

INCOME TAX : Where assessee-petitioner filed an application before competent authority to issue a certificate for non-deduction of tax under section 197 on interest income received from the partnership firm in which he was a partner which was pending consideration during lock down period and said application was rejected by competent authority being barred by limitation, since Government of India issued an ordinance called 'Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020' extending time limits specified in specified Acts till 30-6-2020, which had the effect of an Act of Parliament and the extension of limitation period as provided by the Ordinance would have an overriding effect over the limitation provision contained in the Income-tax Act for the financial year relevant to the assessment year 2020-21 and having regard to the extraordinary situation faced by the country in view of the pandemic and the lockdown for which the Ordinance had to be promulgated, simplicitor rejection of the application of the petitioner as having been rendered infructuous and unsustainable in law as well as on facts was not justified and matter remanded for consideration afresh

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HIGH COURT OF BOMBAY

Vijaykumar Satramdas Lakhani

v.

Central Board of Direct Taxes

UJJAL BHUYAN AND ABHAY AHUJA, JJ.

WRIT PETITION (ST.) NO.5837 OF 2020

SEPTEMBER 29, 2020

Ms. Ritika Agarwal and Salman Balbale *for the Petitioner.* **Suresh Kumar** *for the Respondent.*

ORDER

Ujjal Bhuyan, J. - Heard Ms. Ritika Agarwal, learned counsel for the petitioner and Mr. Suresh Kumar, learned counsel for the respondents.

2. By filing this petition under Article 226 of the Constitution of India, petitioner has assailed the legality and validity of order dated 3-4-2020 issued by the first respondent under section 119 of the Income-tax Act, 1961 as well as for quashing of the decision of respondent No. 2 dated 8-6-2020 rejecting the application of the petitioner for a certificate under section 197 of the Income-tax Act, 1961 (briefly 'the Act' hereinafter).

3. According to the petitioner, he is a partner in M/s. Lakhani Realty LLP. During the previous year 2019-2020 corresponding to the assessment year 2020-2021 petitioner earned salary income amounting to Rs. 24,00,000.00 from the limited liability partnership on which there is tax deduction at source (TDS). Petitioner incurred loss under the head 'income from house property' amounting to Rs. 59,666.00. It is stated that petitioner had earned interest income from M/s. Lakhani Builders Private Limited amounting to Rs. 4,82,80,790.00 besides other interest income of Rs. 4,39,357.00. It is further stated that petitioner had also paid interest amounting to Rs. 4,86,55,285.00. Thus, after adjustment the

interest income is Rs. 64,862.00.

4. On 26-2-2020, petitioner filed an application in Form No. 13 requesting respondent No. 2 to issue a certificate for non-deduction of tax under section 197 of the Act on interest income received from M/s. Lakhani Builders Private Limited. Be it stated that respondent No. 2 is the competent authority under the Act to verify the application of the petitioner for non-deduction of TDS and grant of certificate under section 197 of the Act.

4.1 In connection with the application, petitioner filed various details before respondent No. 2 on 4-3-2020. Additional details were called for by respondent No. 2, which were submitted by the petitioner on 18-3-2020.

5. In the meanwhile, because of the outbreak of COVID-19 pandemic, Government of India declared lockdown in the country with effect from 25-3-2020 by exercising powers under the Disaster Management Act, 2005 and Epidemic Diseases Act, 1897. Initially the lockdown was for 21 days.

5.1 Government of Maharashtra also issued notification dated 25-3-2020 imposing lockdown in the entire state with effect from 25-3-2020 till 14-4-2020.

6. Petitioner has stated that as per the central government order and the state government notification imposing lockdown, any person found violating lockdown measures was liable to be proceeded against under the Disaster Management Act, 2005 besides various penal provisions of the Indian Penal Code.

7. The lockdown was extended by the Government of India upto 3-5-2020 *vide* order dated 15-4-2020 and by the Government of Maharashtra till 30-4-2020 *vide* notification dated 13-4-2020.

8. In view of the unprecedented situation, Ministry of Law and Justice, Government of India issued an ordinance called 'Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020' (briefly 'the Ordinance' hereinafter). As per section 3 of the said Ordinance any time-limit specified in or prescribed or notified under any of the Specified Acts, such as the Income-tax Act 1961, falling within the period from 20-3-2020 to 29-6-2020 or such other date after 29-6-2020 as may be specified by the central government would stand extended to 30-6-2020 or to such other date after 30-6-2020 as may be notified by the central government.

9. According to the petitioner ignoring the said Ordinance, respondent No. 1 *i.e.*, Central Board of Direct Taxes (CBDT) issued an order dated 3-4-2020 under section 119 of the Act as per which in the case of pending applications for lower or nil rate of deduction of TDS under sections 195 and 197 of the Act or applications filed by buyers/licensees/lessees under section 206-C(9) of the Act, the applicant shall intimate *vide* email the concerned assessing officer about pendency of such application for the financial year 2019-2020 whereafter the assessing officer shall dispose off the application by 27-4-2020 and communicate the decision to the applicant regarding issuance/rejection of certificate *vide* email.

9.1 Following such order dated 3-4-2020, respondent No. 2 issued a notice dated 10-4-2020 calling upon the petitioner to submit certain additional details. It is stated that petitioner could not reply to the said notice as the second phase of lockdown was in place and his movements were restricted. This was also because the details sought for were kept in the office of the petitioner which is separate from his residence.

9.2 When the petitioner logged in to the TDS Reconciliation Analysis and Correction Enabling System (TRACES) on 30-7-2020, he found that the status of his application was shown as 'rejected'.

10. Aggrieved, present writ petition has been filed seeking the reliefs as indicated above.

11. Contention of the petitioner is that issuance of the order dated 3-4-2020 by respondent No. 1 was not

justified in view of all pervasiveness of the lockdown. That apart, the said order has disregarded the ordinance dated 31-3-2020. Rejection of the application of the petitioner is without furnishing any reasons and without granting proper and adequate opportunity of hearing to the petitioner.

12. Respondent No. 2 has filed reply affidavit. As narrated by respondent No. 2, the assessee *i.e.*, the petitioner had made an online application on 27-2-2020 on TRACES portal requesting for certificate under section 197 of the Act @ nil % on certain income received in financial year 2019-2020 on which TDS was sought to be deducted. Though the application was filed on 27-2-2020, the request was forwarded to TDS Circle, Thane. Ultimately, the same was received in the office of respondent No. 2 who is the jurisdictional assessing officer on 13-3-2020. On receipt of the application, a questionnaire was sent to the petitioner online on 16-3-2020 to substantiate the claim for nil deduction. Petitioner filed reply on 18-3-2020.

12.1 Reply of the petitioner was found to be not satisfactory. Accordingly, a further questionnaire was issued and clarification was sought for from the petitioner on 20-3-2020. Petitioner did not reply to the questionnaire.

12.2 Thereafter lockdown was declared in the whole country by the Government of India on 25-3-2020. Application of the petitioner could not be processed on TRACES by 31-3-2020.

12.3 On 3-4-2020, CBDT issued an order to the effect that in those cases where the assessees had filed applications for lower or nil deduction of TDS for the financial year 2019-20 timely and where those applications were pending, the applicants should intimate by email the concerned assessing officer about pendency of such applications and if required, to submit documents and evidence. In those cases, assessing officer was directed to dispose off such applications by 27-4-2020 with communication to the concerned applicants regarding issuance/rejection of certificate *vide* email. The above order of CBDT was given wide publicity in both print and electronic media and was available on the official website of the income tax department with contact details of all the assessing officers.

12.4 Petitioner however did not file any such application electronically by email on or before 27-4-2020, which was the extended limitation date for disposal of such application. Notice of respondent No. 2 dated 10-4-2020 went unresponded. Since no application was filed by the petitioner, his application became infructuous. When the offices were opened in the first part of June, 2020, the same was filed as 'rejected' on 8-6-2020. Petitioner was intimated accordingly.

12.5 In so far the Ordinance is concerned, stand taken is that the second proviso to sub-section (1) of section 3 thereof clearly stipulates that action contemplated under section 3 would not include payment of any amount as referred to in sub-section (2) of section 3. Therefore, it is contended that the Ordinance does not extend the due date of deduction or payment of TDS.

13. Contention of respondent No. 2 is that in terms of the order passed by the CBDT, the time limit for approving or rejecting such application which was till 31-3-2020 was extended till 27-4-2020. Since petitioner failed to avail the benefit of the extended period till 27-4-2020, application of the petitioner became barred by limitation.

14. Petitioner has filed rejoinder affidavit wherein it is contended that petitioner has questioned rejection of his application for lower/no TDS because there was no adjudication on the application; rejection was without considering the materials on record; and finally, before rejecting the application, no opportunity of hearing was given to the petitioner.

14.1 Regarding the contention of respondent No. 1, it is stated that petitioner could not furnish relevant documents in terms of the questionnaire of respondent No. 2 because the details were voluminous which were available only in his office and with his chartered accountant. In view of the lockdown, petitioner

could not move out of his residential premises. Filing of application by the petitioner and its pendency was already known to respondent No. 2. That apart, it is contended that the rejection was done after 27-4-2020 on 8-6-2020 which is illegal.

15. Respondent No. 2 has filed a further affidavit denying the contention of the petitioner that the questionnaire sent from his office required furnishing of bulky details. It is stated that all the applications pending as on 31-3-2020 on the TRACES portal became infructuous on 31-3-2020. Only on re-opening of the offices after easing of lockdown in the month of June, 2020, the applications could be technically closed/rejected on 8-6-2020.

15.1 Elaborating further respondent No. 2 has stated that an application under section 197 has to be ordinarily decided by 31st March; in this case by 31-3-2020. Due to the lockdown petitioner's application could not be processed by 31-3-2020. Hence, all applications for the financial year 2019-20 filed on TRACES portal became infructuous on 31-3-2020. It was in that context that CBDT issued order dated 3-4-2020 to mitigate genuine hardship of the taxpayers who had timely filed applications for lower/nil deduction of income tax certificates. By the said order, time was extended till 27-4-2020 for the concerned assessing officers to decide such applications. Only condition laid down by the said order was that the applicant should inform the concerned assessing officer about pendency of the application.

16. Ms. Agarwal, learned counsel for the petitioner submits that issuance of order dated 3-4-2020 by respondent No. 1 is contrary to the Ordinance. When the Ordinance had extended all limitations across board till 30-6-2020, there could not have been any justifiable reason for respondent No. 1 to curtail extension of the limitation period only till 27-4-2020. Respondent No. 2 rejected the application of the petitioner without considering the materials furnished by the petitioner and without affording reasonable opportunity of hearing. Calling for further details from the applicants and placing the burden upon them to intimate the jurisdictional assessing officer about pendency of their applications under section 197 of the Act during the lockdown was not at all justified. Petitioner cannot be penalised for non-compliance because of lockdown. She therefore submits that such decision may be interfered with and respondent No. 2 may be directed to consider afresh the application of the petitioner for issuance of a certificate under section 197 of the Act on the basis of materials on record and after hearing the petitioner.

17. Per contra, Mr. Suresh Kumar submits that petitioner had initially made the application before the income tax authorities at Thane though respondent No. 2 is the jurisdictional assessing officer. Ultimately, the application was received in the office of respondent No. 2 on 13-3-2020. Though petitioner had replied to the initial queries of respondent No. 2, the same was found to be not satisfactory by respondent No. 2. When the limitation had expired on 31-3-2020, application of the petitioner was pending. In the meanwhile, lockdown was imposed in the entire country. To mitigate the genuine hardship of taxpayers desirous of obtaining a certificate under section 197, CBDT had stepped in and by the order dated 3-4-2020 had extended the limitation till 27-4-2020 for taking a decision on such application, the only requirement being that the applicants should inform the jurisdictional assessing officer about pendency of their applications. In this connection, respondent No. 2 had issued notice to the petitioner on 10-4-2020. But petitioner did not respond to the said notice. In such circumstances, respondent No. 2 had no other option but to reject the application of the petitioner. When the offices re-opened following relaxation of lockdown in the first week of June, 2020, petitioner was informed about rejection of his application. He therefore submits that no illegality has been committed by respondent No. 2 and consequently, no case for interference has been made out.

18. Submissions made by learned counsel for the parties have received the due consideration of the Court.

19. At the outset, we may advert to section 197 of the Act which provides for certificate for deduction at lower rate. As per sub-section (1) of section 197, where in the case of any income of any person or sum

payable to any person income tax is required to be deducted at the time of credit or as the case may be, at the time of payment at the rates in force under the provisions of section 192, etc., the assessing officer is satisfied that the total income of the recipient justifies deduction of income tax at any lower rates or no deduction of income tax, as the case may be, the assessing officer shall on an application made by the assessee in this behalf give to him such certificate as may be appropriate.

19.1 As per sub-section (2), where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the assessing officer, deduct income tax at the rates specified in such certificates or deduct no tax, as the case may.

20. The procedure for applying for a certificate under section 197 and for grant of such certificate is provided in rules 28 and 28-AA of the Income Tax Rules, 1962. Rule 28 says that such an application shall be made in Form No. 13 electronically and rule 28-AA says that on such application being made if the assessing officer is satisfied that existing and estimated tax liability of a person justifies the deduction of tax at a lower rate or no deduction of tax, as the case may be, the assessing officer shall issue a certificate in terms of sub-section (1) of section 197 for deduction of tax at such lower rate or no deduction of tax. Sub-rule (2) mentions the factors which are required to be taken into consideration while determining existing and estimated liability by the assessing officer.

21. Having noted the broad statutory framework regarding issuance of a certificate for TDS either at lower rate or at nil rate, we may advert to the facts of the present case, though admittedly, there is no dispute as such on facts. Petitioner's application for a certificate under section 197(1) was pending as on 31-3-2020. In the meanwhile, lockdown was declared through out the country. To mitigate the hardship of the taxpayers, CBDT came up with the order dated 3-4-2020 extending the time limit for taking a decision on such applications till 27-4-2020, the only requirement being that the concerned applicant should inform the jurisdictional assessing officer about pendency of any application. Though respondent No. 2 had issued notice to the petitioner on 10-4-2020, petitioner did not or could not respond to the same. The extended time-limit having expired on 27-4-2020, petitioner's application was rejected as having been rendered infructuous. Decision to that effect could be recorded only on 8-6-2020 when the offices reopened.

22. We may now advert to the Ordinance issued on 31-3-2020. As per preamble to the Ordinance, the same was promulgated to provide relaxation in the provisions of certain acts and for matters connected therewith or incidental thereto. It was mentioned that in view of the spread of pandemic causing immense loss to the lives of people, it had become imperative to relax certain provisions including extension of time-limit in the taxation and other laws. Since Parliament was not in session, it was mentioned that President was satisfied that circumstances exist rendering it necessary for him to take immediate action. Therefore, in exercise of the powers conferred by clause (1) of Article 123 of the Constitution of India, President was pleased to promulgate the Ordinance.

22.1 Section 2 of the Ordinance defines 'Specified Act' to mean amongst others, the Income-tax Act, 1961. Section 3 thereof deals with relaxation of certain provisions of the Specified Acts. As per sub-section (1), where any time-limit has been specified in or prescribed or notified under the Specified Acts which falls during the period from 20-3-2020 to 29-6-2020 or such other date after 29-6-2020 as the central government may by notification specify, for completion or compliance of such action such as completion of any proceeding or passing of any order or issuance of any notice, etc., or for filing of any appeal, reply or application or furnishing of any report, document, return, statement or such other record under the provisions of the Specified Acts and where completion or compliance of such action has not been made within such time then the time limit for completion or compliance of such action shall notwithstanding anything contained in the Specified Acts stand extended to 30-6-2020 or such other date after 30-6-2020 as the central government may by notification specify. As per the second proviso, it was

mentioned that such action shall not include payment of any amount as is referred to in sub-section (2). Sub-section (2) provides that where any due date has been specified or prescribed or notified under the Specified Acts for payment of any amount towards tax or levy falling within the period from 20-3-2020 to 29-6-2020 or such other date after 29-6-2020 as may be notified by the central government and such amount has not been paid within the due dates but paid on or before 30-6-2020 or any later date notified by the central government, the rate of interest payable for the period of delay shall not exceed three-fourth percent for every month or part thereof and no penalty and prosecution shall be sanctioned for the delay in payment.

23. Before dilating on the provisions contained in section 3 of the Ordinance, it needs to be mentioned that the Ordinance has been promulgated in exercise of the powers conferred by clause (1) of Article 123 of the Constitution of India. Clause (1) says that if at any time except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as the circumstances appear to him to require. Clause (2) is relevant and it says that an ordinance promulgated under Article 123 shall have the same force and effect as an Act of Parliament. However, the procedure is laid down for placing such ordinance before both Houses of Parliament.

24. It is well settled that an ordinance made by the President is not an executive act. Power to promulgate ordinance is legislative in nature. An ordinance issued by the President is as much a law as an Act passed by the Parliament. President's power of legislation by an ordinance is coextensive with the power of Parliament to make legislation.

25. Reverting back to section 3 of the Ordinance, we find that as per the said provision, all time-limits falling within the period from 20-3-2020 to 29-6-2020 stood extended to 30-6-2020 by virtue of the said Ordinance though the extended limitation period could be further extended by the central government by notification. Coming to the contention of respondent No. 2 about non-applicability of the Ordinance to the present case, for the purpose of which he has relied upon the second proviso to sub-section (1) of section 3, we find that the said proviso excludes payment of any amount referred to in sub-section (2) from the benefit of sub-section (1). Sub-section (2) says that where any due date has been specified or prescribed or notified for payment of any amount towards tax or levy falling within the period from 20-3-2020 to 29-6-2020 or such other date after 29-6-2020 as may be notified by the central government and such amount having not been paid within such date but paid subsequently on or before 30-6-2020 or such other date after 30-6-2020 as may be notified by the central government, then it would carry a lower rate of interest with no penalty and prosecution. In our view, the said provision cannot be invoked to justify rejection of the application of the petitioner for issuance of a certificate under sub-section (1) of section 197 on the ground of being barred by limitation. On the contrary, as we have already noted earlier sub-section (1) of section 3 also provides for extension of limitation to 30-6-2020 or even beyond in case of furnishing of any reply, application, report, document, return, statement or such other record under the provisions of the Act which would cover the case of the petitioner. To make it more explicit, in that portion of sub-section (1) of section 3 preceding the first proviso, it is clarified that such extension of limitation upto 30-6-2020 or even beyond would be notwithstanding anything contained in the Specified Acts, in this case the Income-tax Act. In other words, the extension of limitation period as provided by the Ordinance would have an overriding effect over the limitation provision contained in the Income-tax Act for the financial year relevant to the assessment year 2020-21.

26. We may now refer to the order dated 3-4-2020 passed by respondent No. 1 under section 119 of the Act. It says that due to outbreak of pandemic there is severe disruption in the normal functioning of all sectors of the economy including functioning of the Income-tax Department. In such a scenario, non-disposal of applications filed under sections 195, 197 and 206-C(9) of the Act in a timely manner may cause genuine hardship to the applicants. In the absence of the certificates, payments may not be

received. That apart, the field officers were also having constraints in dealing with such applications in view of the lockdown. Therefore, to mitigate the hardship of the assesseees and buyers/licensees/lessees, directions were issued under section 119 of the Act. As per paragraph 3 of the order, in those cases where assesseees had timely filed applications and such applications were pending for disposal as on 3-4-2020, the applicant should intimate *vide* email the concerned assessing officer about pendency of such application furnishing evidence of filing of application. As per paragraph 4, assessing officer shall dispose off the applications by 27-4-2020 and communicate to the applicant regarding issuance/rejection of certificate *vide* email.

27. Though the intention of the order dated 3-4-2020 is beneficial to provide benefit to the assesseees who had made applications under section 197(1) of the Act, in our view, the same cannot be applied in a manner which acts to the disadvantage of the applicants, particularly in view of the extra-ordinary situation following the outbreak of pandemic and declaration of lockdown. While the timeline for taking a decision on such applications was extended to 27-4-2020, an additional burden was placed on the applicants to inform the concerned assessing officer about pendency of their application supported by documents and evidence. While many of the assesseees may have complied with the said requirement, petitioner has failed to comply with the said requirement. He has given reasons for the same. According to him, because of the strict imposition of lockdown, he could not venture out of his residence to retrieve the required documents and information from his office as well as from the office of his Chartered Accountant. In the light of the lockdown such explanation cannot be brushed aside or rejected as being flimsy or frivolous. This is more so in view of the beneficial nature of the order dated 3-4-2020. If the application of the petitioner was pending, the same should or ought to have been reflected in the system of respondent No. 2 notwithstanding non-response of the petitioner to the notice dated 10-4-2020. On the contrary, issuance of the notice dated 10-4-2020 by respondent No. 2 is itself indicative that he had knowledge about pendency of the application of the petitioner. If that be so then the obligation placed on the petitioner to inform respondent No. 2 about pendency of application with proof stood obviated. In such circumstances, the application could not have been rejected as infructuous. In any event, when the Ordinance was in place, which had the effect of an Act of Parliament, the benefits conferred by the Ordinance could not have been curtailed by an order even though the said order is passed by a statutory authority under the statute and for the benefit of the taxpayers.

28. Considering the above and having regard to the extra-ordinary situation faced by the country in view of the pandemic and the lockdown for which the Ordinance had to be promulgated, simplicitor rejection of the application of the petitioner as having been rendered infructuous either on 31-3-2020 or on 27-4-2020 cannot be justified and is wholly unsustainable in law as well as on facts.

29. In view thereof, we *set aside* the decision of respondent No. 2 dated 8-6-2020 to reject the application of the petitioner and remand the matter back to respondent No. 2 for taking a fresh decision on the application of the petitioner for issuance of a certificate under sub-section (1) of section 197 of the Act for the assessment year 2020-21 on merit and in accordance with law within a period of six weeks from the date of receipt of a copy of this order.

30. Writ petition is accordingly allowed. However, there shall be no order as to costs.

31. This order will be digitally signed by the Private Secretary of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

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