IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO. 165 OF 2023

1. Unique Trading Company
2. Munnidevi P. Purohit
3. Rakesh P. Purohit
4. Mukesh P. Purohit ...Applicants

Versus

1. Income Tax Officer – 18 (3)(5)
2. Principal Commissioner of Income Tax-18
3. The State of Maharashtra ...Respondents

Mr. Sameer Dalal, i/b Satish Mody, for the Applicants.
Mr. S. R. Aagarkar, APP for the State/Respondent.
Mr. Siddharth Chandrashekhar, for Respondent No.2.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 2nd JANUARY, 2024
PRONOUNCED ON: 5th FEBRUARY, 2024

JUDGMENT:-

1. This is an application under Section 482 of the Code of Criminal Procedure, 1973 ("the Code") to quash the complaint lodged by the Income Tax Authorities for an offence punishable under Section 276C(2) read with Section 278B of the Income Tax Act, 1961 ("the IT Act, 1961").

2. Shorn of unnecessary details, the background facts can be stated as under:

(a) Applicant No.1 is a partnership firm registered under the provisions of Indian Partnership Act, 1932. Applicant No.1 is engaged in the business of distribution of welding electrodes,

machines and accessories. Applicant Nos.2 to 4 are the partners of applicant No.1 firm.

(b) Applicant No.1 firm had filed its original return of income for Assessment Year (AY) 2010-2011 declaring income of Rs.21,79,850/- computing the tax payable alongwith interest at Rs.7,15,573/-. Out of which Rs.1,06,512/- was claimed as Tax Deducted at Source (TDS) and Rs.1,00,000/- was paid as advance tax. An amount of Rs.5,09,061/- was shown as tax payable on the reported income.

(c) The applicants claim, applicant No.1 firm is a family run concern. Mr. P. G. Purohit, the husband of applicant No.2 and father of applicant Nos.3 and 4, was managing the entire affairs of the firm. Mr. P. G. Purohit passed away in the month of May, 2014. Applicant Nos.2 to 4 were unaware of the affairs of the firm especially the non-payment of the tax of Rs.5,09,061/- declared in the return for AY-2010-2011.

3. Principal Commissioner of Income Tax, respondent No.2, issued a notice calling upon the applicant to show cause as to why prosecution proceedings under Section 276C(2) of the IT Act, 1961 be not initiated as the applicant had allegedly wilfully attempted to evade payment of due tax. After assessing the position, the applicants claim, immediately on 12th March, 2018

the applicants paid the entire due tax including interest thereon aggregating to Rs.5,32,410/-. A reply was also filed to the show cause notice on 13th March, 2018 pointing out the payment of the aforesaid amount of Rs.5,32,410/- and also ascribing the reason for non-payment thitherto, namely, the late P. G. Purohit then being at the helm of the affairs of the firm and the applicants unaware thereof.

4. The applicants assert, without considering the factum of payment, the reason ascribed in the reply and absence of wilful attempt to evade the payment of tax, respondent No.2 granted sanction to prosecute the applicants for an offence punishable under Section 276C(2) of the IT Act, 1961. The sanction is vitiated by non-application of mind.

5. Armed with the said sanction, respondent No.1 filed a complaint for an offence punishable under Section 276C(2) read with Section 278B of the IT Act, 1961. The learned Additional Chief Metropolitan Magistrate, 30th Court Ballard Pier, issued process against the applicants for an offence punishable under Section 276C(2) read with Section 278B of the IT Act, 1961.

6. The applicants aver prosecution of the applicants for the alleged offence punishable under Section 276(2) of the IT Act, 1961 is an abuse of the process of the Court. Even if the case of

the Income Tax Department, as set out in the complaint, is taken at its face value, no offence under Section 276C(2) of the IT Act, 1961 can be said to have been made out. In substance, it is the contention of the applicants that there was no wilful attempt to evade the tax on the part of the applicants. Under four days of the service of the show cause, the applicants deposited the due tax and interest thereon. Subsequently, the applicants have also deposited a sum of Rs.4,47,220/- towards interest for AY-2010-2011 under Section 220 of the IT Act, 1961, on 23rd January, 2020. Since applicant No.1 firm had faithfully disclosed the income and the tax which was payable thereon and the due tax alongwith interest came to be paid immediately after service of the show cause notice, the non-payment cannot be construed as a wilful attempt to evade the payment of tax, to fall within the mischief of Section 276C(2) of the IT Act, 1961. Hence, the applicants were constrained to invoke the inherent jurisdiction of this Court.

7. An affidavit-in-reply is filed on behalf of respondent Nos.1 and 2 controverting the contentions in the application. At the outset, respondent Nos.1 and 2 contend that the claim of the applicants that applicant Nos.2 to 4 were unaware of the affairs of the firm as late P. G. Purohit was managing the entire affairs

is patently incorrect. In fact, the ITR filed on 28th September, 2019 was signed and verified by Mr. Rakesh Purohit, applicant No.3. Thus, the applicants cannot feign ignorance.

8. The respondents further contend that it was only after the service of the show cause notice the applicants paid the tax which was shown to be payable in the ITR for AY-2010-2011. Had the applicants paid the tax *suo motu*, different considerations would have come into play. Therefore, the applicants cannot derive mileage from the factum of payment of the tax after service of the show cause notice, in the year 2018. On the contrary, according to respondent Nos.1 and 2, the said fact points to the wilful evasion of tax.

9. Respondent Nos.1 and 2 have also refuted the assertions of the applicants that mere failure to pay the tax does not amount to a wilful attempt to evade the tax. In any event, according to respondent Nos.1 and 2, the aspect of the intent on the part of the applicants in the non-payment of the tax is a matter for trial. Therefore, at this stage, a legitimate prosecution cannot be interdicted.

10. In the wake of the aforesaid pleadings, I have heard Mr. Sameer Dalal, the learned Counsel for the applicants, Mr. Chandrashekhar, the learned Counsel for respondent Nos.1 and

2 and Mr. Aagarkar, the learned APP for the State – respondent No.3. With the assistance of the learned Counsel for the parties, I have also perused the material on record especially the ITR for AY-2010-2011, show cause notice, reply thereto, order of sanction and the complaint lodged by respondent No.1.

11. Mr. Dalal, the learned Counsel for the applicant, submitted that the order passed by respondent No.2 granting sanction for prosecution suffers from the vice of complete non-application of mind. Despite having noted that the applicants had paid the entire tax due upon being served with the notice, respondent No.2 unjustifiably observed that the applicants had made a wilful attempt to evade the tax. Respondent No.2 clearly lost sight of the fact that the applicants had disclosed the income and also computed the self-assessment tax which was to be paid. Mere failure to pay the tax due by itself cannot be construed as a wilful attempt to evade the tax. Absence of the *mens rea* to evade the payment of tax was not at all considered by respondent No.2.

12. Mr. Dalal submitted that by catena of decisions it has been held that there is a distinction between a mere failure to pay the tax due and wilful attempt to evade the tax, which requires a positive act on the part of the assessee. To bolster up this

submission, the learned Counsel for the applicants placed reliance on the decision of the Supreme Court in the case of ***Prem Dass vs. Income Tax Officer***[1]***,*** a decision of Karnataka High Court in the case of ***Vyalikaval House Building Co-operative Society Ltd & ors. vs. Deputy Commissioner of Income Tax***[2]***,*** a decision of the Madras High Court in the case of ***S. P. Velayutham vs. Assistant Commissioner of Income Tax***[3]***,*** a decision of Gujarat High Court in the case of ***Ganga Devi Somani & ors. vs. State of Gujarat***[4] and another decision of Madras High Court in the case of ***Bejan Singh Eye Hospital Pvt. Ltd. and ors. vs. Income Tax Department***[5]***.***

13. Per contra, Mr. Chandrashekhar, the learned Counsel for respondent No.2, would submit that the time-lag of more than eight years in making the payment in itself speaks volumes about the intent on the part of the applicants to evade the tax. It is only after the service of the show cause notice, the applicants paid the amount of self-assessment tax. The applicants, therefore, cannot be heard to urge that there was no wilful attempt at evasion of the tax.

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1 (1999) 5 SCC 241.
2 (2020) 428 ITR 89 (Karn.).
3 (2022) 327 CTR (Mad).
4 (2021) 321 CRT (Guj) 640.
5 (2020) 428 ITR 206 (Mad).

14. Taking the Court through the provisions of sub-sections (1) and (2) of Section 276C of the IT Act, 1961 and comparing and contrasting the text thereof, the learned Counsel for respondent No.2 submitted that the legislature has consciously used different language to prescribe punishment in the matter of wilful evasion of tax chargeable and imposable, i.e. before filing of return, and wilful evasion of payment of tax, i.e. after filing of the return. The evasion of payment of self-assessment tax by the applicants squarely falls within the dragnet of the offence punishable under Section 276C(2) of the Act, 1961 as a clear case of deliberate evasion for eight long years has been made out.

15. Mr. Chandrashekhar placed reliance on a decision of this Court in the case of ***Nayan Jayantilal Balu vs. Union of India and ors.***[6]***,*** wherein a Division Bench of this Court declined to interfere with an order sanctioning prosecution and the consequent complaint under Section 276C(1) of the IT Act, 1961, opining that *prima facie* the ingredients of the said offence were made out and the veracity or otherwise of the allegations contained therein can only be decided at the stage of trial.

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6 Cri.WP/2698/2021 dtd.7/12/2021.

16. To start with, it may be apposite to note the provisions contained in Section 276C of the IT Act, 1961. Section 276C is subsumed in Chapter XXI under caption 'Penalties Imposable'. It reads as under:

> "276C. (1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or [imposable, or under reports his income,] 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,–
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> (i) in a case where the amount sought to be evaded [or tax on under- reported income] 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;
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> (ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to [two] years and with fine.
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> (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.
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> *Explanation.*– For the purposes of this sections, a wilful attempt to evade any tax, penalty or interest chargeable or imosable under this Act or the payment thereof shall include a case where any person–
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> (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
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> (ii) makes or causes to be made any false entry or statement in such books of account or other documents; or
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> (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 circumstances 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.].

17. On a plain reading of sub-section (1) and (2) of Section 276C, the distinction between two sub-sections becomes evidently clear. While sub-section (1) of Section 276C deals with wilful attempt to evade any tax penalty or interest chargeable or imposable or under reporting of income, sub-section (2) of Section 276C punishes wilful attempt to evade the payment of any tax, penalty or interest. Evidently, sub-sections (1) and (2) of Section 276C operate in different spheres. However, the linchpin of the offences covered by sub-section (1) as well as sub-section (2) of Section 276 is, "wilful attempt to evade". The Explanation to Section 276C by way of illustration provides the the kinds of acts which may amount to wilful attempt to evade tax. Undoubtedly, the Explanation is inclusive and, therefore, there can be a wilful attempt to evade tax in any other manner not expressly referred to in the Explanation. Nonetheless, the illustrations adverted to in the Explanation emphasise a conscious act or omission on the part of the assessee with a design to evade the tax.

18. The moot question that wrenches to the fore is, "whether a failure to pay any tax, interest or penalty can be construed as a wilful attempt to evade tax, interest or penalty, without anything more?

19. The text of sub-section (2) of Section 276C is required to be construed keeping in view its evident nature and purport being penal. A penal statute is required to be construed strictly. It is not open to expand the scope of the words used in a penal statute so as to fasten liability on the persons who would otherwise not fall within the dragnet of the penal provision. Undoubtedly, the object of the penal provision cannot be lost sight of and it must be construed in such a manner as to advance the object of the enactment. In substance, both the text and the context deserve to be taken into account.

20. As noted above, the key phrase in sub-sections (1) and (2) of Section 276C is "wilful attempt to evade". When the expression wilful is used in a penal statute it is generally construed to bring in its trail the element of a mental state. In the Black's Law Dictionary, Eighth Edition, the term 'wilful' is explained as under:

> "**wilful**, *adj.* Voluntary and intentional, but not necessarily malicious. — Sometimes spelled *wilful*. Cf. WANTON. — **wilfulness**, *n*.

> "The word 'wilful' or 'wilfully' when used in the definition of a crime, it has been said time and again, means only intentionally or purposely as distinguished from accidentally or negligently and does not require any actual im-propriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless there is a bad purpose or evil intent." Rollin M. Perkins & Ronald N. Boyce, Criminal Law 875–76 (3d ed. 1982)."

21. In P. Ramnatha Aiyar's Advanced Law Lexicon, 3rd Edition, after noting the aforesaid explanation in the Black's Law Dictionary, the import of the term in civil and criminal causes is elucidated as under:

> "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."
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> (emphasis supplied)

22. In the case of ***Kapildeo Prasad Sah vs. State of Bihar***[7] in the context of civil contempt, the Supreme Court enunciated the word 'wilful' would exclude casual, accidental, bona fide or unintentional acts or genuine inability to comply with the terms of the order.

23. It would be contextually relevant to note what the term "to evade" or "evasion" implies.

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7 1999(7) SCC 569.

24. In Black's Law Dictionary, 'tax evasion', is defined as a wilful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability. In P. Ramnathan Law Lexicon, the word "evade" is defined as under:-

> "**Evade.** To avoid by some dexterity; by some device or stratagem; to elude: to escape (as) to evade a blow; to evade punishment; to evade the force of an argument."

25. In the context of the payment of duty as enunciated by the Supreme Court in the case of ***Tamil Nadu Housing Board vs. CCE***[8]***,*** the word 'evade' means defeating the provisions of law of paying duty. In substance, evasion of tax means illegal non-payment of tax as due.

26. If the aforesaid two expressions, "wilful attempt" and "to evade" are read in conjunction, to fall within the tentacles of Section 276C(2) the act or omission ought to constitute a wilful attempt with a design to defeat the liability to pay tax. "Attempt" in turn, means an act or an instance of making an effort to accomplish something. In criminal law an attempt connotes an overt act that is done with the intent to commit a crime but that falls short of completing the crime. It is an inchoate offense which is distinct from the attempted crime.

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8 1995 (Supp.) (1) SCC 50.

27. In the backdrop of the aforesaid juridical connotation of the key words used in Section 276C(1) and (2) of the IT Act, 1961, a reference to the judgments, which bear upon the determination of the controversy, may become advantageous.

28. In the case of ***Prem Dass*** (supra) the appellant therein was convicted under Section 276C(1) of the Act, 1961 on a complaint by the Tax Authorities that the appellant had incorrectly made a verification on the Income Tax Return. The learned Magistrate convicted the appellant; which order was set aside by the Court of Session. In appeal against acquittal, the High Court was persuaded to set aside the order of acquittal and convict the appellant.

29. In the aforesaid factual background, after adverting to provisions contained in Section 276C(1) and Section 277 (false statement in verification etc.) of the IT Act, 1961, the Supreme Court enunciated that wilful attempt to evade any tax, penalty or interest chargeable or imposable under Section 276C is a positive act on the part of the accused which is required to bring home the charge against the accused. Similarly, a statement made by a person in any clarification under the Act can be an offence under Section 277 if the person making the same effort knew or believed the same to be false or does not

believe it to be true. Necessary *mens rea,* therefore, is required to be established by the prosecution to attract the provisions of Section 277 of the Act.

30. Following the aforesaid pronouncement, a learned Single Judge of the Karnataka High Court in the case of ***Vyalikaval House Building Co-operative Society Ltd.*** (supra) enunciated the law as under:

> "8. The gist of the offence under Section 276C(2) of the Act is the wilful attempt to evade any tax, penalty or interest chargeable or imposable under the Act. What is made punishable under this Section is an "attempt to evade tax penalty or interest" and not the actual evasion of tax. 'Attempt' is nowhere defined in the Act or in the Indian Penal Code. In legal echelons 'attempt' is understood as a "movement towards the commission of the intended crime". It is doing "something in the direction of commission of offence". Viewed in that sense, in order to render the accused guilty of "attempt to evade tax" it must be shown that he has done some positive act with an intention to evade tax.
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> 9. In the instant case, the only circumstance relied on by the respondent in support of the charge levelled against the petitioners is that, even though accused filed the returns, yet, it failed to pay the self-assessment tax along with the returns. This circumstance even if accepted as true, the same does not constitute the offence under Section 276C (2) of the Act. The act of filing the returns by itself cannot be construed as an attempt to evade tax, rather the submission of the returns would suggest that petitioner No.1 had voluntarily declared his intention to pay tax. The act of submitting returns is not connected with the evasion of tax. It is only an act which is closely connected with the intended crime, that can be construed as an act in attempt of the intended offence. In the backdrop of this legal principle, the Hon'ble Supreme Court in the case of *Prem Dass - vs - Income Tax Officer* cited supra, has held that a positive act on the part of the accused is required to be established to bring home the charge against the accused for the offence under Section 276C(2) of the Act.
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> 10. In the case on hand, conduct of petitioner No.1 making payments in terms of the returns filed by him, though

> delayed and made after coercive steps were taken by the Department do not lead to the inference that the said payments were made in an attempt to evade tax declared in the returns filed by him. Delayed payments, under the provisions of the Act, may call for imposition of penalty or interest, but by no stretch of imagination, the delay in payment could be construed as an attempt to evade tax so as to entail prosecution of the petitioners for the alleged offence under Section 276C(2) of the Act. In that view of the matter, the prosecution initiated against the petitioners, in my considered opinion, is illegal and tantamount to abuse of process of Court and is liable to be quashed."
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> (emphasis supplied)

31. To the same effect is the decision of the Madras High Court in the case of ***Mrs. Noorjahan vs. Deputy Commissioner of Income Tax***[9]***.*** Repelling the submissions that presumption contained in Section 278B of the IT Act, 1961 comes to the aid of the prosecution, the learned Single Judge, in the facts of the said case, observed as under:

> 13. In the instant case, admittedly there is no concealment of any source of income or taxable item, inclusion of a circumstance aimed to evade tax or furnishing of inaccurate particulars regarding any assessment or payment of tax. What is involved is only a failure on the part of the petitioner to pay the tax in time, which was later on paid after 4½ months along with interest payable. So, it would not fall under the mischief of Section 276 C of the Income Tax Act, which requires an attempt to evade tax and such attempt must be a wilful.
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> 14. If the intention (culpable mental state) of the assessee was to evade tax or attempt to evade tax, they would not have filed the returns in time disclosing the income and the tax liable to be paid. They would not have remitted the tax payable along with interest without waiting for the authorities to make demand or notice for prosecution. Thus, except a delay of 4 ½ months in payment of tax, it is clear that there was no tax evasion or attempt to evade the payment of tax. To invoke the deeming provision, there should be a default in payment of tax in true sense. Nothing

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9 (2022) 445 ITR (Mad).

> can be deemed contrary to the fact borne by record. If such deeming fiction is applied by the authority, is has to be termed as non application of mind over the material records.
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> 16. A 'culpable mental state' which can be presumed under Section 278E of the Act would come into play only in a prosecution for any offence under the Act, when the said offence requires a 'culpable mental state' on the part of the accused. Section 278E of the Act is really a rule of Evidence regarding existence of mens rea by drawing a presumption though rebuttable. That does not mean that, the presumption would stand applied even in a case wherein the basic requirements constituting the offence are not disclosed. More particularly, when the tax is paid much before the process for prosecution is set into motion. The presumption can be applied only when the basic ingredient which would constitute any offence under the Act is disclosed. Then only, the rule of evidence under Section 278E of the Act regarding rebuttable presumption as to existence of culpable mental state on the part of accused would come into play.
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> 17. When the facts on record discloses that the tax already paid and no evasion of tax, no man of ordinary prudence can presume that there is an attempt to evade tax and such attempt is a wilful one."
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> (emphasis supplied)

32. In the case of ***S. P. Velayutham*** (supra), another learned Single Judge of Madras High Court, after noticing the decisions holding the field, observed that the word employed in the section namely, "wilful attempt" cannot be imported to mere failure to pay the tax. The judgment of Gujarat High Court in the case of ***Ganga Devi Somani*** (supra) *inter alia* observes that delayed payment under the provisions of the Act may call for penalty or interest but by no stretch of imagination (in the facts and circumstances as pleaded by the petitioners therein) could

be construed as an attempt to evade tax so as to entail prosecution of the petitioner for the alleged offence under Section 276C(2) of the IT Act, 1961.

33. The decision of this Court in the case of ***Nayan Balu*** (supra), on which reliance was placed by the learned Counsel for respondent No.1, does not govern the facts of the case as in the said case the challenge was to the initiation of the prosecution under Section 276C(1) of the IT Act, 1961 as it was alleged that the petitioner therein failed to substantiate the claim of purchases as the Assessing Officer had found the purchases to be bogus.

34. A profitable reference, in this context, can be made to a decision of the Supreme Court in the case of ***M/s. Gujarat Travancore Agency vs. Commissioner of Income Tax, Kerala, Ernakulam***[10]***,*** wherein pointing out the distinction between the nature of the provisions contained in Section 271(1)(a) (failure to furnish return) and Section 276C (as it then stood), the Supreme Court enunciated that there can be no dispute having regard to the provisions 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

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10 (1989) 3 SCC 52.

imposed under that provision unless the element of *mens rea* is established. In most cases of criminal liability, the intention of the legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act or omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. Thus, there was nothing in Section 271(1)(a) which required that *mens rea* must be proved before penalty can be levied under that provision.

35. In the case of ***Union of India and others vs. Dharmendra Textile Processors and others***[11]**,** the question that arose before a Three-Judge Bench of the Supreme Court was, whether Section 11-AC of the Central Excise Act, 1944 inserted by the Finance Act, 1996 with the intention of imposing mandatory penalty on persons who evaded payment of tax should be read to contain *mens rea* as an essential ingredient and whether there is a scope of levying penalty below the prescribed minimum. Emphasising the element of *mens rea* as an essential ingredient for fastening the criminal liability, the Supreme Court *inter alia* observed that the explanation appended to Section 271(1)(c) of the IT Act, 1961 clearly indicates that element of strict liability

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11 (2008) 13 SCC 369.

on the assessee for concealment or for giving inaccurate particulars while filing return.

36. There was a duality of opinion in two Division Bench judgments of the Supreme Court in the cases of ***Dilip N. Shroff vs. CIT*** [12] ***and SEBI vs. Shriram Mutual Fund***[13]***.*** While resolving the conflict, the Supreme Court in the case of ***Dharmendra Textile Processors*** (supra) enunciated as under:

> "17. It is of significance to note that the conceptual and contextual difference between Section 271(1) (c) and Section 276C of the IT Act was lost sight of in Dilip Shroff's case (supra).
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> 18. The Explanations appended to Section 272(1)(c) of the IT Act entirely indicates the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing return. The judgment in Dilp N. Shroof's case (supra) has not considered the effect and relevance of Section 276C of the I.T. Act. Object behind enactment of Section 271 (1)(e) read with Explanations indicate that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under Section 276C of the I.T. Act."
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> (emphasis supplied)

37. The aforesaid pronouncements thus indicate that there is an essential distinction between the cases where failure or breach leads to civil liability, even in the nature of imposition of monetary penalty, and the cases which entail punishment as a sequel to the commission of offences. Ordinarily in the cases

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12 (2007) 6 SCC 329.

13 (2006) 5 SCC 361

where the breach or failure leads to civil liability, *mens rea* is not considered as an essential ingredient and proof of mere failure or breach in itself may be sufficient. In contrast, where the punishment is to be imposed, existence of *mens rea* is ordinarily considered as an essential ingredient of the offence, save and except the cases where the punishment is imposed on the principle of strict liability.

38. From the text of the provisions contained in Section 276C(1) and the use of the expressions, "wilful attempt" "to evade" it becomes clear that Section 276C professes to punish an act or omission on the part of the assessee designed to evade the liability to pay the tax and not a "mere failure" to pay the tax. There are provisions in the Income Tax Act, 1961 which take care of interest (of the revenue) of recovering the due tax amount alongwith interest and/or penalty where the tax has not been paid within time. It is the wilful evasion of tax due which is the crux of the offence under Section 276C(2) and not a mere failure to pay tax.

39. The matter can be looked at from a slightly different perspective. The sections which precede Section 276C deserve to be noted. Section 276B punishes failure to pay tax to the credit of the Central Government, which has been deducted at source under Chapter XVIIB or the tax payable under Section 115-O or

the second proviso to Section 194B. Likewise, Section 276BB provides punishment for failure to pay to the credit of the Central Government, the tax collected by a person as required under the provisions of Section 206C. Under these two sections, it is the act of mere failure to credit the tax, which has already been collected or deducted that entails punishment. The text of Section 276, on the other hand, professes to punish wilful attempt to evade payment of tax interest or penalty.

40. In a given case, if it could be demonstrated that though the assessee was in a position to pay tax, interest on penalty, the assessee evaded payment of tax by dishonestly disabling himself from payment of tax, interest or penalty or fraudulently dealt with his assets or property with intent to evade the payment of tax, interest or penalty, different considerations may come into play. However, mere failure cannot be equated with wilful attempt to evade.

41. To sum up, on a plain reading the provisions contained in Section 276C(2) do not indicate that mere failure to pay the tax, interest or penalty falls within the dragnet of the said provision. Even otherwise, it is a well settled rule of construction of penal statutes that if two possible and reasonable constructions can be put upon a penal provision, the Court must lean towards that construction which exempts the subject from penalty

rather than the one which imposes penalty. (*Tolaram Relumal and another vs. State of Bombay*[14])

42. On the aforesaid touchstone, reverting to the facts of the case, there is material to indicate that within five days of the show cause notice the applicants had deposited the tax due as declared in the return for AY-2010-2011. Since the applicants had declared the income and assessed the self-assessment tax, it cannot be urged that there was an attempt to evade the tax. It was neither a case of under reporting of income nor that of showing diminished tax liability. The action on the part of the applicants to pay the tax due under five days of the notice militates against the stand of the Income Tax Department that there was an intent to evade the tax throughout. It is not disputed on the date of the lodging of the complaint, no tax was due, and even the applicants deposited the amount of Rs.4,47,420/- towards interest on the due amount.

43. In the aforesaid view of the matter, I find substance in the submissions on behalf of the applicants that in the facts of the case the continuation of the prosecution for the offence punishable under Section 276C(2) of the IT Act, 1961 amounts to abuse of the process of the Court. It is true there was delay of about eight years in paying the amount of self-assessment tax.

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14 AIR 1956 SC 496.

In this proceeding, it may not be appropriate to delve into the veracity of the claim of the applicants that on account of death of Mr. P. G. Purohit they were unaware of the tax liability. It is the conduct of the applicant, after being served with the show cause notice, that assumes significance. Payment of tax due under five days of the service of the show cause notice, underscores the *bona fide* of the applicants. Thus, the aspect of delay, which was forcefully canvassed on behalf of respondent No.2, does not detract materially from the applicants claim.

44. In the totality of the circumstances, the offence punishable under Section 276C(2) of the Act, 1961 cannot be said to have been made out.

45. For the foregoing reasons, I am inclined to allow the application. Hence, the following order:

: O R D E R :

(i) The application stands allowed in terms of prayer Clause (a).

(ii) The proceedings in Criminal Case No.1195/SW/2018 pending on the file of the learned Additional Chief Metropolitan Magistrate, Ballard Peer Court, Mumbai, (now transferred to the Court at Mazgaon), stand quashed and set aside,

(iii) Application stands disposed.

No costs.

[N. J. JAMADAR, J.]