has deposited the amount within the extended time. On the other hand, the allegations are to the effect that survey itself was conducted on 27.09.2011. According to prosecution, the amount was deposited subsequent to survey conducted by the Department. Under the said circumstances, even on question of fact, the above principle does not come to the aid of the petitioners. As a result, I do not find any merit in the contentions urged by petitioners.

Consequently, the petition is ***dismissed***. It is made clear that the observations made in this order shall not influence the trial Court while dealing with the matter on merits.