IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 28.11.2018

PRONOUNCED ON: 14.12.2018

CORAM :

THE HON'BLE MR.JUSTICE P.N. PRAKASH

Crl.R.C. No.111 of 2011 & Crl.M.P. No.1 of 2011

Sayarmull Surana — Revision Petitioner

Vs.

The Income Tax Officer
Business Ward XII (3)
Chennai — Respondent

Criminal Revision Case filed under Sections 397 and 401 of Cr.P.C. seeking to set aside the order dated 03.01.2011 passed by the Additional Chief Metropolitan Magistrate (E.O.-I), Chennai in Crl.M.P. No.2435 of 2010 in E.O.C.C. No.82 of 2005 and thereby, discharge the accused.

For revision petitioner Mr. P. Ramesh Kumar
For respondent Mr. N. Baskaran
Public Prosecutor for I.T. Department

ORDER

This Criminal Revision Case has been preferred seeking to set aside the order dated 03.01.2011 passed by the Additional Chief Metropolitan Magistrate (E.O.-I), Chennai in Crl.M.P. No.2435 of 2010 in E.O.C.C. No.82 of 2005 and thereby, discharge the accused.

2 The facts in brief, leading to the filing of this criminal revision

case, are as under:

2.1 The Income Tax Department launched a prosecution in E.O.C.C.No.82 of 2005 before the Additional Chief Metropolitan Magistrate (E.O.I), Egmore, Chennai, against Sayarmull Surana, the petitioner herein/accused, for the offence under Section 276C(2) of the Income Tax Act, 1961 (for short "the IT Act").

2.2 It is the case of the Income Tax Department that for the assessment year 1998-1999, the accused filed income tax returns on 16.06.1998, wherein, he had shown his total income at Rs.48,150/-; the Income Tax Department conducted investigation and found that his total income was Rs.29,05,126/- and determined the tax payable, including interest, at Rs.16,02,601; the accused filed an appeal before the Commissioner of Income Tax (Appeals) and by order dated 15.09.2003, the Commissioner of Income Tax (Appeals) determined the total income of the accused and the tax payable at Rs.26,69,470/- and Rs.14,84,199/- respectively; thereagainst, the accused filed an appeal before the Income Tax Appellate Tribunal; however, the Income Tax Appellate Tribunal dismissed his stay petition on 23.02.2004; hence, the accused is liable to be punished under Section 276C(2) of the IT Act for non-payment of the determined tax.

2.3 On summons, the accused appeared and the prosecution commenced in terms of Chapter XIX-B - *Cases instituted otherwise than on police report* of the Cr.P.C.. On behalf of the Income Tax Department, three witnesses were examined and they were cross-examined by the accused. In all, 35 exhibits were marked through the officials, both in examination-in-chief as well in cross-examination. After the Income Tax Department closed the pre-charge evidence, the accused filed Crl.M.P.No.2435 of 2010 in E.O.C.C. No.82 of 2005 under Section 245(1) Cr.P.C. for discharge, which has been dismissed by the trial Court by order dated 03.01.2011, aggrieved by which, the accused is before this Court.

3 At the outset, it may be necessary to state here that the accused has not filed this petition to quash the prosecution at the threshold under Section 482 Cr.P.C. The Trial Court has recorded the pre-charge evidence of three prosecution witnesses and on the closure of the prosecution evidence, the accused prayed for discharging him from the prosecution, which plea was negatived, challenging which, the accused has filed the present criminal revision case.

4 Before adverting to the rival submissions on facts, it may be apposite to allude to Section 276C(2) of the IT Act which reads as under:

"Wilful attempt to evade tax, etc.:

276C(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to two years and shall, in the discretion of the Court, also be liable to fine."

Explanation: For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person --

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.

The expression "wilfully admits" employed in the above provision is an inclusive one, despite which, it does not, in any way, change the common and fundamental meaning of it. The allegation against the accused in this case cannot be fitted into any of the clauses, viz., clause (i) to clause (iv) set out in the Explanation.

5 The learned counsel for the accused submitted that the complaint is not for evasion of tax, but, is for evasion of payment of tax.

He contended that after the assessment order was passed by the Income Tax Officer, the accused filed an appeal before the Commissioner of Income Tax (Appeals) and by order dated 15.09.2003, the order passed by the Income Tax Officer was modified; thereafter, the accused approached the Income Tax Appellate Tribunal, which, by order dated 29.06.2007, set aside the order passed by the Commissioner of Income Tax (Appeals) holding that the order was passed without giving an opportunity to the accused to present his case and remanded the matter back to the Commissioner of Income Tax (Appeals); after the matter was remanded, the accused placed sufficient materials before the Commissioner of Income Tax (Appeals) to repudiate the assessment made by the Income Tax Officer and succeeded substantially, inasmuch as the total income determined at Rs.29,05,126/- by the Income Tax Officer was reduced to Rs.2,82,650/-; consequently, the tax amount was also reduced to Rs.59,795/-; after adding interest and deducting tax already paid, the demand was determined at Rs.1,10,402/-; therefore, the accusation in the complaint that the tax payable is a sum of Rs.14,84,199/- does not survive any more.

6 Per contra, the learned Public Prosecutor for the Income Tax Department admitted the fact that the matter was remanded by the Income Tax Appellate Tribunal to the Commissioner of Income Tax (Appeals), who determined the income at Rs.2,82,650/- as against

Rs.29,05,126/- that was determined by the Income Tax Officer. However, on law, he submitted that the accused cannot be discharged from the prosecution, since tax was due from him when the prosecution was launched. He placed reliance on the following judgments:

- P. Jayappan vs. S.K. Perumal, First Income Tax Officer, Tuticorin [1984 Supp. SCC 437]
- Raja Corporation and others vs. the Income Tax Officer [1992 ITR 487 (Vol.194)]
- Sujatha Venkateshwaran vs. The Assistant Commissioner of Income Tax (order dated 13.07.2018 in Crl.R.C. No.615 of 2011)

The judgments alluded to above, relied on by the learned Public Prosecutor appearing for the Income Tax Department have no bearing on the facts obtaining in this case, inasmuch as, in this case, pre-charge evidence has been adduced by the prosecution and the accused has cross-examined the witnesses and through P.W.1, he has marked the order dated 29.06.2007 passed by the Income Tax Appellate Tribunal as Ex.P.30. Likewise, through P.W.1, he has marked the order dated 15.05.2008 passed by the Commissioner of Income Tax (Appeals) as Ex.P.31.

7 At this juncture, it may be profitable to refer to the judgment of the Supreme Court in **Commissioner of Income Tax, Mumbai vs. Bhupen Champak Lal Dalal and another [(2001) 3 SCC 459]**, wherein, the Supreme Court, relying upon **Jayappan** (supra), has held as under:

"3. The prosecution in criminal law and proceedings arising under the Act are, undoubtedly, independent proceedings and, therefore, there is no impediment in law for the criminal proceedings to proceed even during the pendency of the proceedings under the Act. However, a wholesome rule will have to be adopted in matters of this nature where courts have taken the view that when the conclusions arrived at by the Appellate Authorities have a relevance and bearing upon the conclusions to be reached in the case necessarily one authority will have to await the outcome of the other authority.

4. This Court in G.L. Didwania v. ITO [1995 Supp (2) SCC 724] dealt with the similar situation where there is a prosecution under the Act for making a false statement that the assessee had intentionally concealed his income and the Tribunal ultimately set aside the assessment holding that there is no material to hold that such income belongs to the assessee and the petition was filed before the Magistrate to drop the criminal proceedings and thereafter, an application was filed before the High Court under Section 482 CrPC to quash those criminal proceedings. This Court held that the whole question is whether the appellant made a false statement regarding the income which according to the assessing authority has escaped assessment and this issue was dependent on the conclusion reached by the Appellate Tribunal and hence the prosecution could not be sustained. In Uttam Chand v. ITO [(1982) 2 SCC 543 : 1982 SCC (Tax) 150] this Court held that in view of the finding recorded by the Tribunal on appraisal of the entire material on the record that the firm was a genuine firm and the assessee could not be prosecuted for filing false returns and, therefore, quashed the prosecution. In P. Jayappan v. S.K. Perumal, First ITO [1984 Supp SCC 437 : 1985 SCC (Tax) 7] this Court observed that the pendency of the reassessment proceedings under the Act cannot act as a bar to the institution of the criminal proceedings and postponement or adjournment of a proceedings for unduly long period on the ground that another proceedings having a bearing on the decision was not proper."

8 In **Gujarat Travancore Agency vs. Commissioner of Income Tax, Kerala, Ernakulam [(1989) 3 SCC 52]**, the Supreme Court has considered Section 276C of the IT Act and has held as under:

"4. . . . . There can be no dispute that having regard to the provision is of Section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under

that provision unless the element of mens rea is established."

9 Further, the expression "wilful" has been explained as follows in *P.Ramanatha Aiyar's The Law Lexicon, Second Edition, 1977*:

> *"The question whether an act or omission is wilful arises oftener in criminal than in civil causes; since in the former the general principle requiring the presence of mens rea excludes from criminality acts done accidentally and unintentionally and even acts done intentionally under honest but mistaken belief in the existence of facts which, if true, would have made the acts lawful or excusable."*

10 In the case at hand, the accused filed his returns on 16.06.1998 showing his income at Rs.48,150/-. The Income Tax Officer conducted investigation and determined the income at Rs.29,05,126/-. Challenging the said determination, the accused took the matter on appeal to the Commissioner of Income Tax (Appeals), where, it was reduced to Rs.26,69,470/- vide order dated 26.09.2003. The accused pursued the matter before the Income Tax Appellate Tribunal, which, set aside the order of the Commissioner of Income Tax (Appeals) and remanded the matter back to him. After remand, the Commissioner of Income Tax (Appeals), by order dated 15.05.2008 (Ex.P.31), determined the tax at Rs.2,82,650/-.

11 It may be necessary to state here that the authorities created under the Income Tax Act are fact-finding bodies and the accused has been knocking the doors of these bodies challenging the determination of

the income by the Income Tax Officer. There was no supine indifference on the part of the accused in not paying the demanded tax, but, on the contrary, he had agitated before various fora and at the end of the day, the fact-finding body itself has come to the conclusion that the income of the accused for the relevant period was only Rs.2,82,650/- and the tax payable by him thereon was only Rs.1,10,402/-.

12 Thus, the very edifice on which the prosecution was launched against the accused, has crumbled like a pack of cards. There was no necessity for the Income Tax Department to have launched the prosecution hurriedly since the law of limitation under Section 468 Cr.P.C. for criminal prosecution has been excluded by the Economic Offences (Inapplicability of Limitation) Act, 1974. In fact, even in the complaint, the Income Tax Officer has stated that the accused has approached the Income Tax Appellate Tribunal. This shows that the Income Tax Officer was aware of the fact that the accused is agitating his case before the Income Tax Appellate Tribunal, which is the final fact-finding body.

13 Thus, in the peculiar facts and circumstances of the case, it cannot be stated that the accused was wilfully evading the payment of tax. But, unfortunately, the Trial Court had failed to appreciate the contention of the accused in the right perspective.

P.N.PRAKASH, J.

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In the result, this Criminal Revision Case is allowed and the order dated 03.01.2011 passed by the Additional Chief Metropolitan Magistrate (E.O.-I), Chennai in Crl.M.P. No.2435 of 2010 in E.O.C.C. No.82 of 2005 is set aside and the accused is discharged from prosecution. Connected Crl.M.P. is closed.

14.12.2018

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To

1 The Additional Chief Metropolitan Magistrate (E.O.-I)
Chennai

2 The Income Tax Officer
Business Ward XII (3)
Chennai

3 The Public Prosecutor
High Court
Madras