

(1986) 03 GUJ CK 0013

In the Gujarat High Court

Case No : IT Reference No"s. 125 and 126 of 1978 & Income-tax Reference No"s. 125 and 126 of 1978

Additional Commissioner of Income Tax

APPELLANT

Vs

Chandravilas Hotel

RESPONDENT

Date of Decision : 28-03-1986

Acts Referred:

Income Tax Act, 1961 — Section 139, 140A, 142, 143, 144

Citation : (1987) 165 ITR 300

Hon'ble Judges : R.C. Mankad, J;A.P. Ravani, J

Bench : Division Bench

Advocate : B.R. Shah, for the Appellant; J.M. Thakore, Advocate-General, for the Respondent

Judgement

Mankad, J.—The assessee, a registered partnership-firm, is running a hotel. It disclosed sales of Rs. 19,55,651 in the previous year relevant to the assessment year 1967-68 and the gross profit disclosed by the assessee worked out to 24 per cent. The sales during the previous year relevant to the assessment year 1968-69 were shown at Rs. 23,49,434 and the gross profit disclosed by the assessee worked out to 28 per cent. The assessee was maintaining the accounts by following the merchantile method and it was its case that this method of accounting was regularly employed by it from year to year. In the course of assessment proceedings for the assessment year 1967-68 the Income Tax Officer noticed that the assessee"s auditors had observed in their report that "daily collection slips or cash memos have not been produced to us for our verification". In other words, the receipts did not admit of check. The Income Tax Officer further noticed that there was no check on closing stock either. In the course of assessment proceedings for the assessment year 1968-69, the Income Tax officer observed that the state of the books of account was the same as in the earlier years. He noticed the following defects in the maintenance of accounts :

"(i) Admittedly, no quantity details are maintained regarding the consumption of

the various item of raw material used and the various preparation made therefrom.

(ii) The list of closing stock file is as per inventory and admits of no check as to its correctness qualitatively or quantitatively.

(iii) The assessee's auditors M/s. K. V. Patel, themselves have observed in their report that "daily collection slips or cash memos have not been produced to us for our verification."

2. The Income Tax Officer, therefore, refused to accept the book result in both the said assessment years. He held that the sales disclosed and the income returned for the said assessment years were not reliable and that position was admitted by the assessee. The Income Tax Officer further pointed out that the book results were not accepted from year to year. Under the circumstances, the Income Tax Officer refused to accept the book results and computed profits u/s 145(2) of the Income Tax Act, 1961 (hereinafter referred to as the "Act"). The Income Tax Officer, since he did not find the book result reliable and consequently not acceptable, estimated sales at Rs. 20 lakhs and worked out gross profit at 30 per cent. of the estimated sales in the assessment year 1967-68. This resulted in an addition of Rs. 1,31,291 in that year. So far as the assessment year 1968-69 was concerned, the Income Tax Officer estimated the sales at Rs. 24 lakhs and applying the gross profit rate of 30% addition for that year was worked out at Rs. 2,11,535. The rejection of the book results and estimates of sales and gross profit and additions made by the Income Tax Officer were accepted by the assessee. In other words, the assessee did not challenge the additions by preferring appeals against the assessment made by the Income Tax Officer in both the assessment years, namely, 1967-68 and 1968-69. The Income Tax Officer initiated penalty proceedings u/s 271(1)(c) of the Act as the minimum penalty leviable exceeded Rs. 1,000, he referred the matter to the Inspecting Assistant Commissioner, u/s 274 of the Act as it stood then. In response to the notice issued by the Inspecting Assistant Commissioner, calling upon the assessee to show cause why penalty should not be levied u/s 271(1)(c) of the Act, the explanation of the assessee was as follows :

(1) The assessee had filed its returns of income on the basis of audited statement of accounts and it had not concealed any income. The Income Tax Officer did not accept the Accounts, made estimates of sales and gross profits and made addition on the basis of such estimate u/s 145(2) of the Act. This, however, would not show that the assessee had concealed any income.

(2) The assessee had accepted the estimate of sales and gross profit made by the Income Tax Officer and the additions made by him to avoid litigation.

(3) The assessee's books of account were being rejected from year to year and it was put great hardship. If the assessee had concealed its income, it would have taken advantage of the disclosure scheme. The assessee had not failed to disclose its correct income. In any case, failure to disclose correct income did not

arise from any fraud or gross or wilful neglect on its part.

(4) So far as the assessment year 1968-69 was concerned, the assessee had paid tax u/s 140A of the Act on estimated income of Rs. 2,81,000 and consequently the amount of tax paid was in excess of what was demanded by the Income Tax Officer as per his assessment order.

3. The Inspecting Assistant Commissioner observed that the books of account maintained by the assessee were such as they could not be relied upon. The book result disclosed by the assessee was rejected from year to year and the additions made were accepted by the assessee. The Inspecting Assistant Commissioner set out a table in which the income returned, the income assessed and the additions made in the assessment years 1963-64 to 1967-68 were stated. The Inspecting Assistant Commissioner observed that in spite of the rejection of the book result from year to year and additions of substantial amounts to the total income of the assessee, the assessee persisted in maintaining the books of account which were such that true income could not be derived. The Inspecting Assistant Commissioner refused to accept the explanation of the assessee and the grounds for doing so were summarised as follows :

(1) The books of account were rejected from year to year as unreliable.

(2) Large amounts were added to the total income; and

(3) In spite of additions, the assessee persisted in maintaining the books of account which were not reliable. In the result, the Inspecting Assistant Commissioner held that the assessee had failed to discharge the burden which lay upon it to prove that failure to disclose correct income did not arise from any fraud or gross or wilful neglect on its part as provided in the Explanation to section 271(1)(c). The Inspecting Assistant Commissioner consequently held that this was a fit case for levying penalty for the assessment years 1967-68 and 1968-69. In the result, he levied penalty of Rs. 20,000 for the assessment year 1967-68 and Rs. 2,12,000 for the assessment year 1968-69 u/s 271(1)(c) of the Act. Being aggrieved by the levy of penalty by the Inspecting Assistant Commissioner, the assessee carried the matter in appeal before the Income Tax Appellate Tribunal (hereinafter referred to as the "Tribunal").

4. The Tribunal observed that the Revenue found that the book version disclosed by the assessee was not amenable to verification and the profits disclosed by it were found to be low. The books of account were maintained in the same manner as before. Since the Revenue authorities were not satisfied that the book version was amenable to verification, the provisions of section 145 were invoked and the total income was determined by applying in a gross profit rate of 30% to the estimated turnover. The tribunal then went on to observe that on the above fact, no finding can be recorded that the assessee was guilty of any fraud or gross or wilful neglect. All that has happened, the Tribunal observed is that the book version of assessee's profits had been held by the Revenue authorities as

not amenable to verification and the proviso to section 145(1) was invoked and the assessee's income was determined by estimate. Under the circumstances the Tribunal was of the view that the assessee's contention that the Explanation to section 271(1)(c) had been wrongly invoked had to be accepted and no finding could be recorded that the assessee was guilty of any fraud or gross or wilful neglect which resulted in the income being returned at a figure less than 80% of the assessed income. In the result, the Tribunal cancelled the penalties imposed on the assessee in the assessment years 1967-68 and 1968-69. The Revenue being dissatisfied with the findings recorded by the Tribunal, the following questions have been referred to us for our opinion at its instance for each of the aforesaid assessment years, namely, 1967-68 and 1968-69 :

Assessment year 1967-68 (income tax Reference No. 125 of 78).

"1. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the assessee was no guilty of any fraud or gross or wilful neglect in returning the income, which resulted in the income being returned at a figure lower than 80% of the income assessed, is contrary to the weight of the record and was arrived at without considering the entire evidence and material on the record ?

2. Whether, on the facts and in the circumstances of the case and in view of the provisions contained in section 271(1)(c) of the Income Tax Act, 1961, and the Explanation thereto, the Tribunal was right in law in cancelling the penalty imposed on the assessee ?"

Assessment year 1968-69 (income tax Reference No. 126 of 78).

"1. Whether, on the facts and in the circumstances of the case, the finding of the Tribunal that the assessee was not guilty of any fraud or gross or wilful neglect in returning the income which resulted in the income being returned at a figure lower than 80 per cent. of the income assessed, is contrary to the weight of the record and was arrived at without considering the entire evidence and material on the record ?

2. Whether, on the facts and in the circumstances of the case and in view of the provisions contained in section 271(1)(c) of the Income Tax Act, 1961 and the Explanation thereto, the Tribunal was right in law in cancelling the penalty imposed on the assessee ?"

5. In order to appreciate the rival contention, it is necessary to deal with the relevant provision of the Act. It may be recalled that the Income Tax Officer made the assessment u/s 145(2) of the Act. Section 145 reads as under :

"145. (1) Income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" shall be computed in accordance with the method of accounting regularly employed by the assessee :

Provided that in any case where the accounts are correct and complete to the

satisfaction of the Income Tax Officer but the method employed is such that, in the opinion of the Income Tax officer, the income cannot properly be deduced therefrom, then the computation shall be made upon such basis and in such manner as the Income Tax Officer may determine.

(2) Where the Income Tax Officer is not satisfied about the correctness or the completeness of the accounts of the assessee, or where no method of accounting has been regularly employed by the assessee, the Income Tax Officer may take an assessment in the manner provided in section 144."

6. It is clear from sub-section (2) of section 145 that where the Income Tax Officer is not satisfied about the correctness or completeness of the accounts of the assessee, he may make assessment in the manner provided in section 144. In the instant case, as pointed out above, the Income Tax Officer was not satisfied about the correctness or completeness of the accounts of the assessee and he, therefore, proceeded to make estimate of sales and gross profit on the basis of such estimates, made addition of the total income of the assessee. In other words, he proceeded to make assessment in the manner provided in section 144, which reads as under :

"144. If any person -

(a) fails to make the return required by any notice given under sub-section (2) of section 139 and has not made a return or a revised return under sub-section (4) or sub-section (5) of that section, or

(b) fails to comply with all the terms of a notice issued under sub-section (1) of section 142 or fails to comply with a direction issued under sub-section (2A) of that section, or

(c) having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of section 143,

the Income Tax Officer, after taking into account all relevant which the Income Tax Officer has gathered, shall make the assessment of the total income or loss to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment."

7. It would thus appear that in the cases covered by section 145(2), the Income Tax Officer has to make assessment of the total income or loss to the best of his judgment. The assessment made u/s 144 would necessary be made on the basis of estimate of income or loss. The next provision which we may advert to is section 271(1). This provision in so far as is material and as it stood at the relevant time read as follows :

"271. (1) If the Income Tax Officer or the Appellate Assistant commissioner, in the course of any proceedings under this Act, satisfied that any person - ...

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

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

(iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than twenty per cent. but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income."

8. Explanation to section 271(1)(c) which has been invoked by the Appellate Assistant Commissioner in imposing penalty on the assessee, was inserted by the Finance Act, 1964, with effect from April 1, 1964. This Explanation was substituted by four Explanation by the Taxation Laws (Amendment) Act, 1975, with effect from April 1, 1976. However, since we are concerned with the assessment years 1967-68 and 1968-69, the Explanation which was inserted by the Finance Act, 1964, is relevant for our purpose and it read as follows :

"Explanation - Where the total income returned by any person is less than eighty per cent. of the total income (hereinafter in this Explanation referred to as the correct income) as assessed u/s 143 or section 144 or section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, he deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of clause (c) of this sub-section."

9. The said Explanation came up for interpretation before this court in Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, . Interpreting this Explanation, the Division Bench of this court observed as follows. (at pages 444-445) :

"It is clear on a plain grammatical construction of the language used by the legislature that the condition which attracts the applicability of section 271(1)(c) is that the Income Tax authority should be satisfied in the course of any proceeding under the Act that any person has concealed the particulars of his income or furnished inaccurate particular of such income. It may be pointed out that, prior to its amendment by the Finance Act, 1964, section 271(1)(c) required that the assessee should have concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, but the word "deliberately" was omitted from the section by the finance Act, 1964. What is the effect of this omission does not fall for determination in this case because the assessee is sought to be brought within section 271(1)(c) not on the application of its own terms but by resort to the deeming fiction contained in the Explanation. The Explanation which was not originally there when section 271(1)(c) was enacted but which was introduced by the Finance Act, 1964, provides that where the total income returned is less than eighty per cent. of the total

income assessed, the assessee shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income within meaning of section 271(1)(c). It is an Explanation enacted in the context of a highly penal provision and there can, therefore, be no doubt that it must be constructed fairly and reasonably. This, of course, does not mean that if a case falls fairly and squarely within the language of the Explanation we should refuse to give effect to the mandate of the legislature as disclosed in the Explanation. But what is necessary to be borne in mind is that when we are construing the true meaning and effect of the Explanation, we must not forget that it is the Explanation which adds to the rigour of a highly penal provision and we must not, therefore, be overanxious to enlarge the scope and ambit of the Explanation by making an effort to bring every possible case within it, but we should instead construe the Explanation and apply it in a fair and reasonable way with a view to achieving the purposes of the main provision, namely, that an assessee who has concealed the particulars of his income or furnished inaccurate particulars of such income should not escape penalty. The Explanation created a legal fiction if the condition of its applicability is satisfied. The condition is an objective condition, namely that the total income returned by the assessee should be less than eighty per cent. of the total income assessed subject to a certain reduction which is not material for our purpose. What the condition contemplates is merely a matter of arithmetical calculation. The Income Tax authority is required to take the total income returned by the assessee and the total income as assessed by the revenue authorities and if the former is less than eighty per cent. of the latter, the condition for the applicability of the Explanation is satisfied. The Explanation then say that the assessee shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income within the meaning of section of section 271(1)(c). The Explanation raises a legal fiction and the assessee is straightaway brought within the ambit of section 271(1)(c). It is then not necessary for the Revenue to show affirmatively by producing the material that the assessee has in fact concealed the particulars of his income or furnished inaccurate particulars of such income. The fact of the total returned income being less than eighty per cent of the total income assessed is sufficient to bring the assessee within the penal provision enacted in section 271(1)(c). This achieved by the legal fiction enacted in the Explanation. But, this legal fiction can be displaced if the assessee proves that the failure to return the correct income, that is the total income assessed, did not arise from any fraud or gross or wilful neglect on his part. If the assessee wants to repel the legal fiction and throw the burden of bringing the case within section 271(1)(c) again on the Revenue, as it would be in the absence of the Explanation, the assessee has to show and this burden is upon him - that his failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. Now this burden is not of the same nature as the burden which rests on the prosecution in a criminal case where the prosecution has to establish the guilt of the accused beyond reasonable doubt

nor is it of same nature as the burden which lies upon the Revenue in establishing that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. It is burden akin to that in a civil case where the determination is made on a preponderance of probabilities. It is also not necessary that any positive material should be produced by the assessee in order to discharge this burden which rest upon him. The assessee may claim to have discharged the burden by relying on the material which is on record in the penalty proceedings, Irrespective of whether it is produced by him or by the Revenue."

10. In *Additional Commissioner of Income Tax Vs. Swatantra Confectionery Works*, , the Allahabad High Court held that the Tribunal was not correct in holding that in a case where the assessee's books are rejected and a best judgment assessment after estimating the sales and after applying the gross profit rate thereon is made, no penalty u/s 271(1)(c) of the Act could be imposed. It was observed that the Income Tax officer made a best judgment u/s 145, because he found that the assessee had not maintained proper books. It was further observed that the Explanation to section 271(1)(c) which provides that in a case where the total income returned by an assessee is less 80% of its correct income as assessed u/s 144 as reduced by certain expenditure, clearly indicates that action for imposing penalty u/s 271(1)(c) can appropriately be taken even in a case where the assessee is assessed on best judgment basis. It was held that the Tribunal should have disposed of the appeal only after considering whether, in the circumstances of the case, the Inspecting Assistant Commissioner was justified in coming to the conclusion that the assessee had concealed or furnished inaccurate particulars of its income and in case it found that the material on record was sufficient to justify an inference that the assessee had concealed or furnished inaccurate particulars of its income, whether he Explanation to section 271(1)(c) was attracted to the facts of the case, and, if it was so attracted, whether the assessee had discharged the burden placed upon it and had shown that in furnishing the particulars of its income, it had neither acted fraudulently nor was it guilty of any gross or wilful default. Similar view was taken by the same High Court in *Commissioner of Income Tax Vs. Kedar Nath Ram Nath*, . It was held therein that the Explanation to section 271(1)(c) of the Act covers also a case where the accounts are rejected and a best judgment assessment is made u/s 144 of the Act and it is found that the income returned by the assessee falls short of 80 per cent. of the income so assessed as reduced by expenditure incurred bona fide by the assessee for the purpose of earning any income included in the assessee's total income. It was observed that the Explanation clearly provides that, in such a case unless the assessee proves that failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part, it will be deemed that he has concealed the particulars of his income. The burden of showing that failure to return the income correctly did not arise from any fraud or gross or wilful neglect is upon the assessee. Accordingly in a case where the income

returned by the assessee was less than 80% of the income assessed as reduced in the manner specified in the Explanation to section 271(1)(c) of the Act, law would deem it that the assessee had concealed or furnished inaccurate particulars unless the assessee is able to bring something on record to show that the failure on its part to return the correct income was not on account of any fraud or gross or wilful neglect. The type of material to be indicated by the assessee for discharging the burden placed upon him will depend upon the facts and circumstances of each case. The Explanation to section 271(1)(c) also came up for consideration before the Patna High Court in Commissioner of Income Tax Vs. Patna Timber Works, , Dealing with the Explanation, Untwalia C.J., as he then was, observed that in a case which is covered by the Explanation, the burden has been thrown on the assessee to prove absence of certain ingredients; otherwise, it will be permissible to draw the presumption of fact that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. In a case where there is a difference of more than 20 per cent. between the income returned by any person and the total income as assessed under the various provisions of the Act, the Explanation is attracted. It was observed that as soon as it is found that there was difference of more than 20 per cent. between the income returned and the income assessed, clause (c) comes into operation by the rule of presumption in other words, by the rule of evidence engrafted in the Explanation and it is for the assessee to prove that the failure to return the correct income i.e., the assessed income, did not arise from any fraud or gross or wilful neglect on his part. If he succeeds in discharging that onus, even though the difference between the amount of the returned income and the assessed income was more than 20 per cent., no penalty can be imposed u/s 271(1)(c). It is further observed that the assessee, within the meaning of Explanation, is required to prove that the failure to return correct income did not arise from any fraud or gross or wilful neglect on his part, which means there is absence of fraud or gross or wilful neglect. Ordinarily and generally, there cannot be any direct evidence to prove such a fact. The assessee merely has to place materials of the primary facts or the circumstances which in all reasonable probability would show that he was not guilty of any fraud or gross wilful neglect. It was observed that the assessee may discharge this onus by placing the facts found in the assessment order to show that the facts found therein had not in the least given an inkling of fraud or gross or wilful neglect on part of the assessee and, therefore, it must be held without proof of any other fact that there was no fraud committed by the assessee in his failure to return the correct income nor was he acting grossly or wilfully negligently. In a given case, it was observed, it may be necessary for the assessee to prove certain additional facts because the materials in the assessment order give some inkling of the commission of fraud or the assessee being grossly or wilfully negligent and in such a situation, it will be necessary for the assessee, if his case is covered by the Explanation, to place some more materials in the shape of oral or documentary evidence or otherwise to prove the negative fact of absence of fraud or gross or wilful negligence. If he succeeds in doing so, the onus will shift

back to the Department to prove the positive fact that failure to return the correct income on the part of the assessee was as a result of fraud or gross or wilful neglect.

11. It would be clear from the aforesaid decisions that the Explanation creates a legal fiction if the condition of its applicability is satisfied. The condition is an objective condition, namely, that the total income returned by the assessee should be less than 80% of the total income assessed subject to certain deduction, which is not material for our purpose. As observed by this court in *Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt*, what the condition contemplates is merely a matter of arithmetical calculation. The Income Tax authority is required to take the total income returned by the assessee and the total income as assessed by the revenue authorities and if the former is less than eighty per cent. of the latter, the condition for the applicability of the Explanation is satisfied. On this condition being satisfied, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income within the meaning of section 271(1)(c). In other words, the Explanation raises a legal fiction and the assessee is brought straightaway within the ambit of section 271(1)(c). It is then not necessary for the Revenue to show affirmatively by producing material that the assessee has in fact concealed the particulars of his income or furnished inaccurate particulars of such income. The fact that the total returned income being less than eighty per cent. of the total income assessed is sufficient to bring the assessee within the penal provision enacted in section 271(1)(c). This legal fiction or presumption, however, can be displaced if the assessee proves that the failure to return the correct income, that is, the total income assessed did not arise from any fraud or gross or wilful neglect on his part. As observed in *Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt*, if the assessee wants to repel the legal fiction and throw the burden of bringing the case within section 271(a)(c) again on the Revenue, as it would be in the absence of the Explanation, the assessee has to show-and this burden is upon him-that his failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. This burden is akin to that in a civil case where the determination is made on a preponderance of probabilities. It is not necessary that any positive material should be produced by the assessee in order to discharge this burden which rests upon him. The assessee may claim to have discharged the burden by relying on the material which is on record in the penalty proceedings, irrespective of whether it is produced by him or by the Revenue. The Tribunal has observed that all that has happened in the instant case is that the book version of the assessee's profits had been held by the revenue authorities as not amenable to verification and consequently the provisions of section 145 were invoked and the income was determined by estimate. Under the circumstances, the Tribunal accepted the contention of the assessee that the Explanation to section 271(1)(c) was wrongly invoked and that no finding would be recorded that the assessee was guilty of any fraud or gross or wilful neglect which resulted in the income being returned at a figure lower

than 80 per cent. of the assessed income. As pointed out above, once it is proved that the total income returned by the assessee is less than 80 per cent. of the total income assessed by the revenue authorities, the condition for the applicability of the section is satisfied, and the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income within the meaning of section 271(1)(c). It is then for the assessee to repel the legal fiction to establish that his failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. The assessee has to establish a negative fact, namely, that the failure to return correct income did not arise from any fraud or gross or wilful neglect on his part. The Revenue need not prove that the assessee was guilty of fraud or gross or wilful neglect. In our opinion, the approach of the Tribunal in dealing with the merits of the assessee's appeal is entirely erroneous. We further find that the Tribunal has not applied its mind to the facts or circumstances which were held proved by the Inspecting Assistant Commissioner in rejecting the assessee's explanation and in holding that the assessee had failed to discharge the burden of proving that the failure to return the correct income did not arise from fraud or gross or wilful neglect on its part. As pointed out above, the facts and circumstances which weighed with the Inspecting Assistant Commissioner were as follows :

(1) The books of account maintained by the assessee were not such that they could be relied upon. In other words, the books of account were not correct and complete and the assessee's income could not be deduced therefrom (2) the books of account of the assessee were rejected from year to year as unreliable and large amounts were added to the total income of the assessee in preceding years; and (3) the assessee persisted in maintaining his books of account in the same manner as in the past in spite of the fact that they were not held to be reliable. These facts and circumstances which weighed with the Inspecting Assistant Commissioner have not been properly appreciated and considered by the Tribunal. Addition made to the total income of the assessee on account of the book result disclosed by the assessee not being amenable to verification was not the sole ground or basis on which penalty was levied by the Inspecting Assistant Commissioner. The past history of the assessee's persistence in maintaining the books of account in the same manner though they were found unreliable was one of the factors which had gone into consideration in levying penalty and this factor has been completely overlooked by the Tribunal in setting aside the order of the Inspecting Assistant Commissioner and cancelling the penalty imposed by him.

12. However, relying on the decision of this court in Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, , it was urged that even assuming for the sake of arguments that the approach of the Tribunal has not been correct and that it has not considered certain important aspects while allowing the assessee's appeals against the imposition of penalty, no penalty have been levied in a case like this. It was urged that admittedly this was a case where assessment is made on the basis of estimate and there is nothing on record to show that any particular entries in the books of account are false or incorrect or any items of purchase or

sales are omitted to be entered in the assessee's accounts. Therefore, the assessee must be held to have discharged the onus which rests upon it to show that failure to return the correct income was not on account of any fraud or gross or wilful neglect on its part. It was urged that this case is on all fours with Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, and, therefore, as held in that case it must be held that the assessee has discharged the burden which lay upon it under the Explanation. We are afraid, we cannot accept this argument. We have already adverted to the ratio of the decision of this court in Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, . In that case, the Explanation to section 271(1)(c) of the Act was interpreted and this court then proceeded to consider the question whether on the facts proved in that case, the assessee had discharged the burden which lay upon him under the Explanation. The income returned by the assessee in that case was less than 80% of the income assessed and, therefore, the objective condition for the applicability of the Explanation was satisfied and the assessee was required to discharge the burden which lay upon him to prove that the failure to return the correct income did not arise from fraud or gross or wilful neglect on his part. It was while dealing with the question whether on the facts and in the circumstances of the case, the assessee had discharged the burden, that this court made certain observations on which reliance is sought to be placed on behalf of the assessee. It was observed that where assessment is made on the basis of estimate and there is nothing on record to show that any particular entries in the books of account are false and incorrect or any particular items of purchases or sales are omitted to be entered in the books of account, the assessee must be held to have discharged the onus that lay upon him to prove that failure to return the correct income was not on account of any fraud or gross or wilful neglect on his part. We do not think that while making the above observations which were made in the context of the facts in that case, the court proposed to lay down any general principle that in all case of estimates, the assessee should be held to have discharged the burden which lay upon him to prove that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. Whether or not the assessee has discharged the burden which lay upon him would depend upon the facts and circumstances of each case. It was in the context of the facts which obtained in Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, that this court held that the assessee had discharged the burden which lay upon him. If we were to hold that this court had laid down as a matter of principle of law in Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, that in all cases of estimates, the assessee should be considered to have discharged the burden which lay upon him under the Explanation, it would render the Explanation nugatory. As pointed out above, the Explanation itself speaks of income as assessed u/s 143, or section 144 or section 147, and if the view canvassed on behalf of the assessee is accepted, it would mean that though the Explanation specifically mentions section 144, in all the cases where the assessment is made u/s 144, the assessee should be deemed to have discharged the burden of establishing that failure to return the correct income did not arise

from fraud or gross or wilful neglect on his part. In other words, by the mere fact that assessment is made u/s 144, the assessee is deemed to have discharged the burden which lay upon it and in effect and substance, the Explanations made non-applicable to a case where assessment is made u/s 144. In the instant case also, as pointed out above the assessment is made u/s 144 read with section 145(2) of the Act. Therefore, if the argument advanced on behalf of the assessee is correct and if the assessee is held to have discharged the burden which lay upon it to prove that failure to return correct income did not arise from any fraud, or gross or wilful neglect on its part, in effect and substance, the Explanation is made non-applicable. We do not think that this court meant or intended to lay down any such law in Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, , as is sought to be urged on behalf of the assessee. This court in that case, no doubt observe that the Explanation must be construed fairly and reasonably but it hastened to add, "This, of course, does not mean that if a case falls fairly and squarely within the language of the Explanation, we should refuse to give effect to the mandate of the legislature as disclosed in the Explanation." (at page 444) This court further observed (at pages 444 and 445) : "But what is necessary to be borne in mind is that when we are construing the true meaning and effect of the Explanation, we must not forget that it is the Explanation which adds to the rigour of a highly penal provision and we must not, therefore, be over anxious to enlarge the scope and ambit of the Explanation by making an effort bring every possible case within it, but we should instead construe the Explanation and apply it in a fair and reasonable way with a view to achieving the purposes of the main provision, namely, that an assessee who has concealed the particulars of his income or furnished inaccurate particulars of such income should not escape penalty." It would thus be seen that this court made it very clear that (1) if a case falls fairly and squarely within the language of the Explanation, the court or the authority concerned should not refuse to give effect to the mandate of the Legislature; and (2) any assessee who has concealed the particulars of his income or furnished inaccurate particulars of such income, should not escape penalty. It is obvious, therefore, that when this court observed (at Page 444) "we must not be over anxious to enlarge the scope and ambit of the Explanation.", it is implicit in it that the Explanation should not be given an unduly narrow or restricted meaning to render it ineffective or inapplicable to any of the assessment falling within its purview. When we say so, we are only making explicit what is implicit in the above observation. If the contention raised on behalf of the assessee is accepted, it will restrict the meaning of the Explanation making it inapplicable in case of assessment u/s 144 of the Act. We, therefore, find ourselves unable to accept the contention that on the facts and in the circumstances of the case, the assessee must be deemed to have discharged the burden which lay upon it to prove that failure to return correct income did not arise from any fraud or gross or wilful neglect on its part.

13. Coming back to the Tribunal's order as pointed out above, the whole approach of the Tribunal in examining the question whether levy of penalty was

justified, is erroneous and illegal. It has not considered various aspect which weighed with the Inspecting Assistant Commissioner in reaching the conclusion that the assessee had failed to discharge the burden which lay on it under the Explanation. It has proceeded on the wrong assumption that it was for the Revenue to prove that the assessee was guilty of fraud or gross or wilful neglect and then to hold that since the assessee's income was estimated because its book result was not amenable to verification, it could not be held guilty of fraud or gross or wilful neglect. As the Explanation to section 271(1)(c) itself makes it clear and as held by the Allahabad High Court in *Additional Commissioner of Income Tax Vs. Swatantra Confectionery Works*, , and *Commissioner of Income Tax Vs. Kedar Nath Ram Nath*, , the Explanation applied even in case of best judgment assessment u/s 144 of the Act. Therefore, the mere fact that the assessee's income was estimated u/s 144 read with section 145(2) would not absolute the assessee from discharging the burden of proving that failure to return correct income did not arise from fraud or gross or wilful neglect. It is necessary to bear in mind that the assessee is under an obligation to file a true return (vide *A.K. Bashu Sahib Vs. Commissioner of Income Tax, Madras*, . In *Addl. CIT v. E. Bhoopathy* [1978] 113 ITR 188, the Madras High Court was called upon to consider the question whether the Tribunal was justified in cancelling penalties imposed on the assessee u/s 271(1)(c) of the Act for the assessment years 1958-59 to 1965-66. So far as the assessment years 1958-59 to 1960-1961, were concerned, it was held that there being no material on record to show that the assessee had earned the amounts added as income in each of the three years in question in the manner allocated, the Tribunal was justified in its conclusion that the penalty proceedings were not attracted. This conclusion is not relevant for our purpose. In respect of the assessment years 1963-64 to 1965-66, though the Income Tax Officer found that there was increase in net wealth between March 31, 1961 and March 31, 1966, he proceeded to estimate the income not on the basis of the said increase but by estimating the income at 20 per cent. of the estimated turnover as against 15 per cent. returned by the assessee. The assessee accepted the estimates so made. The penalties levied by the Inspecting Assistant Commissioner were cancelled by the Tribunal for these years as well. The Madras High Court held that the Tribunal had not applied its mind to the facts of the said three assessment years. The Madras High Court observed that the Income Tax Officer had only made an estimate on the basis of turnover of each of the years. He had to make the estimate as the assessee did not produce any accounts for those years. The assessee himself having accepted the estimate of 20 per cent. made by the officer and not having been able to show that his own estimate was bona fide or proper, there was clear scope for the finding that the assessee had concealed the particulars of his income or filed inaccurate particulars thereof in those years and the difference between the assessed income and the returned income would represent concealment and hence the levy of penalty was justified. It would appear from the judgment of the Madras High Court that the assessee must prove that his own estimate of income was bona fide or proper when he filed his return of income. In other words, one

way of discharging the burden of proving that failure to return the correct income did not arise from fraud or gross or wilful neglect, would be to show that the income returned was bona fide and proper. It is also important to bear in mind that u/s 145(2), the income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" has to be computed in accordance with the method of accounting regularly employed by the assessee, unless in the opinion of the Income Tax Officer, the income, profits and gains cannot properly be deduced therefrom or the Income Tax Officer is not satisfied about the correctness or completeness of the accounts of the assessee. Under the proviso to sub-section (1) of section 145 in any case where the accounts are correct and complete to the satisfaction of the Income Tax Officer but the method employed is such that, in the opinion of the Income Tax Officer, the income cannot properly be deduced therefrom, then the computation has to be made upon such basis and in such manner as the Income Tax Officer may determine. However, if the Income Tax Officer is not satisfied about the correctness or completeness of the accounts of the assessee or where no method of accounting has been regularly employed by the assessee, the Income Tax Officer may make the assessment in the manner provided in section 144. Section 145 is mandatory and the Revenue is bound by the assessee's choice of a method regularly employed unless by that method the true income, profits and gains cannot be arrived at. In other words, section 145 enacts that for the purpose of section 28 (profits and gains of business, profession or vocation) and section 56 (income from other sources), income, profit and gains must be computed in accordance with the method of accounting regularly employed by the assessee. Therefore, if the assessee regularly employs a particular method of accounting and if no defects are found in the method or maintenance of accounts, the taxing authority is bound to compute the profits and gains of business or profession or vocation in accordance with the method employed by the assessee. Therefore, in a case where the Income Tax officer or the taxing authority finds that in maintaining accounts, the assessee has regularly employed a particular method and does not make any investigation to find or does not find any defect in the accounts and accept the accounts as they are, he is bound to compute the income in accordance with the accounts maintained by the assessee. Therefore, when the assessee represents to the taxing authority that its accounts are maintained by a method of accounting regularly employed, he expects the Income Tax Officer to act upon such method and compute the income accordingly. If in such a case, defects in maintaining accounts are noticed and the book result is rejected, a heavy burden lies on the assessee to establish that the income returned by it was bona fide and proper. In the instant case, the Tribunal has not at all examined the question whether the income returned by the assessee was bona fide and proper. It is also necessary to bear in mind that it is not the assessee's case that it did not have in its but it, however, did not choose to produce such vouchers either before the Income Tax Officer or before the Inspecting Assistant Commissioner. In the absence of vouchers or proper maintenance of stock, how could the taxing authorities have verified the

correctness or otherwise of the various entries made in the books of accounts. No evidence was led before the Inspecting Assistant Commissioner and the assessee place reliance on the facts found in the assessment order to discharge the onus of proving that there was no fraud or gross or wilful neglect on its part. It was the duty of the Tribunal on appreciation of the facts found in the assessment order to find whether they did not in the least give an inkling of fraud or gross or wilful neglect on the part of the assessee. If these facts gave some inkling of commission of fraud or the assessee being grossly or wilfully negligent, the Tribunal should have considered whether it was necessary for the assessee to place some more materials in the shape of oral or documentary evidence or otherwise to prove the negative fact of absence of fraud or gross or wilful negligence, and when such material was not placed on record whether the assessee could escape penalty. Merely because the accounts were not amenable to verification and on that account, estimate of income is made, the assessee could not be said to have discharged the burden which lay upon it. In the light of the above discussion, it must be held that the Tribunal was not right in cancelling the penalty. It ought to have properly appreciated the factors and the reasons which weighed with the Inspecting Assistant Commissioner. It should also have considered all the relevant aspects and factors indicated above before reaching the conclusion whether or not the assessee had discharged the burden which lay on it. In the absence of a clear finding recorded by the Tribunal, we are unable to answer the question on the materials placed before us. We have refrained from expressing any opinion on the aspects discussed above and have only indicated many a factor which ought to have gone into consideration in deciding the question whether or not imposition of penalty is justified. Under the circumstances, as held by the Supreme Court in COMMISSIONER OF Income Tax, WEST BENGAL I Vs. INDIAN MOLASSES CO. P. LTD., , two courses are open to us : to call for a supplementary statement of the case from the Tribunal or to decline to answer the question raised by the Tribunal and to leave the Tribunal to take appropriate steps to adjust its decision u/s 260(1) of the Act in the light of the answer of this court. If we direct the Tribunal to submit a supplementary statement of the case, the Tribunal will, according to the decision of the Supreme Court in New Jehangir Vakil Mills Ltd. Vs. Commissioner of Income Tax, North, Kutch and Saurashtra, , PETLAD TURKEY RED DYE WORKS CO. LTD. Vs. COMMISSIONER OF Income Tax, BOMBAY NORTH., and The Keshav Mills Co. Ltd. Vs. Commissioner of Income Tax, Bombay North, , be restricted to the evidence on the record and may not be entitled to take additional evidence. That may result in injustice. In the circumstances, as held by the Supreme Court in COMMISSIONER OF Income Tax, WEST BENGAL I Vs. INDIAN MOLASSES CO. P. LTD., , we think it appropriate to decline to answer the question. It will be open to the Tribunal to dispose of the appeal u/s 260(1) of the Act in the light of the observations made above after determining the question which ought to have been decided.

14. References answered accordingly with no order as to costs.