IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	Delivered on
21.02.2024	27.02.2024

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THE HONOURABLE MR.JUSTICE N. ANAND VENKATESH

CRL.O.P No.6219 of 2023
and Crl.MP.No.3877 of 2023

Vinayagam Sabarisanthanakrishnan ...Petitioner

.Vs.

The Assistant Commissioner of Income Tax
Non-Corporate Circle 14
Annexe Building, 5th Floor, Room No.606
121, M.G.Road, Nungambakkam
Chennai 600034. ... Respondent/Complainant

PRAYER : Criminal Original Petition filed under Section 482 of Criminal Procedure Code, to call for the records in E.O.C.No.507 of 2017, on the file of the Additional Chief Metropolitan Magistrate (Economic Offences) Egmore, Chennai and to quash the prosecution proceedings under Section 276CC of the Income Tax Act, 1961.

For Petitioner : Mr.P.V.Ravi Kumar

For Respondent : Mr.L.Murali Krishnan
Special Public Prosecutor for Income Tax

ORDER

This petition has been filed to quash the proceedings in E.O.C.No.507 of 2017, pending on the file of the Additional Chief Metropolitan Magistrate (Economic Offences) Egmore, Chennai.

2. The respondent has filed a private complaint against the petitioner for offence under Section 276CC of the Income Tax Act, 1961 (for brevity hereinafter referred to as 'the Act'). During the Financial Year 2013-2014 (Assessment Year 2014-2015), the respondent detected that the petitioner had earned income/made investment. Despite having earned substantial income, the petitioner failed to file his returns for Assessment Year 2014-2015. The petitioner was bound to file the returns on or before 31/07/2014 as per Section 139(1) of the Act. Hence, show cause notice dated 03/08/2017 was issued to the petitioner to show cause as to why prosecution under Section 276CC should not be launched against the petitioner for failing to file the return of income for the Assessment Year 2014-2015. On receipt of this show cause notice, the petitioner gave a reply dated 11/08/2017 by giving some reasons as to why he missed out in filing the returns.

3. The respondent was not satisfied with the reply given by the petitioner and the respondent *prime facie* found that the non-filing of the return was wilful and hence, proceeded to file the complaint against the petitioner for alleged offence under Section 276CC of the Act. The same has been put to challenge in this quash petition.

4. The learned counsel for the petitioner submitted that there was no wilfulness on the part of the petitioner in not filing the returns and that the

petitioner had Tax Deducted at Source standing to his credit to the tune of Rs.11,34,018/- which covers the entire income earned by the petitioner during the relevant point of time. Therefore, the mere delay in filing the income tax returns due to ill health should not result in a prosecution.

5.The learned counsel for the petitioner further submitted that the respondent issued a notice under Section 148 of the Act after a very long time and an assessment order was also passed under Section 147 of the Act. The petitioner has also filed an appeal before the Appellate authority against the assessment order and the same is pending. In view of the same, it was contended that a criminal prosecution was not warranted in this case and accordingly, sought for quashing the proceedings.

6. Per contra, the learned Special Public Prosecutor for income tax submitted that the petitioner has committed a wilful act of non-filing of the return of income as per Section 139(1) of the Act. The notice under Section 148 of the Act is issued to give a chance to the assessee to report any income that has originally escaped from assessment. Therefore, the return of income filed after issuance of notice under Section 148 of the Act is not the original return of income. Therefore, the petitioner cannot be allowed to take a stand that the notice under Section 148 of the Act was issued with a delay and more particularly, when 6 years' time was given to the department to issue a notice under Section 148 of the Act. Even thereafter, the assessment was

made and it was found that the petitioner is liable to pay tax and a tax demand of Rs. 10,11,169/- was raised. The petitioner cannot take a stand that the tax liability is covered by the TDS. The Tax Deducted at Source is much less than what the petitioner was expected to pay towards Income Tax for the income earned by him during the relevant period.

7. The learned Special Public Prosecutor further submitted that there is a legal presumption under Section 278E which can be rebutted by the petitioner only in the course of trial. The learned Special Public Prosecutor further submitted that the trial has already commenced in this case and PW1 has been examined and Exhibits P1 to P4 have been marked and since the petitioner did not cross examine the witness, an application was filed to recall PW1 and the same was also allowed. It was therefore contended that a *prima facie* case has been made out against the petitioner for offence under Section 276CC of the Act. Accordingly, the learned Special Public Prosecutor sought for the dismissal of this petition.

8. This Court carefully considered the submissions made on either side and the materials available on record.

9. There is no dispute with regard to the fact that the petitioner did not file the returns under Section 139(1) of the Act for the Assessment Year 2014-2015 on or before 31/07/2014. The petitioner for the first time, reacted

only after notice under Section 148 of the Act was issued to him. It must be borne in mind that the notice under Section 148 of the Act has nothing to do with the return of income to be filed under Section 139(1) of the Act. This notice is issued only for the purpose of assessing escaped income. Therefore, till the year 2017, the petitioner did not file the returns for the Financial Year 2013-2014 and also did not declare his total income. The petitioner cannot be permitted to take a defence that the Income Tax department issued the notice under Section 148 of the Act with delay and if such a notice had been issued earlier, the petitioner would have immediately responded to the same and also filed the returns. There is no connection between the notice issued under Section 148 of the Act and the duty of the assessee to file the returns under Section 139(1) of the Act.

10. Even after the notice was issued under Section 148 of the Act, the petitioner filed his returns declaring his total income as Rs.29,50,000/- but however, the assessing officer after the completion of the assessment proceedings, found that the total income of the petitioner is Rs.54,09,683/- and the tax liability after adjustment of TDS was Rs.10,11,169/-. Therefore, it is not as if the petitioner has paid the tax and there was only a delay in filing the returns. The petitioner cannot assume that the Tax Deducted at Source will cover the entire tax liability for the relevant Assessment Year even without filing his returns and declaring his total income.

11. This Court has consistently held that the only criterion for initiation of prosecution is that there must be a wilful failure to furnish returns as required under Section 139(1) of the Act and once that requisite is fulfilled, the statutory presumption under Section 278E starts operating and this provision brings in a statutory presumption with regard to the existence of a culpable mental state. At this stage, the Court can only presume the culpable mental status of the petitioner and the onus is upon the petitioner to prove the contrary and that can be done only at the time of the trial. Useful reference can be made to the judgment of this Court in Criminal Original Petition No.4688 of 2017dated 11/07/2023 and the relevant portions are extracted hereunder:

> *"12. The main issue to be considered by this Court is as to whether, based on the allegations in the complaint, the offences are made out under Section 276CC and 276C(2) of the Act.*
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> *13. The judgment of the Apex Court in the case of* ***Prakash Nath Khanna & Another Vs. CIT & Another [reported in 2004 (135) Taxman 327]*** *has a lot of relevance. For proper appreciation, the relevant paragraphs are extracted as hereunder :*
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> *"One of the significant terms used in Section 276-CC is 'in due time'. The time within which the return is to be furnished is indicated only in Sub-Section (1) of Section 139and not in Sub-Section (4) of Section 139. That being so, even if a return is filed in terms of Sub-Section (4) of Section 139, that would not dilute the infraction in not furnishing the return in due time as prescribed under Sub-Section (1) of Section 139. Otherwise, the use of the expression "in due time" would lose its relevance and it*

cannot be said that the said expression was used without any purpose. Before substitution of the expression "Clause (i) of Sub-Section (1) of Section 142" by Direct Tax Laws (Amendment) Act, 1987 w.e.f. 1.4.1989, the expression used was "Sub-Section (2) of Section 139". At the relevant point of time the assessing officer was empowered to issue a notice requiring furnishing of a return within the time indicated therein. That means the infractions which are covered by Section 276-CC relate to non-furnishing of return within the time in terms of Sub-Section (1) or indicated in the notice given under Sub-Section (2) of Section 139.There is no condonation of the said infraction, even if a return is filed in terms of Sub-Section (4). Accepting such a plea would mean that a person who has not filed a return within the due time as prescribed under Sub-Sections (1) or (2) of Section 139 would get benefit by filing the return under Section 139(4)much later. This cannot certainly be the legislative intent.

Another plea which was urged with some amount of vehemence was that the provisions of Section 276- CC are applicable only when there is discovery of the failure regarding evasion of tax. It was submitted that since the return under Sub-Section (4) of Section 139 was filed before the discovery of any evasion, the provision has no application. The case at hand cannot be covered by the expression "in any other case". This argument though attractive has no substance.

The provision consists of two parts. First relates to the infractions warranting penal consequences and the second, measure of punishment. The second part in turn envisages two situations. The first situation is where there is discovery of the failure involving the evasion of tax of a

particular amount. For the said infraction stringent penal consequences have been provided. Second situation covers all cases except the first situation elaborated above.

The term of imprisonment is higher when theamount of tax which would have been evaded but for the discovery of the failure to furnish the return exceeds one hundred thousand rupees. If the plea of the appellants is accepted it would mean that in a given case where there is infraction and where a return has not been furnished in terms of Sub-Section (1) of Section 139 or even in response to a notice issued in terms of Sub-Section (2), the consequences flowing from non-furnishing of return would get obliterated. At the relevant point of time Section 139(4)(a) permitted filing of return where return has not been filed within Sub-Section (1) and Sub-Section (2). The time limit was provided in Clause (b). Section 276-CC refers to "due time" in relation to Sub-Sections (1) and (2) of Section 139 and not to Sub-Section (4). Had the Legislature intended to cover Sub-Section (4) also, use of expression "Section 139" alone would have sufficed. It cannot be said that Legislature without any purpose or intent specified only the Sub-Sections (1) and (2) and the conspicuous omission of Sub-Section (4) has no meaning or purpose behind it. Sub-Section (4) of Section 139 cannot by any stretch of imagination control operation of Sub-Section (1) wherein a fixed period for furnishing the return is stipulated. The mere fact that for purposes of assessment and carrying forward and to set off losses it is treated as one filed within Sub-Sections (1) or (2) cannot be pressed into service to claim it to be actually one such, though it is factually and really not by extending it beyond its

legitimate purpose.

Whether there was wilful failure to furnish the return is a matter which is to be adjudicated factually by the Court which deals with the prosecution case. Section 278-E is relevant for this purpose and the same reads as follows:

'278-E: Presumption as to culpable mental state-

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation: In this Sub-Section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability'.

There is a statutory presumption prescribed in Section 278-E. The Court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution. Therefore, the factual aspects highlighted by the appellants were rightly not dealt with by the High Court. This is a matter for trial. It is certainly open to the appellants to plead absence of culpable mental state when the matter is taken up for trial."

14.It is pellucid from the above judgment that Section 139(4) of the Act cannot, by any stretch, control the operation of

Section 139(1) of the Act, which actually fixes the period for furnishing the returns. The term 'wilfully fails to furnish in due time' as contained in Section 276CC of the Act takes within its fold the due time that has been fixed under Section 139(1) of the Act and not the extended time provided under Section 139(4) of the Act. Therefore, the mere filing of return during the extended time will not come to the aid of the petitioner to escape from the criminal prosecution.

15. The next important issue to be considered is as to whether there is wilfulness on the part of the petitioner in filing the returns with delay. To deal with this issue, one cannot avoid Section 278E of the Act. This provision brings in a statutory presumption with regard to the existence of a culpable mental state. Therefore, the issue as to whether there was wilfulness in not filing the returns on time and not paying the tax on time, is only a matter of fact, which can be ascertained only through appreciation of evidence. In the light of this provision, this Court, exercising its jurisdiction under Section 482 of the Code, cannot presume innocence or absence of wilfulness on the part of the petitioner. On the other hand, what can be presumed is only culpable mental status and the onus is upon the petitioner to prove the contrary and that can be done only at the time of trial.

16. If hypothetically Section 278E is not available in the Act, this Court can certainly look into the materials and come to a prima facie conclusion as to whether there was wilfulness on the part of the petitioner in filing the returns with delay. Such an exercise cannot be done in the light of Section 278E of the Act. It is enough for the Income Tax Department to lay the foundational facts and thereafter, the statutory presumption under Section 278E of the Act takes care of the culpable mental state, which is directly relatable to wilfulness. Once onus is shifted to the petitioner by virtue of the statutory presumption, it has to be discharged by the petitioner only in the course of evidence. That exercise cannot be

carried out in a petition under Section 482 of the Code.

17. On the facts alleged in the complaint, the offences have been prima facie made out. In view of the same, the statutory presumption under Section 278E of the Act comes into operation. Under such circumstances, this Court, in exercise of its jurisdiction under Section 482 of the Code, cannot disregard the statutory presumption. This Court also cannot go into the facts of the case nor the defence taken by the petitioner to discharge the onus since it will be beyond the jurisdiction under Section 482 of the Code. This exercise can be carried out only in the course of trial since the determination of culpable state of mind is primarily a determination of fact, which requires appreciation of evidence.

18. This Court has consistently taken a stand in a line of recent decisions and it will suffice to take note of the following judgments :

"(a) Shri Raman Krishna Kumar Vs. DCIT [Crl.O.P.No.25561 of 2016, dated 26.10.2021];

(b) M/s.World Bridge Logistics Private Ltd. Vs. DCIT [Crl.O.P.No.11998 of 2018, dated 28.1.2022]; and

(c) Guruprasad Angisetty Vs. ACIT [Crl.O.P. No.12046 of 2019, dated 30.9.2022]."

12. The learned counsel for the petitioner submitted that an appeal has been filed against the assessment order and the same is pending before the appellate authority and therefore, the prosecution cannot be continued. There is no basis for this submission and the mere pendency of the appellate proceedings is not a relevant factor for initiating prosecution proceedings under Section 276CC of the Act. Useful reference can be made to the judgment of the Apex Court in ***Sasi Enterprises v. CIT*** reported in (2014) 5 SCC 139 and paragraph 30 of the judgment is extracted hereunder:

"***30.*** *We also find no basis in the contention of the learned Senior Counsel for the appellant that pendency of the appellate proceedings is a relevant factor for not initiating prosecution proceedings under Section 276-CC of the Act. Section 276-CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings except for the second part of the offence for determination of the sentence of the offence, the Department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. The language of Section 276-CC, in our view, is clear so also the legislative intention. It is trite law that as already held by this Court in B. Premanand v. Mohan Koikal [(2011) 4 SCC 266 : (2011) 1 SCC (L&S) 676] that: (SCC p. 272, para 19)*

"*19. '19. It is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is the determinative factor of legislative intent. …' [**Ed.**: As observed in Shiv Shakti Coop. Housing Society v. Swaraj Developers, (2003) 6 SCC 659, p. 669, para 19.]"*

If it was the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are completed by way of appeal or otherwise the same would have been provided in Section 276-CC itself. Therefore, the contention of the learned Senior Counsel for the appellant that no prosecution could be initiated till the culmination of assessment proceedings, especially in a case where the appellant had not filed the return as per Section 139(1) of the Act or following the notices issued under Section 142 or Section 148 does not arise."

13. In the instant case, the trial has already commenced and this is yet another reason as to why this Court is not inclined to interfere with the criminal proceedings which was initiated in the year 2017. Therefore, it is left open to the petitioner to raise all the grounds before the Court below and the same will be considered on its own merits and in accordance with the law. Any finding rendered in this Order will not have any bearing on the trial court while dealing with the issues involved in the case.

14. In the result, this Criminal Original Petition stands dismissed and there shall be a direction to the Court below to complete the proceedings in E.O.C.No.507 of 2017, within a period of three months from the date of receipt of copy of this Order. Consequently, the connected miscellaneous petition is closed.

27 .02.2024

Speaking Order
Index: Yes/No
Internet: Yes
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To

1.The Assistant Commissioner of Income Tax
Non-Corporate Circle 14
Annexe Building, 5th Floor, Room No.606
121, M.G.Road, Nungambakkam,Chennai 600034.

2. Additional Chief Metropolitan Magistrate
(Economic Offences) Egmore, Chennai.

3.The Public Prosecutor
High Court, Madras.

N. ANAND VENKATESH., J
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