

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on: November 04, 2022**

Pronounced on: December 16, 2022

+ CRL.M.C. 462/2017 & CRL.M.A. 2055/2017

RAJINDER KUMAR Petitioner

Through: Mr.Mohit Mathur, Senior Advocate
with Mr. Abhilash Mathur &
Mr.Harsh Gautam, Advocates

Versus

STATE & ANR. Respondents

Through: Mr. Abhishek Maratha, Senior
Standing Counsel, Income Tax
Department

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. The facts of the present case are that the respondent No.2- Income Tax Office (“ITO”) filed a complaint Case bearing No. 526721/2016, titled as “*ITO Vs. Rajinder Kumar*”, under the provisions of Sections 276C (1)/276D and 277 of the Income Tax Act, 1961 against the petitioner in respect of Income Tax Return pertaining to the financial year 2006-07 alleging opening of an undisclosed account in HSBC Bank, London on 20.08.1991 by the petitioner and having the maximum credit balance USD 575,010, equivalent to Rs.2,53,00,440/- at the exchange rate of Rs.44 per USD for the Year 2006-07 (F.Y. 2005-06). Thereafter, a search and seizure was carried out at petitioner’s residence and business premises under Section

132 of the Act on 23.08.2011 and notice under Section 153-A of the Income Tax Act, 1961 dated 26.04.2012 was issued to him for filing his Income Tax Return. In the income tax return income of Rs.6,47,19,401/- was shown, whereas according to respondents the peak balance in the HSBC account was offered in the return of assessment year 2007-08 by the petitioner. It is further alleged that the petitioner filed a revised income tax statement on 16.05.2015 for the assessment year declaring balance in HSBC bank, London of USD 575,010 equivalent to INR 2,53,00,44/- as his income. Petitioner was served with Notice under Section 274d of the Income Tax Act and also a penalty of Rs.10,000/- under Section 271(1) (b) of the Act was levied upon him.

2. On 27.02.2015, Assessment Order under Section 153A of the Income Tax Act, 1961 was framed and vide order dated 30.04.2015 penalty of Rs.90,45,966 under Section 271(1) (c) of the Income Tax Act, 1961 was levied upon the petitioner for not disclosing his true income. The learned trial court vide order dated 18.01.2016 took cognizance of the offence alleged. Pursuant to receipt of summons, petitioner appeared before the learned trial court and was admitted to bail on furnishing of surety. The petitioner, on the ground of his old age being 80 years and medical conditions, sought exemption from personal appearance, which was granted to him. Petitioner also made an application under Section 245(2) Cr.P.C. before the learned trial court for dropping of the proceedings on the ground of his age and on the basis of Circular/Instruction No. 5051 dated 07.02.1991, however, the same was dismissed.

3. Petitioner has preferred the present petition seeking quashing of

Complaint Case bearing No. 526721/2016, titled as “*ITO Vs. Rajinder Kumar*”, filed under the provisions of Sections 276C (1)/ 276D and 277 of the Income Tax Act and all consequential proceedings arising there-from.

4. In the present petition, the grounds urged by the petitioner, who claims to an Architect by profession and 80 years of age, are that detailed response to the Show Cause Notices issued by the department were sent and the beneficial circulars were also brought to their knowledge, in particular Instruction No. 5051 dated 07.02.1991. However, the Commissioner of Income Tax did not consider the replies filed by the petitioner and initiated proceedings under Section 276-C (1)/276-D and 277 of the Income-tax Act, 1961 for Assessment Year 2006-07; in the year 14.01.2016 for allegedly evading tax for the assessment year 2006-07.

5. During the course of hearing, learned Senior Counsel appearing on behalf of petitioner urged that as on 31.03.2006, petitioner was already 70 years of age and in terms of Instruction No. 5051 dated 07.02.1991; prosecution cannot be initiated against a person who has attained the age of 70 years at the time of commission of the offence. Reliance was placed upon decision in *Arun Kumar Bhatia & Anr. Vs. Vijay Kumar & Ors.* 2011 X AD (Delhi) 347 wherein on a complaint under Section 276 CC of the Income Tax Act, 1961, this Court while relying upon Circular dated 07/02/1991 issued by Central Board of Direct Taxes and also the fact that petitioner therein was above 70 years of age, were discharged from all charges. However, the learned trial court while ignoring the aforesaid position of law, rejected petitioner’s application for discharge on 24.11.2016. Reliance was also placed upon decision in *Union of India and*

Others Vs. Arviva Industries India Limited And Others (2014) 3 SCC 159 wherein the Hon'ble Supreme Court has held that the Circulars issued by the department are binding on them and stand contrary thereto cannot be taken.

6. Learned Senior Counsel for petitioner submitted that in order to buy peace in his old age, petitioner had already paid all the taxes and interest on the assessment year 2006-07 on the basis of documents provided to him during search and proceedings on 16.05.2012, but the respondents have taken a stand that despite payments of taxes, petitioner will not be absolved of the offences committed by him. It was submitted by petitioner's counsel that there was no provision for the assessee to disclose foreign account till the year 2013 and still petitioner has paid the taxes which substantiates that the default on petitioner's part was not intentional and deliberate in attempt to evade the tax. Lastly, learned counsel for petitioner submitted that the impugned complaint deserves to be quashed and this petition deserves to be allowed.

7. On the other hand, learned Senior Standing Counsel appearing on behalf of respondents submitted that on information received from Government of France in the year 2011 under Double Tax Avoidance Convention with India, it came to notice that petitioner had opened an account in HSBC, London on 20.08.1991. Accordingly a search and seizure action under Section 132 of the Act was carried on 23.08.2011. Petitioner's statement under Section 132(4) of the assessee was recorded on 23/24.08.2011, wherein though petitioner at the first instance to the question No. 13 denied having any foreign account but thereafter,

conceded in question No.45 that he had an account in UK. It was submitted that despite issuance of Notice dated 26.04.2012 under Section 153A of the Act, petitioner in his income tax return disclosed his income as Rs.6,47,19,409/-, as was declared in his original income tax return on 31.10.2006. Thereafter, show cause notices were issued to the petitioner. Subsequently, petitioner filed a revised income tax return on 16.02.2015 and declared his additional income as Rs.2,53,00440/- under the head 'income from other sources' i.e. the maximum credit balance in the undisclosed bank account maintained in HSBC account. Correspondingly, the income disclosed in return of assessment year 2007-08 was reduced. It was submitted that the petitioner, therefore, tried to evade tax on account of undisclosed foreign account.

8. Learned Senior Standing Counsel for respondent further submitted that the petitioner/assessee had succeeded in evading tax on deposit and transaction in the said undisclosed foreign account and various notices under Section 274 r/w 271 of the Act were issued against him and on 26.09.2013 also a penalty under Section 271 (1) (b) of the Act for non-compliance of notice under Section 142(1) was levied. The appeal filed by the petitioner against the order dated 26.09.2013 was dismissed vide order dated 23.01.2015.

9. Learned Senior Standing Counsel also submitted that petitioner's date of birth is 30.03.1936 and the impugned foreign account was opened on 20.08.1991. Accordingly, taking his date of birth as 30.03.1936, the petitioner/assessee was 55 years of age when the undisclosed foreign account was opened. However, his age cannot be taken into account on the

date of filing of the return of the assessment year 2006-07. It was empathically submitted by learned Senior Standing Counsel that as per ‘Guidelines for Identifying and Examining Prosecution cases’ vide F No.285/08/2014-IT (Inv.V)/155 dated 27.06.2019 issued by the Central Board of Direct Taxes (‘CBDT’), *“a case of individual shall not ordinarily be considered for initiating prosecution for any offence, if the individual concerned as attained the age of 70 years at the time of commission of the offence. However, if such individual has placed active role in commission of offence, this clause shall not apply.”*

10. Lastly, learned senior standing counsel submitted that the petitioner is a wilful defaulter and has not cooperated in the proceedings initiated by the respondents’ department and so, he cannot be permitted to take benefit of his age to evade tax by having a huge sum in an undisclosed foreign account.

11. In rebuttal, learned Senior Counsel for petitioner submitted that petitioner deserves to get umbrella of Para-4 of Instruction No. 5051, dated 07.02.1991 issued by the CBDT which prohibits prosecution of persons above 70 years of age. It was submitted that the date of birth of petitioner is 30.03.1936 and the date of alleged offence is assessment year 2006-07 and so, the petitioner had already attained the age of 70 years not only at the time of filing of return for the year 2006-07 but prior to the relevant year 2006-07 itself.

12. Learned counsel for petitioner submitted that the complaint in question has been filed under the provisions of Section 276C & D and 277 of the Income tax Act, 1961. The provisions of Section 277 pertains to

‘Concealment of Income’ and the penalty of Rs.90,45,966/- imposed under Section 271(1) (c) is paramatna, as it is a civil consequence; whereas Section 276C of the Income tax Act, 1961 is a criminal consequence. Lastly, it was submitted that the present petition deserves to be allowed and it is prayed that petitioner deserves to be discharged from the offences charged with.

13. The submissions advanced by learned counsel representing both the sides were heard at length and the material placed on record has been carefully perused.

14. Pertinently, in the year 2011, on an information received from France with regard to petitioner amongst others, having opened an account in HSBC, London on 20.08.1991, search and seizure was carried out at various business premises and residence of petitioner on 23.08.2011. On 26.04.2012, Notice under Section 153-A of the Income Tax Act, 1961 was issued to petitioner to file income tax return for the assessment year 2005-06, though the same had already been filed on 31.10.2006 under the provisions of 139(1) of IT Act. On 16.02.2015 the petitioner filed a revised return for the assessment year 2006-07 declaring the balance in the HSBC account London of US \$ 575010, equivalent to Rs.2,53,00,440/- as income from other sources, on the basis of details provided to the petitioner at the time of search and assessment proceedings. A Show Cause Notice dated 26.10.2015 under Section 277 read with Section 279(1) of the Act was issued to the petitioner; which was replied on 24.11.2015 informing payment of entire taxes, penalties and interest, age, various ailments of petitioner as well as reliance placed upon Circular/ Instruction No. 5051 dated 07.02.1991 of the CBDT. The prosecution against the petitioner

commenced by filing a complaint under Sections 276C (1) (ii) and 277 of the Income Tax Act, 1961 on 14.01.2016 and cognizance was taken on 18.01.2016. Thereafter, on 26.08.2016, petitioner filed an application under Section 245(2) Cr.P.C. for dropping of proceedings and consequential discharge on the basis of Circular/ Instruction No.5051 dated 07.02.1991 issued by the CBDT, which was dismissed by the learned trial court vide order dated 24.11.2016. The present petition has been filed seeking quashing of the complaint in question.

15. A perusal of impugned judgment dated 24.11.2016 shows that the learned trial court has relied upon decisions of this Court in ***Pradip Burman Vs. Income Tax Office*** 2015 SCC OnLine Del 13739 and another decision of this Court in ***V.P. Punj Vs. ACIT*** 94 (2001) DLT 156 to hold that the Circular/ Instruction No. 5051 dated 07.02.1991 do not bar on initiation of prosecution who have attained the age of 70 years.

16. Relevantly, the decision in ***Pradip Burman (Supra)*** has been rendered by me and in the said case the petitioner had sought stay of criminal proceedings initiated against him on account of non-disclosure of having a foreign account in HSBC (P) Bank, Zurich. When the Investigation Wing of the Income Tax Department, Government of India came to know about his having a foreign non-disclosed account, summons under Section 131 (1A) of the Income Tax Act, 1961 were issued. In response to which, petitioner therein first took the stand that the information with the department was unauthentic/unreliable, however, later agreed to deposit income tax on account of the balance existing in the foreign bank. In the said case also the petitioner relied upon Circular/

Instruction No. 5051 dated 07.02.1991 to submit that no prosecution can be initiated against a person who is above the age of 70 years. The petitioner in the said case was 63/64 years at the time of commission of offence but the Assessment year was 2006-07. In the said case also the petitioner had relied upon decision of this Court in *Arun Kumar Bhatia (Supra)*. This Court in the facts of the said case held as under:-

“13. It is pertinent to mention here that the aforesaid petition of Arun Kumar Bhatia and Anr. (supra) was allowed on the statement made by learned senior standing counsel for the Income Tax Department, who fairly conceded that as per Circular dated 07.02.1991, no prosecution can be initiated against a person who is above the age of 70 years.

14. Since the aforesaid order dated 02.11.2011 was passed by this Court only, therefore, it can authoritatively be said that the said order was not passed on merits, however, based on the precise statement made by the learned counsel for the Department. The fact remains that Instruction No.5051/1991 dated 07.02.1991 states as under:-

“4. Prosecution need not normally be initiated against persons who have attained the age of 70 years at the time of commission of offence.”

15. Admittedly, at the time of commission of alleged offence, the petitioner was not reached to the age of 70 years, however, the complaint in question was filed against him when he attained the age of 70 years. Thus, in my considered opinion, since case of Arun Bhatia (supra) was decided on the basis of the Circular dated 07.02.1991 and not on merits,

therefore, benefit of the same cannot be given to the present petitioner.”

17. The facts of the present case are more or less similar to the case in **Pradip Burman** and my view with regard to Circular/ Instruction No. 5051 dated 07.02.1991 in **Arun Bhtia**, still holds the field and so, reliance placed upon **Arun Bhtia’s** case in the present petition is of no assistance to the case of petitioner.

18. In the present petition, the sole issue to be examined by this Court is as to whether the Circular/ Instruction No. 5051 dated 07.02.1991 applies to the present case or not?

19. In the case in hand, petitioner had opened the account in HSBC, London on 20.08.1991 and it is only after Government of France brought to the knowledge of the competent authorities, it was disclosed in the year 2011. During the check period i.e. Assessment year 2006-07, the petitioner was allegedly having the maximum credit balance USD 575,010, equivalent to Rs.2,53,00,440/- at the exchange rate of Rs.44 per USD for the Year 2006-07 (F.Y. 2005-06) in his said foreign account. In the return pertaining to the assessment year 2006-07, petitioner had declared his income as Rs.6,47,19,409/-. Admittedly the said foreign account was opened in the HSBC Bank, London on 20.08.1991 and not disclosed. Taking the date of birth of petitioner, as claimed by him, as 30.03.1936, this Court finds that at the time of commission of offence in the year 1991 he was more than 55 years of age. The Circular/ Instruction No. 5051 dated 07.02.1991 notes that *prosecution normally be not initiated against a person who has attained the age of 70 years at the time of commission of*

offence. Meaning thereby, in terms of Circular/ Instruction No. 5051 dated 07.02.1991, the age at the time of commission of offence has to be taken and not when the proceedings initiated.

20. Even though petitioner claims to have filed a revised income tax return on 16.02.2015 declaring his additional income as Rs.2,53,00440/- under the head 'income from other sources' i.e. the maximum credit balance in the undisclosed bank account maintained in HSBC account, however, this Court cannot lose sight of the fact that on 26.09.2013 Show Cause Notice under Section 274 r/w 271 of the Act was issued against him and also that penalty under Section 271 (1) (b) of the Act for non-compliance of notice under Section 142(1) was also levied vide order dated 26.09.2013. It is only thereafter that the petitioner has chosen to file revised income tax return and by doing so, he cannot evade the judicial process of law for not disclosing his correct income and foreign account since the year 1991.

21. Further, in ***Pradip Burman (Supra)*** I have already held as under:-

“19. From the above noted facts, it is crystal clear that the petitioner had admitted to have bank accounts outside India only after the investigation by the Income Tax Department. The said foreign account was the undisclosed account and the deposits therein relates to his undisclosed income and the same needs to be examined.”

22. I find myself on the same page when I penned my perspective in ***Pradip Burman (Supra)***. In my considered opinion petitioner cannot be

permitted to take benefit of Circular/ Instruction No. 5051 dated 07.02.1991 to find an escape route for the wrong committed by him. Accordingly, the present petition is dismissed. Pending application is disposed of as infructuous.

(SURESH KUMAR KAIT)
JUDGE

DECEMBER 16, 2022

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