INCOME TAX : Unless strong materials seized from accused, for offence allegedly committed while filing returns and false verification filed before Assessing Authority, only Assessing Authority or any other officer authorised by that officer is competent to file a complaint under section 276C/277, not by the Deputy Director

• Unless strong materials seized from accused or any incriminating statement recorded from accused the prosecution has to wait till the finding recorded by Assessing Officer. In view of the same, complaint filed by the Deputy Director for the offence allegedly committed while filing Returns and false verification filed before the Assessing Authority, this Court is of the view that only the Assessing Authority or any other officer authorised by that officer is competent to file a complaint, not by the Deputy Director.

• Merely because search has been conducted and some third parties statements were recorded and further they have also not been examined, this Court is of the view that unless a finding recorded by the Assessing Officer as to wilful attempt to evade tax or filing false verification, the complaint filed by the Deputy Director is not maintainable.

• Only in the cases where incriminating materials seized from the possession of the assessee and any statements which incriminate themselves recorded under section 132 (4) of the Income-tax Act or any incriminating evidence collected clinchingly establishes complicity of the accused with the crime, prosecution can be initiated without waiting for the assessment or reassessment proceedings. Otherwise when materials collected are weak and prosecution itself rely them only as corroborative evidence then Department has to wait till the finding recorded by Assessing Officer.

[2020] 122 taxmann.com 146 (Madras)

HIGH COURT OF MADRAS

Karti P. Chidambaram

v.

Deputy Director of Income Tax (Investigation),Chennai

N SATHISH KUMAR, J.
CRL. R.C. NOS. 510 AND 511 OF 2020
CRL.M.P.NOS. 4044 & 4045 OF 2020
DECEMBER 11, 2020

Kapil Sibal, **N.R.R. Arun Natarajan**, **P.S. Raman**, **Ms. C. Uma** and **N.R. Elango**, Sr. Standing Counsel *for the Petitioner.* **Mrs. M. Sheela** and **N. Baskaran**, Standing Counsel *for the Respondent.*

ORDER

1. Aggrieved over the order of the Special Court No. 1 for Trial of Criminal Cases related to Elected Members of Parliament and Members of Legislative Assembly of Tamiland in Crl.M.P.No.25634 of 2019 in C.C.No.15 of 2019 and Crl.M.P.No.25633 of 2019 in C.C.No.16 of 2019 the present revisions filed.

2. The brief facts leading to file these Revisions are as follows:

2.(*a*) The Revision Petitioners are husband and wife. The case of the Department/Prosecution is that the Petitioners/Accused sold their immovable property situated in Muttukadu village. The Petitioner in Crl.R.C.No.15 of 2020 Mr. Karti P. Chidambaram has sold 5.110 Acres of land for a total consideration of Rs. 21.7175 Crores out of which Rs. 15.33 Crores said to have received by cheque and remaining Rs. 6.38 Crores was received as Cash, whereas he has filed Return of Income for the Assessment Year 2014-15 on 29-7-2014 declaring his total income at Rs. 45,18,430/-. In his Return of Income he has shown the sale of the said property at Rs. 15,33,00,000/- as a Long Term Capital Gain. However, he did not disclose the cash part of the sale consideration of Rs. 6.38 Crores. Mrs. Srinidhi Karthi Chidambaram 1st Petitioner in Crl.R.C.No.16 of 2020 has sold 1.18 Acres of land for a total consideration of Rs. 5.01 Crores out of which Rs. 3.65 Crores was received by Cheque and Rs. 1.36 Crores was received by cash, whereas she has filed Return of Income for the Assessment Year 2015-16 declaring her total income at Rs. 69,98,410/-. In her Return of Income she has shown the sale of the said property at Rs. 3,65,80,000/- as a Long Term Capital Gain. She has also not disclosed the cash payment of Rs. 1.36 Crores in the return of income.

3. Above facts came to light in a survey under section 133 A of the Income-tax Act carried out in the case of M/s. Advantage Strategic Consulting Private Limited and other entities on 1-12-2015 by the Income-tax Department and Enforcement Directorate. In the course of the search several hard disks were retrieved by the Income-tax Department and Enforcement Directorate. Further search and seizure also conducted in M/s. Agni Estates and Foundation Pvt. Ltd., in the year 2018 and certain Note books were seized from cashier of the purchaser company and their statements also recorded. Thereby, private complaint was filed by the Deputy Director of Income Tax Department against Mr. Karti P. Chidambaram for the offences under section 276C(1), 277 of the Income-tax Act. Similarly another complaint was filed against Tmt. Srinidhi Karti Chidambam and Mr. Kati P.Chidambaram under Section 276C(1), 277 and 278 of the Income-tax Act. The private complaints on examination of some witness on the side of the respondent, taken on file and numbered as CC.No.15 of 2019 for the offences under sections 276C(1) and 277 of the Income-tax Act as against the Petitioner/Accused Mr. Karti P Chidambaram and another complaint taken on file in CC.No.16 of 2019 against both wife and husband for the offences under sections 276C(1), 277 and 278 of the Income-tax Act.

4. After the court has taken cognizance of the complaint, the Petitioners/Accused have filed petitions under section 245 Cr.P.C., to discharge them from the prosecution mainly on the ground that the documents alleged to have been seized during the search conducted in M/s. Advantage Strategic Consulting Pvt. Ltd., and M/s. Agni Estates and Foundation Pvt. Ltd., are inadmissible and the alleged cloning of the electronic records were not done by any experts and those documents also not admissible due to non-compliance of Section 65B of the Indian Evidence Act. Similarly, the so called person who said to have given a statement as to the cash transaction has not been examined while taking cognizance by the Court. Hence, without any evidence in this regard, there is no materials to proceed as against the accused.

5. It is also further submitted that the Deputy Director of Income-tax Department is not a competent person to file a complaint for the alleged false declaration. Only the Assessing Officer of Income Tax, before whom the Returns were filed is competent to file any complaint for the alleged false Returns or evidence. All the assessment proceedings are deemed to be a judicial proceedings within the meaning of Section 193 and 196 of the Indian Penal Code Section 136 of the Income-tax Act also stipulate that any proceedings under the Act shall be deemed to be judicial proceedings for the purpose of 193, 228 and for the purpose of Section 196 of I.P.C. and every Income-tax authority shall be a Civil Court for the purpose of Section 195 of the I.P.C. Therefore, the plea was taken to the effect that the complaint lodged by the Deputy Director of Income-tax is not maintainable in the eye of law. However, learned trial Court

has dismissed the Petitions filed by both accused in C.C. Nos.15 and 16 of 2019. Hence, present revisions have been filed.

6(*a*). Learned Senior Counsel Mr. Kapil Sibal appearing for the Revision Petitioner in Crl.R.C.No.510 of 2020 has submitted that the prosecution was launched against the accused without any materials and only due to the political reasons. It is further submitted that the Returns of the year 2014-15 filed and completed as early as 30-12-2016. Therefore, the assessment still holds good. The proceedings under section 148 of the Income-tax Act to reopen the assessment did not result in order of reassessment. The time limit for reassessment is also lapsed. Now it appears that the notice under section 153(C) has been issued. Hence, it is the contention that merely on the basis of the some search said to have taken place in third party premises and statements recorded from 3rd parties the prosecution cannot be launched by the Deputy Director of Income-tax Department, who is not competent to launch the prosecution for the offences under section 276(C) and 277 of the Income-tax Act. It is his submission that none of the ingredients to attract the offence under section 276(C) of the Income-tax Act is made out and no materials unearthed by the searching officer or the Deputy Director. Therefore, the complaint lodged by the Deputy Director is not maintainable in the eye of law. Only the Assessing Officer who records the finding on the basis of the search materials that there is a wilful attempt to evade any tax, or any another person authorised by him is competent to file a complaint as per Section 195 of the Cr.P.C. Hence it is his contention that the alleged offences making false statement or wilful attempt to evade any tax cannot be inferred. Without any finding as to the nature of the escaped income or false Return, the Deputy Director of Income-tax cannot assume the role of fact finding authority and lodge a complaint for the offences referred above.

6(*b*). Further it is his submission that since the assessment officer deemed to be a Civil Court, all the proceedings deemed to be a judicial proceedings any statement which is false and an attempt to evade tax, prosecution can be launched only under section 195 of the Cr.P.C. Section 195 of the Cr.P.C is an exception to the general rule. Any false statements or returns filed before the authority only such authority or their subordinate as directed alone competent to file complaint under section 195 Cr.P.C. It is his further contention that on the basis of the very complaint there is no materials to proceed against the accused. It is well settled position of law by various judgments of the Apex Court that prosecution must await the outcome of the assessment or reassessment proceedings. Whereas in this case the very competence of the complainant is questioned. It is his further contention that the position of law in this regard has been adopted as a policy of the Government for launching the prosecution. It is the policy of the Government that the prosecution has to be launched after the assessment of tax or penalties imposed by the ITAT. It is his submission that the Revenue mainly relied upon the case of *P.Jayappan* v. *S.K.Perumal, First Income-Tax Officer, Tuticorin* [1984 (Supp) Supreme Court Cases 437]wherein it is held that the prosecution can be launched irrespective of pendency of the assessment or re-assessment proceedings. His contention is that the above case is distinguished by the subsequent judgements of the Apex Court. At any event, his contention is that the prosecution at this stage is premature and launched by the incompetent person. It is also submitted by the learned Senior Counsel that the Department cannot avoid the rigour of Section 195 of Cr.P.C. by avoiding the IPC Offences.

6(*c*). It is his further contention that the materials relied by the prosecution is not admissible in evidence. The so called print outs allegedly taken from the cloned copies are not admissible. Further, third party statements also cannot be pressed into service as against the assessee. Assessees never incriminated themselves in the statement recorded by the Department. Further, electronic records are not admissible without the originals being produced by the owners. Wherein in this case, the alleged search said to have been taken in the premises of the purchaser of the land from the assessee has not supported the prosecution. They have not even come before the Court to substantiate their version. Therefore, without any materials and with the inadmissible documents the prosecution has to fail.

6.(*d*) In support of his contentions, the learned Senior Counsel Mr. Kapil Sibal relied on the following judgments :

1. *Basir-Ul-Huq and others* v. *The State of West Bengal, Nur-Ul-Hudav, The State of West Bengal* [1953 AIR 293]
2. *Lalji Haridas* v. *State of Maharashtra and another* [1964 AIR 1154]
3. *Babita Lila and another* v. *Union of India* [2016 (9) Supreme Court Cases 647]
4. *Uttam Chand and others* v. *Income-tax Officer, Central Circle, Amridsar* [1982 (2) Supreme Court Cases 543]
5. *G.L.Didwania and another* v. *Income-tax Officer and another* [1995 Supp. (2) Supreme Court Cases 724]
6. *Harish Dahiya @ Harish & Another* v. *Teh State of Punjab and Ors.* [2019 SCC Online Sc 1452]
7. *Commissioner of Income Tax, Mumbai* v. *Bhupen Champak Lal Dalal and another* [2001 (3) Supreme Court Cases 459]
8. *Commissioner of Income-tax , Bhopal* v. *Shelly Products and Another* [(2003) 5 SCC 461]
9. *Thanjai Murasu and others* v. *Income-tax Officer* [1998 SCC OnLine Mad 1393]
10. *Arjun Panditrao Khotkal* v. *Kailash Kushanrao Gorantyal and others* [Decision of the Supreme Court in C.A.No.20825 - 20826 of 2017.]

7(*a*) Mr. P.S. Raman learned Senior Counsel appearing for the 1st Petitioner in Crl.R.C.No.511 of 2020 adopting the arguments of Mr. Kapil Sibal in entirety also submitted that as far as petitioner in Crl.R.C.No.511 of 2020, Returns filed by her in the year 2015-16 holds good and his further submission is that the entire complaint against the petitioner in the above revision is also do not contain any material to proceed. There is no evidence available on record to show that she has given a false declaration or evidence before the authority. No false statements given before the so called Deputy Director of Income Tax. Hence, the complaint lodged by him is not maintainable and she has to be discharged from the complaint.

7(*b*) The learned Senior Counsel further submitted that the original Returns filed in the year 2015-16 has not been *set aside* and still holds good. Reassessment is lapsed by period of limitation. Once assessment is confirmed, there cannot be parallel prosecution. Even in the complaint lodged by the Deputy Director of Income-tax Act, there is no material available to show that the Revision Petitioner in Crl.R.C.No.511 of 2020 made false declaration or given a false evidence before the authority. Hence, it is submitted that the so called alleged false declaration given before some other officer, only such officer has to give a finding as to the nature of false declaration and returns. Then only the complaint can be launched by such officer or any other officer authorised by the assessing officer. Whereas in this case the assessing officer has not even reassessed the Return filed by the husband and wife. Such view of the matter, the officer who have no way connected with the passing Assessment Order cannot come to the conclusion that there is false verification or false evidence and abetment of such offence. Hence the complaint is not maintainable.

7(*c*) It is the further submission of the learned Senior Counsel that the very complaint lodged by the Deputy Director of Income-tax Department indicates that no false statement made before him. Therefore, the very complaint lodged by the Deputy Director of Income-tax Department should not have been taken cognizance by court below. Being a search officer he cannot make a complaint for filing

false return. It is his contention that to show that there is a wilful suppression or false declaration, the prosecution must show that the loss should have occasioned to Government. In the absence of any finding in that regard, the prosecution cannot be maintainable for the alleged false returns. It is his contention that the capital gain also can be set off as against capital loss. Therefore, merely on the basis of some third party statements, which also not substantiated by the so called maker of the statement, the trial court ought not to have taken cognizance of the offence. Reassessment period is also lapsed. Therefore, without any categorical finding by the Assessing Officer as to the false declaration or suppression of income or capital gain, the prosecution is not maintainable. Learned Senior Counsel has also submitted that the documents relied upon and said to have been seized during search in third party firm is not at all admissible in view of the fact that no certificate as required under section 65B of the Evidence Act is appended to those documents.

7(*d*) The learned Senior Counsel also submitted that the assessment has not been reopened and assessment under section 148 of the Income-tax Act even after the search is also lapsed. Therefore, without any finding as to the nature of the concealment of income or false declaration there cannot be any prosecution by the third party officer who never dealt with such assessment. Merely because the power has been granted to the officer to conduct the search, without recording the finding as to the nature of the concealment of income or false declaration, the prosecution cannot be maintained. It is his further submission that notice has been issued under section 153(C) Income-tax Act. Unless orders are passed recording specific finding as to the nature of the false declaration and concealment of income, the prosecution would not be maintainable. Any assessment order passed either under section 148 or 153(A) of Income-tax Act will be subject to the orders passed by the appellate authority. If such orders are *set aside* by the Appellate Authority, the prosecution will not be maintainable. Even prosecution is launched after such orders under section 153-A of Income-tax Act, even those orders are appealable. Therefore, without any order being passed as to nature of false declaration or false returns by Assessing officer it is premature to file a complaint by incompetent officer.

7(*e*) It is further contention of the learned Senior Counsel that the so called print outs taken from the cloning copy of the hard disk, such print outs acquired the character of print out taken from the secondary evidence, which is not admissible in evidence. The owner of the hard disc was never examined nor given any certificate as required under section 65-B of the Evidence Act. Therefore, those documents cannot be used in evidence. He also relied on the judgments placed by learned Senior Counsel Mr. Kapil Sibal.

8(*a*). The learned Senior Counsel Mr. N.R. Elango appearing for the 2nd Petitioner in Crl.R.C.No.511 of 2020 submitted that in the First Law Commission Report, reasons were given as to why the Income-tax Department officer is to be treated as a Civil Court under section 136 of the Income-tax Act. In fact the Law Commission has recommended for including Chapter XXVI of the Code of Criminal Procedure. Whereas Chapter XXVI has not been included in the Act only for the purpose to reduce the work of the officer to record a finding with regard to the "Interest of justice require to lodge a complaint". Whereas, the appeal in the Appellate Tribunals such Chapter XXVI was included. Merely because Chapter XXVI is not in the Section 136 of the Income Tax Act, it cannot be said that the different authority can file a complaint for the alleged false declaration, false statement etc., Hence, his contention is that the defacto complainant in the given cases never recorded any finding as to the nature of the concealment of income or false declaration. Without any finding, the very prosecution itself is not maintainable by the different authority, who has no right to launch the prosecution.

8(*b*) In support of his contention the learned Senior Counsel relied upon the following judgments:

1. *The Chief Commissioner of Income Tax and another* v. *M/s. Pamapathi* [ILR 2008 KAR 16 35]

2. *Y.B. Mahadeva Royal* v. *Virabasava CHikka Roayal and another* [AIR 1948 Privy Counsel 114]
3. *H.Siddiqui* v. *A. Ramalingam* [2011 (4) SCC 240]
4. *J. Yashoda* v. *Shobha Rani* [2007 (5) SCC 730]

9. It is the contention of the learned Standing Counsels of the Income-tax Mrs. Sheela and Mr. Baskaran that the complaints were filed not based on any assessment, it is based on the materials unearthed during the search. The Note Book, Hard discs were seized. Statements under section 131 of the Income-tax was also recorded from the Petitioners and Purchaser of the land. When the materials show that there was evasion and under report of income the prosecution is very well maintainable under sections 276C(1), 277 and 278 of the Income-tax Act. The prosecution can be launched irrespective of any assessment or reassessment order. Therefore, it is not necessary that assessment orders to be finalised to maintain the prosecution. Section 279 of the Income-tax Act authorises the Deputy Director of Income-tax to launch the prosecution. Therefore, merely because the reassessment order has not been passed it cannot be said that the prosecution is not maintainable In this regard the Apex court in *P.Jayappan* v. *S.K.Perumal, First Income-Tax Officer, Tuticorin* [1984 (Supp) Supreme Court Cases 437]this regard has held that prosecution is maintainable. Further contention that when the petitioners were examined under Section131 of the Income-tax Act, they just denied the nature of the materials unearthed during the search. That itself indicate that they filed false Return and Declaration. The materials seized can be tested only in the trial, now the *prima facie* case is made out. Merely because third parities who given statements have not been examined that cannot be a ground to discharge the accused. It is their further contention that what has to be seen in a discharge application is a *prima facie* materials and suspicion. There cannot be any roving enquiry as to the validity of the documents. Hence, submitted that the Deputy Director is competent to lodge the complaint. Such power has been conferred by the Statute.

10. Further, it is their contention that the complaint is not for the offence under section 193 or 195 of the I.P.C. It is lodged for the specific offence under the Income-tax Act, which is permissible under law and the petitioners during the examination under section 131 of the Income-tax Act have not given any explanation with regard to the seized materials from the third parties. According to the learned standing counsels there is no bar to proceed under sections 276, 277 and 278 of the Income-tax Act without IPC offences, which has been held in various judgements. It is their further conention that the notice issued under section 148 of the Income-tax Act has not been lapsed as contended by the Petitioners in fact same has been abated since the notice under Section153 was issued. Hence it is their submission that once the materials were unearthed during search proceedings conducted by such officer. Such search also deemed to be judicial proceedings. The statement recorded under section 132(4) of the Income-tax is admissible in evidence. Therefore, submitted that the prosecution is very well maintainable.

11(*a*). With regard to the electronic evidence, it is the contention that certificate and original can be produced any any stage to prove the contents. Therefore, at this stage it is not germane for consideration to contend that the documents are inadmissible. Hence prayed for dismissal.

11(*b*) In support of their contention they relied upon the following judgements:

1. *T.S. Balaiah* v. *TG.S. Rangachari* [AIR 1969 SC 701]
2. *R. Bharathan* v. *Income-tax Officer* [1980 (2) KLJ 26]
3. *G.S.R. Krishnamurthy* v. *M. Govindaswamy* [1991 SCC Online Mad 580]
4. *R. Vijayalakshmi and Another* v. *Income-tax Officer* [1995 216 ITR 173 Mad.]
5. *Radheshyam Kejriwal* v. *State of West Bengal and another* [2011 (3) Supreme Court Cases 581]

6. *P.Jayappan* v. *S.K.Perumal, First Income-Tax Officer, Tuticorin* [1984 (Supp) Supreme Court Cases 437]
7. *S.R. Arulprakasam* v. *Prema Malini Vasan, Income-Tax Officer* [1987 163 ITR 487 Mad]

12. Heard the learned Senior Counsels, Standing Counsels of Income-tax Department and perused the materials.

13. Before discussing the issues on merits it is also relevant to record that the accused an earlier occasion filed an applications for quash the prosecution in Crl.O.P.No.22136, 22137 of 2019, 1526 and 1527 of 2019 on the ground that the transfer of the cases from the Additional Metropolitan Magistrate court to Sessions Court was not according to law. They also took a stand that since the original Returns still holds good, the prosecution launched on the basis of the statements from the 3rd parties not maintainable. The prosecution was launched even before the reasons for issuing 148 notice was issued. This Court dismissed the above applications. While dismissing the above applications this Court has held that since the complaints were not based on the assessment, they are based on search and seizure, their contention was negatived. Similarly held that third parties statements cannot be gone at this stage, only it has to be seen in the trial for evidentary value. Apart from that Transfer of cases also upheld. Now it appears that the appeal is pending before Honourable Supreme Court. It is relevant to note that the two grounds *viz.*, the third party statements on which the prosecution is relied, and the absence of assessment order the prosecution not maintainable one, already decided in the above O.P., which is pending before the Apex Court. Therefore, this Court is of the view that the same cannot be once again urged in the revision petition. Though much reliance has been placed by Senior Counsels on the judgment *Harish Dahiya @ Harish & Another* v. *Teh State of Punjab and Ors.* [2019 SCC Online Sc 1452]wherein the Apex Court has held that refusing to discharge the Appellants on the ground that the application to quash the entire prosecution already dismissed is not correct such order suffers from abdication of jurisdiction. In the above judgement the Apex Court has held that since the ground for quashing criminal proceedings and reasons for allowing the applications for discharge preferred by the accused are completely different. Order of refusal to discharge is *set aside* and the matter is remitted back. In the above case makes it clear that the discharge was sought on the entirely different grounds. Therefore, this Court is of the view that the two of the grounds raised before this Court were already decided in the O.P. However, it is fairly submitted by both sides that that the other grounds namely inadmissibility of electronic evidence and the competency of the Deputy Director of the Income Tax, to lodge the prosecution was not raised in earlier occasions, it has been raised only in the discharge application. In view of the above, this Court is inclined to decide the competency of the officer to lodge a prosecution and admissibility of electronic evidence.

14. The main reason for lodging the prosecution appears to be some search conducted in two firms by the Income-tax Department and Enforcement Department simultaneously. Based on certain excel sheets and hard discs said to have been seized in the search, the prosecution said to have unearthed the escaped income. In fact it is the case of the prosecution that though the husband and wife have filed a return for the assessment year 2014-15 and 2015-16 respectively, they shown the sale consideration as Rs. 15.33 Crores and Rs. 3.65 Crores as against the original sale consideration of Rs. 21.7175 and Rs. 5.01 Crores respectively. In nutshell, it is the contention of the prosecution that both the husband and wife received cash consideration other than the cheque payment shown in the Return filed for the year 2014-15 and 2015-16 respectively. The payment received in cash were suppressed and not shown. Thereby the prosecution has been lodged at the instance of the Deputy Director of Income-tax Department. He has lodged a complaint as per the power vested in Section 279 of the Income-tax Act. Section 279 of the Income-tax Act deals with the previous sanction of the principal commissioner or Commissioner (Appeals) or the appropriate authority to proceed against for an offence under section 275A (275B),

section 276, section 276A, section 276B, section 276BB, section 276C, section 276CC, section 276D, section 277 section 277A or section 278 of the Income-tax Act. The very reading of the Section 279 of the Income-tax Act clearly indicates that to proceed against any person for the offences referred in Section 279 of the Income-tax Act, previous sanction of the Principal Commissioner or Commissioners (appeal) or the Appropriate Authorities is required. In the given case, the prosecution has been launched for the offences under section 276C(1) and 277 of the Income-tax Act as against the husband Mr. Karti P Chidambaram Revision Petitioner in Crl.R.C.No.510 of 2020 and for the offences under section 276C(1), 277 and 278 of the Income-tax Act as against both the wife and husband *viz.*, Mr. Karti P Chidambaram and Tmt. Srinidhi Karti Chidambaram, the Revision Petitioners in Crl.R.C.No.511 of 2020.

15. It is useful to refer Section 276 C(1) and 276C(2) of the Income-tax Act.

> "276C. *Wilful attempt to evade tax, etc*.—(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable 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,-
>
> (*i*) in a case where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;
>
> (*ii*) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine."
>
> (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 three years and shall, in the discretion of the court, also be liable to fine.
>
> *Explanation*.— For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person-
>
> (*i*) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement;
>
> or
>
> (*ii*) makes or causes to be made any false entry or statement in such books of account or other documents; or
>
> (*iii*) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or
>
> (*iv*) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.]

16. On perusal of the above, to attract the offence under section 276 (C) the following ingredients must be available.

(*a*) Wilfully attempts to evade any tax

(*b*) wilfully attempts to evade any penalty; or

(*c*) wilfully attempts to evade any interest chargeable or imposable under this Act; or

(*d*) under reports his income.

17. The explanation further indicates that the expression "wilfully attempts" employed in the above provision is an inclusive one. The explanations makes it very clear that to maintain the prosecution, the so called false entry or statement containing the books or account or other documents ought to have been in the possession or control of such person or and such person makes any false entry or statement in such a books of account or other document or wilfully omitted or caused to be omitted any relevant entry or statement in such books of account or other documents; or causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act. The essential ingredients of the above sections makes it clear that any statements or incriminating materials either should come from the accused or very strong material unearthed during search or survey are required to maintain prosecution under section 276C or 277 of the Income-tax Act.

18. In the light of the above provision when entire complaint read same show that the Survey under section 133(A) was carried out in the case of M/s. Advantage Strategic Consulting Pvt. Ltd., and other entities on 1-12-2015 and the so called excel sheets containing certain entries with regard to sale of the properties said to have been unearthed by the department and the department were aware of these documents as early as in the year 2015. Thereafter, the search said to have been carried out in M/s Agni Estates and Foundation Pvt. Ltd., the so called purchaser of the property on 5-7-2018. It is relevant to note that the complaint is totally silent about the fact that whether the assessees, *i.e.,* the accused are either director or control over the said firms. Whereas in the evidence in the pre-stage cognizance it is introduced that the different entity said to have been searched and the materials were seized. That apart the entire reading of the complaint makes it clear that the accused never incriminated themselves in the statements recorded by the raiding officers at any point of time. When the officers confronted the accused Karthi Chidambaram he denied the complicity and maintained that what was the Return filed by him is correct and the statements recorded from the third parties is no way connected his Return. In the entire proceedings while examining the accused Karthi Chidambaram has maintained that the Return filed by him for the Assessment Year 2014-15 is correct and denied the prosecution version. In fact the officer who had lodged the complaint in fact formed the opinion that there is an offence. He has recorded in his very complaint itself that mere denial of such statements and records seized reflected the cash component cannot be accepted. He has recorded as follows: "since the accused has denied the receipt of cash portion and it is clear that the accused has wilfully attempted to evade the payment of tax by concealing the income through sale of the property. This Court is also conscious of the fact the while deciding the application for discharge only the complaint and materials placed by the prosecution are germane for consideration. The basis for lodging the complaint on the entirety read indicate that it is only a formation of the opinion by the Deputy Director of the Income-tax Department to lodge the complaint.

19. It is to be noted that all the proceedings before the Income-tax Officer, particularly, assessment proceedings are deemed to be a civil proceedings as per Section 136 of the Income-tax Act. Section 136 of the Income-tax reads as follows:

> "136. Proceedings before income- tax authorities to be judicial proceedings:
>
> Any proceeding under this Act before an income- tax authority shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code, 18603 (45 of 1860) 4 and every income- tax authority shall be deemed to be a Civil Court for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974)]. D.-Disclosure of information."

20. As indicated above Section 136 of the Income-tax Act, clearly spelt out the nature of the proceedings under the Income-tax Act. When all the proceedings before the Assessment Officer under the Act deemed to be judicial proceedings and officer deemed to be a civil court, any such false declaration or false returns filed before the Assessing Officer such act of the assessee certainly punishable under section 193 of I.P.C. In such case there must be finding to the effect that the statement given by the assessee during the assessment proceeding is false, has to be recorded by the officer concerned in the reasseement proceedings. Without finding recorded, this Court is of the view that the prosecution cannot be launched by merely on the basis of some statements said to have been recorded from third parties.

21. Even Income-tax search proceedings also held to be a judicial proceedings and such authority deemed to be a judicial authority within the meaning of Section 193 and 196 of I.P.C. as held in *Bapitha Lila and Another* v. *Union of India* [(2016) 9 SCC 647] Now it is the contention of the prosecution that on the basis of the false statement and under reporting the sale component, the prosecution has launched. It is to be noted that both the assessees never incriminated before the raiding officer or the Deputy Director during the search. What was stated in the statement that, one of the assessees reiterated his Returns filed earlier is correct and denied the prosecution version. The spouse of the one of the assessees has given a statement to the effect that all transaction is known to her husband only. Such statement cannot be construed to be a false statement even before the authority or to be construed an abetment for false return etc., Further the assessees never done any act before the authority who lodged the complaint to attract the offence under section 276 of the Income-tax Act also. Even Raiding Officer is deemed to be a civil court and the proceedings before are to be a judicial proceedings any offence committed before such authority, the complaint can be lodged only following the procedure under section 195 Cr.P.C.

22. Section 195(*b*) of Cr.P.C. Deals with taking cognizance of the certain category of offences *i.e.*, under Section 193 to 196 (both inclusive) 199, 200, 205 to 211(both inclusive) and 228 of I.P.C., alleged to have been committed in, or in relation to, any proceeding in any Court. Section195 (*b*) reads as follows:

> "195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.
>
> (1) No Court shall take cognizance-
>
> (*a*) (*i*) of any offence punishable under sections 172 to 188 (both inclusive) of the Indian Penal Code (45 of 1860), or
>
> (*ii*) of any abetment of, or attempt to commit, such offence, or
>
> (*iii*) of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;
>
> (*b*) (*i*) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or
>
> (*ii*) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or
>
> (*iii*) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub- clause (*i*) or sub-clause (*ii*), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate."

23. Admittedly, in this case neither the false Return nor any false statement or verification done before the Deputy Director of Income-tax Act to invoke such provision. Prosecution stand is that since some materials have seized in connection with the under Reporting by the accused, prosecution is very well maintainable. In *Basir-Ul-Huq and Ors*. v. The *State of West Bengal* [1953 AIR 293] the Honourable Supreme Court has held as follows:

> "Though, in our judgment, section 195 does not bar the trial of an accused person for a distinct offence disclosed by the same facts and which is not included within the ambit of that section, it has also to be borne in mind that the provisions of that section cannot be evaded by resorting to devices or camouflages. The test whether there is evasion of the section or not is whether the facts disclose primarily and essentially an offence for which a complaint of the court or of the public servant is required. In other words, the provisions of the section cannot be evaded by the device of charging a person with ail offence to which that section does not apply and then convicting him of an offence to which it does, upon the ground that such latter offence is a minor offence of the same character, or by describing the offence as being one punishable under some other section of the Indian penal Code,, though in truth and substance the offence falls in the category of sections mentioned in section 195, Criminal Procedure Code. Merely by changing the garb or label of an offence which is essentially all offence covered by the provisions of section 195 prosecution for such an offence cannot be taken cognizance of by mis- describing it or by putting a wrong label on it. Before concluding, reference nay also be made to the decision of the Federal Court in *Hori Ram Singh* v. *The Crown*(1). The appellant in that case was charged (1) [1939] F.C.R. 159. "

24. The above judgment makes it very clear that the provision under section 195 cannot be evaded by the device of charging a person with an offence to which that section does not apply and then convicting him of an offence to which it does, on the ground that the latter offence is a minor one of the same character, or by describing the offence as one punishable under some other section of the Indian Penal Code, though in truth and substance the offence falls in the category of sections mentioned in section 195, Criminal Procedure Code.

In *Lalji Haridas* v. *State of Maharashtra and Another* [AIR 1964 SC 1154]in a majority view the Apex Court has held that the proceedings before the Income-tax officers deemed to be a judicial proceedings; any false statement given before him deemed to be made within the meaning of 193 of I.P.C. The Apex Court while dealing with Section 37(4) Income-tax (old Act) held that any false evidence or declaration given any proceeding under the Act deemed to be a judicial proceedings and only complaint is maintainable as contemplated under section 195 of Cr.P.C.. It is also held that Section 195 of the CR.P.C. provides for exception to the ordinary rule that any person can make a complaint in respect of commission of an offence triable under section 4(*h*) of the Cr.PC.

25. The Apex Court in *Babita Lila and Another* v. *Union of India* [(2016) 9 Supreme Court Cases 647]has held that the complaint made by the Deputy Director of Income-tax Department for alleged false statement made during the income tax search proceedings under section 131 of the Income-tax Act not maintainable. Such complaint cannot be maintainable by the Deputy Director of Income Tax Department as he is not a court or forum or authority to whom appeal would lie from any decision or action of the Income-tax Officer named in 131 proceedings.

26. In the above case search operation was conducted at the residence of the appellants/husband and wife, at both Bhopal and Aurangabad, and statements were recorded on oath under section 131 of the Income-tax Act. In such a statement they made a statement to the effect that they have no locker either in individual names or jointly in any bank. Later, it transpired that they did have a safe deposit locker at Aurangabad, thereafter complaint was registered by the Deputy Director of Income Tax, Bhopal. One of the issues in the above case before the Apex Court is whether the Deputy Director of Income Tax,

Bhopal was competent to lodge the complaint under section 195 Cr.P.C. against the appellant/accused making a false statement on oath during the search operation carried by the Income-tax authorities. The Apex Court considering the various judgments particularly in *Lalji Haridass* v. *State of Maharashtra* [AIR 1964 SC 1154]and held that Section 195 Cr.P.C.is an exception to the ordinary rule and further held that the Deputy Director before whom no such statement was made. The only statement was recorded by the searching officer. Therefore, the Deputy Director has no right to lodge a complaint.

27. In *Thanjai Murasu and others* v. *Income-tax Officer* [2001 (247) ITR 465 MAD.] this Court while quashing the complaint lodged under section 276C of Income-tax Act, has held that when the complaint was not on discovery of certain facts unearthed during a raid. It was an opinion drawn on examination of witnesses, regarding the vouchers, which opinion was not accepted by the appellate forum, held that the complaint is not maintainable.

28. In *Uttamchand and Others* v. *Income-tax Officer, Central Circle, Amritsar* [(1982) 2 SCC 543]the Honourable Apex Court has held that when the tribunal has passed judgement that firm was genuine, the complaint lodged on the ground that for filing false return quashed.

29. In *P.Jayapan* v. *S.K.Perumal,* [1984 (Supp) SCC 437]the Apex Court has held that pendency of reassessment proceeding cannot be a bar to registration of criminal Proceedings under sections 276 and 277 of the Income-tax Act. However holding note of caution in para 6 of the above judgement the Apex Court held that in an appropriate case, the Criminal Court may adjourn or postpone the hearing of the criminal case in exercise of its discretionary power under section 309 of the Cr.P.c. if the disposal of any proceeding under the Act which has a bearing on the proceedings before it is imminent so that it may take also into consideration the order to be passed therein. The prosecution mainly relied upon this Judgement to contend that pendency of reassessment proceedings cannot be a bar to institution of the criminal prosecution under section 276C and 277 of the Income-tax Act. In the above case, search was conducted at the residence of the Assessee under section 132 of the Act, which resulted in the seizure of several documents and account books which revealed the suppression of purchase of chicory seeds, the existence of several bank accounts, fixed deposits, investments in the name of his wife and daughters and several bank accounts not disclosed in the statements filed along with the return. When the incriminating material seized from the very assessee and the statement under section 132 of the Income-tax Act from him, the Apex Court has held that there is no bar for institution of criminal prosecution for the offence under section 276C and 277 of the Income-tax Act.

30. In *G.L. Didwania & Another* v. *Income-tax Officer and Another [1995 Supp* (*2*) *SCC 724]* the Honourable Supreme Court has held as follows:

> "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 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."

P.Jayappan's case (*supra*) has also referred in the above judgment.

31. In *Commissioner of Income Tax, Mumbai* v. *Bhupen Champal Lal Dalal & Another* [(2001) 3 SCC 459] the Apex Court has held as follows:

> "3. The prosecution in criminal law and proceedings arising under the Act are undoubtedly independent proceedings and, therefore, there is no impediment in law for the criminal proceedings to proceed even during the pendency of the proceedings under the Act. However, a wholesome rule will have to be adopted in matters of this nature where courts have taken the view that when the

conclusions arrived at by the appellate authorities have a relevance and bearing upon the conclusions to be reached in the case necessarily one authority will have to await the outcome of the other authority.

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

32. Similarly in a judgment in *K.C.Builders and another* v. *Assistant Commissioner of Income-tax* [(2004) 2 SCC 731]the Honourable Supreme Court has held that the Tribunal has *set aside* the order of concealment of income and penalties, there is no concealment in the eye of law. Therefore, the prosecution cannot be proceeded with the complainant and further proceedings will be illegal and without jurisdiction.

33. In *Radheshyam Kejriwal* v. *State of West Bengal and Another* [(2001) 3 SCC 581] the Honourble Apex Court has held as follows:

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

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

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

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

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

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

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

(*vii*) In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of

facts and circumstances can not be allowed to continue underlying principle being the higher standard of proof in criminal cases."

34. In *Commissioner of Income-tax , Bhopal* v. *Shelly Products and Another* [(2003) 5 SCC 461] the Apex Court held that if the assessing authority cannot make fresh assessment in accordance with the provisions of the Act it amount to deemed acceptance of the return of income furnished by the assessee. In such a case the Assessing Authority is denuded of its authority to verify the correctness and completeness of the return, which authority it has while framing a regular assessment.

35. In *T.S. Balaiah* v. *TG.S. Rangachari* [AIR 1969 SC 701]the Apex Court considering the provisions of General Clauses Act and held that there is no bar for trial or conviction of the offender under both enactments but there is only a bar to the punishment of the offender twice for the same offence. In other words, the sanction provides that where an act or omission constitutes an offence under two enactments, the offender may be prosecuted and punished under either or both the enactments.

36. In *R. Bharathan* v. *Income-tax Officer* [1980(2) KLJ26]the Kerala High Court held that complaint under section 193 or 196 I.P.C. in a different authority not maintainable, however, held that Section 276(C)(1) and Section 277(*i*) of the Income-tax Act are independent of Section 193 or 196 I.P.C.

37. In *G.S.R. Krishnamurthy* v. *M. Govindaswamy* [1991 SCC Online Mad 580]also held that in the course of the same transaction distinct offence are made out apart from commission of offences falling within the ambit or the purview of Section 195(1)(*b*)(*i*) Cr.P.C. and a complaint had been lodged in respect of all the offences without a complaint emanating from the court under the provisions of section 195(1)(*b*)(*i*), Criminal Procedure Code, the entirety of the prosecution shall not stand vitiated and, if at all, that part of the prosecution as relatable to the offences falling within the ambit of section 195(1)(*b*)(*i*), Criminal Procedure Code, alone would become invalid and the prosecution in respect of other offence has to be continued in the manner allowed by law.

38. In the above case also factually distinguishable wherein also the accused in the statement recorded during the course of the search has confessed to having received the amount. only on the strong materials collected from the accused the prosecution launched.

39. In *Commissioner of Income-tax* v. *Kabul Chawla* [(2016) 380 ITR 573 (Delhi)]the Division Bench of Delhi High Court, after considering the various judgments summaries a legal position as follows:

"37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. Once a search takes place under section 132 of the Act, notice under section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.

iii. The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or

information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (*i.e*. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.

vii. Completed assessments can be interfered with by the AO while making the assessment under section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment."

40. The above judgement makes it clear that at the moment the search is conducted the proceedings have to be initiated under section 153 and Assessment can be based only on the seized material.

41. A conspectus of various judgments referred above, it can be seen that though the prosecution is permissible during the assessment or reassessment proceedings, the Supreme Court has consistently held that any prosecution must await of any assessment or reassessment proceedings. In *R. Vijayalakshmi and Another* v. *Income-tax Officer* [1995 216 ITR 173 Mad.] it is held that when there is a *prima facie* case for a commission of offence the court has to frame charges without going to the minor details. Absolutely, there is no dispute with regard to the position stated in the above judgement. Whereas in a given case as already discussed in entirety of complaint there is no material available. It is only formation of opinion by the Deputy Director of Income Tax. Further it is not the case of the prosecution that any incriminating materials unearthed by the prosecution from the accused to proceed under section 276(C) of the Income-tax Act. In Jayappan Case, incriminating evidence including statements under section 132(4) of the Income-tax Act was recorded from the accused. Other cases relied upon by the Revenue also incriminating materials seized from the accused and statements under section 132(4) of the Income-tax Act also recorded. Such circumstances the courts held that prosecution under section 276(C) and 277 of the Income-tax Act can be proceeded independently irrespective of any assessment or reassessment orders. Whereas in this case no material seized from accused nor any incriminating statements were recorded from accused to contend that same is admissible under section 132(4) of the Income-tax Act. Mere denial of prosecution version cannot at any stretch of imagination construed as incriminating evidence.

42. In *Babita Lila and another* v. *Union of India* [2016 (9) Supreme Court Cases 647] the Honourable Apex Court held that despite incriminating statements were recorded during search by Income-tax Officer, the Deputy Director is not competent to lodge complaint. It is to be noted that though power to file complaint is granted under statute as per Section 279 of the Income-tax Act, the Honourbale Apex Court held that the Deputy Director is not a court or forum or authority to whom appeal would lie from any decision or action of the Income-tax officer named in 131 proceedings and quashed the complaint.

43. In majority of judgments referred above the Honourable Supreme Court has consistently held that any prosecution must await the outcome of the assessment or reassessment proceedings. Though the offences under section 276, 277 and 278 are distinct offences and the Deputy Director can launch the

prosecution as per Section 279 of the Income-tax Act, it is to be noted merely because the power was conferred to the Deputy Director to launch a complaint on sanction merely on the basis of some materials said to have been collected from third parties, the prosecution will not be maintainable. The intention of the legislature is only to prosecute the persons where concrete materials unearthed during the search or survey etc., It is also fortified by the very policy of the Government. It is useful to refer Circular No. 24 of 2019 issued by the Government of India, Ministry of Finance, Department of Revenue (Central Board of Direct Taxes). The circular reads as follows:

" Circular No. 24/2019

F.No.285/08/2014-IT(Inv. V)/349

Government of India

Ministry of Finance

Department of Revenue

(Central Board of Direct Taxes)

****

Room No. 515, 5th Floor, C-Block,

Dr. Shyama Prasad Mukherjee Civic Centre,

Minto Road, New Delhi -110002.

Dated: 9-9-2019

Subject: Procedure for identification and processing of cases for prosecution under Direct Tax Laws-reg.

The Central Board of Direct Taxes has been issuing guidelines from time to time for streamlining the procedure of identifying and examining the cases for initiating prosecution for offences under Direct Tax Laws. With a view to achieve the objective behind enactment of Chapter XXII of the Income-tax Act, 1961 (the Act), and to remove any doubts on the intent to address serious cases effectively, this circular is issued .

2. Prosecution is a criminal proceeding. Therefore, based upon evidence gathered, offence and crime as defined in the relevant provision of the Act, the offence has to be proved beyond reasonable doubt. To ensure that only deserving cases get prosecuted the Central Board of Direct Taxes in exercise of powers under section 119 of the Act lays down the following criteria for launching prosecution in respect of the following categories of offences.

(*i*) Offences u/s 276B: Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B.

Cases where non-payment of tax deducted at source is Rs. 25 Lakhs or below, and the delay in deposit is less than 60 days from the due date, shall not be processed for prosecution in normal circumstances. In case of exceptional cases like, habitual defaulters, based on particular facts and circumstances of each case, prosecution may be initiated only with the previous administrative approval of the Collegium of two CCTT/DGIT rank officers as mentioned in Para 3.

(*ii*) Offences u/s 276BB: Failure to pay the tax collected at source.

Same approach as in Para 2.i above.

(*iii*) Offences u/s 276C(1): Wilful attempt to evade tax, etc.

Cases where the amount sought to be evaded or tax on under -reported income is Rs. 25 Lakhs or below, shall not be processed for prosecution except with the previous administrative approval of the Collegium of two CCIT/DGIT rank officers as mentioned in Para 3.

Further, prosecution under this section shall be launched only after the confirmation of the order imposing penalty by the lncome Tax Appellate Tribunal.

(*iv*) Offences u/s 276CC: Failure to furnish returns of income.

Cases where the amount of tax, which would have been evaded if the failure had not been discovered, is Rs. 25 Lakhs or below, shall not be processed for prosecution except with the previous administrative approval of the Collegium of two CCIT/DGIT rank officers as mentioned in Para 3.

3. For the purposes of this Circular, the constitution of the Collegium of two CCIT/DGIT rank officers would mean the following-

As per section 279(1) of the Act, the sanctioning authority for offences under Chapter XXII is the Principal Commissioner or Commissioner or Commissioner (Appeals) or the appropriate authority. For proper examination of facts and circumstances of a case, and to ensure that only deserving cases below the threshold limit as prescribed in Annexure get selected for filing of prosecution complaint, such sanctioning authority shall seek the prior administrative approval of a collegium of two CCIT/DGIT rank officers, including the CCIT/DGIT in whose jurisdiction the case lies. The Principal CCIT (CCA) concerned may issue directions for pairing of CCsIT/DGIT for this purpose. In case of disagreement between the two CCIT/DGIT rank officers of the collegium, the matter will be referred to the Principal CCIT(CCA) whose decision will be final. In the event that the Pr. CCIT(CCA) is one of the two officers of the collegium, in case of a disagreement the decision of the Pr. CCIT(CCA) will be final.

4. The list of prosecutable offences under the Act specifying the approving authority is annexed herewith.

5. This Circular shall come into effect immediately and shall apply to all the pending cases where complaint is yet to be filed.

6. Hind version shall follow.

Encl: As above

(Mamta Bansal)

Director to the Government of India"

44. It is stated in the circular that the prosecution under section 276(C)(1) shall be launched only after the confirmation of the order imposing penalty by the Income Tax Appellate Tribunal. Further, Circular No. 5 of 2020 dated 23-1-2020 also modified in Circular No. 24 of 2019, wherein it is stated as follows:

"2. ... ... Accordingly, the existing para 2(iii) of the aforementioned Circular is mentioned as under:-

"*iii*. Offences u/s 276C(1): Wilful attempt to evade tax, etc.,

Cases where the amount sought to be evaded or tax on under-reported income is Rs. 25 lakhs or

below, shall not be processed for prosecution except with the previous administrative approval of the Collegium of two CCIT/DGIT rank officers as mentioned in Para 3.

Further, the prosecution under this section shall be launched ordinarily after the confirmation of the order imposing penalty by the Income-tax Appellate Tribunal. Further prosecution in other cases, including cases covered u/s 132/132A/133A, may be launched at any stage of the proceedings before an Income-Tax authority, with the previous approval of the Collegium of two CCIT/DGIT rank officers as mentioned in para 3 of the circular."

The above circular also makes it clear that the policy has been adopted by the Government for launching the prosecution.

45. The very explanation provided under section 276C makes it clear that such incriminating materials and documents ought to have been seized from the accused. Unless strong materials seized from accused or any incriminating statement recorded from accused the prosecution has to wait till the finding recorded by Assessing Officer. In view of the same, complaint filed by the Deputy Director for the offence allegedly committed while filing Returns and false verification filed before the Assessing Authority, this Court is of the view that only the Assessing Authority or any other other officer authorised by that officer is competent to file a complaint, not by the Deputy Director. As discussed earlier no incriminating statements nor any documents seized from the accused either under survey or search. What is sought to be used against the accused is some statements said to have been contained in hard disc seized in some other entity as to the cash component and other third parties. As held by the Division Bench of Delhi High Court, reassessment or assessment order has to be passed only based on the materials seized during search. On such assessment, when the Assessment Officer comes to the conclusion that there is a wilful suppression to evade tax or under reporting etc., certainly the complaint is maintainable. In the case on hand, the Deputy Director had filed the complaint merely on the basis of his opinion. It is also relevant to note that the survey was originally conducted on 1-12-2015. Despite the above facts, scrutiny under 143 of the Income-tax Act, in respect of one of the assesses was completed on 30-12-2016. Despite unearthing some materials, the assessments were scrutinised and completed in respect of both the Assessees before search in the year 2018. Thereafter it appears that notice under section 148 was also issued. However no Assessment Order has been passed. It is the contention of the Department that as the Notice under section 153(C) of the Income-tax Act has issued, previous Returns are abated and it has to be passed afresh.

46. Be that as it may. Now, the fact remains that the prosecution was launched for the alleged offence under section 276C and 277. As already indicated, there must be material to show that there was wilful attempt to evade tax, penalty, interest or under report etc., Admittedly, Returns have been filed before the Assessing Officer. Merely because search has been conducted and some third parties statements were recorded and further they have also not been examined, this Court is of the view that unless a finding recorded by the Assessing Officer as to wilful attempt to evade tax or filing false verification, the complaint filed by the Deputy Director is not maintainable. Only the Assessment Officer shall reassess the total income of six Assessment year, then Assessing Authority take note of the income disclosed in the earlier report any undisclosed income found during the search and find out what is the total income each year and pass an Assessment Order. When such finding is given and the Assessing Officer come to such conclusion that there is under report or the wilful attempt to evade tax or penalty, it is well within the power of the Assessment Office to proceed against the accused for penal action. There cannot be any bar for the Department to take a penal action after reassessment order is passed. Merely because statute gives power to certain officer to launch the complaint when none of the ingredients ofthe offence is made out before the officers empowered under statute they cannot maintain complaint, merely on the ground that the power conferred under the statute. The very object of the statute as could be discernible under section 276 is that to maintain such complaint by the Deputy Director of Income-tax

Act, the materials seized or collected during search should unerringly pointing towards the accused, not mere statements of some third parties and some entries made by them. Section 277 of the Income-tax Act reads as follows:

> "277. False statement in verification, etc. If a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable,-
>
> (*i*) in a case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, exceeds one 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 three years and with fine."

47. To attract the offence the assessee did not do any of the act required to constitute the offence of 277 of Income-tax Act before the Deputy Director of the Income-tax Department. Whereas it is admitted that the Returns were filed before the Assessing Officer by the Assessee and the verification is also done by them while fling the return. Whether such verification are false or not has to be decided by the Assessing Officer before whom such verification has filed. Further, mere showing ignorance by one of the assessees by maintaining that only her husband is aware of the return such conduct cannot be construed as abetment to attract the offence under section 278 of the Income Tax Act. To attract the offence of abetment there must be materials to show that she has instigated or invites her husband to commit offence. Therefore, this court is of the view that the offence under section 278 not at all attracted against accused. Now, the prosecution contention is that merely because the accused signed the statement while recording statement under section 131 of the Income-tax Act, such statement can be construed as verification. No false statement whatsoever given before the Deputy Director to contend that he is competent to launch the complaint. Mere keeping silent does not amount to giving a false evidence, merely the accused or assessees did not accept every accusation made against them such conduct cannot be taken by the Department to contend that they committed an offence. If the contention of the prosecution that when the accused confronted with the statement of third parties they did not explain properly such conduct amounts to false statement before the Deputy Director, therefore the complaint is maintainable is accepted the same will lead to serious consequences. If such contention is accepted by the Court of Law, it is easy for the authorities to summon any assessee under section 131 of the Income-tax Act and make accusations against them when accused or assessee denies, then it is easy for the authorities for launching prosecution against anybody as per their like and dislike. Therefore, such contention by the prosecution that false statement made while recording statement under section 131 of the Income-tax Act also amounts to false evidence, therefore, complaint is maintainable, at no stretch of imagination can be countenanced.

48. The Apex Court in Jayappan's Case and other judgments where the High Courts of Madras and Kerela have held that the complaint under sections 276C and 277 of the Income-tax Act is maintainable irrespective of the Assessment orders where the complaints were lodged on the basis of the very statement of the accused/assessee and incriminating materials collected from him. Therefore, merely because the power vested to lodge a complaint by the Deputy Director every case the prospection cannot be launched merely on the conferment of such power without any material. Only in the cases where incriminating materials seized from the possession of the assessee and any statements which incriminate themselves recorded under 132 (4) of the Income-tax Act or any incriminating evidence collected clinchingly establishes complicity of the accused with the crime, prosecution can be initiated without waiting for the assessment or reassessment proceedings. Otherwise when materials collected are weak and prosecution itself rely them only as corroborative evidence then Department has to wait till the

finding recorded by Assessing Officer. When the very complaint itself launched on the basis of the opinion formed by the Deputy Director of Income-tax Department based on some materials according to them it is only helpful for corroboration, prosecution has to fail and the court has to conclude that such prosecution is without any materials. In such view of the matter this Court is of the view that the complaint filed by the Deputy Director of Income-tax is premature at this stage. Accordingly this submission is answered against the Respondent.

49. As far as the contention as to admissibility of Electronic Evidence is concerned, this Court is of the view that such contention become insignificance since this court has already concluded the very launching of the prosecution is not proper and the Deputy Director of prosecution is incompetent to file the complaint in a given set of facts. Though the certificate can be produced at appropriate stage as per the dictum laid down by the Apex Court in *Arjun Panditrao Khotkar* v. *Kailash Kushanrao Gorantyal and others* [C.A.Nos.20825-20826 of 2017 Supreme Court dated 14-7-2020]this court is of the view that since this Court has already held that the very complaint is not maintainable restrain itself to further discussion with regard to the validity and admissibility of those documents, if any finding is recorded by this Court as to the admissibility of Electronic Evidence, same will have impact on the prosecution if any lodged at later stage by the Assessing Officer as indicated in para 46of this Order.

50. In fine the Revision Petitions allowed. The prosecution launched by the Deputy Director is not maintainable and as discussed above the present complaint lodged by the prosecution is premature one. If the Assessing Officer comes to the conclusion in a proceedings under section 153 of the Income-tax Act, it is open to the Department to initiate penal action as per law. With the above observation the Revisions are allowed. Consequently co M.P.s are closed.

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