INCOME TAX : Where petitioner failed to file timely return and prosecution was initiated under sections 276CC and 276C, then a presumption as to culpable mental status of assessee, can be drawn under section 278E, and therefore, it would be for assessee to establish that failure was not wilful

• Petitioner received substantial income as salary in relevant assessment year and also indulged in high end transactions with respect to purchase and sale of mutual funds and with respect to credit card transactions, however failed to file return of income. The burden lies on the assessee to show that he had no wilful intention not to file the return.

• Filing of return within stipulated and mandatory period is a duty cast on assessee who had to declare the income, if the returns are not filed within stipulated period, then, a presumption as to the culpable mental status, can be drawn under section 278E.

• In prosecution offence like section 276CC, there can be a presumption for existence of *mens rea* and it is for accused-petitioner to prove the contrary.

[2021] 131 taxmann.com 341 (Madras)

HIGH COURT OF MADRAS

Raman Krishna Kumar

v.

Deputy Commissioner of Income-tax

C.V. KARTHIKEYAN, J.
CRL.OP.NO.25561 OF 2016 & CRL.MP.NOS.12438 & 12439 OF 2016
OCTOBER 26, 2021

Naveen Kumar Murthi *for the Petitioner.* **L. Murali Krishnan** *for the Respondent.*

ORDER

1. This petition has been filed by the accused in EOCC.No.121/2016 now pending on the file of the learned Additional Chief Metropolitan Magistrate/Economic Offences-I, Egmore, Chennai, under section 482 Cr.P.C., to quash further proceedings in the said Calendar Case.

2. The respondent herein had occasion to file a complaint before the said jurisdictional Court against the petitioner herein for offences under sections 276CC and 276C[1] of the Income-tax Act, 1961, [hereinafter referred to as "the Act, 1961"] with respect to the Assessment Year 2013 - 2014.

3. It is the case of the respondent that the petitioner herein who had taxable income for the Financial Year 2012 - 2013/Assessment Year 2013 - 2014, had not filed the Annual Return as mandated under section 139[1] of the Act, 1961, nor under the extended time under section 139[4] of the said Act. It had been stated that the petitioner herein had received substantial income in the form of salary amounting to Rs. 68,71,731/- and had also indulged in high end transactions with respect to purchase and sale of mutual funds and with respect to credit card transactions.

4. It is the contention of the respondent that owing to non-filing of the Income-tax Returns, suspicions

had arisen over the source of funds for such transactions. It had also been contended that several Show Cause Notices had been issued, but there was no reply by the petitioner herein. Finally, the petitioner had condescended to give a reply on 2-5-2016 for the Show Cause Notice dated 26-4-2016. The respondent contended that the petitioner had deliberately not filed the Income-tax Returns within the stipulated period and therefore, the respondent was not able to assess the income for the escaped assessment, for which the Return should have been submitted.

5. In view of the above facts, complaining that the petitioner herein had committed offences under section 276CC and 276C[1] of the Income-tax Act, 1961, with respect to the Assessment Year 2013 - 2014, a complaint, as aforesaid, had been preferred before the learned Additional Chief Metropolitan Magistrate/EO-I, Egmore, Chennai, which had been taken cognizance as EOCC.No.121/2016.

6. This petition has been filed seeking to quash the said Calendar Case.

7. Heard arguments advanced by Mr. Naveen Kumar Murthi, learned counsel appearing for the petitioner and Mr. L.Murali Krishnan, learned Special Public Prosecutor [Income Tax] appearing for the respondent.

8. Mr. Naveen Kumar Murthi, learned counsel for the petitioner pointed out that the petitioner was not able to file the Returns owing to the fact that the petitioner was under the *bona fide* impression that his erstwhile employer, namely, ITW India Limited, where he was working as General Manager [Automotive Group] during the years 2012-2014, would have filed the Tax Returns in the normal course. Learned counsel stated that the income of the petitioner for the Financial Year 2012 - 2013 was Rs. 45,07,595/-, but, there had been a mistake in Form 26AS filed by the Company on behalf of the petitioner wherein the income was entered as Rs. 68,71,731/-. It was also stated by the learned counsel that the petitioner had paid tax amounting to Rs. 10,21,101/-. It was also pointed out that the petitioner had, thereafter left the said Company and he was not aware of the mistake which had crept in Form 26AS and only when notices had been issued, did the petitioner come to know about this particular mismatch between the information contained in Form 16 and Form 26AS. Thereafter, the petitioner had sent a reply on 2-5-2016 for the Show Cause Notice dated 26-4-2016.

9. Learned counsel submitted that however, the petitioner received yet another notice dated 20-5-2016 under section 148 of the Act, 1961, stating that the petitioner's income would be re-assessed for the Assessment Year 2013 - 2014. He stated that the petitioner had paid an additional sum of Rs. 9,870/- as Self Assessment Tax. Learned counsel lamented that in spite of these steps taken by the petitioner herein, the respondent had preferred a complaint and stated that the petitioner had no intention of committing any offence much less offences under sections 276CC and 276C[1] of the Act, 1961.

10. The learned counsel for the petitioner also stated that it was a *bona fide* mistake on the part of the former employer of the petitioner and the petitioner could not be held liable to answer to the charge levied by the respondent herein.

11. In this connection, the learned counsel for the petitioner relied on the judgment of the Gujarat High Court reported in 1995 213 ITR 307 [Guj] - *Vinaychandra Chandulal Shah* v. *State of Gujarat and Another*, wherein a learned Single Judge had examined a application filed to quash the proceedings initiated owing to non-filing of Returns as per Section 139[1] of the Income-tax Act, 1961. In that particular case, the accused had disclosed total income of Rs. 2,01,380/- and had also paid advance tax and also paid Self Assessment Tax under section 140A of the Act, 1961 after the filing of the Return. The assessment under section 143[3] of the Act, 1961 was determined and the accused thereafter was required to pay tax and interest under section 139[8] of the Act, 1961 and also penalty. The learned Single Judge, after extracting the provisions under section 276C of the Act, 1961, had also examined the word 'evasion' as defined in various judicial dictionaries and had stated that it would require an element

of wilful attempt to evade to pay tax, penalty or interest. It was also stated that there should be evasion to pay tax and only when there is a finding that there is evasion, then a charge can be levied imposing tax, penalty or interest. It was also held by the learned Judge that Section 276 C can be attracted only when a person wilfully attempts to evade payment of any tax, penalty or interest and not otherwise.

12. The learned counsel also relied on the judgment of a learned Single Judge of this Court reported in 1995 [II] CTC 4 [*J.M. Shah* v. *Income-tax Officer,* City Ward III [4], Madras-6] wherein the learned Single Judge had examined the necessity of *mens rea* as an ingredient to constitute the offence under section 277 of the Act, 1961. It was held by the learned Single Judge that unless the assessee knows or believes that the statement or accounts is false, or knows that it is not true or does not believe it to be true, there cannot be an offence under the said provision. In that particular case, the petitioner therein, had been acquitted by the learned Principal Sessions Judge, for the offence under Section 276C of the Act, 1961. A specific finding had been given that omission to include notional rental income was not wilful or wanton and such a finding had become final and the respondent had not taken it up in appeal. It was therefore, concluded that omission for filing the Return was not wilful. In view of that particular fact, the further conviction under section 277 of the Act, 1961, was *set aside* by the learned Single Judge.

13. The learned counsel for the petitioner also relied on the judgment of a learned Single Judge of the Karnataka High Court made in Crl.OP.No.4891/2014 dated 14-6-2019 [M/s. Vyalikaval House Building Cooperative Society Limited rep. by its Secretary *H. Sreenivasa and Others* v. *The Income-tax Department* by the Deputy Commissioner of Income Tax, Central Circle-1[II], Bangalore-560 032]. The petitioner in that particular case, was a Cooperative Society. A search was conducted and assessment proceedings came to be initiated by issuing Notice under section 153A of the Act, 1961. Since there was no compliance, a Show Cause Notice was issued as to why prosecution should not be launched for the offence under section 276CC of the Act, 1961.

Thereafter, the petitioner therein, had filed the Returns of income. They had declared total income and the tax payable thereon. They, however, failed to pay the Self Assessment Tax. The property of the petitioner therein/Society was attached. That was lifted on condition that the property should be brought for sale and the sale proceeds should be remitted to the Department. The petitioner therein/Society had issued a cheque stating that the cheque can be encashed at the time of registration of the Sale Deed. The Department, however, did not encash the cheque. A complaint was lodged before the Court for Economic Offences at Bengaluru, seeking prosecution of the petitioner therein/Society for the offence under section 276C[2] of the Act, 1961. The petitioner therein/Society approached the High Court under section 482 Cr.P.C., to quash the proceedings. The learned Single Judge found that the only circumstance which the respondent relied was non-payment of Self Assessment Tax along with the Return. It was found by the learned Single Judge that though the Returns were filed after much delay, there cannot be an inference that there was an attempt to evade the tax declared in the Returns. It was further held that delayed payment could be a ground to impose penalty or interest, but cannot be a ground to initiate prosecution under section 276C[2] of the Act, 1961. Leaving the doors open for imposing penalty and interest, the criminal proceedings were quashed.

14. The learned counsel for the petitioner further relied on the decision of a learned Single Judge of this Court made in Crl.OP.[MD].No.13383/2019 dated 12-3-2020 [*M/s. Bejan Singh Eye Hospital Private Limited and Others* v. *The Income-tax Officer*, O/o. Principal Commissioner of Income Tax, Madurai rep. By the Assistant Commissioner of Income-tax Circle-I, Nagercoil]. The learned Single Judge had directly referred to the judgment of the Karnataka High Court in M/s. Vyalikaval House Building Cooperative Society [referred *supra*] and held that since the taxes have been paid and there are no dues, the prosecution would only amount to abuse of legal process. The learned Single Judge, therefore quashed the Calendar Case.

15. Per contra, Mr. L. Murali Krishnan, learned Special Public Prosecutor appearing for the respondent/Department, disputed the contentions raised by the learned counsel for the petitioner. According to him, the petitioner had not filed the Returns of Income for the Assessment Year 2013-2014 within the stipulated period. Therefore, Show Cause Notices were continuously issued. The final Show Cause Notice was replied only in the year 2016. It was also contended that the petitioner herein had declared the income of Rs. 68,71,731/- and had also indulged in high end transactions with respect to purchase and sale of mutual funds and with respect to credit cards. Learned counsel stated that the sources for these transactions remained unexplained owing to the non-filing of the Income-tax Returns. He also stated that even the reply to the Show Cause Notice was given after a period of nine months. No explanation was given with respect to the high valued transactions in the purchase and sale of mutual funds and transaction with credit cards. He, therefore stated that there was a wilful and deliberate attempt on the part of the petitioner to defraud the Income-tax Department by not filing the Return of income. Learned Special Public Prosecutor pointed out that filing of Return is mandatory under section 139 of the Act, 1961.

16. The learned Special Public Prosecutor for the respondent/Department relied on a judgment of the Hon'ble Supreme Court of India reported in 2014 [5] SCC 139 [*Sasi Enterprises* v. *Assistant Commissioner of Income Tax*], wherein the Hon'ble Supreme Court had stated that protection as given under the proviso to Section 276CC of the Act, 1961, is not available once there is a failure to file the Return and once such failure is discovered and detected and notices under section 142 or under section 148 of the Act, 1961, had been issued calling for filing of the Return. It had been stated that duty to file the Return under section 139[1] of the Act, 1961, is mandatory and failure to file the Return within the stipulated period would invite compulsory punitive interest as well as prosecution under section 276CC of the Act, 1961. In paragraphs No. 26 to 29, the Hon'ble Supreme Court has held as follows:-

> "26. Section 276CC, it may be noted, takes in sub-section (1) of Section 139, Section 142(1)(*i*) and Section 148. But, the proviso to Section 276CC takes in only sub-section (1) of Section 139 of the Act and the provisions of Section 142(1)(*i*) or 148 are conspicuously absent. Consequently, the benefit of proviso is available only to voluntary filing of return as required under section 139(1) of the Act. In other words, the proviso would not apply after detection of the failure to file the return and after a notice under Section 142(1)(*i*) or 148 of the Act is issued calling for filing of the return of income. Proviso, therefore, envisages the filing of even belated return before the detection or discovery of the failure and issuance of notices under section 142 or 148 of the Act.
>
> 27. We may in this respect also refer to sub-section (4) to Section 139 wherein the legislature has used an expression "whichever is earlier". Both Section 139(1) and Sub-Section (1) of Section 142 are referred to in sub-section (4) to Section 139, which specify time limit. Therefore, the expression "whichever is earlier" has to be read with the time if allowed under sub-section (1) to Section 139 or within the time allowed under notice issued under sub-section (1) of Section 142, whichever is earlier.
>
> So far as the present case is concerned, it is already noticed that the assessee had not filed the return either within the time allowed under sub-section (1) to Section 139 or within the time allowed under notices issued under sub-section (1) to Section 142.
>
> 28. We have indicated that on failure to file the returns by the appellants, income tax department made a best judgment assessment under section 144 of the Act and later show cause notices were issued for initiating prosecution under section 276CC of the Act. Proviso to Section 276CC nowhere states that the offence under section 276CC has not been committed by the categories of assesses who fall within the scope of that proviso, but it is stated that such a person shall not be proceeded against. In other words, it only provides that under specific circumstances subject to the

proviso, prosecution may not be initiated. An assessee who comes within clause 2(*b*) to the proviso, no doubt has also committed the offence under section 276CC, but is exempted from prosecution since the tax falls below Rs. 3,000/-. Such an assessee may file belated return before the detection and avail the benefit of the proviso.

Proviso cannot control the main section, it only confers some benefit to certain categories of assesses. In short, the offence under Section 276CC is attracted on failure to comply with the provisions of Section 139(1) or failure to respond t o the notice issued under Section 142 or Section 148 of the Act within the time limit specified therein.

29. We may indicate that the above reasoning has the support of the Judgment of this Court in *Prakash Nath Khanna* v. *CIT* reported in 2004 [9] SCC 686. When we apply the above principles to the facts of the case in hand, the contention of the learned senior counsel for the appellant that there has not been any willful failure to file their return cannot be accepted and on facts, offence under section 276CC of the Act has been made out in all these appeals and the rejection of the application for the discharge calls for no interference by this Court.

[Emphasis supplied]

17. The learned Special Public Prosecutor also relied on the judgment reported in 2004 [135] Taxman 327 [SC] [*Prakash Nath Khanna* v. *Commissioner of Income Tax*], wherein the Hon'ble Supreme Court examined Section 276CC read with 139 of the Act, 1961 and held as follows:-

"18. Another plea which was urged with some amount of vehemence was that the provisions of Section 276-CC are applicable only when there is discovery of the failure regarding evasion of tax.

It was submitted that since the return under sub-section (4) of Section 139 was filed before the discovery of any evasion, the provision has no application. The case at hand cannot be covered by the expression "in any other case". This argument though attractive has no substance.

19. The provision consists of two parts. First relates to the infractions warranting penal consequences and the second, measure of punishment. The second part in turn envisages two situations. The first situation is where there is discovery of the failure involving the evasion of tax of a particular amount. For the said infraction stringent penal consequences have been provided. Second situation covers all cases except the first situation elaborated above.

20. The term of imprisonment is higher when the amount of tax which would have been evaded but for the discovery of the failure to furnish the return exceeds one hundred thousand rupees. If the plea of the appellants is accepted it would mean that in a given case where there is infraction and where a return has not been furnished in terms of sub-section (1) of Section 139 or even in response to a notice issued in terms of sub-section (2), the consequences flowing from non-furnishing of return would get obliterated. At the relevant point of time Section 139(4)(*a*) permitted filing of return where return has not been filed within sub- section (1) and sub-section (2). The time limit was provided in clause (*b*). Section 276-CC refers to "due time" in relation to sub-sections (1) and (2) of Section 139 and not to sub-section (4). Had the Legislature intended to cover sub- section (4) also, use of expression "Section 139" alone would have sufficed. It cannot be said that Legislature without any purpose or intent specified only the sub-sections (1) and (2) and the conspicuous omission of sub-section (4) has no meaning or purpose behind it. Sub-section (4) of Section 139 cannot by any stretch of imagination control operation of sub-section (1) wherein a fixed period for furnishing the return is stipulated. The mere fact that for purposes of assessment and carrying forward and to set off losses it is treated as one filed within sub-sections (1) or (2) cannot be pressed into service to claim it to be actually one such, though it is factually and really not by

extending it beyond its legitimate purpose.

21. Whether there was wilful failure to furnish the return is a matter which is to be adjudicated factually by the Court which deals with the prosecution case. Section 278-E is relevant for this purpose and the same reads as follows:

"278-E: Presumption as to culpable mental state-

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation: In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact (2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability".

22. There is a statutory presumption prescribed in Section 278-E. The Court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution.

Therefore, the factual aspects highlighted by the appellants were rightly not dealt with by the High Court. This is a matter for trial. It is certainly open to the appellants to plead absence of culpable mental state when the matter is taken up for trial.

23. Looked at from any angle the appeals are without merit and are dismissed."

[Emphasis Supplied]

18. The learned Special Public Prosecutor appearing for the respondent/Department further relied on the judgment reported in 2021 SCC Online 315 [*Neeharika Infrastructure Private Limited* v. *State of Maharashtra and Others*], wherein it had been stated that the Court should be circumspect in interfering with any criminal prosecution and that, quashing of a Calendar Case should be an exception rather than an ordinary rule. It was also held that the Court will only have to examine whether a cognizable offence had been made out and it is not for the Court to examine whether the allegations made, are true or not.

19. I have considered the arguments advanced and also perused the materials placed.

20. Very unfortunately, in the judgments cited/relied on by the learned counsel for the petitioner, there had been no reference to the Judgments of the Hon'ble Supreme Court of India, more particularly, the judgment reported in 2014 [5] SCC 139 [*Sasi Enterprises* v. *Assistant Commissioner of Income Tax*]. The Hon'ble Supreme Court had very clearly stated that filing the Return within the stipulated and mandatory period is a duty cast on any person who has to declare the income.

21. It has also been held by the Hon'ble Supreme Court that the said provisions are mandatory in nature and it has been further expanded that if the Returns are not filed within the stipulated period, then, a presumption as to the culpable mental status, can be drawn under section 278E of the Act, 1961. It has also been held by the Hon'ble Supreme Court that in a prosecution of offence like Section 276CC, which incidentally is one of the offences alleged against the petitioner herein, there can be a presumption for existence of *mens rea* and it is for the accused to prove the contrary and that too, beyond reasonable doubt.

22. If the facts in the present case are examined, the petitioner had laid the blame on his previous employer stating that there has been a mismatch in the income earned as given in Form 16 and as

uploaded in Form 26AS. It had also been stated that this was not brought to the knowledge of the petitioner since he had left employment. It was also stated that even though the Show Cause Notices have been received, he was under the *bona fide* impression that since tax had been paid, no further action is required to be clarified from his end.

23. It is the case of the petitioner herein that there was no wilful act of non disclosure of income. As a matter of fact, it is the further contention that not just was tax paid, but Self Assessment Tax had also been paid. However, it is seen that it is the consistent case of the respondent/Department that the petitioner had not explained the high level transactions in purchase and sale of mutual funds and transactions in credit cards.

24. As stated by the Hon'ble Supreme Court, the claim of the petitioner herein that he was innocent and ignorant and therefore, indulgence should be granted to him, is actually a fact which should be proved by him in a Court of law. Such innocence or ignorance cannot be presumed. On the other hand, what can be presumed is the culpable mental status and it is for the petitioner herein to prove the contrary.

25. Even in the case relied on by the learned counsel for the petitioner, namely, in Vyalikaval House Building Cooperative Society's case and also relied on by a learned Single Judge of this Court in Crl.OP.[MD].No.13383/2019, only the prosecution had been quashed, but the imposition of penalty and interest had not been interfered with. The learned Single Judge of this Court had unfortunately, overlooked that particular fact while relying on the judgment of the learned Single Judge of the Karnataka High Court.

26. Insofar as the judgment relied on by the learned counsel for the petitioner of the Gujarat High Court is concerned, the learned Judge, with due respect, has not at all considered the presumption as given in Section 278E of the Act, 1961, regarding culpable mental state. This was a provision brought into the Taxation Law in the year 1986 itself. The burden lies on the assessee to show that he had no wilful intention not to file the Return. Any explanation to discharge such burden can be tested only during the course of trial.

27. This Court cannot presume that the petitioner herein is innocent of any of the offences complained. It is for the petitioner to establish such innocence. The platform for establishing such innocence is the Court where the trial is to be conducted and in the present case, that particular Court is the Court of the Additional Chief Metropolitan Magistrate/EO-I, Egmore, Chennai.

28. I would therefore, direct the petitioner herein to concentrate on the efforts to be put in during the course of trial in that particular Court.

29. The submissions made by the learned counsel for the petitioner stand rejected and the Criminal Original Petition stands dismissed.

30. A direction is given to the learned Additional Chief Metropolitan Magistrate/EO-I, Egmore, Chennai, to commence trial and to complete the same on or before 31-1-2022. The petitioner is directed to cooperate in the trial process. Consequently, connected miscellaneous petitions stand closed.

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