



CrI.O.P.No.28572 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.10.2023

Pronounced on : 09.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

CRL.O.P.No.28572 of 2018 and
CrI.M.P.No.16630 of 2018

R.P.Darmalingam

... Petitioner

Vs.

Assistant Commissioner of Income Tax,
Central Circle,
Investigation Wing, Room No.109,
1st Floor, No.46, M.G.Road,
Nungambakkam, Chennai 600 034

... Respondent

PRAYER: Criminal Original petition is filed under Section 482 of Criminal Procedure Code, to call for the records relating to EOCC.No.574 of 2017 on the file of the Additional Chief Metropolitan Magistrate, (Economic Offences), Egmore, Chennai and to quash the same.

For Petitioner

: Mr.R.Sivaraman
for Mr.M.Vivekanandan

For Respondent

: Mrs.M.Sheela,
Special Public Prosecutor
for Income Tax

ORDER



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This criminal original petition has been filed to quash the proceedings in EOCC.No.574 of 2017 on the file of the Additional Chief Metropolitan Magistrate, (Economic Offences), Egmore, Chennai taken cognizance for the offence punishable under Section 276CC of Income Tax Act, 1961.

2. The respondent lodged complaint for the offences under Section 276CC of Income Tax Act, 1961 for non filing of the income tax return for the assessment year 2012-2013. The crux of the complaint is that the accused is an assessee on the file of the respondent. During the search on 03.09.2013, it was detected that the accused did not file his return of income for the assessment year 2012-2013. Therefore, he was issued notice under Section 153A of Income Tax Act dated 29.04.2014 to file return of income tax within 30 days from the date of the said notice. But the petitioner did not file his return of income within the period of 30 days, but filed belatedly on 20.11.2015 by admitting the total income of Rs.2,29,92,150/-. Therefore, the accused was issued show cause notice to show reason for not initiating prosecution. On receipt of the same, the accused replied that the delay was due to books of accounts and other materials were seized by the Income Tax Department. It is

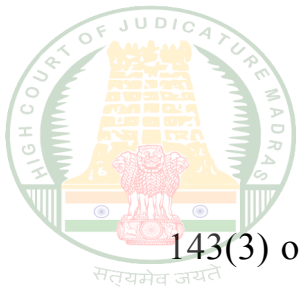


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difficult for the accused to collect details with regard to 18 assesseees in the group. He is aged person and suffering from hypertension and diabetes.

Therefore, he was unable to file his return of income. Without being satisfied with the reply submitted by the accused, the respondent filed complaint.

3. The learned counsel for the petitioner would submit that the allegations made in the complaint neither make out any case against the petitioner nor it discloses the ingredients of offence under Section 276CC of Income Tax Act against the petitioner. The trial court had taken cognizance without application of mind and it is against the provisions under Section 153A and 276CC of Income Tax Act. He had submitted his returns as provided under Section 139(1) of the Income Tax Act on 18.04.2013 itself. Therefore, the question of non filing of return does not arise. In fact, the respondent ought to have revealed the said fact that the petitioner already submitted his return of income on 18.04.2013 for the assessment year 2012-2013. If it was disclosed, the sanction would not have been granted to initiate prosecution against the petitioner. Even after receipt of the notice under Section 153A of Income Tax Act, the petitioner could not able to file additional return within the stipulated time of 30 days only for the reason he fell ill. In fact, the additional return filed by the petitioner was duly accepted and order has been passed under Section



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143(3) of the Income Tax Act. Therefore, there is no *mens rea* for non filing of

income tax return for the assessment year 2012-2013. As such, the criminal prosecution itself is non est in the eye of law. After accepting the return of income and passed order under Section 143(3) of Income Tax Act dated 30.03.2016.

3.1 He further submitted that the complaint itself is barred by limitation as contemplated under Section 468 of Cr.P.C. According to the respondent, the income tax return shall be filed within the period of 30 days from the date of receipt of the notice issued under Section 153A of the Income Tax Act. It was served on the petitioner on 08.05.2014 and as such, the period for non filing of income tax return ended on 07.06.2014. Whereas the sanction was granted for initiation of prosecution only on 27.09.2017. The complaint was lodged in the month of October 2017. Therefore, the complaint was filed after period of three years from the date of the alleged occurrence and the complaint itself is barred by limitation.

4. Heard, Mr.R.Sivaraman, the learned counsel appearing for the petitioner and Mrs.M.Sheela, the learned Special Public Prosecutor for Income Tax appearing for the respondent.



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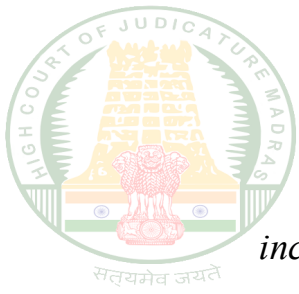
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5. The petitioner is an income tax assessee. A search was conducted on 03.09.2013. In the search, it was found that the petitioner had several transactions which were not reported by him to indulge in large scale tax evasion. The petitioner had purchased an immovable property for the value of Rs.2,50,00,000/-. During the search, it was also found that he had purchased the said property actually for a sum of Rs.4,50,00,001/- . However, the petitioner did not file his return of income within the time as stipulated under Section 139(1) of Income Tax Act. He filed belated income tax return under Section 139(4) of the Income Tax Act. Further, he did not disclose the property in his return of income for the assessment year 2012-2013. He had shown the total income of only Rs.29,92,146/-. It is relevant to extract provision under Section 139 of Income Tax Act hereunder:

139. Return of income-

(1) Every person,—

(a) being a company or a firm or (b) being a person other than a company or a firm, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his



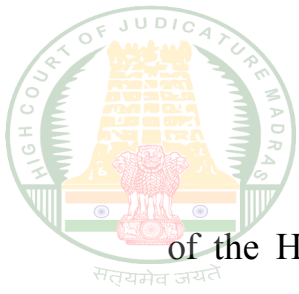
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income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed.

6. Thus, it is clear that the income tax return shall be filed before the due date. It mandates filing of return on or before the due date and non filing of such returns within the time constitutes an offence under Section 276CC of Income Tax Act. Therefore, the petitioner was served notice under Section 153A of Income Tax Act, thereby called upon him to file return of income within the period of 30 days from the date of receipt of the notice. It was duly received by him on 29.04.2014. But the petitioner failed to file his return within the stipulated time. Therefore, he wilfully concealed the purchase of property and he did not disclose the true and real income in returns. There is an infraction of Section 139(1) and Section 153 of the Income Tax Act. The benefit of voluntary compliance by way of belated returns would have arisen, if the petitioner disclosed the true and real income under Section 139(4) of Income Tax Act. Therefore, he is liable to be punished under Section 276CC of Income Tax Act.

7. The learned counsel for the respondent relied upon the judgment



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of the Hon'ble Supreme Court of India in the case of *Sasi Enterprises Vs.*

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Assistant Commissioner of Income Tax reported in *2014 (5) SCC 139*,

wherein it is held that Section 276CC of the Income Tax Act is attracted once is a failure there to file the return. Once such failure is discovered and detected, the subsequent act of filing returns will not protect the defaulters from prosecution proceedings. She also relied upon the judgment in the case of *Prakash Nath Khanna Vs. CIT* reported in *2004 (9) SCC 686*, wherein the Hon'ble Supreme Court of India held that the infractions which are covered by Section 276CC 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.

8. Therefore, the provision makes it punishable under Section 276CC for non filing of return within the stipulated time and wilfully concealing its true and correct income under Section 276C(1) and the petitioner cannot seek indulgence of this Court to quash the entire proceedings. Though the Tribunal

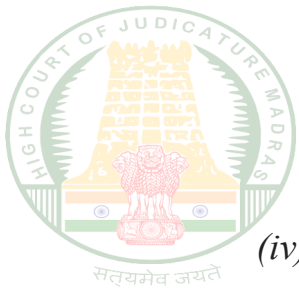


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had set aside the penalty on the ground of limitation, it would not prevent the

respondent from initiation of prosecution against the petitioner for the offence punishable under Section 276CC of the Income Tax Act. Non filing of returns has nothing to do with the adjudication of assessment proceedings. That apart, the Tribunal dropped the penalty proceedings solely on the ground of limitation. Further, the present prosecution is not based on the penalty levied under Section 271 of the Income Tax Act. When the ingredients of the offences are clearly made out in the complaint to establish that the accused had committed offence, it cannot be quashed on the ground that the penalty proceedings was dropped against the petitioner. It is relevant to rely upon the judgment of the Hon'ble Supreme Court of India in the case of **Radheshyam Kejriwal Vs. State of West Bengal and another** reported in (2011) 3 SCC 581, wherein the following ratio has been stated:

- (i) *Adjudication proceeding and criminal prosecution can be launched simultaneously;*
- (ii) *Decision in adjudication proceeding is not necessary before initiating criminal prosecution;*
- (iii) *Adjudication proceeding and criminal proceeding are independent in nature to each other;*



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(iv) *The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;*

(v) *Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20 (2) of the Constitution or Section 300 of the Code of Criminal Procedure;*

(vi) *The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue;*

9. Therefore, the relief sought for in this criminal original petition cannot be considered though the penalty proceedings was dropped against the petitioner. Further, in a prosecution for the offence under Section 276C of the Income Tax Act, there can be a presumption for existence of *mens rea* and it is for the accused to prove the contrary and that too, beyond reasonable doubt during the course of trial. Therefore, the grounds raised by the petitioner can be considered only before the trial court during the trial since subsequent act of offering additional income payment after search and after detection is not voluntary compliance and it was only during such proceedings it came to light



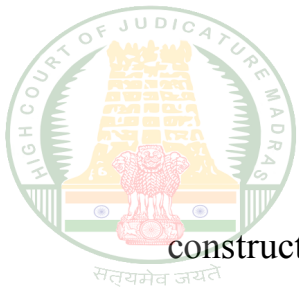
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that the petitioner made an attempt to evade the taxes and interest. Hence, it is

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for the petitioner to rebut the presumption under Section 278E of the Income Tax Act which provides culpable mental state of mind of the accused.

10. However, in support of his contention, the learned counsel appearing for the petitioner relied upon the judgment of the Hon'ble Supreme Court of India in the case of *K.C.Builders Vs. Assistant Commissioner of Income Tax* reported in (2004) 135 Taxman 461(SC), in which the Hon'ble Supreme Court of India decided the issue that whether the criminal prosecution gets quashed automatically when the Income Tax Appellate Tribunal which is the final court on the facts comes to the conclusion that there is no concealment of income since no offence survives under the Income Tax Act thereafter and held that the difference between the income as per original returns and the income shown in the revised returns was treated as concealed income and the assessing officer has rightly levied the penalty under Section 271(1)(c) of the Act in all these years. The assesseees were unsuccessful before the Commissioner of Income Tax. Therefore, the assessee filed the appeals before the Income Tax Appellate Tribunal. Before the Tribunal, it was pointed out that since there were defects in the books of account that regard to the cost of

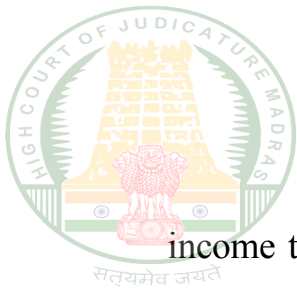


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construction, the assessee voluntarily referred the matter to the approved valuer

and has revised the returns accordingly. All this was done with a view to buy piece with the Department and the returned income does not represent any concealed income. After considering the said submission, the Hon'ble Supreme Court of India held that the findings of the Appellate Tribunal was conclusive and the prosecution cannot be sustained since the penalty after having been cancelled by the complainant following the Appellate Tribunal's order, no offence survives under the Income Tax Act and thus, quashing of prosecution is automatic. The penalties levied under Section 271(1)(c) were cancelled by the respondent by giving effect to the order of the Income Tax Appellate Tribunal. Therefore, the levy of penalties and prosecution under Section 276C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under Section 276C is automatic.

11. Whereas in the case on hand, the petitioner failed to file his return of income. After inspection, seized the materials and found that the petitioner concealed the income. Therefore, he was issued notice under Section 153A of Income Tax Act. It was also proved that the petitioner subsequently filed



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income tax return for the assessment year 2012-2013 on 20.11.2015 showing

his income. He suppressed and concealed the said income in the income tax return filed by him on 18.04.2013. Therefore, the above judgment is not applicable to the case on hand.

12. The learned counsel appearing for the petitioner also cited the judgment of the Hon'ble Supreme Court of India in the case of ***Suresh Kumar Agarwal Vs. Union of India*** reported in ***(2023) 146 taxmann.com 27(Jharkhand)***, in which the Hon'ble Supreme Court of India held that when the income tax officer has levied interest on filing of the return, it must be presumed that the income tax officer has extended the time for filing the return after satisfying himself that there was ground for delay in filing the return. Therefore, no sentence can be imposed under that provision unless the element of *mens rea* is established and the intention of the legislature is that the penalty should serve as a deterrent.

13. In the case on hand, as stated supra, the *mens rea* is categorically proved against the petitioner. In his income tax return, he failed to disclose a major portion of income. Therefore, after inspection and seizure of documents, found that there was concealment of income by the petitioner. As such, he was



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issued notice under Section 153A of Income Tax Act. Thereafter, he was also

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issued show cause notice. Only thereafter, the petitioner filed his second

income tax return for the assessment year 2012-2013 on 20.11.2015.

Therefore, the respondent rightly prosecuted the petitioner for concealment of income. Hence, the above judgment is also not helpful to the case on hand.

14. The learned counsel appearing for the petitioner also cited the judgment of the Hon'ble High Court of Delhi in the case of *Principal Commissioner of Income Tax-19 Vs. Neeraj Jindal* reported in (2017) 79 *taxmann.com* 96(Delhi), in which it is held that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. Further held that when the assessment officer has accepted the revised return filed by the assessee under Section 153A, no occasion arises to refer to the previous return filed under Section 139 of the Act for all purposes, including for the purpose of levying penalty under Section 271(1)(c) of the Act, the return that has to be looked at is the one filed under Section 153A. In fact, the second proviso to [Section 153A\(1\)](#) provides that "assessment or reassessment, if any, relating to any assessment year falling within the period of six



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assessment years referred to in this sub-section pending on the date of initiation

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of the search under [Section 132](#) or making of requisition under [Section 132A](#), as the case may be, shall abate." Therefore, [Section 153A](#) is in the nature of a second chance given to the assessee, which incidentally gives him an opportunity to make good omission, if any, in the original return. Once the assessment officer accepts the revised return filed under [Section 153A](#), the original return under [Section 139](#) abates and becomes non-est. Now, it is trite to say that the "concealment" has to be seen with reference to the return that it is filed by the assessee. Thus, for the purpose of levying penalty under [Section 271\(1\)\(c\)](#), what has to be seen is whether there is any concealment in the return filed by the assessee under [Section 153A](#), and not vis-a vis the original return under Section 139.

15. No quarrel that once the assessment officer accepts the revised return filed under Section 153A, the original return filed under Section 139 abates and becomes non est. Therefore, no penalty can be levied under Section 271(1)(c) of the Income Tax Act. Whereas in the case on hand, there was concealment by the petitioner while filing his first return of income for the assessment year 2012-2013. In fact, the levying of penalty was already dropped in view of the order passed by the tribunal. However, the petitioner is



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now facing prosecution under Section 276CC of Income Tax Act. That apart,

the *mens rea* of the petitioner is clearly established by the respondent and as such, the above judgment is also not helpful to the case on hand.

16. Further, already the prosecution examined PW1 before the trial court. Therefore, all the grounds raised by the petitioner can be agitated before the trial court to rebut the presumption.

17. In view of the above discussion, this Court is not inclined to quash the impugned proceedings. As such, this criminal original petition is liable to be dismissed. Accordingly, this criminal original petition is dismissed. Consequently, connected miscellaneous petition is closed.

09.11.2023

Index :Yes/No
Internet : Yes/No
Speaking order/non-speaking order
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G.K.ILANTHIRAIYAN, J.

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To



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- 1.The Additional Chief Metropolitan Magistrate Court,
(Economic Offences),
Egmore, Chennai
- 2.Assistant Commissioner of Income Tax,
Central Circle,
Investigation Wing, Room No.109,
1st Floor, No.46, M.G.Road,
Nungambakkam, Chennai 600 034
- 3.The Government Advocate,
High Court of Madras

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