

DLCT020054302016



**IN THE COURT OF SH. ABHILASH MALHOTRA :
ADDL CHIEF METROPOLITAN MAGISTRATE (Spl.Acts):CENTRAL
TIS HAZARI COURTS, DELHI**

CNR NO. DLCT020054302016

Ct.Case No.528997/2016

INCOME TAX DEPARTMENT VS M/s PARSVNATH DEVELOPERS LTD

JUDGMENT

(a)	Sr. No. of the Case	Ct.Case No.528997/2016
(b)	Complainant	Income Tax Department Through Ms. Sudha Yadav, ACIT, Circle- 76(1), Income Tax Department, Laxmi Nagar, District Centre, Delhi-110092.
(c)	Name, parentage and residence/address of accused	(1) M/s Prasvnath Developers Ltd Parsvnath Metro Tower, Shahdara Metro Station, Delhi. 2) Sh. Pradeep Kumar Jain Chairman and Managing Director M/s Prasvnath Developers Ltd Parsvnath Metro Tower, Shahdara Metro Station, Delhi. Also at:- 7, Central Lane, Bengali Market, New Delhi-110001

(d)	Offence complained of	U/s 276 B r/w 278-B of Income Tax Act, 1961.
(e)	Plea of accused	Pleaded Not guilty
(f)	Final Order	Accused no.1 M/s Prasnath Developers Ltd is Convicted. Accused No. 2 Sh. Pradeep Kumar Jain is Acquitted.
(g)	Date of Institution	12.01.2016
(h)	Date of reserving judgment	27.03.2021
(i)	Date of judgment	31.03.2021

Brief facts and reasons for the decision:-

FACTS

1. The present complaint was filed u/s 276 B read with Section 278 B of the Income Tax Act, 1961 against accused no. 1 company and accused no. 2 Pradeep Kumar Jain being its Chairman and Managing Director. The complaint was filed by authorized representative Ms. Sudha Yadav, ACIT.
2. It is alleged that in the survey u/s 133 A of the Income Tax Act conducted on 06.12.0013 at the business premises of accused company, it was found that accused company has deducted the TDS of Rs.10,59,08,557/- and has failed to deposit the TDS for the financial year 2013-2014. It is stated that in the survey Mr. Ashish Verma, G.M Taxation in his statement Ex. CW-1/5 admitted that the accused company has not deposited the TDS and he undertook that the TDS will be deposited by 28.02.2014. It is stated that only an amount of Rs. 6.95 Crore out of Rs. 13.17 Crore of TDS demand was deposited by the accused company by 20.03.2014. Accordingly, a proposal to initiate prosecution u/s 276 B of Income Tax Act was sent by the then, Assessing officer to CIT which is Ex. CW-1/6.

3. It is stated that a notice u/s 2(35) of the Income Tax Act dated 06.02.2014 Ex. CW-1/7 was sent to accused no. 2 for treating him as Principal Officer of the accused no. 1 company. No reply to the said notice was filed by accused no. 2. Thereafter, vide order dated 25.02.2014 passed u/s 2(35) of the Income Tax Act Ex. CW-1/8, accused no. 2 was treated as the Principal Officer of accused no. 1 company.
4. Thereafter a show cause notice dated 19.05.2014 Ex. CW-1/9 was issued and no explanation regarding the default of late deposit of TDS was given. Thereafter, another show cause notice dated 01.07.2015 Ex. CW-1/10 was issued. A reply was filed by the company which is Ex. CW-1/11. The reply was considered by the CIT and was not found satisfactory. The sanction u/s 279 (1) of the Income Tax Act dated 11.08.2015 Ex. CW-1/2 was granted by Sh. Avdhesh Kumar Mishra CIT (TDS) Delhi to prosecute accused no. 1 and 2 u/s 276 B read with Section 279 of the Income Tax Act for the financial year 2013-2014.

PROCEEDINGS

5. After the filing of the complaint, my Ld. Predecessor took the cognizance of the offence and by order dated 12.01.2016, summoned the accused persons for offence u/s 276 B read with Section 278 B of the Income Tax Act, 1961. Complainant examined CW-1 Ms. Sudha Yadav ACIT, CW-2 Sh. Amit Mohan Mittal Joint CIT and CW-3 Sh. Sandeep Rana, DCIT in evidence. Vide order dated 02.11.2016, the charge u/s 276 B read with Section 278 B of the Income Tax Act was framed against accused no. 1 and 2. The accused no. 1 company was represented through the authorized representative Sh. K.L. Sharma. The statement of accused no. 1 and

2 was recorded u/s 313 Cr.P.C by my Ld. Predecessor on 24.09.2019. Additional questions u/s 313 Cr.P.C were also put to the accused no. 1 and 2 on 06.03.2021 (after the examination of CW-3 pursuant to the application u/s 311 Cr.P.C). Accused examined DW-1 Sh. Ashish Verma in the defence evidence.

SUBMISSIONS

6. It is argued by the Ld. Special Public Prosecutor for the complainant that accused no. 1 company as well as accused no. 2 who is the Principal Officer being the Managing Director failed to deposit the TDS within the stipulated time and therefore are liable to be punished for the offence u/s 276B read with Section 278 B of the Income Tax Act. It is argued that the company failed to show any reasonable cause for non-deposit of the TDS. It is submitted that the documents on record shows that accused no. 2 was actively involved in day to day affairs of the accused no. 1 company and therefore liable to be prosecuted.

7. On the other hand, Ld. Defence Counsel submits that the complete tax deducted at source is already deposited by the accused no. 1 company. However, the delay in deposit of TDS is not disputed. It is argued that neither the notice u/s 2(35) Ex. CW-1/7 of the Income Tax Act nor the order u/s 2(35) Ex CW-1/8 of the Income Tax Act is served upon the accused no. 2 and therefore, he can not be treated as the Principal Officer. It is further argued that accused no. 2 is not the Managing Director of accused no. 1 company and has been prosecuted under erroneous presumption. It is submitted that the Form-27A on record clearly shows that it was Mr. Yogender Singh who was responsible for deduction and deposit of the TDS but despite that accused has been erroneously prosecuted. It is submitted that the

accused was given first show cause notice u/s 279 (1) of the Income Tax Act on 19.05.2014 and the second show cause notice on 01.07.2015. He submits that the accused gave reasonable explanation pursuant to the first show cause notice and the matter was culminated, but despite that second show cause notice was issued. He submits that sanction order is also silent regarding the fate of the proceedings held pursuant to the first show cause notice. It is argued that the time limits as mandated in CBDT circulars is not adhered during the proceedings before the authorities.

Payment of TDS amount

8. I have heard the arguments and perused the record. In present case the prosecution has alleged the offences under Section 276B read with Section 278 B of the Income Tax Act, 1961. In the complaint, it is stated that the accused company had deposited only amount of Rs. 6.95 Crores out of Rs. 13.17 Crores of TDS amount. On the other hand, it is argued by Ld. Defence Counsel that accused company had already made the complete payment of TDS along with interest. It is submitted by Ld. Defence Counsel that para 4 of the sanction order also records the payment of TDS of Rs. 13.24 Crores by the company and in para 8 of the sanction order also it is observed that the TDS was not deposited within the prescribed time and in the complaint, it is erroneously stated that the TDS was not deposited. He further submits that in in defence evidence accused has placed on record DW-1/2 all the challans showing that the payment complete TDS amount with interest to the Income Tax Department. The statement of account Ex. DW-1/2 shows the total payment of TDS as Rs. 13,40,24,297/-. In challans/payment receipts Ex DW 1/2 assessment year 2014-2015 is mentioned on the challans. No cross examination was conducted by the complainant disputing the said payments. In the written

submissions filed by the complainant it is stated that the TDS is deposited with the delay of 15 months. Accordingly, from the evidence on record it is clear that the accused company had deposited the TDS in question with the Income Tax department and only the issue regarding delay in deposit of TDS needs to be examined.

CBDT Circulars

- 9.** It is argued by the defence counsel that the notice u/s 2(35) EX CW1/7 and the show cause notice u/s 279(1) Ex CW1/9 and Ex CW1/10 did not followed the mandatory timelines as stipulated in the SOP issued by the Income Tax department vide circular dated 07.02.2013. It is argued that sanction order is silent regarding the fate of proceedings in respect of first show cause notice Ex CW1/9.
- 10.** So far as the question regarding the time lines as stated in the SOP are concerned it is no doubt an earnest effort is required to be made to adhere to the deadlines and comply the directions. But it cannot be concluded that missing some deadlines can give any blanket protection to the accused/assessee from prosecution. Therefore, the argument does not go to the root of the matter and does not affect the merits of the case.
- 11.** In respect of the second contention. CW1 Ms. Sudha Yadav, ADIT in her cross examination clarified that as the concerned CIT had transferred and a new officer had joined therefore in the interest of Justice a fresh show cause notice was issued. She also clarified that there is nothing on record to show that proceedings initiated

vide 19.05.2014 Ex CW 1/9 were dropped. Therefore, the contention of accused in this regard is without any merit and hence rejected.

Role of accused no. 2.

12. In the memo of parties of the complaint, accused no. 2 Pradeep Kumar Jain is prosecuted in capacity of 'Chairman/Managing Director'. In the notice u/s 2(35) of the Income Tax Act Ex. CW-1/7, accused no. 2 is shown as 'Chairman' of the accused no 1 company. In the order u/s 2(35) of the Income Tax Act Ex. CW-1/8 the responsibility of the accused is fixed as 'CMD'. The relevant portion of the order u/s 2(35) of the Income Tax Act by which he was chosen as the Principal officer is reproduced below:

“Sh. Pradeep Kumar Jain did not appear on the fixed date neither any written submissions for the same has been filed by the deductor company. Therefore, in the absence of the specifically mentioned to whom the responsibility is fixed as Principal Officer while committing such default Mr. Pradeep Kumar Jain CMD of M/s Parsvnath Developers Ltd is held to be a “Principal Officer” within the meaning of sub-section 35 of Section 2 of the Act for the purpose of ensuing initiation of the proceedings as per the provisions of Section 276 B of the I.T.Act, 1961.

13. Para 5 of the order u/s 2(35) of the Income Tax Act clearly shows that in the absence of any other person on whom the responsibility as a Principal Officer can be fixed, accused no. 2 was held responsible because of his capacity as 'CMD' in the accused no. 1 company. CW-3 in his examination also brought on record documents i.e Company Master Data Ex. CW-3/2, list of Board of Directors generated from the website of accused company Ex. CW-3/3, ITR-6 for the assessment year 2014-2015 Ex. CW-3/4 in order to prove that accused was responsible for the affairs of the accused no 1 company.

14. From bare perusal of the complaint, notice u/s 2(35) of the Income Tax Act Ex. CW-1/7 and order u/s 2(35) of the Income Tax Act Ex. CW-1/8, it is clear that accused no. 2 has been treated and prosecuted as Principal Officer because of his capacity as the 'Chairman and Managing Director' of the accused no 1 company. But the documents brought on record by the complainant itself shows a contrary picture. Company Master Data Ex. CW-3/2 and Income Tax Return Ex. CW-3/4 only shows that accused no. 2 as one of the Director amongst various other Directors of the company during the relevant period. The document Ex. CW-3/3 i.e. the Director's Profile shows that it is Mr. Sanjeev Kumar Jain who is the Managing Director and the CEO of the accused no. 1 company. Therefore, the deposition that accused no. 2 is the Managing Director gets belied from the documents filed by the complainant itself.

15. CW1 Ms. Sudha Yadav, ADIT in her cross examination admitted that no document has been placed on record to show that it was accused no 2 who was concerned person responsible for handling the present matter. She stated that as her predecessor had passed order under section 2(35) therefore he may comment as to why accused no 2 has been treated as principal officer when there were other director and responsible officers were there in the company. She admitted that it is not a thumb rule to declare to declare the 'CMD' as principal officer. The relevant portion her testimony is reproduced below:

“No such document or any other material has been filed with the complaint to show that the accused no. 1 was the concerned person responsible for handling the present matter.

My Predecessor had passed the order u/s 2(35) of the Income Tax Act and therefore, he may comment as to why the accused no. 2 has been held as

Principal Officer when there were other Directors and responsible officers in the accused company. Vol. The accused no. 2 was the CMD of the accused no. 1 at the relevant time. It is not a thumb rule to declare the CMD as the Principal Officer but generally the CMD is declared as principal officer”

16. CW2 Mr Amit Mohan Mittal in his cross examination stated that accused no 2 was considered as CMD of the accused no 1 company on the basis of MCA record, but the said MCA record is not filed on record. He also admitted that there were six directors in the accused no1 company but only accused no 2 has been prosecuted. The relevant portion of his testimony is reproduced below:

“Qns: What evidence did you have or placed on record that stated accused no. 2 was the CMD of the accused no. 1 company and was actively involved in the functioning of accused no. 1 in his capacity of CMD of such company?

Ans. On the basis of MCA records, it was established that accused no. 1 was CMD of accused no. 2 company. It is correct that MCA record were not filed on record. It is correct that there were six directors in the accused no. 1 company. It is correct that only accused no. 2 Pradeep Kumar is prosecuted.”

17. CW3 Sh. Sandeep Rana, DCIT in his examination in chief stated that Income Tax Return was signed by accused no 2 in capacity of ‘Director’. CW-3 in order to show the role of accused no 2 in company brought on record Ex. CW-3/2 Company Master Data and Ex. CW-3/3 Director profile. But in cross examination he admitted that he cannot say whether those documents were relied upon by the assessing officer while passing the order u/s 2(35) of the Income Tax Act choosing the accused no 2 as the Principal officer. CW-3 in his cross examination also admitted that document Ex. CW-3/4 i.e the ITR return for the financial year 2013-2014 do not suggest that the accused no. 2 was the Managing Director.

18. CW-3 in his cross examination stated that as per Ex. CW-3/3 Director profile and Ex. CW-3/4 ITR accused no. 2 was responsible for deposit of TDS/financial affairs of the accused no. 1 company. He stated that the ITR was digitally signed by accused no 2. During his cross examination CW3 was confronted by accused with Form-27A Ex. CW-3/DX1 for the assessment year 2014-2015. CW3 admitted that at serial no. 3 of the said Form, it is stated that that Mr. Yogender Singh is the person who was responsible for collection / deduction of TDS at source. CW-3 further stated that he can not say as to why the other Directors who were there in the company were not prosecuted by the department. The relevant portion of the testimony is reproduced below:

“Qns :- Is it correct that Form 27 A exhibited as Ex. CW-3/DX/1 is a form for furnishing information with respect to statement of deduction / collection of tax deducted at Source (TDS)?

Ans:-Form 27 A is regarding furnishing of information with the statement of deduction / collection of tax at source (TDS).

Qns :- Is it correct that Form 27 A exhibited as Ex. CW-3/DX/1 suggests at point no. 3 marked as Mark A as name of the person responsible for deduction / collection of tax as Mr. Yogender Singh?

Ans:- It is correct that as per entry at serial no. 3 of the aforesaid form Mr. Yogender Singh was the person responsible for deduction / collection of tax deducted at source but he was not the person responsible for the deposit of TDS in the Income Tax Department. Vol. It is the Directors of the company who were responsible for the deposit of the TDS within the statutory prescribed period.

Qns:- Whether one Director or all Directors of the company are responsible for deposit of TDS within the statutory period?

Ans:- As per Ex. CW-3/4 and Ex. CW-3/3, accused no. 2 is responsible for deposit of TDS / financial affairs of the accused no. 1. I can not say as to why only accused no. 2 who is one of the Director was only prosecuted and why the other Directors who were there in the company at the relevant period were not prosecuted as the prosecution was initiated by my Ld. Predecessor”.

19. A bare perusal of the complaint, order u/s 2(35) of the Income Tax Act and the

sanction order u/s 279(1) of the Income Tax Act shows that accused no. 2 was prosecuted being the Charman and the Managing Director of the accused no. 1 company. But the documents filed by the complainant itself militate against it and shows accused no. 2 as one amongst other Director during the relevant period. No document is placed on record by the complainant showing the accused as the 'Managing Director' in the accused no. 1 company for the relevant period. The company Master Data Ex 3/2 shows accused no 2 only as one of the directors and not the Managing director. The Director profile Ex CW3/3 brought on record by complainant shows Mr. Sanjeev Kumar Jain as Managing director. Ex CW 3/4 ITR also reflects accused no 2 only as one of the director. Form-27A shows that it was Mr. Yogender Singh who was responsible for the deduction/collection of the tax deducted at source. Complainant witnesses in their testimony have failed to explain as to why the other similarly placed directors during the relevant period were left and not treated as principal officers. From the documents brought on record by the complainant itself, it is apparent that accused no. 2 was only a director and not the Managing Director of the accused no. 1 company during the relevant period. The premises of treating accused no 2 as the Managing Director is erroneous and therefore treating him as principal officer by order u/s 2(35) Ex. CW 1/8 and the subsequent sanction u/s 279(1) Ex CW1/2 is based on erroneous presumption which goes to the root of the matter and vitiates it.

Service of notice and order u/s 2(35) of the Income Tax Act.

20. It is argued by Ld. Defence Counsel that neither the show cause notice dated 06.02.2014 u/s 2(35) of the Income Tax Act Ex. CW-1/7 nor the order dated 25.02.2014 u/s 2(35) of the Income Tax Act Ex. CW-1/8 was served upon accused

no. 2 before treating him as 'Principal Officer'. It is argued that as the prosecution has failed to prove the service of aforesaid order and notice, therefore, the accused cannot be treated as Principal Officer and the prosecution against him do not lie.

21. Before proceedings further to appreciate the arguments, it will be prudent to sum up the legal position in respect of the liability of directors and compliance of provisions under section 2(35) to treat as director as principal officer.

“Section 2 (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, 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;

Duty of person deducting tax.

200. (1) 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 Board directs.

Meaning of "person responsible for paying".

204. For the purposes of the foregoing provisions of this Chapter and [section 285](#), the expression "person responsible for paying" means (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;

22. In **Income-Tax Officer v. Roshni Cold Storage (P.) Ltd.**, 1998 SCC On-line Mad 1237 it was held that:

“10. Further, it was made clear in the above ruling that non-issuance of individual notices for other offences such as section 276C, 276CC or 277 is of no consequence. Therefore it is very clear that even after the introduction of section 278B with effect from October 1, 1975, it is mandatory to issue notice under section 2(35)(b) in case the prosecution is for the offence under section 276B and not otherwise.

13. In view of the above three rulings, the prosecution of the managing director and other directors without issuing notice under section 2(35)(b) is bad in law.”

23. In **M.R. Pratap v. V.M. Muthuramalingam**, 1983 SCC OnLine Mad 272 the Hon'ble High Court of Madras held that:

11. Under sub-clause (a), the secretary, treasurer, manager or agent will automatically constitute a “principal officer”. In their absence, it is open to the ITO to treat any one else as a “principal officer” of the company, provided he gives a notice to the person concerned of his intention of treating him as the principal officer of the company. To enable the ITO to do so, sub-cl. (b) has been enacted. The resultant position would, therefore, be that if any one who is connected with the company is not the secretary, treasurer, manager or agent, then he cannot be treated as the principal officer of the company unless the ITO has served a notice as envisaged under s. 2(35)(b) of the Act. It is in the light of these provisions, we have to consider the claim of the petitioner that he is not the principal officer and, as such, he cannot be prosecuted for an offence under s. 276B.

12. There is reference here also to a person responsible for paying any income chargeable under the head “Salaries”. But, there is no reference to a director or a managing director. Therefore, it follows that the managing director of a company, like the petitioner, cannot be held liable under s. 276B unless the ITO has served a notice on him under s. 2(35)(b) and informed him of his intention to treat him as the principal officer of the company. In the instant case, it is admitted by the Department that no such notice as contemplated under s. 2(35)(b) has been served on the petitioner. Hence, the petitioner's contention that he cannot be proceeded with for the delayed payment of the tax amount by the company, is a well-founded one.”

- 24.** From the mandate given in Roshni Cold Storage (Supra) and M.R. Pratap (Supra) it is clear that a prosecution for delay in deposit/non-deposit of TDS u/s 276B can be launched against a person who is treated as the Principal officers. The Principal officer in its ambit includes the secretary, treasurer, manager or agent of the authority in a company. In case director of the company is required to be treated a Principal officer service of notice of his intention of treating a director as the principal officer is pre requisite.
- 25.** In other words, the basis or the foundation stone prior to launch of prosecution under section 276B is the order u/s 2(35) wherein the directors of the company are treated as Principal officers and then prosecuted. The non-service of notice or defect in notice u/s 2(35) goes to the root of matter and affects the cardinal indispensable pre-requisite prior to launch of prosecution.
- 26.** Complainant has placed on record the list of Directors of accused company which is at page no. 28 of the complaint. The said list shows the address of accused no. 2 as resident of 7, Central Lane, Bengali Market, New Delhi-110001. The notice u/s 2(35) of the Income Tax Act Ex. CW-1/7 is not sent at the aforesaid address of the accused. It is argued by the Ld. Special Public Prosecutor that the address mentioned in the notice u/s 2(35) of the Income Tax Act is the address of the company. Even, in respect of the address of the company no postal receipt or the service report is placed on record showing the proof of delivery of the aforesaid notice. Para 5 of the complaint is silent about the mode of service by which the notice u/s 2(35) of the Income Tax Act Ex. CW-1/7 and the order u/s 2(35) of the Income Tax Act Ex. CW-1/8 were served upon the accused no. 2.

27. CW-1 Ms. Sudha Yadav, ACIT in her cross examination admitted that the service of notice u/s 2(35) and order u/s 2(35) of the Income Tax Act on the concerned person is mandatory and the mode of service of notice u/s 2(35) of the Income Tax Act on the accused no.2 is not mentioned in the complaint. She admitted that there is no evidence attached with the complaint showing the proof of service. The relevant portion of her testimony is reproduced below:

“It is correct that the mode of service of notice u/s 2(35) of the Income Tax Act to the accused no. 2 is not mentioned in the complaint. It is correct that the service of notice u/s 2(35) of the Income Tax Act on the concerned person is mandatory.

It is important to serve copy of order passed u/s 2(35) of the Income Tax Act on the concerned persons who has been held as Principal Officer. I have to check the records to find out whether the copy of order was served. There is no evidence attached with the complaint showing the proof of service”

28. CW-2 Sh. Amit Mohan Mittal, Joint Commissioner is the officer who had issued the notice and order under u/s 2(35) Ex CW1/7 and Ex CW1/8. In his testimony he stated that he does not remember that what was the mode of service of notice u/s 2(35) Ex. CW-1/7. He admitted that proof of service is not filed on Court record. In respect of order u/s 2(35) of the Income Tax Act Ex. CW-1/8 he admitted that the order was dispatched vide diary no. 2447. The Court while recording his testimony made an observation that the diary number is partially visible on Ex. CW-1/8. Despite that the complainant did not file the fresh document and corrected the lacunae. CW-2 stated that because diary number was mentioned on order Ex. CW-1/8 and therefore it was presumed to be served. The relevant portion of his testimony is reproduced below:

“At this stage, witness is shown Ex. CW-1/7 from the records and asked

what was the mode of service of such notice on the accused persons to which witness states that he does not remember the mode of service of Ex CW1/7.

It is correct that proof of service is not filed on record.

It is correct that the said diary number is not visible on the Ex CW1/8.

Court observation: Diary number is partially visible on the Ex. CW1/8.

Qns:- On what basis above, you have stated that the said order Ex. CW-1/7 and Ex. CW-1/8 was served on the accused?

Ans:- After perusing the office file brought by witness, he states that the order was dispatched vide Diary no. 2447 as in the Income Tax Office file which is mentioned on the top of order under Section 2(35) of the Income Tax Act and therefore the same was presumed to be served on the accused no. 1 company.”

29. From the evidence on record, it is clear that the complaint does not mention about the mode of service of notice and order u/s 2(35) Ex CW1/7 and Ex CW1/8 of the Income Tax Act; CW-1 and CW-2 confirmed that no proof of service is placed on record and the diary number on CW1/8 was incomplete and no clarification was brought on record despite court observation. Merely, on the basis of partial diary number written on the notice, it cannot be safely presumed that the notice and order u/s 2(35) of the Income Tax Act Ex CW1/7 and Ex CW1/8 have been served upon the accused no.2. From the record, it is clear that the complainant has failed to prove the service of notice and order u/s 2(35) of the Income Tax Act upon accused no. 2. From the mandate given in **Roshni Cold Storage** (Supra) and **M.R. Pratap (Supra)** it is clear that in the absence of proof of service of notice u/s 2(35) the contention of accused that he cannot be proceeded with for the delayed payment of the tax amount by the company, is a well-founded one.

Form-27 A

30. It is argued by Ld. Defence Counsel that accused was not personally responsible for

the deposit / collection of the TDS with the complainant department. During the cross examination of CW-3 Sh. Sandeep Rana DCIT, accused confronted him with document Form-27A for assessment year 2014-2015 Ex. CW-3/DX/1. It is pointed out by Ld. Defence Counsel that aforesaid document clearly at serial no. 3 mentions that it was Mr. Yoginder Singh who was responsible for deduction/ collection of Tax Deducted at Source (TDS) and accused no. 2 was not responsible.

31. CW-3 in his cross examination sought time to verify the said document and the opportunity was granted by the Court. Despite that CW-3 in his cross examination dated 06.03.2021 stated that he cannot confirm about the availability of CW-3/DX1. Accordingly, the said documents remained un rebutted and undisputed by the complainant.

32. CW-3 Sh. Sandeep Rana DCIT in his cross examination admitted that Form-27 A is regarding furnishing of information with the statement of deduction/collection of TDS. He admitted that as per entry at serial no. 3 it was Mr. Yoginder Singh who was the person responsible for collection /deduction of tax collected at source. The said document is neither considered and appreciated u/s 2(35) of the Income Tax Act Ex. CW-1/8 nor in the sanction order u/s 279(1) of the Income Tax Act Ex. CW-1/2. It has remained unexplained as to why the role of Mr. Yoginder Singh was not considered. It has remained unexplained why the role of other Directors and Managing Directors were not considered when admittedly accused was not the Managing Director of the accused company at the relevant point of time.

33. From the evidence on record, it is clear that complainant has failed to prove that

accused no 2 Sh. Pradeep Kumar Jain as Managing director for the relevant period, the service of notice and order under section 2 (35) Income Tax Act, 1961 on accused no 2 is not proved and the document Form 27A shows that it was Mr. Yoginder Singh who was responsible for the deduction and collection of TDS. In view of the aforesaid, accused no 2 Sh. Pradeep Kumar Jain is given benefit of doubt and acquitted for the offence u/s 276B r/w S. 278B of the Income Tax Act, 1961.

Financial Difficulties

34. It is argued by the Ld. Defence Counsel that due to recession in the real estate sector the accused no 1 company was suffering from severe liquidity crunch and was not able to fulfill obligations like payment of salaries, taxes and has to obtain huge amount of loans. It is submitted that the said position was also apprised to the complainant department in the reply dated 10.07.2015 Ex 1/11 filed by the accused no 1 company, but the said exigencies were not considered in the sanction order u/s 279 (1) Ex CW1/2 and the sanction for prosecution was granted. Ld. defence counsel submits that accused in its defence evidence has proved the reasonable cause and the case is covered u/s 278AA of the Income Tax Act, 1961.

35. To appreciate these contentions, it will be appropriate to reproduce the provisions of Section 276 B and 278 AA of the Income Tax Act, 1961.

Section 276 B :- If a person fails to pay to the credit of the Central Government within the prescribed time, as above, the tax deducted at source by him, he shall be punishable with rigorous imprisonment for a term which shall be between 3 months and 7 years alongwith fine.

Section 278 AA:- Notwithstanding anything contained in the provisions of Section 276 A, Section 276 AB, or Section 276 B, 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.

36. A bare reading of section 278 AA of the Income Tax Act shows that no person shall be punishable for any failure refer to in Section 276 B of the Income Tax Act, if the person proves that there was reasonable cause for such failure. To understand the concept of “reasonable cause” and the burden of proof to be discharged by the accused, it will be prudent to refer to the following judgments of various High Courts.

i) In **Shaw Wallace and Company Limited v. Commissioner of Income Tax (TDS)**, 2003 SCC OnLine Cal 345 Hon’ble High Court of Calcutta held that:

“**23.** The provisions of section 278AA of the Income Tax Act, 1961, will no doubt be available to the appellant to its benefit if it is able to prove that it had sufficient and good reasons for committing the default contemplated in section 200 of the said Act.”

ii) In **Banwarilal Satyanarain v. State of Bihar**, 1989 SCC OnLine Pat 137 Hon’ble Patna High Court held that:

“**33.** Now it has to be seen as to what is the effect of the amendment. Can it be said that after amendment, the question whether an accused had any reasonable cause or not for not deducting and paying tax within time is of academic importance and not relevant for a criminal court? My answer is emphatically in the negative. Section 278AA is nothing else but a proviso to section 276B of the Act, but a separate section has been inserted in the Act, as similar provisions have been made with respect to prosecution under sections 276A, 276AB, 276DD and 276E. Cumulative effect of the amendment, in my view, is that in case of prosecution under section 276B of the Act, two things have to be shown; firstly, that there was failure on the part of the assessee in deducting or paying the tax within time and, secondly, that the failure was without any reasonable cause.

iii) In **Sonali Autos Private Limited vs State of Bihar and Others**, 2017 SCC

OnLine Pat 3620 the Hon'ble High Court of Patna held that:

“**26.** The petitioners have stated in the petition that the aforesaid tax could not be deposited within time due to oversight on the part of the Accountant, who was appointed to deal with the Accounts and Income Tax matters. This mistake was detected at the time of audit of Books of Accounts by the Statutory Auditors of the petitioner-company in August, 2010. Thereafter, the petitioner immediately deposited the amount of tax along with interest in the year 2010 itself. Section 278 AA of the Act specifically says that no person shall be punished for any failure referred to under the said provisions if the assessee proves that there was reasonable cause for such failure. Reasonable cause would mean a cause which prevents a reasonable man of ordinary prudence acting under normal circumstances, without negligence or inaction or want of bonafides.”

37. From the aforesaid judgments, it is clear that the case of accused will be covered u/s 278 AA of the Income Tax Act, if he is able to prove the reasonable cause existed when the default was committed. There is initial onus on prosecution to establish the ingredients of offence alleged and prove absence of the reasonable cause on the part of the accused / assessee. The reasonable cause shall be fair, not absurd, not irrational and not ridiculous. Reasonable cause would mean a cause which prevents a reasonable man of ordinary prudence acting under normal circumstances, without negligence or inaction or for want of bonafides.

38. DW-1 in his testimony has brought on record document Ex. DW-1/3, Ex. DW-1/4, Ex. DW-1/5 and Ex. DW-1/6 in order to prove the financial difficulties faced by the company. It is submitted that the auditor's statement for the financial year 2011-2012, 2012-2013 and 2013-2014 clearly records that the company was unable to make the payment of various debts and liabilities due to stagnancy in the real estate sector. It is also stated that in reply Ex. CW-1/11 to the show cause notice u/s 279 (1) of the Income Tax Act the company pointed out the financial exigences and also

the fact that the trade receivables as on 31.03.2014 were Rs. 578.12 Crores. It is argued that due to high debt and trade receivable the company was not able to make the payment of the sale tax, service tax, salary, interest etc.

39. The tax deducted as source cannot be equated with the payment of other liabilities like service tax or sales tax whose payment may be dependent upon the actual realization of money. TDS is deducted in advance by the assessed before making any payment for the scheduled items. The assessee acts as custodian of tax/TDS amount and needs to deposit the same within stipulated period as per Rule 30. Merely because the business suffered from recession and the working capital stifled, cannot be a termed as sufficient cause for non-payment of TDS amount. A company cannot be permitted to use the TDS amount for channelizing and fulfilling its working capital deficit. DW1 Sh Ashish Verma in his cross examination admitted that the company was making payment of various loans to its directors and its associate companies during the relevant period. Therefore, when the company is able to discharge its other liabilities, the ground for recession cannot be cited as an excuse for non-payment of the TDS amount. In the sanction order Ex CW1/2 the CIT (TDS) has also appreciated the financial exigencies cited by the company and has concluded that the payment of TDS has nothing to do with the liquidity of the deductor company. Though the audit reports DW1/3 to DW1/6 specifies the liabilities and the loans of the accused no 1 company, but it does not pinpoint the reasons for failure make the payment of TDS amount.

40. Reasonable cause would mean a cause which prevents a reasonable man of ordinary prudence acting under normal circumstances, without negligence or

inaction or for want of bonafide. In present facts and circumstances the company has failed to show any circumstances which has prevented the company from payment of TDS amount especially when the payment to the associate companies and directors were continuing. Merely because there was recession in the market cannot be considered as reasonable cause for non-compliances because a company is supposed to keep its working capital reserves or overdraft facilities to meet these lean period patches. The case of the accused company is clearly not covered u/s 278AA Income Tax Act, 1961 and accordingly the accused no 1 company is convicted for the offence u/s 276 B Income Tax Act, 1961 for delay in depositing the of the TDS amount.

**Announced in Open Court
on 31.03.2021**

**(ABHILASH MALHOTRA)
ACMM(Special Acts) CENTRAL
TIS HAZARI COURTS DELHI**