(1992) 02 MAD CK 0033

In the Madras High Court

Case No : Criminal Miscellaneous Petition No. 13890 of 1989

K. Jagadeesan APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 17-02-1992

Acts Referred:

Income Tax Act, 1961 — Section 131, 139, 139(1), 139(4), 139(8)

Citation : (1993) 199 ITR 307

Hon'ble Judges : Arunachalam, J

Bench : Single Bench

Advocate : K.A. Panchapagesan, for the Appellant; Ramaswamy, K., Special Public Prosecutor, for the Respondent

Judgement

Arunachalam, J.—The petitioner is the sole accused in E. O. C. C. No. 284 of 1989, pending on the file of the Additional Chief

Metropolitan (E. O. I.), Madras. On a private complaint preferred by the respondent who is the Income Tax Officer, City Ward V(2), Madras,

the petitioner is being prosecuted for having committed an offence punishable u/s 276CC of the Income Tax Act, 1961, viz., wilful failure to file the

return of income within due time for the assessment year 1985-86.

2. In this petition, preferred u/s 482, Criminal Procedure Code, 1973, to call for the records and quash the pending prosecution as not

maintainable and an abuse of the process of court, Mr. K. A. Panchapagesan, learned counsel appearing on behalf of the petitioner, contended

that once interest was levied u/s 139(8), of the Act, prosecution cannot be maintained for failure to file the return in due time. He pointed out that

the assessment order showed that interest had been levied u/s 139(8) and also u/s 217 of the Act. He further submitted that, by charging interest u/s 139(8), the Income Tax Officer had impliedly extended the time for the filing of the return and hence no question of wilful default can arise. In

passing, learned counsel mentioned that, against the ex parte order passed u/s 144 of the Act, the petitioner had filed an appeal before the

Commissioner of Income Tax. In the appeal, relief for Rs. 8,76,027 was allowed, though the income of the petitioner was enhanced. Against the

order of the Commissioner, an appeal was filed before the Income Tax Appellate Tribunal. By an order dated May 17, 1989, the Tribunal allowed

the appeal and remitted the matter for fresh disposal to the Commissioner of Income Tax, after affording an opportunity to the petitioner the

Income Tax Officer.

3. Mr. Ramaswamy, K., learned counsel representing the respondent, contended that, after the amendment to section 139 of the Act by the

Taxation Laws (Amendment) Act, 1970, which came into effect on and from April 1, 1971, there was no discretion vested in the Income Tax

Officer, for not charging interest for any period. Hence, merely because interest had been levied u/s 139(8) of the Act, it cannot be deemed that

impliedly, time had been extended for filing the return. A prosecution for an offence punishable u/s 276CC of the Act was maintainable. Factually,

he stated that, for the assessment year 1985-86, the petitioner ought to have filed his return of income on or before June 30, 1985, as required by

section 139(1) of the Act. Since the petitioner failed to file his return within due time, a notice u/s 148 of the Act was issued directing the petitioner

to file his return of income within was issued directing the petitioner to file his return of income within 30 days from the date of service of notice. In

spite of service of notice on the petitioner on July 26, 1987, he failed to file the return of income within the time prescribed in the notice. Thereafter,

a notice u/s 142(1) of the Act was served on the petitioner on December 18, 1987. Summons u/s 131 of the Income Tax Act, 1961, requiring the

presence of the petitioner on December 24, 1987, were also served on December 18, 1987. Since there was no compliance with the above

notices, another notice u/s 142(1) of the Act was served on the petitioner on January 11, 1988. The petitioner again failed to respond even to this

notice. Thereafter, the assessment was completed on March 29, 1988, ex parte, u/s 144 of the Act. However, the petitioner had filed the return of income on March 29, 1988, after an inordinate delay and long after receipt of repeated statutory notices.

4. The averments in the complaint disclose that the petitioner is a medical practitioner, as well as one of the shareholders of Messrs. K. J.

Electronics Equipment Services and Marketing Company Ltd. He derives income from his business as well as from his medical profession.

Subsequent to the remand by the Tribunal, the Commissioner of Income Tax had determined the tax payable by the petitioner and again the

petitioner has preferred another appeal before the Income Tax Appellate Tribunal which is pending. A show-cause notice was issued to the

petitioner on November 3, 1988, to show cause why a prosecution should not be launched for wilful failure to file the return of income in due time.

The petitioner replied by his letter dated December 26, 1988.

5. Both counsel agree that the only question to be decided in this petitioner is whether, by charging interest u/s 139(8) of the Act, the Income Tax

Officer has impliedly extended the time to file the return and hence wilful default in filing the return of income cannot at all arise.

6. Mr. K. A. Panchapagesan would strenuously urge that the amendment to section 139 of the Act in 1971 had only recast the section and nothing

new had been imported by such amendment. On the contrary, Mr. Ramaswamy, K., would urge that the proviso to section 139(1)(b) of the Act

would indicate a vital change and, irrespective of the extension of time, interest will have to be inevitably levied by the Income Tax Officer who had

no discretion in the matter. He pointed out that section 139(8) of the Act, before the amendment in 1971, is now the proviso to section 139(8)(a)

after amendment. Both learned counsel relied upon certain decisions in support of their respective contentions. I will refer to them a little later.

7. To appreciate the contentions of learned counsel, it will be necessary to extract section 139(1) and section 139(8) of the Act before it

underwent a change in 1971 :

139. (1) Every person, if his 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 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 and setting forth such other particulars as may

be prescribed -

(a) in the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act,

includes any income from business or profession, before the expiry of six months from the end of the previous year or where there is more than one

previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of

June of the assessment year, whichever is later;

(b) in the case of every other person, before the 30th day of June of the assessment year :

8. Provided that, on an application made in the prescribed manner, the Income Tax Officer may, in his discretion, extend the date for furnishing the

return -

(i) in the case of any person whose total income includes any income from business or profession the previous year in respect of which expired on

or before the 31st day of December of the year immediately preceding the assessment year, and in the case of any person referred to in clause (b),

up to a period not extending beyond the 30th day of September of the assessment year without charging any interest;

(ii) in the case of any person whose total income includes any income from business or profession the previous year in respect of which expired

after the 31st day of December of the year immediately preceding the assessment year, up to the 31st day of December of the assessment year

without charging any interest; and

(iii) up to any period falling beyond the dates mentioned in clauses (i) and (ii), in which case, interest at nine per cent. annum shall be payable from

the 1st day of October or the 1st day of January, of the case may be, of the assessment year to the date of the furnishing of the return -

(a) in the case of a registered firm or an unregistered firm which has been assessed under clause (b) of section 183, on the amount of tax which

would have been payable if the firm had been assessed as an unregistered firm; and

(b) in any other case, on the amount of tax payable on the total income reduced by the advance tax, if any, paid or by any tax deducted at source, as the case may be.

9. Section 139(8) :

Notwithstanding anything contained in clause (iii) of the proviso to sub-section (1), the Income Tax Officer may, in such cases and under such

circumstances as may be prescribed, reduce or waive the interest payable by any person under any provision of this section.

10. Before we analyse the effect of the change in law on and from April 1, 1971, on the basis of the Taxation Laws (Amendment Act), 1970, it

will be better to refer to the case-law on the section as it existed before certain changes were introduced.

11. The Calcutta High Court in Dooars Transport Vs. Commissioner of Income Tax, , held that, if interest was charged up to the date of filing of

the return, even after failure to file the return in spite of extended time, a presumption of extension of time was raised and hence penalty cannot be

levied. In that case, the scope for prosecution u/s 276CC of the Act was not considered. On facts, the assessee therein was required to file returns

u/s 139 of the act as it stood at the relevant time, for the assessment years 1964-65 and 1966-67 to 1969-70 by June 30 of the calendar year

1964, 1966, 1967, 1968 and 1969. The assessee filed an application on September 30, 1966, praying for extension of time by three months for

submission of the returns for the assessment year 1966-67. No order was communicated to the assessee in respect of the said application. In

respect of the assessment year 1968-69, time to file the return was extended till December 31, 1968, and, for the assessment year 1969-70, such

time was extended till June 30, 1970. The assessee did not file the returns in respect of all the three assessment years even during the extended

time. The assessee filed the returns on June 30, 1965, December 27, 1967, December 27, 1967, February 3, 1970, and February 11, 1971. In

making the assessments, the Income Tax Officer charged interest under sub-section (8) of section 139 of the Act. A penalty u/s 271(1)(a) was

also imposed. The interest charged u/s 139(8) was waived by the Commissioner. The Tribunal did not accept the case of the assessee that, since

the Commissioner had waived interest, there was a reasonable cause for the delay in the submission of the returns and the challenge regarding

penalty will have to be upheld. On a reference u/s 256(2) of the Act, a Division

Bench of the Calcutta High Court held that interest having been

charged by the Income Tax Officer up to the date of the filing of the returns, the principles laid down by the Supreme Court in Commissioner of

Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, were clearly attracted. The fact that such interest was waived subsequently by the

Commissioner would not make any difference in principle inasmuch as it was the primary act of the Income Tax Officer in accepting the return filed

and charging interest up to the date of the filing which raised the presumption of extension of time. As the Income Tax Officer had levied interest up

to the date of the filing of the return, he was not justified in further invoking penalty proceedings. Even in the three assessment years where time

was in fact extended by the Income Tax Officer, the charging of interest up to the dates of the filing of the returns after the extended period gave

rise to the presumption of further extension of time for the filing of the returns.

12. The aforestated facts clearly show that the decision rested on the law before certain amendments were introduced with effect from April 1,

1971, to section 139 of the Act. Since the Calcutta High Court had referred to the decision of the Supreme Court in Commissioner of Income

Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , would be better to look into the law enunciated by the Supreme Court now, before scrutinising

the other case-law.

13. In Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , the apex court was considering the scope for levying penalty on

failure to file return within the ""time allowed"". ""Time allowed"" was construed to include the period up to the date extended by the Income Tax

Officer. By extension of time only on application and charging of interest, extension of time can be presumed and no penalty was leviable. That was

again a case in which the Supreme Court was considering the filing of voluntary returns of income by the assessee for the assessment years from

1959-60 to 1962-63 all on August 2, 1963, and for the assessment years from 1963-64 on August 2, 1964, and the Income Tax Officer had

levied interest up to the date of the filing of the returns and also imposed penalty u/s 271(1)(a) of the Act. The Tribunal held that the assessee had

given his reasons for the delay in filing the returns for the purpose of both levy of interest u/s 139(1) and also levy of penalty u/s 271(1)(a) and that as the Income Tax Officer had levied interest up to the date of the filing o the returns, it must be presumed that the Income Tax Officer had

extended time for filing the returns after satisfying himself that it was a fit case for extension of time, and cancelled the penalties. On a reference, the

High Court held that the Tribunal was justified in relying upon the presumption that official acts had been regularly performed and that, therefore, it

must be presumed that the Income Tax Officer had extended the time upon grounds made out by the assessee because otherwise the Income Tax

Officer could not have charged interest, and that, therefore, no penalty was leviable. On appeal to the Supreme Court, it was held, affirming the

view of the High Court and the Tribunal, that, in the ordinary course of things, the Income Tax Officer could have extended the date only upon

being satisfied that there was good reason for doing so, and that would have been on the grounds pleaded by the assessee and that, in the

circumstances of this case, a presumption could validly be raised that all that was done. Secondly, on the facts, the extension was a matter falling

within section 139(1) and the returns furnished by the assessee must be attributed to that provision; they were not returns furnished within the

contemplation of section 139(4). Therefore, thirdly, the penalty provisions did not come into play at all. While referring to the various provisions as

they existed then, the apex court noted that the language of sub-section (8) of section 139(4) had suffered material change with effect from April 1,

1971. Interpreting the old section, the following observation was made (at page 438) :

It is only where the Income Tax Officer extends the time for furnishing the return beyond September 30, or December 31, as the case may be,

that interest becomes payable.

14. The observations of the Supreme Court show that the decision was rendered on the provisions which were applicable to the facts in issue

decided by the Supreme Court while being conscious of the material change the language of sub-section (8) of section 139(4) had suffered with

effect from April 1, 1971. It will be necessary to scrutinise whether the principle enunciated by the Supreme Court prior to the change in language

in section 139 of the Act would still be attracted after the change with effect from April 1, 1971. Before doing so, it will be better to refer to the other decisions cited by Mr. K. A. Panchapagesan, all of which except one had considered the language of section 139 before its change in April,

1971. The only other case which was decided after the change was effected does not appear to have specifically considered the effect of the

change in law.

15. In Gopalji Shaw Vs. Income Tax Officer, ""D"" Ward and Others, , a single judge of the Calcutta High Court took the view that prosecution

cannot be launched merely because there was delay in filing return, unless there was wilful default in filing returns within the time allowed. Charging

of interest u/s 139(8) of the Act led to the presumption that the Income Tax Officer had extended the time for filing the return. If penalty also was

not levied u/s 271(1)(a) of the Act, the prosecution was liable to be quashed. The following observations were made (headnote) :

The object of launching criminal prosecution for wilful default in complying with the provisions of the Income Tax Act, 1961, is to prevent evasion

of tax. But in each and every case, without looking into the gravity of the offence and without considering the attending circumstances, no

prosecution should be launched. Unless there is wilful default in filing the return, no prosecution can be launched. A proceeding under the Income

Tax law for imposition of penalty is quasi-criminal in nature. If the quasi-criminal proceedings, namely, the proceeding for imposition of penalty,

cannot be sustained when the Income Tax Officer, while making the assessment, charges interest u/s 139(8) of the Income Tax Act, 1961, on a

parity of reasoning, no criminal prosecution can be launched in such a case. In the criminal proceeding, wilful default in filing the return has to be

established. By charging interest u/s 139(8), the Income Tax Officer has impliedly extended the time of file the return and the question, therefore, of

wilful default in filing the return of income does not and cannot arise.

In a criminal case, it is not for the accused to establish his innocence. The onus is on the prosecution to bring home the guilt of the accused. Mens

rea is an essential ingredient of a criminal offence. The fact of extension of time to file the return excludes the element of mens rea inasmuch as it

must be presumed that the Income Tax Officer, being satisfied that there was ground for delay in filing the return, had extended the time.

16. In that case, the assessee, as a karta of a Hindu undivided family, filed his

return for the assessment year 1982-83 in February, 1985. The

assessee also paid tax on self-assessment. The Income Tax Officer completed the assessment in December, 1985. After adjustment of the tax paid

on self assessment, the assessee was required to pay a further sum of Rs. 3,036, which the assessee paid. The Income Tax Officer charged

interest u/s 139(8) of the Act up to the date of filing of the return. He also charged interest u/s 217 and 220(2) of the Act. Penalty proceedings

were initiated u/s 271(1)(a), but no penalty was levied. Prosecution was launched u/s 276CC(ii) and the initiation of prosecution was challenged in

a writ petition. It was held that though penalty proceedings were initiated, no penalty was imposed which showed that the Income Tax Department

did not consider it necessary to impose any penalty after realisation of interest u/ s 139(8) of the Act. The Income Tax Officer could not say that

there was wilful default on the part of the assessee in filing the return within the time allowed. Initiation of criminal prosecution was without

jurisdiction and was liable to be quashed. Though the learned judge has relied upon the decision of the Supreme Court in Commissioner of Income

Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , it does not appear that the change in the language of section 139 had been specifically taken note

of. Further, delay in filing the return being wilful or otherwise is a pure question of fact and, if prima facie allegation are discernible in the complaint,

it will not be proper to abort the prosecution in the exercise of inherent powers.

17. A Division Bench of the Gauhati High Court in AJIT SINGH RAIS Vs. COMMISSIONER OF Income Tax., held that penalty cannot be

levied u/s 271(1)(a) of the Income Tax Act, 1961, for delay in filing returns where interest had been charged under the provisions of clause (iii) of

the proviso to section 139(1). The law laid down by the Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra

Sekhar, was followed. That was a cases where the delay in filing of the returns related to the assessment years 1963-64 to 1967-68, long prior to

introduction of amendments to section 139 of the Income Tax Act, 1961, on and from April 1, 1971. Hence, unless the principle laid down by the

Supreme Court before section 139 was amended would still be applicable even after the amendment, this decision of the Gauhati High Court may

not enure in favour of the petitioner.

18. Now, it will be necessary to extract the provisions of section 139 of the Act, so far as it would be relevant for a decision in this case, after in

underwent a change on April 1, 1971 :

139. (1) Every person, if his 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 furnish a return of his income or the income of such

other person during the previous year in the prescribed from and verified in the prescribed manner and setting forth such other particulars as may

be prescribed -

(a) in the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act,

includes any income from business or profession, before the expiry of four months from the end of the previous year or where there is more than

one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day

of June of the assessment year, whichever is later;

(b) in the case of every other person, before the 30th day of June of the assessment year :

Provided that, on an application made in the prescribed manner, the Income Tax Officer may, in his discretion, extend the date for furnishing the

return, and notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of sub-section (8)...

(2) In the case of any person who, in the Income Tax Officer''s opinion, is assessable under this Act, whether on his own total income or on the

total income of any other person during the previous year, the Income Tax Officer may, before the end of the relevant assessment year, serve a

notice upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other

person during the previous year, in the prescribed from and verified in the prescribed manner and setting forth such other particulars as may be

prescribed :

Provided that, on an application made in the prescribed manner, the Income Tax Officer may, in his discretion, extend the date for furnishing the

return, and, notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of sub-section (8).

(3) If any person who has not been served with a notice under sub-section (2), has sustained a loss in any previous year under the head ''Profits

and gains of business or profession'' or under the head ''Capital gains'' and claims that the loss of any part thereof should be carried forward under

sub-section (1) of section 72 or sub-section (2) of section 73, or sub-section (1) of section 74 or sub-section (3) of section 74A, be may furnish,

within the time allowed under sub-section (1) (or within such further time which, on an application made in the prescribed manner the Income Tax

Officer may, in his discretion, allow) a return of loss in the prescribed from and verified in the prescribed manner and containing such other

particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1).

(4) (a) Any person who has not furnished a return within the time allowed to him under sub-section (1) or sub-section (2) may, before the

assessment is made, furnish the return for any previous year at any time before the end of the period specified in clause (b), and the provisions of

sub-section (8) shall apply in every such case;

(b) the period referred to in clause (a) shall be -

(i) where the return relates to a previous year relevant to any assessment year commencing on or before the 1st day of April, 1967, four years

from the end of such assessment year;

(ii) where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April, 1968, there years from the end

of the assessment year;

(iii) where the return relates to a previous year relevant to any other assessment year, two years from the end of such assessment year....

(8) (a) Where the return under sub-section (1) or sub-section (2) or sub-section (4) for an assessment year is furnished, after the specified date, or

is not furnished, then (whether or not the Income Tax Officer has extended the date for furnishing the return under sub-section (1) or sub-section

(2)), the assessee shall be liable to pay simple interest at twelve per cent. per annum, reckoned from the day immediately following the specified

date to the date of the furnishing of the return or, where no return has been furnished, the date of completion of the assessment u/s 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax

deducted at source :

Provided that the Income Tax Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest

payable by any assessee under this sub-section.

Explanation 1. - For the purposes of this sub-section, ''specified date'', in relation to a return for an assessment year, means, -

(a) in the case of every assessee whose total income, or the total income of any person in respect of which he is assessable under this Act, includes

any income from business or profession, the date of the expiry of four months from the end of the previous year or where there is more than one

previous year, from the end of the previous year which expired last before the commencement of the assessment year, or the 30th day of June of

the assessment year, whichever is later;

(b) in the case of every other assessee, the 30th day of June of the assessment year.

19. The proviso to section 139(1) of the Act, while vesting discretion in the Income Tax Officer to extend the date for furnishing the return, on an

application made in the prescribed manner, provides that, notwithstanding that the date is so extended, interest shall be chargeable in accordance

with the provisions of section 139(8). If this proviso is read along with section 139(1)(a) and (b), provisos (i), (ii) and (iii), as it existed earlier to

April 1, 1971, it is clear that up to any period falling beyond the dates mentioned in clauses (i) and (ii), interest at nine per cent. per annum shall be

payable from the first day of October or the first day of January, as the case may be, of the assessment year to the date of the furnishing of the

return. Provisos (i) and (ii) denote that the Income Tax Officer, then, had the discretion to extend time up to a period not extending beyond the

30th day of September of the assessment year, without charging any interest under (i) and up to the 31st day of December of the assessment year

without charging any interest under (ii). It is apparent that, after April 1, 1971, notwithstanding extension of date for filing return, interest shall be

chargeable in accordance with the provisions of sub-section (8) of section 139. As far as the time prescribed for filing of returns is concerned, there is no change in section 139(1) of the Act. Section 139(8) of of the Act, prior to April 1, 1971, which has already been extracted earlier in

this order, provided for reduction of waiver of interest payable by any person under any provision of that section by the Income Tax Officer in

such cases and under such circumstances as may be prescribed, notwithstanding anything contained in clause (iii) of the proviso to sub-section (1).

After amendment, how the section reads has again been extracted earlier in this order. The proviso to section 139(8)(a) is almost similar to section

139(8) of the Act before its amendment. After amendment, section 139(8)(a) fixes the liability of the assessee to pay simple interest at 12 per cent.

per annum, reckoned from the day immediately following the specified date to the date of the furnishing of the return or, where no return has been

furnished, the date of completion of the assessment u/s 144, on the amount of the tax payable on the total income as determined on regular

assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source. So, after the amendment, the interest to be paid is

absolute, notwithstanding extension of date by the Income Tax Officer under the proviso to section 139(1) of the Act. In the old Act, the discretion

to extend the time for furnishing the return could not be beyond 30th day of September of the assessment year, or 31st day of December of the

assessment year, as the case may be, and such extension was in the direction of the Income Tax Officer. After amendment, the discretion of the

Income Tax Officer has been retained, but the restricted period up to 30th day of September or 31st day of December of the assessment year has

been removed. This change clearly shows that fixing of a limit to extended periods was not thought necessary since, in any event, the assessee was

liable to pay interest, irrespective of extension of time for furnishing return. In this context, it would be relevant to refer to the observation of the

Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , which reads as hereunder (at page 438) :

It is only where the Income Tax Officer extends the time for furnishing the return beyond September 30, or December 31, as the case may be,

that interest becomes payable.

20. Bakthavatsalam J., in RAVI STEEL CORPORATION Vs. Income Tax OFFICER AND OTHER., , observed, that, in view of the

amendment made to section 139 of the Income Tax Act, 1961, with effect from April 1, 1971, the levy of interest in case of delay in filing returns

is automatic and that the levy of interest is not penal in nature and that, even where the time for filing returns is extended and interest is levied,

penalty can also be imposed u/s 271(1)(a). The learned judge, after referring to the decision of the Supreme Court in Commissioner of Income

Tax, Andhra Pradesh Vs. M. Chandra Sekhar, , stated thus (at page 685) :

Under the amended provision, the levy of interest in automatic unlike the provision as it was before the amendment. Therefore, in my view, the

decision in Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, is not applicable to the facts of the present case. The

assessment year in this case is 1981-82 to which the amended section applies.

21. A Division Bench of this court, in Commissioner of Income Tax Vs. Veppalodai Salt Corporation, , observed as follows (at page 369) :

There is no warrant for the observation made by the Tribunal in view of the language of the relevant provisions in section 139. Interest is leviable

u/s 139(8). Whenever there is a delay in filing the return, the assessee shall be liable to pay interest at the prescribed rate u/s 139(8). The proviso

to section 139(8) gives a discretion to the Income Tax Officer to reduce or waive the interest payable by the assessee under the said sub-section

under such circumstances as may be prescribed. Those circumstances have been prescribed in rule 117A of the Income Tax Rules. The proviso to

section 139(1) provides from any application in the prescribed manner for extension of time for furnishing the return. The said proviso makes it

clear that notwithstanding the extension granted The said proviso makes it clear that notwithstanding the extension granted on an application made

in the prescribed manner, interest shall be chargeable in accordance with the provisions of sub-section (8) of section 139. That would not mean

that whenever there is no application for extension of time, the assessee will not be liable for interest. Whether there is an application for extension

of time or not, the liability for payment of interest arises u/s 139(8) if there is a delay in filing the return. This position is recognised by the Supreme

Court in the decision in Ganesh Dass Sreeram Vs. Income Tax Officer, ''A'' Ward, Shillong and Others, .

22. A Division bench of the Kerala High Court in Kerala State Cashew

Development Corporation Ltd. Vs. Income Tax Officer and Another, ,

observed as follows (headnote) :

It is evident from the provisions of section 139(8) of the Income Tax Act, 1961, that interest becomes chargeable in all cases where the return is

not furnished within the prescribed time. Interest u/s 139(8) of the Act is levied by way of compensation and not by way of penalty. The interest is

levied because the default in furnishing the return in time resulted in postponement of payment of tax by the assessee, thereby depriving the state of

a corresponding amount of revenue for the period of the delay. The proviso to section 139(8) read with rule 117A of the Income Tax Rules, 1962,

empowers the Income Tax Officer to reduce or waive the interest where the assessee produces evidence to the satisfaction of the Income Tax

Officer that he was prevented by sufficient cause from furnishing the return within time. On the language of the proviso to section 139(8) and having

regard to the fact that the Legislature itself had left it to the rule-making authority to prescribed the conditions and circumstances, it has to be held

that what the proviso intends is only to vest a discretion in the Income Tax Officer to reduce or waive the interest. What sub-rule (v) of rule 117A

stipulates is only a condition precedent the establishment of which alone will form the foundation for reduction or waiver of interest. It is not as if

waiver of interest should follow automatically if sufficient cause enjoined by sub-rule (v) is made out. There is no warrant for this proposition in the

language of rule 117A(v). On the other hand, it is clear that the sub-rule gets attracted and the question of exercising the discretion arises only if the

circumstance mentioned in it is found to exist. The discretion must be exercised fairly and reasonably. The fact that penalty u/s 271(1)(a) had been

cancelled is by itself not a ground for waiving or reducing the interest. The two impositions operate in different fields though they are

complementary to each other. While penalty is punitive, interest is compensatory. Penalty is imposed in the absence of a reasonable cause while a

request for reduction or waiver of interest requires the assessee to make out sufficient cause. The nature of the causes to be made out is

qualitatively different. Therefore, on the language and on the object of the two provisions, it cannot be held that cancellation of the penalty ipso

facto results in total waiver of interest. It is for the Income Tax Officer to reduce the interest in appropriate cases and waive it altogether if the

circumstances of a given case justify it. The reduction or waiver of interest does not follow as a matter of course on sufficient cause being shown

for delay in filling returns. All the relevant circumstances have to be considered. The exercise will depend upon an overall survey and assessment of

all the facts and circumstances of the case. One of the relevant factors which needs to be taken into account in the exercise of the discretion is the

loss to the revenue by reason of the delay in furnishing the return.

23. The observation of the Division Bench of the Madras High Court and the Kerala High Court make it clear that waiver or reduction of interest

operates in a different filed and they cannot follow automatically. Therefore, I am unable to agree with Shri K. A. Panchapagesan, learned counsel

for the petitioner, that since discretion is vested in the Income Tax Officer to reduce or waive the interest payable by any person, in such cases and

under such circumstances as may be prescribed in section 139 of the Act, both before and after its amendment, a prosecution cannot be

maintained, once interest was levied up to the date of assessment. Further, the question of waiver or reduction of interest does not arise on the

facts of this case. It will be difficult to accede to the contention of Mr. Panchapagesan that nothing new is imported in section 139 of the Act after

April 1, 1971, since it is evident that, after the amendment, the Income Tax Officer has no discretion under the proviso to section 139(1) and

interest will have to be levied on the assessee notwithstanding extension of time. The petitioner does not appear to have pleaded for extension of

time nor pleaded for reduction or waiver of interest.

24. Mr. K. A. Panchapagesan finally referred to the judgment of the Andhra Pradesh High Court in Income Tax Officer Vs. Autofil and Others, ,

for the proposition that prosecution u/s 276CC was warranted only when there was wilful failure to submit the return and there should further be

presence of mens rea. Mere rejection of the assessee''s explanation and levy of penalty u/s 271(1)(a) were not sufficient. Absence of mens rea

coupled with the conduct of assessees in paying advance tax, penal interest and penalty were sufficient to discharge the assessees and acquit them.

The principle laid down by the Andhra Pradesh High Court cannot be applied to the instant case at the present stage. The Andhra Pradesh High

Court was considering an appeal preferred by the Income Tax Officer against the acquittal of the respondents by the trial court. Evidence was

available for consideration as to whether the failure by the respondents was wilful or otherwise. The conduct of the assessees was also taken note

of by the High Court while arriving at its conclusion to exonerate the respondents therein. Here, we are at a stage where we have the complaint of

the Income Tax Officer and his evidence recorded in part. The complaint as well as the evidence prima facie show that, in spite of several

opportunities furnished to the petitioner, he did not choose to respond. The details of opportunities which had no impact on the petitioner have

been stated in paragraph 3 on this order. The question of default being wilful or otherwise is a pure question of fact which will be available for

being canvassed by the petitioner before the trial magistrate after sufficient evidence is brought on record. On the peculiar facts of this case, when

prima facie averments are available, it will not be possible to hold, in the exercise of inherent powers, that default in furnishing of the returns was

not wilful. As a matter of fact, it will not even be possible to clinchingly decide that the default was wilful, since it will relate to the realm of

appreciation of evidence. In Gopalji Shaw Vs. Income Tax Officer, ""D"" Ward and Others, , on the facts, the Calcutta High Court held that the

element of mens rea was excluded on the presumption that the Income Tax Officer had extended the time on being satisfied that there was ground

for delay in filing the return. Since I have already observed that default being wilful or otherwise is a pure question of fact, no further discussion will

be necessary and, more so, on the averments available in the instant complaint.

25. Again, the penal section 276C of the Act which came into the statute book with effect from April 1, 1971, underwent a change and now

section 276CC is the relevant provision. u/s 276CC of the Act, a person who wilfully 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 sub-section (2) of section 139 or 148, shall be punishable. Prima

facie evidence shows that the complaint filed by the respondent alleging commission of offence punishable u/s 276CC of the Income Tax Act,

1961, by the petitioner is maintainable.

26. In the result, I hold that, after amendment of section 139 of the Income Tax

Act, 1961, on and from April 1, 1971, mere charging of interest

by the Income Tax Officer cannot be deemed to be implied extension of time to file the return which would in effect excluded wilful default and

consequent prosecution. ""No"" is the answer to the question posed. On the basis of my reasoning, this petition, which has no merit, shall stand

dismissed.

