(2013) 02 PAT CK 0051

In the Patna High Court

Case No : Criminal Miscellaneous No''s. 17189, 17801, 17842, 17847, 17849 and 17850 of 2011

Anil Kumar Sinha APPELLANT

Vs

Union of India and Another RESPONDENT

Date of Decision : 06-02-2013

Acts Referred:
Constitution of India, 1950 — Article 20(2)
Criminal Procedure Code, 1973 (CrPC) — Section 300
Foreign Exchange Regulation Act, 1973 — Section 9(1)(f)(i)
Income Tax Act, 1961 — Section 115WD, 115WH, 12A, 132, 132A

Citation : (2013) 261 CTR 89 : (2013) 352 ITR 170

Hon'ble Judges : Shivaji Pandey, J

Bench : Single Bench

Advocate : Y.V. Giri, A.K. Rastogi, R.K. Sinha, S.K. Srivastava and Manish Rastogi, for the Appellant; Harshwardhan Prasad and Mrs. Archana Sinha, for the Respondent

Judgement

Shivaji Pandey, J.—Since in all these batch cases common points are involved, with the consent of the parties, they have been heard together and are being disposed of by this common order. In all these cases common points have been raised, as such, in order to avoid repetition of facts, the facts of only one case (Crl. Misc. No. 17189 of 2011) are being incorporated.

2. The first point that has been raised on behalf of the petitioner is as to whether the prosecution u/s 276CC of the income tax Act, 1961 (hereinafter, in short, referred to as "the Act"), is permissible, when the Settlement Commission, while deciding the case has granted immunities for penalty. Another point that has been raised is that the complaint petition does not disclose the amount of evasion of tax and in the absence of statement of tax, and in the absence of the amount evaded, the proceeding u/s 276CC of the Act is an abuse of process of the court. The third point which arises for consideration is as to whether if a person wilfully fails to furnish the return in due time or even after giving notice,

is that sufficient to launch prosecution, in the absence of statement, the tax payable by him does exceed Rs. 3,000.

3. In all these cases, the facts are common but separate cases have been filed for non-furnishing of return of tax for different assessment years and, as such, to understand the facts, the following facts are relevant for proper appreciation of the case.

4. On February 13, 2008, the search of the residential as well as business premises of the assessee-accused was conducted by the income tax Department u/s 132 of the Act. A notice u/s 153A of the Act was issued on October 29, 2008, requiring the assessee to file return of income for different years within 15 days of the service of notice. The assessee did not file the return. Thereafter, on July 6, 2009, a notice u/s 142(1) of the Act was issued to the assessee asking him to file the return by August 10, 2009. The assessee did not file the return but filed a time petition asking for another 45 days for filing of the return. On August 10, 2009, a show-cause notice was issued to the assessee (accused-petitioner) as to why the prosecution u/s 276CC of the Act be not initiated against him. The said notice was received by the accused on August 10, 2009. In the complaint petition, it appears that Anil Kumar Sinha is the chairman of the trust known as MSV Memorial Educational Scientific and Health Trust, Dalsingsarai, and the said trust was not registered u/s 12A of the Act. It has further been alleged in the complaint petition that neither Anil Kumar Sinha nor his family members nor even the trust filed any income tax return, though they were running schools in the name and style of St. Joseph Public School, Joseph High School at Dalsingsarai and at Patna. During the course of the post-search proceeding, it was found that receipts from the schools were directly credited in the personal account of the accused and his family members. Schools are practically run as the proprietorship concern of the accused-petitioner and his family members and in the complaint petition, it has been mentioned that the accused persons deliberately and wilfully avoided the income tax proceeding and did not file the income tax return nor the petitioner offered any plausible explanation in the show cause reply, on getting sanction from the appropriate authority, as such, the prosecution u/s 276CC of the Act was launched. The case was registered and the court took cognizance, vide order dated December 23, 2009, u/s 276CC of the Act.

5. In this case, counsel for the petitioner submits that the order of cognizance is bad in law also on facts on the ground, in the complaint petition, though the facts have been mentioned therein but there is nothing in the body of the complaint petition to show the amount of evasion of tax by the petitioner which is the sine qua non for a proceeding u/s 276CC of the Act. He has further submitted that the Settlement Commission found that the petitioner had disclosed the income correctly and truly, agreed to pay tax on the income computed, has granted immunity from penalty and also from the prosecution on other issues, excluding already prosecution lodged u/s 276CCC of the Act where

the prosecution was already launched the case against the petitioners and has submitted that in view of the finding of true disclosure and immunity from penalty or any other prosecution, submitted the present prosecution is an abuse of the process of the court to proceed with the matter, specially in a situation when the petitioner was granted immunity from penalty.

6. Counsel for the petitioner in support of his argument has relied on the judgments reported in K.C. Builders and Another Vs. The Assistant Commissioner of Income Tax, , Bhubaneshwar Prasad Bhaskar Vs. State of Bihar and Another, , Mahadeo Lal Agarwala Vs. State of Bihar and Another , P.S. Rajya Vs. State of Bihar, , Harshendra Kumar D. Vs. Rebatilata Koley Etc., , Inder Mohan Goswami and Another Vs. State of Uttaranchal and Others, , Radheshyam Kejriwal Vs. State of West Bengal and Another, and All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another, .

7. Counsel for the income tax Department vehemently opposed the argument of the petitioner and has submitted that it is the undisputed fact that the petitioner wilfully did not file the return even after notice given by the income tax authority after search of the premises. The immunity granted to the petitioner from the penalty and from other prosecution does not mean the order of cognizance is any way bad and the proceeding is an abuse of the process of the court. It has further been submitted that it is not necessary to mention or disclose the amount of evasion of tax in the complaint petition but the pre-requisite for filing the complaint petition in a case of search and later failed to file the return in spite of the notice constitute offence u/s 276CC of the Act as it amounts to willful failure to submit the return as provided under the Act. Counsel for the opposite party has relied on the judgments reported in Commissioner of Income Tax, Jalpaiguri Vs. Om Prakash Mittal, , Deputy Commissioner of Income Tax Vs. Shri M. Sundaram, , Upasana Hospital and Nursing Home and Another Vs. Income Tax Officer, , A.Y. Prabhakar (Huf) Vs. Assistant Commissioner of Income Tax, , Deepak Engineering Works, Deepak Kumar, Prakash Kumar and Suresh Chandra Yadav Vs. The Commissioner of Income Tax, The Income Tax Officer and The Union of India (UOI) and Raghunath Pandey Vs. State of Bihar, .

8. It appears from the record before filing an application before the Settlement Commission at Kolkata that the petitioner has deposited an aggregate amount of Rs. 1,34,08,582 in Form No. 34B of the Act. The income tax Settlement Commission which is a High Power Tribunal under the income tax Act found the disclosure by the petitioner to be true and accepted the statement of income. With regard to the issue of granting of immunity from the future prosecution and penalty and waiver of interest part leviable under the provisions of the Act, the Tribunal held, the waiver of interest was not allowed and held that the interest would be charged as per law by the Assessing Officer, keeping in view the decision of the hon''ble Supreme Court passed in Brij Lal and Others Vs. Commissioner of Income Tax, Jalandhar, the Tribunal granted immunity from penalty under the Act for all the years involved in the settlement application.

While considering the issue of granting immunity in connection with the present prosecution already launched u/s 276CC of the Act, the Tribunal took the view that the law would take its own course. But on other issues, the Tribunal held, no further prosecution needs to be launched against the applicant, as he has disclosed the income correctly and truly and agreed to pay tax on the income as above and the court has held that the applicant should get immunity under the income tax Act from further prosecution on other issues, excluding the prosecution already launched u/s 276CC of the Act.

9. The Tribunal refused to grant immunity from the pending prosecution under the aforesaid sections of the Act. Let us examine the relevant provisions of the income tax Act for coming to just and right conclusion.

10. Section 139 of the Act deals that every person being a company or a firm, or a person other than the company or a firm, if the total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax, shall on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner.

11. Section 142 of the Act provides for enquiry before assessment which provides that for the purpose of making an assessment under this Act, the Assessing Officer may serve on any person who has made a return u/s 139(1) for furnishing the return has expired, a notice requiring him on a date to be specified therein. In a case where such person has not made any return within the time allowed under sub-section (1) of section 139 or before the end of the relevant year to furnish a return of his income or income of any other person in respect of which he is assessable under the Act in the prescribed form or to produce such accounts or documents as the Assessing Officer may require, or to furnish in writing in the prescribed manner.

12. Section 143 of the Act deals with the assessment and provides that when a return has been made u/s 139 or in response to a notice under sub-section (1) of section 142, such return shall be processed in the manner provided under the Act.

13. Section 144 of the Act provides the provisions of best judgment assessment where it has been provided that if a person fails to make return required under sub-section (1) of section 139, has not made a return or a revised return under sub-section (4) or sub-section (5) of that section or fails to comply with all terms of notice under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143, the Assessing Officer, after taking into account all relevant materials which the Assessing Officer has gathered, shall, after giving the assessee a opportunity of being heard, make the assessment of the total income or loss to the best of his

judgment and determine the sum payable by the assessee on the basis of such assessment.

14. Section 147 of the Act provides the income escaping assessment which provides that the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153 assess escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned.

15. Section 153A of the Act deals with assessment in case of search or requisition, here it has been provided that in a case of a person where a search is initiated u/s 132A after the 31st day of May, 2003, the notice will be given to the person requiring him to furnish within such period as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years in the prescribed form and verified in the prescribed manner, setting forth other particulars as provided under the Act. The Assessing Officer shall assess or reassess the total income of six years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made.

16. For the purpose of this case it will be desirable to consider the provisions from sections 245A to 245-I which deal with filing of settlement application also provides, under what circumstances the application before settlement Commission can be filed. Section 245C prescribes the condition for filing the settlement application and section 245D deals with procedure for disposal of application u/s 245C by the Settlement Commission. Section 245H deals with the power of the Settlement Commission in the matter of granting immunity from penalty and prosecution and section 245-I declares the order of the Settlement Commission is final and conclusive.

17. Section 276CC of the Act provides failure to furnish the return of income and section 276CCC deals with failure to furnish the return of income in search cases.

18. For appreciating the present case, it will be desirable to consider the provisions of sections 245A, 245C, 245H, 276CC and 276CCC relevant portions of sections are quoted hereinbelow:

245C. Application for settlement of cases.--(1) An assessee may, at any stage of a case relating to him, make an application in such form and in such manner as may be prescribed, and containing a full and true disclosure of his income which has not been disclosed before the Assessing Officer, the manner in which such income has been derived, the additional amount of income tax payable on such income and such other particulars as maybe prescribed, to the Settlement Commission to have the case settled and any such application shall be disposed of in the manner hereinafter provided:

Provided that no such application shall be made unless--

(i) in a case where proceedings for assessment or reassessment for any of the assessment years referred to in clause (b) of sub-section (1) of section 153A or clause (b) of sub-section (1) of section 153B in case of a person referred to in section 153A or section 153C have been initiated, the additional amount of income tax payable on the income disclosed in the application exceeds fifty lakh rupees.

245H. Power of Settlement Commission to grant immunity from prosecution and penalty.--(1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement u/s 245C has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived, grant to such person, subject to such condition as it may think fit to impose immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also (either wholly or in part) from the imposition of any penalty under this Act, with respect to the case covered by the settlement:

276CC Failure to furnish return of income.--If a person wilfully fails to furnish in due time the return of fringe benefits which he is required to furnish under sub-section (1) of section 115WD or by notice given under sub-section (2) of the said section or section 115WH or the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under clause (i) of sub-section (1) of section 142 or section 148 or section 153A, he shall be punishable,--

(i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, 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 imprisonment for a term which shall not be less than three months but which may extend to three years and with fine:

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of fringe benefits under sub-section (1) of section 115WD or return of income under sub-section (1) of section 139 --

(i) for any assessment year commencing prior to the 1st day of April 1975 ; or

(ii) for any assessment year commencing on or after the 1st day of April, 1975 ; if--

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees.

276CCC Failure to furnish return of income in search cases.--If a person wilfully fails to furnish in due time the return of total income which he is required to furnish by notice given under clause (a) of section 158BC, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extent to three years and with fine.

19. In this case, the admitted fact is that the petitioner was not a regular assessee of income tax, though he was earning more than the limit of exemption and was liable to pay tax under the income tax Act. It is also admitted fact that a search was conducted and thereafter notices were issued to him for submission of return but he did not file the return, though he made a prayer for extension of time. It is a fact that after paying the tax, he filed an application before the Settlement Commission who found that the petitioner had disclosed the income truly and correctly, and also agreed to pay the tax on the income computed and for that reason, the immunity for penalty as well as prosecution on other issues excluding pending criminal case u/s 276CCC of the Act which was already launched against the petitioner. Section 276CC of the Act deals with the situation if the person wilfully fails to furnish return in due time on the income or fringed benefit which he is required to furnish under sub-section (1) of section 139 or by notice given under clause (1) of section 142 or section 148 or section 153A of the Act, shall be liable for prosecution. In a case where the amount of tax which would have been evaded if the failure had not been discovered exceeding twenty five thousand rupees with rigorous imprisonment for a term which shall not be less than six months and may extend to seven years with fine and in any other case shall not be less than three months, but may extent to three years with fine, but a person shall not be proceeded against u/s 276CC of the Act for failure to furnish the return in due time under sub-section (1) of section 139 of the Act, in case of any assessment year commencing after the 1st day of April (applicable to the petitioner), if a return is furnished by him before expiry of the assessment year or the tax payable by him on the total income determined on regular assessment as reduced by advance tax, if any, paid on any tax deducted at source does not exceed Rs. 3,000. Basically the proviso is applicable in a case of filing of return in regular assessment required under the Act. So the embargo of Rs. 3,000 will not be applicable to the present case, as is basically applicable in a situation when on regular assessment and reduced by advance tax, if any, paid and any tax deducted at source does not exceed Rs. 3,000. These facts are not applicable to the present case, as in this case the petitioner was not the regular assessee rather a search was conducted u/s 132 of the Act but even after notice, he failed to furnish the return in due time and, as such, the present case is covered u/s 276CCC of the Act which deals with a situation when the assessee fails to furnish the return in due time and in view of the aforesaid consideration, the embargo of Rs. 3,000 is not applicable to the present case rather it is applicable in a case of regular assessment.

20. Counsel for the petitioner has basically raised the point that immunity was granted from penalty as well as of prosecution and as such, the present

prosecution cannot proceed, as such, the continuance of the present case is an abuse of the process of the court and has placed reliance on the judgments as aforesaid. Out of those cases, the case of K.C. Builders was related to concealment of income and as a matter of fact, it was found, there was no concealment of income. This judgment is not applicable to the present case, as in the case the hon''ble Supreme Court has held there was no concealment of income and as such, no offence survives under the Act. Another point that was raised is that the finding of the income tax Appellate Tribunal is binding, in view of the fact the Chief Commissioner and the Assessing Officer who initiated the prosecution had no right to overcome the order of the Tribunal.

21. The Tribunal had found that the assessee filed return and revised return and in the revised return, the assessee has submitted the income of the original return with a revised return vis-a-vis there was no concealment of any income. In view of the aforesaid finding of non-concealment of income by the assessee, which set aside the order of concealment and penalty, as there was no concealment, therefore, the prosecution for concealment cannot proceed with at the instance of the complainant and further proceeding was quashed holding it as without jurisdiction. In this case, there is no such finding of fact. So this case is not applicable to the facts of the present case.

22. With regard to the two judgment of this court, so far one in the case of Mahadeo Lal Agarwala Vs. State of Bihar and Another is concerned, it is not applicable to the present case as it was a case of regular assessment where the person was prosecuted on the ground that the petitioner had fraudulently and dishonestly made a false assessment about his income for the verification of the return for the year 1974-75 and thereby dishonestly induced the income tax authority to assess on the lesser amount causing loss to the income tax Department and wrongful gain to him. The court has held that if the proceeding u/s 271(1)(c) of the Act pending before the assessing authority was dropped, the criminal prosecution launched against the assessee will be an abuse of the process of court and, accordingly, the petitioner of that case was discharged from criminal liability. Similar view was taken in Bhuneshwar Prasad Bhaskar''s case (supra). The petitioner has relied on P.S. Rajya Vs. State of Bihar, which is also not applicable to the present case, as it is related to the Departmental proceeding vis-a-vis criminal proceeding where the hon''ble Supreme Court has held that in the Departmental proceeding, charges were not found proved where the proof of guilt was based on the principle of preponderance then in that circumstance, the criminal proceeding will be abuse of process of the court as in the criminal case the charges have to be proved beyond reasonable doubt.

23. In Radheshyam Kejriwal Vs. State of West Bengal and Another, , the proceeding under the Foreign Exchange Regulation Act, 1973, was vitiated and a show-cause notice was issued for contravention of the provisions of section 9(1)(f)(i) of the aforesaid Act. The Adjudicating Officer came to the conclusion that the allegations made for contravention of the aforesaid Act were not proved after

considering the materials on the record and ultimately, the proceeding was dropped. There the point was raised that when the Special Director on adjudication of facts found that there was no violation of the provisions of the Act, will it not be desirable that the person be asked to face the trial before the criminal court. There the hon''ble Supreme Court held that the proof in a criminal case is much higher than that of adjudication proceeding, the Enforcement Directorate has not been able to prove its case in the adjudication proceeding, the appellant was exonerated, on the same facts and allegation the appellant was facing the criminal case. In the opinion of the hon''ble Supreme Court, determination of fact in adjudication cannot be said to be irrelevant in a criminal case. The hon''ble Supreme Court in Radheshyam Kejriwal''s case (supra) culled out the principle in paragraph 38 on the proposition of criminal case vis-a-vis adjudication proceeding which runs as follows (page 525 of 163 Comp Cas):

The ratio which can be culled out from these decisions can broadly be stated as follows:

(i) Adjudication proceedings and criminal prosecutions can be launched simultaneously;

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

(iii) An adjudication proceedings and criminal proceedings are independent in nature to each other;

(iv) The finding against the person facing prosecution in the adjudication proceedings is not binding on the proceeding for criminal prosecution, 1973;

(v) An adjudication proceedings 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, 1973;

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

(vii) In case of exoneration, however, on the merits where the allegation is found to be not sustainable at all and the person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue, the underlying principle being the higher standard of proof in criminal cases.

24. Ultimately, the hon''ble Supreme Court in paragraph 47 of the said judgment has found that when the Enforcement Directorate itself failed to prove the case during the proceeding on the merits, it would be unjust and abuse of the process of the court to permit the Enforcement Directorate to continue the criminal proceeding. The hon''ble Supreme Court while deciding the aforesaid case, for a test the issue of applicability of the finding of the adjudication proceeding vis-a-

vis criminal proceeding, has fixed the yardstick to judge as to whether the proceeding in the adjudication proceedings as well as the criminal proceeding is identical and the exoneration of the person concerned in the adjudication proceeding on the merits. In case it is found on the merits that there is no contravention of the provisions of the Act in the adjudication proceeding, the criminal trial of the person concerned shall be abuse of the process of the court.

25. In the present case, before the Settlement Commission, the issue was quite different as the petitioner after receipt of the notice from the income tax Department, after payment of tax, moved petition before the Settlement Commission with true and full disclosure and where the Commission found a disclosure of the income by the petitioner was true and correct. In the present case, the prosecution has been filed for non-submission of the return, even after notice to the petitioner after search and seizure as provided u/s 132 of the Act. The issue is quite different than what was there before the Settlement Commission and, as such, whatever the finding was there by the Settlement Commission was given in its own fact and has no bearing on the present criminal proceeding. The petitioner has further relied on judgment reported in All Cargo Movers (I) Pvt. Ltd. and Others Vs. Dhanesh Badarmal Jain and Another, where the issue was quite different as issue was raised with regard to civil wrong as well as criminal offence where the court has held that from the pleading of the parties, it is disclosed that the proceeding was basically a civil wrong, in that circumstance, proceeding in the criminal case will be abuse of the process of the court. Similarly, in the case of Indra Mohan Goswami (supra), the issue was quite different where the hon''ble Supreme Court has said that from the facts mentioned in the complaint petition it does not disclose the offence alleged, the proceeding will be an abuse of the process of the court. Those cases are not applicable to the facts of the present case.

26. Let us examine the judgments relied on by learned counsel for the income tax Department for the proper appreciation of the argument of the other side.

27. Learned counsel for opposite party No. 2 has relied on the judgment in the case of Commissioner of Income Tax, Jalpaiguri Vs. Om Prakash Mittal, . There the issue was raised that the order was obtained by fraud and an application for revival of the proceeding before the Commission was filed and the Commission refused to reopen the proceeding as the Commission is of the view that the Commission did not possess power. The Commission would go into the merit regarding the genuineness of the loans that would amount to re-appraisal and re-evaluation of the evidence which was already appraised by the earlier Bench and it would amount to sitting in judgment over the findings arrived at the earlier Bench which was not legally permissible to the Commission to review its own decision. The matter went to the hon''ble Supreme Court where the hon''ble Supreme Court considering the provisions of section 245D and other provisions of the Act has held that any order obtained by playing fraud or by misrepresentation of fact shall be void and directed the Commission to rehear

the matter and directed the parties to place further material in support of their respective cases. In this case, the fact and issue are quite different hence this judgment is not applicable to the facts of this case.

28. In another judgment in the case of Upasana Hospital and Nursing Home and Another Vs. Income Tax Officer, where the court has held that even in a case of finding of the appellate authority that the asses-see did not conceal its income will not be a ground to quash the criminal proceeding which was not related to filing the return within the time prescribed. The facts of the case is very much near to the present case.

29. In another case this court in Crl. Misc. No. 21592 of 1998 has held that even the confiscation proceeding was decided in favour of the accused that will not give a ground for quashing the case under the customs case which will be dependent on the evidence brought on record during the trial. The case was related to the Customs Act vis-a-vis the Gold Control Act.

30. Another case related to the case of Deputy Commissioner of Income Tax Vs. Shri M. Sundaram, where the point was raised that charging of interest by the income tax Officer will not be deemed to be implied extension of time to file the return which would not in effect exclude wilful default in filing return and a consequent prosecution. The Kerala High Court has held that mere charging the interest cannot be deemed to be the implied extension of time to file the return and refused to interfere with the criminal prosecution which was for not filing the return within the time.

31. In another judgment in the case A.Y. Prabhakar (Huf) Vs. Assistant Commissioner of Income Tax, where the point was raised that non-filing of return is wilful or deliberate which is a matter of fact can be raised at the proper stage and that can be proved by prosecution by bringing the material evidence.

32. In another judgment in the case of Deepak Engineering Works, Deepak Kumar, Prakash Kumar and Suresh Chandra Yadav Vs. The Commissioner of Income Tax, The Income Tax Officer and The Union of India (UOI) where the point was raised that when penalty proceeding was never initiated and in the absence of penalty proceeding prosecution for the petitioner for the failure to produce the accounts and documents despite service of notice will be an abuse of the process of the court and there also a point was raised that the assessment order was already unsettled that will be a good ground for interference in the criminal proceeding. The court has come to the conclusion that penalty proceeding was initiated that will not be a ground to absolve the assessee from filing incorrect and false return thereby clubbing the income of M/s. Deepak Electrical. The court has held that that action taken at the subsequent stage by the accused persons may not absolve them from the charges of the present case, at least for the period between 1989 to 1997 offence for evasion of the income tax was committed by the accused persons. The allegation was made for wilful attempt to evade tax, interest or penalty due to concealment of particulars of

income. The court has refused to interfere with the order of criminal proceeding and refused to exercise the inherent power in favour of the assessee.

33. In another judgment in the case of K. Jagadeesan Vs. Income Tax Officer, where the point was raised that charging of interest by the income tax Officer had the implied extension of filing the return hence wilful default in filing the return cannot at all arises. The court has held that charging of interest u/s 139(8) of the Act cannot be deemed that impliedly time was extended for filing the return and the court has refused to interfere with the criminal proceeding which was related to late filing of the return punishable u/s 276 of the Act. In this case, the complaint has been filed u/s 276CC of the Act which is related to non-filing of return, even though on different occasions, notices were given to the petitioners to file necessary return but in spite thereof, the petitioners gave no response which led to filing of the present case, whereas the issue before the Settlement Commission was with regard to different aspect of the matter, as the petitioners deposited the necessary tax and, thereafter, approached the Settlement Commission, who found the disclosure made by the petitioners to be true and the applicant was agreed to be taxed on the deposits and that was the reason for holding that the applicant cannot be made suffer for this and, accordingly, granted immunity from the penalty under the Act for all years involved in the settlement application whereas the Commission has not granted any immunity for the prosecution already launched u/s 276CC of the Act. It is clear that the issue involved before the Commission was quite different whereas the prosecution that has been launched is quite different, i.e., for non-filing of the return even after the notice. In this view of the matter, the judgments relied on by the petitioners are not applicable to the present case, as explained hereinabove and the judgments that have been relied on by the respondents are by and large very near to this case and, as such, the order of cognizance cannot be held to suffer from any infirmity.

Accordingly, these petitions are dismissed.

