

(2023) 10 JH CK 0020

In the Jharkhand High Court

Case No : Criminal Miscellaneous Petition No. 1244 Of 2017

Gunwant Singh Saluja

APPELLANT

Vs

State Of Jharkhand And Others

RESPONDENT

Date of Decision : 10-10-2023

Acts Referred:

Income Tax Act, 1961 — Section 132, 139(1), 142, 142(1)(i), 143(3), 148, 153A, 154, 254, 271(1), 271(1)(c), 276, 276C, 276CC, 279
Code Of Criminal Procedure, 1973 — Section 397, 401

Citation : (2023) 10 JH CK 0020

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : Sumeet Gadodia, Nehala Sharmin, Ratnesh Nandan Sahay

Final Decision : Allowed/Disposed Of

Judgement

Sanjay Kumar Dwivedi, J

1. Heard Mr. Sumeet Gadodia, learned counsel for the petitioner, Ms. Nehala Sharmin, learned counsel for the State and Mr. Ratnesh Nandan Sahay, learned counsel for the opposite party no.2-Income Tax Department.

2. This petition has been filed for quashing the entire criminal proceedings arising out of Complaint Case No.09 of 2012 including the order taking cognizance dated 04.06.2012 passed by the learned Special Judge, Economic Offences, Ranchi, whereby, cognizance under Section 276CC of the Income Tax Act, 1961 has been taken against the petitioner, pending in the Court of the learned Special Judge VII, Economic Offences, Ranchi.

3. The complaint case was filed by opposite party no.2 alleging therein that a search under Section 132 of the Income Tax Act was undertaken in Mongia Group of cases by the Investigating Wing, Jharkhand and during the course of search operation, various incriminating documents relating to the petitioner were found and seized. It was further alleged that notices under Section 153A of the Income

Tax Act for filing of returns of income for the Assessment Year 2005-06 to 2009-10 and 2010-11 were issued by the Assistant Commissioner of Income Tax, Central Circle, Dhanbad and the same were served on 15.02.2011 for compliance, but there was no compliance. It was also alleged that the petitioner was granted time till 15.04.2011 and further till 05.05.2011 for compliance, but there was no compliance. It was alleged that under the circumstances, the Assessing Officer issued a show-cause notice under Section 276 of the Income Tax Act on 19.07.2011 for initiation of prosecution proceeding for non-filing of return of income in time. It was further alleged that the petitioner filed a letter dated 26.07.2011 and took a plea that since the office of the Director General of Central Excise Intelligence, Jamshedpur has not given him the copy of the documents seized on 27/28.03.2006 during the course of search and seizure operation in his business premises, he is unable to furnish the return. It was also alleged that the Assistant Commissioner of Income Tax, Central Circle, Dhanbad wrote a letter to the Director General, Central Excise, Intelligence, Jamshedpur seeking his comments on seized documents. It was also alleged that in reply to the above letter, the Director General of Central Excise, Intelligence, Jamshedpur said that the authorized representative of M/s Mongia Steel Ltd. has already collected the original and photocopy of the documents seized. It was further alleged that the Assessing Officer submitted a current status report of the proposal of initiation of prosecution proceeding under Section 276CC vide letter dated 30.09.2011 and another letter dated 14.10.2011 to the Commissioner of Income Tax, Central Circle, Patna and submitted that still the petitioner has not filed returns of income. It was also alleged that the Commissioner of Income Tax, Central Circle, Patna gave his opinion that the petitioner has failed to comply with the notices of the Assessing Officer without assigning any reasons and has also failed to file the return of income and, thus, there was willful omission on the part of the petitioner in filing returns of his income and, as such, accorded sanction under Section 279 of the Income Tax Act for launching prosecution under Section 276CC of the Act for not filing returns of income without giving any reasonable cause and non-compliance of the notices of the Assessing Officer. On the basis of the aforesaid allegations, Complaint Case No.09 of 2012 was filed by opposite party no.2 in the Court of the learned Special Judge, Economic Offence, Ranchi.

4. Mr. Gadodia, learned counsel for the petitioner submits that the search and seizure operation under Section 132 of the Income Tax Act, 1961 was conducted by the Investigation Wing, Jharkhand. Pursuant to search and seizure, notices under Section 153A of the Income Tax Act was issued to the petitioner on 15.02.2011 for filing of income tax return for the assessment year 2005-06 to 2010-11. On 15.03.2011, the petitioner filed a letter seeking 30 days' time to submit returns and he was granted time till 15.04.2011 for compliance of notice issued under Section 153A of the Income Tax Act. Again letter dated 25.04.2011 was filed by the petitioner and time till 05.05.2011 was granted to the petitioner. He further submits that on 19.07.2011, a show-cause notice under Section

276CC of the Income Tax was issued for initiation of prosecution proceeding for non-filing of income tax returns and the petitioner was directed to file reply by 29.07.2011. The petitioner vide letter dated 26.07.2011 stated that since the office of the Director General, Central Excise, Intelligence, Jamshedpur did not give copy of the ceased documents during search and seizure operation, therefore, he was unable to furnish return. The Commissioner of Income Tax, Central Circle, Patna accorded sanction under Section 279 of the Income Tax Act for launching prosecution under Section 276 CC of the Income Tax Act and, thereafter, the present complaint case has been filed, contained in Annexure-1 of the petition and the learned Court has taken cognizance vide order dated 04.06.2012 under Section 276CC of the Income Tax Act. He submits that on 29.12.2011, assessment orders were passed by the Assessing Officer against the petitioner for the Assessment Years 2004-05 to 2010-11. He also submits that the assessment order for the period 2004-05 was challenged before the CIT (Appeal), Patna, which was dismissed on 30.09.2015, which was further challenged before the Income Tax Appellate Tribunal (ITAT), Ranchi and vide order dated 13.09.2017, the ITAT, Ranchi remanded the matter back to the CIT (Appeals). The CIT (Appeals) vide order dated 02.03.2020 set aside the demands for the period 2004-05 and subsequent to passing of appellate order, the appeal was given affect and an amount of Rs.16,65,986/- found to be refundable to the petitioner. He also submits that the assessment order dated 29.12.2011 for the year 2005-06 was challenged before the CIT (Appeals) and vide order dated 30.10.2015, total demand of Rs.87,58,494/- was raised against the petitioner. The petitioner challenged the said order before the ITAT, Ranchi and vide its order, a demand of Rs.87,58,494/- was confirmed against the petitioner. He further submits that the assessment order dated 29.12.2011 was confirmed by the CIT (Appeals) and subsequently the ITAT vide order dated 13.09.2017 remanded the matter back to the Appellate Authority and on remand, majority of demand against the petitioner was set aside and consequently only a demand of Rs.67,862/- was raised against the petitioner vide order dated 28.05.2020. The assessment order for 2007-08 was ultimately challenged before the ITAT, Ranchi and vide order dated 13.09.2017, the matter was remanded to the Appellate Court who in turn determined refund of Rs.80,82,799/- to the petitioner. He also submits that similarly for the period 2008-09, pursuant to remand order passed by the ITAT, appeal-effect-order dated 28.05.2020 was passed by determining refundable amount of Rs.3,42,815/-. For the period 2009-10, the Appellate Authority confirmed demand of Rs.20,61,849/- against the petitioner. He submits that the assessment order for the period 2010-11 was set aside by the Appellate Court vide order dated 29.09.2015 and pursuant to that, the assessment order dated 30.10.2015 was passed wherein the petitioner was found for refund of Rs.2,50,70,600/-. He submits that for the block assessment period, the refund was found to be refundable to the petitioner and refunds were already adjusted against outstanding demand of the petitioner, despite thereof, the respondents are proceeding with the prosecution under Section 276CC of the Income Tax Act. He submits that in this background, when there is no demand, filing of the

prosecution itself is bad in law. He submits that to allow to continue the proceeding will amount to abuse of process of law. He further submits that the case arising out of the same search and seizure, the petitioner and Balvinder Singh Saluja @ Balvinder Singh moved before this Court in Cr.M.P. No.1245 of 2017, which was allowed vide judgment dated 29.08.2023. He submits that the present case is identical to that case and in view of that, the entire criminal proceedings may kindly be quashed.

5. Mr. Sahay, learned counsel appearing for opposite party no.2-Income Tax Department submits that his argument has been taken note of by this court in Cr.M.P. No.1245 of 2017 at paragraphs 5 and 6 and he is further adopting the same argument.

6. In view of the above submissions of the learned counsel for the parties, the Court has gone through the material on record and finds that the amount in question has already been set at rest in view of different orders passed by the Appellate Authority as well as the Tribunal, as has been noted in the argument of Mr. Gadodia, learned counsel for the petitioner. In view of that, whether the criminal case can survive or not, it is already answered by the Hon'ble Supreme Court in the case of K.C. Builders and Another v. Assistant Commissioner of Income Tax, reported in [2004 265 ITR 562 (SC)], wherein at paragraph no.14, 15, 16 and 17 of the said judgment, it has been held as under:

"14. Relevant paragraphs of the said judgment are quoted herein below:

"The above judgment squarely applies to the facts and circumstances of the case on hand. In this case also, similarly, the application was moved by the assessee before the Magistrate to drop the criminal proceedings which were dismissed by the Magistrate and the High Court also on a petition filed under Sections 397 and 401 of the Criminal Procedure Code, 1973 to revise the order of the Additional Chief Metropolitan Magistrate has also dismissed the same and refused to refer to the order passed by the competent Tribunal. As held by this Court, the High Court is not justified in dismissing the criminal revision vide its judgment ignoring the settled law as laid down by this Court that the finding of the appellate Tribunal was conclusive and the prosecution cannot be sustained since the penalty after having been cancelled by the complainant following the appellate Tribunal's order, no offence survives under the Income Tax Act and thus quashing of prosecution is automatic. In the instant case, the penalties levied under Section 271(1)

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

In our opinion, the appellants cannot be made to suffer and face the rigorous of criminal trial when the same cannot be sustained in the eyes of law because the

entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and under Section 254 of the Act, a finding of the Appellate Tribunal supersedes the order of the Assessing Officer under Section 143(3) more so when the Assessing Officer cancelled the penalty levied.

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

15. By way of referring this judgment, learned counsel for the petitioner submits that once the penalties are cancelled on the ground that there is no concealment, the quashing of prosecution under Section 276CC is automatic and the petitioner cannot be made to suffer and face the rigorous of criminal trial when the same cannot be sustained in the eyes of law because the entire prosecution in view of a conclusive finding of the Income Tax Tribunal that there is no concealment of income becomes devoid of jurisdiction and under Section 254 of the Act, a finding of the appellate authority supersedes the order of the Assessing Officer under Section 143(3) and more so when the Assessing Officer cancelled the penalty levied.

16. Learned counsel for the petitioner further submits that protective measure because of similar penalty was the subject matter before the Punjab and Haryana High Court in the case of Commissioner of Income-Tax, Patiala-II v. Behari Lal Pyare Lal, reported in (1983) 141 ITR 32 (P&H).

17. Relevant paragraph of the said judgment is quoted herein below:

“The penalty was imposed by the IAC as a protective measure because a similar

penalty had already been imposed on the two partners for concealment of the said income. The Tribunal found that, under law, a protective order of assessment can be passed but not of penalty. The learned counsel for the Revenue was unable to challenge this view of the Tribunal and frankly conceded that he was not able to cite any provision of law or decided case which warranted a protective order of penalty. That apart, no finding was recorded by the IAC that there was any wilful concealment of the income and in the absence of such a finding, the order of penalty would be unsustainable. The other reason given for deleting the penalty was that the income did not accrue to the present firm. As is apparent from the facts stated above, the amount received by the firm was not credited in its account and instead credited to the accounts of Lachhman Dass and Sat Parkash who were partners in the earlier firm. The assessee-firm, therefore, did not treat the said amount as its own and it being a firm different from the one to whom the refund had been made could not be held guilty of any concealment. The Tribunal, therefore, rightly deleted the penalty and questions Nos. 1 and 3 are accordingly answered against the Revenue and in favour of the assessee."

7. Looking into the aforesaid ratio of the judgment of the Hon'ble Supreme Court, it appears that the case of the petitioner is fully covered as there is no penalty or assessment against the petitioner in view of the subsequent orders passed by the competent authority in the said statute.

8. The argument which has been adopted by Mr. Sahay, learned counsel for the Income Tax Department relying on two judgments of the Hon'ble Supreme Court in the case of *Sasi Enterprises v. Assistant Commissioner of Income Tax*, reported in [(2014) 5 SCC 139] and in the case of *U.S. Technologies International Pvt. Ltd. v. Commissioner of Income Tax*, reported in (2023 SCC OnLine SC 387) has been considered by this Court in paragraphs 13 and 14 of the judgment dated 29.08.2023 passed in Cr.M.P. No.1245 of 2017. Paragraphs 13 and 14 of the said judgment are quoted hereinbelow:

" 13. The judgment relied by Mr. Sahay, the learned counsel for the respondent Income Tax Department in the case of *Sasi Enterprises*(supra), the proviso to section 276 CC was also considered and section 276 CC of the said statute is quoted below:

"276.-CC. Failure to furnish returns of income- If a person willfully fails to furnish in due time 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, 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 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"

14. Looking into clause(ii)(b) of section 276 CC, it is crystal clear that if the tax payable determined on regular assessment is reduced by advance tax paid and the tax deducted at source does not exceed Rs.3,000/-such an assessee shall not be prosecuted for not furnishing the return under section 139(1) of the said Act. In the case in hand, in view of subsequent orders passed by the concerned authority under the statute, there is no assessment against the petitioners. Thus, the tax liability is not there even to the tune of Rs.3,000/- in view of the said proviso and this aspect of the matter has already been considered by the Hon'ble Supreme Court in the case of Sasi Enterprises(supra) on which much force has been made by the learned counsel for the Income Tax Department and the said aspect was discussed in paragraph no.25 of the said judgment which is quoted as under:

"25. Section 276-CC applies to situations where an assessee has failed to file a return of income as required under Section 139 of the Act or in response to notices issued to the assessee under Section 142 or Section 148 of the Act. The proviso to Section 276- CC gives some relief to genuine assesseees. The proviso to Section 276- CC gives further time till the end of the assessment year to furnish return to avoid prosecution. In other words, even though the due date would be 31st August of the assessment year as per Section 139(1) of the Act, an assessee gets further seven months' time to complete and file the return and such a return though belated, may not attract prosecution of the assessee. Similarly, the proviso in clause (ii) (b) to Section 276-CC also provides that if the tax payable determined by regular assessment as reduced by advance tax paid and tax deducted at source does not exceed Rs 3000, such an assessee shall not be prosecuted for not furnishing the return under Section 139(1) of the Act. Resultantly, the proviso under Section 276-CC takes care of genuine assesseees who either file the returns belatedly but within the end of the assessment year or those who have paid substantial amounts of their tax dues by pre-paid taxes, from the rigour of the prosecution under Section 276-CC of the Act."

9. There is no doubt that the penal provision is required to be dealt with as it is,

and the Court is not required to shift the language of penal provision, however, in the case in hand, the facts are otherwise.

10. In view of the above discussions, reasons and analysis, the entire criminal proceedings arising out of Complaint Case No.09 of 2012 including the order taking cognizance dated 04.06.2012 passed by the learned Special Judge, Economic Offences, Ranchi, pending in the Court of the learned Special Judge VII, Economic Offences, Ranchi is quashed.

11. Accordingly, the petition is allowed in above terms and disposed of.

12. Pending I.A., if any, is disposed of.