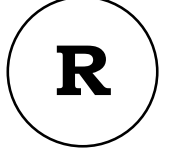


IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 20<sup>TH</sup> DAY OF DECEMBER, 2023



BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPRASANNA

CRIMINAL PETITION No.909 OF 2017

C/W

CRIMINAL PETITION No.910 OF 2017

CRIMINAL PETITION No.911 OF 2017

CRIMINAL PETITION No.912 OF 2017

CRIMINAL PETITION No.913 OF 2017

CRIMINAL PETITION No.4590 OF 2017

CRIMINAL PETITION No.4591 OF 2017

CRIMINAL PETITION No.4593 OF 2017

CRIMINAL PETITION No.4594 OF 2017

CRIMINAL PETITION No.4595 OF 2017

**IN CRIMINAL PETITION No.909 OF 2017:**

**BETWEEN:**

ANURAG BAGARIA  
AGED ABOUT 40 YEARS  
S/O LATE SUBHASH BAGARIA  
RESIDING AT NO.6/3  
1<sup>ST</sup> CROSS ROAD, 9<sup>TH</sup> MAIN  
RAJMAHAL VILLAS EXTENSION  
BENGLAURU - 560 080.

... PETITIONER

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF

INCOME TAX (INV)  
UNIT 2 (1)  
C.R.BUILDING (ANNEX)  
QUEENS ROAD  
BENGALURU – 560 001.

... RESPONDENT

(BY SRI DILIP M., ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.221/2016 PENDING BEFORE THE SPECIAL COURT (ECONOMIC OFFENCES), BENGALURU.

**IN CRIMINAL PETITION No.910 OF 2017:**

**BETWEEN:**

KARAN BAGARIA  
AGED ABOUT 32 YEARS  
S/O LATE SUBHASH BAGARIA  
R/AT NO. 6/3, 1<sup>ST</sup> CROSS ROAD  
9<sup>TH</sup> MAIN, RAJMAHAL VILLAS EXTENSION  
BENGALURU – 560 080.

... PETITIONER

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV), UNIT 2(1)  
C.R.BUILDING, (ANNEX) QUEENS ROAD  
BENGALURU - 560 001.

... RESPONDENT

(BY SRI DILIP M., ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.222/2016 PENDING BEFORE THE SPL. COURT (ECONOMIC OFFENCES), BANGALORE.

**IN CRIMINAL PETITION No.911 OF 2017:**

**BETWEEN:**

KUM KUM BAGARIA  
AGED ABOUT 63 YEARS  
S/O LATE SUBHASH BAGARIA  
R/AT NO. 6/3, 1<sup>ST</sup> CROSS ROAD  
9<sup>TH</sup> MAIN, RAJMAHAL VILLAS EXTENSION  
BENGALURU - 560 080.

... PETITIONER

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV) UNIT 2(1)  
C.R.BUILDING (ANNEX), QUEENS ROAD  
BENGALURU - 560 001.

... RESPONDENT

(BY SRI DILIP M., ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.223/2016 PENDING BEFORE THE SPECIAL COURT (ECONOMIC OFFENCES), BENGALURU.

**IN CRIMINAL PETITION No.912 OF 2017**

**BETWEEN:**

- 1 . M/S. KEMFIN SERVICES PRIVATE LIMITED  
NO.11, KEMWELL HOUSE  
TUMKUR ROAD  
BENGALURU - 560 022.  
REPRESENTED BY ITS  
AUTHORIZED SIGNATORY  
MR. ANURAG BAGARIA.
  
- 2 . MR. ANURAG BAGARIA  
AGED ABOUT 40 YEARS  
S/O LATE SUBHASH BAGARIA  
R/AT NO. 6/3, 1<sup>ST</sup> CROSS ROAD  
9<sup>TH</sup> MAIN, RAJMAHAL VILLAS EXTENSION  
BENGALURU - 560 080.

... PETITIONERS

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV), UNIT 2 (1)  
C.R.BUILDING (ANNEX), QUEENS ROAD  
BENGALURU - 560 001.

... RESPONDENT

(BY SRI DILIP M., ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.224/2016 PENDING BEFORE THE SPL. COURT (ECONOMIC OFFENCES), BANGALORE.

**IN CRIMINAL PETITION No.913 OF 2017**

**BETWEEN:**

- 1 . M/S. BIOWORTH INDIA PRIVATE LTD.,  
HEAD OFFICE: NO. 11  
KEMWELL HOUSE, TUMKUR ROAD  
BENGALURU - 560 022  
REPRESENTED BY ITS  
AUTHORIZED SIGNATORY  
MR. ANURAG BAGARIA.
  
- 2 . MR. ANURAG BAGARIA  
AGED ABOUT 40 YEARS  
S/O LATE SUBHASH BAGARIA  
R/AT NO. 6/3, 1<sup>ST</sup> CROSS ROAD  
9<sup>TH</sup> MAIN, RAJMAHAL VILLAS EXTENSION  
BENGALURU – 560 080.

... PETITIONERS

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV), UNIT 2(1)  
C.R.BUILDING (ANNEX) QUEENS ROAD  
BENGALURU - 560 001.

... RESPONDENT

(BY SRI DILIP M., ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.225/2016 PENDING BEFORE THE SPL. COURT (ECONOMIC OFFENCES), BANGALORE.

**IN CRIMINAL PETITION No.4590 OF 2017**

**BETWEEN:**

ANURAG BAGARIA  
AGED ABOUT 40 YEARS  
S/O LATE SUBHASH BAGARIA  
RESIDING AT NO.6/3, 1<sup>ST</sup> CROSS ROAD  
9<sup>TH</sup> MAIN, RAJMAHAL VILAS EXTENSION  
BENGALURU – 560 080.

... PETITIONER

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV), UNIT-2(1)  
C.R.BUILDING (ANNEX), QUEENS ROAD  
BENGALURU – 560 001.

... RESPONDENT

(BY SRI E.I.SANMATHI, ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.324/2016 PENDING BEFORE THE SPECIAL COURT (ECONOMIC OFFENCES), BANGALORE.

**IN CRIMINAL PETITION No.4591 OF 2017**

**BETWEEN:**

KARAN BAGARIA  
AGED ABOUT 32 YEARS  
S/O LATE SUBHASH BAGARIA  
R/AT NO. 6/3, 1<sup>ST</sup> CROSS ROAD  
9<sup>TH</sup> MAIN, RAJMAHAL VILLAS EXTENSION  
BENGALURU - 560 080.

... PETITIONER

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV), UNIT 2(1)  
C.R.BUILDING (ANNEX), QUEENS ROAD  
BENGALURU - 560 001.

... RESPONDENT

(BY SRI E.I.SANMATHI, ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF  
CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF  
C.C.NO.328/2016 PENDING BEFORE THE SPECIAL COURT  
(ECONOMIC OFFENCES) BANGALORE.

**IN CRIMINAL PETITION No.4593 OF 2017****BETWEEN:**

KUM KUM BAGARIA  
AGED ABOUT 63 YEARS  
S/O LATE SUBHASH BAGARIA  
R/AT NO.6/3, 1<sup>ST</sup> CROSS ROAD, 9<sup>TH</sup> MAIN,  
RAJMAHAL VILLAS EXTENSION  
BENGALURU - 560 080.

... PETITIONER

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV), UNIT 2(1)  
C.R.BUILDING (ANNEX), QUEENS ROAD  
BENGALURU - 560 001.

... RESPONDENT

(BY SRI E.I.SANMATHI, ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.327/2016 PENDING BEFORE THE SPECIAL COURT (ECONOMIC OFFENCES) BANGALORE.

**IN CRIMINAL PETITION No.4594 OF 2017**

**BETWEEN:**

- 1 . M/S. KEMFIN SERVICES PRIVATE LIMITED  
NO.11, KEMWELL HOUSE, TUMKUR ROAD  
BENGALURU - 560 022  
REPRESENT BY ITS  
AUTHORIZED SIGNATORY  
MR. ANURAG BAGARIA.
  
- 2 . MR. ANURAG BAGARIA  
AGED ABOUT 40 YEARS  
S/O LATE SUBHASH BAGARIA  
R/AT NO. 6/3, 1<sup>ST</sup> CROSS ROAD  
9<sup>TH</sup> MAIN, RAJMAHAL VILLAS EXTENSION  
BENGALURU - 560 080.

... PETITIONERS

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV), UNIT 2(1)  
C.R.BUILDING (ANNEX), QUEENS ROAD  
BENGALURU - 560 001.

... RESPONDENT

(BY SRI E.I.SANMATHI, ADVOCATE)



THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.325/2016 PENDING BEFORE THE SPECIAL COURT (ECONOMIC OFFENCES), BENGALURU.

**IN CRIMINAL PETITION No.4595 OF 2017**

**BETWEEN:**

- 1 . M/S. BIOWORTH INDIA PRIVATE LIMITED  
NO.11, KEMWELL HOUSE  
TUMKUR ROAD  
BENGALURU – 560 022.  
REPRESENTED BY ITS  
AUTHORIZED SIGNATORY  
MR. ANURAG BAGARIA.
  
- 2 . MR. ANURAG BAGARIA  
AGED ABOUT 36 YEARS  
S/O LATE SUBASH BAGARIA  
R/AT NO.6/3, 1<sup>ST</sup> CROSS ROAD  
9<sup>TH</sup> MAIN, RAJMAHAL VILLAS EXTENSION  
BENGALURU – 560 001.

... PETITIONERS

(BY SRI GAUTAM BHARADWAJ, ADVOCATE)

**AND:**

THE INCOME TAX DEPARTMENT  
BY THE DEPUTY DIRECTOR OF  
INCOME TAX (INV), UNIT 2(1)  
C.R.BUILDING (ANNEX), QUEENS ROAD  
BENGALURU – 560 001.

... RESPONDENT

(BY SRI E.I.SANMATHI, ADVOCATE)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 482 OF CR.P.C., PRAYING TO QUASH THE PROCEEDINGS ARISING OUT OF C.C.NO.326/2016 PENDING BEFORE THE SPECIAL COURT (ECONOMIC OFFENCES), BENGALURU.

THESE CRIMINAL PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

**ORDER**

Conglomeration of these cases call in question proceedings initiated against the petitioners under Section 276C of the Income Tax Act, 1961 ('the Act' for short). Since issues raised and facts leading to registration of crime in every one of these cases are similar, they are taken up together and considered in this common order.

2. Facts leading to initiation of proceedings have a slight variation from petition to petition. Therefore, I deem it appropriate to succinctly note the facts in each of the petitions.

3. The petitioners in all these cases are income tax assesses for decades. Criminal Petition Nos.909 and 4590 of 2017 concern one Anurag Bagaria. He claims to be a businessman and is assessed

to pay tax in his individual capacity right from 1977. At the relevant point in time, the petitioner while filing his returns under Section 139 of the Act, claimed certain deductions under Chapter VI-A and in particular, deductions under the heads of Long Term Capital Gain/Short Term Capital Loss. Long after the said deductions, sometime around September, 2015 the Income-Tax Department conducts search under Section 132 of the Act and later registers a crime on 30-07-2016 which becomes a crime in C.C.No.221 of 2016 for offence punishable under Section 276C(1) of the Act. Petitioners in other petitions also belong to the family members of this petitioner. All of them alleged of the same act of willful evasion of tax and are charged of offence under Section 276C(1) of the Act.

4. Criminal Petition Nos.910 and 4591 of 2017 arise out of C.C.No.222 and 328 of 2016 respectively. The petitioner therein is the brother of the petitioner in CrI.P.No.909 of 2017. Criminal Petition Nos. 911 and 4592 of 2017 arise out of C.C.Nos. 223 and 327 of 2016 respectively and are filed by one Kum Kum Bagaria, mother of the petitioner in CrI.P.No.909 of 2017. Criminal Petition

Nos. 912 and 4594 of 2017 arise out of C.C. Nos. 224 and 325 of 2016 respectively and are filed by M/s Kemfin Services Private Limited, a Company which belongs to the petitioner in CrI.P.No.909 of 2017. Criminal petition Nos. 913 and 4595 of 2017 arise out of C.C.Nos.225 and 326 of 2016 respectively. These petitions are preferred by M/s Bioworth India Private Limited, again owned by the petitioner in CrI.P.No.909 of 2017.

5. One common stream that runs through in all these petitions is willful evasion of tax on claims made under the head Long Term Capital Gain/Short Term Capital Loss. Against all these petitioners for filing of income tax returns by claiming Long Term Capital Gain/Short Term Capital Loss proceedings are initiated by registering a crime invoking Section 200 of the CrPC for offence punishable under Section 276C of the Act. The infirmities pointed out in the complaints registered independently against all the members of the family and the Companies succinctly stated are as follows:

In Criminal Petition Nos. 909 and 4590 of 2017 the allegation is that the petitioner for the financial year 2012-13 had made a bogus long term capital gain of ₹1,42,03,110/- from trading in scripts of JMD Telefilm Industries, Splash Media, Essar India, Tuni Textiles Limited and Alpha. In Criminal Petition Nos.910 and 4591 of 2017 the allegation is that for the financial year 2012-13 the brother of petitioner in Crl.P.No.909 of 2017 had made a claim for long term capital gains which is alleged to be bogus to the tune of ₹2,78,62,110/- from trading in the aforesaid scripts. In Criminal Petition Nos. 911 and 4592 of 2017 the allegation is similar. The claim is also the same as also the scripts. In Criminal Petition Nos.912 and 4594 of 2017 and Criminal Petition Nos. 913 and 4595 of 2017 which belong to the Companies, the allegation is the same. The financial year vary from 2010-11 to 2012-13. Here the Company has claimed capital gain of ₹19,22,44,266/- by trading with the same Companies. In Criminal petition No.913 of 2017, the Company is said to have claimed long term capital gain of ₹1,93,02,738/- by trading with the same Company. Therefore, the solitary stream of allegation that runs *qua* the petitioners in all these cases is that the petitioners have registered long term capital

gain or short term capital loss and thus the claims registered are bogus. It appears that all these claims so registered by the respective income tax assesseees for the year 2010-11 which runs through 2012-13, the claims were accepted by the Income-Tax Department. At a later point in time, it was found that these claims had some suspicion. Based thereon assessment proceedings were instituted under the Income Tax Act for levy of penalty and simultaneously search was conducted under Section 132 of the Act. Statements of assesseees were recorded under sub-section (4) of Section 132 of the Act and premises were also searched and later on, crimes come to be registered under Section 276-C of the Act. Registration of the crime is what has driven the petitioners to this Court in these petitions.

6. Heard Sri Gautam Bharadwaj, learned counsel appearing for the petitioners in all these cases and Sri Dilip M., and Sri. E. I. Sanmathi, learned counsel appearing for the respondent/revenue.

7. The learned counsel appearing for the petitioners would at the outset contend that there is no element of *mens rea* involved in any of the transactions. It is at best an incorrect claim which would not amount to willful evasion of tax. He would contend that the moment search was conducted and the petitioners have been advised, they have waived all the claims and have paid the tax that was necessary to be paid by filing their revised returns on 26-10-2016. On that basis, the learned counsel would again contend that there is no willful evasion of tax. It is his submission that criminal proceedings ought to have awaited conclusion of assessment proceedings under the Act as evasion itself is yet to be determined in the assessment proceedings. Therefore, criminal prosecution was initiated in a hurry. He would lastly contend that the order of the learned Magistrate in taking cognizance of the offences suffer from blatant non-application of mind and, therefore vitiated and all proceedings taken thereto are to be treated as a nullity in law. In effect, he would seek quashment of proceedings in all these cases.

8. The learned counsel appearing for the respondent/ revenue would vehemently refute the submissions to contend that the petitioners did not file revised returns on their own volition. The search conducted on the premises of the petitioners revealed that they had made certain alleged bogus claims. It is only after that act, the petitioners have come out and filed their revised returns. He would submit that it does amount to willful evasion of tax as, if it would have been undetected, it would pass muster. He would, therefore, submit that the proceedings are appropriately initiated and since petitioners have by themselves paid tax through revised returns, no assessment determination would require to await initiation of proceedings under Section 276C of the Act. He would submit that this Court should not interfere in exercise of its jurisdiction under Section 482 of the CrPC on any of the grounds in favour of assesseees who have willfully evaded payment of tax. Both the counsel appearing for assesseees and revenue have relied on several judgments which would bear consideration according to their relevance in the course of the order.



9. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

10. The afore-narrated facts are not in dispute. The petitioners, be it individuals or Companies, now alleged of similar offences are all income-tax assesseees for several decades. Between the years 2010-11 and 2012-13 individuals and Companies had registered two claims – one deduction for long term capital gain and the other deduction for short term capital loss while filing their returns under Section 139 of the Act. All was well up to September, 2015. The Department conducted search on all the petitioners herein under Section 132 of the Act. Section 132 of the Act reads as follows:

**"132. Search and seizure.—(1)** *[Where the [Principal Director General or Director General] or Director or the [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] or Additional Director or Additional Commissioner], [or Joint Director or Joint Commissioner] in consequence of information in his possession, has reason to believe that—*

*(a) any person to whom a summons under sub-section (1) of Section 37 of the Indian Income Tax Act, 1922 (11 of 1922), or under sub-section (1) of Section 131 of this Act, or a notice under sub-section (4) of Section 22 of the Indian*

*Income Tax Act, 1922 (11 of 1922), or under sub-section (1) of Section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account, or other documents as required by such summons or notice, or*

*(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act, or*

*(c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income Tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property), then,—*

*(A) the [Principal Director General or Director General] or Director or the [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner], as the case may be, may authorise any [Additional Director or Additional Commissioner or] Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income Tax Officer, or*

*(B) such [Additional Director or Additional Commissioner or] Joint Director or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income Tax Officer,*

*(the officer so authorised in all cases being hereinafter referred to as the authorised officer) to—*

*(i) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;*

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

(ii-a) search any person who has got out of, or is about to get into, or is in, the building, place, vessel, vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;

[(ii-b) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) of sub-section (1) of Section 2 of the Information Technology Act, 2000, to afford the authorised officer the necessary facility to inspect such books of account or other documents;]

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

**[Provided** that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorised officer shall make a note or inventory of such stock-in-trade of the business.]

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing:

**Provided** that where any building, place, vessel, vehicle or aircraft referred to in clause (i) is within the area of jurisdiction of any [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner], but such [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c), then, notwithstanding anything contained in Section 120, it shall

*be competent for him to exercise the powers under this sub-section in all cases where he has reason to believe that any delay in getting the authorisation from the [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] having jurisdiction over such person may be prejudicial to the interests of the revenue:*

**Provided further** *that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorised officer may serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it, except with the previous permission of such authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (iii):*

**[Provided also** *that nothing contained in the second proviso shall apply in case of any valuable article or thing, being stock-in-trade of the business.]*

*[Provided also that no authorisation shall be issued by the Additional Director or Additional Commissioner or Joint Director or Joint Commissioner on or after the 1st day of October, 2009 unless he has been empowered by the Board to do so.]*

*[Explanation.— For the removal of doubts, it is hereby declared that the reason to believe, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.]*

*(1-A) Where any [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner], in consequence of information in his possession, has reason to suspect that any books of account, other documents, money, bullion, jewellery or other valuable article or thing in respect of which an officer has been authorised by the [Principal Director General or Director General] or Director or any other [Principal Chief*

*Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] or Additional Director or Additional Commissioner] [or Joint Director or Joint Commissioner] to take action under clauses (i) to (v) of sub-section (1) are or is kept in any building, place, vessel, vehicle or aircraft not mentioned in the authorisation under sub-section (1), such [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] may, notwithstanding anything contained in Section 120, authorise the said officer to take action under any of the clauses aforesaid in respect of such building, place, vessel, vehicle or aircraft.*

*[Explanation.— For the removal of doubts, it is hereby declared that the reason to suspect, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.]*

*[(2) The authorised officer may requisition the services of,—*

*(i) any police officer or of any officer of the Central Government, or of both; or*

*(ii) any person or entity as may be approved by the Principal Chief Commissioner or the Chief Commissioner or the Principal Director General or the Director General, in accordance with the procedure, as may be prescribed, in this regard,*

*to assist him for all or any of the purposes specified in sub-section (1) or sub-section (1-A) and it shall be the duty of every such officer or person or entity to comply with such requisition.]*

*(3) The authorised officer may, where it is not practicable to seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing, for reasons other than those mentioned in the second proviso to sub-section (1), serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of*

*such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.*

*Explanation.—For the removal of doubts, it is hereby declared that serving of an order as aforesaid under this sub-section shall not be deemed to be seizure of such books of account, other documents, money, bullion, jewellery or other valuable article or thing under clause (iii) of sub-section (1).*

**(4) The authorised officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act.**

*Explanation.—For the removal of doubts, it is hereby declared that the examination of any person under this sub-section may be not merely in respect of any books of account, other documents or assets found as a result of the search, but also in respect of all matters relevant for the purposes of any investigation connected with any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act.*

*(4-A) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search, it may be presumed—*

*(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;*

*(ii) that the contents of such books of account and other documents are true; and*

*(iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document,*

*stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.*

*[\* \* \*]*

*(8) The books of account or other documents seized under sub-section (1) or sub-section (1-A) shall not be retained by the authorised officer for a period exceeding [thirty days from the date of the [order of assessment or reassessment or recomputation under sub-section (3) of section 143 or section 144 or section 147 or] [ Section 153-A or clause (c) of Section 158-BC]] unless the reasons for retaining the same are recorded by him in writing and the approval of the [Principal Chief Commissioner or Chief Commissioner], [Principal Commissioner or Commissioner], [Principal Director General or Director General] or Director] for such retention is obtained:*

**Provided** *that the [Principal Chief Commissioner or Chief Commissioner], [Principal Commissioner or Commissioner], [Principal Director General or Director General] or Director] shall not authorise the retention of the books of account and other documents for a period exceeding thirty days after all the proceedings under the Indian Income Tax Act, 1922 (11 of 1922), or this Act in respect of the years for which the books of account or other documents are relevant are completed.*

*[(8-A) An order under sub-section (3) shall not be in force for a period exceeding sixty days from the date of the order:]*

**Provided** *that the [[Principal Director or Director] or, as the case may be, [Principal Commissioner or Commissioner]] shall not approve the extension of the period for any period beyond the expiry of thirty days after the completion of all the proceedings under this Act in respect of the years for which the books of account, other documents, money, bullion, jewellery or other valuable articles or things are relevant.*

*(9) The person from whose custody any books of account or other documents are seized under sub-section (1) or sub-section (1-A) may make copies thereof, or take*

*extracts therefrom, in the presence of the authorised officer or any other person empowered by him in this behalf, at such place and time as the authorised officer may appoint in this behalf.*

*[(9-A) Where the authorised officer has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c) of sub-section (1), the books of account or other documents, or any money, bullion, jewellery or other valuable article or thing (hereafter in this section and in Sections 132-A and 132-B referred to as the assets) seized under that sub-section shall be handed over by the authorised officer to the Assessing Officer having jurisdiction over such person within a period of sixty days from the date on which the last of the authorisations for search was executed and thereupon the powers exercisable by the authorised officer under sub-section (8) or sub-section (9) shall be exercisable by such Assessing Officer.]*

*[(9-B) Where, during the course of the search or seizure or within a period of sixty days from the date on which the last of the authorisations for search was executed, the authorised officer, for reasons to be recorded in writing, is satisfied that for the purpose of protecting the interest of revenue, it is necessary so to do, he may with the previous approval of the Principal Director General or Director General or the Principal Director or Director, by order in writing, attach provisionally any property belonging to the assessee, and for the said purposes, the provisions of the Second Schedule shall, mutatis mutandis, apply.*

*(9-C) Every provisional attachment made under sub-section (9B) shall cease to have effect after the expiry of a period of six months from the date of the order referred to in sub-section (9B).*

*[(9-D) The authorised officer may, during the course of the search or seizure or within a period of sixty days from the date on which the last of the authorisations for search was executed, make a reference to,—*

- (i) a Valuation Officer referred to in Section 142-A; or*
- (ii) any other person or entity or any valuer registered by or under any law for the time being in force, as may be*



*approved by the Principal Chief Commissioner or the Chief Commissioner or the Principal Director General or the Director General, in accordance with the procedure, as may be prescribed, in this regard,*

*who shall estimate the fair market value of the property in the manner as may be prescribed, and submit a report of the estimate to the authorised officer or the Assessing Officer, as the case may be, within a period of sixty days from the date of receipt of such reference.]]*

*(10) If a person legally entitled to the books of account or other documents seized under sub-section (1) or sub-section (1-A) objects for any reason to the approval given by the [Principal Chief Commissioner or Chief Commissioner], [Principal Commissioner or Commissioner], [Principal Director General or Director General] or Director] under sub-section (8), he may make an application to the Board stating therein the reasons for such objection and requesting for the return of the books of account or other documents [and the Board may, after giving the applicant an opportunity of being heard, pass such orders as it thinks fit].*

*[\* \* \*]*

*(13) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1) or sub-section (1-A).*

*(14) The Board may make rules in relation to any search or seizure under this section; in particular, and without prejudice to the generality of the foregoing power, such rules may provide for the procedure to be followed by the authorised officer—*

*(i) for obtaining ingress into any building, place, vessel, vehicle or aircraft to be searched where free ingress thereto is not available;*

*(ii) for ensuring safe custody of any books of account or other documents or assets seized.*

*[Explanation 1.— For the purposes of sub-sections (9-A), (9-B) and (9-D), the last of authorisation for search shall be deemed to have been executed,—*

*(a) in the case of search, on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued; or*

*(b) in the case of requisition under Section 132-A, on the actual receipt of the books of account or other documents or assets by the authorised officer.]*

*Explanation 2.—In this section, the word "proceeding" means any proceeding in respect of any year, whether under the Indian Income Tax Act, 1922 (11 of 1922), or this Act, which may be pending on the date on which a search is authorised under this section or which may have been completed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year."*

*(Emphasis supplied)*

Section 132 deals with search and seizure. Sub-section (4) of Section 132 deals with the power of the authorized officer, who shall, during the course of search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents *inter alia* and record any statement made by such person during the examination. This is permissible to be used as evidence in any proceeding under the Act. The search results in seizing of books of account. Seizure leads to discovery of certain payments claimed which according to the Authorities were bogus. The moment search was conducted and assessment proceedings commenced, the petitioners filed their revised returns on

26-10-2016. The revised returns were filed waiving of claims, be it long term capital gains or short term capital loss. Therefore, the tax stood cleared in the year 2016 through revised returns. This fact is not in dispute. After the petitioners filed their revised returns complaints come to be registered against all these petitioners invoking Section 200 of the CrPC before the learned Magistrate for offences punishable under Section 276-C of the Act. Section 276-C of the Act reads as follows:

**"276-C. Wilful attempt to evade tax, etc.—***(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable [or imposable, or under reports his income,] under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable,—*

*(i) in a case where the [or tax on under-reported income] exceeds [twenty-five hundred thousand rupees], with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;*

*(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to [two years] and with fine.*

**(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty, or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to [two years] and shall, in the discretion of the court, also be liable to fine.**

*Explanation.—For the purposes of this section, a wilful attempt to evade any tax, payable or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person—*

*(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or*

*(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or*

*(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or*

*(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.”*

*(Emphasis supplied)*

Section 276-C makes the person liable for punishment and penalty if one willfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable. Sub-section (2) of Section 276-C also deals with a person who willfully attempts to evade tax. The proceedings are instituted for offences punishable under Section 276-C of the Act. The submission is that there is no *mens rea* as it was a claim based on documents. The claim is not accepted by the revenue. Mere non-acceptance of the claim by the revenue would not mean that evasion was willful. On the contrary, the case of the

revenue was that evasion was willful and, therefore, it is presumed to be out of guilty mind i.e., *mens rea*.

11. Before embarking upon consideration of defence of the petitioners, I deem it appropriate to notice the law laid down by the Apex Court and that of this Court interpreting Section 276-C of the Act. The Apex Court in the case of M/s **GUJARAT TRAVANCORE AGENCY, COCHIN v. COMMISSIONER OF INCOME TAX, KERALA**<sup>1</sup> has held as follows:

"..... .."

**4. ....Indeed, many of them were considered by the High Court and are referred to in the judgment under appeal. It is sufficient for us to refer to Section 271(1)(a), which provides that a penalty may be imposed if the Income Tax Officer is satisfied that any person has without reasonable cause failed to furnish the return of total income, and to Section 276-C which provides that if a person wilfully fails to furnish in due time the return of income required under Section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine. It is clear that in the former case what is intended is a civil obligation while in the latter what is imposed is a criminal sentence. There can be no dispute that having regard to the provisions of Section 276-C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the**

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<sup>1</sup> (1989) 3 SCC 52

**element of mens rea is established.** In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. **The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. In the case of a proceeding under Section 271(1)(a), however, it seems that the intention of the legislature is to emphasise the fact of loss of revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty. In this connection the terms in which the penalty falls to be measured is significant. Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred. In our opinion, there is nothing in Section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision. We are supported by the statement in Corpus Juris Secundum, Vol. 85, p. 580, para 1023:**

*"A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."*

**5.** Accordingly, we hold that the element of mens rea was not required to be proved in the proceedings taken by the Income Tax Officer under Section 271(1)(a) of the Income Tax Act against the assessee for the assessment years 1965-1966 and 1966-1967."

*(Emphasis supplied)*

The Apex Court holds that Section 276-C of the Act can be invoked only if a person willfully fails to furnish in due time the return of income required under Section 139(1) of the Act. It should be

willful and should establish element of *mens rea* which would be sufficient to prove default in complying with the statute. This principle is reiterated in ***PREM DASS v. INCOME TAX OFFICER***<sup>2</sup> wherein it is held as follows:

***"8. Wilful attempt to evade any tax, penalty or interest chargeable or imposable under the Act under Section 276-C is a positive act on the part of the accused which is required to be proved to bring home the charge against the accused. Similarly a statement made by a person in any verification under the Act can be an offence under Section 277 if the person making the same either knew or believed the same to be false or did not believe to be true. Necessary mens rea, therefore, is required to be established by the prosecution to attract the provisions of Section 277. We see nothing in Section 132(4-A) which would establish the ingredients of the aforesaid two criminal offences contemplated under Sections 276-C and 277 of the Indian Income Tax Act. It may be noticed at this point of time that the Tribunal, while interfering with the penalty imposed under Section 271(1-C) of the Act came to a positive finding that there is no act of concealment on the part of the assessee and he had returned the income on estimate basis. The Tribunal further found that it is a case purely on difference of opinion as to the estimates and not a case of concealment of income or even furnishing of inaccurate particulars of income."***

*(Emphasis supplied)*

The interpretation is to the same effect. The Apex Court holds that willful attempt to evade tax, penalty or interest chargeable should

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<sup>2</sup> (1999) 5 SCC 241

be a positive act on the part of the accused which is required to be proved to bring home the charge against the accused. The Apex Court in the case of **UNION OF INDIA V. DHARAMENDRA TEXTILE PROCESSORS**<sup>3</sup> has held as follows:

".... ....  
**17.** It is of significance to note that the conceptual and contextual difference between Section 271(1)(c) and Section 276-C of the IT Act was lost sight of in Dilip Shroff case [(2007) 6 SCC 329 : (2007) 8 Scale 304] .

**18.** The Explanations appended to Section 271(1)(c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilip N. Shroff case [(2007) 6 SCC 329 : (2007) 8 Scale 304] has not considered the effect and relevance of Section 276-C of the IT Act. Object behind enactment of Section 271(1)(c) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. **Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276-C of the IT Act.**"

(Emphasis supplied)

It is also to the same effect. The Apex Court, later, in the case of **COMMISSIONER OF INCOME TAX, AHMEDABAD v. RELIANCE PETROPRODUCTS PRIVATE LIMITED**<sup>4</sup> has held as follows:

".... ....

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<sup>3</sup> (2008) 13 SCC 369

<sup>4</sup> (2010) 11 SCC 762



**15.** It was only on the point of mens rea that the judgment in *Dilip N. Shroff v. CIT* [(2007) 6 SCC 329] was upset. In *Union of India v. Dharamendra Textile Processors* [(2008) 13 SCC 369] after quoting from Section 271 extensively and also considering Section 271(1)(c), the Court came to the conclusion that since Section 271(1)(c) indicated the element of strict liability on the assessee for the concealment or for giving inaccurate particulars while filing return, there was no necessity of mens rea. **The Court went on to hold that the objective behind enactment of Section 271(1)(c) read with the Explanations indicated with the said section was for providing remedy for loss of revenue and such a penalty was a civil liability and, therefore, wilful concealment is not an essential ingredient for attracting civil liability as was the case in the matter of prosecution under Section 276-C of the Act. The basic reason why the decision in *Dilip N. Shroff v. CIT* [(2007) 6 SCC 329] was overruled by this Court in *Union of India v. Dharamendra Textile Processors* [(2008) 13 SCC 369] was that according to this Court the effect and difference between Section 271(1)(c) and Section 276-C of the Act was lost sight of in *Dilip N. Shroff v. CIT* [(2007) 6 SCC 329] .**

....

**18.** We must hasten to add here that in this case, there is no finding that any details supplied by the assessee in its return were found to be incorrect or erroneous or false. Such not being the case, there would be no question of inviting the penalty under Section 271(1)(c) of the Act. A mere making of the claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding the income of the assessee. Such claim made in the return cannot amount to inaccurate particulars.

**19.** It was tried to be suggested that Section 14-A of the Act specifically excluded the deductions in respect of the expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. It was further pointed out that the dividends from the shares did not form part of the total income. It was, therefore, reiterated before us that the assessing officer had correctly

*reached the conclusion that since the assessee had claimed excessive deductions knowing that they are incorrect; it amounted to concealment of income. It was tried to be argued that the falsehood in accounts can take either of the two forms; (i) an item of receipt may be suppressed fraudulently; (ii) an item of expenditure may be falsely (or in an exaggerated amount) claimed, and both types attempt to reduce the taxable income and, therefore, both types amount to concealment of particulars of one's income as well as furnishing of inaccurate particulars of income.*

**20.** *We do not agree, as the assessee had furnished all the details of its expenditure as well as income in its return, which details, in themselves, were not found to be inaccurate nor could be viewed as the concealment of income on its part. It was up to the authorities to accept its claim in the return or not. Merely because the assessee had claimed the expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, in our opinion, attract the penalty under Section 271(1)(c). If we accept the contention of the Revenue then in case of every return where the claim made is not accepted by the assessing officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the legislature."*

*(Emphasis supplied)*

The Apex Court again holds that *mens rea* is an element that is to be present in a proceeding under Section 271 of the Act. The mere fact of not accurate tax, not exact tax or erroneous tax would not lead to the proceedings under Section 276 of the Act.

12. Following all the aforesaid judgments, a co-ordinate Bench of this Court in the case of **M/S VYALIKAVAL HOUSE**

**BUILDING CO-OPERATIVE SOCIETY LIMITED v. INCOME TAX****DEPARTMENT**<sup>5</sup> has held as follows:

"2. The premises of petitioner No.1 was subjected to search and seizure under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as the Act. for brevity) on 5.7.2011. Consequent to search, assessment proceedings came to be initiated by the Assessing Officer by issuing a notice under Section 153A of the Act dated 27.9.2011 calling upon petitioner No.1 to file its returns of income for the assessment years 2006- 07 to 2011-12. Since there was no compliance of the aforesaid notice, the Assessing Officer issued a show cause notice dated 31.7.2013 calling upon petitioner No.1 as to why prosecution for the offence punishable under Section 276CC of the Act could not be initiated. In response to the said show cause notice, petitioner No.1 filed returns of income on 8.8.2013 for the assessment years 2010-11 and 2011-12. In the said returns, petitioner No.1 declared the total income of Rs.3,49,93,300/- and the total tax payable at Rs.10,54,420/- for the assessment year 2010-11 and income of Rs.3,78,36,508/- and the tax payable thereon at Rs.1,03,88,310/- for the assessment year 2011-12 respectively. Petitioner No.1 though filed returns, failed to pay the self-assessment tax along with the return of income under Section 140A of the IT Act. In the meanwhile, the property owned by petitioner No.1 was attached under Section 281B of the Act. The attachment was later lifted on condition that the sale proceeds of the attached property would be directly remitted to the Department. Thereafter, petitioner No.1 sent a cheque for Rs. 1,25,00,000 towards self-assessment tax due for the assessment years 2010-11 and 2011-12. On the back of the said cheque, it was instructed that "cheque to be presented at the time of registration of the property". In view of this Instruction, Department did not encash the said cheque. Contending that the petitioners have willfully and deliberately made an attempt to create circumstances to enable them to evade payment of tax, a complaint was lodged before the Court for Economic Offences, Bengaluru, seeking prosecution of the petitioners for the offence punishable under Section

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<sup>5</sup> Crl.P.No.4891 of 2014 c/w Crl.P.No.4892 of 2014 decided on 14-06-2019

276C(2) of the Act. The Special Court took cognizance of the offence and issued summons to the petitioners. Aggrieved by the impugned action, the petitioners have invoked the jurisdiction of this Court under Section 482 of Cr.P.C. seeking to quash the impugned proceedings.

.... ..

**8. The gist of the offence under Section 276C(2) of the Act is the willful attempt to evade any tax, penalty or interest chargeable or imposable under the Act. What is made punishable under this Section is an "attempt to evade tax penalty or interest" and not the actual evasion of tax. 'Attempt' is nowhere defined in the Act or in the Indian Penal Code. In legal echelons 'attempt' is understood as a "movement towards the commission of the intended crime". It is doing "something in the direction of commission of offence". Viewed in that sense, in order to render the accused guilty of "attempt to evade tax" it must be shown that he has done some positive act with an Intention to evade tax.**

**9. In the instant case, the only circumstance relied on by the respondent in support of the charge levelled against the petitioners is that, even though accused filed the returns, yet, it failed to pay the self-assessment tax along with the returns. This circumstance even if accepted as true, the same does not constitute the offence under Section 276C (2) of the Act. The act of filing the returns by itself cannot be construed as an attempt to evade tax, rather the submission of the returns would suggest that petitioner No.1 had voluntarily declared his intention to pay tax. The act of submitting returns is not connected with the evasion of tax. It is only an act which is closely connected with the intended crime, that can be construed as an act in attempt of the intended offence. In the backdrop of this legal principle, the Hon'ble Supreme Court in the case of Prem Dass-vs-Income Tax Officer cited supra, has held that a positive act on the part of the accused is required to be established to bring home the charge**

***against the accused for the offence under Section 276C(2) of the Act.”***

*(Emphasis supplied)*

The co-ordinate Bench holds the act of the assessee to evade tax should be palpable and demonstrable. The intention should be clearly to evade tax. Following the judgment of the Apex Court in the case of ***PREM DASS*** (*supra*) the co-ordinate Bench holds that there was no *mens rea*, as tax was immediately paid. It was a erroneous calculation of tax which cannot be attracted in a case of the kind. The order in the case of ***VYALIKAVAL HOUSE BUILDING CO-OPERATIVE SOCIETY LIMITED*** has been followed in a subsequent judgment by another co-ordinate Bench of this Court in the case of ***M/S CONFIDENT PROJECTS (INDIA) PRIVATE LIMITED v. INCOME TAX DEPARTMENT***<sup>6</sup>. The issues framed by the co-ordinate Bench which are germane for consideration of issues raised in the *lis* are as follows:

- "(1)                   ...                   ...                   ..."
- (3)   *Whether the delayed payment of income tax would amount to evasion of tax or not?*
- (5)                   ...                   ...                   ...  
*Whether the order of cognizance by the Economic Offences Court is proper and correct?*  
                           ...                   ...                   ..."

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<sup>6</sup> CrI.P.No.5480 of 2016 c/w 5481 of 2016 decided on 28-01-2021

The co-ordinate Bench answers the said issues as follows:

".... .."

**10. Answer to Point No.3: Whether the delayed payment of Income Tax would amount to evasion of tax or not?**

10.1. *This question is no longer res integra inasmuch as this Court in Crl.P No.4891/2014 (Vyalikaval's case) has held that delayed payment of income tax would not amount to evasion of tax. Applying the same principle to the present fact situation, the delay caused by the petitioner-Company in making payment of the income tax cannot be said to be evasion.*

10.2. *The fact remains that income tax has been paid and the authorities have received the necessary taxes. If at all, for the said delay, there could be an interest component which could have been levied.*

**10.3. Hence, I answer Point No.3 by holding that delayed payment of Income Tax would not amount to evasion of tax, so long as there is payment of tax, more so for the reason that in the returns is an there filed acknowledgement of tax due to be paid."**

*(Emphasis supplied)*

What would unmistakably emerge from a coalesce of the judgments rendered by the Apex Court and that of this Court is that, in such cases what is necessary to be present is *mens rea*. Incorrect claim or erroneous claim would not amount to willful evasion. Erroneous claim in certain circumstances can be erroneous interpretation of law.

13. On the bedrock of the principles laid down in the afore-quoted judgments, the case at hand requires to be noticed. The offence alleged against each of the petitioners is as afore-quoted. The defence of the petitioners is that they had sold certain shares of Tuni Textiles and earned long term capital gains amounting to certain amounts all through banking transactions with the stock brokers in relation to the advice the stock brokers had rendered. The stocks vary from JMD Telefilm Industries, Splash Media, Essar India and Alpha. Trading is both by the individuals and by the companies. But, the moment it is brought to the notice of all these petitioners, retracing of steps immediately happen by filing of revised returns. Therefore, it is not a case where *ipso facto* evasion of tax can be laid against these petitioners. The facts in the case are akin to what is considered by the Apex Court and co-ordinate Benches of this Court in the aforesaid cases. These cases would become cases where it would amount to delayed payment of tax as revised returns are filed after the search is conducted on the petitioners. The judgments rendered by the co-ordinate Benches in the cases of M/s **VYALIKAVAL HOUSE BUILDING CO-OPERATIVE SOCIETY LIMITED** and M/s **CONFIDENT PROJECTS**

**(INDIA) PRIVATE LIMITED** were tossed by the revenue before the Apex Court and both of which have been dismissed. These are admitted facts. Therefore, in the light of all the issues standing answered by plethora of judgments quoted hereinabove, the proceedings instituted against the petitioners cannot but be termed to be an error in law.

14. The other submission is with regard to the order of the learned Magistrate taking cognizance of the offence. The order taking cognizance reads as follows:

*"Complainant present, perused complaint and connected papers, sufficient materials placed to proceed against the Accused for the offence punishable under Section 276C(1) of the Income Tax Act, 1961. Accordingly "Cognizance is taken". Office is hereby directed to register the case against Accused in III register and issue A/s to Accused R/by 6-10-2016".*

All that the order reads is complainant present and perused complaint. Sufficient materials are placed to proceed against the accused for offence punishable under Section 276C(1) of the Act. Accordingly, cognizance is taken and a criminal case is directed to be registered. Whether this would be sufficient in law also need not



detain this Court for long or delve deep into the matter. The order of cognizance is trite, that it sets the criminal law in motion and brings the accused under the umbrella of crime. The co-ordinate Bench in the case of M/s. **CONFIDENT PROJECTS (INDIA) PVT LTD.,** has framed a specific issue on an identical order of taking of cognizance and has answered it as follows:

**"12. Answer to Point No.5: Whether the order of cognizance by the Economic Offences Court is proper and correct?"**

**12.1. The order of cognizance in both cases is identical and is extracted below:-**

**"Perused Complaint and Connected papers, materials placed proceed against the A-1 to 8 to take Cognizance. Hence "Cognizance" taken for the offence P/U/Sec 276c(2) and 277 R/W/S. 2788 of the Income Tax Act, 1961. Register the case as C.C. in 3 register and issue Accused Summons to accused No.1 to 8 through RPAD If RPAD charges paid R/by-27-05-2016".**

12.2. *Shri Vivek Holla, learned counsel for the petitioners has contended that the Court taking Cognisance is required to apply its mind while taking Cognisance, the above order passed does not indicate such application of mind as such the order of Cognisance is to be set aside.*

12.3. *The Hon'ble Apex Court as also this Court in a catena of decisions has categorically held that the court taking Cognisance is required to apply its mind to the allegations made and the applicable statute and thereafter pass a reasoned order in writing taking Cognisance, which should be apparent from a reading*

*of the order of Cognisance to indicate that the requirement of "sufficient grounds for proceedings" in terms of Section 204 of the code has been complied with.*

- 12.4. At the time of taking Cognisance, there must be a proper application of judicial mind to the materials before the said Court either oral or documentary, as well as any other information that might have been submitted or made available to the Court.*
- 12.5. The test that is required to be applied by the Court while taking Cognisance is as to whether on the basis of the allegations made in the Complaint or on a police report or on information furnished by a person other than a police officer, is there a case made out for initiation of criminal proceedings.*
- 12.6. For the above purpose, there is an assessment of the allegations required to be made applying the law to the facts and thereby arriving at a conclusion by a process of reasoning that Cognisance is required to be taken.*
- 12.7. An order of Cognisance cannot be abridged, formatted or formulaic. The said order has to make out that there is a judicial application of mind. Since without such application, the same may result in the initiation of criminal proceedings when it was not required to be so done.***
- 12.8. The order of taking Cognisance is a safeguard inbuilt in the criminal justice system as so to avoid malicious prosecution and/or frivolous complaints.*
- 12.9. When a complaint or a police report or information by a person other than police officer is placed before the Court, the judicial officer must apply judicious mind coupled with discretion which is not to be exercised in an arbitrary, capricious, whimsical, fanciful or casual way.*

- 12.10. *Any offence alleged being one of commission or omission attracting penal statutes; Cognisance can be taken only if the allegations made fulfil the basic requirement of the said penal provision. At this point, it is not required for the Court taking Cognisance to ascertain the truth or veracity of the allegation but only to appreciate if the allegations taken at face value, would amount to the offence complained of or not. If Yes, Cognisance could be taken, if No, taking Cognisance could be refused. The only manner of ascertaining the above is by the manner of recordal made by the Court in the order taking Cognisance. The order passed by the court taking Cognisance would therefore reflect such application of mind to the factual situation*
- 12.11. *In the above background the order passed by the Magistrate does not indicate any such consideration by the Magistrate.*
- 12.12. *It can be ex facie seen that the order of the Magistrate does not satisfy the requirement of arriving at a prima facie conclusion to take Cognisance and issue process let alone to the accused residing outside the Jurisdiction of the said Magistrate.*
- 12.13. *Mere reference to the provisions in respect of which offences are alleged to have been committed would not be in compliance with the aforesaid requirement of the statutes as also the various decisions of the Honb'le Apex Court extracted hereinabove.*
- 12.14. *When there are multiple accused, the order is required to disclose the application of mind by the Court taking Cognisance as regards each accused.*
- 12.15. *The Court taking Cognisance ought to have referred to and recorded the reasons why the said Court believes that an offence is made out so as to take Cognisance more so on account of the fact that it is on taking Cognisance that the criminal law is set in motion insofar as accused is concerned and there may be several cases and***

**instances where if the Court taking Cognisance were to apply its mind, the Complaint may not even be considered by the said Court taking Cognisance let alone taking Cognisance and issuance of Summons.**

12.16. *In view of the above, I am of the considered opinion that the order dated 29.03.2016 taking Cognisance is not in compliance with applicable law and therefore is set aside.*

12.17. ***I answer Point No.5 by holding that the order of Cognisance dated 29.03.2016 in both matters is not in compliance with the requirement of Section 191(1)(a) of the Cr.P.C and further does not indicate the procedure under Section 204 of Cr.P.C having been followed. At the time of taking Cognisance and issuance of process, the Court taking Cognisance is required to pass a sufficiently detailed order to support the conclusion to take Cognisance and issue process, in terms of the discussion above. The judicious application of mind to the law and facts of the matter, should be apparent on the ex-facie reading of the order of Cognisance.***

*(Emphasis supplied)*

In the light of the law so laid down by the co-ordinate Bench, which in fact follows the earlier judgments of the Apex Court, an identical order of taking cognizance which forms the fulcrum of cases at hand would also be rendered illegal. As observed hereinabove, the judgment of the co-ordinate Bench in the case of M/s **CONFIDENT PROJECTS (INDIA) PVT LTD.,** was tossed before the Apex Court

by the revenue unsuccessfully, except in regard to findings under Section 202 of the CrPC. The order of the Apex Court passed in ***Special Leave to Appeal (Crl.) No.8316 of 2021*** dated ***13-12-2021*** reads as follows:

*"In view of the peculiar facts of the present case, we are not inclined to interfere with the impugned order and hence the special leave petition is dismissed. The dismissal of the special leave petition would not be construed as approval of the observations made in the impugned judgment in re. Section 202 of the Code of Criminal Procedure, 1973. Neither the dismissal nor the findings recorded in the impugned order reflect on other proceedings under the Income Tax Act, 1961."*

The Apex Court affirms all the findings in the judgment except with regard to Section 202 of the CrPC. Section 202 CrPC is not the ground that is set out in the cases at hand. Therefore, even with regard to the order of taking cognizance suffering from non-application of mind, the judgment of the co-ordinate Bench would cover the issue.

15. With these issues resulting in annulment of proceedings before the concerned Court, the other issues raised as to whether

the criminal proceedings should await the assessment proceedings or the other way round, need not be gone into.

16. For the aforesaid reasons, I pass the following:

**ORDER**

- (i) All Criminal Petitions are allowed.
- (ii) Proceedings pending before the Special Court (Economic Offences) Bengaluru in C.C.Nos. 221 to 225 of 2016 and C.C.Nos.324 to 328 of 2016 concerned in these cases stand quashed.
- (iii) It is made clear that the finding rendered herein is only for the purpose of consideration of the case of the petitioners under Section 482 of Cr.P.C. It will not influence or bind any other proceedings pending against the petitioners.

**Sd/-  
JUDGE**

bkp  
CT:SS