

CNR No. MHMM20-000181-2014
Complaint filed on : 26.03.2014.
Complaint registered on:26.03.2014.
Decided on : 25.04.2019
Duration : 05Y. & 29D.

**IN THE COURT OF ADDL. CHIEF METROPOLITAN MAGISTRATE,
38th COURT, BALLARD PIER, MUMBAI
(Presided over by R. S. Sarkale)
COURT CASE NO.95/SW/2014.**

Exh. –

Income Tax
Through -
Ajay G. Kamble
Income Tax Officer(TDS)-1(5) .. **Complainant.**

V/s.

Mr. Firoz Abdul Gafar Nadiadwala
Plot No.20, Barkat, Gulmohor Cross Road,
No.5, Juhu Scheme, Andheri(W), Mumbai. .. **Accused.**

Charge : Under Section 276B of The Income Tax Act,1961.

Appearance : Special Public Prosecutor Mr. Amit Munde for
complainant.

Ld. Advocate Mr. Ashok Bhatia for accused.

JUDGMENT

(Delivered on 25.04.2019)

1. The complainant Ajay Kamble, Income Tax Officer(TDS)-1(5) had filed the complaint u/s. 200 of the Cr.P.C. against the accused for committing the offence punishable u/s. 276B of Income Tax Act, 1961 pertaining to financial year 2009-2010 and assessment year 2010-2011.

2. Brief facts of the complainant's case are as under -

The complainant is the Income Tax Officer (TDS)-1(5), Mumbai, attached to CIT(TDS), Mumbai. The sanctioning authority in

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exercise of powers conferred u/s. 279(1) of Income Tax Act has accorded sanction to prosecute the accused u/s. 276B of Income Tax Act. Accused is an assessee in the jurisdiction of the complainant for the income tax (TDS purpose). The accused is an individual having his office at plot No.20, Barkat, Gulmohor Cross Road, No.5, Juhu Scheme, Andheri(W), Mumbai. The accused during various dates from the period 01/04/2009 to 31/03/2010 and was under obligation u/s.194A of the Act to deduct the income tax from interest paid/credited under section 194C of the act to deduct the income tax from the payment of contractors, u/s.194H of the Act to deduct the income tax from the payments of commissions and u/s.194J of the Act to deduct the income tax from the payment of fees for professional or technical services. The accused was under further obligation u/s. 200 and 204 of the Act r/w Rule 30 of the Income Tax Rules, 1962 to pay or to deposit income tax so deducted to the credit of Central Government within the prescribed period. During the period from 01/04/2009 to 31/03/2010 accused had deducted tax of Rs. 8,56,102/- u/s. 194A, 194C, 194H and 194J of the Income Tax Act but failed to pay or to deposit income tax so deducted to the credit of Central Government. The accused failed to show reasonable cause or excuse to pay deducted tax within the prescribed period to the credit of Central Government within the prescribed period. The said amount was paid after a long period of delay beyond 12 months. Therefore, the accused has committed default u/s. 200 and 204 of the Act, 1961 r/w Rule 30 of the Income Tax Rules, 1962.

3. The complainant further submitted that in view of default committed by the accused show cause notice was issued to the accused,

the accused required to show cause as to why prosecution should not be launched against him for offence u/s. 276B of the Income Tax Act for failure to pay the amount deducted by way of income tax within stipulated time. The complainant submitted that the explanation given by the accused for his failure to pay the said tax deducted at source within prescribed time does not constitute reasonable cause for the said default. The accused has committed a default u/s. 200 and 204 of the Income Tax Act 1961 r/w Rule 30 of the Income Tax Rules, 1962 by failing without reasonable cause or excuse to pay the income tax so deducted to the credit of Central Government and said default amounts to an offence punishable u/s. 276B of the Income Tax Act. Therefore, by granting sanction u/s. 279(1) of the Income Tax Act, prosecution launched against the accused as accused has failed to comply with the statutory provisions without reasonable cause. Hence accused has committed an offence punishable under section 276B of Act. Hence, present complaint.

4. After filing of the complaint, cognizance was taken and case was registered against the accused for offence punishable u/s. 276B of the Income Tax Act. The process was issued u/s. 276B of the Income Tax Act. Notice was served on the accused, in response to the notice, accused appeared through his Counsel and enlarged on bail.

5. The complainant complied the formalities u/s. 207 of Cr. P.C. All the documents were furnished to the accused. Thereafter evidence of the complainant and sanctioning authority was recorded before charge and after hearing both the sides my Predecessor hold that there is sufficient material to frame the charge and accordingly charge

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was framed against the accused as per Ex.17 u/s. 276B of the Income Tax Act. Contents of the charge were read over to the accused in vernacular. Accused pleaded not guilty and claimed for trial. The plea of the accused is at Ex.18.

6. In order to prove the charges leveled against the accused, the complainant has examined two witnesses. These are C.W.1 Vinod Kumar Pande, sanctioning authority at Ex.10 and C.W.2 Ajay Ghanshyam Kamble, complainant at Ex.19 and placed number of documents on record. After closer of evidence of the complainant, statement of accused u/s. 313 of Cr. P.C. was recorded at Ex.23. The accused denied incriminating evidence put to him. Defence of accused is of total denial. The accused submitted that TDS amount is already deposited with the Government and he is regular payee of the tax and false case filed against him.

7. From the contents of the complaint and evidence of both the sides, after hearing Ld. Advocate for complainant and accused at length, following points arise for my determination and I have recorded my findings against each point with reasons as follows -

Sr.No.	Points	Findings
1	Does prosecution prove that, accused is responsible for deduction of Tax at source but accused failed to pay TDS of the Financial year 2009-2010 and Assessment year 2010-2011 to the credit of Central Government within time without any justifiable reason and thereby committed an offence punishable u/s. 276B of The Income-Tax Act?	..In the affirmative.
2	What order ?	As per final order.

REASONS.

8. In order to prove the guilt against the accused, complainant has examined C.W.1 Vinod Kumar Pande, sanctioning authority at Ex.10 and C.W.2 Ajay Ghanshyam Kamble, complainant at Ex.19. Except that no other witness was examined by the complainant. While complainant relied upon documentary evidence i.e. proposal Ex.14, reply Ex.15, show cause notice Ex.12, 13, 16, details of traces Ex.20, sanction order Ex.11. Except that no other oral or documentary evidence led by the complainant. Thereafter complainant has filed evidence closed pursis at Ex.21. While in defence accused has not led any oral or documentary evidence and filed evidence close pursis at Ex.25.

As to Point No.1:

9. It is the case of complainant that the accused has deducted the tax amount but failed to deposit the tax within stipulated period prescribed in the Income Tax Act to the Central Government, therefore accused has committed offence u/s. 276B of the Income Tax Act. In order to prove the guilt against the accused, complainant has examined two witnesses. C.W.2 Ajay Ghanshyam Kamble, complainant deposed at Ex.19. He deposed that from 2013 to 2015 he was attached to TDS office situated at Charni Road, Mumbai. He received sanction order from CIT(TDS) Shri. V.K. Pandey for launching prosecution against the accused Firoz Nadiadwala. During assessment of case of accused he found that accused had deducted tax of Rs. 8,56,102/- of the financial year 2009-2010 but deducted tax amount not deposited or paid to the Central Government account within stipulated time. The period of deduction of tax amount is up to the 7th day of next month.

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He collected the information from the system of his department and found that accused was defaulter for non payment of tax amount within stipulated time. The traces statement is at Ex.20. The accused deposited tax and TDS amount after expiry of 12 months.

10. The witness was cross-examined. In the cross-examination witness admitted that he did not remember which documents are annexed with sanction order by CIT(TDS), he also did not remember on which date he received the sanction order. He has not issued the notice dtd. 27/09/2012 and the said notice was issued by his Predecessor. He denied that he was not signatory of any document filed on record. He admitted that reply given by the accused to show cause notice is seen by him before filing of complaint. He did not file reply of the accused of show cause notice as he do not want it is necessary. He admitted that Ex.20 is unsigned document and there was no mention of name of Government Website. He admitted that in the complaint nowhere mentioned about Ex.20 is generated by him personally from official computer system traces. He did not remember on which date accused filed income tax returns of financial year 2009-2010 and year 2010-2011. On Ex.20 there are 104 PAN numbers are mentioned. Witness admitted that the amount of Rs. 8,56,102/- was deposited by the accused. He also admitted that in his complaint it was mentioned that accused deposited said amount and delayed by 12 months. He admitted that his department levied penalty, interest and legal fees in case of delayed payment. He admitted that accused deposited same amount in the department. He did not remember about the correspondence dtd. 09/10/2012 made by the accused with department. The sanction order is of dtd. 25/03/2014 while he filed complaint on 26/03/2014 but denied that he has no any authority to file the complaint. Witness denied that accused has given satisfactory

explanation to the department but department has not considered his explanation about delayed payment of TDS. He denied that department has accepted the amount from the accused after giving satisfactory explanation by the accused, by accepting explanation of the accused. He denied that he has filed false complaint against the accused without any authority.

11. By perusing the evidence of complainant, it seems that as per the directions given by Principal Income Tax Commissioner(TDS), he has filed complaint against the accused as accused deducted the tax but not deposited the said amount with tax authority within stipulated time. The witness admitted that the accused have paid the TDS amount but amount was paid by the accused after expiry of stipulated time. As per directions given, witness filed present complaint as per authority given to him.

12. C.W.1 Vinod Kumar Pande, sanctioning authority deposed at Ex.10. He deposed that he has passed sanction order for prosecution against the accused on 25/03/2014 as per Ex.11 and authorised complainant Ajay Kamble to file complaint against the accused. Before granting sanction he issued show cause notice dtd. 12/11/2012 as per Ex.12 & 13. The proposal came from Shri. Ramankumar I.T.O. TDS 1(5) as per Ex.14, reply received by the accused as per Ex.15. Assessee deducted the TDS from various payment made to others but assessee/accused did not deposit TDS with the Government within stipulated period. On 01/10/2013 notice was issued to the accused through ITO head quarter, Mumbai and one more opportunity was given to accused but accused not complied with the same.

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13. The witness was cross-examined by defence. In the cross-examination the witness admitted that he has gone through the record of assessee. In the financial year 2009-2010 assessee deducted Rs. 8,56,102/- but deposited said amount after 12 months. He did not remember whether accused gave a reply to the notice. Witness denied that if the amount of income exceeded Rs. 20,000/- then TDS would be applicable. To the notice issued by him, accused gave reply dtd. 17/12/2012 but witness denied that he ignored that reply. When he found that reply of accused is not satisfactory that is why he has passed sanction order for launching prosecution against the accused. He denied that before passing sanction order he had not gone through the reply of assessee. He denied that in spite of satisfactory explanation given by the accused, he passed sanction order in the year 2014. He denied that he passed orders without verifying details of assessee and not verified whether the said amount comes under the exceptions of section 192 clause 1 A of Income Tax Act.

14. C.W.2 is the sanctioning authority, as per procedure and authorisation given by the Act to him and by perusing relevant documents and by applying his mind and after considering all the relevant factors, he passed sanction order against the accused for prosecution. Nothing brought on record from the mouth of this witness to discard his testimony.

15. Spl. Public Prosecutor Shri. Munde argued that on perusal of the evidence on record the guilt of accused is proved. The accused deducted TDS but failed to deposit the deducted tax to the Government within stipulated period. The accused himself admitted the said fact

during recording the statement under section 313 of The Code of Criminal Procedure as well as in his reply to the show cause notice therefore accused be punished as per law. The Advocate also submitted that the accused is duty bound to remit the deducted TDS amount within stipulated period of time as prescribed in Rule 30 Income Tax rules and the failure to remit the TDS after its deduction within stipulated period of time attracts penal provision contained in section 276B of The Income-Tax Act. The deducted TDS amount belongs to the Government and the payer acts in fiduciary capacity. Thus, it is bounden duty to remit the TDS to the Government account and no amount of helplessness and financial difficulty will not come in the rescue of the payer. The payer is not entrusted to retain the deducted TDS and used the same for any other purpose. Thus, the accused has failed to comply with the statutory provisions without reasonable cause, hence committed an offence punishable under section 276 B of Income-Tax Act.

16. Advocate for accused submitted that before any initiating the prosecution, the accused has deposited all the TDS amount to the department, therefore present complaint is not maintainable. It is also submitted by Advocate that during the stipulated period, the economical condition of the accused is not well and the business of the complainant was not in a good condition. After March 2008, there were no active film production. His income comprised of only sale receipt of old movie. No new movie released during three years therefore accused could not paid TDS amount within stipulated period. The accused submitted reply to the show cause notice and this is the first time accused defaulted for payment of money. It is further submitted that in

view of the instructions issued by Government Of India, Ministry Of Finance, CBDT dt. 28.05.1980, the prosecution under section 276B are not expected to be proposed when the amount involved and period of default is not substantiated and the amount in default has also been deposited, in the meantime, to the credit of Government along with interest and these instructions are binding on the Government. Advocate for accused also submitted that in view of provisions under section 278AA when there is reasonable cause, in such cases, no penalty should be imposed. On that basis Advocate for accused submitted that accused is entitled for acquittal.

17. It is not disputed that the accused had deducted the TDS amount of Rs.8,56,102/- for the period from 01/04/2009 to 31/03/2010. It is admitted that accused not deposited said amount within stipulated period i.e. on or before 7th day of next month. It is also admitted position that subsequently out of total amount deducted under section 194A, 194C,194H and 194J of the Act accused paid all the amount with interest as required under section 201A of the Act. Owing to the delay in payment of the aforesaid amount. The accused paid TDS amount after statutory period, therefore there was delay for the payment of amount. The complainant during the evidence brought on record that the accused deducted TDS, but not deposited and deposited after the period of 12 months. It means that the accused not deposited TDS amount within stipulated time or deposited beyond the period of statutory limit, the accused not denied the same fact. The accused is responsible to deposit deducted TDS amount within stipulated time as per section 200 and 204 of the Act and accused committed default.

18. Advocate for accused submitted that sanction accorded by sanctioning authority under section 279(1) of Income Tax Act for launching prosecution against accused under section 276B of Income-Tax Act is mechanical and contrary to the instructions issued by the Central board of Direct taxer dt. 28.05.1980. Advocate for accused further submitted that section 278A of the Act postulates an express bar on punishment under section 276A, 276AB or 276B of the Act. If access is proved that there was reasonable cause for such failure. In the present case accused shows reasonable cause about financial difficulty and payment of taxes to the Government and shows bonafides the tax along with interest has been paid, therefore the prosecution is unwarranted. While Advocate for complainant submitted that by making payment of TDS amount along with interest will not exonerate the accused from the liability of section 278B of the Act. Accused deducted the tax at the source, but did not deposit with Central Government within specified time limit.

19. Advocate for accused submitted that sanction accorded without proper offering opportunity and not considered say or reply and only mechanical sanction is granted. Accused gave a reply to show cause, but it was not considered by sanctioning authority, but here in this case the sanction order on record at Ex.12 in paragraph No. 05 of Ex.12, the sanctioning authority mentions that the facts and materials placed before me which I have gone through fully and carefully examined and I am further satisfied that adequate ground exist to prosecute the said person.

20. Sanction is an administrative function and is only to see that frivolous or avoidable trials do not take place notwithstanding that it is

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an objective exercise by the sanctioning authority to consider the material on record to satisfy himself whether a case fit for launching prosecution exists, on such satisfaction, the sanction can be accorded and thereafter the trial proceedings in which the person sent proceeded against has ample opportunity to defend himself against the allegations made against him and to meet the evidence, led to substantiate those allegations by the prosecution. In the present case notice is given before issuance of sanction to which reply was filed by accused and after considering all the relevant facts and material on record sanction was granted.

21. Advocate of accused submitted that no proper sanction to initiate the criminal proceeding against accused person as sanction order does not mentioned any details regarding explanation given by the accused in respect of delay in making the payment. Sanction order at Ex.11 is on record and that discloses in paragraph No.05 that “ the facts and material placed before me which I have gone through fully and have carefully examined and I am further satisfied that adequate grounds exists to prosecute the said person”, accordingly sanction was granted to initiate the criminal proceeding. In case of **Gopal Engineering V/s Thanngaraja reported in 1995 211 ITR 303**, it is held that “ there is no necessity that each and every aspect of the case must be dealt with in the authorisation”. Thus there is no merit in the contention of the accused that there is no proper sanction to initiate the criminal proceeding against the accused person.

22. Section 277AA provides a window for the accused to escape from the penal consequence by proving that he had reasonable

cause for the non-depositing of deducted TDS amount within time limit. The accused taken defence that financial constraints and lower down the business activity during financial year 2009-2010 as no active film production and income only comprised old films sale resulted in not depositing of TDS amount but except putting suggestions and say filed on record, no material is produced to substantiate the fact. Say of the accused on record which shows that the taxes are deducted and same was deposited but it is delayed. But accused during the trial not produced any material to substantiate the contentions referred above. Mere taking of the contentions is not amounting to offering a reasonable cause for the failure to remit the deducted TDS.” It is the defence of accused that accused gave detailed explanation of non payment of TDS in time where accused's business activities during the financial year 2009-2010 is not active in film production. His income comprised only sale receipts of old movies and no movies were completed and sold or released during three years, also problem of competent staff, accountants negligence, accused not aware about deducted and payment of tax voluntary payment of TDS and small amount of default. There is no intentional default, no mens rea, but because of above reasons accused could not deposited TDS in time. But accused not produced any material to substantiate the contention above referred. Mere taking up the contention is not amounting to offering a reasonable cause for the failure to remit the defaulted TDS.

23. Advocate of complainant submitted that financial constrains could not be made as a ground to evade the penal consequences. Once TDS amount is deducted then the deductor is legally bound to remit the same to the Government. The accused has no right to retain the TDS amount and make use of the same for any

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purpose. The financial difficulty is not defence of the default. As far as not having mens rea is concerned, it is submitted that mens rea is not pre-requisite ingredients to the offence under section 194C of The Income-Tax Act. If accused fails to make deduction of tax at source, he is liable to be punished for the said offence. This liability is an absolute liability.

24. Thus mens rea is not a requisite ingredient of the offence under section 194A, 194C and 276B of The Income-Tax Act. If accused failed to make 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 194(A). Section 194A requires the person making any payment of interest to deduct the tax at the rate in force. This liability is an absolute liability. Deficit deduction or non deduction was a conscious act therefore in a case under section 276B r/w sec. 194A mens rea is not required.

25. Advocate for accused submitted by referring of the documents on record and answers given by the complainant in cross-examination that the deducted TDS amount with interest,penalty and legal fees deposited by accused before initiation of proceeding. Hence, the present complaint is not maintainable. This contention is not substantiate under law because the offence punishable under section 276B of The Income-Tax Act is complete when the tax deducted at source is not deposited within given time and late deposit will not absolve the accused.

26. Advocate of accused submitted that since TDS has already

been deposited to the account of Central Government, there was no default and no prosecution can be ordered. There is no provision in the Income-Tax Act imposing criminal liability for delay in deduction as for non payment in time. I am unable to agree with Advocate of accused 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, there is default and appropriate action can be taken under the Act.

27. Advocate for accused pointed out section 278E of the Act which shows that if any prosecution for any offence under this act which requires a culpable mental state on the part of accused, then Court shall presume the existence of such mental state, but it shall be a defence for the accused to prove the fact that he has no such mental state with respect to the Act charged is an offence in that prosecution. Advocate of accused submitted that the accused have no mental state or no intention to avoid payment of TDS, but there are some financial problems under such circumstances, accused default in making payment of TDS and tax were paid at belated stage. If the defence of the accused about existence of such 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 accused person if the failure deposit TDS amount beyond time limit. There is no positive evidence brought on record, therefore it appears that accused failed to rebut the presumption lies against him under section 278E of The Income-Tax Act.

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28. Before proceeding further it shall be useful to see the relevant instructions, the same reads as “the prosecution under section 276B should not normally be proposed when the amount involved and for period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of the Government. No such consideration will of course apply to levy of interest under section 201, section 278AA of the Act reads as “punishment not to be proposed in certain cases--Notwithstanding anything contained in the provisions of section 276A, 276AB or 276B, no person shall be punishable for any failure referred to in the said provision if he proves that there was reasonable cause for such failure. This section provides a window for accused to escape from the penal consequence by proving that he had reasonable cause for the non-depositing of deducted TDS amount within time limit.

29. Advocate for accused contended that accused had given reason for failure to pay tax in time due to to financial problem, competent staff, accountant's negligence, accused not aware about depositing tax, but accused during trial not proved the same. The accused taken defence that due to financial problem resulted in not depositing of TDS amount, but except putting suggestions and say filed on record, no material is produced to substantiate the fact. Mere taking of the contentions is not amount to offering a reasonable cause for failure to remit the deducted TDS. The accused not proved that during trial by leading evidence that there was reasonable cause for not depositing the aforesaid tax amount within specified time limit.

30. Section 276B of The Income-Tax Act reads as “Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B - If a person fails to pay to the credit of the Central

Government -

(a) the tax deducted at source by him as required by or under the provisions of Chapter MVII-B; or

(b) the tax payable by him, as required by or under -

(i) sub-section(2) of section 115-O; or

(ii) the second proviso to section 194-B

he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine.

Income Tax Act makes separate provisions for levy of interest, penalty and criminal prosecution. The charging of interest has altogether a different purpose and i.e. for compensating the revenue for depriving it of the user of the money during the period the payment was withheld. The provisions with regard to criminal prosecution in cases of economic offences or violations of income tax law are of recent growth and their desirability and for necessity was felt because of rampant attitude of the defiance displayed by some affluent sections of the society. The pernicious effect on the economy of the country that evasions and violations were playing naturally called for sterner measures. These prosecutions has thus been made permissible in spite of the already existing provisions with regard to levy of penalties by income tax authorities. The legislature's wisdom, therefore, to open up prosecutions and dire consequences has a sound basis and can not be doubted. There is no question of Double Jeopardy in such cases. The main objectives of prosecution provisions contained in Chapter XXII of the Act is to punish the offenders found guilty of the tax evasion and other tax related offence and to install 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. The existence of one or the other is not bar to any of them. They are co-existing. An assessee can be levied penalty as well as punished by the prosecution. It is defence of the accused that they has paid all the amount with interest and penalty. No doubt the accused has paid all the tax amount. It was not paid within stipulated period, but it was paid after delay and said fact was not disputed by the accused.

31. It is the defence of accused that delay in depositing TDS and interest on such delay was due to reasons beyond its control. However, this plea of accused does not hold much water. The accused has not explained as to what has prevented or under which circumstances TDS could not be deposited in time. Except bald statement accused has not produced any document on record or lead any defence evidence to show its bonafide for not depositing TDS within time. Said defence was taken by the accused before Income-Tax authorities, but Income-Tax Department not to considered the defence of accused. Reasonable excuses shown by the accused before granting sanction for prosecution. But accused failed to brought on record said defence taken before income tax officer during proceeding before the concern department and to show these documents before the concern department. It is contention of accused that accused paid all deducted TDS amount with interest and penalty. In spite of that, sanction was granted by Commissioner of Income Tax u/s. 279(1) of Income-Tax. But, here in the present case, accused not applied for compounding of offence. Under the Income-Tax Act, all the powers are vested with department about compounding. But here accused not availed the said

remedy. Therefore it can be conclude that the accused have number of defences but accused has not brought on record that there was reasonable cause and accused not followed proper procedure and not availed opportunity given to them. Therefore defence taken by accused was not proper.

32. Section 200 of I.T. Act obligates a person, deducting any sum in accordance with the various provisions under the chapter to pay within the prescribed time period in the treasury of the Central Government, the sum so deducted to the credit of the Central Government or as the board directs. In this case, breach of provisions of section 200 of I.T. Act has been alleged against the accused for which sanction for prosecution has been granted u/s.279 of the Act.

33. However, for breach, one of consequence is to levy penalty as provided u/s.201 which reads as under -

Sec. 201- Consequences for failure to deduct or pay - (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 (1-A) 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 persons shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

34. From the aforesaid provisions, it is apparent that

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notwithstanding treating a company which has not deposited the tax to the credit of Central Government within prescribed time as an assessee in default to be liable to penalty. It further makes it clear that such penalty is not to be imposed on any person, whether in his own capacity, as a company or as Principal Officer of the company unless Assessing Officer is further satisfied that such person or Principal Officer of the company, as the case may be, has failed to deduct and to pay tax without any good and sufficient cause. Therefore, a bonafide default with good and sufficient reasons in payment of tax required to be deducted at source to the treasury within prescribed time mitigates the gravity of the offence to an extent that even penalty for such breach can not be imposed.

35. It is argued on behalf of the accused that in reply to show cause notice at Ex.15 dt. 17.12.2012 the accused gave reasons for non payment of the tax, but the Principal Commissioner of Income-Tax has not gone through it and not considered the same as reasonable cause for non paying TDS to the Government, but during granting sanction the Principle Commissioner Of Income-Tax specifically held in paragraph of Ex.11 that “ The facts and materials placed before me which I have gone through fully and have carefully examined and I am further satisfied that adequate grounds of exist to prosecute the said person”. Thus, contention of defence about concerned authority is not considered and to grant prosecution is not tenable and proper. It is also defence of accused that sanctioning authority not applied proper rules during granting the sanction, but on perusal of section order the sanctioning authority clearly gave finding about applying the mind and thereafter granted sanction, therefore there is no question of non applying of mind would arise. Therefore, it clear that accused gave

opportunity for explaining for non payment of tax, but accused not availed the same. Therefore accused not given reasonable cause for delaying payment of tax.

36. It is the defence of accused that reply was filed by the Chartered Account of accused and accused is not aware about the same, but the said defence of accused is not acceptable because the reply filed on record and it was not possible for C.A. without giving any authority and without instructions by accused, he cannot filed reply to the concerned authority. Moreover, accused has not examined his C.A. as a defence witness. In spite of stating during recording of statement of accused under section 313 of Criminal Procedure about to examine C.A. but not examined him and brought on record, the said fact, best reason known to the accused. Moreover, as per the contentions of accused his Chartered Accountant without his instruction, Chartered Accountant filed reply in the proceeding. Thereafter, accused have liberty to take necessary steps against the CA for filing reply in the proceeding without authority and without any information, but in the present case no any evidence brought on record to show that C.A. of accused filed reply without consent of accused, hence defence is not accepted.

37. Advocate for accused argued that whole prosecution case is on annexure B i.e. Ex.20 which is TDS default statement on Traces. As per the contentions of accused, the document is not proved by complainant and it can not be read in evidence and this document have no evidentiary value and not proved as per law as no any signature on document, the documents does not reflect in any manner that he has

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been generated to the office system and bears the name of the Government of India or any dominion made to the Income-Tax Act also no where mentioned that Ex.20 has been generated by the witness personally from office computer traces, also witness not known how the entries Ex.20 are generated, not examined any witness who feed data, who obtain print out, as well as no certificate annexed under section 65B of The Evidence Act. On the basis of which date is accessed and document is not verified with Income-Tax Department. Hence, Advocate for accused submitted that document is not admissible.

38. While Advocate for complainant submitted that the document is not a CD or DVD. The document is auto generated by putting PAN or TAN number in which cases certificate under section 65B of Evidence Act is not necessary. The certificate is required for service provider, but concerning with contention of Advocate of complainant is not acceptable.

37. As per authority in case of **Anwar P.V. V/s P.L. Bashir (2014)10 SCC, 473**, the Hon'ble Apex Court held that "An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirement under section 65B are specified. Thus, in case of CD, DVD chips etc, the same shall be accompanied by certificate in terms of section 65B obtained at the time of taking document, without which the secondary evidence pertaining to that electronic record is inadmissible. In the present case complainant has not complied the provisions of section 65B of Evidence Act and the document is not proved as per law and it is not admissible in evidence. here, in the present case, the case of prosecution is not entirely on the said document where in the present case accused admitted that he paid

TDS amount to the Government Treasury after statutory period which is admitted by filing reply as well as during recording statement of accused under section 313 of Cr.P.C. Admission is best evidence to prove the allegations. The fact of deposit of tax amount within time has been proved by the complainant by leading evidence. Thus, there is no further evidence required to prove the case of complainant.

39. From the above discussion it is clear that it is admitted by the accused that accused not paid deducted TDS amount within stipulated time. No doubt, in the present case, accused paid the tax with interest and penalty, but tax was paid after stipulated period. The accused not preferred the application for compounding the offence before concern authority where as per act the powers of compounding was only given to Commissioner of Income-Tax, but accused not availed the same. Also sanction granted by sanctioning authority after considering the documents and applying mind. After considering all the material facts before the court and the defence of the accused about reasonable cause is not proper. The accused has defaulted to pay the tax within stipulated time to the Central Government from the TDS amount for the financial year 2009-2010 and assessment year 2010-2011 and accused is the only person to pay the said amount. No doubt in the present case the accused has deposited the TDS in the amount of Central Government but depositing amount at belated stage.

40. The advocate for the complainant relied on the authority reported in **Madhumilan Syntex Ltd; and Ors. v/s Union of India(UOI) and Ors. AIR 2007 SC (148).** The Hon'ble Apex Court in para. 37, 40 and 41 held that -

37 - "Once a statute requires to pay tax and stipulates period within

..24..

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.”

40 - “It is true that the Act provides for imposition of penalty for non payment of tax. That, however, does not take away the power to prosecute accused persons if an offence has been committed by them.”

41 - “Finally, the contention that a civil suit is filed by the complainant and is pending has also not impressed us. If a civil suit is pending, an appropriate order will be passed by the competent Court. That, however, does not mean that if the accused have committed any offence, jurisdiction of criminal court would be ousted. Both the proceedings are separate, independent and one can not abate or defeat the other.”

41. Considering the above referred authority and the present case, it appears that if the payment is made at belated stage then it will be treated as default and appropriate action can be taken under this Act. It also clear that deposit of TDS with delay does not absolve criminal liability. If it is considered that accused paid the amount after period of 12 months, in such circumstance, complaint is maintainable and it does not absolve criminal liability of the accused persons.

42. Considering all the discussion and record, it clear that the accused deducted TDS amount for the relevant financial year 2009-2010 but failed to deposit the TDS amount with Government account within stipulated time. The accused is responsible person to pay the amount within time. The factum of non-deposit of tax amount within time has been proved and admitted by the accused during statement recorded u/s. 313 of Cr.P.C. Thus, no further evidence is required to

prove the case of the complainant. Admission is the best evidence to prove the allegations. Thus, in view of aforesaid case laws and admission by the accused, the case of complainant stands proved. All the facts clearly indicates that accused deducted the TDS for the relevant period and did not deposit the same with Government account within stipulated period and withheld the same for her own use. Accused can not be allowed to use the tax amount, so deducted for any other purpose. The TDS deducted on behalf of the Government and should be deposited in Government account. Deductor is not supposed to finance their business through Government money. Therefore, considering the evidence available on record, I come to conclusion that the accused is the person to pay tax within time and accused failed to deposit TDS within time. Therefore, the complainant has proved the case against the accused beyond reasonable doubt and proved the guilt of the accused u/s. 276B of I.T. Act. Therefore, I answer point no.1 in affirmative. I heard the accused on the point of sentence.

Date:25.04.2019.

(R.S. Sarkale)
Addl. Chief Metropolitan Magistrate,
38th Court, Ballard Pier, Mumbai.

43. Heard accused, advocate of accused and Special P.P. Accused submitted that this is his first offence and he has already paid tax amount with interest to the Government Treasury and submitted to show leniency. While advocate for accused submitted that this is his first offence already all TDS amount with interest, penalty and legal charges are paid to Government Treasury and prayed for leniency.

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44. On the other hand, Ld. Spl.P.P. Munde submitted that accused is the educated person and he had sufficient amount to pay TDS amount, but he failed to do so. The accused failed to credit the amount in Government account and used said amount for any other purpose, therefore this aspect cannot be viewed lightly and prayed for maximum punishment for accused.

45. Considering the submission of either side, it is well established that accused committed alleged offence. Before authority, he also remain absent. No any application for compounding the offence is filed. It appears that there is culpable mental state of the accused for non depositing of TDS amount within time therefore, he is liable for punishment. The offence U/sec. 276B of Income-Tax Act 1961 is punishable with rigorous imprisonment which shall not be less than three months and which may extend to 7 years and with fine. The matter is on record not substantiate the contention of accused that due to financial crunches fund problems, accountants negligence, accused not aware about payment of depositing tax constrains resulted in not depositing TDS amount. However, there is no allegation that accused is irregular in paying the tax other than the case in hand. Thus, the Court is of the considered view that accused is liable for possible sentence of 3 months rigorous imprisonment and fine. It is the minimum punishment. The Court is not having discretion in reducing the sentence. Therefore, accused shall undergo rigorous imprisonment for a period of 3 months and fine of Rs.5,000/- (Rs. Five Thousand only) for having committed offence U/sec. 276B of Income-Tax Act. From the above said reasons and discussions, my findings recorded as to point No.1 in the affirmative and proceed to pass the following order.

ORDER.

- i. By exercising the power conferred U/sec. 248(2) of The Code of Criminal Procedure the accused Firoz Abdul Gafar Nadiadwala is convicted for the offence punishable U/sec.276B of The Income-Tax Act, 1961.
- ii. The accused shall undergo rigorous imprisonment for a period of three months and to pay the fine of Rs.5,000/- (Rs. Five Thousand only) in default of payment of fine, the accused shall undergo simple imprisonment for a period of 30 days for the offence punishable U/sec. 276B of The Income-Tax Act, 1961.
- iii. Bail bonds of accused shall stands surrendered.
- iv. Copy of Judgment be provided to the accused on free of costs.
- v. Dictated and pronounced in open Court, before parties and their counsels.

Date:25.04.2019.

sd x.x.x.
(R.S. Sarkale)
Addl. Chief Metropolitan Magistrate,
38th Court, Ballard Pier, Mumbai.

Dictated on - 22.04.2019
Transcribed on - 23.04.2019
Signed on - 25.04.2019

Date:25.04.2019.

sd x.x.x.
(R.S. Sarkale)
Addl. Chief Metropolitan Magistrate,
38th Court, Ballard Pier, Mumbai.