

HON'BLE SRI JUSTICE M.S.K.JAISWAL

Criminal Petition No.3954 of 2008

ORDER:-

This petition is filed by the petitioners/A.3 and A.5 under Section 482 Cr.P.C., for quashing all further proceedings against them in C.C.No.72 of 2007 on the file of the Special Judge for Economic Offences, Hyderabad, filed by the 1st respondent under Sections 276C and 278B of the Income-Tax Act, 1961 (hereinafter referred to as 'the Act').

2. Ind Barath Energies Limited – A.1 is a registered Company. A.2 is the Chairman and Managing Director; A.4 is the whole-time Director; and A.3 and A.5 are the Directors of A.1 Company.

3. The allegation of the complainant is that for the assessment year 2003-04, A.1 Company filed its income-tax returns on 27-11-2003 disclosing 'NIL' income by showing Book Profits for the purpose of computation of MAT u/s.115JB at Rs.4,00,14,538/- and the said return was accepted under Section 143(1) of the Act. It is alleged that as per the Book Profits, A.1 Company has the tax liability of Rs.32,03,711/-. As per the provisions of Section 210 of the Act, the accused Company was required to pay the same amount of tax by way of Advance Tax or in the alternative, the said amount should have been paid by way of Self-Assessment Tax as per the provisions of Section 140A before filing the return of income. But the accused Company filed the return for the Assessment Year 2003-04 without paying the taxes either by way of Advance Tax or by way of Self-Assessment Tax. Notice under Section 156 of the Act was served on the Company but it had not paid the demand even after lapse of a long time, and that, such failure to pay the taxes was wilful. It is also alleged that a penalty opportunity letter was issued to the accused Company on 21-11-2005 and to all its Directors on 30-11-2005 to submit their explanation fixing the dates of hearing as 25-11-2005 and 08-12-2005. The accused Company submitted its explanation on 07-12-2005 wherein it is simply stated that there is only the payment of tax being made with interest after filing the return of income with interest. The accused Company was deliberately filing the returns of income in time without payment of taxes, even at the stage of filing of the returns, as is required under Section 140A of the Act. A.2 to A.4 have overall control over the

affairs of A.1 Company and were responsible for conducting the business of the Company.

4. This complaint is sought to be quashed by the petitioners/A.3 and A.5 on the ground that A.3 is a housewife and A.5 is Director of A.1's Company and they were neither in-charge of the day-to-day affairs of the Company nor had overall control over the affairs of the Company.

5. It is contended that A.1 Company has filed its return of income and the same was accepted under Section 143(1) of the Act and later on the case was taken up for scrutiny and after conducting necessary enquiry, the income returned has been accepted. It is submitted that as per the Assessment Order, dated 28-02-2006, the tax payable was Rs.32,95,152/-, but A.1 Company has paid total tax of Rs.33,43,819/-, which is in excess. It is submitted that for the delay in remitting the tax, the respondent/complainant filed the present complaint roping the petitioners along with A.1, A.2 and A.4 under Section 278B of the Act alleging that they were in-charge of and responsible to the affairs of A.1 Company in conducting its business and in the absence of such allegation, the present complaint is not maintainable, and therefore continuation of proceedings against the petitioners is abuse of process of Court.

6. It is further submitted that a cursory glance of the provisions of Section 276C of the Act reveal that the said provision for punishing an assessee who is guilty of evasion of tax is designed to prosecute assessee who have either not disclosed any accurate particulars of income or concealed material particulars of income. The explanation appended to Section 276C of the Act shows the objective behind the said provision to punish the assessee who is guilty of tax evasion. Prosecution is entirely different from the process of recovery which is contemplated in Schedule II of the Act. It is submitted that the provisions of Section 276C of the Act are *para materia* with Order XXI of C.P.C., laying down elaborate procedure for recovery of taxes which are quantified and assessed in the hands of the assessee. The Department has all the powers of a civil Court virtually to attach and sale movable as also immovable property belonging to the defaulting assessee. Even the provision of detention of an assessee to civil imprisonment is provided. Therefore, it is submitted that when the returns are filed and tax was paid within the permitted time or if there is any dispute, launching criminal prosecution under Section 276C is onerous without taking recourse to the other provisions of the Act. Therefore, launching of the criminal prosecution is nothing but subjecting the assessee to needless harassment

and hence all further proceedings in the calendar case may be quashed.

7. In that view of the matter, what is required to be seen is as to whether the petitioner/assessee has conducted himself in the manner which could fall within the ambit of Section 276C of the Act so as to prosecute him in a criminal Court and whether he can be termed as a person who wilfully attempted to evade any tax, penalty or interest. Section 276C of the Act reads as under:-

“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 twenty-five hundred thousand rupees, with rigorous imprisonment for 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, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person –

- iii. 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

- iv. makes or causes to be made any false entry or statement in such books of account or other documents; or
- v. wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or
- vi. 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. A bare reading of the above provision, unambiguously demonstrate that the said provision can be invoked without prejudice to any penalty that may be imposable but in order to attract the stringent provisions of criminal prosecution what is required is that there should be a wilful attempt to evade any tax, penalty or interest. The explanation appended to the Section, as seen above, makes it clear as to what acts of an assessee can be brought within the ambit of a person guilty of wilful attempt to evade any tax.

9. The explanation provides for four categories of acts which encompasses the conduct to come within the ambit of wilful attempt.

10. Learned Counsel appearing for the petitioner/assessee strenuously submitted that in the case in hand, the assessee has filed the return declaring his income and also the tax payable by him. Upon processing the return, which is filed under Section 139 of the Act, if there is any defect, the Assessing Officer can call upon the assessee to rectify the defects, if any, noticed. Section 143 of the Act provides for assessment and after computing the same, an intimation shall be sent to the assessee specifying the sum determined to be payable or the amount of refund due to assessee. The penalties imposable, for failure to furnish return, comply with notices, concealment of income etc., is incorporated in Chapter XXI of the Act. Section 271 stipulates that if the Assessing Officer is satisfied that any person has failed to comply with notice, under sub-section (2) of Section 115WD, or under sub-section (2) of Section 115WE, or under sub-section (1) of Section 142 or sub-section (2) of Section 143, or fails to comply with a direction issued under sub-section (2A) of Section 142, or has concealed the particulars of his income or furnished

inaccurate particulars of such income, can be directed to pay the penalty as contemplated under Section 271 of the Act. Under the same Chapter, there is Section 276C which provides for criminal prosecution. When Section 271 of the Act takes care of an assessee who has failed to comply with the demand notice, or has concealed the particulars of his income or furnished inaccurate particulars of income, Section 276C deals with a person who wilfully attempts in any manner whatsoever to evade any tax. There is no gain saying the fact that Section 271 of the Act has to be invoked in respect of assesses who, by the Assessing Officer, is found to have made a wilful attempt to evade any tax, penalty or interest. The underlying principle is manifest. There may be instances where an assessee furnished inaccurate particulars or conceals some particulars of the income but files the return and pays the tax as determined by him has to be treated under Section 271 of the Act by imposing penalties as against a person who wilfully attempts to evade payment of any tax. Wilful evasion of the tax is more serious than concealing a particular income. Therefore, the former has to be dealt with under Section 276C of the Act whereas the latter has to be dealt with under Section 271 of the Act.

11. How the honest assesses and tax evaders are to be dealt with can be noticed from different provisions of the Act. For instance w.e.f., 01-04-1989, Section 143 (1-A) of the Act is introduced and the object thereof is the prevention of evasion of tax. By introduction of this Section, persons who have filed returns in which they have sought to evade the tax properly payable by them is meant to have a deterrent effect and hefty amount of 20% as additional income tax is payable on the difference between what is declared in the return and what is assessed to tax. However, for launching criminal prosecution, which by any standards is more stringent and harsh than any other provisions of the Act even severe than Parts I to VI of Schedule-II of the Act, the basic requirement is the satisfaction of the Revenue that there was wilful attempt to evade tax. It is no doubt true that prosecution under Section 276C of the Act is without prejudice to any penalty that may be imposable on an assessee but the authorities should take notice of the following observations of the Constitution Bench of the Supreme Court made as long back as in 1957 in the decision reported in **PANNALAL BINJRAJ v. UNION OF INDIA** viz., “A humane and considerate administration of the relevant provisions of the Income Tax Act would go a long way in allaying the apprehensions of the assesseees and if that is done in true spirit, no

assessee will be in a position to charge the revenue with administering the provisions of the Act with an evil eye and unequal hand.”

12. Learned Counsel appearing for the petitioner has relied upon a decision of the Supreme Court reported in **K.C.Builders and Anr. V. The Assistant Commissioner of Income Tax** .

13. In the case before the Apex Court, the assessee was unsuccessful in his attempts to get the proceedings launched in a criminal Court quashed under the provisions of Sections 397 and 401 Cr.P.C. The trial Court and the High Court rejected the prayer of the assessee and hence the matter went to the Supreme Court. After elaborately referring to the case law on the subject, the Supreme Court made the following observations in paragraph Nos.16, 17, 26, 27, 28, 29 and 34, which have a bearing to the facts of the case in hand and ultimately quashed the criminal case registered against the assessee:-

“16. The word “concealment” inherently carried with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire in the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under Section 271(1)(iii) may be imposed it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income. Where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled as in the instant case. Ordinarily, penalty cannot stand if the assessment itself is set aside. Where an order of assessment or reassessment on the basis of which penalty has been levied on the assessee has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and the same is liable to be cancelled as in the instant case ordered by the Tribunal and later cancellation of penalty by the authorities.

17. Section 276C of the Act deals with wilful attempt to evade tax, etc. Section 277 deals with false statement in verification, etc. and

Section 278B deals with the offences by companies.

26. The above Judgment squarely applies to the facts and circumstances of the case on hand. In this case also, similarly, the application was moved by the assessee before the Magistrate to drop the criminal proceedings which were dismissed by the Magistrate and the High Court also on a petition filed under Sections 397 and 401 of the Code of Criminal Procedure, 1973 to revise the order of the Additional Chief Metropolitan Magistrate has also dismissed the same and refused to refer to the order passed by the competent Tribunal. As held by this Court, the High Court is not justified in dismissing the criminal revision vide its Judgment ignoring the settled law as laid down by this Court that the finding 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.

27. In the instant case, 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 in I.T.A.Nos.3129-3132. **It is settled law that 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.**

28. In our opinion, the appellants cannot be made to suffer and face the rigours of criminal trial when the same cannot be sustained in the eyes of law because the entire prosecution in view of a conclusive finding of the Income tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and under Section 254 of the Act, a finding of the Appellate Tribunal supercedes the order of the Assessing Officer under Section 143(3) more so when the Assessing Officer cancelled the penalty levied.

29. In our view, once the finding of concealment and subsequent levy of penalties under Section 271(1)(c) of the Act has been struck down by the Tribunal, the Assessing Officer has no other alternative except to correct his order under Section 154 of the Act as per the directions of the Tribunal. **As already noticed, the subject matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the Assessing Officer, if the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction.** The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has

been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable.

30. It is a well-established principle that the matter which has been adjudicated and settled by the Tribunal need not be dragged into the criminal Courts unless and until the act of the appellants could have been described as culpable.”

14. Bearing in mind the above principles enunciated by the Supreme Court and in view of the submissions made by the learned senior Counsel appearing for the petitioner, what could be stated is that continuing the criminal prosecution of the petitioner/assessee will be subjecting the assessee to needless harassment in view of the facts and circumstances noted hereunder:-

In the instant case, for the assessment year 2003-04, as per the Assessment Order, dated 28-02-2006, the total tax payable was Rs.32,95,152/-. The assessee paid Rs.33,43,819/- by 13-09-2006 (refund amounts of sister companies - Rs.8,55,911/- and Rs.8,59,744/- were adjusted on 26-12-2003, and the remaining amount was paid through challans - Rs.2,97,813/- on 27-07-2004, Rs.5,00,000/- on 26-08-2004, Rs.7,04,005/- on 08-09-2004 and Rs.1,26,346/- on 13-09-2006). Proof thereof is produced. It is not disputed.

In that view of the matter, all further proceedings are liable to be quashed.

15. In the result, the Criminal Petition is allowed quashing all further proceedings in C.C.No.72 of 2007 on the file of the Special Judge for Economic Offences at Hyderabad against the petitioners/accused No.3 and 5.

Miscellaneous petitions, if any, pending in this Criminal Petition shall stand closed.

M.S.K.Jaiswal, J

October, 2015

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