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**(1985) 05 P&H CK 0039**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : Income Tax Case No. 109 of 1977**

Commissioner of Income Tax

APPELLANT

Vs

Ravail Singh and Co.

RESPONDENT

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**Date of Decision :** 09-05-1985

**Acts Referred:**

Income Tax (Amendment) Act, 1964 — Section 271(1)  
Income Tax Act, 1961 — Section 256(2), 271(1)

**Citation :** (1986) 157 ITR 747

**Hon'ble Judges :** S.P. Goyal, J; M.M. Punchhi, J

**Bench :** Division Bench

**Advocate :** Ashok Bhan and Ajay Mittal, for the Appellant; D.S. Nehra and Arun Nehra, for the Respondent

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## Judgement

M.M. Punchhi, J.—The Commissioner of Income Tax, Jullundur, has prayed for a mandamus requiring the Income Tax Appellate Tribunal, Amritsar, to refer to this court for its opinion the following two questions :

"1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that the Inspecting Assistant Commissioner is not justified in taking the view that mens rea need not be established in the proceedings drawn u/s 271(1)(c)?

2. Whether, on the facts and in the circumstances of the case, the Tribunal is right in law in holding that no penalty u/s 271(1)(c) is leviable in this case ?"

2. The Tribunal, vide its order dated December 20, 1976, declined to make a reference when asked for by the Revenue being of the view that no question of law arose.

3. The material facts are that the assessee was a wholesale and retail dealer of liquor. Nearing the close of the accounting year, the assessee claimed to have made sales at a loss. The assessee also claimed to have paid a sum of Rs. 7,800 to the police for organising raids to prevent sale of illicit liquor as otherwise the

business of the assessee statedly would have been affected. The loss occurring by the said sales and the expense incurred, though claimed by the assessee, was rejected by the Income Tax Officer. Finally, up to the level of the Income Tax Tribunal, the addition of Rs. 85,000 as suppressed sales and of Rs. 7,800 as non-claimable expenditure were kept added to the income the assessee. Thus, on these two additions, the Inspecting Assistant Commissioner initiated penalty proceedings invoking Section 271(1)(c) of the Income Tax Act, 1961, read with the Explanation and imposed Rs. 92,800 as penalty. The assessee's appeal succeeded before the Income Tax Tribunal, Amritsar, on August 20, 1976.

4. The Tribunal took the view that the Inspecting Assistant Commissioner was not justified in taking the view that mens rea need not be established in the proceedings drawn u/s 271(1)(c) of the Act. The Tribunal further took the view that ordinarily burden rests on the Revenue to prove that the particulars of income have been concealed and inaccurate particulars have been furnished by the assessee. But when the returned income is less than 80 per cent. of the assessed income, it is presumed that the assessee deliberately concealed the particulars or furnished inaccurate particulars of income. The Tribunal also held that the presumption was rebuttable and the onus could again shift to the Revenue on the preponderance of probabilities. Then, while applying the rule, the Tribunal observed as follows :

"In view of this rule, it is to be seen whether or not the assessee succeeded in proving by preponderance of probability that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. The case of the assessee is that there was no suppression of the sales and they were fully accounted for. According to the assessee, the addition of Rs. 85,000 is purely based on estimate of the Department and there is no basis for that. The assessee means to say that there is no positive evidence to prove that the sum of Rs. 85,000 really represented the income of the assessee. Before imposing penalty, the Revenue must establish that the subject-matter of penalty really represented the income of the assessee. In taking this view, we are supported by Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . As there is no proof that the addition of Rs. 85,000 represented the real income of the assessee, we are inclined to say that no penalty can be imposed on the assessee. As it is purely a case of estimate, it cannot be said that the failure to return the correct income was due to fraud or gross or wilful neglect on the part of assessee."

5. With regard to the item of Rs, 7,800, the Tribunal observed as follows:

"Next we come to the item of Rs. 7,800. The assessee believed that the expenditure incurred on the police raid party is business expenditure and hence allowable. This belief appears to be a bona fide belief and the assessee cannot be charged for having furnished inaccurate particulars of income. It is only a matter of opinion that the Department considered that the given amount cannot constitute a business expenditure. There does not appear to be any concealment

and production of inaccurate particulars income. The assessee sufficiently discharged its onus which was shifted on to it by the Explanation 1 to Section 271(1)(c). The Department, in its own turn, failed to establish the mental element or the mens rea that the assessee . deliberately acted in defiance of law or the conduct of the assessee was contumacious and dishonest."

6. Now, the element of mens rea in taxing statutes containing provisions for imposition of penalty has more or less been eroded. In *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, , a Constitution Bench of the Supreme Court has held that the classical view that "no mens rea, no crime" has long ago been eroded and several laws especially regarding economic crimes and departmental penalties have created severe punishments even where the offences have been defined to exclude mens rea. That element permeated in *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, , when the Supreme Court interpreted Section 28 of the Indian Income Tax Act, 1922. Later, when the present Act was amended by the Finance Act, 1964, by causing changes in Section 271(1)(c), the efficacy of *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, came to be doubted. This court initially in *Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran*, , took the view of the amended law more in accord with *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, , but when its correctness was challenged, a Full Bench of this court in *Vishwakarma Industries Vs. Commissioner of Income Tax*, , overruled *Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran*, and laid down as follows (at p. 671 of 135 ITR):

"To conclude, it must be held that the patent intent of the Legislature in amending Section 271(1)(c) and in inserting the Explanation thereto by the Finance Act of 1964 was to bring about a change in the existing law. Consequently, the ratio of *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, , which had considered the earlier provision of Section 28(1) of the 1922 Act, is no longer attracted. The true legal import of the Explanation is to shift the burden of proof from the Department on to the shoulders of the assessee in the class of cases where the returned income was less than 80 per cent. of the income assessed by the Department. In this category of cases, the Explanation raises three rebuttable presumptions against the assessee as spelt out in detail above in para, 16 of this judgment. The onus of proof for rebutting these presumptions lies on the assessee. This burden, however, can be discharged (as in civil cases) by the preponderance of evidence. Equally, it would be permissible in the penalty proceedings for the assessee to show and prove that on the existing material itself, the presumption raised by the Explanation stands rebutted. On these points, *Additional Commissioner of Income Tax Vs. Karnail Singh V. Kaleran*, , does not lay down the law correctly."

7. It is obvious that the Tribunal's view is of a time when *Vishwakarma Industries Vs. Commissioner of Income Tax*, , had not appeared on the scene. It

is equally obvious that the Tribunal took support for its view from Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . On these grounds alone, a statement of the case would be required to be made to this court for referring the aforesaid two questions of law.

8. To be fair to the learned counsel for the assessee, it must be noticed that he asserted on the strength of a few precedents like Commissioner of Income Tax Vs. Dewan Singh Gurbachan Singh, , a decision of this court, to contend that sufficiency or otherwise of the evidence to establish whether in a given case, there is concealment of income for levy of penalty u/s 271(1)(c) of the Act is a pure question of fact and not of law. Particular emphasis was laid by him on the concluding lines of the order of the Tribunal afore-extracted to contend that since the addition was made on the basis of estimate, the Tribunal had found as a fact that it could not be said that failure to return the correct income was due to fraud or gross or wilful neglect on the part of the assesses. We regret our inability to draw any such inference from the said observation. To us, it appears to be a statement of law, rather than of fact.

9. We thus, for the foregoing reasoning, allow this petition and direct the Tribunal to draw up a statement of the case and refer to us the above-said questions of law for opinion of this court. In the circumstances of the case, we leave the parties to bear their own costs.