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Crl.O.P.No.17906 of 2017
and Crl.M.P.Nos.10920 and 10921 of 2017

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
20~01~2022	28~01~2022

CORAM:
THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

Crl.O.P.No.17906 of 2017
and Crl.M.P.Nos.10920 and 10921 of 2017

S.P. Velayutham .. Petitioners /Accused

~Vs~

The Assistant Commissioner of Income Tax
Non Corporate Circle – 14(1)
Annex Building, Room No.606,
No.121, M.G.Road,
Chennai – 600034. .. Respondent /Complainant

Prayer: Petition filed under Section 482 of Cr.P.C.to call for the records and quash the prosecution in E.O.C.C.No.82 of 2017, on the file of the learned Additional Chief Metropolitan Magistrate (Economic Offences)-II, Egmore at Allikulam, Chennai

For Petitioner : Mr.T. Mohan for
Mr.K.Surendar



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For Respondent : Mr. L. Muralikrishnan
Spl. Public Prosecutor for
Income Tax Cases

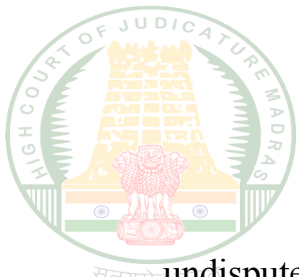
ORDER

This petition has been filed to quash the proceedings in E.O.C.C.No.82 of 2017 for the offences under Section 276C(2) of the Income Tax Act, pending on the file of the learned Additional Chief Metropolitan Magistrate (Economic Offences)-II, Egmore at Allikulam, Chennai. The trial Court took cognizance of the offence on the basis of the complaint filed by the Respondent.

2. The brief fact of the Petitioner's case is as follows:

2.a. The Petitioner/accused while filing the Return of Income for the financial year 2012-13 (Assessment year 2013-14) has shown tax payable of Rs.2,22,23,010/- and paid tax of Rs.10,000,000/- only as self assessment tax. The assessment under Section 143(3) of the IT Act, 1961 for the Assessment year 2013-14 was completed by accepting the income returned by the assessee vide order dated 31.03.2016. Since the assessee has paid only Rs.10,000,000/- towards

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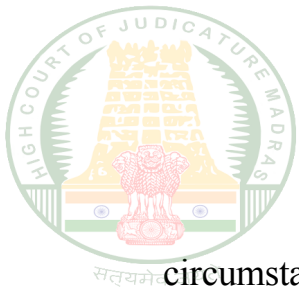


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undisputed tax and still remaining amount has not been paid, the prosecution has been launched. Show cause Notice also issued before the initiation of the prosecution on 16.09.2016. Reply given by the accused on 24.09.2016 is general in nature. Hence prosecution has been launched. Challenging the prosecution the present petition has been filed.

3.a. Learned Counsel appearing for the Petitioner mainly contended that it is not the case of the department that the petitioner/accused has suppressed the real income or undisclosed income was unearthed either under inspection or search. The return submitted by the accused was accepted and the assessment order of the year 2013-14 was also confirmed. He has paid part of the tax amount which was accepted by the department. The Assessment Order dated 31.03.2016 also confirmed the income. Thereafter an immovable property of the petitioner was attached on 13.05.2016. It is his further contention that he has paid tax with great difficulty and still he has to pay only Rs.71 lakhs. In the reply notice he has categorically explained the circumstances which forced him delayed the payment and he has also stated that as the immovable property has already attached, he could not mobilise the funds by sale of the property and he has also expressed the various



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सत्यमेव जयते circumstances which lead to loss in his business. The reply notice has not been considered properly. The complainant has mechanically filed prosecution without applying his mind. It is his contention that mere delayed payment of tax without an intention to evade tax will not constitute offence under Section 276(C)(2) of the Income Tax Act.

3.b. It is also his contention that now out of total due substantial tax has been paid only remaining Rs.7,62,945/-alone to be paid and the property has already been attached. Recovery also can be made by the department with interest. Therefore, it is his contention that as there is no intention on the part of the petitioner, in any manner to willfully evade the payment of tax. Therefore offence under Section 276C(2) will not be attracted. Hence submitted that the complaint is bereft of details as to the averments that the petitioner has made any willful attempt to evade any tax or penalty or interest. Therefore submitted that the entire prosecution is nothing but abuse of process of law. Hence prayed for quashment of the proceedings.

4. In support of his contention he relied upon the following judgments:



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1. *Tamil Nadu Housing Board vs. Collector of Central Excise, Madras and Ors. [1995 Supp(1) SCC 50]*
2. *Prem Dass vs. Income Tax Officer [2001-1-LW(Crl) 471]*
3. *Vijaychandra Chandulal Shah vs. State of Gujarat and Ors. [[1995] 213 ITR 307 (Guj) = MANU/GJ/0054/1993]*
4. *Union of India (UOI) vs. Jiwai Lal Chironji Lal and Ors. [MANU/MP/ 0143/2010]*
5. *Sayamull Surana vs. Income Tax Officer [(2019) 306 CTR (Mad) 354]*
6. *Forzza Projects Private Limited and Other vs. Principal commissioner of Income Tax Act, Kochi and Others [(2021) 279 Taxmann 459 (Ker)]*
7. *Ganga Devi vs. State of Gujarat [[2021] 437 ITR 323 (Guj)]*



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5. Whereas the learend counsel appearing for the Respondent submitted that though the petitioner has filed the Return showing the correct income for the assessment year 2013-14, he has not paid the tax fully. At the relevant point of time he has paid only Rs.10,000,000/-. Assessment Order was also passed on 31.03.2016. Even thereafter the amount has not been paid. Hence, it is his contention that when the tax has not been paid the prosecution certainly maintainable. It is his contention that as per Section 140A of the where any tax is payable on the basis of any return required to be furnished, assessee shall be liable to pay said tax without together with interest and failure to pay whole or any part of tax, assessee shall be deemed to be a defaulter in respect of the tax. Therefore, when the law mandates payment of tax within a period the person failed to pay such a tax, there is no bar for initiation of prosecution. Hence opposed the petitioner. He has also placed reliance on the following judgments:

1. *Madhumilan Syntex Ltd. vs. Union of India and another [(2007)11 SCC 297]*
2. *Prakash Nath Khanna and Another vs. Commissioner of Income Tax and Another [(2004) 9*



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3. *Arun Arya Vs.Income Tax Officer [CRMC No. 205/2015, IA No. 01/2015 dated 28.09.2018 High Court of Jammu & Kashmir at Jammu]*
4. *Sujatha Venkateshwaran vs. the Assistant Commissioner of Income Tax [Crl.R.C.No.615 of 2011 dated 13.07.2018 Madras High Court]*
5. *M/s. Konark Refrigerator vs. Dy. Commissioner of Income Tax [M/s. Konark Refrigeration vs. Dy.Commissioner of Income Tax [Crl.Petition No.5964 of 2018]*

6. Entire materials perused. The prosecution has been launched for the non payment of tax. It is not in dispute that the assessee has filed Return on 25.11.2003 for the assessment year 2013-14 and revised Return also filed by the Petitioner on 13.03.2014 for the Assessment Year 2013-14. The assessment order dated 13.05.2016 is also confirmed the Return and the tax payable by the Assessee. The prosecution has been mainly launched on the ground that as the assessee did not pay

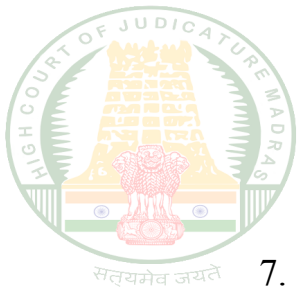


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the entire tax as per his Return he sought to be prosecuted under Section 276C(2).

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It is relevant to note that the Assessment Order has been confirmed on 31.3.2016, which was also appended with the typed set which is not disputed by the Revenue, which in fact confirmed the taxable income shown in the Return filed by the Petitioner. Thereafter, on 13.05.2016 an order of attachment of immovable property was passed by the Department and show cause notice also issued as to why the prosecution should be initiated against him. Show cause notice was issued on 16.09.2016 which was replied by the assessee on 24.9.2016 admitting that he has not paid the entire amount. Non payment of entire tax is due to loss in the business and also stated in the reply that he has paid Rs.1,52,14,460/- on different dates and the remaining amount of Rs.57,84,557/- to be payable by him. He has also stated in the reply that since the immovable property has been attached he could not mobilise any fund and giving various reasons and circumstances narrating his default sought for time. Whereas in the complaint it is stated that by the defacto complainant that the reason given in the reply for non-payment of tax is very general in nature and loss in business cannot be an excuse for evading tax. Therefore, the prosecution is lodged.



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7. Now, it is admitted by the Department that only a sum of Rs.7,62,945/- to be paid. It is admitted by the Department that Rs.1,95,76,736/- has paid on various dates. These facts are not in dispute. Now the question remains to be answered is whether the accused has wilfully attempted in any manner to evade the payment of any tax, penalty or interest. Section 276(C) of the Income Tax is as follows:

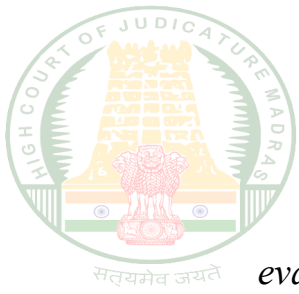
“ **276C. Wilful attempt to evade tax, etc.**

(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable 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 amount sought to be evaded exceeds one 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 three years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to



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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 three 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, penalty 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



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(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.]”

8. To prosecute a person there must be a wilful attempt on the part of the assessee to evade payment of any tax, penalty or interest. The explanation to the above section makes it very clear that the evasion by way of any false entry or statement in the books of account or other document or omission to make any entry in the books of accounts or other documents or any other circumstances which will have the effect of enabling the assessee to evade tax or penalty or interest chargeable or imposable under this Act or the payment thereof. Though explanation is inclusive one it is not the case of the Department that assessee has made any false entry in the statements or documents or omitted to make any such entry in the books of account or other document or acted in any other manner to avoid payment of tax. It is not the case of the Department that the assessee has made an attempt to alienate the property in order to defeat the payment etc., Therefore, when the Return has been properly accepted and the assessment is also confirmed, mere default in



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payment of taxes in view of this Court, unless such default arising out of any of the circumstances, which will have a effect of the assessee to defeat the payment, the word employed in the section viz., “wilful attempt” cannot be imported to mere failure to pay the tax. From the inception there is no suppression and even the reply notice he has clearly stated the circumstances which forced him to such default.

9. It is also to be noted Section 140A of the Income Tax Act makes it very clear that any tax is based on any Return filed by the Assessee, the Assessee shall be liable to pay such tax. Similarly, sub-clause 3 of the Section 140A reads as follows:

“140A(3) If any assessee fails to pay the whole or any part of such tax or interest or both in accordance with the provisions of sub- section (1), he shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of the tax or interest or both remaining unpaid, and all the provisions of this Act shall apply accordingly.”

10. The above sub-clause 3 of Section 140A makes it very clear that in the event of failure to pay tax the assessee shall be deemed to be a default in respect of



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tax. The word “wilfully attempt to evade the tax” is absent in Section 140A(3). If, mere default in payment of tax in time to be construed as a wilful attempt to evade the payment of tax the legislatures would have included the word “wilful attempt to evade the tax” in Sub-clause 3 of Section 140A which is in fact absent. Therefore, mere default on payment of tax in time the wilful attempt to evade the tax cannot be imported to prosecute. To prosecute the person for penal action, the penal provision has to be strictly construed. Only the circumstances and the conduct of the accused show the wilfull attempt in any manner whatsoever to evade the tax or to evade the payment of any tax, penalty or interest, the prosecution can be launched.

11. The Apex Court in *Tamil Nadu Housing Board vs. Collector of Central Excise, Madras and Ors. [1995 Supp(1) SCC 50]* while dealing with Section 11A of the Central Excises and Salt Act, 1944, has held that the word “evade” in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word “intent”. In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law and held that when the law requires an intention to evade payment of duty then it is not mere failure to



pay duty. It must be something more.
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12. In *Prem Dass vs. Income Tax Officer [2001-1-LW(Crl) 471]* the

Honourable Supreme Court has held as follows:

“8. Willful attempt to evade any tax, penalty or interest chargeable or imposable under the Act under Section 276C 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 believe the same to be false or does not believe to be true. Necessary mensrea, 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 aforesaid two criminal offence contemplated under Sections 276C 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



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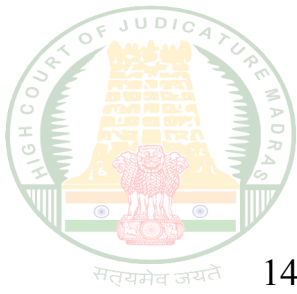


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found that it is a case purely on difference of opinion as to the estimates and not a case of concealment of income or even furnishing of inaccurate particulars of income.”

13. In *Vijaychandra Chandulal Shah vs. State of Gujarat and Ors.*[[1995] 213 ITR 307 (Guj) = MANU/GJ/0054/1993] the Gujarat High Court has considered various judgments and held that mere failure pay the advance tax the offence is not attracted. The relevant portion of the judgment is as follows:

11.
Sub-section (2) of section 276C could be attracted only when a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act and not otherwise. The complaint is for offences punishable under section 276C(2) of the Act. In view of what is discussed above, it is very clear that there is not even a whisper that there is wilful attempt in any manner whatsoever to evade the payment of tax and hence the process issued is required to be quashed and is hereby quashed.”



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14. In **Union of India (UOI) vs. Jival Lal Chironji Lal and Ors. [MANU/**

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MP/ 0143/2010] The High Court of Madhya Pradesh (Gwalior Bench) has held as

follows:

“22.From the minute analysis of the aforesaid Judgments of the Supreme Court, it clearly emerges that the conduct of the Assessee acquires importance, in relation to the proceedings of imposition of penalty or prosecution or conviction of the Assessee and whne the Assessee satisfactorily demonstrate that he was having no intention of concealment of Income, either Deliberately or indeliberately, the conviction could not be sustained. In the circumstances of the present case also, it is apparent from the perusal of the record that there was no wilful attempt to evade tax or concealment of income on the part of the Assessee Firm or false statement in verification and therefore, it would not be a case of 'Wilful concealment of Income' or even a case of `furnishing of inaccurate particulars of income` and therefore no fault could be found in the impugned judgment of the Appellate Court.”

15. This Court in **Sayamull Surana vs. Income Tax Officer [(2019) 306**

CTR (Mad) 354] has held as follows:



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“9. Further, the expression “wilful” has been explained as follows in *P.Ramanatha Aiyar's The Law Lexicon, Second Edition, 1977*:

“The question whether an act or omission is wilful arises oftener in criminal than in civil causes; since in the former the general principle requiring the presence of mens rea excludes from criminality acts done accidentally and unintentionally and even acts done intentionally under honest but mistaken belief in the existence of facts which, if true, would have made the acts lawful or excusable.””

“13 Thus, in the peculiar facts and circumstances of the case, it cannot be stated that the accused was wilfully evading the payment of tax. But, unfortunately, the Trial Court had failed to appreciate the contention of the accused in the right perspective.”

16. The High Court of Kerala in *Forzza Projects Private Limited and Other vs. Principal commissioner of Income Tax Act, Kochi and Others [(2021) 279 Taxmann 459 (Ker)]* followed the Judgement of *Prem Dass's case (supra)* and held as follows:

“6. In view of the legal position settled by the Apex



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court in Prem Dass's case (supra) , it cannot be held that the legal position laid down by this Court in G.Viswanathan's case (supra) is good law. In the instant case, admittedly there is no concealment of any source of income or taxable item, inclusion of a circumstance aimed to evade tax or furnishing of inaccurate particulars regarding any assessment or payment of tax. What is involved is only a failure on the part of the petitioner to pay the tax in time, which was later on paid after availing installment facility with interest. The penalty imposed is now pending consideration before the appellate authority. So it would not fall under the mischief of Section 276 C of the Income Tax Act.

10. What is dealt with in Prakash Nath Khanna's case is the criminal liability that can be fastened under [Section 276CC](#) of the Act when there is wilful failure to furnish return. The expression "failure" used in Section 276 CC of the Act is with respect to submission of assessment and return and the same cannot be equated with any failure to pay the tax in time and the liability under Section 276 C of the Act. A mere failure to pay the amount due (tax, interest or penalty) will not satisfy the requirement which would constitute the offence under [Section 276C\(2\)](#) of the Income



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Tax Act. Hence the crime registered and the further proceedings thereof will not serve any purpose, if it is proceeded further. The same is quashed.”

17. In ***Ganga Devi vs. State of Gujarat*** [[2021] 437 ITR 323 (Guj)] the High Court of Gujarat at Ahmedabad held as follows:

“22.1 What the law requires is the intention to evade payment of taxes then it is not mere failure to pay the tax but must be something more. The assessee must be aware that the tax was leviable and such assessee deliberately avoids paying it. The word 'evade' in the context means defeating the provisions of law of paying tax.”

18. Considering the above judgments and the mere failure to pay the tax in time without any intention or deliberate attempt to avoid tax in totality or without any mens rea to avoid the payment, the word employed “wilful attempt” cannot be inferred merely on failure to pay tax in time. If the intention of the assessee to evade the payment of tax was present from the very inception, he would not have made further payments. The statements filed by the Department would also indicate



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that he was continuously paying the taxes from the year 2017 by instalments and he has paid the tax from 2016 till 10.11.2021 around 40 instalments he paid about Rs.1,95,76,736/-. His conduct itself shows that there was no wilful attempt to evade the payment of tax and payment of the tax in instalment in fact clearly probabalise his reply given to the show cause notice which has not taken note of the Revenue.

19. It is also relevant to note that for non-payment of tax the attachment order also passed on the immovable property of the assessee in the year 2016 itself. The authorities have attached the property till now keeping silent without making any recovery proceedings as contemplated under Sections 222, 223 and 226 of the Act. It is also relevant to note that as per Sub-Clause 4 Section 220 of the Act, ff the tax is not paid within the time limited under sub- section (1) or extended under sub- section (3), as the case may be, the assessee shall be deemed to be in default. The word “Wilful”is also not included the above legal fiction. Having attached the property the department has not made any attempt to recover all the taxes. Therefore, when the immovable property was attached and attachment is still continued, it is common knowledge that liquidating the asset is very difficult.



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Therefore, explanation offered by the assessee in this case for failure to pay the amount is very reasonable. The conduct of making payment of tax to the tune of Rs.1,95,00,000/- is also clearly show that he never had an intention to defeat the provision of law by evading the payment of tax. As long as there is no deliberate Act or willful act on the part of the accused to evade the payment of tax, mere failure to pay the tax will not constitute the offence under Section 276C(2).

20. In the judgment of the Apex Court relied by the Respondent in ***Madhumilan Syntex Ltd. vs. Union of India and another [(2007)11 SCC 297]*** cited to the effect that non-payment of tax within the stipulated period, prosecution is maintainable. The above case factually distinguished where the assessee company having deducted the tax at source and failed to pay the TDS amount in time. Such circumstances the Apex Court took a view that they are not company or director not immune from prosecution.

21. In ***Prakash Nath Khanna and Another vs. Commissioner of Income Tax and Another [(2004) 9 SCC 686]*** the prosecution launched for the offence under Section 276(CC) was sought to be quashed. The plea before the Apex Court



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in the above case is that as the assessee has already submitted the levy of interest and also penalty he could not be prosecuted under Section 276(CC) for the same default. The same was negated by the Apex Court. Whereas in this case the prosecution initiated only under Section 276(C)(2) of the Act. Therefore, the above judgment is not applicable to the fact of this case.

22. The judgment relied upon by the Department in *Arun Arya Vs. Income Tax Officer [CRMC No. 205/2015, IA No. 01/2015 dated 28.09.2018 High Court of Jammu & Kashmir at Jammu]* on the basis of the survey conducted by the Income Tax Department under Section 133A of the IT Act, tax was assessed. The above case is also not applicable to the facts of the present case as the above case is arising out of the survey and search which squarely fall within the explanation of Section 277 of the Income Tax Act.

23. In *Sujatha Venkateshwaran vs. The Assistant Commissioner of Income Tax [Crl.R.C.No.615 of 2011 dated 13.07.2018 Madras High Court]* this Court has rejected the revision filed by the Assessee. In this case also the prosecution initiated on the ground that the accused made false entry in the books of

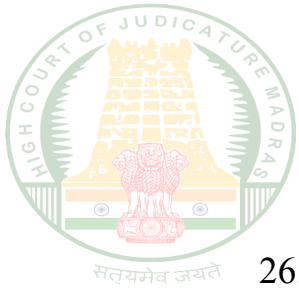


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account and shown a bogus payment to avoid tax. As those facts fall within the
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explanation, which cannot be applied to the present case.

24. In *M/s. Konark Refrigerator vs. Dy. Commissioner of Income Tax [M/s. Konark Refrigeration vs. Dy. Commissioner of Income Tax [Crl.Petition No.5964 of 2018 dated 12.08.2018 Telangana High Court]* the Telangana High Court took a view that as the assessee has not paid the tax within the period stipulated under Section 140A of the Act, the prosecution initiated against him is maintainable. I respectfully disagree with the above view. The provision 140A on failure of payment will not make the assessee as willful defaulter. Therefore, the above judgment is also cannot be applicable to the facts of the case on hand.

25. Taking the overall fact and the nature of the complaint, this Court is of the view that the prosecution in this case is nothing but sheer waste of time and there was no intention or willful attempt made by the Assessee to evade the payment of tax. Only he expressed his inability and mere failure to pay a portion of the tax cannot be construed to mean that he has wilfully attempted to evade the payment of tax.



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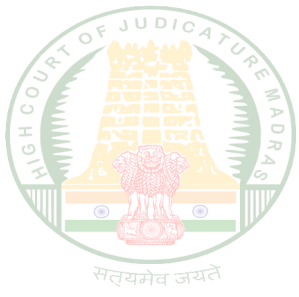
26. In such view of the matter, the proceedings in E.O.C.C.No.82 of 2017, on the file of the learned Additional Chief Metropolitan Magistrate (Economic Offences)-II, Egmore at Allikulam, Chennai, is quashed.

27. In the result, the Criminal Original Petition is ordered. Consequently connected Miscellaneous Petitions are closed.

27.01.2022

Index : Yes
Internet : Yes
Speaking/non-speaking order : Yes/No
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Note : Issue Order Copy on 31.01.2022

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