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Crl.O.P.No.18609 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23.11.2023

Pronounced on : 01.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE **G.K.ILANTHIRAIYAN**

CRL.O.P.No.18609 of 2021 and
Crl.M.P.No.10228 of 2021

P.Arulmudi

... Petitioner

Vs.

The Assistant Commissioner of Income Tax,
New No.46, M.G.Road,
Nungambakkam, Chennai-34

... Respondent

PRAYER: Criminal Original petition is filed under Section 482 of Criminal Procedure Code, to call for the records in complaint No.EOCC.No.23 of 2019 pending on the file of the Additional Chief Metropolitan Magistrate Court (E.O-II), Egmore and to quash the same.

For Petitioner : Mr.C.Emalias

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

ORDER

This criminal original petition has been filed to quash the proceedings in EOCC.No.23 of 2019 pending on the file of the Additional



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Chief Metropolitan Magistrate Court (E.O-II), Egmore, thereby taken cognizance for the offence under Section 276CC of Income Tax Act, 1961, as against the petitioner.

2. The respondent filed complaint for the offence punishable under Section 276 CC of the Income Tax Act, 1961 (hereinafter called as 'the Act'). for the assessment year 2013-2014. The crux of the complaint is that the petitioner failed to file his return of income for the assessment year 2013-2014 as required under Section 139 of the Act. He is duty bound to file his return of income on or before 30.09.2013 for the assessment year 2013-2014. A search was conducted as per Section 132 of the Act on 03.09.2013. Subsequent to the search, a notice was issued as contemplated under Section 153A of the Act, thereby called upon to file his return of income within a period of 30 days from the date of receipt of the notice. It was duly received and the petitioner failed to file his return of income within the time mentioned in the notice. Once again, a reminder letter was also sent to the petitioner dated 15.07.2014 and 02.06.2015. The petitioner filed reply on 08.06.2016, but no valid reasons were stated for non filing of return of income. But he filed the same only on 19.07.2016 with a delay of more than 15 months and thereby declared his total



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income of Rs.2,32,48,580/- for the assessment year 2013-2014. Non

filing of the income tax return within the time limit is wilful and deliberate on the part of the petitioner. The assessment proceedings was completed for the assessment year 2013-2014 on 12.08.2016 thereby the total income of Rs.3,98,72,510/- was determined against the returned income filed by the petitioner to the tune of Rs.2,32,48,580/-. Therefore, the penalty proceedings were initiated and imposed penalty under Section 271F of the Act on 28.02.2017 for non filing of the return of income under Section 139(1) of the Act.

2.1 Thereafter, sanction was accorded to prosecute the petitioner for the offence punishable under Section 276CC of the Act. Before accorded sanction, sanctioning authority issued show cause notice to the petitioner and the petitioner replied by the explanation dated 09.06.2018. The petitioner explained that for change in auditor, appointing new auditor and obtaining of copies of the seized documents, approaching settlement commission, there was a failure to file return of income and there was delay. Further, the petitioner explained that he had already made payment of taxes in the form of Tax Deduction at Sources (TDS) and requested not to accord sanction for



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prosecution. In fact, the application filed before the settlement commission was dismissed twice. Further, the petitioner did not ask for any seized documents. The admitted tax payable by the petitioner was higher than the amount which was paid by way of TDS. Therefore, the petitioner has wilfully failed to file his return of income either under Section 139(1) of the Act and also within a period of 30 days from the date of receipt of notice under Section 153A of the Act. Hence, the complaint. On the said complaint, the trial court had taken cognizance in EOCC.No.23 of 2019.

3. Mr.C.Emalias, the learned counsel appearing for the petitioner would submit that on 03.09.2013, there was a search under Section 132 of the Act in the companies which were aggregating land for a setting up of SEZ for companies based out of New Delhi. The petitioner is being a legal consultant to the companies was also searched on 03.09.2013. During the search, the authorities had seized bills raised and agreements that he had entered in connection with his legal consultancy work and the same were in custody of the authorities. Therefore, the petitioner was not able to file his return within the due date. The seized documents were returned to the petitioner only after the due date. Thereafter, the petitioner was issued notice under Section 153A



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of the Act to file their return of income for previous six consecutive years for the assessment year 2008-2009 to 2014-2015 within a period of thirty days.

Though the provision under Section 153B of the Act provides two years for completion of the assessment, the petitioner was provided only one month to file his return of income, that too for all the six assessment years. After receipt of the reminders from the authorities, the petitioner had sent reply stating that there was an erroneous calculation of tax that is due and tax deducted at source was not adjusted to the tune of Rs.47,66,509/- for the assessment year 2013-2014 since it was deducted before the due date. The petitioner had collected service tax to the tune of Rs.52,18,727/- and had duly paid on 15.05.2014. Therefore, the petitioner sought for further time to file his return of income for all six previous assessment years. Therefore, the delay is only for bonafide reasons and not wilful or wanton.

3.1 He further submitted that as per Section 245C of the Act, the petitioner filed application declaring his income before the settlement commission in the month of March 2016 by making further deposit of Rs.38,49,956/- as additional payment of taxes. However, the application before the settlement commission was rejected on technical grounds. Thereafter, the



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petitioner filed his return of income on 19.07.2016 and it is well within the time limit provided under Section 153B of the Act. So he declared his professional fees to the tune of Rs.4,01,40,976/- out of which taxes in the form of TDS was already paid and also service tax to the tune of Rs.99,80,947/-. However, the assessment officer assessed his income to the tune of Rs.3,98,72,510/- by adding a sum of Rs.1,66,08,499/- from the declared income by the petitioner. The petitioner also preferred appeal before the Commissioner of Appeals challenging the addition of service tax as part of income. Therefore, if the petitioner succeeds in the appeal, no tax is payable by the petitioner.

3.2 He further submitted that on receipt of the show cause notice dated 25.06.2018, the petitioner submitted detailed reply by way of explanation dated 29.06.2018. Even then, the authority without application of mind, mechanically accorded sanction to prosecute the petitioner. The initiation of prosecution is pre-mature since appeal filed by the petitioner against the order of assessment is still pending. Therefore, delay in filing the income tax return is not wilful but due to exigency of a situation. The complaint should disclose necessary *mens rea* to prove the wilful element to



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delay the filing of income tax returns. It requires mental element of wilful delay in filing the return which is not reflected in the show cause notice. The petitioner had no intention *per se* to evade tax at any point of time. The only mistake committed by the petitioner was delay in filing his return of income. It was also duly explained in his explanation as due to sheer volume of work, obtaining copies of the seized materials from the assessing officer and time taken before the settlement commission and also rejection of the said application.

4. The respondent filed counter and Mrs.M.Sheela, the learned Special Public Prosecutor for Income Tax submitted that the petitioner in his individual capacity having substantial income both as a legal consultant and Director in various companies had to file his return of income as mandated under Section 139(1) of the Act. Even post search, the petitioner was served with statutory notice under Section 153A of Act and thereby called upon the petitioner to file his return of income within period of 30 days from the date of receipt of the notice. The petitioner ought to have filed his return of income voluntarily as contemplated under Section 139(1) available till 30.09.2013. There was non filing of return of income even till 29.01.2014 and as such,



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notice under Section 153A of the Act was sent to the petitioner. By not filing

the returns within the time mandated under Section 139(1), 139(4) or in

response to the notice under Section 153A of the Act, offence for non filing of

returns is attracted. Only after filing the return of income, the assessment can

be completed within the time. Therefore, the provision under Section 153B is

applicable only for completion of assessment by the assessment officer

proceedings post search. The TDS was deducted by their parties and not by the

petitioner. The petitioner was having huge taxable income which mandated the

filing of returns. Further, there was filing of application before the settlement

Commission and the same was rejected on two occasions. Further, the

petitioner had disclosed his income of return to the tune of Rs.2,32,48,580/-.

As per the assessment order, a total income was assessed to the tune of

Rs.3,98,72,510/-. Therefore, there was penalty proceedings initiated under

Section 271 of the Act. Though the petitioner had filed appeal as against the

order of assessment, it yet to reach finality. Further, mere expectation of

success in the appeal cannot be a bar to initiate prosecution. The adjudication

proceedings and prosecution are independent to each other and the object of

adjudication proceedings is to garner revenue while the object of prosecution

proceedings is to punish the guilty.



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5. Heard, the learned counsel appearing on either side.

6. The learned Special Public Prosecutor also relied upon the judgment of the Hon'ble Supreme Court of India in the case of ***P.Jayappan Vs. S.K.Perumal*** reported in ***1984 AIR 1693***, in which the Hon'ble Supreme Court of India held that there is no rigid rule which make 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 proceedings which may have some bearing on it is pending elsewhere. Further in the case of ***Kejriwal Vs. State of West Bengal*** reported in ***(2011) 3 SCC 437***, the Hon'ble Supreme Court of India laid down the following ratio which can be culled out that can broadly be stated as follows :-

(i) Adjudication proceeding and criminal prosecution can be launched simultaneously;

(ii) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;

(iii) Adjudication proceeding and criminal proceeding are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;



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(v) *Adjudication proceeding by the Enforcement Directorate is not prosecution by a competent court of law to attract the provisions of Article 20(2) of the Constitution or Section 300 of the Code of Criminal Procedure.*

(vi) *The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue;*

(vii) *In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue underlying principle being the higher standard of proof in criminal cases.*

(viii) *In our opinion, therefore, the yardstick would be to judge as to whether allegation in the adjudication proceeding as well as proceeding for prosecution is identical and the exoneration of the person concerned in the adjudication proceeding is on merits."*

7. Therefore on the ground of pending appeal, the proceedings initiated by the respondent cannot be quashed and the petitioner cannot be exonerated from prosecution. Admittedly, the petitioner had filed his return of income only on 19.07.2016. Therefore, it cannot be treated as compliance of



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provision under Section 139(1) or 139(4) or under Section 153A of the Act.

Even after receipt of several communications from the respondent, the petitioner failed to file his return of income. It is relevant to extract provision under Section 276CC of the Act hereunder:

"276 CC - Failure to furnish returns of income - If a person willfully fails to furnish in due time (the return of fringe benefits which she is required to furnish under Sub-Section (1) of section 115WD or by notice given under sub-Section (2) of the said section or Section 115 WH or] the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under [clause (i) of sub-section (1) of section 142] or section 148 [or section 153A], he shall be punishable,

i) In a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds [twenty-five] hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

ii) In any other case, with imprisonment for a term which shall not be less than three months but which may extend to [two] years and with fine."

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of income under subsection (1) of section 139-



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(i) for any assessment year commencing prior to the 1st day of April, 1975 ; or

(ii) for any assessment year commencing on, or after the 1st day of April, 1975 , if-

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees.

8. Further, the Hon'ble Supreme Court of India held in the case of ***Prakash Nath Khanna & Another Vs. CIT & Another*** reported in **2004 (135) Taxman 327**, wherein it was held that the expression 'failure' used in Section 276CC is with respect to the submission of assessment as well as the return of income but cannot be equated with the failure to pay the tax in time under Section 276C and filing of return of income within the time allowed under Section 139(4) cannot dilute the infraction in not furnishing return in due time as prescribed under Sec 139(1) of the I.T.Act.

9. It is a settled law by the Hon'ble Supreme Court of India in the case of ***Sasi Enterprises Vs. Assistant Commissioner of Income Tax*** reported



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in **2014 [5] SCC 139**, wherein the Hon'ble Supreme Court had stated that

Section 276CC of the Act, is attracted once failure there to file the Return.

Once such failure is discovered and detected, the subsequent act of filing of returns will not protect the defaulters from prosecution proceedings. The Hon'ble Supreme Court of India had very clearly stated that filing the Return within the stipulated and mandatory period is a duty cast on any person who has to declare the income and file the returns and pay the taxes within the stipulated time.

10. The only contention raised by the petitioner is that the search conducted was premature since the tax due was only on 30.09.2013. Whereas the search was conducted on 03.09.2013. Though the search was conducted on 03.09.2013, it is not an impediment for the petitioner to file his return of income on or before 30.09.2013. Filing return of income is mandatory as contemplated under Section 139(1) of the Act. Therefore, mere search conducted by the authority concerned would not preclude the petitioner to file his return of income. Further, it is mandatory in nature and further expanded that if the returns are not filed within the stipulated time, then a presumption as to the culpable mental state can be drawn under Section 278E of the Act. The



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non filing of return of income within the time as stipulated under Section 139(1) and 153 of Act, offence stands complete and there can be a presumption for existence of *mens rea* and it is for the accused to prove the contrary beyond reasonable doubt, only before the trial court during the trial. Therefore, the issue as to whether there was wilfulness in not filing the returns on time and not paying the tax on time is only a matter of fact, which can be ascertained only through appreciation of evidence before the trial court. Therefore, these grounds cannot be considered by this Court, that too under Section 482 of Cr.P.C since onus is upon the petitioner to rebut the presumption and that can be done only before the trial court during the trial by letting in evidence.

11. The learned counsel for the petitioner vehemently contended that once notice issued under Section 153A of the Act, it overrides all other provisions such as Sections 139, 147, 148, 149, 151 and 153 of the Act. He relied upon the judgment of the Hon'ble Supreme Court of India in the case of ***Principal Commissioner of Income Tax, Central-3 Vs. Abhisar Buildwell*** reported in ***2023 SCC Online SC 481***, in which the Hon'ble Supreme Court of India dealt with the issue as to whether in respect of completed assessments/unabated assessments, whether the jurisdiction of the assessing



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officer to make assessment is confined to incriminating material found during the course of search under Section 132 or requisition under Section 132A or not i.e. whether any addition can be made by the assessment officer in absence of any incriminating material found during the course of search under Section 132 or requisition under Section 132A of the Act or not. In the said issue, it is held that as per the provisions of Section 153A, in case of a search under Section 132 or requisition under Section 132A, the assessment officer gets the jurisdiction to assess or re-assess the total income in respect of each assessment year falling within six assessment years. As per second proviso to Section 153A of the Act, the assessment or reassessment if any, relating to any assessment year falling within the period of six assessment years pending on the date of initiation of the search under Section 132 or making of requisition under Section 132A, as the case may be, shall abate.

12. Whereas in the case on hand, the respondent initiated prosecution for the offence punishable under Section 276CC of the Act. Accordingly if a person wilfully fails to furnish in due time, the return of income which he is required to furnish under sub section (1) of Section 139 or by notice given by sub section (1) of Section 142 or Section 148 shall be punishable. Therefore,



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the search under Section 132 and subsequent notice under Section 153A are completely different from filing the return of income as contemplated under Section 139(1) of the Act. At any point of time, a search can be made under Section 132 of the Act if any incriminating material to show that the assessee evaded certain income in his return of income, notice under Section 153 will be issued to file his return of income for the concealed income. Therefore, the above judgment is not applicable to the case on hand.

13. It is true as per search under Section 132 or requisition under Section 132A, the assessment officer assessed or re-assessed the total income in respect of each assessment year falling within six assessment years, taking into consideration of the incriminating materials collected during the search and other material pending would abate. It is nothing to do with the mandatory provision under Section 139(1) of the Act to file his return of income. Admittedly, in the case on hand, the petitioner failed to file his return of income on or before 30.09.2013. Further, there was not even an attempt by the petitioner to file his return of income till 29.01.2014 as contemplated under Section 139 sub clause (4) of the Act till the notice under Section 153A. That apart, the petitioner also failed to file his return of income even after receipt of



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the notice under Section 153A of the Act within the period of 30 days from the date of receipt of the notice under Section 153A of the Act.

14. Further, this court already dealt with this issue in the criminal original petition in Crl.OP.No.28572 of 2018 and by order dated 09.11.2023, this Court held as follows:

*“14. The learned counsel appearing for the petitioner also cited the judgment of the Hon'ble High Court of Delhi in the case of **Principal Commissioner of Income Tax-19 Vs. Neeraj Jindal** reported in (2017) 79 taxmann.com 96(Delhi), in which it is held that once the assessee files a revised return under Section 153A, for all other provisions of the Act, the revised return will be treated as the original return filed under Section 139. Further held that when the assessment officer has accepted the revised return filed by the assessee under Section 153A, no occasion arises to refer to the previous return filed under Section 139 of the Act for all purposes, including for the purpose of levying penalty under Section 271(1)(c) of the Act, the return that has to be looked at is the one filed under Section 153A. In fact, the second proviso to [Section 153A\(1\)](#) provides that "assessment or reassessment, if any, relating to any assessment year falling within the period of six assessment years referred to in this sub-section pending on the date of initiation of the search under [Section 132](#) or making of*



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requisition under [Section 132A](#), as the case may be, shall abate." Therefore, [Section 153A](#) is in the nature of a second chance given to the assessee, which incidentally gives him an opportunity to make good omission, if any, in the original return. Once the assessment officer accepts the revised return filed under [Section 153A](#), the original return under [Section 139](#) abates and becomes non-est. Now, it is trite to say that the "concealment" has to be seen with reference to the return that it is filed by the assessee. Thus, for the purpose of levying penalty under [Section 271\(1\)\(c\)](#), what has to be seen is whether there is any concealment in the return filed by the assessee under [Section 153A](#), and not vis-a vis the original return under [Section 139](#).

15. No quarrel that once the assessment officer accepts the revised return filed under [Section 153A](#), the original return filed under [Section 139](#) abates and becomes non est. Therefore, no penalty can be levied under [Section 271\(1\)\(c\)](#) of the Income Tax Act. Whereas in the case on hand, there was concealment by the petitioner while filing his first return of income for the assessment year 2012-2013. In fact, the levying of penalty was already dropped in view of the order passed by the tribunal. However, the petitioner is now facing prosecution under [Section 276CC](#) of Income Tax Act. That apart, the mens rea of the petitioner is clearly established by the respondent and as such, the above judgment is also not helpful to the case on hand."



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15. Therefore, the respondent rightly initiated prosecution against the petitioner and this Court finds no grounds to quash the same. Accordingly, this criminal original petition is dismissed. However, considering the age of the petitioner, the personal appearance of the petitioner is dispensed with and he shall be represented by a counsel after filing appropriate application. However, the petitioner shall be present before the Court at the time of furnishing of copies, framing charges, questioning under Section 313 Cr.P.C. and at the time of passing judgment. Consequently, connected miscellaneous petition is closed.

01.12.2023

Index :Yes/No

Internet : Yes/No

Speaking order/non-speaking order
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To

1. Additional Chief Metropolitan Magistrate Court (E.O-II),
Egmore, Chennai
- 2.The Assistant Commissioner of Income Tax,
New No.46, M.G.Road,
Nungambakkam, Chennai-34
- 3.The Government Advocate,
High Court of Madras



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