

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 5386 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

sd/-

and

HONOURABLE MR.JUSTICE B.N. KARIA

sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

VINUBHAI MOHANLAL DOBARIA....Petitioner(s)

Versus

CHIEF COMMISSIONER OF INCOME TAX & 1....Respondent(s)

Appearance:

MR. S.N. SOPARKAR, LD. SR. ADV WITH MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 21/03/2017

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.0. By way of this petition under Article 226 of the Constitution of India, the petitioner-assessee has prayed for an appropriate writ, direction and order to quash and set aside the order at "Annexure A" dated 14.02.2017 passed by the Chief Commissioner of Income Tax, Vadodara, by which, the application preferred by the petitioner- assessee permitting him to compound

the offence under Section 276 CC of the Income Tax Act for AY 2013-14 has been rejected.

2.0. The facts leading to the present Special Civil Application in nutshell are as under:

2.1. That the petitioner-assessee filed the return of income for AY 2011-12 on 04.03.2013, though the return was due on 01.08.2011. That the said return was processed under Section 143(1) of the Income Tax Act. As the return was not filed before the due date and therefore, the petitioner violated the provision of Section 276 CC of the Act, the respondent no.2- Assistant Commissioner of Income Tax sent a proposal for prosecution to CIT- III, Vadodara, who in turn issued a show cause notice dated 27.10.2014. That on receipt of said show cause notice, the petitioner replied vide communication dated 11.11.2014 along with application for compounding as prescribed under the Guidelines for Compounding of Offence, 2008 (hereinafter referred to as the "Guidelines"). That the said application along with application for two other years i.e. AY 2011-12 and 2012-13 came to be accepted by the respondent no.1 - Chief Commissioner of Income Tax, Vadodara and the application of the petitioner for compounding offence came to be allowed / granted. That the petitioner filed return of income for AY 2013-14 on 29.11.2014, which was also after the due date of filing of the return. Therefore, the petitioner - assessee again violated the provision of Section 276CC of the Act. Therefore, the petitioner received a notice dated 12.03.2015 for prosecution under Section 276 CC of the Act for AY

2013-14. On receipt of the said show cause notice, the petitioner replied vide communication dated 19.03.2015 along with application for compounding as prescribed under the Guidelines. That by impugned order, the Chief Commissioner of Income Tax, Vadodara has rejected the said application of compounding submitted by the petitioner by observing that as per the Guidelines issued with respect to first offence only compounding is permissible.

2.2. Feeling aggrieved and dissatisfied with the impugned order passed by the respondent no.1 rejecting the compounding application of the petitioner for AY 2013-14, the petitioner - assessee has preferred the present Special Civil Application.

3.0. Shri S.N. Soparkar, learned Senior Advocate appearing on behalf of the petitioner has vehemently submitted that in the present case compounding application of the petitioner has been rejected by the respondent no.1 solely on the ground that it is not the "first offence" of the petitioner. It is submitted that the show cause notice for prosecution under Section 276 CC of the Act for AY 2013-14 was issued only on 12.03.2015. It is submitted that prior thereto the petitioner already filed the return of income on 29.11.2014 and therefore, it cannot be said that it was the first offence. It is submitted that the respondent no.1 has erroneously computed date of issue of show cause notice for AY 2011-12 for holding that the petitioner has committed the offence post that date. It is submitted that it cannot be said that the petitioner has further committed the offence after issuance of show cause notice.

3.1. It is further submitted by Shri S.N. Sopakar, learned Senior Advocate appearing on behalf of the petitioner that as provided in the Guidelines, the Guidelines of non compounding offence is only a general guideline and not a strict law as suggested by the heading "offence generally not to be compounded".

3.2. It is submitted that the compounding application of the petitioner has been rejected by the respondent no.1 on erroneous understanding of the law. It is submitted that whilst Guidelines no doubt are to be kept in mind specially while exercising jurisdiction, however they cannot bind the authority from considering the objective facts before it. It is submitted that in the present case, petitioner's failure to file return of income was beyond its control due to the financial constraints and the petitioner could not follow empty formality of only filing return of income without paying the due tax which would have been a defective return. It is submitted that as soon as the petitioner could arrange for the funds to pay the tax, it filed return of income along with payment of tax within the prescribed time under Section 139(4) of the Act. It is submitted that without appreciating the aforesaid factors, the respondent no.1 has rejected the compounding application submitted by the petitioner.

Making above submissions and relying upon the decision of the Madras High Court in the case of K. Inba Sagarán vs. Assistant Commissioner of Income Tax reported in (2001) ITR 528 (Madras) as well as decision of the Delhi High Court in the case of Sports

Infratech (P) Ltd vs. Deputy Commissioner of Income Tax (HQRS) reported in (2017) 78 Taxmann. com 44 (Delhi), it is requested to admit / allow the present petition.

4.0. Heard Shri S.N. Soparkar, learned Senior Advocate for the petitioner at length. That by impugned order, the respondent no.1 has rejected the compounding application submitted by the petitioner for AY 2013-14 on the ground that as per the Guidelines only in a case of "first offence" the compounding is permissible. The Guidelines for compounding offence under the Direct Tax Laws, 2014 is produced at Annexure E. As per the clause 4 of the said Guidelines, the compounding offence is not a matter of right. There are different categories of offence mentioned in the Guidelines. The offence under Section 276 CC of the Act falls in category "B". As per Clause 8(ii) with respect to offence falling under category "B", the offence other than first offence as defined generally not to be compound. What can be said to be first offence is also mentioned in the clause 8(ii) and as per the same, first offence means offence under any of the Direct Tax Laws committed prior to (a) the date of issue of any show cause notice for prosecution or (b) any intimation relating to prosecution by the Department to the person concerned or (c) launching of any prosecution, whichever is earlier. It is the case on behalf of the department and so mentioned in the impugned order that in the present case prior to offence under Section 276 CC of the Act for AY 2013-14 there was already show cause notice for prosecution for AY 2011-12 and despite the same, the assessee did not file the return of income for AY 2013-14 within the time prescribed and

therefore, the offence under Section 276 CC of the Act for AY 2013-14 cannot be said to be the "first offence". However, on the other hand, it is the case on behalf of the petitioner - assessee that for AY 2013-14 the show cause notice under Section 276 CC of the Act was issued on 12.03.2015 and prior thereto the return of income for AY 2013-14 was already filed on 29.11.2014 and therefore, the same can be said to be "first offence" even as per the clause 8(ii) of the Guidelines. The submission on behalf of the assessee cannot be accepted. The aforesaid submission on behalf of the assessee is absolutely on misreading of clause 8(ii). On true interpretation of clause 8(ii), in case the offence is committed prior to date of issuance of any show cause notice for prosecution, in that case, it can be said to be the "first offence". Therefore, in case for any prior assessment year, the show cause notice has been issued for prosecution and despite the same, in the subsequent year, the offence is committed by not filing the return, the same cannot be said to be "first offence". The submission on behalf of the petitioner - assessee that in the present case the show cause notice for prosecution for AY 2013-14 was issued on 12.03.2015 and prior thereto the return of income was filed for AY 2013-14 on 29.11.2014 and therefore, the same can to be said to be first offence, cannot be accepted. What is required to be considered is whether for any prior year any show cause notice for prosecution is issued and served upon the petitioner or not. If the contention on behalf of the petitioner is accepted, in that case, it will be contrary to the clause 8(ii) of the Guidelines. In the present case, for AY 2011-12, the show cause notice was already issued under Section 276 CC of the Act on 27.10.2014 for non filing of return before due

date (for AY 2011-12) and despite the same for the subsequent years i.e. for AY 2013-14 the assessee did not file return of income before due date of filing of return. Therefore, again the petitioner-assessee committed the offence for AY 2013-14. Thus, it cannot be said that in AY 2013-14 it can be said to be the "first offence" committed by the assessee. Under the circumstances, the respondent no.1 has rightly rejected the compounding application submitted by the petitioner. Rejection of the compounding application submitted by the petitioner is absolutely in consonance with the Guidelines, 2014.

5.0. Now, so far as submission on behalf of the petitioner that while rejecting the compounding application submitted by the petitioner, respondent no.1 has not properly appreciated and / or considered the reason for not filing the return of income by petitioner before due date is concerned, at the outset, it is required to be noted that it has nothing to do with the compounding application. It is required to be noted that while considering the application for compounding, merits is not required to be considered as is to be considered in trial.

6.0. Now, so far as reliance placed upon the decision of the Madras High Court in the case of K.Inba Sagar (supra) relied upon by the learned advocate for the petitioner-assessee is concerned, the said decision shall not be applicable to the facts of the case on hand, more particularly, while considering the compounding application. In the case before the Madras High Court, three different complaints for the offence under Section 276

CC of the Act for AY 1991-92, 1992-93 and 1993-94 though were filed and numbered separately, were clubbed together in one case and the learned Magistrate passed the orders holding the accused guilty under Section 276CC on three counts. The question arose whether the offence for which accused was charged were distinct or separate and not in any way inter-related and when each offence had no connection with other, joinder of charges would become bad in law or not and to that it has been observed and held by the Madras High Court that framing of charge was defective and violative of Sections 218 and 219 of the Code of Criminal Procedure and as judgment was rendered only in one case and there was no finding of guilt recorded as regards two other cases, the Madras High Court has observed that error committed by the trial Court was of such grave nature that it had caused prejudice to accused and therefore, in that view of the matter, conviction and sentence passed by the lower Court has to be set aside. Therefore, the said decision shall not be applicable to the facts of the case on hand.

7.0. Now, so far as reliance placed upon the decision of the Delhi High Court in the case of Sport Infratech (P) Ltd (supra) relied upon by the learned advocate for the petitioner is concerned, the said decision also shall not be applicable to the facts of the case on hand.

8.0. Even the learned advocate for the petitioner has requested not to observe anything on merits and therefore, we refrain from observing anything on merits, more particularly, the reasons given

by the petitioner -assessee for not filing return of income before due date, even for AY 2013-14.

9.0. In view of the above and for the reasons stated above, the impugned order passed by the respondent no.1 rejecting the compounding application submitted by the petitioner cannot be said to be either illegal or contrary to the Guidelines, we see no reason to interfere with the same. In view of the above and for the reasons stated above, present petition fails and same deserve to be dismissed and is accordingly dismissed.

Kaushik

sd/-
(M.R. SHAH, J.)

sd/-
(B.N. KARIA, J.)

