

(2000) 09 GUJ CK 0140
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No's. 959 to 967 of 1992 8
September 2000

Vinodchandra C. Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Income Tax Act, 1961 — Section 139(2), 140A, 143(3), 276C, 276C(1)

Citation : (2001) 118 TAXMAN 526

Hon'ble Judges : D.H. Waghela, J

Bench : Division Bench

Advocate : K.A. Puj, for the Assessee, A.J. Desai and B.B. Naik, for the Revenue, for the Appellant;

Judgement

Heard the learned counsel Mr. Puj for the petitioner, the learned counsel Mr. Naik for respondent No. 2 - Income Tax authority, and learned Mr. Desai for the state in all these matters. As was agreed and stated at the Bar, all these matters involve common legal issues and, therefore, they are, by consent, disposed by this common judgment.

2. The petitioner in Criminal Misc. Application Nos. 959 to 961 of 1992 is a partner in the firm which is the petitioner in Criminal Misc. Application Nos. 965 to 967 of 1992. The petitioner in Criminal Misc. Application Nos. 962 to 964 of 1992 is also a partner in the same firm as the first mentioned petitioner. Thus, the two partners and the partnership firm have approached this court with a prayer to quash the complaints and the criminal proceedings in the various pending criminal cases initiated by the Inspecting Assistant Commissioner, Ahmedabad.

3. The offences alleged against the petitioners are one or more or all of the offences defined or made punishable under sections 276C(I), 276C(2), 276CC and 277 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The offences alleged against the petitioners are in respect of the assessment years

1980-81 to 1984-85. Primarily the complaints against the petitioners are arising from late filing of Income Tax returns, non-payment of advance tax, wilful attempt to evade tax, penalty or interest, false statement in verification, etc.

4. There is no controversy about the fact that the partners and the partnership firm were required to file their returns of income by the prescribed date and that they had failed in doing so. The petitioners had also failed to pay any advance tax at the time when it was payable. In most of the cases, the petitioners were required by notice u/s 139(2) of the Act to furnish their returns of income. Thereafter, when the returns were filed and the assessment was finalised u/s 143(3) of the Act and the tax payable, interest and penalty were also determined, they were paid. Broadly on these facts, it is alleged in the original complaints that by filing the returns late and only after the notice u/s 139(2), the petitioners had wilfully evaded payment of self-assessment tax payable u/s 140A of the Act. Thus, the offences punishable under sections 276C(2) and 276CC are alleged to have been committed by the petitioners. In Criminal Miscellaneous Application Nos. 963 and 964 of 1992, the offences punishable under sections 276C(1) and 277 are also alleged to have been committed by wilful attempt to evade tax, penalty or interest and on account of false statement made in the verification, etc.

5. Addressing the arguments common to all these cases, the learned counsel for the petitioners has submitted that the lapses on the part of the petitioners are of technical nature and the complainant has singled out the petitioners for prosecution. It is also submitted that, even assuming the allegation against the petitioners to be true, there is no element of mens rea which can be attributed to the petitioners particularly in view of the fact that the petitioners have paid up all the amounts, interest charged and the penalty imposed. As against these submissions, Mr. Naik appearing for the department has submitted that the allegation that the petitioners are singled out for criminal prosecution is baseless and, in any case, the criminal cases cannot be quashed only on the ground that other assesseees committing similar defaults are not prosecuted. As regards the plea of absence of mens rea, the provisions of section 278E of the Act are relied upon to submit that a culpable mental state on the part of the accused has to be presumed in the prosecution for any offence under the Act. It is further submitted that although section 278E is introduced in 1986, it has retrospective effect and it applies to the pending proceedings.

6. The main controversy in these cases centres around the provisions of section 276C, which reads as under :

"Wilful attempt to evade tax, etc.(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable,

(i) in a case where the amount sought to be evaded exceeds one hundred

thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

ExplanationFor the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case, where any person

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstances to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof."

Since the offences u/s 276C(2) are alleged in all the complaints, it is vehemently argued and stressed on behalf of the petitioners that section 276C(2) does not at all apply in the facts of these cases for the reasons that the assessee concerned had not evaded the payment of any tax, penalty or interest in any manner but, instead, such amounts of tax, penalty or interest were immediately paid. In this context, the petitioners have relied upon the judgment in one of the petitioners own case decided by this court in Vinaychandra Chandulal Shah Vs. State of Gujarat and Another, . It is held the said judgment in the case of one of the present petitioners that in the facts of that case there was not even a whisper that there was wilful attempt in any manner whatsoever to evade the payment of tax and, hence, the process issued was required to be quashed. The observations made by the Kerala High Court in G. Viswanathan Vs. Income Tax Officer, A-Ward, Parameswar Nagar, are referred to for the proposition that sub-section (2) of section 276C talks about the case of evasion of tax, penalty or interest after assessments were made. The aforesaid judgment of the Kerala High Court is relied for the further proposition that section 276C(2) deals with evasion of tax after quantification and becomes applicable only after the income is assessed and the assessee attempts to evade payment.

7. The wording and language in both sub-section (1) and sub-section (2) of section 276C appear to be identical except for two important differences. While sub-section (1) deals with evasion of any tax, penalty or interest "chargeable or imposable" under the Act, sub-section (2) deals with the evasion of the "payment" of any tax, penalty or interest under the Act. The Explanation given below the section makes it clearer that two sets of penal provisions are sought to be made; one for evasion of tax, penalty or interest which is chargeable or imposable and the other for the evasion of payments of any tax, penalty or interest in respect of which the words "chargeable or imposable" are not applying. Therefore, it would appear that the provisions of sub-section (1) of section 276C operate when any tax, penalty or interest is chargeable or imposable and the same is alleged to have been evaded. On the other hand, the provisions of section 276C(2) would operate when the payment of tax, penalty, or interest is due and an attempt is made to evade the payment thereof. In the facts of the present cases, except in Criminal Miscellaneous Application Nos. 963 and 964 of 1992, the provisions of sub-section (1) of section 276C are neither invoked by the department nor, is it alleged that the payment of tax, penalty or interest was attempted to be evaded by the petitioners even after the income and tax was assessed and interest and/or penalty were imposed.

8. In this view of the matter, as far as the petitioners are charged with the offence u/s 276C(2), they would be required to be discharged and the complaints and the criminal proceedings to that extent are required to be quashed.

9. As far as the offences u/s 276C(1) and section 277 are concerned, there are clear allegations of late filing of Income Tax returns and wilful attempt at evading the tax. As seen earlier, a complaint in this regard cannot be quashed only on the ground that the petitioners have averred that there was no element of mens rea in their alleged defaults or that in the hundreds of similar cases the department was desisting from filing criminal complaints.

10. It is pointed out on behalf of the petitioner-firm in Criminal Misc. Application Nos. 965 to 967 of 1992 that these cases involve only the offence u/s 276C(2) and even the order of penalty in respect of the assessment year 1982-83 was cancelled by the department itself. Otherwise, factually, the default alleged against the petitioner in these three matters is non-payment of advance tax only.

11. In the facts and circumstances as above Criminal Miscellaneous Application Nos. 965, 966 and 967 of 1992 are allowed and the Criminal Case Nos. 374, 375 and 376 of 1986 and the proceedings therein are quashed and the rule issued therein is made absolute. In the other Criminal Miscellaneous Application Nos. 959 to 964 of 1992, as the offences under the provisions other than sub-section (2) of section 276C are alleged, the complaints and criminal proceedings are not quashed and have to be ordered to be expeditiously conducted. However, as far as the offences alleged u/s 276C(2) are concerned, the observations made hereinabove shall apply. Accordingly, these last mentioned six criminal miscellaneous applications are rejected and rule is discharged with no order as to

costs. The interim relief operating in these criminal miscellaneous applications stands vacated.