IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.08.2019

Pronounced on : 28.08.2019

CORAM

THE HONOURABLE MR. JUSTICE M.S.RAMESH

W.P.No.3929 of 2014
and
M.P.No.1 of 2014

K.M.Mammen ... Petitioner

Vs.

1.The Director General of Income Tax
(Investigation),
No.46, (Old No.108), M.G. Road,
Nungambakkam,
Chennai-600 034.

2.The Assistant Commissioner of Income Tax,
Central Circle IV (1),
Income Tax New Building,
Room No.112, 1st Floor,
No.46, (Old No.108), M.G. Road,
Nungambakkam,
Chennai-600 034.

3.The Deputy Commissioner of Income Tax,
Central Circle IV (1),
Income Tax New Building,
Room No.112, 1st Floor,
No.46, (Old No.108), M.G. Road,
Nungambakkam,
Chennai-600 034.

4.The Chief Commissioner of Income Tax, (CCA)
No.121, (Old No.108), M.G. Road,
Nungambakkam,
Chennai-600 034.

5.The Chief Commissioner of Income Tax/
Director General of Income Tax,
No.121, (Old No.108), M.G. Road,
Nungambakkam, Chennai-600 034. ... Respondents

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PRAYER : Writ Petition is filed under Article 226 of the Constitution of India, praying for a Writ of Certorarified Mandamus, calling for the records of the respondents pertaining to the petitioner's income tax assessment for the AY 2002-2003 in PAN:AAEPMO314R and to quash the impugned order of the first respondent dated 15.01.2014 and consequently direct the respondents 1, 4 and 5 herein to compound the offence in accordance with law.

For Petitioner : Mr.Abudukumar Rajaratnam
for Mr.S.Ashok Kumar

For Respondents : Mr.ANR. Jayaprathab
Junior Standing Counsel

O R D E R

The petitioner, while filing his returns for the assessment year 2002-2003, is alleged to have concealed an amount of Rs.2,26,38,372/- deposited in a Foreign Bank Account and is thereby prosecuted for offences under Section 270 C of the Income Tax Act, 1961. The petitioner had filed a compounding petition under Section 279 of the Income Tax Act, 1961 and the same was dismissed on 15.01.2014. The present Writ Petition has been filed against this dismissal order.

2. Heard Mr.Abudukumar Rajaratnam, learned counsel for the petitioner and Mr.A.N.R. Jayaprathap, learned Junior Standing counsel appearing on behalf of the respondents.

3. The brief facts of the case are as follows:-

a) The case of the respondent is that the petitioner had created a Trust in the name of Webster Foundation and the said Trust had opened an account with LGT bank, Liechtenstein, a Foreign State in Europe. The petitioner, his father and his brother were named as direct beneficiaries of the Trust. It is further alleged that the petitioner, had made a declaration of endowment in favour of M/s. Webster Foundation, by endowing the Foundation with a sum of € 1,23,000 on 24.03.2000. The statement of accounts showing the balance in the foreign account of Webster Foundation as on 31.12.2001, including the accrued interest, was a sum of Swiss Franc 778, 437.80 (equivalent to Indian Rs.2,26,38,372/-).

b) On 25.03.2009, a notice under Section 148 of the Income Tax Act was issued, stating that the income of the petitioner chargeable to tax for the assessment year 2002-03, has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961. The petitioner gave a reply to the said notice on

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13.04.2009, based on which a sworn statement was recorded under Section 131 of the Act on 16.11.2009. The assessment order came to be passed thereafter on 29.12.2009. The petitioner had paid the tax for a sum of Indian Rs.1,28,15,546/-. After about a year, a show cause notice was issued by the Commissioner on 28.01.2011 for alleged commission of offences under Section 276C and 277 of the Act to which, the petitioner had given a reply on 17.02.2011. After obtaining the sanction for prosecution on 24.03.2011, a complaint was filed in E.O.C.C.No.121 of 2011 for offences under Section 276C and 277 of the Income Tax Act, 1961.

c) In this background, the petitioner had filed a petition on 28.03.2011 under Section 279 (2) of the Act, for compounding the offences in the criminal complaint. The first respondent herein, had dismissed the same by an order dated 15.01.2014, which is under challenge in the present Writ Petition.

d) Pursuant to the impugned order of the DGIT, the Commissioner of Income Tax, Appeals had reduced the penalty levied on the petitioner through orders in ITA No.12/2012-13 and the reduction was confirmed by the Income Tax Appellate Tribunal in ITA.No.1882/MDS/2014 dated 27.09.2017. Subsequently, when the petitioner had filed a petition before this Court seeking to quash the criminal complaint filed in E.O.C.C.No.121 of 2011, the same was dismissed on 28.02.2019.

4. The learned counsel for the petitioner put forth his submissions under the following points:

A) As per the CBDT Guidelines, the authority to compound a non-technical offence under Section 276 C (1) is by a Committee, which Guidelines are binding on the Income Tax authorities under Section 119 of the Income Tax Act and as such, the impugned order passed by the DGIT (investigation) Chennai is without jurisdiction.

B) When the Commissioner of Income Tax had reduced the penalty under Section 279 (1A) of the Act, the DGIT was not justified in refusing to compound the offences. In support of such a contention, the learned counsel relied upon the decision of the Hon'ble Supreme Court in Prem Dass V. Income Tax Officer reported in 1999 (5) SCC 241.

C) The documents relied upon by the respondents are not legally valid in the eye of law and therefore has no legal existence.

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D) The notice issued under Section 148 of the Act is without jurisdiction since, the Deputy Commissioner of Income Tax has failed to record his satisfaction that the escapement of chargeable income was due to the omission or failure on the part of the assessee.

E) The notice under Section 148 is beyond the limitation period of six years as provided under Section 149 of the Act and hence is without jurisdiction.

5. To such submissions, the learned Standing counsel for the respondents would place his objections in the following manner:

A) The application for compounding the offences were rejected in the preliminary stage and as such, the Committee contemplated under the CBDT Guidelines need not be approached. Even otherwise, the offence under Section 277 is a technical offence and as such, the DGIT was well within his jurisdiction to pass the order. Insofar as the offence under Section 276C (1) is concerned, the conditions prescribed in paragraph 4 of the Guidelines were not satisfied and in view of paragraph 5.1 of the Guidelines, such non-satisfaction would entitle the DGIT to pass the impugned order.

B) Reduction of penalty will not be a ground to quash the impugned order and the decision in Prem Dass's case (supra) is not applicable to the present case since the order passed under Section 273A of the Act, reducing the penalty has not become final since the Department has filed a Tax Case Appeal against the ITAT order in a Tax Case Appeal and therefore the benefit under Section 279 cannot be claimed by the petitioner.

C) The Madras High Court has directed the trial court to decide the authenticity of the documents relied upon by the petitioner in its order in Crl.O.P.No.9065 of 2011 and hence there is no infirmity.

D & E) The legality of the notice issued under Section 148 of the Act has been seized by the Hon'ble Division Bench of this Court in TCA.No.252 of 2013. Since the Tax Case Appeal and the criminal case are independent to each other, it cannot be said that the notice is without jurisdiction. As per the Economic Offences (Inapplicability of limitation) Act, there is no limitation for launching such types of cases and therefore these submissions deserves no consideration.

6. I have given careful thought and consideration to the submissions advanced by both the counsels and would answer them

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as follows:

7. Point A:

7.1. The Central Board Of Direct Taxes had issued revised Guidelines for compounding of offences under the provisions of the Direct Tax Laws on 16.05.2008. Guideline No. 7.1 (c) of the said Guidelines reads as follows:

> "The authority competent to compound all applications for compounding of non-technical offences other than the non-technical offences as covered in para 7.1(b) above will be the Committee comprising:
>
> i) CCIT (CCA)
>
> ii) DGIT (Inv.) and
>
> iii) CCIT/DGIT having jurisdiction over the case.
>
> Where CCIT (CCA)/DGIT (Inv.) is the CCIT/DGIT having jurisdiction over the case, then another officer of the rank of CCIT may be co-opted as the member of the Committee. The CCIT/DGIT having jurisdiction over the case will act as Member-Secretary who will also co-opt such other member as the case may be, and convene the meeting, as well as maintain its minutes."

7.2. As per the aforesaid Guidelines, the authority to compound a non-technical offence under Section 276C (1), which is an offence for a wilful attempt to evade tax, etc., would be by a Committee comprising of CCIT (CCA), DGIT (Investigation) and CCIT/DGIT (referred to as Committee) having jurisdiction over the case. Section 276C has been classified as a non-technical offence as per the aforesaid revised Guidelines and as such, the competent authority to compound such a non-technical offence would be the Committee.

7.3. When the petitioner was alleged to have concealed the declaration of endowment in a foreign country in his return of income filed for the assessment year 2002-2003 and thereby wilfully attempted to evade tax penalty and interest, prosecution was launched against him for offences under Section 276C (1) and 277 of the Income Tax Act. The learned Standing counsel for the respondents would attempt to say that since, the

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offence under Section 277 is a technical offence as per the aforesaid Guidelines and therefore the DGIT was well within his jurisdiction in passing the impugned order. Insofar as the non-technical offence under Section 276C (1) of the Act is concerned, it is his submission that the conditions prescribed in paragraph 4 of the Guidelines were not fulfilled and since Guideline No. 5.1 prescribes that all conditions prescribed in paragraph 4 should be satisfied before a non-technical offence is considered for compounding, the DGIT was well within its powers in passing the impugned orders. Above all, the impugned order was rejected in the preliminary stage itself and therefore, there was no necessity for the Committee to consider the compounding application.

7.4. I am not in agreement with such submission for more than one reason. When the revised Guidelines confers jurisdiction on the Committee for compounding non-technical offences, the reasoning of the Department that the application came to be rejected in the preliminary stage itself and hence the Committee need not be approached, is not founded on any legal principle. In order to exercise its jurisdiction, the DGIT must be vested with powers to handle the compounding application from the inception itself. This goes without saying that even if the DGIT is of the view that the application requires to be rejected in the preliminary stage itself, there is the duty cast on him to forward such a compounding application to the Committee, who is vested with the jurisdiction to handle the same and not assume such powers on himself.

7.5. Likewise, when one among the two offences, namely, Section 276C (1) of the Act has been classified as a non-technical offence, the compounding of which powers was vested with the committee, the DGIT will have no powers to go into the merits of the compounding application, on the ground that the other offence, namely, Section 277 has been classified as a technical offence under the Guidelines and therefore, deal with the application which involves the non-technical offence also. Viewed from this angle also, it can be said that the DGIT had exceeded in his jurisdiction to take up the petitioner's compounding application.

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7.6 There is yet another aspect to this ground. The revised Guidelines does not define or explain as to what are technical offences and non-technical offences. While that being so, I am unable to comprehend as to how Section 277, which finds place in both the technical, as well as the non-technical offences has been adopted as a technical offence, in the absence of any definition to these terms. Hence, the reliance on the classification of technical and non-technical can only be said to be an attempt to get over the mandate in the revised

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Guidelines. As such, it is quite evident that the DGIT has exceeded his powers in dealing with the petitioner's compounding application, when he had absolutely no powers to deal with it from the inception, in view of the revised Guidelines of CBDT.

7.7. Under Section 119 (1) of the Income Tax Act, all instructions issued by the Board shall be observed and followed by all the Income Tax authorities. The said provision reads as follows:

> "Section 119 (1): The Board may, from time to time, issue such orders, instructions and directions to other income- tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board:
>
> Provided that no such orders, instructions or directions shall be issued-
>
> a) so as to require any income-tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or
>
> b) so as to interfere with the discretion of the [***][Commissioner (Appeals)] in the exercise of his appellate functions."

7.8. The Hon'ble Apex Court in the case of Catholic Syrian bank Ltd V. Commissioner of Income Tax, Thrissur reported in 2012 (3) SCC 784 had held that the circulars can be issued by the Board to explain or tone down the rigours of law and that the circulars cannot be ignored. The relevant portion of the said order reads as follows:

> "23. Now, we shall proceed to examine the effect of the circulars which are in force and are issued by the Central Board of Direct Taxes (for short, `the Board') in exercise of the power vested in it under Section 119 of the Act. Circulars can be issued by the Board to explain or tone down the rigours of law and to ensure fair enforcement of its provisions. These circulars have the force of law and are binding on the income tax authorities, though

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> they cannot be enforced adversely against the assessee. Normally, these circulars cannot be ignored.
>
> 24. A circular may not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specified circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act. {Refer to UCO Bank, Calcutta v. Commissioner of Income Tax, W.B. (1999) 4 SCC 599]}."

7.9. Section 120 of the Income Tax Act provides that the Income Tax authorities shall exercise all or any of the powers assigned to them in accordance with such directions as the Board may issue for the exercise of the powers and performance of their functions. When the circular prescribes and confers powers on the committee to deal with an application seeking for compounding the offences, the DGIT cannot usurp the powers of the Committee to deal with non-technical offences and deviate from the Guidelines which is binding on him in view of Section 119 of the Income Tax Act. In view of these statutory provisions and in the light of the decision of the Hon'ble Apex Court cited above, I am of the view that the impugned order passed by the DGIT is without jurisdiction.

8. Point B:

8.1. The learned counsel for the petitioner relies on Section 279 (1A) of the Income Tax Act and the decision in Prem Dass's case (supra) and contends that since the Commissioner (Appeals) has reduced the penalty from 300% to 100%, no prosecution can be launched or continued against the assessee. Per contra, the learned Standing counsel contends that the order in appeal has been subjected to further appeal before this Court and hence has not attained finality. Before addressing this issue, it would be relevant to have a glimpse of Section 279 (1A) and the law laid down in Prem Dass's case (supra), touching upon this aspect.

8.2. Section 279 (1A) of the Income Tax Act reads as follows:

> "A person shall not be proceeded against for an offence under section 276C or section 277 in relation to the assessment for an

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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."

8.3. In the case of Prem Dass (supra), the Hon'ble Supreme Court was of the view that the assessee cannot be proceeded against for the offences, when the Commissioner (Appeals) has reduced the penalty. The relevant portion of the order reads as follows:

"10. We also find sufficient force in the contention of Mr. Salve that the legislative mandate in Section 279(1A) of the Income Tax Act has not been borne in mind by the High Court while interfering with an order of acquittal. Mr. Shukla, no doubt has indicated that the said provision will have no application as the penalty imposed has not been reduced or waived by an order under Section 273A. We do not agree with the aforesaid literal interpretation of the provisions of Section 279(1A) of the Act, when we find that the Commissioner of Income Tax (Appeal) has reduced the penalty. Further the tribunal has totally set aside the order, imposing penalty could not have been lost sight of by the High Court while considering the question whether the order of acquittal passed by the Sessions Judge has to be interfered with or not, particularly, when the gravamen of indictment relates to filing of incorrect return and making wrong verification of the statements filed in support of the return, resulting in initiation of penalty proceedings. Bearing in mind the legislative intent engrafted under Section 279(1A) of the Income Tax Act and the conclusion of the learned Sessions Judge, on appreciation of evidence not having been reversed by the High Court and the grounds of acquittal passed by the Sessions Judge not having been examined by the High Court, we have no hesitation to come to the conclusion that the High Court was not justified in interfering with an order of acquittal."

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8.4. Section 279 of the Income Tax Act, in explicit terms, is self-explanatory to the effect that when the penalty imposed on the assessee is reduced under Section 273A, such an assessee cannot be proceeded against for offences under Sections 276C or 277. The term used in the Section is 'shall' and hence is required to be considered as mandatory in nature and would therefore imply that when the penalty imposed has been reduced or waived, the Assessee cannot be proceeded against for the alleged offences.

8.5. The Hon'ble Supreme Court, in Prem Dass's case (supra) has reiterated this proposition as seen from the above extract. The Commissioner of Appeals, in his order dated 25.03.2014 in ITA, had taken note of the fact that in the penalty order, the Assessing Officer has not accorded any justification or reasons for levying the maximum penalty of 300% of the tax sought to be evaded and thereby was of the opinion that a minimum amount of penalty at 100% can be imposed.

8.6. The only objection to such a proposition from the Department is that the order passed by the Tribunal, reducing the penalty, has been challenged in Tax Case Appeal before this Court. It is not the case of the Department that this Court had stayed the order of the Commissioner of Appeals, as well as the Tribunal in the Tax Case Appeals. Just because the order reducing the penalty has been put under challenge in the Tax Case Appeals, it cannot be said that the order reducing the penalty itself has been kept under abeyance. In this background, it can only be said that the petitioner would be entitled to the benefit of Section 279 (1A) of the Act and the mere challenge to the order reducing the penalty may not suffice to deny such a benefit. In view of these subsequent developments, there cannot now be any impediment on the part of the Department to compound the offences under Sections 276C and 277 of the Act.

8.7. The learned Standing counsel for the respondents made a faint attempt by placing reliance on paragraph 19 of the dismissal order dated 28.02.2019 passed in Crl.O.P.No.9065 of 2011 and submitted that Prem Dass's case (supra) has been distinguished and held to be not applicable to the present case. Hence the learned Standing counsel would submit that, since the order of reduction of penalty was not passed under Section 273B of the Act, Section 279 (1A) of the Act is not applicable to the petitioner.

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8.8. As observed earlier, Section 279 (1A) is self-explanatory and the Hon'ble Supreme Court in Prem Dass's case (supra) has further clarified that the assessee cannot be proceeded against for an offence when the penalty imposed on him has been reduced. Under Article 141 of the Constitution of India, the law declared by the Hon'ble Supreme Court shall be binding on all Courts, which includes the High Courts. As such, the decision in Prem Dass's case (supra) would be binding on this Court and as such, with due respects to the observations made in this regard in paragraph 19 of the order passed by the learned Judge in Crl.O.P.No.9065 of 2011 dated 28.02.2019, is per incuriam and the observation made therein is not the proper appraisal and cannot be relied upon.

8.9. At this juncture, it is brought to my notice that the order in Crl.O.P.No.9065 of 2011 has been challenged by the petitioner before the Hon'ble Supreme Court of India in S.L.A (Criminal) No. 6179 of 2019 and the order has been stayed on 28.02.2019.

9. Point C, D and E:

Now that, this Court has held that the appropriate authority to consider a compounding petition filed under Section 279 of the Act would be by a Committee comprising of the CCIT (CCA); DGIT (Investigation); and CCIT/DGIT having jurisdiction over the case, as per the revised Guidelines of CBDT and that in view of the subsequent developments, whereby the penalty imposed on the petitioner has been reduced by the Commissioner of Income Tax, Appeals on 25.03.2014 and the same being confirmed by the Income Tax Appellate Tribunal on 27.09.2017, the contentions raised in point Nos.C, D and E are not specifically dealt with by this Court since, this Court is of the view that the matter be remanded back to the Committee prescribed under the revised Guideline No.7.1 (c) for passing appropriate orders.

10. In the light of the above observations, the impugned order passed by the first respondent herein under Section 279 (2) of the Income Tax Act, 1961 dated 15.01.2014 is set aside and the matter is remanded back to the Committee prescribed under the CBDT Guideline No.7.1 (c) dated 16.05.2008. The petitioner is granted liberty to place a copy of this order along with afresh compounding petition under Section 279 of the Income Tax Act, before the Committee, within a period of 30 days from the date of receipt of a copy of this order. On receipt of

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the aforesaid application along with a copy of this order, the Committee shall consider the same, in the light of the observations made in this order and pass appropriate orders in accordance with law, within a period of 60 days there from. The Writ Petition stands allowed accordingly. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar(CS-V)

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Sub Assistant Registrar

DP

To

1.The Director General of Income Tax
(Investigation),
No.46, (Old No.108), M.G. Road,
Nungambakkam,
Chennai-600 034.

2.The Assistant Commissioner of Income Tax,
Central Circle IV (1),
Income Tax New Building,
Room No.112, 1st Floor,
No.46, (Old No.108), M.G. Road,
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Chennai-600 034.

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5.The Chief Commissioner of Income Tax/
Director General of Income Tax,
No.121, (Old No.108), M.G. Road,
Nungambakkam,
Chennai-600 034.

+1cc to Mr.AP.Srinivas, Advocate SR.No.73828

+1cc to Mr.S.Ashokkumar, Advocate SR.No.73833

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and
M.P.No.1 of 2014

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