

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.01.2022

PRONOUNCED ON : 22.02.2022

CORAM

THE HONOURABLE MR.JUSTICE M.NIRMAL KUMAR

CrI.O.P.Nos.24005 & 24012 of 2021 and
CrI.M.P.Nos.13250, 13251, 13254 & 13257 of 2021

Shri.K.E.Gnanavel Raja ... Petitioner in both cases

Vs.

The Assistant Commissioner of Income Tax
Central Circle-1(2),
Investigation Wing, Room No.311,
No.46, M.G.Road,
Chennai-600 034.

... Respondent in both cases

COMMON PRAYER: Criminal Original Petitions are filed under Section 482 of the Code of Criminal Procedure, to quash the complaints in E.O.C.C.No.582 & 583 of 2017 on the file of Additional Chief Metropolitan Magistrate, Economic Offences - II, Egmore, Chennai.

For Petitioner : Mr.T.Vasudevan

For Respondent : Ms.M.Sheela,
Special Public Prosecutor for
Income Tax Department

COMMON ORDER

Criminal Original Petitions have been filed to quash the proceedings in E.O.C.C.Nos.582 & 583 of 2017, pending on the file of the Additional Chief Metropolitan Magistrate Court, Economic Offence - II, Egmore, Chennai/trial Court.

2.Since the petitioner and the respondent are one and the issues are identical in both the petitions, this Court decides to dispose of the same, by way of common order.

3.Gist of the case in E.O.C.C.No.582 of 2017 is that the petitioner in his Income Tax Return for the Assessment Year 2007-08 admits a loss of Rs.2,87,82,522/-. The respondent conducted search and seizure operation under Section 132 of the

Income Tax Act, 1961 (Hereinafter referred to as 'Act') on 29.01.2010. During the course of search operation, it was found that the petitioner was not maintaining proper and complete books of account for his business. Consequently, a notice under Section 153A of the Act was issued to the petitioner for the Assessment Year 2007-08 on 09.03.2011. In response to the notice under Section 153A of the Act, the petitioner filed his income tax return on 14.12.2011 admitting a total loss of Rs.1,38,26,780/-. Thus, the loss admitted by the petitioner in his original return filed on 31.10.2007 was Rs.2,87,82,522/-. But in the return filed on 14.12.2011 in response to notice under Section 153A of the Act was Rs.1,38,26,780/-. If a search under Section 132 of the Act was not conducted, the petitioner would not have come forward to offer additional income in the revised return. It is further alleged in the complaint that in accordance with the provision of Section 40(A)(3) of the Act, a sum of Rs.24,15,218 was disallowed. Accordingly, an order under Section 143(3) of the Act was passed on 30.12.2011 determining the total income at Rs.1,14,11,562/- after making an addition of Rs.24,15,218/-. The Assessing Officer simultaneously initiated penalty proceedings under Section 271(1)(c) of the Act and passed an order, dated 29.06.2012, levying penalty of Rs.31,30,000/- under Section 271(1)(c) of the Act. The petitioner contested the levy of penalty before the CIT(A)(c)-II and the CIT(A) vide order, dated 29.03.2014 in ITA.No.57/12-13 dismissed the appeal and upheld the action of Assessing Officer. Therefore, the petitioner paid the penalty on 23.06.2014.

4. Gist of the case in C.C.No.583 of 2017 is that the petitioner filed his return of income for the Assessment Year 2008-09 admitting a total income of Rs.31,31,710/- after setting off of brought forward business loss of Rs.2,86,23,462/- related to the Assessment year 2007-08. During the search and seizure operation under Section 132 of the Act, it was found that the petitioner not maintained proper and complete books of account for his business. Hence, a notice under Section 153A of the Act was issued to the petitioner for the Assessment Year 2008-09 on 09.03.2011. In response to the notice, the petitioner filed his return of income for the Assessment Year 2008-09 on 14.12.2011 admitting a total loss of Rs.1,27,22,437/- after setting off of brought forward business loss of Rs.1,38,26,780/-. Thus, the loss admitted by the petitioner in his original return filed on 29.09.2008 was Rs.2,86,23,462/-. But in the return filed on 14.12.2011 in response to the notice under Section 153A of the Act, the business loss was Rs.1,38,26,780/-. Similarly the net profit also increased from Rs.2,38,14,396/- to Rs.2,63,23,846/-. The Assessing Officer passed penalty order under Section 271(1)(c) and 271A of the Act, dated 28.06.2012 levying minimum penalty of Rs.9,29,566/-. The petitioner contested the levy of penalty before the CIT(A)(C)-II and the CIT(A) vide order, dated

28.02.2014 in ITA.No.60/12-13, dated 28.02.2014 dismissed the appeal and upheld the action of Assessing Officer levying penalty. The petitioner paid the penalty amount of Rs.9,29,566/- on 23.04.2014.

5.Since the reply was not convincing and acceptable, the sanction for prosecution obtained and the prosecution was launched against the petitioner for the Assessment Years 2007-08 and 2008-09 and the complaints were filed before the trial Court.

6.The learned counsel for the petitioner submitted that the penalty was levied on the petitioner for not maintaining proper books of account and the business loss was also upheld in the order of the Commissioner of Income Tax Appeals. He further submitted that there was no tax due payable by the petitioner and the penalty was confirmed by the Commissioner of Income Tax Appeals on account of non-maintenance of proper books of account as the expenditure could not be verified and it is pertinent to note that there was no tax chargeable or payable in the Assessment Proceedings by the Assessing Officer or in the Appeals and there was no evasion of tax. He further submitted that the difference in loss was purely on account of disallowance of expenditures, for which, the receipts could not be verified with the books of account and the penalty levied was not for any wilful attempt to evade tax or interest. He further submitted that after three years of payment of penalty, the Assessment Proceedings attained the finality and penalty paid in the year 2014. While that being so, the cases proceeding against the petitioner are unwarranted.

7.He further submitted that the gist of the offence under Section 276C(1) of the Act is the wilful attempt to evade any tax, penalty or interest chargeable or imposable or under reports of the income. What is made punishable is "attempt to evade tax, penalty or interest" and not the "actual evasion of the tax". In the case of "Prem Dass Versus Income Tax Officer reported in (1999) 5 SCC 241", the Hon'ble Apex Court had held that to bring a person to show he evaded tax, it must be shown that the person had done some positive act with an intention to evade any tax or interest. In this case, no such averments is made out against the petitioner. Mere omission and negligence, cannot be construed as an offence. It is a well-established principle that there has to be some mensrea on part of the accused and there should be some amount of tax which was sought to be evaded or concealed or deliberate intention to have filed false returns to evade taxes. In the case of the petitioner, there is no income and only loss and there is no tax due.

8.In support of his submissions, the learned counsel for the petitioner relied on the decisions of this Court in the case

of "Sivakumar Ragavan Versus DCIT in Crl.O.P.No.8930 & 8931 of 2018, dated 11.08.2021" and "Inland Builders Versus DCIT in Crl.O.P.No.6244 of 2020, dated 25.08.2020", wherein this Court quashed the complaint on the ground that when the entire liability stood discharged, the prosecution could not continue. Hence, he prayed for quashing of the proceedings against the petitioner.

9.Ms.M.Sheela, learned Special Public Prosecutor for Income Tax Department, appearing for the respondent submitted that after obtaining the sanction for prosecution from the concerned authority on 20.09.2017, the complaints filed under Section 276 (c)(1) and 277 of the Act, against the petitioner. The petitioner for the Assessment Years 2007-08 and 2008-09 have filed his Income Tax Return admitting a loss, which could not be corroborated and sustained in view of the petitioner not maintaining the books of account for his business. The respondent conducted search operation. During search, available documents were seized, which could not be corroborated with the Income Tax Returns filed earlier. Thereafter, Assessment has been done and the loss shown was re-calculated with lesser amount, which was admitted and penalty paid. In such circumstances, show cause notice was issued to the petitioner to launch prosecution against the petitioner. Since the reason given by the petitioner in his reply is not justifiable and not proper, the above complaints filed against him. She further submitted that the petitioner filed his Income Tax Returns for the said Assessment Years suppressing the true particulars and later revised returns were filed. The points raised by the petitioner are factual in nature and that has to be decided only during trial and not in these Quash Petitions. The petitioner would not absolve from the case citing that he paid the penalty imposed by the Income Tax Department. Hence, he prayed for dismissal of these petitions.

10.This Court considered the rival submissions and perused the materials available on record.

11.It is seen that the gravamen of allegation against the petitioner is that the petitioner filed incorrect Income Tax Returns declining loss of business. During search, some documents were seized by the respondent. On verification, it was found that the loss accounted was not corroborated with the books of account and also found that the books of account of his business were not properly maintained by the petitioner. On assessment of notice, the petitioner filed revised Income Tax Returns and also paid the penalty. The deletions made in the assessment was purely on the basis of difference of opinion as to the estimates and not a case of concealment of income or even furnishing of inaccurate particulars of income. To attract the

provisions of Section 276C of the Act, the prosecution has to establish that the accused willfully attempted in any manner to evade any tax, penalty or interest chargeable or imposable under the Act. To attract the provisions of Section 277 of the Act, the prosecution is required to establish that the accused made a statement in any verification under the Act, which he either knows or believes to be false, or does not believe to be true.

12.The presumption under Section 132(4)(a) of the Act is with regard to the books of account or the other documents found in possession of a person from whom it is seized. The same presumption shall not apply for offence, under Section 276(c) and 277 of the Act.

13.On the facts of the case, it is seen that there is no act of concealment on the part of the assessee. 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. Admittedly, in this case, it is only wrong calculation of the loss sustained in his business, which is not supported by the books of account or other documents.

14.The petitioner paid the penalty as early as on 23.04.2014. Three years thereafter, show cause notices were issued to the petitioner. In these cases, the entire payments paid by the petitioner and there is no intention to evade payment. The Assessment Orders shows that only penalty was levied for wrong calculation of loss and no concealment of income, penalty paid in the year 2014. In this case, there is no material to show that there was any deliberate and conscious evasion of tax on the part of the petitioner. The Hon'ble Apex Court in the case of "Prem Dass Versus Income Tax Officer reported in (1999) 5 SCC 241" had held that mere omission and negligence, cannot be construed as offence. It is established principle that there has to some 'mensrea' on the part of the accused and there should be some amount of tax evaded or concealed. In this case, there is no concealment of income.

15.In view of the above, the continuation of prosecution against the petitioner would amount to abuse of process of law. Hence, the proceedings in C.C.Nos.582 & 583 of 2017, on the file of the trial Court are liable to be quashed and, are quashed. Criminal Original Petitions are, accordingly, allowed. Consequently, the connected Criminal Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Additional Chief Metropolitan Magistrate Court,
Economic Offence - II,
Egmore, Chennai.
- 2.The Assistant Commissioner of Income Tax
Central Circle-1(2),
Investigation Wing, Room No.311,
No.46, M.G.Road,
Chennai-600 034.
- 3.The Public Prosecutor,
High Court, Chennai.

Crl.O.P.Nos.24005 & 24012 of 2021

SMI(CO)
SB(02/03/2022)