# CALCUTTA HIGH COURT

Shaw Wallace and Co. Ltd

Vs

Commissioner of Income-Tax

(Altamas Kabir and A K Basu ,JJ.)

29.07.2003

## JUDGMENT

**Altamas Kabir J.**

1. As the appeal involves a question of law, on consent of the parties the appeal itself was taken up for consideration along with the application for stay of operation of the judgment and order dated June 11, 2003, passed by the learned single judge on the writ petition filed by the appellant herein, being W. P. No. 992 of 2003 (Shaw Wallace and Co. Ltd. v. CIT (TDS) .

2. In the writ petition the appellant-company challenged the decision of the respondents to initiate prosecution against the appellant under Section 276B of the Income-tax Act, 1961, for theyears 1995-96, 1997-98, 1998-99 and 1999-2000 for the appellant's failure to deposit and/or pay to the credit of the Central Government the tax deducted by the appellant at source, hereinafter referred to as tax deducted at source. By his judgment and order dated June 11, 2003 (see , the learned single judge dismissed the writ petition upon holding, inter alia, that there was no scope for pre-empting the criminal proceedings unless it could have been established that even if the allegations made by the respondents were all true, they did not constitute any offence under Section 276B of the Income-tax Act, 1961.

3. Disagreeing with the reasoning of the learned single judge, Mr. Sudipto Sarkar urged that even if the allegations constituted an offence under Section 276B of the Income-tax Act, 1961, grant of sanction for prosecution was not automatic and the surrounding circumstances did not warrant grant of sanction for prosecution.

4. Mr. Sarkar submitted that admittedly the appellant had defaulted in depositing the tax deducted at source for the financial years in question, but such default was neither intentional nor with a motive to avoid payment of the said tax, but because of severe financial crisis faced by the appellant-company which was duly recognised both by the court and the income-tax authorities themselves. Mr. Sarkar submitted that the appellant company had been permitted to pay off the tax in instalments without imposition of penalty and that the company had honoured the commitment and had paid off the entire outstanding dues. Mr. Sarkar submitted that the conduct of the appellant-company did not warrant prosecution for the default in question.

5. Mr. Sarkar contended that the prosecution for default in paying tax deducted at source to the credit of the Central Government did not automatically follow such default and the provision had, therefore, been made under Section 279 of the Income-tax Act for sanction to be granted for such prosecution by the Chief Commissioner. Mr. Sarkar urged that it had repeatedly been held by the courts that whenever the decision was left to the subjective satisfaction of a statutory authority, it necessarily implied that such authority was required to apply its mind to all relevant factors before arriving at a decision. Mr. Sarkar submitted that grant of sanction for launching prosecution was a very serious business having serious consequences which entailed proper exercise of discretion upon consideration of all relevant materials, including mitigating circumstances in favour of the defaulter.

6. According to Mr. Sarkar, if the Legislature had intended otherwise it would not have provided the safeguard against prosecution in Section 279 of the above Act.

7. In support of his aforesaid contention, Mr. Sarkar firstly referred to and relied on the decision of the Supreme Court in CIT v. Mahindra and Mahindra Ltd. , wherein while considering the decision of the Bombay High Court in connection with an application for amalgamation, the Supreme Court, inter alia, observed that whenever a decision making function was entrusted to the subjective satisfaction of a statutory functionary, there was an implicit obligation to apply his mind to proximate matters only and to eschew the irrelevant and the remote. If the decision of the authority was perverse or was such that no reasonable person could have arrived at such decision, the High Court would be justified in interfering with the decision.

8. Mr. Sarkar then referred to and relied heavily on the decision of a learned single judge of the Rajasthan High Court in S. G. Kale v. Union of India , wherein also sanction for grant of prosecution under Section 276B of the Income-tax Act was under challenge. Referring to the provisions of Section 278AA of the said Act, the learned judge observed that in the case of Basdeo Agarwalla v. Emperor , it had been observed that the sanction under the Act was not intended to be an automatic formality and it was essential that the provisions in regard to the sanction should be observed with complete strictness. The learned judge observed further that since the validity of the sanction depends on the application of mind by the sanctioning authority to the facts of the case, as also the material evidence collected during the investigation, it must follow that the sanctioning authority has to apply its own mind for generation of genuine satisfaction whether the prosecution has to be sanctioned or not.

9. The next decision referred to by Mr. Sarkar was the decision of the Supreme Court in*Mansukhlal Vithaldas Chauhan v. State of Gujarat*, which was a case under the Prevention of Corruption Act which required sanction for prosecution under Section 197 of the Code of Criminal Procedure. Following the decision in Basdeo Agarwalla's case , the Supreme Court observed that the sanction lifts the bar for prosecution. The grant of sanction is not an idle formality or an acrimonious exercise but a solemn and sacrosanct act which affords protection to Government servants against frivolous prosecution. The validity of the sanction would require the sanctioning authority to apply its mind to the relevant materials placed before it and the order of sanction must ex facie disclose that the sanctioning authority had considered the evidence and other material placed before it.

10. Reference was also made to another decision of the Supreme Court in Jas-want Singh v. State of Punjab, , where the same sentiments have been expressed. Mr. Sarkar contended that while the

appellant would no doubt get an opportunity to question the validity of the sanction during the criminal trial, if launched, there could be no justification for the appellant to be subjected to a criminal trial, if it could be shown that the sanction which was the very basis for the prosecution had not been validly granted.

11. Mr. Sarkar submitted that the decision to initiate prosecution for the default in paying tax deducted at source to the Central Government for the financial years in question had not been communicated to the appellant company despite the company having been asked to show cause. Mr. Sarkar added that while the sanctioning authority was not required to give a hearing before granting sanction, since it had chosen to do so, it was incumbent, in keeping with the principles of natural justice, to communicate its decision to the appellant-company.

12. Mr. Sarkar urged that the decision to initiate prosecution against the appellant-company was liable to be quashed and the writ court had ample power to do so.

13. Mr. Sarkar's submissions were strongly opposed by the learned Additional Solicitor General. It was contended by Mr. Kapur that the scheme and the relevant provisions of the Income-tax Act did not support Mr. Sarkar's contentions. Mr. Kapur submitted that Section 279 of the said Act did not provide for or contemplate that a notice to show cause or a hearing was required to be given to the assessee by the authority empowered to sanction prosecution. According to Mr. Kapur, the opportunity given to the appellant was wholly redundant and did not entitle the appellant to receive a copy of the order passed on the cause shown by the appellant.

14. Mr. Kapur submitted that grant of sanction was a purely administrative action. Under the Income-tax Act, 1961, the authorities indicated in Section 279 would have to be satisfied on the existing materials that the situation warranted grant of sanction for prosecution.

15. In support of his contention Mr. Kapur firstly relied on the decision of the Supreme Court in*Superintendent of Police (CBI) v. Deepak Chowdhary*, wherein while considering a similar question which had arisen with regard to grant of sanction for prosecution under the Prevention of Corruption Act, the Supreme Court held that no opportunity of hearing was required to be given to the accused before granting sanction since it was an administrative Act.

16. Reference was also made to another decision of the Supreme Court in *Union of India v. Banwari Lal Agarwal*, where the same view has been expressed.

17. Mr. Kapur submitted that in order to prevent frivolous prosecutions, certain safeguards had been engrafted in Sections 278AA and 279 of the aforesaid Act and the concerned authority was required to satisfy himself fully on the materials placed before him that sanction for prosecution was required to be granted. It was urged that in the instant case, however, not only had it been admitted that default in terms of Section 200 of the Act, had been committed by the appellant-company, but the authority granting sanction for prosecution had considered the matter in extenso before granting such sanction. Mr. Kapur urged that once it had been admitted that default had been committed in terms of Section 200 of the Act, the provisions of Section 276B were immediately attracted.

18. Mr. Kapur, submitted that the fact that penalty had not been imposed for delayed payment of

the tax deducted at source deducted by the appellant-company was not a factor which could bring the appellant's case within the ambit of Section 278AA of the above Act. The learned Additional Solicitor General submitted that in similar circumstances in the case of Jagmohan Singh v. ITO , the Punjab and Haryana High Court had held that the fact that the income-tax authorities had charged interest on late deposits and did not impose penalty would not absolve the accused from liability to prosecution.

19. Mr. Kapur submitted that the appellant was not entitled to question the validity of the sanction which was not before the court. It was contended that the stage for questioning the sanction for prosecution would come once the prosecution had commenced and not in proceedings under Article 226 of the Constitution.

20. The learned Additional Solicitor General submitted that the writ petition was misconceived and had been rightly dismissed by the learned single judge.

21. We have carefully considered the submissions made on behalf of the respective parties and are inclined to agree with the learned additional Solicitor General that no interference is called for in this appeal.

22. 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. Except for pleading financial hardship, there is no other reason provided by the appellant for such default.

23. On the question of grant of sanction for prosecution, on which great stress has been laid by Mr. Sarkar, we are of the view that it would not be proper for us to make any observations in respect thereof in these writ proceedings, although we have had occasion to examine the sanction granted. We, therefore, refrain from doing so, since, in our view, the appellant will get ample opportunity to question the validity of the sanction at the time of trial.

24. We see no reason to differ with the views expressed by the learned single judge for not entertaining the writ petition. It is for the appellant to produce sufficient evidence for non-deposit of the tax deducted at source during the criminal trial to avail of the benefit of Section 278AA of the Income-tax Act.

25. The appeal and the connected application are accordingly dismissed.

26. There will, however, be no order as to costs.

27. All parties to act on a signed copy of the operative portion of this judgment on the usual undertakings.

**Alok Kumar Basu J.**

28. I agree.

Cases Referred.