

THE HON'BLE DR. JUSTICE D.NAGARJUN

CRIMINAL APPEAL (TR) Nos.41 and 21 of 2018

COMMON JUDGMENT:

Cr1.A.(TR).No.41 of 2018 is filed by A1 and A3 i.e., Company and one of its Directors respectively, whereas Cr1.A.(TR).No.21 of 2018 is filed by A2 and A4, who are the Directors of A1/company, being aggrieved by the conviction and sentence imposed by the learned Special Judge for Economic Offences at Hyderabad in C.C.No.128 of 2011 vide Judgment dated 09.01.2014, wherein Accused Nos. 1 to 4 were found guilty of the offences punishable under Section 276-C(2) read with Section 278-B of the Income Tax Act, 1961 (for short, "the Act") consequently accused No.1 was sentenced to pay fine of Rs.10,000/- and in default of payment of fine to initiate appropriate proceedings as required under Section 421 of Cr.P.C., whereas Accused Nos.3 and 4 were sentenced to undergo rigorous imprisonment for a period of one year each and A2 was sentenced to undergo rigorous imprisonment for a period of six months and also to pay fine of Rs.10,000/- each and in default of payment of fine by accused Nos.2 to 4, to undergo simple imprisonment for a period of one month each.

Since the issues involved in these appeals are one and the same, both the appeals are being disposed of by this common judgment.

2. For convenience, the parties herein are referred to as they are arrayed before the trial Court. i.e., Appellant No.1 as Accused No.1/Company and Appellant Nos.2 to 4 as Accused Nos. 2 to 4.

3. The genesis of these cases, which lead the appellants-accused to prefer these appeals, are narrated in brief as under:

i) Accused No.1/Company - M/s. Wardha Greenfields Private Limited, which was registered under the Companies Act with the Registrar of Companies at Hyderabad as Private Limited Company, was engaged in the business of acquisition and sale of lands. Appellant Nos. 2 to 4 herein are the Directors of Accused No.1/Company.

ii) Accused No.1/Company has acquired lands to an extent of Ac.7.08 guntas in Sy.No.197 under the limits of Bachupally Mandal, Ranga Reddy District during the financial year 2002-2003 and developed the said lands by

incurring some amounts during the financial years 2002-03 to 2007-08. Accused No.1/Company along with other companies, who have lands contiguous to the lands of Accused No.1/Company, have agreed to develop the lands jointly with M/s. Mytas Property Private Limited. As per the said development agreement, the built up area agreed to be given to Accused No.1/company, was allowed to be sold to various buyers by M/s. Mytas Property Private Limited and pass on the sale proceeds to Accused No.1/Company.

iii) For the assessment year 2008-09, accused No.1/company has filed income tax returns on 30.09.2008 under Ex.P1 by bifurcating the sale proceeds into long term capital gains accrued from the sale proceeds of the lands and short term capital gains accrued from the sale proceeds of the constructed area by showing gross taxable income as Rs.7,74,39,596/-, out of which an amount of Rs.4,92,42,840/- was shown as long term capital gain and Rs.2,81,96,756/- was shown as short term capital gains.

iv) Accused No.1/Company is expected to pay the income tax either by way of advance tax as required under Section 208 of the Act or at least along with filing of returns in terms of Section 140-A of the Act. As per Section 143 (1) of the Act, the tax liability of Accused No.1 was arrived at Rs.2,30,34,548/- by the respondent/complainant and raised a demand under Section 156 read with Section 143 of the Act and issued an intimation to Accused No.1/Company under Ex.P2. Accused No.1/company was required to pay the tax demanded within 30 days of service of notice, but it has committed default.

v) Respondent/complainant has issued show-cause notice dated 17.11.2009 under Section 221 (1) of the Act under Ex.P5, wherein the appellants were asked to show cause as to why penalty should not be levied for committing default in payment of tax. As there was no response from the appellants, the complainant has issued another show-cause notice dated 25.08.2010 under Ex.P6 under Section 221 (1) read with Section 143-A of the Act.

Finally, one more opportunity was also given by the Department by giving another show-cause notice dated 12.10.2010 (Ex.P7) under Section 221 (1) read with Section 143-A of the Act. An opportunity of being heard was also given by the respondent/complainant to Accused No.1/Company fixing the date of hearing as 18.10.2010, but there was no response, on which a penalty of Rs.50,00,000/- was imposed by way of order dated 25.10.2010 (Ex. P8) under Section 221 read with Section 140-A(3) of the Act and the said proceedings were served on accused No.1 on 29.10.2010.

4. Considering the willful evasion of payment of tax, the respondent/complainant has decided to initiate prosecution and accordingly a notice was issued to accused No.1/company and other Directors under Section 276-C(2) of the Act, as to why prosecution shall not be initiated against them for willful evasion of the tax. All of them have given reply stating that there was no intention to evade payment of tax. Another notice was issued to accused No.1/Company and its directors under Exs.P10 and P11 dated 11.01.2011 asking them as to why prosecution shall

not be initiated under Section 276-C(2) of the Act. Again replies were filed by accused No.1/company and its Directors/accused Nos.2 to 4 under Exs.P12 and P13 stating that there was no intention of willful evasion of tax.

5. As Accused No.1/Company and its Directors/accused Nos.2 to 4 have not paid the tax in response to the demand notice issued under Section 143 (1) of the Act and also failed to pay the penalty, the respondent/complainant after obtaining sanction order dated 16.03.2011 for launching of prosecution filed a complaint before the Special Court for Economic Offences against accused No.1 and accused Nos.2 to 4, the other Directors, alleging that they have committed offence punishable under Section 276-C(2) read with Section 278-B of the Act, as they have willfully evaded tax even though they were having sufficient resources.

6. The Special Court for Economic Offences took cognizance of the offences against Accused No.1/Company and its Directors i.e., Accused Nos. 1 to 4, under Section 276-C(2) read with Section 278-B of the Act and charges were framed against them under Section 276 – C(2) read with Section 278-B(1) of the Act

and all the accused have pleaded not guilty of the charges and claimed to be tried.

7. In order to prove the charges leveled against the appellants, the respondent/complainant has examined PWs.1 to 3 and got marked Exs.P1 to P14. After closure of evidence of the complainant, the incriminating evidence elicited against the appellants was read over and explained to them under Section 313 of the Cr.P.C., for which all of them have denied and reported that they did not choose to examine any witness on their behalf. However, they got marked Exs.D1 to D3 on their behalf.

8. The substance of the evidence of PW1 is that after receiving of returns of income tax filed by accused No.1/company, the respondent/complainant has processed the same under Section 143(1) of the Act and issued intimation determining the total taxable income as Rs.7,74,39,600/- and tax liability as Rs.2,53,16,220/-. The evidence of PW2/Income Tax officer is to the extent that he has considered the annual report of accused No.1/company for the financial year 2007-08 under Ex.P3 and bank account statements of accused No.1/Company with the

AXIS Bank Limited under Ex. P4 and found that accused No.1/Company did not pay the tax returns in spite of having surplus and sufficient funds. PW3 is the Income Tax Officer, who has succeeded PW2. His evidence is that he has passed penalty order under Ex.P8 imposing penalty of Rs.50 lakhs and raised demand under Ex.P9 and the same was served on the accused. He also deposed that as there was no response from the accused, show cause notices under Section 276-C of the Act were issued against all the accused through which accused were informed that the department is initiating criminal proceedings and consequently the department has filed the complaint.

9. After full-fledged trial, on considering the entire material on record, the trial Court has found Accused No.1/Company and A2 to A4, the Directors of A1 company, guilty of the offences punishable under Sections 276-C(2) and 278-B of the Act and were sentenced as stated supra. Aggrieved by the said judgment and conviction of Special Judge for Economical Offences at Hyderabad, the present appeals are filed originally before the Metropolitan Sessions Judge Court at Hyderabad.

10. The erstwhile High Court for the States of Telangana and Andhra Pradesh has issued circular ROC.No.34, Criminal Section/2017, dated 28.08.2017, wherein it is clarified that against any orders passed by the Special Judge for Economic Offences, Hyderabad, in the State of Telangana and Visakhapatnam in the State of Andhra Pradesh, the High Court has the jurisdiction to entertain the appeals, not the Sessions Court. In view of the said circular, these appeals filed by the appellants have been transferred from Metropolitan Sessions Judge Court, Hyderabad, to the High Court for the State of Telangana.

11. The summary of grounds of appeal as filed by the appellants in brief are as under:

a) The trial Court has failed to see that accused No.1/company was not having funds to pay the tax on the due date as reflected in Ex.P4-bank statements and that accused No.1 has not received any sale proceeds from M/s. Mytas Property Private Limited, thereby the respondent/complainant has not produced any evidence to show that accused

No.1/Company has received sale proceeds from M/s. Mytas Property Private Limited.

b) The trial court has misconstrued the presumption under Section 278-E of the Act and erred in holding that the burden of proof is on the accused to prove that there was no willful evasion of payment of tax.

c) The trial Court erred in holding that the accused failed to prove non-existence of culpable mental state in non-payment of taxes on the date of filing returns and as on the date of demand notice and that the trial Court failed to appreciate that in spite of not having any cogent evidence to show that all the accused have willfully evaded the tax, the trial Court has concluded that accused have committed willful evasion in payment of tax.

d) The trial court failed to see that all the assets belong to accused No.1/Company were attached under Section 281-B of the Act and due to paralyzing of financial activities of accused No.1, tax could not be paid in time.

e) The trial court failed to consider the admission of PW3 that the amount received by Accused No.1/Company is towards

share application money does not attract tax liability and that the trial Court could not consider that accused No.1 has not received Rs.7 crores 70 lakhs from M/s. Mytas Property Private Limited.

f) The Trial Court should not have concluded that accused Nos.2 to 4 are responsible for day to day affairs of accused No.1/company and should have taken into consideration the notices issued under Section 278-B of the Act proposing the prosecution did not refer accused Nos. 2 to 4 as principal officers and thereby accused Nos.2 to 4 should have been acquitted.

12. Heard Sri Vinod Kumar Deshpande, learned Senior counsel for the appellants and Sri B. Narasimha Sharma, learned Standing counsel for the income tax department, considered the entire material on record, relevant provisions of the Act and the authorities cited.

13. Appellants have filed an application under Section 391 Cr.P.C., along with the appeals for receiving of two documents i.e., (1) Common order passed by the Appellate Tribunal in ITA.No.1016 of 2014, dated 22.05.2015 and (2) consequential

order, dated 21.03.2016 passed by the Assessing Officer, Assistant Commissioner of Income Tax, Central Circle-3(2), Hyderabad, as additional evidence. As per the common order of the Tribunal, dated 22.05.2015 (document No.1), the assessment order dated 02.12.2010 on which the prosecution is initiated was directed to be modified. Basing on the orders of the Income Tax Appellate Tribunal, the assessment officer has modified the earlier orders dated 02.12.2010 by re-assessing the tax liability, which the appellants were expected to pay for the assessment year 2007-2008 (document No.2). Considering the above, and on hearing both sides, this Court is of the opinion that these two documents are very relevant to consider the appeals on hand, thereby these documents are received.

14. It is submitted vehemently by the learned Senior Counsel for the appellants that during the pendency of the complaint before the trial Court, the accused have paid entire tax as demanded, including the penalty and interest and that the appellants have challenged the assessment orders dated 02.12.2010 under Ex.D2 before the learned CIT(A). On hearing both sides, learned CIT(A) has found that there are no merits in

the contentions raised by the appellants, and dismissed the appeal upholding the orders passed by the Assessing Officer for assessment year 2008-09. Aggrieved by the same, the appellants have preferred appeal before the Income Tax Appellate Tribunal (in short, "the Tribunal"), and on hearing both sides, learned Tribunal has partly allowed the appeal vide orders dated 22.05.2015 in ITA.No.943/Hyd/2014 and batch finding that the Assessing Officer has committed error in calculating the tax to be paid by the appellants and directed the Assessing Officer to re-assess the tax by computing the income of the appellants from the transfer of lands held by accused No.1/company as capital assets by way of development agreement and subsequent to sale of flats and bungalows received as consideration for such transferred amounts to stock in trade on conversion. These orders are passed after passing conviction vide judgment dated 09.01.2014 in C.C.No.128 of 2011 by the learned Special Judge. It is also submitted by the learned Senior counsel that the Assessing Officer has re-assessed the tax as per the directions of the Tribunal and passed consequential order, dated 21.03.2016, wherein the tax liability was substantially reduced and found that the tax, which was already paid to the tune of

Rs.2,30,34,548/- was in excess of the revised tax thereby, the excess tax paid Rs,1,45,16,296/- and interest of Rs.52,61,382/- the total of which was Rs.1,97,77,678/-, was ordered to be refunded and the same was also adjusted against the demand for the accounting year 2009-10 vide RO.No.303523 dated 28.03.2016.

On considering the submissions of the learned Senior counsel it is clear that the appellants have not only paid the tax demanded along with interest and penalty, but also on account of re-assessment of tax, the tax already paid was in excess of tax liability, and that the same was adjusted for future tax liability and hence, sought for allowing of the appeals.

15. Learned standing counsel representing the Income Tax Department stated that as on the due date, the accused have not paid the tax having sufficient funds and committed willful evasion of payment of tax. It is also submitted that Accused No.1/company has filed annual returns (Ex.P3), through its Chartered Accountant for the financial year 2007-08 relevant for the assessment year 2008-09, according to which Accused No.1 made profit on sale of land to a tune of Rs.7,35,19,240/- and the

bank statements show that Accused No.1/Company has received part of sale consideration in respect of “Mytas Hill County” from time to time, but did not choose to pay the advance tax. It is further submitted that the balance sheet of Accused No.1/Company also shows Rs.9,44,40,957/- under the head reserves and surplus, so also Rs.11,87,75,050/- under the head current assets by way of loans and advances. It is further submitted that accused No.1/Company having enough liquid cash during the relevant accounting year, willfully evaded in payment of tax, thereby the accused have committed the offence punishable under Section 276-C(2) read with Section 278-B of the Act and hence conviction recorded by the trial Court is proper.

16. Now, the points for determination in these appeals are:

- 1) Whether the conviction recorded based on the assessment order dated 02.12.2010 can be sustained, since the said assessment order dated 02.12.2010 was subsequently revised?
- 2) Whether the accused have committed willful evasion of tax?

3) To what relief?

Point No.1:

17. The cause of action for the respondent department/complainant to file the complaint against the appellants is the assessment order dated 02.12.2010, according to which the appellants were asked to pay tax of Rs.2,30,34,548/- for the taxable income of Rs.7,74,39,596/- and accordingly an intimation was sent by the Assessing officer to the appellants under Section 143 (1) of the Act. Admittedly as on the date of initiating the prosecution against the appellants, demanded tax of Rs.2,53,16,220/- was not paid by the appellants. It is also an admitted fact that after initiating the prosecution, the appellants have paid the entire tax demanded along with penalty, interest etc. Therefore, as on the date of pronouncement of the judgment by the trial Court, there was no tax liability to be paid by the appellants.

18. It is to be noted that the Income Tax Appellant Tribunal having considered the appeals of the appellants found that the assessment order, dated 02.12.2010 directing the appellants to pay Rs.2,30,34,548/- was incorrect and the Assessment Officer

was directed to assess the income tax afresh in terms of the directions given by the Tribunal. Accordingly, the Assessment officer has re-assessed the income tax and passed modified orders, dated 21.03.2016 determining the tax liability, which is far less than what was assessed at the first place. The basis for respondent/complainant to initiate prosecution against the appellants is the assessment order, dated 02.12.2010, on the ground that the appellants have committed default in payment of the tax as per the said assessment order. When assessment order dated 02.12.2010 itself is re-assessed as per the directions of the Tribunal which held that the assessment of tax dated 02.12.2010 is incorrect and the tax to be paid was substantially reduced, it cannot be alleged that the appellants have committed default in payment of tax and willfully evaded. When the assessment order dated 02.12.2010 itself was modified holding that the Assessment Officer has incorrectly assessed the tax, whatever the consequential proceedings that have been initiated, including the initiation of prosecution of the appellants by the respondent/complainant, conviction recorded by the trial Court, cannot sustain. Basing on the fresh assessment order, dated 21.03.2016, it is to be examined afresh that whether the

appellants have committed any willful evasion of tax, as defined under Section 276-C of the Act.

19. Therefore, on considering the above discussion, it is clear that the finding of the trial Court that the appellants were guilty of the offences under Section 276-C(2) read with Section 278-B of the Act is erroneous as the same is based on incorrect assessment order, dated 02.12.2010 and hence, shall not sustain, and required to be set aside.

Considering the same, point No.1 is decided in favour of the appellants/accused.

POINT No.2:-

20. The appellants have also raised other issues i.e., they have not committed any willful evasion in payment of tax since, as on the due date there were no liquid funds in their accounts and the appellants – Accused Nos. 2 to 4, who are the Directors, are not responsible for the day to day activities of accused No.1/Company as on the date of the alleged default, the trial Court has misconstrued the presumption under Section 278E of the Act, the trial Court failed to record admission of PW.3, that

the amount received towards share application does not attract the tax etc.

21. This Court has already come to the conclusion while discussing point No.1 that the conviction and sentence recorded in favour of the appellants required to be set aside, on account of the fact that the assessment order dated 02.12.2010 on which the conviction was recorded was modified and a fresh assessment order came into force, hence, the issues raised by the appellants, need not be answered.

22. Learned Senior Counsel for the appellants has placed reliance on the authority passed by the Hon'ble Supreme Court in the case of **V.Srinivas Reddy Vs. State of Andhra Pradesh**¹, wherein it was held as follows:

“13. It was then urged by Mr. Arunachalam that if the High Court felt that further evidence was necessary for disposal of the case then it could have exercised its power under Section 391 Cr. P.C. and ought not to have set aside the order of acquittal and remanded the matter for fresh disposal. This argument also did not impress us because the High Court instead of recording the additional evidence in terms of Section 391 Cr. P.C.; preferred to remand the matter back to the trial court for disposal in accordance with law. It also appears from the record that some of the documents including FDRs, loan applications etc., should also have been brought on record for effective

¹(1998) 9 SCC 331

disposal of the controversy raised in the case and to do justice between the parties. It is needless to say that the trial court will strictly adhere to the observations and directions given by the High Court in its judgment.”

The rationale in the above authority of the Apex Court squarely applicable to the facts of the case on hand.

23. Considering the facts and circumstances, this Court is of the considered opinion that as the assessment orders dated 02.12.2010 on which the prosecution was initiated itself does not exist and that the same was modified and fresh assessment order dated 21.03.2016 came into force, the conviction and sentence recorded against the appellants basing on the incorrect assessment orders dated 02.12.2010 shall be set aside.

24. Accordingly, both these criminal appeals are disposed of setting aside the conviction and sentence dated 09.01.2014 recorded by Special Court for Economical Offences at Hyderabad and C.C.No.128 of 2011 is remanded back to the trial Court with a direction to consider the documents i.e., (1) Common order passed by the Appellate Tribunal in ITA.No.1016 of 2014, dated 22.05.2015 and (2) consequential order, dated 21.03.2016 passed by the Assessing Officer, Assistant Commissioner of

Income Tax, Central Circle-3(2), Hyderabad, filed by the appellants and decide the complaint afresh in accordance with law, after giving an opportunity to both sides to adduce any further evidence, if any. However, the trial Court shall not be influenced by the comments and observations, if any, made by this Court touching merits of the case while passing orders.

As a sequel, pending miscellaneous applications, if any, shall stand closed.

Date: 17.06.2022
AS/ES

DR. D.NAGARJUN, J