**(1996) 10 P&H CK 0066**

**In the Punjab And Haryana At Chandigarh**

**Case No :** Income-tax Reference No''s. 48 and 49 of 1978

Commissioner of Income Tax — APPELLANT

Vs

Ess Ess Kay Engineering Co. Ltd. — RESPONDENT

**Date of Decision :** 01-10-1996

**Acts Referred:**
Income Tax Act, 1961 — Section 256, 256(2), 271(1)

**Citation :** (1997) 224 ITR 82

**Hon'ble Judges :** G.S. Singhvi, J;B. Rai, J

**Bench :** Division Bench

**Advocate :** R.P. Sawhney, instructed by Mahabir Ahalawat, for the Appellant; N.K. Sood, for the Respondent

## Judgement

G.S. Singhvi, J.—Pursuant to the direction given by the High Court on November 18, 1977 (see COMMISSIONER OF Income Tax, JULLUNDUR Vs. ESS ESS KAY ENGINEERING CO. PVT. LTD., in I. T. C. No. 113 and I. T. C. No. 114 of 1977, the Income Tax Appellate Tribunal, Amritsar, referred the following question for the opinion of the High Court :

" Whether, on the facts and in the circumstances prevailing for the assessment years 1969-70 and 1970-71, the Tribunal was justified in cancelling the penalties imposed of- Rs. 1,86,163 and Rs. 2,26,617 by following its earlier order in respect of the similar penalties imposed for the assessment years 1967-68 and 1968-69 and thus concluding that the assessee was not guilty of any wilful concealment of its income ?"

2. The assessee is a private limited company carrying on business in the manufacture of electrical switches and plugs. The company was incorporated on April 22, 1964. It took over the business which was being carried on in the name of Kay Engineering Co. On April 1, 1965, the company appointed Kay Engineering Sales Corporation as their sole selling agent. It was agreed that the sole selling agent will receive commission at the rate of five per cent. on the net sale of the products manufactured by the company after deducting trade discounts, freight,

sales tax, distributor''s commission, etc. For the assessment year 1969-70, the assessee claimed a benefit of commission of Rs. 1,86,163 allegedly paid to the sole selling agent. For the assessment year 1970-71, the assessee claimed that commission amounting to Rs. 2,26,617 was paid to the sole selling agent. The Income Tax Officer did not allow the deduction in respect of the commission allegedly paid by the assessee to the sole selling agent. He also initiated penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 (for short, "the Act"), and referred the case to the Inspecting Assistant Commissioner u/s 274(2) of the Act. The said authority imposed penalty equal to the amount of commission claimed by the assessee for the assessment years 1969-70 and 1970-71. The appeals filed by the assessee were allowed by the Income Tax Appellate Tribunal, vide its order dated August 7, 1976. While accepting the appeals of the assessee, the Tribunal placed reliance on its earlier order dated March 24, 1976, passed in respect of the assessment years 1967-68 and 1968-69.

3. At the commencement of the hearing, Sri N. K. Sood, learned counsel for the assessee, brought to our notice the fact that the main case relating to the amount of commission paid to the sole selling agent was still pending before the authorities constituted under the Act because the Tribunal has remanded the case to the appellate authority and after a fresh decision was rendered by the appellate authority, the Tribunal again remanded the case to the said authority by accepting the appeals preferred by the assessee. He submitted that when the question of deduction of commission is still pending consideration before the appellate authority, no question of law relating to the power of the competent authority to impose penalty deserves to be considered by the court and these petitions should be decided without answering the question posed by the Tribunal. On the other hand, learned counsel for the Department argued that in view of the order dated November 18, 1977, passed by this court it is not now open for the court to decline to answer the question of law referred to it by the Tribunal. He, however, conceded that the issue relating to the quantum of commission payable to the sole selling agent is pending adjudication before the appellate authority.

4. In view of the admitted fact that the issue relating to the quantum of commission payable to the sole selling agent of the assessee, is still undecided, determination of the question of law called for by this court would be a futile exercise. In our considered opinion, the question referred to this court by the Tribunal on February 23, 1978, does not deserve to be answered because in fact no such question arises in the facts and circumstances of this case.

5. For the aforementioned reason, we dispose of these petitions without answering the question of law referred to by the Tribunal. However, it is made clear that once the appellate authority decides the matter afresh in the light of the directions given by the Tribunal, the parties shall be entitled to avail of the remedies available to them by way of further appeals and then by filing applications u/s 250(1) or 250(2) of the Act.