Shailaja

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
# CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.3034 OF 2022
a/w
CRIMINAL WRIT PETITION NO.3035 OF 2022
a/w
CRIMINAL WRIT PETITION NO.3036 OF 2022
a/w
CRIMINAL WRIT PETITION NO.3037 OF 2022
a/w
CRIMINAL WRIT PETITION NO.3038 OF 2022

| | | |
|---|---|---|
| Hemant Mahipatray Shah and another | ] | Petitioners |
| Vs. | | |
| Anand Upadhyay and another | ] | Respondents |

a/w

CRIMINAL WRIT PETITION NO.3039 OF 2022

| | | |
|---|---|---|
| Hemant Mahipatray Shah and another | ] | Petitioners |
| Vs. | | |
| Sahil Arora and another | ] | Respondents |

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Mr. Puneet Jain a/w Mr. Pawan Ved, Mr. Sajal Yadav, Ms. Aishwarya Kantawala, Ms. Diya Jayan i/b Mr. Meghashyam Kocharekar, for the Petitioners.

Mr. Suresh Kumar a/w Ms. Jyoti Yadav, for Respondent No.1.

Ms. R.S. Tendulkar, A.P.P, for Respondent No.2 – State.

…..

CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 12th July, 2024.
PRONOUNCED ON : 12th August, 2024.

SHAILAJA SHRIKANT HALKUDE
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**COMMON ORDER:**

1. Rule.

2. Rule is made returnable forthwith.

3. Learned Counsel for the respondents waives service.

4. With the consent of the learned Counsel for the parties, the petitions are taken up for final disposal at the stage of admission.

5. This bunch of petitions arose from identical set of facts questioning legality and propriety of prosecution of the petitioners by the respondent No.1.

6. The petitioners, have, therefore, invoked inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr. P.C") r/w Article 227 of the Constitution of India impugning issuance of process on the basis of the complaints filed by the Income Tax Officer under Section 279 (1) of the Income Tax Act, 1961 (for short "I.T Act") to prosecute them for



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the offence punishable under sections 276B r/w 278B of the I.T. Act. Briefly stated, facts are as follows.

7. Respondent No.1 - Income Tax officer has filed complaints under Section 279 (1) of the I.T Act along with sanction to prosecute the petitioners for the offences as referred hereinabove. The complainants alleged that M/s. Hubtown Ltd (hereinafter referred to as "assessee" ) is a Company incorporated under the Companies Act, 1956. It was brought to the notice of the respondent No.1 by the assessee that it has deducted amounts of Rs. 13,11,35,617/- during the Financial Year 2011-2012 (Relevant Assessment Year 2012-13); Rs.14,54,20,798/- during the Financial Year 2013-2014 (relevant Assessment Year 2014-15), Rs.15,38,51,407/- during the Financial Year 2012-2013 (relevant Assessment Year 2013-2014), Rs.15,78,03,299/-, during the Financial Year 2016-2017 (relevant assessment year 2017-2018) , Rs. 12,70,04,846/- during the financial year 2014-2015 (Relevant Assessment Year 2015-2016) and Rs.8,78,68,793/- during the Financial Year 2017-2018 (relevant Assessment Year 2018-2019) but delayed in paying the same to the Government Treasury within the prescribed time limit.



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8. Show cause notices came to be issued to the assessee and it's Directors i.e the petitioners herein. The petitioners tendered their explanation to the respondent No.1. However, respondent No.1 arrived at a conclusion that the assessee and it's Directors are responsible for paying tax as per section 204 of the I.T Act and have, therefore, committed default under Section 200 of the I.T Act r/w Rule 30 of the Income Tax Rules without reasonable cause or to pay the tax so deducted under the various sections of the I.T Act from payment made to various parties, which amounts to an offence punishable under section 276B r/w Section 278B of the I.T Act.

9. The CIT (TDS) accorded sanction under section 279 (1) of the I.T Act to prosecute the assessee and it's Directors under section 276B r/w 278B of the I.T. Act as, *prima facie*, they are liable to be prosecuted under these sections. Complaints, therefore, came to be filed being C.C. No.529/SW/2019; C.C. No.532/SW/2019; C.C.No.530/SW/2019; C.C. No.2365/SW/2018; C.C. No.531/SW/2019 and C.C. No.27/SW/2020 in the Court of Additional Chief Metropolitan Magistrate, Mumbai.



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10. The Additional Chief Metropolitan Magistrates, Mumbai vide orders dated 16th November, 2019, 6th March, 2019, 16th November, 2019 and 25th January, 2021, *prima facie*, arrived at a conclusion and issued process against the petitioners and assessee, as above.

11. The said orders were challenged by filing Criminal Revision Application No.357 of 2021, Criminal Revision Application No.360 of 2021, Criminal Revision Application No.358 of 2021, Criminal Revision Application No.361 of 2021, Criminal Revision Application No.359 of 2021 and Criminal Revision Application No.163 of 2021 before the Additional Sessions Court, Mumbai. However, the said Court also, by the impugned orders dated 2nd May, 2022 rejected the Revision Applications and confirmed the orders of issuance of process passed by the Additional Chief Metropolitan Magistrates.

12. I heard Mr. Puneet Jain, learned Counsel for the petitioners at a considerable length as well as Mr. Suresh Kumar, learned Counsel for the respondents. I have also perused the affidavits-in-reply as well as affidavits in rejoinder.



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13. Mr. Jain in his elaborate arguments has taken me through various provisions of the I.T Act and the case laws on the subject. He would argue that the petitioners are not the principal officers and they could only be held vicariously liable provided they fulfill the statutory requirements of section 278B of the I.T Act which is more or less analogous with the provisions of section 141 of the Negotiable Instruments Act, 1881, section 34 of the Drugs and Cosmetics Act as well as section 10 of The Essential Commodities Act. He would emphasize that the complaint is bereft of essential ingredients, in the sense, the person sought to be proceeded against vicariously should be both "In-charge" and "responsible" for conducting the business of the company. No such basic averments are present in the complaint and, therefore, interference of this Court is essential.

14. Mr. Jain would argue that just because a person is Director, it cannot be presumed that he is In-charge and responsible for the conduct of business of the company. There is no automatic presumption of vicarious liability.



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15. Mr. Jain would further argue that no order as contemplated under section 201 (1) r/w 201 (3) of the I.T Act has been passed treating any of the petitioners as "Principal Officer" of the company and by which such principal officer is whereby "deemed to be assessee in default". No notice under section 2 (35) (b) of the I.T Act has been issued by the "Assessing Officer" to any of the petitioners to treat any of them to be the "Principal Officer" of the Company. It is an admitted fact that the TDS deducted by the company has already been deposited with interest as provided under section 201 (1A) of the IT Act.

16. Per contra, Mr. Sureshkumar, learned Counsel for the respondent No.1 while taking strong exception to the arguments of Mr. Jain would argue that in view of Section 204 of the I.T Act, the petitioners are responsible as Directors of the Company to deduct TDS. Merely because demand was made before the show cause notice would not wipe out the offence. Mr. Sureshkumar has placed reliance on a decision of the Hon'ble Supreme Court in a case of **Madhumilan Syntex Ltd and others Vs. Union of India and another[1].**

1 (2007) 11 Supreme Court Cases 297



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17. Mr. Sureshkumar has invited my attention to paragraph 10 of the impugned order wherein the learned Additional Sessions Judge observed that there is a specific averment in the complaint with regard to the petitioners being Directors who are responsible for paying tax as per Section 204 of the I.T Act. A show cause notice was, therefore, came to be issued to the assessee Company who thereafter sought an adjournment for ten days. The assessee, in response to the show cause notice, raised various reasons for non payment of TDS.

18. A few undisputed facts will have to be taken into consideration before adverting to the various provisions of the I.T Act, especially, the scope of Section 276B r/w 278 of the I.T Act. It is an undisputed fact that the complaint has been filed against the Company and the petitioners who are it's Directors, for delay in deposit of TDS. Admittedly, TDS deducted by the Company had already been deposited with interest as provided under section 201(1A) of the I.T Act.

19. No notice has been issued by the "Assessing Officer" to any of the petitioners under Section 2 (35) (b) of the I.T Act to treat any of



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them as “Principal Officer” of the Company.

20. No order as contemplated under Section 201 (1) r/w Section 201 (3) of the I.T Act has been passed treating any of the petitioners as ‘Principal Officer” of the company and by which such Principal Officer is whereby “deemed to be assessee in default”.

21. In respect of assessment year 2017-2018, a positive order has been passed holding the Company not to be “Assessee in Default”.

22. No order imposing penalty (either initially or further penalty) as “deemed to be an assessee in default” under Section 221 has been passed against the company or any of the petitioners.

23. The petitioners are “Directors” of the Company, however, no averment has been made in the complaints regarding “Consent”, “Connivance” or “negligence” as required under Section 278B (2) of the I.T Act.

24. Now, the scope of section 276B (as amended by the Finance Act, 1997) will have to be understood in its correct perspective.



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This Section covers cases of "Failure to Pay" and not mere "Delay in Deposit" of TDS". In Pre-1997 unamended provisions, the words "as required by or under the provisions of Chapter XVII-B" could be read along with the words "BOTH". Under the amended provisions (post 1997), the criminal liability, however, is attracted on "Failure to Pay". The phrase "as required by or under the provisions of Chapter XVII-B" is separately mentioned in Clause (a) of Section 276B and hence, is linked only with and explains the manner in which tax is required to be deducted and not the manner of payment thereof. Thus, under the amended provisions, in case TDS has been paid in full, even with some delay, Section 276B would not be attracted.

25. At this stage, learned Counsel for the respondents places reliance on a decision of the Supreme Court in case of **Madhumilan Syntex Ltd** (supra), which, according to Mr. Sureshkumar still holds the field. However, Mr. Jain, learned Counsel for the petitioners countered that the decision in case of **Madhumilan Syntex Ltd** (supra) would not apply to the case in hand in view of a subsequent CBDT Circular issued by the respondents. According to Mr. Jain, **Madhumilan Syntex Ltd** (supra) dealt with the Assessment Year



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1989-1990 (i.e prior to the 1997 Amendment) and cannot apply to the cases during the Assessment Year 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2016-2016 and 2017-2018.

26. Mr. Jain would invite my attention to the Circular F. No. 285/90/2008 – IT (Inv-I)/05 dated 24.04.2008. Clause 3 of the said Circular reads thus;

> *““3. <u>Identification and processing of potential prosecution cases:</u>*
>
> *3.1 The following categories of offences shall be processed for launching prosecution:-*
>
> ***(i) Offences u/s 276B: Failure to pay taxes deducted at source to the credit of Central Government;***
>
> *Cases, where the amount of tax deducted is Rs.25,000 or more, and the same is not deposited even within 12 months from the date of deduction, shall be processed for prosecution in addition to the recovery steps as may be necessary in such cases.*
>
> *The authority for processing the prosecution under this section shall be the officer having jurisdiction over TDS cases. The prosecution shall preferably be launched within 60 days of such detection. If any such default is detected during search/survey, the processing ADIT/DDIT or the authorised officer shall*



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*inform the AO having jurisdiction over TDS forthwith".*

27. In case of **Madhumilan Syntex Ltd** (supra), which was decided by the Supreme Court on 23rd March, 2007, it has been held thus;

> *"In view of Section 200, 201 (Chapter XVII), 276B, 278B (Chapter XXII) and 2 (20), 31 and 35 of the I.T Act, it is clear that wherever a Company is required to deduct tax at source and to pay it to the account of the Central Government, failure on the part of the company in deducting or in paying such amount is an offence under the Act and has been made punishable. It, therefore, cannot be said that the prosecution against a Company or its Directors in default of deducting or paying tax is not envisaged by the Act. It is held that although a Company is not a natural person but "legal" or "juristic" person that does not mean that Company is not liable to prosecution under the Act. "Corporate Criminal Liability" is not unknown to law".*

28. There can be no second view in light of the ratio laid down by the Supreme Court in case of **Madhumilan Syntex Ltd Vs. Union of India and another** (supra), at the relevant time, however, Mr. Jain has pressed into service two decisions of Punjab and Haryana High Court and of Jharkhand High Court wherein the aforesaid Circular has been referred.



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29. Let me now first look into the judgment delivered by the High Court of Jharkhand at Ranchi in case of **M/s. Dev Prabha Construction Private Limited Vs. The State of Jharkhand and another**[2] wherein while deciding a bunch of petitions, the learned Judge has discussed scope of section 276B of the I.T Act in respect of quashing of the cognizance taken by the Special Judge of the Economic Offence, Dhabad, by which cognizance has been taken against the petitioner for the offences under section 276B of the I.T Act. It would be apposite to extract paragraphs 15 to 19 of the judgment;

> *"15. In view of the above facts and arguments of both the parties, the Court has gone through the materials available on record. For ready reference, 276 (B) of the said Act is quoted hereinbelow:-*
>
> > *"276 (B) Failure to pay tax to the credit of the Central Government under Chapter XII-D or Chapter XVII-B Section 276B of the Income Tax Act, 1961 lays down that if a person fails to pay to the credit of the Central Government:*
>
> *(I) The tax deducted at source by him as required by or under the provisions of Chapter XVII-B; or*

2 Cr. M.P. NO.2941 of 2018



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*(II) The tax payable by him, as required by or under*

> *(a) Sub-section (2) of section 115-O; or*
>
> *(b) The second proviso to section 194B, within the prescribed time, as above, the tax deducted at source by him, he shall be punishable with rigorous imprisonment for a term which shall be between 3 months and 7 years, along with fine."*

*16. Section 201 (1A) of the Act is also quoted hereinbelow, which speaks as follows:-*

> *"(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest.-*
>
> *(i) at one per cent, for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and*
>
> *(ii) at one end one-half per cent, for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,*



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*and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200."*

*Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first provision to sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident".*

*17. It is an admitted fact that the TDS amount in all these cases were deposited with interest and the chart with respect to the same is also annexed with the counter affidavit of the Income Tax Department, wherein the date of deduction and date of depositing the said amount has been mentioned. However, some delay occurred in depositing the TDS. Apart from one or two cases, the deducted amount are not more than 50,000/-. While passing the sanction under Section 279 (1) of the Act, the sanctioning authority has not considered the CBDT instructions, bearing F. No.255/339/79-IT (Inv.) dated 28.05.1980, issued in this regard by the CBDT. The*



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*CBDT guidelines was considered by the Patna High Court in the case of Sonali Autos (P) Ltd. (supra) and after considering this guidelines, the Court has interfered with the matter and quashed the entire criminal proceedings. In CBDT instructions, it is mentioned that prosecution under Section 276 (B) of the Act shall not normally be proposed when the amount involved and/or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of Government. No such consideration will, of course, apply to levy of interest under Section 201 (1A) of the Act. This is quoted in the case of Sonali Autos (P) Ltd. (Supra). Moreover after receiving the deducted amount with interest, the prosecution has been launched against the petitioners, which is not in accordance with law. If the petitioners failed to deposit the amount in question within the stipulated time i.e by the 7th day of the subsequent month, it was required to launch the prosecution immediately, which has not been done in the cases in hand. Moreover Section 278 (AA) of the Act clearly states that no person for any failure referred to under Section 276(B) of the Act shall be punished under the said provisions, if he proves that there was reasonable cause for such failure. The judgment relied by Ms Amrita Sinha, the CBDT guidelines were not considered. On this ground these cases are distinguishable in view of the facts and circumstances of the cases relied upon by Ms. Amrita Sinha.*



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> *18. The amount has already been deposited with interest and there is no reason why the criminal proceeding shall proceed and the criminal proceeding was launched after receiving the said amount with interest, had it been a case that the case was immediately instituted and thereafter the TDS amount has been deposited with interest, the matter would have been different. As such the continuation of the proceedings will amount to an abuse of the process of the Court.*
>
> *19. Accordingly, the entire criminal proceedings and the cognizance orders in their respective cases, passed by the learned Special Economic Offices, Dhanbad, in the respective C.O. Cases, whereby cognizance has been taken against the petitioners for the offences under Sections 276 (B) and 278 (B) of the Income Tax Act, pending in the Court of learned Special Judge, Economic Offences, Dhanbad, are hereby, quashed".*

30. The ratio laid down by the Jharkhand High Court would be squarely applicable to the present set of facts which are identical. In the said case also, the petitioners had already deposited TDS amount with interest and that the case was instituted against the petitioners after considerable lapse of time. The learned Judge referred the CBDT instructions, bearing F. No. 255/339/79-IT (Inv.)



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dated 28.05.1980. The said guidelines issued by the CBDT were also considered by the Patna High Court in case of **Sonali Autos (P) Ltd vs The State Of Bihar and others**[3], and had interfered with the matter while quashing the entire criminal proceedings.

31. A Special Leave Petition (Criminal) Diary No (s). 3073 of 2023 challenging the judgment of the Jharkhand has been preferred by the Revenue in the Supreme Court. However, the Supreme Court, upon hearing the Counsel, dismissed the SLP on the ground that it did not find any merit. Thus, the Supreme Court has also not interfered with the verdict rendered by the Jharkhand High Court. The decision in the case of **Madhumilan Syntex Ltd Vs. Union of India and another** (supra) thus can be distinguished in light of above discussion.

32. Before considering judicial analysis made in case of **Bee Gee Motors & Tractors and another Vs. Income Tax Officer**[4]**,** it would be expedient to refer to CBDT Circular bearing F. No.255/339/79-IT (Inv.) dated 28th May, 1980 in this context. Section 276B deals with prosecution for failure to pay tax deducted at source.

3 [2017] 396 ITR 636 (Patna)
4 [1996] 218 ITR 155 (Punj. & Har.), 157-158



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Prosecution under section 276B should not normally be proposed when the amount involved and/or the period of default is not substantial and the amount in default has also been deposited in the meantime to the credit of the Government. No such situation will, of course, apply to levy of interest under Section 201 (1A) of the I.T Act. In **Bee Gee Motors & Tractors Vs. Income Tax Officer** (supra), it has been observed at pages 157 to 158 and I quote;

> ***JUDICIAL ANALYSIS***
>
> *"EXPLAINED IN – The above Instruction was explained in the High Court judgment cited above, as follows:*
>
> *'The words'"not normally" precede the words "be proposed when the amount involved and/or the period of default is not substantial and the amount has also been deposited in the meantime to the credit of the Government". It is true that the word "normally" does not mean that it is necessary or incumbent upon the authorities concerned so as not to launch proceedings under section 276B but when the conditions for exempting the assessee from prosecution as spelled out in the instructions are available, in the considered view of this Court it will not be open for the authorities then also to have discretion in the matter as otherwise, the authorities concerned may exempt an assessee from the prosecution in one set of circumstances and to prosecute another assessee in the same or identical facts. That would undoubtedly be violative of article 14 of the Constitution of*



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*India. The argument of Mr. Sawhney with regard to discretion of the officer concerned can be accepted only to the extent that as to what facts constitute the discretion for launching the prosecution and what facts would entail exemption from prosecution shall always depend upon the facts of each case with regard to the amount involved or the period of default. That is always in the discretion of the authorities concerned which, of course, again is to be used in a judicious manner. In so far as the first contention of Mr. Sawhney that it is the provisions of the statute which shall have precedents and not the instructions is concerned, suffice it to say that the court does not find any inconsistency or contradiction in the relevant provisions of the statute and the instructions quoted above. The relevant provision of the statute no doubt talks of prosecution but the instructions in the considered view of the court provide an exception in limited matters and that too where the conditions precedent in the instructions are available or in existence…"*

33. Mr. Jain has also pressed into service a recent judgment of Orissa High Court in case of **Sree Metaliks Ltd. Vs. Union of India**[5], wherein there is reference of CBDT Circular dated 24th April, 2008 which came into being after the decision in the case of **Madhumilan Syntex Ltd and others Vs Union of India and another** (supra). Cases, where amount of tax deducted is Rs.25,000/- or more, and

5 [2024] 162 Taxmann.com 161 (Orissa)



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the same is not deposited even within twelve months from the date of deduction, especially, proceeded for prosecution in addition to the recovery steps as may be necessary in such cases. The Authority for processing the prosecution under the said section shall be the officer having jurisdiction over TDS cases. The prosecution shall preferably be launched within sixty days of such deduction. If any such default is detected during search/survey, the processing ADIT/DDIT or the authorized officer shall inform the A.O having jurisdiction over TDS forthwith.

34. In case of **Sree Metaliks Ltd. Vs. Union of India** (supra), the petitioner was being prosecuted in view of Section 276B r/w Section 278B and 279 of the I.T Act on the basis of failure to pay tax on distributing profits of domestic companies/deducted at source for the Assessment Year 2021-21. The assessee failed to deposit TDS amount for financial year 2019-20 within statutory period, leading to complaint case under Sections 276B and 278B. Despite specifically depositing TDS amount with interest, prosecution was sanctioned under Section 279 (1) of the I.T Act. The assessee had explained that the delay was due to factors like market sluggishness, insolvency proceedings and COVID-19 pandemic with no *mens rea*



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involved. It is held that the Authorities ought to have taken into consideration explanation offered by assessee, particularly for the reasons that the Company had suffered insolvency and bankruptcy proceedings and restrictions imposed during COVID-19 Pandemic. Since the prosecution had been initiated by the Revenue after having received TDS amount along with interest, it is held that in such circumstances, entire proceeding initiated against the assessee was to be quashed.

35. A combine reading of Circulars dated 28th May, 1980 and 24th April, 2008 contemplate that prosecution ought not be launched where the tax has been deposited. The words "where the amount of default has been deposited in the meantime" in the Circular dated 28th May, 1980 signify such intent and the words "in addition to the recovery steps as may be necessary in such cases" in Circular dated 24th April, 2008 also signify that there are pending arrears which need to be recovered. Mr. Jain is, therefore, right in his contention that the ratio laid down in **Madhumilan Syntex Ltd and others Vs Union of India and another** (supra), would not be made applicable in view of the Circular dated 24th April, 2008 and, therefore, it cannot be treated as a precedent for the period after 24th April,



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2008. It is also expedient to note that Circular dated 24th April, 2008 prescribes that the prosecution is to be launched within sixty days of deduction of the default. Though the circular also prefixes the requirement with the words “preferably”, it also signify that if not in sixty days the period cannot extend indefinitely for an unreasonable period. If Section 276B is interpreted to include the delay in deposit of TDS would make the said provision manifestly arbitrary.

36. Turning to the definition of “Principal Officer” as contemplated in Section 2 (35) of the IT Act which requires the assessing officer to issue notice to any person connected with the management or administration of the company for his intention of treating him as the ‘Principal Officer” thereof. The obligation, however, does not end with merely a notice. Section 201 (1), Proviso to Section 201 (1) and 201 (3) of the I.T Act make it mandatory for the assessing officer to pass an order. The order is also appealable under section 246 (1) (i) of the I.T Act. The order would:-

(a) Determine which officer is proposed to be dealt as “Principal Officer” of the Company;



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(b) Determine in light of the exclusion under the proviso to section 201 (1), whether the company and its Principal Officer should be "deemed to be Assessee in Default".

37. Section 2 (35) (b) of the I.T Act postulates the Assessing Officer to issue notice of his "intention to treat" a person connected with the management and administration of the company as it's "Principal Officer". This point has been enunciated by this Court in a decision in the case of **Homi Phiroz Ranina and others Vs. State of Maharashtra and others**[6] wherein the applicants sought quashing of an order dated 30th November, 1996 passed by the Additional Chief Metropolitan Magistrate, 47th Court, Bandra, *inter alia*, prayed for their discharge. It was a complaint filed by the Income Tax Officer TDS, VI, Bombay against the applicants as well as Unique Oil India Ltd stating therein that the applicants/accused are Directors as well as Chairman and Managing Director of accused No.1 Company. They were charged under Section 276B r/w 278B of the I.T Act. Summons were issued to all the accused persons including the applicants. They moved for discharge which came to be rejected by

6 (2003)263 ITR 636



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the Magistrate and, therefore, they approached this Court. A Single Judge of this Court made following observations;

> *"4. It is the contention of the applicants/accused that they are not the principal Officers of the said company Accused No.1. They are only the non executive Directors of the Company. Accused No.2 L.K Khosla is the Chairman and Managing Director and accused No.8 Yogesh Khosla is whole time Director of the said Company and hence, the liability for deducting income tax and crediting to the Central Government is that of accused No.2, 8 and Company, accused No.1. It is also contended that no notice was given by the Commissioner of Income Tax to the applicant/accused prior to his granting sanction to prosecute the accused under section 279 (1) of the Act. Principles of natural justice required that the notice ought to have been given to the applicants by the Commissioner before according sanction.*
>
> *5. The aforesaid submissions were made by the applicants before the learned Magistrate at the time of hearing their application for discharge. However, the learned Magistrate rejected the said contention by a speaking order. The learned Advocate Mr. Ranina for the applicants/accused has submitted that the applicants being non-executive Directors are not concerned with the day-today affairs of the Company which are looked after by the Managing Director and whole time Director. Admittedly no administrative responsibilities*



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*were shouldered by the applicants. Furthermore applicant Nos.1 and 3 are also practising Advocates and therefore, they cannot by law act as full time Directors. They could only act as non-executive Directors not exercising any administrative powers or performing any administration duties.*

*13. Unless the complaint disclosed a prima facie case against the applicants/accused of their liability and obligation as Principal Officers in the day to day affairs of the Company as Directors of the Company under section 278 (b) the applicants cannot be prosecuted for the offences committed by the Company. In the absence of any material in the complaint itself prima facie disclosing responsibility of the accused for the running of the day to day affairs of the Company process could not have been issued against them. The applicants cannot be made to undergo the ordeal of a trial unless it could be prima facie showed that they are legally liable for the failure of the Company in paying the amount deducted to the credit of the Company. Otherwise, it would be a travesty of justice to prosecute them and ask them to prove that the offence is committed without their knowledge. The Supreme Court in the case of Shyam Sundar v. State of Haryana reported in (1989) 4 SCC 630 : A.I.R 1984 page 53 held as follows:-*

> *"It would be a travesty of justice to prosecute all partners and ask them to prove under the proviso to sub-section*



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> *(1) that the offence was committed without their knowledge. It is significant to note that the obligation for the accused to prove under the proviso that the offence took place without his knowledge or that he exercised all due diligence to prevent such offence arises only when the prosecution establishes that the requisite condition mentioned in sub-section (1) is established. The requisite condition is that the partner was responsible, for carrying on the business and was during the relevant time in charge of the business. In the absence of any such proof no partner could be convicted".*

38. It can, thus, be seen that merely issuance of notice would not *ipso facto* become a final "determination" of classification and identification of a person as "Principal Officer". Since treating a person as such would not only have Civil but also penal consequences. As such, an order making such determination is necessary. The said "adjudication" is contemplated under Section 201 when such person (other than a Company) is held to be a Principal Officer and is also thereafter deemed to be an assessee in default. Any person aggrieved by such order would have remedies available under Section 246 (1) (i) of the I.T Act. There is one more significant aspect to be noted which is the term "Principal Officer"



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has been used "singular" and not in 'plural' and the word "officer" is further premised by the word "principal" which signifies "main" officer and not all the officers who may someway connected with the management or administration of the company. The said "determination" can, therefore, be done only while passing an order under section 201 (1) of the I.T Act. Section 204 (iii) of the I.T Act also defines and fixes the responsibility for paying tax in relation to the company on its "Principal Officer".

39. Now, turning to the application of sub-section (1) of Section 278B of the I.T Act which reads thus;

> *"**278B.** (1) Where an offence under this Act has been committed by a company in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*
>
> ***Provided** that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.*
>
> *(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act*



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*has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*

*[(3) Where an offence under this Act has been committed by a person, being a company, and the punishment for such offence is imprisonment and fine, then, without prejudice to the provisions contained in sub-section (1) or sub-section (2), such company shall be punished with fine and every person, referred to in sub-section (1), or the director, manager, secretary or other officer of the company referred in sub-section (2), shall be liable to be proceeded against and punished in accordance with the provisions of this Act.]*

*Explanation.- For the purposes of this section,-*

*(a) "company" means a body corporate, and includes-*

*(i) a firm; and*

*(ii) an association of persons or a body of individuals whether incorporated or not; and*

*(b) "director", in relation to-*

*(i) a firm, means a partner in the firm;*



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*(ii) any association of persons, or a body of individuals, means any member controlling the affairs thereof.]*

40. Since the provision is squarely for prosecuting an offender, the term 'conduct of business of the Company" must have a nexus with "the offence committed" and hence, in the context of such offence under section 276B ought to be interpreted (which is in relation to "failure to pay" the TDS deducted) to be the "Principal Officer" who has been made responsible, under Section 204 (iii) of the I.T Act, for paying the tax. Proviso to Section 278B (1) prescribes 'absence of knowledge' as a valid defence for invoking the said section. Where a person is declared a principal officer of a company by an "order" under section 201 (1), it would, *prima facie*, fulfill the requirement of presumption of knowledge. The term "Director" which has been separately defined under section 2 (20) of the I.T Act has not been used in Section 278B (1). As such director is not covered thereunder.

41. Turning to sub-section (2) of Section 278B of the I.T Act which commences with *non obstante clause* "provides an action to



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prosecute a person which expressly applies to a Director. Emphasis is on the words "with the consent", "connivance" or "attributable to the neglect" of such Director, Manager, Secretary or other office of the company. The offence in the present case being an offence under Section 276B of the I.T Act would, therefore, imply that the "failure to pay" the TDS deducted, must have direct relation namely consent, connivance or neglect of such person.

42. A useful reliance has been placed upon a decision in the case of **Dayle De'Souza Vs. Government of India through Deputy Chief Labour Commissioner (C) and another** [7]. While interpreting section 22-C (1) and (2) of the Minimum Wages Act, 1948 which relates to offence of firm and vicarious liability, the Supreme Court enunciated necessity of requirements under each of the sub-sections. It is held that the requirements of Section 22-C (2) are different from those of Section 22-C (1). Relevant paragraphs are extracted below;

> *"9. However, in the context of the present appeal, it is Section 22-C of the Act which is of more relevance which reads thus:*
>
> ***"22C. Offences by companies.** — (1) If the person committing any offence under this Act is a company,*

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*every person who at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:*

*Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the* commission of such offence.

*(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Director, manager, secretary or other officer of the company, such Director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.*

*Explanation. — For the purposes of this section —*

*(a) "**company**" means any body corporate and includes a firm or other association of individuals; and*

*(b) "**Director**" in relation to a firm means a partner in the firm."*

*10. Sub-section (1) to Section 22-C states that where an offence is committed by a company, every person who at the time the offence was committed was*



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*in-charge of and was responsible to the company for the conduct of the business, as well as the company itself shall be deemed to be guilty of the offence. By necessary implication, it follows that a person who does not bear out the requirements is not vicariously liable under Section 22-C(1) of the Act. The proviso, which is in the nature of an exception, states that a person who is liable under sub-section (1) shall not be punished if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. The onus to satisfy the requirements to take benefit of the proviso is on the accused, but it does not displace or extricate the initial onus and burden on the prosecution to first establish the requirements of sub-section (1) to Section 22-C of the Act. The proviso is to give immunity to a person who is vicariously liable under sub-section (1) to section 22-C of the Act.*

*11. In S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla [(2005) 8 SCC 89] in relation to pari materia proviso in Section 141 of the Negotiable Instruments Act, 1881, this Court observed: (SCC pp. 96 & 98, paras 4 & 9)*

> *"4… A company being a juristic person, all its deeds and functions are the result of acts of others. Therefore, officers of a company who are responsible for acts done in the name of the company are sought to be made personally liable for acts which result in criminal action being taken against the company. It makes every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of business of the company, as well as the company, liable for the offence. The proviso to the sub-section contains an escape route for persons who are able to prove that the offence was committed without their knowledge or that*



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*they had exercised all due diligence to prevent commission of the offence.*

*9. The position of a Managing Director or a Joint Managing Director in a company may be different. These persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. In order to escape liability such persons may have to bring their case within the proviso to Section 141(1), that is, they will have to prove that when the offence was committed they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence."*

*(Emphasis added)*

*12. In Aneeta Hada v. Godfather Travels & Tours (P) Ltd, [(2012) 5 SCC 661] this Court had reiterated that the proviso to general vicarious liability under Section 141 of the Negotiable Instruments Act, 1881, applies as an exception, by observing: (SCC p. 678, para 22)*

*"22. On a reading of the said provision, it is plain as day that if a person who commits the offence under Section 138 of the Act is a company, the company as well as every person in charge of and responsible to the company for the conduct of business of the company at the time of commission of offence is deemed to be guilty of the offence. The first proviso carves out under what circumstances the criminal liability would not be fastened. Sub-section (2) enlarges the criminal liability by incorporating the concepts of connivance, negligence and consent that engulfs many categories of officers. It is worth noting that in both the provisions, there is a "deemed" concept of criminal liability."*

*(Emphasis added)*



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*The proviso being an exception cannot be made a justification or a ground to launch and initiate prosecution without the satisfaction of conditions under sub-section (1) of Section 22-C of the Act. The proviso that places the onus to prove the exception on the accused, does not reverse the onus under the main provision, namely Section 22-C(1) of the Act, which remains on the prosecution and not on the person being prosecuted.*

*13. Sub-section (2) states that notwithstanding anything contained in sub-section (1), where any offence under the Act has been committed by a company, and it is proved that such offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any Director, manager, secretary or other officer of the company, then such Director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. Without much ado, it is clear from a reading of sub-section (2) to Section 22-C of the Act that a person cannot be prosecuted and punished merely because of their status or position as a Director, manager, secretary or any other officer, unless the offence in question was committed with their consent or connivance or is attributable to any neglect on their part. The onus under sub-section (2) to Section 22-C is on the prosecution and not on the person being prosecuted".*

43. It is needless to reiterate the ratio laid down by the Supreme Court in the case of **Dayle De'Souza Vs. Union of India through Deputy Chief Labour Commissioner (C) and another** (supra) since it is incumbent upon the Revenue to prove that the offence in question has been committed with the consent or connivance or is



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attributable to any neglect on the part of, any Director, Manager, Secretary or other officer of the company, such Director, Manager, Secretary or other officer of the Company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. This is also in *pari materia* with the vicarious liability under section 141 of the Negotiable Instruments Act, 1881, as has been observed in paragraph 12 (supra).

[Emphasis supplied]

44. In the present case, the Revenue has chosen not to invoke the provisions of Section 221 r/w Section 201 (1) of the I.T Act to impose penalty against the company or the principal officer of the company for "failure to pay the whole or any part of tax, as required by or under this Act". The Revenue cannot now be permitted to prosecute the petitioners for the same substantive act which is also categorized as an "offence" under Section 276B of the I.T. Act. As such, further trial of the petitioners by the criminal Court cannot be permissible which would tantamount to abuse of process of the Court. The Counsel has, therefore, rightly placed reliance on a decision in the case of **K.C. Builders Vs. Assistant**



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**Commissioner of Income-Tax**[8]. It would be apposite to extract relevant paragraph which reads thus;

> *"14…....One of the amendments made to the abovementioned provisions is the omission of the word "deliberately" from the expression "deliberately furnished inaccurate particulars of such income". It is implicit in the word "concealed" that there has been a deliberate act on the part of the assessee. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, 3rd Edition, Vol. I, is as follows:-*
>
> > *"In law, the intentional suppression of truth or fact known, to the injury or prejudice of another."*
>
> *The word "concealment" inherently carries with it the element of mens rea. Therefore, the mere fact that some figure or some particulars have been disclosed by itself, even if takes out the case from the purview of non-disclosure, it cannot by itself take out the case from the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt does neither amount to concealment nor deliberate furnishing of inaccurate particulars of income unless and until there is some evidence to show or some circumstances found from which it can be gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid the imposition of tax thereon. In order that a penalty under Section 271(1) (iii) may be imposed, it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars*

8 [2004] 135 TAXMAN 461 (SC)



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*of his income. Where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment and, therefore, in such a case no such penalty can survive and the same is liable to be cancelled as in the instant case. Ordinarily, penalty cannot stand if the assessment itself is set aside. Where an order of assessment or reassessment on the basis of which penalty has been levied on the assessee has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and the same is liable to be cancelled as in the instant case ordered by the Tribunal and later cancellation of penalty by the authorities".*

*24. In the instant case, the penalties levied under Section 271(1)(c) were cancelled by the respondent by giving effect to the order of the Income Tax Appellate Tribunal in I.T.As Nos. 3129-3132. It is settled law that levy of penalties and prosecution under Section 276-C are simultaneous. Hence, once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under Section 276-C is automatic.*

*25. In our opinion, the appellants cannot be made to suffer and face the rigorous of criminal trial when the same cannot be sustained in the eye of law because the entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and under Section 254 of the Act, a finding of the Appellate Tribunal supersedes the order of the Assessing Officer under Section 143(3) more so when the Assessing Officer cancelled the penalty levied.*



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*26. In our view, once the finding of concealment and subsequent levy of penalties under Section 271(1)(c) of the Act has been struck down by the Tribunal, the Assessing Officer has no other alternative except to correct his order under Section 154 of the Act as per the directions of the Tribunal. As already noticed, the subject - matter of the complaint before this Court is concealment of income arrived at on the basis of the finding of the Assessing Officer. If the Tribunal has set aside the order of concealment and penalties, there is no concealment in the eyes of the law and, therefore, the prosecution cannot be proceeded with by the complainant and further proceedings will be illegal and without jurisdiction. The Assistant Commissioner of Income Tax cannot proceed with the prosecution even after the order of concealment has been set aside by the Tribunal. When the Tribunal has set aside the levy of penalty, the criminal proceedings against the appellants cannot survive for further consideration. In our view, the High Court has taken the view that the charges have been framed and the matter is in the stage of further cross-examination and, therefore, the prosecution may proceed with the trial. In our opinion, the view taken by the learned Magistrate and the High Court is fallacious. In our view, if the trial is allowed to proceed further after the order of the Tribunal and the consequent cancellation of penalty, it will be an idle and empty formality to require the appellants to have the order of the Tribunal exhibited as a defence document inasmuch as the passing of the order as aforementioned is unsustainable and unquestionable".*

The ratio laid down in the aforesaid decision is squarely applicable to the present set of facts.



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45. The Hon'ble Supreme Court in the case of **G.L. Didwania and another Vs. Income Tax Officer and another**[9] while dealing with an appeal preferred by the assessee made following observations in paragraph 4;

> *"4. In the instant case, the crux of the matter is attracted and whether the prosecution can be sustained in view of the order passed by the Tribunal. As noted above, the assessing authority held that the appellant - assessee made a false statement in respect of income of M/s. Young India and Transport Company and that finding has been set aside by the Income-tax Appellate Tribunal. If that is the position then we are unable to see as to how criminal proceedings can be sustained".*

A prosecution was launched by the Revenue *qua* the assessee on the ground of making false statement. The Assessing Authority held that the assessee had intentionally concealed his income derived from "Y" Company which belonged to him. The appellant preferred an appeal against assessment order wherein the Appellate Tribunal set aside the assessment by holding that there was no material to hold that "Y" company belonged to assessee. A petition filed by the appellant before the Magistrate to drop the criminal proceedings, and an application moved before the High Court

9 1995 Supp (2) Supreme Court Cases 724



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under Section 482 of the Cr. P.C to quash the criminal proceedings came to be dismissed. The Supreme Court, therefore, held that the whole question was whether the appellant made a false statement regarding income which, according to the assessing authority had escaped assessment. It is noted that the said issue attained finality in light of the finding of the Appellate Tribunal which was conclusive and, therefore, the prosecution could not sustain. Accordingly, the Supreme Court quashed the criminal proceedings. The ratio laid down hereinabove would also be made applicable to the present set of facts.

46. A corollary of the aforesaid discussion of the facts, material placed on record *vis-a-vis* the decisions rendered by various Courts have persuaded me to allow all the petitions. Now, to the order.

: **<u>O R D E R</u>** :

(a) Petitions are allowed.

(b) Orders of issuance of process in;

(i) C.C No.529/SW/2019 dated 16th November, 2019;

(ii) C.C. No.532/SW/2019 dated 16th November, 2019;



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(iii) C.C. No.530/SW/2019 dated 16th November, 2019;

(iv) C.C. No.2365/SW/2018 dated 6th March, 2019;

(v) C.C. No.531/SW/2019 dated 16th November, 2019 and

(vi) C.C. No.27/SW/2020 dated 25th January, 2021

are quashed and set aside.

(c) Consequent orders passed in;

(i) Revision Application No.357 of 2021;
(ii) Revision Application No.360 of 2021;
(iii) Revision Application No.358 of 2021;
(iv) Revision Application No.361 of 2021;
(v) Revision Application No.359 of 2021

and

(vi) Revision Application No.163 of 2021

passed by the Additional Sessions Judge, Mumbai on 2nd May, 2022 are also quashed and set aside.

47. The Petitions are disposed of as above with no order as to costs.

**[PRITHVIRAJ K. CHAVAN, J.]**



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