
(1975) 07 GAU CK 0006
In the Gauhati High Court
Case No : Income-tax Reference No. 8 of 1972

F.C. Agarwal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 16-07-1975

Acts Referred:

Income Tax Act, 1961 — Section 119, 119(1), 119(2), 139(5), 271(1)

Citation : (1976) 102 ITR 408

Hon'ble Judges : M.C. Pathak, C.J.; D.M. Sen, J

Bench : Division Bench

Advocate : S.K. Ghose and B.P. Saraf, for the Appellant; G.K. Talukdar and D.K. Talukdar, for the Respondent

Judgement

Pathak, C.J.—The following two questions of law as arising out of the consolidated order of the Income Tax Appellate Tribunal in respect of the assessment years 1963-64, 1964-65 and 1965-66 have been referred by the Tribunal u/s 256(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"):

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was correct in holding that penalties u/s 271(1)(c) of the Income Tax Act read with Explanation to that section were justified in respect of the assessment years 1963-64, 1964-65 and 1965-66 ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that for the purpose of calculation of penalty the difference between the tax on the incomes shown in the first return and the tax on the incomes assessed shall be taken as the amounts of tax that would have been avoided ?"

2. The relevant assessment years are 1963-64, 1964-65 and 1965-66. In the relevant years the assessee, F. C. Agarwal, was carrying on business in his individual capacity. In respect of these three years the assessee filed returns

which were later revised as follows:

3. Assessment year 1963-64 :

Original return showing total income of Rs. 30,750 was filed on May 22, 1964. Revised return showing total income as Rs. 2,74,189 was filed on March 20, 1968.

4. Assessment year 1964-65 :

Original return showing total income as Rs. 36,315 was filed on May 22, 1964. Revised return showing total income as Rs. 3,35,181 was filed on March 20, 1968.

5. Assessment year 1965-66:

6. Original return showing Nil income was filed on September 13, 1965. Revised return showing a total income as Rs. 81,030 was filed on March 20, 1968.

7. Before the Income Tax Officer the assessee stated that he had not maintained any regular books of account and, therefore, the returns had been filed on estimate of certain net profits on sales. The Income Tax Officer completed the assessments by estimating the sales at slightly higher figures and by adopting the rate of net profit as shown by the assessee in the revised returns. The Income Tax Officer was of the view that while filing the returns the assessee had concealed his income and had not deliberately disclosed his correct income. The Income Tax Officer, therefore, initiated penalty proceedings u/s 271(l)(c) of the Income Tax Act and referred the matter to the Inspecting Assistant Commissioner u/s 274 of the Act. After considering the facts and circumstances of the case the Inspecting Assistant Commissioner came to the conclusion that the assessee had concealed his income and had not been able to discharge the onus of showing that the difference between the income shown in the original returns and the income assessed had not arisen as a result of any fraud or gross or wilful neglect on the part of the assessee. The Inspecting Assistant Commissioner held that for the assessment year 1963-64, the original return had been filed after April 1, 1964, and, therefore, the provisions of the Explanation to Section 271(1)(c) applied to the case. In respect of the other two years the provisions of the Explanation were ipso facto attracted. The Inspecting Assistant Commissioner also noticed the very wide difference between the income shown in the original returns and the income which had been admitted in the revised returns. No explanation has been given before the Inspecting Assistant Commissioner regarding the basis on which the original returns had been filed. The Inspecting Assistant Commissioner held that the penalty u/s 271(l)(c) was leviable in all the three years and accordingly he levied penalties of Rs. 90,000, Rs. 80,000 and Rs. 20,000 for the assessment years 1963-64, 1964-65 and 1965-66, respectively.

8. The assessee preferred three appeals before the Income Tax Appellate Tribunal in respect of the three assessment orders and by a common order the

Tribunal allowed the appeals partly.

9. In its judgment the Tribunal came to the conclusion that the original returns had definitely shown income which was much below the correct income of the assessee. It was further held that the assessee had not been able to point out even one item of income in order to explain the inadvertent nature of the mistake. It was admitted before the Tribunal that the original returns did not show correct incomes and there was no dispute regarding the finally assessed income. The Tribunal further held that if an assessee conceals income while filing the original returns, the filing of a revised return cannot absolve him from the default already committed, The Tribunal further observed that on a specific query being made, the counsel for the assessee could not explain the basis on which the original returns had been prepared and submitted. The Tribunal rejected the submission of the assessee to the effect that when he filed the original returns showing a much lower income he was not aware of the correct income which has been shown in the revised returns and that the assessee was acting under a bona fide belief. The Tribunal also did not accept the argument made on behalf of the assessee that the quantum of penalty should be calculated only on the basis of the difference between the tax on the income shown in the revised return and the tax on the assessed income. The Tribunal held that the concealment having taken place in the original return the tax that would have been avoided had that return been accepted would be the correct figure to be taken into consideration while calculating the penalty u/s 271(l)(c) of the Act. The Tribunal also held that the totality of circumstances clearly pointed out that at best it was a case of gross and wilful neglect on the part of the assessee. The Tribunal, therefore, upheld the order of the Inspecting Assistant Commissioner for levying penalty in respect of the concealment in the original returns. The Tribunal, however, reduced the penalty to 20% of the tax sought to be avoided. On these facts the above-mentioned two questions of law have been referred.

10. The original returns are found to have been furnished u/s 139(1) of the Act and the revised returns were filed u/s 139(5) of the Act on March 20, 1968, before the assessments were made on March 23, 1968.

11. It is very conspicuous to notice that in the original return for 1963-64, the total income was shown as Rs. 30,750 but in the revised return for the same year the total income was shown as Rs. 2,74,189, for the year 1964-65 the total income in the original return was Rs. 36,315 whereas in the revised return for the same year it has been shown as Rs. 3,35,181 and for the assessment year 1965-66, the total income in the original return was shown as "Nil income" whereas in the revised return for the same year it has been shown as Rs. 81,030.

12. Section 271(l)(c) reads as follows :

"271. Failure to furnish returns, comply with notices, concealment of income, etc.--(1) If the Income Tax Officer or the Appellate Assistant Commissioner, in the course of any proceedings under this Act, is 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, but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished.

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, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of Clause (c) of this sub-section."

13. In the instant case for the assessment year 1963-64, the assessee showed in the revised return Rs. 2,43,439 as income in addition to the income shown in the original return. Similarly, for the assessment year 1964-65, the assessee showed in the revised return Rs. 2,98,866 as income in addition to the income shown in the original return. So also for the assessment year 1965-66, the assessee showed in the revised return Rs. 81,030 as income in addition to the income shown in the original return. These sums of Rs. 2,43,439, Rs. 2,98,866 and Rs. 81,030 for the respective years are admittedly the incomes of the assessee which were not shown in the original returns but have been shown in the revised returns.

14. In *The Commissioner of Income Tax Madras Vs. Khoday Eswarsa and Sons*, the Supreme Court has observed as follows :

"Before we conclude we may refer to the decision of this court in *Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali*, wherein it has been held that one of the principal objects in enacting Section 28 is to provide a deterrent against recurrence of default on the part of the assessee and that Section 28 is penal in the sense that its consequences are intended to be effective deterrent which would put a stop to the practices which the legislature considers to be against the public interest. It has been further held that the department must establish that the receipt of the amount in dispute constitutes the income of the assessee and if there is no evidence on record except the explanation given by the assessee, which explanation has been found to be false, it does not follow that the receipt constitutes its taxable income. It has been further held that, as the proceedings u/s 28 are of a penal nature and the burden is on the department to show that a particular amount is revenue receipt, it is legitimate to say that the mere fact that the explanation of the assessee is false,

does not necessarily give rise to the inference that the disputed amount represents the income. It has been pointed out in the said decision that the finding given in the assessment proceeding for determining or computing the tax is not conclusive though it may be good evidence. It has been further held by this court in the above decision :

"Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars."

From the above it is clear that penalty proceedings being penal in character, the department must establish that the receipt of the amount in dispute constitutes income of the assessee. Apart from the falsity of the explanation given by the assessee, the department must have before it before levying penalty cogent material or evidence from which it could be inferred that the assessee has consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the same and that the disputed amount is a revenue receipt. No doubt the original assessment proceedings for computing the tax may be a good item of evidence in the penalty proceedings but the penalty cannot be levied solely on the basis of the reasons given in the original order of assessment."

14. In *K.C. Trunk and Bucket Factory Vs. Commissioner of Income Tax and Others*, a Full Bench of this court has observed as follows :

"From the above observations of the Supreme Court it is found that penalty proceedings are penal in character and such proceedings may be said to be quasi-criminal proceedings. Since the character of the proceedings is penal it is the burden of the department to establish that the assessee is liable to payment of penalty. The department must establish that the receipt of the amount in dispute constitutes income of the assessee and that the assessee has concealed the particulars of such income. The finding given in the assessment proceeding for determining or computing the tax cannot be said to be conclusive but it is good evidence which may be considered for arriving at the finding in the penalty proceedings. Before a penalty can be imposed the entirety of circumstances must reasonably point that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had, deliberately furnished inaccurate particulars."

15. It is now settled law that in order to sustain a penalty u/s 271(1)(c) of the Act the department must establish that the receipt of the amount in dispute constitutes income of the assessee and apart from the falsity of the- explanation given by the assessee, the department must have before it cogent material or evidence from which it can be inferred that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars in respect of such income. It is also settled law that the finding given

in the assessment proceedings for determining or computing the tax cannot by itself be said to be conclusive in penalty proceedings though it may be good evidence which may be considered along with the other evidence in the penalty proceedings.

16. In the instant case the admitted position is that the aforementioned amounts, namely, Rs. 2,43,439, Rs. 2,98,866 and Rs. 81,030, for the assessment years 1963-64, 1964-65 and 1965-66, respectively, are incomes of the assessee for the respective years as shown in the revised returns. So, for the penalty proceedings, the only point that requires consideration is whether there was cogent material or evidence before the Income Tax authority from which it could be inferred that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars in respect of such income.

17. In its appellate order the Tribunal has observed that the learned counsel for the assessee had not at all been able to point out even one item of income in order to explain that the revised returns were merely the result of inadvertent mistake. That it was clearly admitted before the Tribunal that the original returns were incorrect and that as against an income of Rs. 30,000, Rs. 36,000 and Rs. 16,000, the income has been assessed at Rs. 2,74,000, Rs. 3,35,000 and Rs. 92,605, for the three assessment years, respectively. The learned Tribunal also has observed:

" We asked the learned counsel for the assessee to explain the basis on which the original returns had been submitted. He, however, could not give any particular basis for the original returns. We find it very difficult to agree to the argument of the learned counsel for the assessee that though the assessee was having a correct income of Rs. 3,00,000 or even more he was not aware of it when he filed returns which was only about 10% of the real income, he was acting under a bona fide belief. The difference between the original return and the revised return was so staggering that the argument of inadvertent mistake cannot be accepted."

18. In the assessment order it has been observed by the Income Tax Officer as follows:

"The assessee has however maintained no production account or any other reliable record of quantity of raw materials consumed, finished goods, quantity of sales and stocks. As a matter of fact no regular and systematic books of accounts have been maintained and the assessee has himself resorted to an estimate to find out his net profits as also some items of the assets and liabilities."

19. Thus, the assessee's case appears to be that though he did business of lakhs of rupees he had no regular books of account at the time of filing the original returns and, therefore, the correct income could not be shown, and that it was only when the property and business of the assessee were taken over by a

limited company then the mistakes and omissions were discovered in the earlier returns. This plea of the assessee that the mistakes or omissions in the original returns were inadvertent and bona fide has not been accepted by the department as well as the Tribunal in view of the facts and circumstances of the case as found in the order of the Tribunal.

20. Considering the entire materials on record the Tribunal has observed :

"We have carefully considered the facts of the case and the arguments of the representative of both sides. This is a case where the original returns have certainly been filed showing incorrect income and inaccurate particulars of the assessee's income."

21. Considering the materials on record and the staggering differences between the original returns and the revised returns and that no particular item of income has been pointed out to explain that the revised returns were merely the result of inadvertent mistakes or omissions, the Tribunal has come to the conclusion that the assessee had submitted inaccurate particulars of his income and had also concealed the particulars of his income while filing his original returns. This is a finding of fact arrived at by the Tribunal after considering the materials on record and the entirety of the circumstances in the case and this finding of fact cannot be said to be in any way bad or perverse in law. Thus, the second requirement for imposing penalty u/s 271(IXc), asset out hereinabove, is found to have been fulfilled in the instant case.

22. The Explanation to Section 271(1)(c) came into force with effect from 1st April, 1964. It is not disputed that the Explanation is applicable for the assessment years 1964-65 and 1965-66. It has, however, been disputed that the Explanation is not applicable to the assessment year 1963-64, inasmuch as the Explanation has come into force with effect from 1st April, 1964. It is, however, found that the return for the assessment year 1963-64 was filed on May 22, 1964, after the Explanation came into force. That being so, we are clearly of the opinion that the Explanation is applicable for the assessment year 1963-64 also in the instant case since the return was filed on May 22, 1964. If there was concealment of the particulars of income or there was furnishing of inaccurate particulars of income as contemplated under Clause (c) of Sub-section (1) of Section 271 of the Act and this was done by furnishing the return after 1st April, 1964, the Explanation in such a case will be attracted. The total income returned by the assessee in each of the three assessment years in the instant case is found to be less than 80% of the total income assessed in each case. That being so, the Explanation is fully and squarely applicable in the instant case and the finding of the Tribunal is that in any view of the matter the totality of the circumstances clearly point out that it was a case of gross or wilful neglect on the part of the assessee and the assessee has failed to prove that it was not a case of gross or wilful neglect on his part in furnishing the original returns. This finding cannot be said to be bad in law or otherwise perverse.

23. Mr. S. K. Ghose, the learned counsel for the petitioner, has submitted that since the revised returns were filed voluntarily by the assessee before the assessments were made and these returns were filed as provided under Sub-section (5) of Section 139 and acted upon, the question of penalty for concealment of income or furnishing inaccurate particulars of income does not arise.

24. The learned counsel for the assessee has submitted that if the revised return under Sub-section (5) of Section 139 is filed voluntarily after the assessee has himself discovered any omission or any wrong statement in the original return, Clause (c) of Sub-section (I) of Section 271 is not attracted.

25. Under Sub-section (I) of Section 139 every person, if his total income or the total income of any other person in respect of which he is assessable under the Act during the previous year exceeded the maximum amount which is not chargeable to Income Tax shall furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed under the rules within the period fixed in the Sub-section itself.

26. Admittedly, the assessee was a person whose income during the previous years in question exceeded the maximum limit of non-taxable income. He was thus under an obligation to furnish the returns for the relevant assessment years u/s 139(1) and in fact he submitted returns for the relevant assessment years under Sub-section (1). While submitting the returns for the relevant assessment years it was the legal duty of the assessee to disclose the full particulars of his income in the returns submitted by him. It is quite possible and natural that in submitting a return and disclosing the full particulars of income in the return some bona fide omission or some bona fide wrong statement may find place in the return and to obviate this possibility the legislature has provided Sub-section (5) of Section 139 which reads as follows :

"139. (5) If any person having furnished a return under Subsection (I) or Sub-section (2), discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the assessment is made."

27. If after having furnished the return the assessee discovers that some omission has taken place or some wrong statement has crept in in the return, he may file a revised return wherein he may correct the omission or the wrong statement made in the original return. Sub-section (5) further provides that in order to enable an assessee to file a revised return as contemplated under Sub-section (5) the omission or wrong statement that might have occurred or crept in in the original return, must be discovered by the assessee himself. In other words, if after examining the return and accounts in the proceedings the discovery of the omission or wrong statement is made by the departmental authority and thereafter the revised return purported to be under Sub-section (5) is filed, that will not be considered as a revised return under Sub-section (5). As

a proposition of law it may be correct that if a revised return as contemplated under Subsection (5) is submitted before the assessment is made after the assessee having discovered some omission or some wrong statement in the original return and in the revised return he makes correction of the omission or the wrong statement, a penalty proceeding for concealment of the particulars of income or furnishing inaccurate particulars of such income as contemplated under Clause (c) of Sub-section (1) of Section 271 may not be attracted. But to avoid the penalty proceeding as contemplated u/s 271(1)(c) by reason of submission of revised return, the revised return itself must be within the correct ambit and scope of Sub-section (5) of Section 139 of the Act. If it cannot be said that a revised return in fact does come within the correct ambit and scope of Section 139(5), then immunity from Section 271(l)(c) cannot be availed of by the assessee.

28. In the instant case let us examine whether the revised returns filed by the assessee for the relevant assessment years can be said to be within the correct ambit and scope of Sub-section (5) of Section 139. No doubt, the discovery of the omission or wrong statement in the instant case was made by the assessee. That by itself is not sufficient to bring the revised return within the ambit and scope of Sub-section (5) of Section 139. The further requirement is that this omission or wrong statement in the original return must be due to bona fide inadvertence or mistake on the part of the assessee. If the omission or wrong statement in the original return cannot be said to be due to bona fide inadvertence or bona fide mistake on the part of the assessee, by any standard of evaluation of the evidence or material on record, mere submission of such a revised return cannot avoid penalty proceeding.

29. In the instant case in the revised returns the assessee showed total incomes of Rs. 2,74,189, Rs. 3,35,181 and Rs. 81,030 for the assessment years 1963-64, 1964-65 and 1965-66, respectively. But in his original returns he showed total incomes as Rs. 30,750, Rs. 36,315 and "nil income " for the said assessment years, respectively.

30. The Tribunal in its order has observed that the assessee had not at all been able to point out even one item of income in order to explain that the revised returns were merely the result of inadvertent mistake. It was clearly admitted by the assessee before the Tribunal that the original returns were incorrect. The assessee could not give any particular basis for the original returns. The contention of the assessee that he had no proper accounts notwithstanding the admitted fact that he had incomes in lakhs of rupees was rightly rejected by the Tribunal. In the circumstances, the omission or wrong statements that crept in in the original returns, as admitted by the assessee, could not be stated to be, by any standard of evaluation of evidence or material on record, inadvertent or bona fide omission or mistake. That being so, in the instant case the revised returns are really not within the correct ambit and scope of Sub-section (5) of Section 139 so as to allow immunity to the assessee from the mischief of Clause (c) of

Sub-section (1) of Section 271. The learned counsel's submission, therefore, in this regard, is not acceptable.

31. Mr. S. K. Ghose, the learned counsel for the assessee, next submits that the Central Board of Direct Taxes has issued instructions in an advertisement dated January 5, 1971, in the Statesman, wherein the Board has stated to the effect that if the original return filed by an assessee is false he may file a revised return to avoid the consequences of discovery. It would be convenient to quote the advertisement published in the issue of the Statesman, dated January 5, 1971 :

" FILING FALSE TAX RETURNS :

Do You KNOW THE CONSEQUENCES ?

Beware:

Filing of false tax returns is severely punishable under the Income Tax, Wealth-tax and Gift-tax Acts. It may cost you more than what you have concealed.

Under the Income Tax Act, a minimum penalty equal to the amount of the concealed income and a maximum penalty equal to twice that amount, is prescribed. Besides, there can also be prosecution and conviction--rigorous imprisonment for not less than six months which can be extended to two years.

Similarly, evasion of wealth-tax is also severely punishable under the Wealth-tax Act. A minimum penalty of an amount equal to the value of the asset so concealed or to the extent of understatement in the value of an asset or overstatement in the value of any debt, is prescribed. This penalty can be as high as twice this amount. In addition, there can be prosecution and conviction with rigorous imprisonment for not less than six months extendable to two years.

Furnishing inaccurate particulars of any gift is punishable with a sum not less than 20% but not more than one and a half times of the tax which would have been avoided if the return had been accepted as correct. Apart from this, you can be prosecuted. Conviction can mean simple imprisonment extendable to one year or with fine up to Rs. 1,000 or both.

REMEMBER EVASION or TAX is A CRIME If the original return filed by you is false why not file a revised return to avoid the consequences of discovery. CENTRAL BOARD OF DIRECT TAXES (Department of Revenue & Insurance) MINISTRY OF FINANCE, GOVERNMENT OF INDIA."

32. The submission of the learned counsel is that u/s 119 of the Act, the Central Board of Direct Taxes may from time to time issue orders, instructions and directions to the Income Tax authorities for the proper administration of the Act and such authorities and all other persons employed in the execution of the Act shall observe and follow such orders, instructions and directions of the Board.

33. Section 119 of the Act, as it stood prior to amendment by the Taxation Laws (Amendment) Act, 1970, stood as follows :

"119. Instructions to subordinate authorities.--(1) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Board:

Provided that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(2) Every Income Tax Officer employed in the execution of this Act shall observe and follow such instructions as may be issued to him for his guidance by the Director of Inspection or by the Commissioner or by the Inspecting Assistant Commissioner within whose jurisdiction he performs his functions."

34. For the old Section 119 a new section was substituted by Section 25 of the Taxation Laws (Amendment) Act, 1970 (Act 42 of 1970) and the new section is as follows:

"119. Instructions to subordinate authorities.--(1) The Board may, from time to time, issue such orders, instructions and directions to other Income Tax authorities as it may deem fit for the proper administration of this Act, and such authorities and all other persons employed in the execution of this Act shall observe and follow such orders, instructions and directions of the Board :

Provided that no such orders, instructions or directions shall be issued--

(a) so as to require any Income Tax authority to make a particular assessment or to dispose of a particular case in a particular manner; or

(b) so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(2) Without prejudice to the generality of the foregoing power,--

(a) the Board may, if it considers it necessary or expedient so to do, for the purpose of proper and efficient management of the work of assessment and collection of revenue, issue, from time to time (whether by way of relaxation of any of the provisions of Sections 143, 144, 147, 148, 154, 155, 210, 271 and 273 or otherwise), general or special orders in respect of any class of incomes or class of cases, setting forth directions or instructions (not being prejudicial to assessee) as to the guidelines, principles or procedures to be followed by other Income Tax authorities in the work relating to assessment or collection of revenue or the initiation of proceedings for the imposition of penalties and any such order may, if the Board is of opinion that it is necessary in the public interest so to do, be published and circulated in the prescribed manner for general information ;

(b) the Board may, if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases, by general or special order, authorise the Commissioner or the Income Tax Officer to admit an application or claim for any exemption, deduction, refund or any other relief under this Act

after the expiry of the period specified by or under this Act for making such application or claim and deal with the same on merits in accordance with law.

(3) Every Income Tax Officer employed in the execution of this Act shall observe and follow such instructions as may be issued to him for his guidance by the Director of Inspection or by the Commissioner or by the Inspecting Assistant Commissioner within whose jurisdiction he performs his functions."

35. The learned counsel for the petitioner submits that the above quoted advertisement or notification was issued by the Central Board of Direct Taxes and, as such, in view of the provisions of Section 119, the Income Tax Officer is required to follow the notification or instruction issued by the Board as stated above, and, therefore, the Income Tax Officer could not draw up penalty proceeding against an assessee who submitted false return but filed a revised return as allowed by the direction given by the Board in the above notification. In this connection the learned counsel has referred to the decision of the Supreme Court in *Navnit Lal C. Javeri v. K. K. Sen*, Appellate Assistant Commissioner of Income Tax [1905] 56 ITR 198 wherein it has been observed at pages 202-203 of the report as follows:

" There is another material circumstance which cannot be ignored. It appears that when these amendments were introduced in Parliament, the Hon'ble Minister for Revenue and Civil Expenditure gave an assurance that outstanding loans and advances which are otherwise liable to be taxed as dividends in the assessment year 1955-56 will not be subjected to tax if it is shown that they had been genuinely refunded to the respective companies before the 30th June, 1955. It was realised by the Government that unless such a step was taken, the operation of Section 12(1B) would lead to extreme hardship, because it would have covered the aggregate of all outstanding¹ loans of past years and that may have imposed an unreasonably high liability on the respective shareholders to whom the loans might have been advanced. In order that the assurance given by the Minister in Parliament should be carried out, a circular (No. 20(XXI-6)/55) was issued by the Central Board of Revenue on the 10th May, 1955. It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act u/s 5(8) of the Act."

36. The learned counsel also has drawn our attention to the decision of the Supreme Court in *Ellerman Lines Ltd. Vs. Commissioner of Income Tax, West Bengal, Calcutta*, . wherein the following observations appear at pages 920-921 :

"The learned Solicitor-General appearing for the revenue at one stage of his arguments contended that the instructions issued by the Board of Revenue cannot have any binding effect and those instructions cannot abrogate or modify the provisions of the Act. But he did not contend that Rule 33 is ultra vires the Act. The instructions in question merely lay down the manner oi applying Rule 33.

Now, coming to the question as to the effect of instructions issued u/s 5(8) of the Act, this court observed in *Navnit Lal C. Javert v. K. K. Sen*, Appellate Assistant

Commissioner, Bombay :

"It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act u/s 5(8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans, and the idea was not to affect such transactions and not to bring them within the mischief of the new provision."

The directions given in that circular clearly deviated from the provisions of the Act, yet this court held that the circular was binding on the Income Tax Officer,"

37. Relying on the above observations of the Supreme Court the learned counsel submits that the Income Tax Officer could not have initiated penalty proceeding in the instant case which is clearly covered by the directions of the Board as published in the Statesman, dated January 5, 1971.

38. The learned counsel for the department submits that the advertisement in the Statesman, dated January 5, 1971, may not be said to be strictly a circular binding upon the Income Tax authorities. At the same time the learned standing counsel submits that he is not in a position to say that the above advertisement was not issued by the Central Board of Direct Taxes.

39. Even assuming that the above advertisement in the Statesman, dated January 5, 1971, issued by the Central Board of Direct Taxes is a circular or instruction or direction as contemplated under Sub-section (1) or Subsection (2) of Section 119 (as amended) and which may be binding on other tax authorities u/s 119 as observed by the Supreme Court in the above mentioned cases, the assessee in the instant case cannot be benefited by it. It is found that the new Section 119 substituting the old Section 119 was introduced by the Taxation Laws (Amendment) Act, 1970, which came into effect from 1st April, 1971. The above advertisement or instruction was issued on January 5, 1971. The revised returns in the instant cases, however, were filed on March 20, 1968, for the assessment years 1963-64, 1964-65 and 1965-66 and the assessments were made on March 23, 1968, and the orders of penalty in the cases were passed by the Inspecting Assistant Commissioner of Income Tax on March 21, 1970. That being so, the revised returns in the instant cases were not filed in pursuance of the advertisement issued by the Central Board of Direct Taxes on January 5, 1971, and the provisions of the substituted Section 119 and more particularly the provisions of Sub-section (2) of Section 119 came into force only with effect from 1st April, 1971. In our opinion, therefore, in any view of the matter the assessee in the instant case is not entitled to avoid the consequences of submission of false return by filing revised return on March 20, 1968. We have already held that the revised returns in the instant case do not come within the proper ambit and scope of Subsection (5) of Section 139.

40. In the result we find that the Tribunal was correct in holding that the penalties u/s 271(l)(c) of the Income Tax Act read with Explanation to that

section are justified in respect of the assessment years 1963-64, 1964-65 and 1965-66.

41. Let us now consider the second question of law.

42. The method of calculating the penalty in a case coming under Clause (c) of Sub-section (1) of Section 271 has been laid down in Clause (iii) of Subsection (1) which has been quoted hereinabove. Clause (iii) lays down that the quantum of penalty shall not be less than but also shall not exceed twice the amount of the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished. The offence of concealing the particulars of income or furnishing inaccurate particulars of income in the instant case has to be considered in relation to the original returns which were submitted by the assessee and wherein this concealment of particulars of income or furnishing inaccurate particulars of such income has occurred. So in determining the quantum of penalty the amount of income, the particulars of which were concealed or inaccurate particulars of which were furnished, has to be taken into consideration.

43. It is, therefore, found that the Tribunal was justified in holding that for the purpose of calculation of penalty the difference between the tax on the incomes shown in the first returns and the tax on the incomes assessed shall be taken as the amounts of tax that would have been avoided.

44. In the result both the questions of law are answered in the affirmative and against the assessee.

D.M. Sen, J.

45. I agree.