

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 05TH DAY OF APRIL 2021

BEFORE

THE HON'BLE MR. JUSTICE JOHN MICHAEL CUNHA

CRIMINAL REVISION PETITION NO.329 OF 2019

C/W

CRIMINAL REVISION PETITION NO.330 OF 2019

CRIMINAL REVISION PETITION NO.331 OF 2019

IN CRIMINAL REVISION PETITION NO.329 OF 2019

BETWEEN:

INCOME TAX DEPARTMENT
BY ITS ASSISTANT/DEPUTY DIRECTOR OF
INCOME-TAX (INV) UNIT-3(1)
C.R.BUILDING (ANNEX), QUEENS ROAD,
BANGALORE-560001

...PETITIONER

(BY SRI: M.B. NARGUND, ASGI A/W
SRI: JEEVAN J NEERALGI, ADVOCATE)

AND:

SRI D K SHIVAKUMAR
S/O D.K.KEMPEGOWDA,
AGED ABOUT 55 YEARS,
R/AT: EAGLETON RESORT, 30TH KM,
BANGALORE MYSORE ROAD HIGH WAY,
BANGALORE-562109.

...RESPONDENT

(BY SRI: M.V. SESHACHALA, SR. ADVOCATE A/W
SRI: ARVIND V. CHAVAN, ADVOCATE)

THIS CRIMINAL REVISION PETITION IS FILED U/S.397 R/W 401
CR.P.C PRAYING TO SET ASIDE THE ORDER DATED 28.02.2019
PASSED BY THE LXXXI ADDITIONAL CITY CIVIL AND SESSIONS
JUDGE, BENGALURU (CCH-82) IN SPL.C.C.NO.285/ 2018 AND
RESTORE THE SPL.C.C.NO.285/2018 AND DIRECT THE COURT BELOW
TO PROCEED IN ACCORDANCE WITH LAW.

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THESE CRIMINAL REVISION PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 15.03.2021 AND COMING ON FOR PRONOUNCEMENT OF ORDER, THIS DAY, THE COURT MADE THE FOLLOWING:

COMMON ORDER

As common questions of fact and law are involved in these revision petitions, all the three revision petitions are disposed of by this common order.

The outline facts of the cases are as follows:-

The petitioner herein (the Income Tax Department) filed complaints against the respondent herein under section 200 Cr.P.C. alleging commission of offences punishable under section 276C(1) of the Income Tax Act, 1961 read with sections 201 and 204 of IPC. It was alleged in the complaints that during the search action under section 132 of the Income Tax Act in the premises of Eagleton Resort, Bidadi, Bangalore where the respondent was staying for time being, the search team proceeded to the said Resort and searched the respondent after completing due formalities. During the course of search, the

respondent took out a piece of paper from his wallet and tore it in front of the officers. The officers immediately reassembled the said piece of paper. The investigation carried out with reference to the said piece of paper which was attempted to be destroyed by the respondent contained certain unaccounted loan transactions with several persons / entities. In continuation of the investigation, on the basis of the entries found in the said piece of paper, the officers conducted search / survey in premises of Mr.Shashikanth, Mr.A.Somashekar, M/s.Keizen Digital and others which revealed that the said persons / entities were having unaccounted financial transaction with the respondent. The respondent had advanced huge amount of loan to these persons / entities. He did not disclose the said unaccounted financial transaction in his returns of income and further, the statements of several persons disclosed that the respondent had received huge amount of interest on the said unaccounted loan, which was not reflected in the books of accounts or in the returns of income.

2. The complaints were filed before the Special Court under sanction accorded by the Principal Director of Income Tax (Investigation), Bengaluru, and were registered in Spl.C.C.No.285/2018, Spl.C.C.No.286/2018 and Spl.C.C.No.287/2018 respectively. The Special Court took cognizance of the offences and issued summons. On service of summons, the respondent put in appearance. The prosecution led its evidence before charge and the matters were posted for hearing before charge. At that stage, respondent filed applications under section 245 Cr.P.C., in all the above three special cases seeking discharge.

3. After hearing the learned counsels for the parties, the Court below by the impugned orders dated 28.02.2019, allowed the applications and discharged the respondent / accused, reserving liberty to the petitioner / complainant to launch prosecution afresh after estimating the undisclosed income of the assessee / accused by the jurisdictional assessing officer on the basis of the materials produced by the authorized

officer for search and such other materials as are available with him.

4(i) The contention of the petitioner is that the court below failed to interpret the provision contained in sections 132(5) and 132(9A) of the Income Tax Act in proper perspective. As per the procedure under the Income Tax Act 1961, after the search and seizure action, the seized documents or assets are handed over by the authorized officer to the jurisdictional assessing officer for carrying out further proceedings including assessment proceedings, if the authorized officer himself is not the assessing officer. Section 132(9A) of the Income Tax Act no way bars the authorized officer from filing prosecution complaint if he is authorized by the competent authority. The only requirement under the Income Tax Act is the prior sanction from the competent authority as provided under section 279(1) of the Income Tax Act. The requisite sanction was given by the competent authority and therefore, the reasoning of the Special Court that the authorized officer was not competent to file prosecution complaints is legally untenable.

4(ii) The court below erred in not considering the mandate of law contemplated in section 280B(b) of Income Tax Act by which a Special Court is empowered to take cognizance of the offence upon a complaint made by the authority authorized in this behalf. The Special Court has also erred in not examining the scheme of the Income Tax Act in proper perspective. As per the provisions of the Income Tax Act, the jurisdictional assessing authority is empowered to file a complaint and the said authority cannot be divested of the said function solely on the ground that the amount of tax evaded was not quantified by passing an assessment order as contended by the respondent.

4(iii). The Court below committed an error in not considering the expression used in section 276C(1) of the Income Tax Act that "willful attempt to evade tax" and "amount sought to be evaded" did not necessarily mean quantification of the exact amount of the tax evaded; rather the said section provided for prosecution for every act of willful attempt to evade tax of an amount sought to be evaded. The allegations of attempted evasion of tax were made in the complaints by

comparing the returns of the income submitted by the accused and the material disclosed during the search and seizure. The accused should have declared the income concealed and should have paid the tax along with the returns of income. Hence, the evasion of tax relates to the returns of income filed for the respective years. The quantum of tax sought to be evaded can be relevant only after the accused is found guilty of the offence and at the time of imposing sentence. In order to make out the offence under section 276C(1) of the Income Tax Act, it was not necessary to pass an assessment order by the jurisdictional assessing Officer. The evidence gathered during the course of search and seizure action under section 132 of the Income Tax Act were sufficient to establish the existence of the ingredients of the said offence which aspect has been lost sight of by the Special Court.

4(iv) The quantification of the amount of tax evaded is not a necessary ingredient of the offence. The language of section 276C(1) of the Income Tax Act specifically refers to an attempt made to evade the tax, penalty or interest chargeable or

imposable or under reports is income under the Act. The section is attracted even before the quantification of the tax being evaded. The terms used are "chargeable", "imposable" and not "charged" or "imposed". The court below has misinterpreted this provision to mean that unless the quantification of tax liability, the assessee cannot be prosecuted under section 276C(1) of the Income Tax Act only by placing reliance of section 276C(1)(i) of the Income Tax Act. If the interpretation placed by the Court below is to be accepted, then section 276C(1)(ii) of the Income Tax Act would be redundant.

4(v) The Court below has erred in holding that the impugned document attempted to be destroyed (Ex.P3) was not destroyed or obliterated and therefore, the ingredients of sections 201 and 204 of IPC were not made out. The undisputed facts disclose that the respondent made an attempt to destroy the alleged document which would be part of the jurisdictional proceedings under section 132 of the Income Tax Act. Under the said circumstances, the facts alleged against the respondent

render him liable for punishment under section 511 IPC though it was not contended by the prosecution.

5. Sri. M.B. Nargund, learned Additional Solicitor General of India appearing for petitioner argued in line with the above contentions. Placing reliance on the decision of the Hon'ble Supreme Court in *RADHESHYAM KEJRIWAL vs. STATE OF WEST BENGAL, 2011(266) E.L.T. 294 (S.C.)*, with reference to para 43 thereof, submitted that, adjudication proceeding and criminal prosecution can be launched simultaneously; the decision in adjudication proceeding is not necessary before initiating criminal prosecution; both are independent in nature and therefore, non-quantification of the tax does not render the criminal prosecution of the respondent either illegal or vitiated.

6(i) On the same point, learned Additional Solicitor General of India referred to the principles laid down by the Hon'ble Supreme Court in *P.JAYAPPAN vs. S.K.PERUMAL, FIRST INCOME-TAX OFFICER, TUTICORIN, 1984 (Supp) SCC 437* and reiterated that there is no provision in law which provides that the prosecution for the offences in question cannot be launched

until determination of tax payable by the respondent on the unaccounted cash and transactions unearthed during the search. As the material collected during the search prima facie disclose commission of the offence, the criminal court has to judge the case independently on the evidence placed before it and not based on the adjudication made by the adjudicating authorities under the Act.

6(ii) Insofar as the finding recorded by the Special Court with regard to the defect in the sanction and competency of the authorized officer to lodge the complaints, learned Additional Solicitor General of India has referred to the decision of the Co-ordinate Bench of this Court in *Criminal Revision Petition No.955/2019 and connected matters*, decided on 12.11.2019 and would submit that the issue raked up by the respondent having been considered and answered in negative, there is no scope to re-agitate the matters over again.

6(iii) Further, referring to the notification issued by the Government of India, Ministry of Finance, Central Board of Direct

Taxes, dated 13.11.2014, the learned Additional Solicitor General of India pointed out that, under the said notification, the Director General of Income-tax specified in column (2) of the Schedule annexed to the notification or the Principal Director / Director of Income-tax specified in column (4) of the Schedule annexed to the notification is authorized to issue orders in writing for exercise of powers and performance of functions mentioned in (i) above by all or any of the Income-tax authorities who are sub-ordinate to such Director General of Income-tax or Principal Director / Director of Income-tax, in respect of the territorial areas of whole of India, and therefore, there is no illegality either in the authorization or in lodging the complaints and consequent initiation of prosecution against the respondent.

6(iv) Further referring to the specific allegations made in the complaints (Exs-P21), especially with reference to paras 19 and 20 thereof, learned Additional Solicitor General of India emphasized that the intention of the respondent to evade taxes being manifest by the clinching material collected during the

search, the Special Court has committed a grave error in exercising jurisdiction under section 245 of Cr.P.C. Referring to the decision in *PARKASH SINGH BADAL* case, learned Additional Solicitor General of India emphasized that the petitioner / complainant having made out prima facie triable cases, the impugned orders discharging the accused is patently illegal and contrary to the principles of law enunciated by the Hon'ble Apex Court as well as by this Court and therefore, the same cannot be allowed to stand.

7. Countering the above submissions, learned Senior Counsel Sri.M.V.Seshachala appearing for respondent / accused argued in support of the impugned orders. In the course of his submissions, learned Senior Counsel raised the following questions for consideration namely:-

1. Whether the complaints filed by the Search Officer, Deputy Director of Income Tax (Investigation), Unit-3(1), Bangalore under section 276C(1) of the Income Tax Act, 1961 is without jurisdiction?

2. Whether the Principal Director of Income Tax (Investigation) Bangalore can exercise jurisdiction of the Director of Income Tax and that of superior officer Director General of Income Tax, Bangalore?

and by referring to section 279 of the Income Tax Act, emphasized that the Legislature in its wisdom has incorporated number of changes to section 279 of the Income Tax Act in order to ensure that powers of prosecution of an assessee is vested with the highest authority in the hierarchy of the officers administering the Income Tax Department so that injustice is not caused and assesses are not harassed. Originally, the authority to prosecute an assessee vested with the Income Tax authority whereas after passage of time, it was found by the Legislature that prosecution being a deterrent force should be invoked in extreme situations. Therefore, the Legislature thought it fit to vest this power of prosecution with two separate independent Income Tax Authorities at the highest level. The official hierarchy of the officers in Income tax Department is promulgated in section 116 of the IT Act.

8. Referring to the term "tax" as defined in section 2(43) of the Income Tax Act, 1961 and "total income" as defined in section 2(45) of the Income Tax Act, 1961, in the backdrop of

section 4 of the Income Tax Act, learned Senior Counsel pointed out that, as per the above provisions, without computing the tax in accordance with the provisions of the Income Tax Act, solely on the basis of equating undisclosed income as tax, the prosecution could not have been launched against the respondent under section 276C of Income Tax Act.

9. Assailing the very authority of the complainant to initiate prosecution, learned Senior Counsel referred to the relevant provision of section 132(9A) of the Income Tax Act and emphasized that the authority who conducted search under section 132 of the Income Tax Act and proceeded to lodge the complaints under section 276C(1) of the Income Tax Act namely Sri.T.Sunil Goutam, DDIT (Investigation), Unit-3(i), Bengaluru was not the jurisdictional Assessing Officer. As per section 132(9A) of the Act, the Authorized Search Officer on handing over the search material to the jurisdictional Assessing Officer becomes functus officio. In the instant cases, he handed over the search material to the jurisdictional Assessing Officer on 30.10.2017 and hence, the complaints filed by him are without

jurisdiction. To bolster up this argument, learned Senior Counsel referred to section 132(5) of the IT Act and pointed out that section 132(5) of IT Act was omitted by Finance Act, 2002 with effect from 01.06.2002. Prior to its omission, the authorized officer had jurisdiction to estimate the undisclosed income in a summary manner based on search material calculating the tax, interest, penalty as if it is a regular assessment. The effect of omission of a provision is explained by the Hon'ble Supreme Court in *GENERAL FINANCE Co. vs. ACIT*, (2002)(257) ITR 338 thus:

"6.... In the IT Act, s.276DD stood omitted from the Act but not repealed and hence, a prosecution could not have been launched or continued by invoking s. 6 of the General Clauses Act after its omission."

10. I have bestowed my careful consideration to the rival submissions. Since the trial Court has discharged the respondent mainly on the ground that the "complaints filed by the complainant estimating the undisclosed income of the accused and launching the prosecution is without jurisdiction"

and that the piece of paper torn by the respondent / accused was not a document lawfully compelled to be produced as evidence and that the same was not "obliterated, nor rendered illegible" making out the offences under section 201 and 204 of IPC, the following questions arise for consideration namely,

(1) *Whether the complaints presented by the authorized officer Sri.Sunil Goutam are without authority of law?*

(2) *Whether the Principal Director of Income Tax (Investigation) Bangalore was competent to issue authorization to prosecute the respondent for the alleged offences punishable under section 276C(1) of the Income Tax Act, 1961 read with sections 201 and 204 of IPC?*

(3) *Whether in the facts and circumstances of the cases, the Special Court was justified in discharging the accused under section 245 of Cr.P.C.?*

11. **Regarding Point Nos.(1) and (2):-**

The petitioner does not dispute the legal position that a complaint for prosecution of the offences under sections 276C and 277 of Income Tax Act can be filed either by the

jurisdictional assessing authority or the person authorized by the competent authority. Undisputably, in the instant cases, Sri.T.Sunil Goutam, Deputy Director of Income Tax (Investigation), Unit-3(1), Bengaluru, has presented the complaints on 08.02.2018. In the complaints, it is specifically averred that, he has been authorized to prosecute the accused and to file the present complaints vide sanction order dated 05.02.2018 issued under section 279(1) of the Income Tax Act, 1961.

12. A perusal of the Proceedings of the Principal Director of Income Tax (Investigation), Bengaluru, which was produced before the Court at Ex.P20 indicate that sanction under section 279(1) of the Income Tax Act, 1961 for launch of prosecution under section 276C(1) of the Income Tax Act, 1961 and sections 201 and 204 of IPC in case of respondent Sri.D.K.Shivakumar was issued by the Principal Director of Income Tax (Investigation), Bengaluru. By the said proceedings, the Principal Director of Income Tax (Investigation), Bengaluru, has accorded sanction for prosecution of the respondent for the

above offences and has further authorized Sri.T.Sunil Goutam, Deputy Director of Income Tax (Investigation), Unit-3(1), Bengaluru, to institute criminal complaints under section 276C(1) of the Income Tax Act, 1961 and section 201 and section 204 of Indian Penal Code. In view of this specific authorization, the contention of the learned Senior Counsel that Sri.T.Sunil Goutam, Deputy Director of Income Tax (Investigation), Unit-3(1), Bengaluru, was not authorized to institute the criminal complaints and that the complaints lodged by him under section 200 Cr.P.C. were without authority of law cannot be sustained.

13. The reliance placed by the learned Senior Counsel for respondent on section 153A and section 132(9A) of the Income Tax Act is misplaced. Section 153A of the Income Tax Act deals with the assessment in case of search or requisition. By virtue of this section, the Assessing Officer is empowered to assess or reassess total income in respect of each assessment year falling within six assessment years for the relevant assessment year in the case of a person where a search is initiated under section

132 or books of account, other documents or any assets are requisitioned under section 132A, in respect of each assessment year falling within the six assessment years and for the relevant assessment year or years.

14. As per section 132(9A) of the Income Tax Act, the authorized officer is required to hand over search material within 60 days from the date on which last of the authorizations for search was executed, to the jurisdictional assessing officer for the purpose of determination of the tax. By virtue of the said provision, after handing over search material to the jurisdictional assessing officer, the authorized officer becomes functus officio.

But these provisions are not applicable to the prosecution of the offender under the Act.

15. The procedure regarding prosecution are dealt under Chapter XXII of the Income Tax Act. As per section 279 of the Income Tax Act, the prosecution under the Act could be launched at the instance of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

Section 279(1) of the Income Tax Act which is relevant for our purpose reads as under:-

279. (1) A person shall not be proceeded against for an offence under section 275A, section 275B, section 276, section 276A, section 276B, section 276BB, section 276C, section 276CC, section 276D, section 277, section 277A or section 278 except with the previous sanction of the Principal Commissioner or Commissioner or Commissioner (Appeals) or the appropriate authority:

PROVIDED that the Principal Chief Commissioner or Chief Commissioner or, as the case may be, Principal Director General or Director General may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of proceedings under this sub-section.

Explanation.- For the purposes of this section, "appropriate authority" shall have the same meaning as in clause (c) of section 269UA.

Clause (c) of section 269UA defines the term "appropriate authority" as under:-

"appropriate authority" means an authority constituted under section 269UB to perform the function of the appropriate authority in this chapter.

16. As per Section **269UB** (1) *The Central Government may, by order, publish in the Official Gazette,—*

- (a) constitute as many appropriate authorities, as it thinks fit, to perform the functions of an appropriate authority under this Chapter; and*
- (b) define the local limits within which the appropriate authorities shall perform their functions under this Chapter.*

17. The notification issued by the Government of India, Ministry of Finance dated 13.11.2014, in exercise of the powers conferred by sub-sections (1) and (2) of section 120 of the Income Tax Act, 1961 and in supersession of the earlier notifications of the Government of India, the Central Board of Direct Taxes

- (i) directs that the Directors General of Income Tax specified in column (2) of the Schedule annexed to this notification or the Principal Director / Director of Income Tax specified in column (4) of the said Schedule shall exercise powers under Part C (Powers) of Chapter XIII and corresponding provisions of Chapter XXI (Penalties imposable), Chapter XXII (Offences and prosecutions) and other provisions incidental thereto of the said Act and perform the functions relating thereto in respect of the territorial areas of whole of India;*

Further clause (iii) thereof reads as under:-

- (ii) Authorises the Director General of Income Tax specified in column (2) or the Principal Director / Director of Income Tax specified in column (4) of the said Schedule to issue*

orders in writing for exercise of powers and performance of functions mentioned in (i) above by all or any of the Income Tax authorities who are subordinate to such Director General of Income Tax or Principal Director / Director of Income Tax, in respect of the territorial areas of whole of India;

18. In view of this notification, the authorization made in favour of Sri.T.Sunil Goutam, Deputy Director of Income Tax (Investigation), Unit-3(1), Bengaluru, is in consonance with the provisions of the Income Tax Act and does not suffer from any error or illegality as sought to be made out by learned Senior Counsel for respondent and hence, the contentions urged by learned Senior Counsel for respondent in this regard are rejected.

19. **Regarding Point No.3:-**

Undisputably, the respondent is sought to be prosecuted under section 276C(1) of the Income Tax Act.

Section 276C(1) read as under:-

276C. (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 imposable 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.*

20. The offence under Section 276C is a non-cognizable offence as could be seen from Section 279A of the Income Tax Act, which is extracted herebelow,

"Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under section 276B or section 276C or section 276CC or section 277 or section 278 shall be deemed to be non-cognizable within the meaning of that Code."

21. Likewise sections 201 and 204 of IPC are also classified as non-cognizable offences. As per the scheme of the Code, Section 201 IPC is either cognizable or non-cognizable offence depending upon disappearance of evidence caused. Since the main offence alleged against the respondent is non-cognizable one, sections 201 and 204 of IPC necessarily to be treated as non-cognizable offences.

22. In the backdrop of the above provisions, section 280B of the Income Tax Act may be noted. It reads as under:

280B. *Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—*

(a) *the offences punishable under this Chapter shall be triable only by the Special Court, if so designated, for the area or areas or for cases or class or group of cases, as the case may be, in which the offence has been committed:*

PROVIDED *that a court competent to try offences under section 292,—*

(i) *which has been designated as a Special Court under this section, shall continue to try the offences before it or offences arising under this Act after such designation;*

(ii) *which has not been designated as a Special Court may continue to try such offence pending before it till its disposal;*

(b) *a Special Court may, upon a complaints made by an authority authorised in this behalf under this Act take cognizance of the offence for which the accused is committed for trial.*

From the reading of the above provision, it is clear that the offences punishable under the Act are triable only by the designated Special Court, and by virtue of proviso (b) of section 280B, a Special Court, upon a complaint made by an authority authorized in this behalf under this Act could take cognizance of the offence for which the accused is committed for trial.”

23. Thus, a conjoint reading of the above provisions make it abundantly clear that the Special Court has no original jurisdiction to take cognizance of the offences under Chapter XXII of Income Tax Act unless the accused is committed for trial. These provisions therefore lead to the conclusion that a complaint seeking prosecution of the accused for commission of the offences under Chapter XXII of the Act could be initiated only before the jurisdictional Magistrate and not directly before the Special Court. In the instant cases, undisputedly, the complaints were lodged by the authorized officer directly before the Special Court and the records of the proceedings indicate that on receiving the complaints, the Special Court straightaway issued summons to the accused without even taking cognizance of any of the offences. The relevant order dated 14.02.2018 in this regard reads as under:-

"Office is to register the case against the accused for the offence punishable under section 276C(1) of the Income Tax Act, 1961 and for the offences punishable under section 201 and 204 of IPC in III register and issue summons to the accused returnable by 22/3/2018."

24. After appearance of the accused, the Special Court appears to have proceeded to record the evidence before charge and examined PW.1 and marked exhibits P1 to P17 and thereafter, considered the applications filed by the respondent under section 245 Cr.P.C. in the respective cases and by the impugned orders, allowed the applications and discharged the respondent granting liberty to the complainant / I.T. Department to launch prosecution afresh after estimating the undisclosed income of the assessee / accused by the jurisdictional assessing officer.

25. The procedure followed by the Special Court, in my view, cannot be countenanced for the following reasons:-

Firstly, provisions of the Criminal Procedure Code, 1973 are applicable to the prosecution under Chapter XXII of the Income Tax Act. In this regard, section 280D of the Income Tax Act provides as under:-

280D. (1) Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bails or bonds), shall apply to the proceedings before a Special Court and the

person conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor:

Provided that the Central Government may also appoint for any case or class or group of cases a Special Public Prosecutor.

(2) A person shall not be qualified to be appointed as a Public Prosecutor or a Special Public Prosecutor under this section unless he has been in practice as an advocate for not less than seven years, requiring special knowledge of law.

(3) Every person appointed as a Public Prosecutor or a Special Public Prosecutor under this section shall be deemed to be a Public Prosecutor within the meaning of clause (u) of section 2 of the Code of Criminal Procedure, 1973 (2 of 1974) and the provisions of that Code shall have effect accordingly.



Secondly, in view of the proviso (b) of section 280B of the

Income Tax Act, the Special Court is debarred from taking cognizance of the offences under Chapter XXII of the Income Tax Act without the accused being committed to the Special Court for trial.

26. In view of the above provisions, the Special Court could not have entertained the complaints as presented by the petitioner and could not have assumed jurisdiction to try the

alleged offences without the accused having been committed for trial. That apart, all the offences alleged against the respondent being non-cognizable offences, the Special Court could not have proceeded in the matter based on the material collected by the authorized officer under section 132 of the Income Tax Act for the reason that investigation in respect of a non-cognizable offence is impermissible under the Code without authorization by the jurisdictional Magistrate. Under the said circumstances, the order passed by the Special Court discharging the accused and permitting the complainant to file fresh complaints may have to be sustained, though for different reasons as discussed above, with a rider that the fresh complaints, if any, on making out the offences under Chapter XXII of the Income Tax Act, be filed before the competent Court, as provided under the various provisions of the Criminal Procedure Code, 1973 and the Income Tax Act, as discussed above.

27. Coming to the allegations leveled against the respondent, in my view, the allegations made in the complaints and the material produced in support thereof prima facie do not

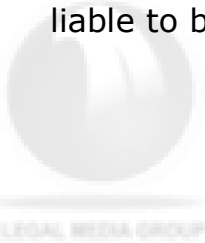
make out the ingredients of the offences under section 276C(1) of the Income Tax Act.

28. The gist of the offence under section 276C(1) is the wilful attempt to evade any tax, penalty or interest chargeable or imposable or under reports of the income. What is made punishable is "attempt to evade tax, penalty or interest" and not the "actual evasion of the tax". The expression "attempt" is nowhere defined under the Act or IPC. In legal parlance, an "attempt" is understood to mean "an act or movement towards commission of a intended crime". It is doing "something in the direction of commission of offence". Viewed in that sense "in order to render the accused / respondent guilty of attempt to evade tax, penalty or interest, it must be shown that he has done some positive act with an intention to evade any tax, penalty or interest" as held by the Hon'ble Supreme Court in *PREM DASS vs. INCOME TAX OFFICER (1999) 5 SCC 241* that a positive act on the part of the accused is required to be established to bring home the charge against the accused for the offence under section 276C(2) of the Act.

29. In the instant cases, the only circumstance relied on by the learned counsel for petitioner / complainant in support of the alleged charges is that, during the search action, certain unaccounted loan transaction with the several persons / entities were detected and it was ascertained that the respondent had advanced huge amount of loan to these persons / entities and the said unaccounted financial transactions were not disclosed in his returns of income for the relevant years and that the respondent had received huge amount of interest on the said unaccounted loan. These allegations, even if accepted as true, the same do not prima facie constitute offences under section 276C(1) of the Income Tax Act. Tax, penalty or interest could be evaded provided tax or penalty is chargeable or imposable in respect of the above transactions. There is no presumption under law that every unaccounted transaction would lead to imposition of tax, penalty or interest. Therefore, until and unless it is determined that the unaccounted transactions unearthed during search were liable for payment of tax, penalty or interest, no prosecution could be launched on the ground of

attempt to evade such tax, penalty or interest. As a result, the very prosecution launched against the respondent being premature and illegal cannot be allowed to continue.

For the above reasons, I do not find any justifiable reason to interfere with the impugned orders. As the prosecution initiated against the respondent is bad in law and contrary to the procedure prescribed under the Code of Criminal Procedure and the provisions of the Income Tax Act, the revision petitions are liable to be dismissed and are accordingly **dismissed**.



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Sd/-
JUDGE

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