

THE HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRL.P.Nos.6300, 6311 and 6310 of 2017

COMMON ORDER

The self-same petitioner, by name, Srinivasa Chakravarthi Raju Gokaraju, Managing Director of M/s Leo Meridian Infrastructure Hotels and Projects Private Limited, in all the three petitions, as sole accused in C.C.Nos.158, 159 and 160 of 2017 on the file of the Special Judge for Economic Offences at Hyderabad, maintained the three quash petitions.

2. The contentions common in Crl.P.Nos.6300 and 6311 of 2017 are that taking of cognizance by the learned Special Judge for Economic Offences, Hyderabad, on the complaint of the Assistant Commissioner of Income Tax respectively, on the private complaints under Section 190 read with Section 200 Cr.P.C., for the alleged offences under Sections 276-CC, 276(C)(2) and 278-E of the Income Tax Act, 1961 (for short 'the Act') against petitioner are unsustainable.

3. The allegations in the complaints taken cognizance for the offences supra are that the petitioner (accused) failed to file the returns of income under Section 139 of the Act for the assessment years 2007-08 and 2008-09 respectively, within the stipulated time, that apart even to the notices issued under Sections 148 and 142(1) of the Act respectively on 10.04.2013 and on 14.11.2014 and thereby committed the offences.

4. It is in respect of the alleged investments said to have been made by the petitioner respectively on M/s.Leo Meridian Infrastructure Hotels and Projects Private Limited to the extent of Rs.12,05,00,000/- and

Rs.24,14,70,900/- respectively, for the assessment years 2007-08 and 2008-09 constituting alleged offences from the alleged non-furnishing of the return of income for those assessment years.

5. It is in fact the contention of the petitioner further that in response to the show case notices dated 13.03.2015 respectively, a return of income for the assessment years 2007-08 and 2008-09 filed by the assessee on 30.03.2015 before the Deputy Commissioner of Income Tax, Hyderabad, declaring the total income of Rs.9,74,000/- and income from agriculture of Rs.7,37,490/- and the taxable liability of Rs.31,670/- and that was assessed and of Rs.17,84,400/- and income from agriculture of Rs.39,58,668/- of the return submitted that was assessed to tax liability of Rs.3,90,350/-. Subsequently, the Assessing Officer completed the assessment under Section 143(3) read with Section 147 of the Act, determining the assessed income of Rs.12,18,42,745/- and agriculture income of Rs.3,68,745/- by addition of Rs.12,05,00,000/- towards unexplained investment in share capital/share premium in raising the demand of Rs.11,85,39,073/- on 31.03.2015 (C.C.No.158 of 2012) and similarly, determining the assessed income at Rs.24,52,34,634/- and agricultural income of Rs.19,79,334/- by addition of Rs.24,14,70,900/- towards unexplained investment in share capital/share premium by raising the demand of Rs.21,93,72,733/- on 31.03.2015. (C.C.No.159 of 2017) and thereby the proceedings are unsustainable.

6. The Assessing Officer initiated the penal proceedings under Section 271(1)(C) of the Act separately on 31.03.2015 for the respective assessment years 2007-08 and 2008-09 by the respective assessment

orders with demand notice under Section 156 of the Act issued on 31.03.2015 of Rs.11,85,39,073/- and Rs.21,93,72,733/-.

7. The contention further is that it has to be shown from Section 139(1) of the Act of willful failure to furnish return of income in response to notices under Sections 142(1) and 148 of the Act to make liable for prosecution under Section 276-CC of the Act or even to constitute commission of any offence under Section 276(C)(2) of the Act, which is lacking. It is also contended that the Assessing Officer made the above additions as investment in M/s.Leo Meridian Infrastructure Hotels and Projects Private Limited disbelieving the information and treated the income as the income of petitioner. The other contention is that the respective two complaints did not narrate the factum of appeals were preferred by the petitioner before the Commissioner of Income-tax by filing Form 35 and without adding the above amounts, without considering the submission of the petitioner and for charging interest as unsustainable, and after hearing, the Commissioner of Income-tax (Appeals)-IV,Hyderabad, ordered allowing 50% of assessed claim under Section 10(1) of the Act as unexplained investment under Section 68 of the Act and without considering the said appellate order, the two complaints are filed in March, 2017 despite there being absolutely no criminal intention or criminal act on the part of petitioner apart from the fact that income tax returns have been already filed by the petitioner even according to the complaint and thereby, the proceedings are liable to be quashed. It is also sought for quashing of the respective two calendar case proceedings otherwise for the delay in launching the prosecution in the year 2017 for the income tax returns of the year 2007-08 and 2008-09.

8. The grounds urged in the counter affidavits of the Assistant Commissioner of Income Tax in the two quash petitions i.e., Crl.P.Nos.6300 and 6311 of 2017 with contentions almost common in seeking dismissal of the quash petitions are that the assessee failed to file his return of income as required under Section 139(1) of the Act within the stipulated time and in response to the notice issued under Section 148 of the Act dated 10.04.2013 served on 12.04.2013 respectively, there was no response from the assessee by way of filing the return of income, the Assessing Officer also issued notice under Section 142(1) of the Act dated 14.11.2014 respectively that was served on him on same day and even the notices issued under Sections 148 and 142(1) of the Act, the assessee did not choose to file return of income, whereby it is evident that he avoided filing of return of income and thus it is a fit case for prosecution of him under Section 276-CC of the Act and the Assessing Officer issued a show cause notice dated 13.03.2015 directing him to explain as to why the amount of investment made by him mentioned supra should not be brought to tax. It was only on 30.03.2015, the assessee filed the return of income declaring total income by admitting the tax liability and that the assessment under Section 143(3) read with Section 147 of the Act was completed on 31.03.2015 assessing the income as mentioned above towards the unexplained cash credit, thereby raising demand of Rs.11,85,39,073/- and Rs.21,93,72,733/- respectively and simultaneously, penal proceedings under Section 271(1)(C) of the Act were initiated and even the demand notice and penalty notices served on the assessee, he did not choose to pay the demand and thus, willfully attempted to evade payment of tax and interest levied under the Act by committed the

offence punishable under Section 276(2) of the Act and the assessee also failed to pay the advance tax as required under Section 209 of the Act for the assessment years 2007-08 and 2008-09 and also failed to pay the self-assessment tax as required under Section 140-A of the Act before filing the return of income which is punishable under Section 276(C)(2) of the Act and thereby, sought for dismissal of the respective petitions.

9. So far as Crl.P.No.6310 of 2017 sought for quashing the proceedings of C.C.No.160 of 2017 on the file of Special Judge for Economic Offences, Hyderabad, concerned; the contentions are that the survey operation under Section 133-A of the Act was conducted on 19.11.2010, for which the assessee declared investment of Rs.27 crores towards share application money in the company M/s.Leo Meridian Infrastructure Projects and Hotels Limited as unexplained income in his hands for the assessment year 2010-11 and the assessee filed returns. The return of income filed by assessee was processed under Section 143(1) of the Act with regard to the assessment on 21.05.2011 and subsequently, notice under Section 143(2) of the Act was issued on 16.09.2011 as the case was selected for scrutiny and subsequently, notice under Section 142(1) of the Act for enquiry before assessment was issued on 29.09.2011 and 16.04.2012 along with the questionnaire calling for information, and in reply to the said notice, the petitioner/accused responded on 16.04.2012. The assessment was in fact completed under Section 143(3) of the Act on 28.03.2013 and Deputy Commissioner of Income Tax passed assessment order on the date supra considering only 50% of the assessee's claim under Section 10(1) of the Act (agriculture income) against Rs.45,74,670/-, by

assessing total income of Rs.27,35,21,865/- and agricultural income of Rs.22,87,335/- and tax payable on total income computed at Rs.12,13,45,227/- initiating penalty proceedings under Section 271(1)(C) of the Act for alleged concealment and furnishing inaccurate particulars by further demand and notice issued under Section 156 of the Act dated 28.03.2013 to pay said amount of Rs.12,13,45,227/-. In fact, the petitioner preferred appeal before the Commissioner of income Tax (Appeals) dated 23.09.2013, and the Commissioner, by order dated 13.03.2015, without considering the material on record stated that assessee has not paid taxes due on the return of income and the appeal is disposed of as not admitted under Section 249(4) of the Act without assigning reasons and that the assessee questioning the same, filed appeal before the Income Tax Appellate Tribunal on 12.06.2015, which is pending (no stay).

10. The complaint was filed based on the contention that the assessee did not pay any amount and became defaulter and liable to be prosecuted under Section 276(C)2) of the Act for willfully attempting to evade tax, which is contending as unsustainable, arbitrary and contrary to the provisions of the Act. According to his further contention, he filed application under Section 154 of the Act for rectification of the mistake dated 18.06.2015 before the Deputy Commissioner of Income Tax on 16.11.2015 mentioning that during the course of survey proceedings under Section 133A of the Act, the petitioner, by mistake, admitted the income of Rs.27,35,21,865/- mentioning the details of the investors and their particulars and submitted before the Deputy Commissioner of Income Tax, Hyderabad, for the assessment year 2010-11, and aggrieved by that order, he preferred an appeal in Form 35 before the

Commissioner of Income Tax (Appeals) on 21.03.2016 and the same is pending and because appeal is pending, no prosecution can be taken up as the assessment under Section 143 of the Act itself is pending before the first appellate authority for the disputed amount and as such the Assessing Officer cannot proceed further by initiating penal action under Section 276 (C) of the Act and also that as per the settled law, statement obtained under Section 133A of the Act would not bind the assessee and hence to quash the proceedings.

11. The contentions of the Assistant Commissioner of Income Tax, the respondent, to the quash petition Crl.P.No.6310 of 2017 in seeking dismissal of the petition are that the prosecution is launched for the offences supra against the petitioner being the Managing Director of the entity supra for the assessment year 2010-11 for failure to make payment of admitted self-assessment tax and the complaint was pursuant to the directions and sanction orders of the Principal Commissioner of Income Tax-4, Hyderabad, issued under Section 279(1) of the Act, as the assessee filed the return of income for assessment year 2010-11 on 01.02.2011 under Section 139(1) of the Act, declaring total income of Rs.27,12,34,530/- and income from agriculture of Rs.45,74,670/- and the self-assessment tax admitted at Rs.8,37,62,030/- for same has not been paid at the time of filing of the return to prosecute as reflected in the sanction order of the Principal Commissioner of Income Tax and thereby there are no grounds to quash the proceedings and he has to face the trial. It is also the contention that pendency of the appeal proceedings is not a bar for launching and continuing proceedings as also held by the Apex Court in **SASI ENTERPRISES v. ASSISTANT COMMISSIONER OF INCOME**

TAX¹ in Crl.A.No.61 of 2007 dated 30.01.2014. It is also contended that the department before initiated the prosecution, examined each and every document relating to the assessee filed in this regard and that shows the assessee made willful default under Section 140-A of the Act and thereby committed the offence and there is also a presumption of culpable mental state on the part of the assessee accused from Section 278-E of the Act for the offence under Section 276(C)(2) of the Act made out and thereby sought for dismissal of the quash petition.

12. Heard both sides at length and perused the material on record in the three quash petitions and also the relevant provisions and the propositions placed reliance by both sides.

13. The penal provisions existing subject to proof of the allegation of culpable mental state is not in dispute. So far as the expression of the Apex Court in **K.C.BUILDERS v. ASSISTANT COMMISSIONER OF INCOME TAX**² concerned it was for the offence under Section 276-C of the Act, where the word 'concealment' held, implies a deliberate act with existence of mens rea and penalty can be imposed only when it is proved that the assessee has made conscious concealment or consciously furnished the inaccurate particulars of his income. It is in fact in relation to default under Section 271(1)(C) of the Act and prosecution was for the offence under Section 276-C of the Act. Here, the prosecution is for the offences punishable under Sections 276-CC and 276(C)(2) read with the presumption under Section 278-E of the Act.

¹ (2014) 5 SCC 139

² (2004) 2 SCC 731

14. Coming to the other expressions placed reliance, in **COMMISSIONER OF INCOME TAX, MUMBAI v. BHUPEN CHAMPAK LAL DALAL**³, it was held by the Apex Court that although the prosecution and appeal against the assessment are independent where the fate of the appeal in relation to assessment before the IT authorities had a direct bearing on the criminal case and there was no claim to quash the criminal proceedings, the High Court has rightly granted interim order of stay of proceedings in the criminal case pending disposal of the appeal. However, in the case on hand there is no any stay granted in the appeal filed if any.

15. Coming to the other expression of the Apex Court in **PREM DASS v. INCOME TAX OFFICER**⁴, it is also in relation to the offence under Section 276-C read with Section 277 of the Act, where it was observed that for attracting the offence, *there* shall be *mens rea* and the mere presumption under Section 132(4-A) of the Act thus cannot sustain conviction as such it is a matter of trial and premature to quash by pre-judging the same.

16. Coming to the other expressions of Madhya Pradesh High Court in **UNION OF INDIA v. DINESH**⁵, the single Judge of that Court placed reliance in relation to Section 276-CC of the Act, at paragraph No.4, observed referring to earlier judgment of that Court in Narayan v. Union of India (1994 208 ITR 82) that except the length of delay, there is nothing on record of any willful default, then the Court would not be unjustified in acquitting the accused by dismissing the appeal against

³ (2001) 3 SCC 459

⁴ (1999) 5 SCC 241

⁵ 2008 Law Suit (MP) 960

acquittal. It is a post trial case, no doubt, with observation that there is no willful default. Here, for the mens rea, once there is a presumption under Section 278-E of the Act, this Court cannot ignore the same and quash the proceedings much less to go into the merits by pre judging the matter without trial.

17. Coming to the other expression of the Apex Court in **G.L.DIDWANIA v. INCOME TAX OFFICER**⁶, it is also in relation to the offence under Section 277 of the Act, where it was held that by virtue of the order of the appellate Tribunal, the prosecution is held unsustainable and the Assessing Authority held that the appellant assessee had concealed his income in initiating the prosecution against assessee, but the appellate Tribunal set aside the same, holding that there was no material to hold that 'Y' company belongs to the assessee and the income therein is not showing as an intentional concealment.

18. In fact, the recent past expression of the Apex Court, which is subsequent to the expressions supra, in **SASI ENTERPRISES** (supra) it was held that the failure to file income tax returns under Section 139(1) of the Act, for partnership firm though individual returns filed by partners and such return not filed even after notices under Sections 142 and 148 of the Act by virtue of the presumption of existence of mens rea under Section 278-E of the Act, there is failure of accused-assesseees to prove contrary, for the burden is on the accused by rejecting the plea of the assessee partners of no willful default. It is also discussed that the proviso to Section 276-CC of the Act protects those assesses who either file returns belatedly but within the end of assessment year or those who

⁶ 1995 Supp (2) SCC 724

have paid substantial amounts of their tax dues by prepaid taxes as advance tax or TDS. However, such protection is not available, once the failure to file return is discovered/detected and notice under Sections 142 or 148 of the Act is issued calling for filing of return and in case of assesseees who fall within the scope of proviso to Section 276-CC of the Act, only prosecution is prevented but that does not mean that they have not committed offence under Section 276-CC of the Act with reference to Sections 139(1), 142 and 148 of the Act.

19. Coming to the provision under Section 139 of the Act, it places a statutory mandate on every person to file an income tax return in the prescribed form and in the prescribed manner before due date and any breach of said Section 139(1) of the Act gives cause of action to prosecute the assessee, subject to other ingredients of Section 276-CC of the Act. Apart from the above, on the scope of Section 276-CC read with Section 139 (1) of the Act, once subsequent notices issued under Sections 142 and 148 of the Act respectively, by affording further opportunities, then also the penal consequences of said Section apply, but for if at all, the application of the proviso to Section 276-CC of the Act in order to protect the genuine assessee who filed returns belatedly, but even by the end of the assessment year or those who paid substantial amount of their tax due by pre-paid tax. Further, the penalty under Section 271(1)(a) of the Act and presumption under Section 276-CC of the Act are different and independent. No doubt, Section 271(1)(a) is deleted and penalty for failure to file a return of income tax under Section 139(1) of the Act is abolished by virtue of the amendment in 1989-90 with effect from 01.04.1989. Further, levy of punitive interest under Section 234-A of the Act was made mandatory by taking away the

discretion of the Assessing Officer to reduce or waive interest. When a return is furnished pursuant to notice under Section 142(1)(i) of the Act, the assessment may be made under Section 143 without recourse to Section 147 of the Act. The non-compliance with a notice under Section 142(1)(i) of the Act may attract prosecution under Section 276-CC of the Act leave Section 271(1)(a) of the Act. The legislature has thus never waived or relaxed its prosecuting provisions under Section 276-CC of the Act for the infraction or non-furnishing of return of income as same was also the observation in **SASI EXERPRISES** (supra) at paragraphs 18 and 19.

20. Coming to the scope of Sections 142 and 148 of the Act, Section 142 of the Act is an enquiry before assessment for purpose of making an assessment by serving notice requiring him for furnishing the return within a specified date and if such person has not made a return within the time allowed under Section 139(1) of the Act in the prescribed form and prescribed manner it is prone to penal consequence. Whereas Section 148 of the Act refers to issue of notice where income has escaped assessment by reassessment or recomputation under Section 147 of the Act, where the assessing officer shall serve on the assessee a notice requiring him to furnish within the prescribed period not less than 30 days, the return of income or of the other person of which he is assessable under the Act during previous year corresponding to the relevant assessment year. The Assessing Officer shall before issuing any notice under this section, no doubt, has to record reasons for so doing. From this, a perusal of Section 276-CC of the Act concerned, it is in respect of the failures to furnish returns of income. The very wording commences with 'if a person willfully fails to furnish in due time the

return of income which he is required to furnish under Section 139(1) of the Act or by notice given under Section 142(1)(i) of the Act or Section 148 of the Act, shall be punishable. The penal consequence is for the willful failure to furnish in due time the return of income which is required to furnish under any of the three provisions of Sections 139(1), 142(1)(i) or 148 of the Act as the case may be.

21. Thus, Section 276-CC of the Act applies to the situations where the assessee failed to file a return of income as required under Section 139 of the Act or in response to the notice issued under Section 142(1) and 148 of the Act and the proviso to Section 276-CC gives some relief to genuine assesses and gives further time till the end of the assessment year to furnish return to avoid prosecution. The assessee of due date statutorily provided under Section 139(1) of the Act for mere belated return may not attract the penal consequences provided the contentions laid down in the proviso of Section 276-CC of the Act are complied with. It is thus observed at paragraph 28 of **SASI ENTERPRISES** (supra) that the proviso to Section 276-CC of the Act cannot control the main Section. It only confers some benefit to certain categories of assesses and the offence under Section 276-CC of the Act is attracted on failure to comply with the provisions of Section 139(1) of the Act or failure to respond to the notice issued under Section 142 or Section 148 of the Act within the time limit specified therein. At paragraph No.30 of **SASI ENTERPRISES** (supra), it was observed that pendency of the appellate proceedings is not a relevant factor for not initiating prosecution proceedings under Section 276-CC of the Act, to mean that is not a bar to the prosecution to initiate.

22. Thus, from the facts no more require repetition, so far as the prosecutions for the offences punishable under Section 276-CC and 276(C)(2) and 278-E read with Sections 139(1) 142(1) and 148 of the Act as the case may be concerned once the acts of the petitioner/accused are alleged as willful, it is a matter to be adjudicated by left open all defences of petitioner/accused including the contention of earlier any return filed and there is no violation of Section 139(1) of the Act, and even if so what is the consequence of the notices under Sections 142(1) and 148 of the Act respectively and the benefit of proviso to Section 276-CC apply if any in any of the two out of the three cases so also the contention of mere delay is not criterion or there is no any willful default.

23. Accordingly and in the result, as there is nothing to quash the proceedings in the three cases respectively, prosecution for the offences punishable under Section 276-CC and Section 276(C)(2) read with Section 278-E of the Act, the petitions are disposed of, by left open all defences including the defences with reference to Section 139(1), 5th proviso explanation (2)(a) Clause (3) and 139 (8)(a) and (9) of the Act, among other including mens rea and as to how far and to what extent that apply to consider during trial by the trial Court in the cases covered by private warrant procedure including to raise any available defences within the scope if at all to consider in the pre-charge enquiry/trial contemplated by Sections 244 and 245 of Cr.P.C.

24. From the difficulty to attend the trial Court personally expressed by the petitioner, remedy is left open to file petitions under Section 205 Cr.P.C., for the trial Court to hear and permit with necessary conditions

to represent through the special vakalat holder, unless personal appearance for any date is required.

25. Miscellaneous petitions, if any, pending in these petitions shall stand closed.

Dr. B. SIVA SANKARA RAO, J

7th September, 2017
sj

