



## ERGO

*Analysing developments impacting business*

### ANOTHER CASE OF DELAYED DEPOSIT OF TDS LEADS TO PROSECUTION

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#### Introduction

In a recent judgment *Sowparnika Projects and Infrastructure Pvt. Ltd. and Ors. v/s ACIT TDS Circle-3(1), Criminal Review Petition No. 456/2019* (Judgment), the Hon'ble Court of the LIX Additional City Civil and Session Judge, Bangalore City (District Court) has dismissed criminal revision petition filed by Sowparnika Projects and Infrastructure Private Limited (Company) and its director and upheld the launching of prosecution proceedings for delayed deposit of tax deducted at source (TDS) by the Company pertaining to Financial Year (FY) 2012-13.

#### Background

Under the Income-tax Act, 1961 (IT Act), certain payments to resident taxpayers are subject to TDS - i.e. the payer has to deduct the applicable tax at source (1<sup>st</sup> Obligation) and deposit the same with the government within stipulated timeframe (2<sup>nd</sup> Obligation). The stipulated timeframe has been prescribed in the Income-tax Rules, 1962 (IT Rules) which provides that the general time-limit for depositing TDS with the government is 7 days from the end of the month in which deduction is made (Due Date). Failure to comply with these obligations is an offence and attracts penal consequences - monetary (interest, penalty, fine) as well as non-monetary (imprisonment ranging from 3 months to 7 years). However, IT Act also provides that a person would not be punished for such failure if he proves that there was 'reasonable cause' for such failure.

Where such offence is committed by a company, IT Act provides that (i) the company would be liable to pay fine; and (ii) the director, manager, secretary or other officer of the company to whom such neglect can be attributed would be liable for prosecution. Further, in such cases of prosecution, the IT Act also contains a presumption - *though rebuttable* - as to the culpable mental state of the accused (Rebuttable Presumption).

#### Judgment

In the instant case, during FY 2012-13, the Company had made certain payments which were subject to TDS. Though the Company complied with the 1<sup>st</sup> Obligation (it deducted TDS amounting to INR 99.10 lakhs), it failed to comply with the 2<sup>nd</sup> Obligation (i.e. it did not deposit TDS with the government by the Due Date). There was a delay to the extent of 2 to 15 months in depositing the TDS.

Consequently, the tax authorities launched prosecution against the Company and its director (together, referred as 'Accused') for delayed deposit of TDS. Notably, the sanction order for the prosecution was passed in the FY 2017-18 only (i.e. after a lapse of more than 3 years from the concerned default). The Hon'ble Special Court for Economic Offences, Bangalore (Special Court) passed an order convicting the Accused and dismissed their application for discharge.

The Accused, thereafter, filed a revision petition before the District Court.

Following were the contentions and arguments raised by the Accused in their defence and the District Court's observations/conclusions with respect to those contentions:

- *Accused's contention: The Accused argued that section 276B (which provides for prosecution for 'failure' to deposit TDS with the government) does not provide any time limit for depositing TDS and that thus, the offence gets attracted only when TDS has not been deposited with the government. In the instant case, as the Accused had deposited TDS with the government and the delay was unintentional, offence under section 276B were not applicable.*

The District Court, noting that strict construction is required to be adopted while interpreting penal provisions, observed that though section 276B does not prescribe any time limit for depositing TDS with the government, it has to be read along with the IT Rules which provide the Due Date. Basis this, the District Court held that provisions of section 276B of the IT Act were rightly invoked by tax authorities for such delay in deposit of TDS.

- *Accused's contention: It was further argued that since section 468 of the Code of Criminal Procedure, 1973 (CrPC) bars taking cognizance of an offence after 3 years, the prosecution complaint in the instant case was barred by limitation as it was launched after a lapse of more than 3 years from the date of default.*

The District Court rejected this contention by ruling that the bar under section 468 of CrPC is applicable only where the maximum imprisonment for the offence is 3 years. On the contrary, in the instant case, the maximum imprisonment for offence under Section 276B of the IT Act is 7 years.

- *Accused's contention: The director of the Company argued that prosecution proceedings against him cannot be upheld as (i) the tax authorities had not placed any material on record to show that he was the 'principal officer' responsible for day to day activities of the Company and (ii) the sanction order for prosecution did not mention his name.*

The District Court rejected this contention by observing that the non-mention of the director's name in the sanction order appears to have been a 'typographical mistake' because the earlier show-cause notice issued by tax authorities treating him as 'principal officer' which had been placed on record was responded to by the Accused.

## Comments

Lately, in cases of delayed deposit of TDS with the government, the instances of initiation of prosecution proceedings against the directors has been on the rise. Since the IT Act does not make a distinction between a complete failure to deposit the TDS with the government OR a delayed deposit of TDS with the government, the tax authorities have generally been launching prosecution proceedings even in case of delayed deposit of TDS with the government. This order will further strengthen the stand of the tax authorities in cases where the prosecution has been launched after a

significant delay. In another recent case, delayed deposit of TDS had led to prosecution ([please see our Ergo dated 20 September 2019](#)).

It is noteworthy that considering the stringency in such punishments, with a view to ensure that minor default cases don't get selected for prosecution, recently, the government has brought out a set of guidelines ([please see our Ergo dated 13 September 2019](#)) which, *inter alia*, provides that for cases pertaining to delay in deposit of TDS amounting to INR 25 lakhs or less, (i) such cases would normally not be selected for prosecution if the delay does not exceed 60 days from the due date, and (ii) even in exceptional circumstances (like habitual offenders), prosecution may be initiated only with the prior approval of a collegium of two senior tax officers.

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