IN THE HIGH COURT AT CALCUTTA

CRIMINAL REVISIONAL JURISDICTION

Appellate Side

Present:

The Hon'ble Justice Jay Sengupta

CRR 3198 of 2018
With
CRAN 1 of 2018 (Old No. CRAN 3116 of 2018)
And
CRR 3199 of 2018
With
CRAN 1 of 2018 (Old No. CRAN 3117 of 2018)

Deputy Commissioner of Income Tax

Versus

Kali Pradip Chowdhuri & Ors.

And

Deputy Commissioner of Income Tax

Versus

KPC Medical College Hospital & Ors.

For the petitioner : Mr. Vipul Kundalia
Mr. Anirban Mitra
Mr. Anurag Roy
..... Advocates

For the OPs : Mr. J.P. Khaitan
Ms. Swapna Das
Mr. Partha Ghosh
Mr. Siddharth Das

.....Advocates

Heard lastly on : 09.11.2022

Judgment on : 07.02.2023

Jay Sengupta, J.:

1. As the two revisional applications are connected ones and involve the same parties and the same questions of law, the same are taken up for hearing together.

In re: CRAN 1 of 2018 in CRR 3198 of 2018 & CRAN 1 of 2018 in CRR 3199 of 2018:

2. The petitioner/Revenue contended that there were delays of about 95 days in filing the revision petitions. It was submitted that there was no deliberate laches on behalf of the Income Tax Authorities in challenging the order dated 09.04.2018. A certified copy was applied and was supplied on the same day. A proposal was submitted with the Pr.CIT, C-1, Kolkata. Then a letter was issued by him to the Ministry of Law and Justice to seek legal opinion in this regard. Thereafter, a letter was issued for necessary approval to the DGIT(Inv.) WB., Sikkim & NER. In the meantime the date for filing a criminal revision expired on 10.07.2018. Then the Ministry of Law and Justice accorded consent to move this Court. Soon thereafter necessary approval was obtained from the DGIT(Inv.) WB., Sikkim & NER. Accordingly, an approval was given by the Pr.CIT, C-1, Kolkata to file revision before this Court. Thereafter, a letter was issued to the Ministry of law requesting to appoint a government counsel. Then, a letter was received from them regarding appointment of government counsel. Conferences were held and a draft was made ready by the learned counsel. The draft was given to the

Pr.CIT, C-1, Kolkata for examination. Learned counsel thereafter asked for the details of the dates for filing application for condonation of delay. List of dates regarding the movement of the file was made available to the learned counsel soon thereafter. Some time went for drafting the application for condonation of delay and for vetting out the applications. The applications were made ready for affirmation on 04.10.2018. In fact, the same were affirmed on the next date. The revisional applications involved substantial questions of law and a careful marshalling of facts. Therefore, the applications could be filed only after a delay.

3. Learned Senior Counsel appearing on behalf of the opposite party submitted that a government department or, for that matter, the State was not a preferred litigant. Although the dates are mentioned for movement of files, the time taken for each such movement appeared to be inordinately long and unacceptable. As such, the explanation provided for the delay in filing the applications could not be accepted.

4. It is true that there is some delay in preferring the revisional applications along with the applications for condonation of delay. However, as is required, the petitioner/Revenue has provided even the minute details of the movement of files leading to the passage of time beyond the stipulated one for filing criminal revision.

5. It is alright to term bureaucratic red-tapism as the root cause for delay in governmental work and indeed there is much room for improvements even in the existing circumstances. However, giving approvals and consent and deciding on issues involve taking into consideration not

only the questions of legal tenability, but also the practicability and the finances. In any event, our system does suffer from a poor ratio not only in respect of judicial officers, but also as regards public servants.

6. In Collector, Land Acquisition, Anantnag & Ors. vs. Mst Katiji & Ors., (1987) 2 SCC 107, the Hon'ble Apex Court held that the question of condoning delay can be considered liberally in certain cases and quite equally for the State.

7. In view of the above and upon considering the painstacking manner in which the details of the steps taken were explained, I am inclined to allow the applications for condonation of delay.

8. Accordingly, CRAN 1 of 2018 in CRR 3199 of 2018 and CRAN 1 of 2018 in CRR 3198 of 2018 are disposed of.

In Re: CRR 3198 of 2018 and 3199 of 2018:

9. The petitioners in CRR 3198 of 2018 challenged the order dated 09.04.2018 passed by the learned Additional Sessions Judge, Alipore, South 24 Parganas in Criminal Motion No. 73 of 2018, thereby allowing the revision and setting aside the order dated 15.02.2018 passed by the learned Additional Chief Judicial Magistrate, Alipore in connection with case no. AC 2829 of 2016 and discharging the accused from the case. Similarly, the petitioners in CRR 3199 of 2018 challenged the same order by which the accused opposite parties were discharged by the learned revisional Court in Criminal Motion no. 74 of 2018, thereby setting aside the order dated 15.02.2018 passed by the learned Trial Court in connection with case no. AC 2736 of 2016 and discharging the accused from the case.

10. On 12.07.2010 a search and seizure operation under Section 132 of the Income Tax Act was conducted at the residential property of one Bhaskar Ghosh, culminating in the seizure of Rs. 35 lakhs. A statement of the said Bhaskar Ghosh was recorded according to which the seized cash amount belonged to KPC Medical College and Hospital. On the same day a survey operation in terms of Section 133 of the Income Tax Act was conducted at the office premises of the said medical college and hospital. According to the income tax authorities, the college and hospital was found to have received corpus fund in the guise of donations from the KPC foundation whose capital to provide such donations was inflated on the strength of loans and advances from five companies having identical office address. A summon was issued to one Kamala Shankar Pandey, one of the directors of the five companies. He purportedly gave a statement that the five companies were actually funded by the college and hospital and that accommodation entries were provided in the guise of loans and advances. On 14.10.2011 the assessee foundation filed its return for the assessment year 2011-2012 under Section 139 of the Act, declared nil income and claimed exemption under Section 12AA of the said Act. In 2012 the five companies were dissolved as per orders of the High Court. Soon thereafter, the petitioner issued notices against the assessee under Section 143(2) of the IT Act. The petitioner thereafter issued notice to the assessee under Section 142 (1) of the IT Act. In 2013 the assessee filed revised return of income under Section 153 (C) of the IT Act for the year 2011-2012, declaring net income of 1.41 crores, but not claiming any exemption. Thereafter,

penalty proceedings were initiated under Section 271AA. On 30th September, 2013 the Income Tax Authorities passed penalty order under Section 271 (1) (C) of the said Act and not under Section 271AA as there had been no search and seizure under Section 132. A minimum penalty of Rs. 43,56,900/- was imposed. On 05.08.2015 a show cause notice under Sections 276C (1), 276C (2) of the IT Act was issued against the assessee. But, no reply came. In successive appeals, the CIT (A) and the Income Tax Appellate Tribunal confirmed the penalty orders. Thereafter, this Court dismissed the applications for admission of appeal against the order passed by the IT Act. On 18.01.2016, Complain Case No. 2829 of 2016 was filed against the assessee before the Chief Judicial Magistrate, Alipore under Sections 276 (1) and 276 (2) read with Section 2 (35) of the IT Act for willingly and intentionally concealing its income to evade tax and to evade payment of income tax. On 15.03.2016 the SLP preferred by the assessee against the order of this Court was disposed of granting liberty to the assessee to file for review. In 2017 the accused prayed for discharge before the learned Trial Court. On 15.02.2018 learned trial Court rejected the application for discharge. However, the learned Additional Sessions Judge, Alipore by an order dated 09.04.2018, set aside the order of the learned Trial Court and discharged the accused. While the foundation and its trustees were the accused in the matter which pertains to CRR 3198 of 2018, in case of CRR 3199 of 2018 the Medical College and Hospital and its directors were the ones who were discharged.

11. Mr. Vipul Kundalia, learned counsel appearing on behalf of the petitioner, submitted as follows. A search and signature under Section 132 of the Income Tax Act at the residence of an individual led to a survey operation. All these pointed to the fact that the KPC College and Hospital had received corpus funds in the guise of donations from the said KPC foundation for the assessment year 2011-2012. The assessee was the ultimate beneficiary of Rs. 1.41 crores. The assessee declared nil income for the said year and only subsequently filed a revised return of Rs. 1.41 crores on 6th March, 2013, after being served with notices under Section 133 (2) and 142 (1) of the said Act. Subsequently, the authorities imposed a penalty under Section 271 (1) (C) for a sum of Rs. 43,56,900/-. Sections 276C (1) and 276C (2) used the words 'wilfully attempts' to evade tax or evade payment of tax. In such cases the Section used the words 'shall' and not 'may' to be punishable. Wilful attempt was also explained by the explanation below Section 276 (C). The next relevant phrase was 'mens rea'. Section 278AA categorically specified that the section where one would not be punishable on fulfilment of the 'reasonable cause' condition. But, Section 276 (C) nowhere found any mention in Section 278AA. Therefore, the facts as stated above would clearly made out a prima facie case against the accused. As regards the issue of the cases being barred by Section 300 of the Cr.PC., one might refer to 279A of the IT Act. It was stated as follows "Notwithstanding anything contained in the Criminal Procedure Code 1973 (2) of 1974, an offence punishable under Section 276 (B) or Section 276 (C) or Section 276 (CC) or Section 277 or Section 278 shall be deemed to be

non-cognizable within the meaning of the Code." Moreover, as per Section 279 (3) of the IT Act, the statement of the said Kamala Shankar Pandey about providing accommodation entries was admissible in evidence and corroborated the charges. The learned revisional Court overlooked the fact that the assessee filed income tax return on 14th October 2011 and only revised undisclosed income at the fag end of the assessment proceeding that is, on 6th March 2013. It was clear by then that the undisclosed income had been unearthed by the department. The assessee tried to evade both the normal tax payable as well as the penalty taxes by revising the return. Section 276C (1) was applicable because there was a wilful attempt to evade tax at the last stage of self-assessment. The income received which would otherwise not be exempted as donation under Section 12AA was made to be shown as corpus donation by the accused trusts. Five shell companies were involved, which were subsequently wound up. Upon survey, when it was imminent to the accused that they were getting exposed, the accused trust and college again tried to attempt to evade tax by revising the same return. They disclosed income that they had not disclosed earlier. Such an Act would surely amount to wilful attempt to evade tax penalty or interest chargeable or imposable. On the point that penalty proceeding could continue even after disclosure of concealed income, reliance was placed on (i) Mak Data Pvt. Ltd., (2014) 1 SCC 674, CIT vs. Sova Bajoria, 1997 SCC Online Cal 497, Kumar Jagadish Chandra Sinha Vs. CIT, 1981 SCC Online Cal 316 and CIT Vs. Balarampur Chini Mills, 2015 SCC Online Cal 1524. The judgments relied upon by the accused in this regard being G.

Viswanathan, Vinaychandra Chandulal Shah and Bindra Chandra Patel were clearly distinguishable on facts. At the time of filing prosecution under Section 276C of the Income Tax Act, what was required to be seen was that there was a prima facie case that the accused parties had wilfully attempted to evade tax. Subsequent disclosures made at the fag end of the proceeding under Section 153 (C) could not absolve the accused parties from being prosecuted. Once such a complaint was filed, the trial Court ought to presume under Section 278 (E) the existence of a culpable mental state on the part of the accused. Reliance was placed on Prakash Nath Khanna vs. Commission of Income Tax, (2014) 9 SCC 686 and on Sasi Enterprises vs. Assistant Commissioner of Income Tax (2014) 5 SCC 139. The case tried to be made out by the accused was that they had not filed the return in March 2013 to have the undisclosed income taxed. But, such income which would have been eligible for exemption in their capacity as trustees and societies holding registration under Section 12AA and the donations received by them were in any case exempt under Section 11 of the Act. This was not quite acceptable. It was incredulous to accept that the accused made the disclosures of income only to buy peace. The judgment relied upon by the accused in Nawal Kishore Kejriwal Charity Trust was distinguishable on facts. It related to action taken by the department for cancellation of registration of tax under Section 12AA of the Act. The adjudication proceeding and the subsequent appellate proceedings were continuing at different appellate forums. It was germane to mention that there could be no limitation in the case of economic offences as per the provisions of the

Economic Offences (Inapplicability of Limitation) Act, 1974. This principle was reiterated in the cases of Friends Union Oil Mills and Ors. vs. Income Tax Officer, and Ors., 1975 SCC Online Ker 116 and in Sayarmull Surana Versus Income Tax Officer, 2018 SCC Online Mad 3505. The judgments relied on by the accused in this regard in Kishan Singh, Uday Kumar Awasthi and Lalita Kumari were related to economic offences and were, thus, distinguishable.

12. Mr. J.P. Khaitan, learned senior counsel representing the respondents in both the revisions submitted as follows. Sub-section (1) of Section 276C was applicable if a person "wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable .....under this Act". Sub-section (2) of Section 276C was applicable where a person "wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act." It was apparent from the use of the words "chargeable or imposable" in sub-section (1) of Section 276C that it dealt with the situation prior to the charging or imposition of any tax, penalty or interest i.e., prior to the stage of passing of the order charging or imposing tax, penalty or interest. On the other hand, sub-section (2) dealt with the post-assessment stage where tax, penalty or interest had already been charged or imposed and the payment thereof was sought to be evaded. Thus, while sub-section (1) dealt with attempt to evade any tax, penalty or interest chargeable or imposable, sub-section (2) dealt with evasion of the payment of any tax, penalty or interest charged/imposed. Reference in this behalf was invited to G.Viswanathan Vs. ITO, (1987) 167 ITR 103 (Ker),

Vinaychandra Chandulal Shah vs. State of Gujrat, (1995) 213 ITR 307 (Guj) and Vinochandra C. Patel Vs. State of Gujrat, (2002) 253 ITR 289 (Guj). A mere reference to the complaint would show that no case was made out as regards evasion of the payment of any tax, penalty or interest after such tax, penalty or interest was charged/imposed. Thus, it fell for consideration whether a prima facie case for prosecution for commission of an offence under sub-section (1) of Section 276C was made out. Before this Hon'ble Court it was contended on behalf of the Revenue that subsequent to search and seizure against one Bhaskar Ghosh and survey against the Society, the Society had filed a disclosure petition dated September 8, 2010 disclosing an income of Rs. 8,50,00,000/-; that in the returns filed under Section 153C on December 20, 2011, the Society did not incorporate the amount so disclosed; that it was only at the fag end of the assessment proceedings when the Revenue unearthed the undisclosed income that the society on March 6, 2013 filed revised returns for the assessment years 2007-08, 2008-09 and 2009-10 offering to tax undisclosed income of Rs. 33,21,00,000/-. According to the Revenue, there was clear attempt to evade tax. It was not the case made out in the complaint that the society as an entity had made the disclosure petition on September 8, 2010. The complaint did not fault the society for non-incorporation of the amount mentioned in the disclosure petition dated September 8, 2010, in the return filed on December 20, 2011. The material portion of paragraph 5 of the complaint (Page 28 of the petition) read as follows:- "..... The Hospital Group, made a disclosure at 8.5 crore, though it was a vague disclosure." Similar

was the pleading in paragraph 3 (page 5) of the petition filed before this Hon'ble Court. Thus, it was not the case of the complainant that the society as a person made a disclosure. The disclosure was made by a "Group" and it was considered a vague disclosure. It was not correct to say that the society offered any "undisclosed income" to tax in course of the assessment proceedings. In the return filed on March 6, 2013, the society did not claim the exemption under Section 11 as a result of which the corpus donations, which were exempt under Section 11, became taxable. Such taxation was not because of any income being offered to tax as "undisclosed income." The Revenue's contentions completely overlooked and did not deal with the finding of the learned Additional Sessions Judge that the income of both the society and M/s. Kali Pradip Chaudhuri Foundation, a Trust registered under the Indian Trusts Act, 1882 (hereinafter referred to as "the Trust") was exempt under Section 11 of the Act and the question of wilful attempt to evade tax did not arise. The finding of the learned Additional Sessions Judge was that both the Trust and the Society were entitled to exemption under section 11 and income was not subject to tax in their hands and as such, the question of evasion of tax did not arise. Since the society was engaged in charitable purpose, namely, education and medical relief, it was granted registration under Section 12AA of the Act with effect from April 1, 2004. The society's income from its medical college and hospital was entitled to exemption under Section 11 of the Act. Voluntary contributions received by the society from part of its income in terms of Section 2(24) (ii) read with Section 12(1) of the Act and, just like its other income, had to be used for

the promotion of its charitable objects. However, in terms of Section 11(1) (d) read with Section 12(1) of the Act, voluntary contributions made with a specific direction that they shall form part of the corpus of the trust or institution shall not be treated as income. The society was required to spend 85% of its income including voluntary contributions (other than corpus donations) for charitable purpose. Except for the assessment years 2007-08, 2008-09 and 2009-10 for which the society withdrew its claim for exemption, the society had all along been assessed as an institution entitled to exemption under Section 11 of the Act. Since the trust was also engaged in charitable purpose, it was granted registration under Section 12AA of the Act with effect from April 1, 2004. As in the case of the society, the trust was also entitled to the exemption under Section 11. Voluntary contributions constituted income of the Trust except where the contribution was made with a specific direction that it shall form part of the corpus of the Trust. The Trust was required to spend 85% of its income including voluntary contributions (other than corpus donations) for charitable purpose. Except for the assessment year 2011-12 for which the Trust withdrew its claim for exemption, the Trust had all along been granted exemption under Section 11 of the Act. In so far as the society was concerned the donations aggregating to Rs. 33,21,00,000/- received by it were with the specific direction that they shall form part of its corpus. Thus, in terms of Section 11(1) (d) read with Section 12(1) of the Act, the society was not required to treat such corpus donations as its income and was thus not liable for any income tax thereon. The Trust was not liable for any income tax in respect of

the amounts aggregating to Rs. 33,21,00,000/- received from the five companies and passed on to the society. The trust fully spent the voluntary contributions for charitable purpose by making the same over to the society. Reference in this behalf is invited to the Division Bench judgment of this Hon'ble Court in CIT (Exemption) Vs. Nawal Kishore Kejriwal Charity Trust, 2022 (2) TMI 534, where it was held that it was permissible for a charitable institution to donate to another charitable institution with the direction that the donation was towards its corpus and in such a case the provisions of Section 11(1) (a) of the Act stood complied with. It would thus be apparent that neither the Trust nor the society was liable for any tax in respect of the donations received by them. In so far as the Trust was concerned, it had received the funds from the five companies and in its turn spent it on charity by making corpus donations to the society. All income of the Trust and the society including by way of donations was exempt under Section 11 of the Act. The requirement of the Section that 85% of the income should be spent for charitable purposes was duly fulfilled by the Trust when it made over the entire amount received as corpus donation to the society. Section 11 did not require the society to spend the corpus donation received by it. Thus, no tax was payable by the Trust in respect of the donations received by it from the five companies or by the society in respect of the donations received from the Trust. The obligation to explain the source of the funds was actually that of the five companies. Even if it was assumed that the money which was donated by the five companies was liable to be subjected to tax, such taxation could happen only in the hands of the five donor

companies. However, the said five companies had in the meantime been dissolved under orders dated March 16, 2012, of this Hon'ble Court in CP Nos. 78 to 82 of 2012 in members' voluntary liquidation. In such circumstances, in order to buy peace of mind, the society decided not to claim the exemption under Section 11 for the assessment years 2007-08, 2008-09 and 2009-10, the consequence of which was that the exemption under Section 11 (1) (d) of the Act in respect of the corpus donations became unavailable and the society became liable for income tax. Having so decided, on March 6, 2013, the society filed revised returns in which the claim for exemption under Section 11 as a charitable institution was not made. As such, by giving up the claim for exemption, the society also gave up the benefit under Section 11(1) (d) read with Section 12(1) of the Act in terms of which corpus donations were not regarded as income. By withdrawing the claim for exemption, the society did not say that the money received was not by way of corpus donation or that it was undisclosed income nor did the society say that it had concealed the particulars of its income or furnished any inaccurate particulars of its income. The society could have persisted with its claim for exemption which would have resulted in long drawn and costly litigation. In order to buy peace of mind and avoid litigation, the Trust also in the revised return for the assessment year 2011-12 filed on March 6, 2013, did not claim exemption under Section 11 and as a result its income of Rs. 1,41,00,000/- became taxable. It was also the understanding of the Trust that it would not be penalized in any manner and that there will be no further proceedings. Reference to the assessment order dated March 31,

2013, in the case of the Trust for the assessment year 2011-12 would show that it was not the case of the Revenue that the said sum of Rs. 1,41,00.000/- came to the Trust from the five companies. It would be relevant to mention that the said cash of Rs. 35,10,400/- was not added to the society's income since Bhaskar Ghosh accepted it as his. At pages 8 and 9 of the assessment order, the Assessing Officer extracted and summarized the stand of the assessee in the submissions filed before him that the donations were genuine and not bogus or accommodation entry. A perusal of the aforesaid assessment orders passed in the society's case would also show that the only material adverted to therein is the alleged statement dated August 30, 2010, of Kamala Shankar Pandey. At the same time, the orders went on to state that Prabir Banerjee, the other common Director of the said five companies, had stated that the donations were genuine and there was no accommodation entry. It was mentioned in the assessment orders that Prabir Banerjee stated before the Assessing Officer that Kamala Shankar Pandey had expired, and he filed a copy of the death certificate. Kamala Shankar Pandey having died is no longer available as a witness. The alleged statement of Kamala Shankar Pandey, which had not been tested, could not be relied upon. Reliance on behalf of the petitioner on Section 279(3) of the Act to content that such alleged statement was admissible evidence was entirely misplaced. There was no proceeding against Kamala Shankar Pandey in which the admissibility of the said alleged statement as evidence arises. Section 279 (3) is ex facie inapplicable. The suggestion on behalf of the petitioner as if in course of the assessment proceedings

discrepancies were found or that the five companies were found to be bogus or that the Assessing Officer had unearthed undisclosed income because of which the society and the Trust were compelled to file revised returns is not borne out from the assessment orders. It was necessary to mention that the penalty imposed upon the society under Section 271(1) (c) of the Act for the assessment years 2007-08, 2008-09 and 2009-10 and upon the Trust for the assessment year 2011-12 was confirmed up to the stage of the Tribunal. The appeal of the Trust under Section 260A of the Income Tax Act, 1961 against the order of the Tribunal, being ITAT 106 of 2015, was admitted by this Hon'ble Court on August 26, 2015. On the other hand, the appeals of the society under Section 260A of the Act, being ITAT 105, 107 and 108 of 2015, were not admitted and dismissed at the admission stage by this Hon'ble Court on August 7, 2015. The Society had preferred SLP(C) Nos. 3229-3231/2015 against such dismissal. On March 14, 2016, the Hon'ble Supreme Court disposed of the Special Leave Petitions by granting liberty to the society to file an application for review before this Hon'ble Court pointing out the fact that the appeal of the Trust had been admitted. The Hon'ble Supreme Court made it clear that the Special Leave Petitions had not been considered on merit. The society has filed review petitions, being RVWO 35, 36 and 37 of 2016, which are all pending. It is submitted that the Assessing Officer accepted the revised returns filed by the society for the assessment years 2007-08, 2008-09 and 2009-10 and by the Trust for the assessment year 2011-12. Having accepted such revised returns in toto, it was impermissible for the Income Tax Authorities to launch prosecution under

Section 276C. Reliance in this behalf was placed on the judgment of the Hon'ble Karnataka High Court in K.E. Sunil Babu, Assistant Commissioner of Income-Tax Vs. Steel Processors & Ors., (2006) 286 ITR 315 (Karn). It is further submitted that the petitioner had not explained the delay to prosecute the opposite parties either in the complaint filed under Section 200 of Cr.PC or in the instant petition filed before this Hon'ble High Court. The unexplained delay of six years is fatal. Reliance in this behalf was placed on the following decisions:-

(i) Kishan Singh Vs. Gurpal Singh, AIR 2010 SC 3624;

(ii) Uday Shankar Awasthi Vs. State of Uttar Pradesh, (2013) 2 SCC;

(iii) Lalita Kumari Vs. Government of U.P., (2014) 2 SCC 1

13. I heard the learned counsels for the parties and perused the petition, the affidavits and written notes of arguments.

14. First, the offences alleged are covered by the Economic Offences (Inapplicability of Limitation) Act, 1974. Even otherwise, the purported delay in lodging the prosecution is not fatal, especially considering that the accused were aware of the constituent facts so that any prejudice can be ruled out.

15. It appears that the prime thrusts of the impugned order were that the impugned proceedings amounted to double jeopardy vis-a-vis the penalty proceedings and that no prima facie case was made out against the accused.

16. It is settled law that double jeopardy would be attracted only if the two proceedings in question involved the same or similar penal provisions. A penalty proceeding under Section 271 of the Income Tax Act is distinctly

different from a prosecution for alleged offences under Sections 276C of the said Act. Not only are the procedures for and the implications of imposition of penalty and for prosecution in a criminal case are different, but the scope and ambit of the purported wrong doings that are contained in the respective provisions are also not similar. Therefore, the instant criminal proceedings cannot be said to be barred under Section 300 of the Code of Criminal Procedure.

17. Now comes the question of existence of a prima facie case. For getting an answer, one may need to sift evidence and materials on record albeit for the limited purpose of finding out whether a prima facie case is made out against the accused or not. After all, the proceeding is not pending at an initial stage, but is one step away from trial.

18. The starting point of the present prosecutions is the alleged seizure of a sum of money from the residential property of one Bhaskar Ghosh. It appears that subsequently he recanted the statement and claimed such money to be his own during assessment proceeding and the income tax authorities apparently did not dispute the same.

19. The only other statement allegedly appearing in favour of the prosecution is that of one Kamala Shankar Pandey, a former common director of the companies. However, he is there no more. As such, his statement made before the income tax authorities would hardly be of much consequence. He will not depose in this case and his statement will not be subjected to cross-examination. Besides, there was no proceeding against

the said Kamala Shankar Pandey so as to attract Section 279 (3) of the Income Tax Act.

20. It is further significant to note that the medical college and the medical foundation were both charitable entities having necessary certificates under the Income Tax Act. It does not appear that the certificates were withdrawn and/or cancelled by the income tax authorities for the subsequent years. Therefore, income in their hands would ordinarily be non-taxable.

21. In the course of the assessment proceedings, the assessing officer required the society to explain the source of donations. The source for the Trust were the five companies. Therefore, the obligation to explain the source of the funds was actually that of the five companies. However, the concerned authorities did not pursue the same and not even with their directors and in the meantime, the said companies were dissolved by an order of this Court in the members' voluntary liquidation. In this light, the stand of the assessee that there was no attempt to evade tax or penalty cannot be totally ignored. The accused contended that the corpus fund was not suppressed. Only an exemption was claimed for the particular financial year. Such an act is not even covered by the Explanation after Section 276C. This became an issue and purportedly to buy peace of mind, the society filed a revised return in which the claim for exemption was not made. While doing so, apparently the society did not admit that the money received was an undisclosed income. It is the further case of the accused that had the society persisted with the claim for exemption, it would have resulted in long

drawn and costly litigations. As a result, a larger income became taxable. The accused further claimed that it was the understanding of the trust that it would not be penalised any more. Yet, punitive proceedings were initiated.

22. Another aspect which needs to be looked into is that if an entity is legally entitled to file a revised return of tax, even in terms of Section 153C, within a period and if it does so within such period, the same cannot attach any further disadvantage to the entity for having done so. In this regard the stand of the Revenue that the assessee tried to evade penalty tax by revising return is also not quite tenable.

23. For the sake of expedience, the relevant provisions of Sections 271 (1) and 276C of the IT Act are quoted as under _

Section 271 (1) (C). "**Failure to furnish returns, comply with notices, concealment of income, etc**. – *(1) If the [Assessing Officer] or the [Commissioner(Appeals)] [or the [Principal] Commissioner or Commissioner]] in the course of any proceedings under this Act, is satisfied that any person –*

(b) has failed to comply with the notice [under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or under sub-section (1) of section 142] or sub-section (2) of section 143 [or fails to comply with a direction issued under sub-section (2A) of section 142], or

(c) has concealed the particulars of his income or furnished inaccurate particulars of [such income, or]

(d) has concealed the particulars of the fringe benefits or furnished inaccurate particulars or such fringe benefits,]

he may direct that such person shall pay by way of penalty, -

(ii) in the cases referred to in clause (b), [in addition to tax, if any payable] by him, [a sum of ten thousand rupees] for each such failure;]

(iii) in the cases referred to in [clause (c) or clause (d)], [in addition to tax, if any, payable] by him, a sum which shall not be less than, but which shall not exceed [three times], the amount of tax sought to be evaded by reason of the

concealment of particulars of his [income or fringe benefits] or the furnishing of inaccurate particulars of such [income or fringe benefits.]

Section 276C. 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, or under-reports his income,] under this Act, he shall, without prejudice to any penalty that may be [or imposable, or under-reports his income,] on him under any other provision of this Act, be punishable, -*

(i) in a case where the amount sought to be evaded [or tax on under-reported income] exceeds [twenty-five 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 [two 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 [two years] and shall, in the discretion of the court, also be liable to fine.

Explanation. – For 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 statements; 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 circumstance 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.

24. As was argued on behalf of the Revenue, it is settled law that penalty proceedings can continue even after disclosure of concealed income. But, one has to test this in respect of a prosecution and that too, in the particular facts of the case.

25. It is quite clear from the above that something more is required to haul up an assessee under Section 276C of the Act than under Section 271 (1) (C). "Wilful" is the key word that sets these provisions apart, besides the core ingredients making them up and therefore, there has to be some additional material or averment of fact in this regard. Otherwise, a prosecution would be an automatic fallout of such a penalty proceeding, perhaps depending solely on the generosity of the officer concerned about whether such charges would be pressed. But, this is not what law envisages.

26. It may not be sufficient in the present facts for the Revenue to raise a plea that here presumption under Section 278E would be applicable. A presumption like this is an exception to the general rule of burden of proof and may shift the onus of proof on an accused during trial. But, the initial onus of showing that a prima facie case is made out would still lie on the prosecution. In other words, there has to be some material to invoke such a presumption. Thus, at this stage, a Court has to find out whether a prima facie case is at all made out in this backdrop.

27. It may be germane to mention here that there is a difference between discharging the initial onus of making out a case and shifting of onus of proof during trial by invoking a presumption. Although on different facts and stage, reliance is placed on Baljeet Singh vs. State of Haryana, (2004) 3 SCC 122 and Durga Prasad & Anr. Vs. State of Madhya Pradesh, (2010) 9 SCC 73.

28. With the statements of the two witnesses appearing against the accused having been rendered ineffective, what is left for the prosecution is the purported wrong claiming of exemption by the accused. On the other hand, the accused purportedly retained their status of charitable entities and filed revised return within the stipulated time, waiving exemption and paying tax.

29. It is one thing to suffer a penalty under Section 271 (1) (c) of the Income Tax Act for avoiding to pay tax or penalty. But, it is quite another to be prosecuted for wilfully trying to evade tax or evade payment of tax. The facts of the case as referred to above, for argument's sake, may be at the best sufficient for inviting a penalty under Section 271 (1) (c) of the Act, but appear to be grossly insufficient for making out a prima facie case of an wilful attempt to evade tax or evade payment of tax.

30. As would be evident from the above, the prosecution has even otherwise failed to make out a prima facie case that the opposite parties wilfully tried to evade tax or evade payment of tax, especially considering the fact that the fund was substantially disclosed and only an exemption was claimed, which was waived within the time for filing a revised return.

31. When the opposite parties have been given the benefit of an order of discharge by the first revisional Court, there has to be cogent and convincing grounds on which such an order can be set aside. This Court is not convinced with the points raised by the petitioner in this regard.

32. In view of the above, I do not find any merit in these applications. The same are, therefore, dismissed.

33. However, there shall be no order as to costs.

34. Urgent photostat certified copies of this judgment may be delivered to the learned Advocates for the parties, if applied for, upon compliance of all formalities.

(Jay Sengupta, J.)

S.M