GAHC010174582022

2026:GAU-AS:12880

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./896/2022

M/S FLAMINGO BREWERIES PVT LTD AND 2 ORS
HAVING ITS REGISTERED OFFICE AT H. NO. 316, NEAR AMOLAPATTY L.P. SCHOOL,
WARD NO. 6, DIPHU 782460, KARBI ANGLONG, ASSAM, REPRESENTED HEREIN BY ITS DIRECTORS, SRI SANJU PHANGCHO AND SRI BIJOY PHANGCHO.

2: SRI SANJU PHANGCHO
S/O SRI LONGKI PHANGCHO
R/O TARALANGSO TINIALI
MANJA-DIPHU ROAD
DIPHU 782462
DIST. KARBI ANGLONG
ASSAM

3: SRI BIJY PHANGCHO
S/O SRI HOREN PHANGCHO
R/O AMOLAPATTY
NEAR BAPTIST CHURCH
DIPHU
DIST. KARBI ANGLONG
ASSA

VERSUS

INCOME TAX DEPTT
REP. BY SRI SAIKAT MITRA ACIT, INCOME TAX OFFICER, TINSUKIA, CIRCLE, TINSUKIA, PIN-786125, ASSAM

Linked Case : Crl.Pet./168/2022

BIJOY PHANGCHO
S/O SRI HOREN PHANGCHO
R/O AMOLAPATTY
NEAR BAPTIST CHURCH
P.O. AND P.S. DIPHU
DIST. KARBI ANGLONG
ASSAM

VERSUS

INCOME TAX DEPARTMENT
REP. BY SRI SAIKAT MITRA
ACIT
INCOME TAX OFFICER
TINSUKIA
CIRCLE TINSUKIA
PIN-786125
ASSAM

Linked Case : Crl.Pet./165/2022

SANJU PHANGCHO
S/O SRI LONGKI PHANGCHO
R/O TARALANGSO TINIALI
MANJA-DIPHU ROAD
DIPHU 782462
DIST. KARBI ANGLONG
ASSAM

VERSUS

INCOME TAX DEPARTMENT
REP. BY THE SRI SAIKAT MITRA
ACIT
INCOME TAX OFFICER
TINSUKIA
CIRCLE TINSUKIA
PIN-786125
ASSAM

- BEFORE -

HON'BLE MR. JUSTICE ROBIN PHUKAN

Advocate for the petitioner	:	Mr. S. Borthakur, Mr. V. Rajkhowa
Advocate for the respondent	:	Mr. D. Borah, Sr. S.C, Mr. J. Chopra, S.C Income Tax
Date on which judgment is reserved	:	**20.08.2026**
Date of pronouncement of judgment	:	**02.09.2026**
Whether the pronouncement is of the operative part of the judgment ?	:	No
Whether the full judgment has been pronounced?	:	Yes

JUDGMENT & ORDER (CAV)

Heard Mr. V. Rajkhowa, learned counsel for the petitioners. Also heard Mr. J. Chopra, learned Standing Counsel appearing for the respondent in Income Tax department.

2. By this common judgment and order, it is proposed to dispose of three criminal petitions being, (i) Crl. Petition No. 896 of 2022, (M/s Flamingo

Breweries Pvt. Ltd. & 2 Others vs.Income Tax Department), (ii) Crl. Pet. No. 165 of 2022 (Sanju Phangcho -vs. Income Tax Department, (iii) Crl. Pet. No. 168 of 2022, (Bijoy Phangcho vs.- Income Tax Department), for quashing and setting aside the **C.R Case No. 1103C of 2019, C.R Case No. 1099^{C}/2019** & **C.R Case No. 1100^{C}/2019,** under Section 276D/277 of the Income Tax Act, 1961, pending against them in the Court of learned Judicial Magistrate First Class, Kamrup (M), Guwahati, instituted by the respondent herein these petitions, pursuant to the same Assessment Order, **dated 21.12.2018,** being Order No. ITBA/AST/S/144/2018-19/1014486281(1), passed by the respondent No.1, as a common question of law is involved in all the three petitions and also being the parties involved are same in all the three petitions.

3. It is to be noted here that in Crl. Petition No. 896 of 2022, under Section 482 of the Code of Criminal Procedure, 1973, three petitioners, namely: (i) M/S Flamingo Breweries Private Limited, (ii) Shri Sanju Phangsho and (iii) Shri Bijoy Phangsho have prayed for quashing the C.R Case No. 1103^{C} of 2019, pending against them. And in Crl. Petition No. 165/2022, the petitioner, namely, Shri Sanju Phangsho has prayed for quashing and setting aside the C.R Case No. 1099^{C}/2019, pending against him and in Crl. Petition No. 168/2022, the petitioner, namely, Shri Bijoy Phangsho, has prayed for and quashing and setting aside the C.R Case No. 1100^{C}/2019, pending against him. All the three cases are registered under Sections 276D/277 of the Income Tax Act, 1961, pursuant to the same Assessment Order No. ITBA/AST/S/144/2018-19/1014486281(1), dated 21.12.2018, are pending in the Court of learned Judicial Magistrate First Class, Kamrup (M), Guwahati.

4. The background facts leading to filing of the present petitions are briefly stated as under: -

> "The petitioner No. 1 is a Private Limited Company, registered under the Companies Act, 1956, bearing Registration No. 07898 of 2005-2006, which deals with the business of Indian Made Foreign Liquor bonded (Wholesale) warehouse, in the district of Karbi Anglong and the petitioner Nos. 2 and 3 are the Directors of the said company.
> The other Directors of the said company are Smt. Joyshree Phangcho, wife of Sanju Phangcho, and Smt. Narola Aier, wife of Sri Bijoy Phangcho, who are only shareholding Directors and not involved in day-to-day operations of the business.
>
> The assessee company (hereinafter referred to as 'assessee') filed its return of income tax for the Assessment Year 2016-17 on 17.10.2016, declaring total income of Rs. 8,01,508/-. Then the respondent had selected the case for scrutiny and assessment under Section 144/143(3) of the Income Tax Act, 1961 (hereinafter as Act) was completed on 21.12.2018, determining the taxable income at Rs. 35,66,191/- against declared income of Rs. 8,01,508/.
>
> The respondent herein had found the assessee remained partly non-compliant to all the statutory notices and show-cause notices, served upon it. Further he found discrepancies in the balance sheet, and P&L A/C vis-à-vis notes on financial statement, as the assessee was asked to provide explanation. But, the assessee remain non-compliant. The Assessing Officer, therefore, rejected books of

account of the assessee.

The respondent had also found that the above assessee has made a willful attempt to evade tax by not disclosing its actual income to Income Tax Department, particularly when the assessee were fully aware of its income. Also, the assessee failed to produce correct accounts and documents willfully by not complying with statutory notices issued and served on it."

5. Thereafter, the respondent herein, had filed three complaint petitions on 05.03.2019, under Section 200 Cr. P.C, in the learned Chief Judicial Magistrate, Kamrup (M), Guwahati, alleging inter-alia amongst others, the aforesaid facts.

5.1 Upon the aforementioned complaints, (i) CR Case No. 1103^{C} of 2019, against three petitioners, as stated above, (ii) C.R Case No. $1099^{\mathbf{C}}$ of 2019, against the petitioner, namely, Shri Sanju Phangsho and (iii) C.R Case No. 1100^{C}/2019, against Shri Bijoy Phangsho, were registered under Sections 276D/277 of the Income Tax Act, 1961, and thereafter, the learned Judicial Magistrate First Class, Kamrup (M), to whom the cases were made over, took cognizance of the offences, under Sections 276D/277 of Income Tax Act and issued summons to the petitioners, vide order, dated 15.07.2022.

5.2 While, the aforesaid cases were pending for disposal, the petitioners herein had challenged the assessment order, dated 21.12.2018, so passed by the respondent herein, under Section 144 of the Income Tax Act, 1961 by filing an appeal before the Commissioner of Income Tax (Appeals), Dibrugarh. Then the Commissioner of Income Tax (Appeals), Dibrugarh, passed the appellate order dated 28.02.2020, under Section 250 of the Income Tax Act, 1961, and gave a particular relief to the petitioner's company, by holding that the Assessing Officer had estimated the net profit of the petitioner's company as 7%, considering the company as IMFL retail outlet, whereas the company is an IMFL bonded (wholesale warehouse) and thereafter, the Commissioner had directed the respondent No. 1, vide aforementioned Appellate Order dated 28.02.2020, to apply the net profit as 2.33% and not 7% in calculating the income of the petitioner's company.

5.3 Even though the appellate order dated 28.02.2020, gave partial relief to the petitioner's company, yet, since the petitioners could not get full and complete relief, they had preferred an appeal against the Appellate Order, dated 28.02.2020, of the Commissioner of Income Tax (Appeals), Dibrugarh, before the Income Tax Appellate Tribunal, Kolkata Bench (SMC), Guwahati.

5.4. The said Income Tax Appellate Tribunal, (hereinafter referred as Tribunal), vide order dated 18.03.2021, passed the following order: -

> "**3. At the outset, Ld. counsel for the assessee has invited my attention to the impugned assessment order and submitted that no proper opportunity was provided by the Learned Assessing Officer (in short, the Ld. AO) to the assessee to reconcile about the figures of account. He has mentioned in his assessment order that since the proceedings u/s. 143(3) of the Income-tax Act, 1961 (in short, the 'Act') would get barred by limitation of time, therefore, he proceeds to frame the assessment u/s. 144 of the Act ignoring the books of account of the assessee. The plea of the Learned Counsel of the assessee has been that the return of income was filed online and the concerned accountant of the**

> **assessee uploaded certain documents, balance sheet/accounts of the assessee, which were not relevant for the A.Y. under consideration. Therefore, there was a mistake in uploading the papers/accounts. This matter was brought to the knowledge of the Ld.AO, however, he did not notice of the same. This plea was also raised before the Ld. CIT(A), but the Ld. CIT(A) has brushed aside the plea observing that the assessee had not pursued the case before the Ld. AO and now production of reconciliation of accounts before him was an afterthought. The Ld. Counsel of the assessee, therefore, has submitted that the assessee may be given an opportunity so that the matter may be decided as per merits of the case. The Ld. Counsel for the assessee, therefore, has requested before this Tribunal that the matter may be restored to the file of the Ld. AO for adjudication on the issue afresh. The Ld. D.R has not objected to the same.**
>
> **4. In view of the above submissions of both the Ld. Representatives', the impugned order of the learned CIT(A) is set aside and the matter is restored to the file of the learned AO to decide the issue afresh. The learned AO will allow the assessee to present/submit necessary evidence / account books, details, etc., and to present its case before him. Thereafter, the learned AO will decide the issue afresh by way of a speaking order."**

5.5 Thereafter, the respondent herein had passed the assessment order, dated 24.03.2022 and he found the net profit of the petitioner company as Rs. 11,87,032 and thereafter he had initiated separate proceedings under Section

271(1)(c) of the Income Tax Act and also proceeding under Section 271(1)(b) of the said Act for non -compliance with the Notice under Section 142(1) of the Income Tax Act and thereafter, the petitioner herein had paid the outstanding demand of Rs.10,00,000/, on 05.04.2023.

<u>Grounds taken by the petitioners: -</u>

6. It is the contention of the petitioners that the subject matter of CR Case No. 1103^{C} of 2019, against three petitioners, C.R Case No. 1099^{C} of 2019, against petitioner namely, Shri Sanju Phangsho and C.R Case No. 1100^{C}/2019, against Shri Bijoy Phangsho, pending in the Court of learned Judicial Magistrate First Class, Kamrup (M), Guwahati, and the subject matter in Order dated 18.03.2021 passed by the Income Tax Appellate Tribunal, (herein after Tribunal) Kolkata Bench, is one and the same, and therefore, the Order dated 18.03.2021 passed by the Income Tax Appellate Tribunal, has a direct bearing upon the (i) CR Case No. 1103^{C} of 2019, (ii) C.R Case No. 1099^{C} of 2019, and (iii) C.R Case No. 1100^{C}/2019. And as such it is a fit case for the interference of this Court.

6.1 It is the further contention of the petitioners that the subject matter of CR Case No. 1103^{C} of 2019, C.R Case No. 1099^{C} of 2019, and C.R Case No. 1100^{C}/2019, pending before the Court of learned Judicial Magistrate First Class, Kamrup (M), Guwahati, was under appeal before the learned Tribunal. The Tribunal, vide order dated 18.03.2021, remanded the matter back to the respondent No. 1, by setting aside the order of the Assessing Officer, Income Tax Department, respondent herein these petitions, to decide the case afresh and also allowed the petitioner's company to present/submit necessary evidence/account books, details, etc.

6.2 Further contention of the petitioners is that since the subject matter, which forms the basis of CR Case No. 1103^{C} of 2019, C.R Case No. 1099^{C} of 2019, and C.R Case No. 1100^{C}/2019, has been set aside and the matter has been remanded to the Assessing Officer, then nothing survived in the aforesaid complaint cases, and as such the same are liable to be set aside and quashed.

6.3 It is also the case of the petitioners that the legal maxim *'sublato fundamento cadit opus'* which means when foundation is removed, structure/work falls and this principle is applicable to the present case also and on such count, the CR Case No. 1103^{C} of 2019, C.R Case No. 1099^{C} of 2019, and C.R Case No. 1100^{C}/2019, are liable to be set aside and quashed.

6.4 The petitioners also contended that the cause of action will now arise only subsequent to fresh assessment being conducted by the respondent, as directed vide order, dated 18.03.2021, passed by the Tribunal and under such circumstances, the criminal proceeding got no legs to stand upon and liable to be interfered with, as it is an abuse of the process of the Court if any further action against the petitioners were allowed to proceed, as nothing survives in the aforesaid three cases.

<u>Submissions of learned counsel for the petitioners: -</u>

7. Mr. V. Rajkhowa, learned counsel for the petitioners, submits that the CR Case Nos. 1099^{C} of 2019, against Sanju Phangcho; CR Case No. 1100^{C} of 2019, against Bijoy Phangcho; and CR Case No. 1103^{C} of 2019, against M/S Flamingo Beverages Private Limited and its two Directors, namely, Sanju Phangcho and

Bijoy Phangcho, were instituted by the Income Tax Officer, Tinsukia, having found anomalies in filing return for the Assessment Year 2016-17, on 17.10.2017, declaring total income at Rs. 8,01,508. But, the Assessment Officer has determined the taxable income at Rs. 35,66,191/- against the declared income of respondent—declared income of Rs. 8,01,508/- and that he also submits that the Assessment Order dated 21.12.2018, by which the income of the petitioner was determined at Rs. 35,66,191/- is challenged before the Commissioner of Income Tax (Appeals) and the said appellate authority partially allowed the appeal and upheld the assessment order by directing net profit as 2.33% and not 7%, in calculating the income of the petitioner's company.

7.1 Mr. Rajkhowa also submits that against the order of the Appellate Authority, dated 28/02/2020, the petitioner had preferred an appeal before the Income Tax Appellate Tribunal, Kolkata Bench (SMC), Guwahati Bench, and vide order, dated 18/03/2021, the Tribunal set aside the impugned order of the learned CIT(A) and restored the file to the Assessment Officer to decide the issue afresh, and also allowed the assessees to present/submit necessary evidence and account books details, etc., and to present its case before him, and thereafter, directed the Assessing Officer to decide the issue afresh, by speaking order and subsequently, the Tribunal has interfered with the appellate order and restored the matter to the file of the Assessment Officer.

7.2 Mr. Rajkhowa, learned counsel, further submits that the petitioners have filed an additional affidavit, bringing on record the copy of Assessment Order dated 24/03/2022, wherein, the net profits of the assessees came to at Rs. 11,87,032/- and the respondent herein had initiated separate proceedings, under Section 271(1)(c) of the Income Tax Act, 1961, and also the penalty proceedings under Section 271(1)(b) of the Income Tax Act, allegedly, for non-compliance with the notice under Section 142(1) of the Income Tax Act and thereafter, he also submits that the petitioner herein had paid out the outstanding demand of Rs. 10,000/- on 05.04.2023, and since for the alleged offence, the proceedings under Sections 271(1)(b) and 271(1)(c) of the Income Tax Act have already been drawn up against the petitioner, the complaint cases, pending before the learned Judicial Magistrate First Class, Kamrup (M), Guwahati, become infructuous and if the petitioners are prosecuted for the same offence twice. It is the further submission of Mr. Rajkhowa that since the Assessment Order dated 21.12.2028, which is the very foundation of the complaint case No. 1103^{C} of 2019, is set aside, the complaint case No. 1099^{C} of 2019 and C.R Case No. 1110^{C} of 2019 got no legs to stand upon and the same falls apart and under such circumstances, he has contended to allow this petition by quashing and setting aside the complaint cases.

7.3 In support of his submissions, Mr. Rajkhowa has referred to a decision of the Hon'ble Supreme Court in the cases of **K.C Builders and Another** -vs- **Assistant Commissioner of Income Tax**, reported in **(2004) 2 SCC 731**; and the **Commissioner of Income Tax, Panchkula** -vs- **Jai Laxmi Rice Mill, Ambala City**, reported in **(2016) 16 SCC 673**; and another decision of the Telangana High Court in **Deccan Tobacco Processors Limited and Another** -vs- **Union of India**, represented by Commissioner (Prosecution), Customs and Central Excise, Hyderabad, reported in **2021 SCC OnLine TS 3694**.

Submissions of learned counsel for the respondent: -

8. Per contra, Mr. J. Chopra, learned counsel for the respondent, has vehemently opposed the petition. According to him, though the assessment order has been set aside by the Tribunal, yet, the offence remains the same, as the petitioner has submitted false statement in verification of return of income tax, and that they failed to produce accounts and documents by not complying with the statutory notice and as such, the offences under Section 276D and Section 277 of the Income Tax Act are clearly made out against the petitioners, and that the penalty proceeding and criminal prosecution can go together, and that there is no merit in this petition, and therefore, he has contended to dismiss the same.

8.1. In support of his submission, he has referred to a decision of the High Court of Madras in (i) **Criminal Miscellaneous Petition No. 6705 of 1985**, (**Madras Vanaspati Limited and Others** -vs- **S. Subramaniam, Income Tax Officer)**, (ii) **Vrindavan Pathak & Another -vs- Union of India** through the Income tax Department, reported in **2026: AHC:118689**, (iii) **P. Jayappan** -vs- **S.K Perumal, First Income Tax Officer, Tuticorin** passed in **S.L.P(Criminal) No. 1923 of 1984**.

Discussion and analysis: -

9. Having heard the submissions of learned counsel for both the parties, this Court has carefully gone through the petition and the documents placed on record, and also perused the complaint case lodged before the court of learned Judicial Magistrate First Class, being C.R. Case No. 11003c of 2019, and also the decisions referred to by learned counsel for both the parties.

10. Notably, in the case of **P. Jayappan (supra),** it has been held that assessment/penalty proceeding is of civil in nature, and that the criminal prosecution under the IT Act are independent in the sense that prosecution can be launched even while assessment/appeal is pending.

11. But, in the case of **K.C. Builders (supra),** Hon'ble Supreme Court has held that when penalty proceeding under Section 271(1)(c) for concealment was cancelled by the ITAT, on the finding of no concealment, the levy of penalty and prosecution under Section 276(C), i.e. willful attempt to evade tax are simultaneous, and once penalties are cancelled on the ground of no concealment, quashing of the prosecution is automatic. The findings so recorded by the Tribunal (ITAT) supersede the order of the Assessing Officer, rendering further prosecution without jurisdiction and the said principle also analogously extends to the offence under Section 277 (that is for false statement in verification).

12. It is also to be noted here that in the case of **G.L. Didwania and Another** -vs- **Income Tax Officer**, reported in **1995 Supp (2) SCC 724**, Hon'ble Supreme Court has held that prosecution under Section 277, for making a false statement regarding income was quashed before the ITAT. The ITAT had set aside the assessing authority's finding that assessee made a false statement. The finding of the tribunal was held to be conclusive, and the very basis of the complaint was knocked out.

13. Again, in the case of **Uttam Chand** vs. **ITO**, reported in (**1982) 133 ITR 909 (SC),** Hon'ble Supreme Court has held that the finding of the Appellate Tribunal favorable to the assessee (that is genuineness of the firm/no false return) is binding upon the criminal court, and prosecution under Section 277 cannot sustain.

14. It is to be noted that Section 276D deals with willful failure to produce accounts/documents under Section 142(1) or comply with a direction under Section 142(2A). And if the assessment order and any related finding of willful non-compliance is set aside on merit, the basis of alleging willful failure typically collapses.

15. Further, Section 277 deals with false statement in any verification under the Act or delivery of false account/statement knowing it to be false or not believing it to be true, the case is covered by the ratio laid down in the case of **G.L. Didwania and Uttam Chand (supra),** and if the appellate order negates the falsity of the underlying assessment, the prosecution does not survive.

16. Thus, what can be crystalized from the aforesaid discussion is that once the appellate order negates the falsity of the underlying assessment, and the assessment order is set aside by CIT(A) or ITAT on merit, the prosecution does not survive. And the assessee can move the Magistrate/High Court under Section 482 Cr.P.C or an equivalent provision to quash the complaint/prosecution.

17. However, in the instant case, Mr. Rajkhowa, learned counsel for the petitioners, has pointed out that the second assessment order being passed by the Assessing Officer, dated 04.03.2022, the assessing officer had initiated proceedings under Section 271(1)(c) of Income Tax Act for concealment of income and under Section 271(1)(b) of the Income Tax Act for non-compliance of the notice under Section 142(1) of the Act and upon the same subject matter, the complaint case has also been filed, and if the person is condemned twice for the same offence, then it would amount to double jeopardy and on this count also, the complaint cases are liable to be set aside and quashed. But, the said submission of Mr. Rajkhowa left this Court unimpressed, in as much as it is well settled in the case of **P. Jayappan (supra)** that assessment/penalty proceeding is civil in nature and that criminal prosecution, under the Income Tax Act, are independent and the prosecution can be launched even while assessment/appeal is pending. Instead, this Court finds substance in the submission of Mr. Chopra, learned counsel for the respondent, who submitted that the assessment/penalty proceeding is civil in nature and that criminal prosecution under the Income Tax Act is independent.

18. This Court has also carefully gone through the decisions referred to by Mr. Chopra, learned counsel for the respondent, **Madras Vanaspati Limited and Others(supra), Vrindavan Pathak & Another(supra)** and **P. Jayappan (supra).** As discussed herein above, in the case of **P. Jayappan (supra),** Hon'ble Supreme Court held that the mere pendency of reassessment (or other assessment) proceedings does not bar the initiation or continuation of criminal prosecution, under sections 276C/277 of the Income-tax Act (or related IPC offences) for filing false returns, etc. Criminal proceedings are independent; there is no statutory bar; and they cannot be quashed or stayed merely because the assessee hopes for a favorable outcome in the parallel tax proceedings. The criminal court must decide the matter on its own evidence.

19. However, in the case of **K.C. Builders(supra)** Hon'ble Supreme Court has held that the ITAT, being the final fact-finding authority, when held that there was no concealment, and thereafter cancelled the penalty under section 271(1)(c), and the Assessing Officer gave effect to that order by cancelling the penalties, the prosecution under section 276C (and related provisions) becomes unsustainable and must be quashed. Penalty and prosecution are simultaneous/ interdependent, and once the factual foundation of concealment is conclusively negated by the Tribunal, no offence survives and continuation of the criminal case is an abuse of process. In holding so Hon'ble Supreme Court has relied upon its earlier decision in **G.L. Didwania (supra),** where it has been held that once the Tribunal's finding that the alleged false statement had no basis, and it led to quashing of the criminal prosecution.

20. Further, in the case of **Radheshyam Kejriwal v. State of West Bengal,** reported in **(2011) 3 SCC 581**, Hon'ble Supreme Court has generalized the principle, though however, in the context of FERA, but it has, drawing premises from **K.C. Builders(supra)** and **Didwania (supra),** held that adjudication and criminal prosecution can proceed simultaneously and are independent in principle. However, where the person is exonerated on merits in the adjudication (allegation found unsustainable and the person held innocent), continuation of criminal prosecution on the identical facts is unjust and an abuse of process, given the higher standard of proof in criminal cases. It has also held that Technical/exoneration-on-other-grounds does not automatically bar prosecution.

21. In this context the finding recorded by Hon'ble Supreme Court in the case of **K.C. Builders (supra)**, is worth noting, wherein, referring to the case of **G.L. Didwania (supra),** in paragraph-22, it has been held as under:

> **"22. In the case of G.L. Didwania vs. ITO, reported in 1995 Supp (2) SCC 724, the prosecution was launched against the assessee for making false statement. The assessing authority held that the**

assessee had intentionally concealed his income derived from 'Y' Company, which belonged to him, initiating prosecution against him. The appellant filed the appeal against the assessment order and the Tribunal set aside the assessment holding that there was no material to hold that 'Y' Company belongs to the assessee. The assessee thereupon filed a petition before the Magistrate to drop the criminal proceeding and the application before the High Court under Section 482 to quash the criminal proceeding, which was dismissed. On appeal, this Court held that the whole question was whether the appellant made out a false statement regarding the income which, according to the assessing authority, had escaped assessment and so far as this issue was concerned, the finding of the Appellate Tribunal was conclusive and held the prosecution cannot be sustained. Accordingly, this Court quashed the criminal proceeding and allowed the appeal filed by the assessee."

21.1 Again in para-26, the Hon'ble Supreme Court has observed as under:

"**26. In our view, once the finding of the concealment and subsequent levy of penalties under Section 271(1)(c) of the Act has been struck down by the Tribunal, the Assessing Officer has no other alternative to correct his order under Section 154 of the Act, as per the directions of the Tribunal………………...**"

21.2 Further, in paragraph-31, the Hon'ble Supreme Court has observed that as under:-

> “**31. It is a well-established principle that the matter which has been adjudicated and settled by the Tribunal need not be dragged into the criminal court unless and until the act of appellant could have been described as culpable”.**

22. Again, in the case of **Prakash Nath Khanna and Another** -vs- **CIT**, reported in **(2004) 9 SCC 686**, wherein Hon’ble Supreme Court has held that whether there was willful failure to furnish the return is a matter that must be adjudicated factually by the Court dealing with the prosecution case.

23. As already noticed, the subject matter of the complaint before this Court is concealment of income on the basis of finding of the Assessing Officer. If the Tribunal has set aside the order of concealment and penalties, then there cannot be any concealment in the eyes of law and therefore, the prosecution cannot be proceeded with by the complainant, and that being so further proceedings will be illegal and without jurisdiction. In holding so, this Court derives authority from the ratio laid down in the case of **K.C. Builders (supra),** Hon'ble Supreme Court, referring to the case of **G.L. Didwania (supra).**

23.1 This court is also of the view that the decision in **P. Jayappan (supra),** would not come into assistance of Mr. Chopra, learned counsel for the respondent, as it is on different field. And in view of the decision of Hon’ble Supreme Court in the case of **K.C. Builders(supra)** and **Didwania (supra)** and in the case of **Radheshyam Kejriwal (supra),** the decision of Madras High Court in **Madras Vanaspati Limited and Others(supra), Vrindavan**

Pathak & Another(supra), also would not come into his assistance of Mr. Chopra.

24. Further, this Court, from a perusal of the complaint, also finds that the respondent herein, while filing the complaint against the petitioners under Sections 276D/277 of the Income Tax Act, relied upon Section 278E of the Income Tax Act, which provides for drawing up presumption. But, it is well settled that the presumption is available to the Court, not to the Assessing Officer, and the presumption of culpable mental state, under Section 278E of the Income Tax Act, operates during the prosecution/trial stage and not before filing of the complaint. It is drawn up by the Court in the course of prosecution, and the said presumption is a rebuttable presumption, and the accused may rebut the same during Trial.

25. Though, Mr. Chopra, referring to the order of the ITAT dated 28.03.2021, submits that the said order was not passed on merit but simply remanded the matter back to the Assessing Officer, by setting aside the impugned order, yet having perused the said order dated 28.03.2021, this Court left unimpressed with the submission of Mr. Chopra. But, having perused the operative portion of the said order, which are extracted in paragraph No.5.4, herein above, it cannot be said that the ITAT had simply set aside the impugned order without considering the merit of the case. It is apparent that the ITAT had considered the submissions of learned counsel for the petitioners herein and appellant before the ITAT, whose submissions were definitely, in respect of merit of the appeal.

25.1 Further, in subsequent assessment by the respondent herein, the net profit of the petitioner company is found to be Rs.11,87,032/- while he found earlier the taxable income of the company as Rs. 35,66,191/ and under such background, the respondent herein was found making false statement in return of income tax and failure to produce accounts and non-compliance with the notice. The petitioner had also paid outstanding demand of Rs. 10,000/-. Another disturbing aspect is that apart from making the two Directors of the assessee company as accused in the CR Case No. 1103c of 2019, he also filed the other two CR Cases individually, being CR Case No. 1100c/2019, against Bijoy Phangsho, and CR Case No. 1099c/2019, against Sanju Phangsho, based upon the same Assessment Order, dated 21.12.2018. This seems to be an abuse of the authority by the respondent herein. The first complaint against the company and its two Directors is maintainable in view of Section 278B of the Act, for the roles attributed to them. But, for the same offence, separate complaints against the Directors are not maintainable, as they cannot be treated in isolation, without the company as an accused; and it is contrary to the principle laid down in the case of **Aneeta Hada Vs. Godfather Travels & Tours (P) Ltd.**, reported in **(2012) 5 SCC 661**, wherein, it has been held that for maintaining prosecution against Directors/Officers, under a vicarious liability provision, arraigning the company as an accused, is imperative and sine qua non.

Finding:-

26. Under the given facts and circumstances, this Court finds sufficient merits in these three criminal petitions. And accordingly, the same stands allowed. The C.R Case No. 1103C of 2019 in Crl. Petition No. 896/2022, C.R Case No. 1099C/2019 in Crl. Petition No. 165/2022 and C.R Case No. 1100C/2019, u/s 276D/277 of the Income Tax Act, 1961 in Crl. Petition No. 168/2022, pending before the learned Judicial Magistrate First Class, Kamrup (M), Guwahati, stands set aside and quashed, leaving the parties have to bear their own costs.

JUDGE

Comparing Assistant