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Crl.O.P.No.20514 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.07.2023

CORAM :

THE HONOURABLE MR. JUSTICE V. SIVAGNANAM

Crl.O.P.No.20514 of 2021

and

Crl.M.P.Nos.11151 & 11152 of 2021

1.M/s.TVH Energy Resources Pvt. Ltd.,
Represented by its Director Mr.T.Selvamani,
PAN-AACCT8802G,
TVH Triveni, No.21, C.V.Raman Road,
R.A.Puram, Alwarpet,
Chennai – 600 028.

2.T.Selvamani
Director M/s.TVH Energy Resources Pvt. Ltd.,
No.1, Viswanathan Street,
R.A.Puram, Alwarpet,
Chennai – 600 028.

3.N.Ravichandran
Director M/s.TVH Energy Resources Pvt. Ltd.,
No.1, Krishnapuri, First Street,
R.A.Puram, Alwarpet,
Chennai – 600 028.

... Petitioners

Vs.

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

... Respondent



CrI.O.P.No.20514 of 2021

Prayer: Criminal Original Petition filed under Section 482 Cr.P.C. to call for the records in E.O.C.No.390 of 2018 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences), Egmore, Chennai, and quash the same.

For Petitioners : Mr.N.R.Elango
Senior Counsel
for M/s.Aruna Elango

For Respondent : Mrs.M.Sheela
Special Public Prosecutor

ORDER

This Criminal Original Petition has been filed challenging the criminal proceedings in E.O.C.No.390 of 2018 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences), Egmore, Chennai.

2.Learned Senior Counsel appearing for the petitioners submitted that the respondent prosecuted the petitioners for the offences under Sections 276 C(1) and 277 of the Income Tax Act, 1961, for the Assessment Year 2013-14, alleging that the petitioners have not explained the source of income for incurring cash expenses of Rs.1,19,72,476/-. The learned Senior Counsel further submitted that the respondent also levied a penalty of Rs.38,84,470/-



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under Section 271(1)(c) of the Income Tax Act, 1961. The learned Senior Counsel further submitted that the petitioners preferred an Appeal before the Commissioner of Income Tax (Appeals), Chennai, in I.T.A.Nos.449/16-17, against the order of penalty levied on the petitioners. However, the Commissioner of Income Tax (Appeals), by his order, dated 22.08.2017 in I.T.A.Nos.449/16-17, dismissed the Appeal, aggrieved by which, the petitioners preferred an Appeal before the Income Tax Appellate Tribunal “A” Bench, Chennai, in I.T.A.No.2497/Chny/2017. The Income Tax Appellate Tribunal, by its order dated 02.04.2018, found that there is no evidence that the petitioner has made any cash payment which is unaccounted and the additions made by the Department are merely based on estimate and not based on any material records, and therefore, allowed the Appeal filed by the petitioners and set aside the order of the Commissioner of Income Tax (Appeals). Therefore, it is the contention of the learned Senior Counsel appearing for the petitioners that, when the Appellate Tribunal has exonerated the petitioners on merits, a criminal prosecution on the same set of facts will not be maintainable, and hence, he submitted that the complaint filed by the respondent is liable to be quashed. In support of his submissions, the learned Senior Counsel relied upon the judgments of the Hon'ble Supreme Court in the cases of ***J.Sekar v. Directorate of Enforcement*** reported in (2022) 7 SCC



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370, and *R.Vasudevan v. The Deputy Commissioner of Income Tax, Central*

Circle-1(1) reported in ***MANU/TN/6309/2022***.

3.Learned Special Public Prosecutor appearing for the respondent/Department submitted that the Department reassessed the petitioners for the Assessment Year 2013-14 and since they found certain violation and since the petitioners had not explained the source for incurring certain cash expenses, the same was treated as unexplained expenditure and separate penalty proceedings were also initiated by the Department under Section 271(1)(c) of the Income Tax Act, 1961. The learned Special Public Prosecutor submitted that, though the penalty proceedings were challenged by the petitioners before the Appellate Tribunal and their Appeal was allowed, separate criminal proceedings is maintainable, and hence, she sought for dismissal of this Criminal Original Petition.

4.Considered the submissions made by the learned counsel on either side and perused the materials available on record.



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WEB COPY 5.Perusal of records would reveal that the respondent/Department had filed a complaint under Section 200 Cr.P.C. before the Additional Chief Metropolitan Magistrate (Economic Offences), Egmore, Chennai, for the offences under Sections 276 C(1) and 277 of the Income Tax Act, 1961, for the Assessment Year 2013-14, against the petitioners for not explaining the source of income for the expenses incurred in cash for a sum quantified at Rs.11,02,21,798/- and Rs.1,19,72,476/- was assessed to tax as unexplained expenses in cash. Further, not satisfied with the explanation of the petitioners for the source for incurring such cash expenses, the Department treated it as unexplained expenditure and therefore, they levied a penalty of Rs.38,84,470/- under Section 271(1)(c) of the Income Tax Act, 1961, which was challenged by the petitioners before the Commissioner of Income Tax (Appeals), Chennai, who dismissed the Appeal filed by the petitioners.

6.Challenging the order of the Commissioner of Income Tax (Appeals), the petitioners preferred further Appeal before the Income Tax Appellate Tribunal, which allowed the Appeal, finding that the penalty imposed under Section 271(1)(c) would not be applicable. Further, on a perusal of the Appellate Tribunal's order, it is seen that, in Para No.7 of the order, the



Appellate Tribunal has found that the estimate made by the Department is without any material. The observations made by the Appellate Tribunal are reproduced hereunder :

“7.From the facts of the case, it is evident that the entire addition is made based on certain documents retrieved from the computer. The assessee had explained that the documents were prepared by the employees to estimate certain expenses to be incurred in the project. Though there were certain vouchers prepared and signed by the employees, there was no authentic evidence to establish that the assessee had made cash payments. The persons to whom such payments were made were neither cross examined nor proper investigation made. The Revenue had not made a concrete finding as to whether the assessee had made any cash payment which is unaccounted. Since the assessee has offered an explanation with respect to the documents found during the course of survey, the onus have shifted on the Revenue to establish it otherwise. Further the assessee has not admitted for any addition as proposed by the Revenue. Therefore in the case of the assessee it appears that the entire addition is made based on presumptions and assumptions from certain documents unearthed during the course of survey proceedings by rejecting the explanations offered by the assessee without any basis. In these circumstances, though it may be a fit case for addition, we are of the considered view that the penal



provisions of Section 271(1)(c) of the Act would not be applicable in the case of the assessee. In the case CIT Vs. Perumalsamy reported in 150 ITR 600, the Hon'ble Madras High Court has held that no penalty can be imposed in case where additions are made merely on the basis of estimate. In the case CIT Vs. Pavankumar Dalmia reported in 168 ITR 1, the Hon'ble Kerala High Court has held that where there was nothing to show that the plea of the assessee was false or inherently impossible, penalty cannot be imposed. That being the case, we wonder how penalty can be levied in the case of the assessee where addition is made based on only presumption.”

7.From the observations of the Appellate Tribunal, it is clear that the Appellate Tribunal factually found that there is no material for cash payment made by the petitioners and in these circumstances, allowed the Appeal. The Hon'ble Supreme Court in the case of *J.Sekar v. Directorate of Enforcement* (*supra*) has reproduced the judgment of the Hon'ble Supreme Court in ***Radheshyam Kejriwal v. State of West Bengal [(2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721]*** and the relevant portion is extracted hereunder :

“18.In the said sequel of facts, the legal position as it emerges by the judgment of Radheshyam Kejriwal [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 :



(2011) 2 SCC (Cri) 721] is relevant in which this Court has culled out the ratio of the various other decisions pertaining to the issue involved and has observed as thus:

12. After referring to various judgments, this Court then culled out the ratio of those decisions in para 38 as follows: (Radheshyam Kejriwal case)

38. The ratio which can be culled out from these decisions can broadly be stated as follows:

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

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

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

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

(v) Adjudication proceedings 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 Criminal Procedure Code;

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

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



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In view of the facts of the present case and applying the ratio laid down by the Hon'ble Supreme Court in *Radheshyam Kejriwal's case (supra)*, when the findings of the Income Tax Appellate Tribunal are in favour of the petitioners, a criminal prosecution on the same set of facts is not maintainable and is unsustainable and the same is liable to be quashed.

8. Accordingly, the criminal proceedings in E.O.C.No.390 of 2018 on the file of the Additional Chief Metropolitan Magistrate (Economic Offences), Egmore, Chennai, is hereby quashed and as a sequel, this Criminal Original Petition is allowed. Consequently, connected miscellaneous petitions are closed.

13.07.2023

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V. SIVAGNANAM, J.
mkn

To

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

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