* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Crl. M.C. No.2110/2010

+ Date of Decision: 13th March, 2013

 # ASSTT.COMMISSIONER OF INCOME TAX...Petitioner
! Through:Mr. Tiger Singh, Advocate

Versus

$ NILOFAR CURRIMBHOY ….Respondent
Through: Mr. H.R.Khan Suhel, Advocate

CORAM:
*** HON'BLE MR. JUSTICE P.K.BHASIN**

ORDER

P.K. BHASIN, J:

The respondent was discharged by the Court of Additional Chief Metropolitan Magistrate, Delhi vide order dated 22nd August,2008 for the commission of the offence punishable under Section 276-CC of the Income Tax Act, 1961 on the ground that the complainant(Income Tax Department) had failed to establish in its pre-charge evidence adduced by it in its complaint case(being Complaint Case no. 35/1999) that her failure to submit the income tax return for the assessment year 1994-95 was wilful. That decision of the learned Additional Chief Metropolitan Magistrate was affirmed by the Sessions Court vide order dated 29th September,2009 when it was challenged by the complainant by way of a revision petition(being Revision Petition No. 06/2008). The complainant

felt aggrieved by the revisional Court's order also and so it filed the present petition under Section 482 of the Code of Criminal Procedure,1973 and Article 227 of the Constitution of India for setting aside the orders of the trial Court as well as of the revisional Court.

2. The relevant facts stated in the complaint of the petitioner-complainant are as follows: -

> "4. That for the assessment year 1994-1995, the accused was to file the Income Tax return by 31.10.1994 but it was found by scanning the relevant records of the Income tax Department that she had not furnished the Income Tax Returns and, therefore, a Caution Notice dated 7.11.1994 was sent to the accused-respondent and the same was duly served upon the assessee/accused through the process-server of the Income tax Department. The copy of the said Caution Notice is attached herewith and is marked as Annexure B. The said notice had made it clear that in case she (accused/Assessee) had filed the Income tax Returns else-where in that event the copy of the Income Tax Return alongwith the proof of filing of the said return should be furnished by 25.11.1994.
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> 5. The said caution notice, however, was not complied withby the accused-respondent and no representation/reply was received.Another statutory notice u/s 142(1) of the Income Tax Act dated 9.1.1995 was duly served upon the Assessee/Accused/ respondent on 11.1.1995 by the Process-Server of the Income tax Department. By virtue of the service of the said notice, the Assessee/Accused was to file the Income Tax return within 30 days from the receipt of the said notice, but the said notice sent by the Income tax Department of the complainant was not complied with by the accused-assessee and no response of any nature whatsoever was received from the Assessee-accused respondent.
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> 6. That the Assessee/accused filed the Income Tax return for the relevant Assessment year 1994-1995 only on 1st May, 1995 whereas the Assessee/Accused was required

> statutorily to file the said returns latest by 31st October, 1994.....
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> 7. That a show-cause notice dated 21.8.1998 was served upon the Assessee/Accused seeking the explanation of the accused/Assessee for late filing of the returns..... The accused/Assessee had replied to the said show-cause notice vide his reply dated 4th September, 1998.....
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> 8. That the accused/Assessee has not rendered any valid and cogent reasons for filing the Income Tax Return for the Assessment year, 1994-95 after the lapse of 7 months. The delay on the part of the accused/Assessee in filing the Return for the relevant Assessment years, mentioned hereinabove, is wilful, deliberate, malicious and the accused has not demonstrated any paucity of funds or any valid and cogent reasons beyond her control. It is pertinent to mention here that the accused/Assessee is a habitual defaulter in filing the late returns.
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> 9. That the accused-respondent has, thus, committed the offence under Section 276-CC of the Income Tax Act, 1961, as amended upto date and she is liable to be prosecuted and punished for the same."

3. After examining the complaint the trial Court summoned the respondent vide order dated 11th February,1999. However, after the respondent entered appearance before the trial Court and pre-charge evidence of the petitioner-complainant had been recorded the trial Court, as noticed already, discharged the respondent vide impugned order dated 22nd August, 2008 which was affirmed by the Sessions Court when challenged by the petitioner-complainant by way of a revision petition.

4. The present petition was then filed by the petitioner-complainant seeking reversal of the orders of both the Courts below.

5. Mr. Tiger Singh, learned counsel for the petitioner had submitted that there was admittedly long delay on part of the respondent herein in filing her income tax return for the assessment year 1994-95 and, therefore, the trial Court should have presumed the delay to be wilful relying upon the provisions of Section 278-E of the Income Tax Act instead of holding that in the pre-charge evidence adduced by the Department it had failed to establish that the delay was wilful and discharging g the respondent. In support of his submission learned counsel placed reliance on one judgment of the Supreme Court in **"Prakash Nath Khanna and Anr. v. Commissioner of Income Tax and Anr.", 2004 Cri.L.J. 3362** and one judgment of this Court in **"V.P. Punj v. Asst. Commissioner of Income Tax & Anr.", 2001 VI AD (Delhi) 501.**

6. On the other hand it was submitted by Mr. H.R.Khan Suhel, the learned counsel appearing on behalf of the respondent that the Courts below had rightly discharged the respondent. It was also submitted that the Department having accepted the delayed return and penalty etc. for the delayed filing of the return and that too before the issuance of the final show cause notice before launching her prosecution could not have subsequently proceeded to prosecute the respondent. It was also argued that the respondent's request for compounding of the offence was also arbitrarily rejected by the Department even though in routine such like offences were compounded by the Department almost in every case on payment of some penalty which the respondent was ready to pay even now.

7. After having considered the record of the trial Court and the submissions made by the counsel for the parties this Court is of the view that the learned trial had wrongly discharged the respondent and the revisional Court also erred in affirming the trial Court's order. It is not in dispute that the respondent had not filed the return for the assessment year 1994-95 within prescribed period and not even within the period within which the petitioner-complainant was required her to do so on it being found that she had not filed her return. The respondent had not even respondent to the communications, as referred to in the complaint, sent to her by the petitioner-complainant requiring her to file her return or to show the proof of filing if it had been filed within the prescribed time. So, the offence under Section 276 CC stood committed by that time and for that offence the Department could file a criminal complaint against her after obtaining requisite sanction from the competent authority which it did obtain and complaint was filed in Court. After the complaint had been filed the trial Court had found a prima facie for taking cognizance of the said offence and so the respondent was summoned. In the pre-charge evidence adduced by the Department the aforesaid facts were reiterated by the departmental witnesses and the same were not challenged also during their cross-examination on behalf of the respondent. However, the learned trial Court on an erroneous view that it was for the complainant Department to show that failure to file the return within time discharged the respondent by holding that wilful default on the part of the respondent was not

established. That conclusion was also erroneous and unsustainable as the learned trial Court conveniently ignored existence of Section 278-E in the Income Tax Act which permits raising of a presumption in favour of the Department regarding the existence of culpable mental state(*mens rea)* on the part of the assessee and non-consideration of that provision of law led to the passing of a wrong order of discharge of the accused-assessee, respondent herein. Section 278-E was considered by the Supreme Court in the case of ***Prakash Nath (supra)***, which was cited by Mr. Tiger Singh, and the Supreme Court had observed as under:

> "22. Whether there was wilful failure to furnish the return is a matter which is to be adjudicated factually by the Court which deals with the prosecution case. Section 278-E is relevant for this purpose and the same reads as follows:
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> > **"278-E: Presumption as to culpable mental state-**
> > (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
> >
> > **Explanation:**In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.
> > (2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is

established by a preponderance of probability:.

> 23. There is a statutory presumption prescribed in Section 278-E. The Court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution. Therefore, the factual aspects highlighted by the appellants were rightly not dealt with by the High Court. This is a matter for trial. It is certainly open to the appellants to plead absence of culpable mental state when the matter is taken up for trial."

9. This decision of the Apex Court squarely applies to the facts of the case in hand. It would be for the respondent to establish during the trial that her failure to file her return was not wilful. The Courts below went wrong in going into the question as to whether the explanation offered by the respondent in response to the show cause notice given to her before the filing of the complaint in Court was rightly rejected or not. Once the complaint stood filed the trial Court was only required to examine whether cognizance should be taken or not and once it was decided to take cognizance and to summon the respondent the trial Court thereafter was required to examine whether in the pre-charge evidence the complainant had been able to show that the respondent had not filed her return for the assessment year in question within the prescribed period, which fact in the present case was not even disputed by the respondent. So, after raising the presumption under Section 278-E the trial Court should have framed the charge against the respondent leaving it to

him show during the trial thereafter that there was no wilful default on her part.

10. Section 278-E came to be considered by this Court also in V.P.Punj's case(supra), which was also relied upon by the learned counsel for the petitioner and the Single Judge bench had held that the sufficiency of the explanation of the defaulter assessee is a question of fact regarding which no finding can be given at the stage of charge but the presumption of *mens rea* against the accused under Section 278-E has to be pressed into service by the Court at the charge stage.

11. Just because the respondent had applied for the compounding of the offence before the filing of the complaint against her in Court, as is was being claimed by her, and the same according to her had not been decided before the filing of the complaint it could not be said that the complaint was not maintainable, as was also the submission of the learned counsel for the respondent not was the trial Court required to examine at the stage of charge as to why the department was not compounding the offence in the case of the respondent herein. If she was aggrieved by any action or inaction on the part of the authority competent to take the decision on her request for compounding she should have had recourse to legal remedies instead of waiting for the prosecution to be launched by the department.

11. The revisional Court also did not go into the aforesaid aspects and simply affixed its seal of approval to the order of the trial Court and, therefore, its order also cannot be sustained.

12. This petition and, is accordingly allowed. The impugned orders of the trial Court and the revisional Court are set aside and the matter is now remanded back to the Court of the Additional Chief Metropolitan Magistrate with the direction for framing charge under Section 276-CC of the Income Tax Act against the respondent and to try her in accordance with law. It is however, clarified that nothing observed by this Court in this order shall be considered by the trial Court to be any final expression of opinion on the merits of the complainant's case or the respondent's explanation which she had tendered in response to show cause notice given to her before the filing of the complaint in Court by the Income Tax Department.

The case shall now be taken up by the trial Court on 29th April,2013 at 2 p.m.

P.K.BHASIN,J

MARCH 13, 2013