

**(1974) 01 OHC CK 0018**  
**In the Orissa High Court**  
**Case No : S.J.C. No. 115 of 1972**

Commissioner of Income Tax

APPELLANT

Vs

Laxmi Auto Stores

RESPONDENT

**Date of Decision :** 18-01-1974

**Acts Referred:**

Income Tax Act, 1961 — Section 271(1)

**Citation :** (1974) 40 CLT 309 : (1977) 106 ITR 626

**Hon'ble Judges :** R.N. Misra, J;B.K. Ray, J

**Bench :** Division Bench

**Advocate :** B.K. Mohanty and S.R. Das, for the Respondent

## Judgement

R.N. Misra, J.—The Income Tax Appellate Tribunal has stated a case and referred the following question for determination of this court u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") at the instance of the revenue:

"Whether the Tribunal was right in law in deleting the penalty by applying the principles of the Supreme Court decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, to the levy of penalty in this case u/s 271(1) (c) after its amendment by omission of the word "deliberately" in Clause (c) of Section 271(1) with effect from April 1, 1964?"

2. The year of assessment is 1964-65. The assessee had returned an income of Rs. 43,023.23 in its return filed on October 1, 1964. The assessing officer found two cash credits of Rs. 10,000 each and treated them to be income of the assessee from undisclosed sources being not satisfied about the genuineness of the transactions. The additions were upheld by the Appellate Assistant Commissioner as also the Tribunal and became final. In the meantime, proceedings u/s 271(1)(c) read with Section 274 of the Act were initiated and the Inspecting Assistant Commissioner by order dated February 26, 1969, imposed a penalty of Rs. 15,000, The assessee appealed to the Tribunal. The

Appellate Tribunal held :

"Reliance is placed on the now well-known decision of the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . While it is true that the inclusion of the cash credits have been upheld by the Appellate Tribunal in the corresponding quantum of assessment on the ground that the assessee has failed to prove satisfactorily its claim that the amounts were genuine loans taken from the parties concerned, it does not automatically give rise to the presumption so far as penalty proceedings are concerned that it represented income which the assessee concealed. The Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, has held that the mere fact of inclusion of certain cash credits in the assessment does not automatically lead to the inference that the amounts are concealed income of the assessee and that, in penalty proceeding?, it is the onus of the department to prove that the amounts represented not only income but also that it was concealed by the assessee. It has been held that even any falsity of the explanation given by the assessee in support of the cash credits cannot tantamount to concealment of the income of the assessee."

3. The Tribunal obviously lost sight of the fact that with effect from April 1, 1964, an Explanation had been added to Section 271(1)(c) of the Act wherein it has been provided that where the total income returned by any person is less than 80 per cent. of the total income as assessed u/s 143, 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. Mr. Mohanty, for the assessee, concedes that the Explanation is attracted and with the Explanation available to be relied upon by the revenue, in the absence of any evidence by the assessee to show that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part, there was concealment and Section 271(1)(c) of the Act would apply and penalty as levied would be exigible. His contention, however, is that such a question was never raised before the Appellate Tribunal and, therefore, we are precluded from taking notice of such a contention and the revenue is not entitled to (all back upon the Explanation. Reliance is placed on the decision of the Supreme Court in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., and Commissioner of Wealth-tax Madras Vs. Ramaraju Surgical Cotton Mills Ltd., . There is no doubt that unless the question raised arises out of the appellate order it is not one which is open to reference. We are, however, of the view that the matter is covered within the first three tests indicated in Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., . The question that was being canvassed before the Appellate Tribunal was in regard to the assessee's liability for penalty u/s 271(1)(c) of the Act on the footing that it had concealed its true income. The ambit of the dispute was wide enough. The Explanation in Section 271(1)(c) being the law applicable to the point must be deemed to have been canvassed before the Tribunal. The question as raised does arise out of the appellate order.

Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, was considering the law as it stood before the amendment in question was brought into the statute book and, therefore, could not provide the guideline for disposal of a case covered by the amendment. We do not think the assessee's stand, that such a question cannot be canvassed before us because it never arose out of the appellate order, can be sustained.

4. Our answer to the question referred to us shall, therefore, be that the Tribunal was not right in law in deleting the penalty by applying the principles of the Supreme Court decision in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . We make no order as to costs.

B.K. Ray, J.

5. I agree.