

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.11.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition No.16540 of 2016
and W.M.P. No.14286 of 2016

Shri.G.N.Anbuchezhian

...Petitioner

Vs

The Deputy Director of Income Tax (INV)
Unit 1 (2),
No.46/108, Uthamar Gandhi Salai,
Nungambakkam,
Chennai - 600 034.

... Respondent

Prayer: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari calling for the records of the respondent in prosecution/DDIT/U1 (2) 2016-17 dated 29.03.2016 and quash the same.

For Petitioner : Mr.R.Sivaraman
For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel.

O R D E R

This Writ Petition challenges show cause notice dated 29.03.2016 calling upon the petitioner to respond and show cause as to why proceedings for prosecution in terms of Section 276C (1) of the Income Tax Act, 1961 (in short 'Act') not be initiated against him.

2. Though the Writ Petition is of the year 2016, no stay has been granted by this Court and the Department was well at liberty to proceed with the matter.

3. The petitioner was subject to search and seizure action in terms of Section 132 of the Act on 30.09.2015, pursuant to which the petitioner approached the Settlement Commission for settlement of the matter. The Settlement Commission came to

dismiss the application, as against which the petitioner approached this Court by way of a Writ Petition in W.P.No.666 of 2018. The Writ Petition also came to be dismissed, as against which Writ Appeal No.301 of 2018 was filed wherein a Division Bench of this Court, vide order dated 08.02.2018, passed the following order:

'Challenge in this Writ Appeal is to an order dated 19.01.2018, made in W.P. No.666 of 2018, by which the writ Court, declined to quash the order, of the Income Tax Settlement Commission, Additional Bench, Chennai, dated 05.01.2018, wherein, the Commission rejected the application, under Section 245 D(1) of the Income Tax Act, 1961.

2. Heard Mr.Vijay Narayan, learned Senior Counsel, assisted by Mr.R.Sivaraman, Mr.A.P.Srinivas, Senior Standing Counsel for the Income tax Department and perused the materials available on record.

3. Though at paragraph No.8.1 of the order of the Income Tax Settlement Commission, dated 05.01.2018, the settlement Commission has discussed the incongruency between the seized materials and the paper book submitted by the appellant, before the Settlement Commission and arrived at a finding that there was no full and true disclosure of Income, a requisite conditions laid down in Section 245 D(1) of the Act, having gone through the relevant provisions and taking note of the decision, in Commissioner of Income Tax Vs. Income tax Settlement Commission reported in ((2013) 35 Taxmann. com 56 (Delhi), we are of the view that the matter requires adjudication.

4. Though the appellant has sought for interim stay of the order impugned before us, and consequently prayed for a direction against the Assistant Commissioner of Income tax, Central Circle 2(2), Chennai, second respondent, not to proceed with the assessment proceedings, till the disposal of the writ Appeal, on the materials considered, we are not inclined to accede to the prayer sought for.

5. Assistant Commissioner of Income Tax, Central Circle 2(2), Chennai, second respondent, can proceed with the assessment, but shall not pass any order.'

4. The aforesaid Writ Appeal is pending. Thus, according to him, since the proceedings for prosecution hinge on the

assessment itself, the impugned show cause notice is pre-mature and all proceedings should be kept in abeyance till such time a decision is taken by the Division Bench in the Writ Appeal.

5. He relies on the two decisions of the Supreme Court, one in the case of Babita Lila V. Union of India ((2016) 73 taxmann.com 32) and the second in the case of Commissioner of Income Tax V. Bhupen Champak Lal Dalal ((2001) 116 Taxman 746).

6. Per contra, Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondent seriously objects to the very maintainability of this Writ Petition pointing out that what is impugned is only a show cause notice, which itself has been issued only as a matter of benevolence. He draws my attention to the judgment of the Supreme Court in the case of Assistant Commissioner V. Velliappa Textiles Ltd. ((2003) 263 ITR 550), wherein the Bench considered a challenge to the sanction issued by the Commissioner of Income Tax under Section 279(1) of the Act. While dealing with the rival contentions, the Court considered the question of whether an opportunity of hearing should be extended to an assessee prior to according of a sanction. At paragraph 8, they negate the said requirement in the following terms:

'8. The grant of sanction is purely an administrative act and affording of opportunity of hearing to the accused is not contemplated at that stage. An identical question has been considered by this court with reference to section 6 of Prevention of Corruption Act, 1947 in Superintendent of Police, C.B.I. v. Deepak Chowdhary (1995) 6 SCC 225 and it was held as under in para 5 of the reports :

"... The grant of sanction is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a court of law. What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material prima facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction. The grant of sanction, therefore, being administrative act the need to provide an opportunity of hearing to the accused before according sanction does not arise. The High Court, therefore, was clearly in error in holding that the order of sanction is vitiated by violation of the principles of natural justice. :

The legal position is, therefore, clear that no opportunity of hearing was required to be afforded to the respondents before grant of sanction by the Commissioner of Income Tax and the view to the contrary taken by the High Court is clearly erroneous in law.'

7. In the present case, the communication impugned before me is only a show cause notice that calls upon the petitioner to appear and show cause as to why proceedings for prosecution not be initiated against him. The conclusion in Vellippa Textiles (supra) would be thus applicable on all fours to the matter before me.

8. Then again, the Supreme Court in the case of P.Jayappan V. S.K.Perumal, First ITO (149 ITR 696) considered the question of whether the pendency of assessment proceedings would act as a bar to the institution of criminal prosecution. After considering the statutory provisions at play, at paragraphs 4 to 6, the Bench states as follows:

'4. At the outset it has to be stated that there is no provision in law which provides that a prosecution for the offences in question cannot be launched until reassessment proceedings initiated against the assessee are completed. Section 279 of the Act provides that a person shall not be proceeded against for an offence punishable under section 276C or section 277 of the Act except at the instance of the Commissioner. It further provides that a person shall not be proceeded against for an offence punishable under those provisions in relation to the assessment for an assessment year in respect of which penalty is imposed or imposable on him under clause (iii) of sub-section (1) of section 271 has been reduced or waived by an order under section 273A. The Commissioner has the power either before or after the institution of proceedings to compound any such offence. In this case it is not claimed that the Commissioner has not initiated the proceedings for instituting the complaints. No other legal bar for the institution of the proceedings is urged except stating that in the event of the petitioner being exonerated in the reassessment proceedings, the prosecutions may have to be dropped. It is true that as observed by this Court in Uttam Chand & Ors. v. Income-tax officer, Central Circle, Amritsar(1) the prosecution once initiated may be quashed in the light of a finding favourable to the assessee recorded by an authority under the Act subsequently in respect of the relevant assessment proceedings but that decision is no authority for the proposition

that no proceedings can be initiated at all under section 276C and section 277 as long as some proceeding under the Act in which there is a chance of success of the assessee is pending. A mere expectation of success in some proceeding in appeal or reference under the Act cannot come in the way of the institution of the criminal proceedings under section 276C and section 277 of the Act. In the criminal case all the ingredients of the offence in question have to be established in order to secure the conviction of the accused. The criminal court no doubt has to give due regard to the result of any proceeding under the Act having a bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act. It does not, however, mean that the result of a proceeding under the Act would be binding on the criminal court. The criminal court has to judge the case independently on the evidence placed before it. Otherwise there is a danger of a contention being advanced that whenever the assessee or any other person liable under the Act has failed to convince the authorities in the proceedings under the Act that he has not deliberately made any false statement or that he has not fabricated any material evidence, the conviction of such person should invariably follow in the criminal court. The High Court of Punjab and Haryana has correctly applied the rule regarding the maintainability of prosecution in such circumstances in M/s. Telu Ram Raungi Ram & Anr. v. Income-tax officer A Ward Hoshiarpur & Anr(1). We do not however, agree with the view expressed by the High Court of Calcutta in Jyoti Prakash Mitter v. Haramohan Chowdhury.(2) In that case on a complaint made against the assessee for an offence punishable under section 277 of the Act, the Chief Metropolitan Magistrate issued process. Thereupon the assessee questioned the validity of the initiation of the criminal proceedings before the High Court of Calcutta on the ground that until the penalty proceedings initiated in respect of the same period under section 271(1)(c) of the Act were finally disposed of, no complaint could be filed. The contention of the assessee was that the prosecution was opposed to the principles of natural justice as he would be deprived of the benefit of a finding which was likely to be recorded in his favour in the penalty proceedings. It was urged on behalf of the Department that the penalty proceedings under section 271(1)(c) had no direct bearing on the

maintainability of a prosecution launched under Chapter XXII of the Act. The High Court took the view which according to us is an erroneous one that the provisions of section 279(1A) of the Act established the necessity for the completion of the penalty proceedings before the institution of the prosecution and therefore as long as the penalty proceedings were pending the criminal proceedings could not be instituted. Section 279(1A) of the Act merely states that a person shall not be proceeded against for an offence under section 276C or section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under clause (iii) of sub-section (1) of section 271 has been reduced or waived by an order under section 273A. Section 273A(1)(ii) provides that notwithstanding anything contained in the Act, the Commissioner may, in his discretion, whether on his own motion or otherwise, reduce or waive the penalty if the conditions mentioned therein are satisfied. The power conferred on the Commissioner under section 273A is an overriding power which he may exercise at his discretion. It is only where the Commissioner reduces or waives the penalty imposed or imposable under section 271(1)(iii) of the Act in exercise of his discretion under section 273A, section 279(1A) comes into operation and acts as a statutory bar for proceeding with the prosecution under section 276C or section 277. It does not, however, provide that merely because there is a possibility of the Commissioner passing an order under section 273A, the prosecution shall not be instituted. The reason given by the High Court of Calcutta, therefore, does not appeal to us.

5. It may be that in an appropriate case the criminal Court may adjourn or postpone the hearing of a criminal case in exercise of its discretionary power under section 309 of the Code of Criminal Procedure if the disposal of any proceeding under the Act which has a bearing on the proceedings before it is imminent so that it may take also into consideration the order to be passed therein. Even here the discretion should be exercised judicially and in such a way as not to frustrate the object of the criminal proceedings. There is no rigid rule which makes it necessary for a criminal court to adjourn or postpone the hearing of a case before it indefinitely or for an unduly long period only because some proceeding which may have some bearing on it is pending elsewhere. But this, however, has no relevance to the

question of maintainability of the prosecution. The prosecution in those circumstances cannot be quashed on the ground that it is a premature one.

6. On a careful consideration of the relevant provisions of the Act, we are of the view that the pendency of the reassessment proceedings cannot act as a bar to the institution of the criminal prosecution for offences punishable under section 276C or section 277 of the Act. The institution of the criminal proceedings cannot in the circumstances also amount to an abuse of the process of the court. The High Court was, therefore, right in refusing to quash the prosecution proceedings in the four cases instituted against the petitioner under section 482 of the Code of Criminal Procedure.

.....'

9. The grant of sanction is thus an administrative Act and if at all the Officer affords an opportunity of hearing, it is purely by way of benevolence as no hearing is contemplated at that stage. The judgments in P.Jayappan (supra), Velliappa Textiles Ltd. (supra), Babita Lila (supra) and Bhupen Champak Lal (supra), have been taken into account by a learned single Judge of this Court in Krishnaswami Vijayakumar V. Principal Director of Income-tax (Inv.) Chennai (404 ITR 442), after which the challenge of the petitioner (in that case) to an identical show cause notice as before me was dismissed.

10. As regards both judgments relied on by the petitioner, they have considered the issue in the context of proceedings already initiated and after the law had been set in motion before the appropriate fora/Courts. Those decisions are thus of no assistance to the petitioner before me and reliance on the same is rejected.

11. The challenge to the show-cause notice is thus rejected and the Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is also dismissed.

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Assistant Registrar(CS V)
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Sub Assistant Registrar

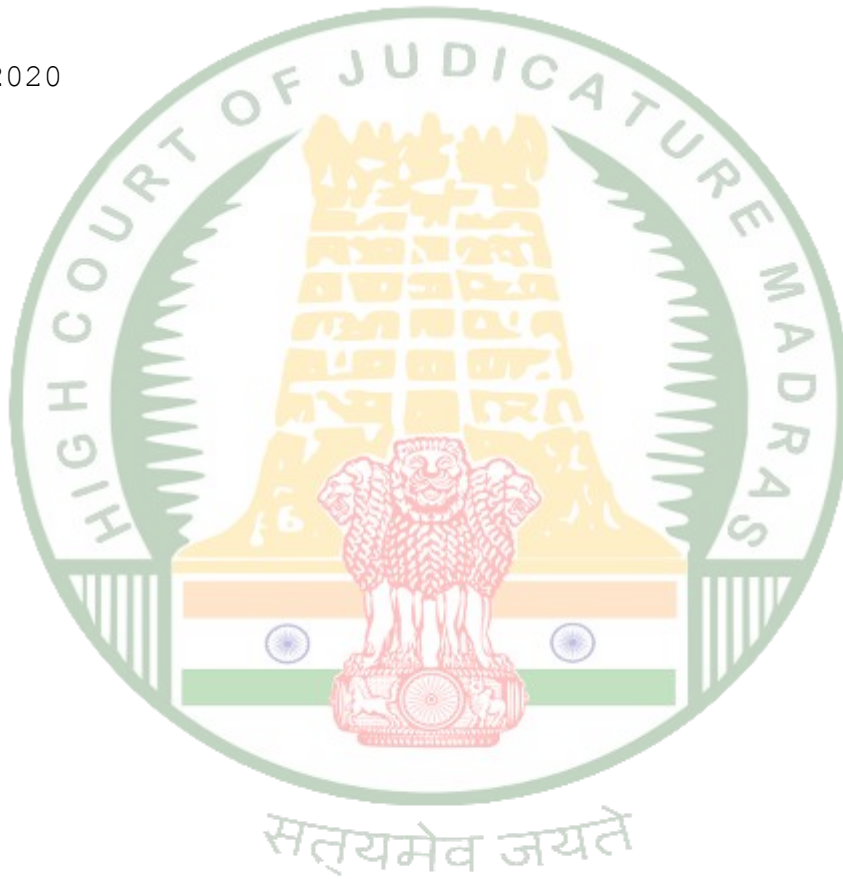
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To

The Deputy Director of Income Tax (INV)
Unit 1 (2),
No.46/108, Uthamar Gandhi Salai,
Nungambakkam,
Chennai - 600 034

Writ Petition No.16540 of 2016
and W.M.P. No.14286 of 2016

In (co)
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