

(1984) 05 PAT CK 0019

In the Patna High Court

Case No : Tax Case No"s. 37 and 38 of 1975 & Taxation Case No"s. 37 and 38 of 1975

Jamunadas Mannalal

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 21-05-1984

Acts Referred:

Income Tax Act, 1961 — Section 139(1)(a), 271(1)(a)

Citation : (1985) 152 ITR 261

Hon'ble Judges : S.K. Jha, J;Prabha Shanker Mishra, J;Nazir Ahmad, J

Bench : Full Bench

Advocate : Kashi Nath Jain and Rameshwar Prasad II, for the Appellant; B.P. Rajgarhia, S.K. Sharan and Samrendu Pratap Singh, for the Respondent

Judgement

P.S. Mishra, J.—At the instance of the assessee, M/s Jamunadas Mannalal, a registered firm, at Jhumritelaiya in the district of Hazaribagh, Income Tax Appellate Tribunal, "B" Bench, Patna, has referred to this court the following questions of law for opinion :

"(1) Whether penalty u/s 271(1)(a) could be imposed even after charging interest u/s 139 for delayed submission of return ?

(2) Whether, on the facts and in the circumstances of the case, the Income Tax Officer had forfeited his rights to impose penalty u/s 271(1)(a) by not completing the assessment u/s 143(3) ?

(3) Whether, on the facts of the case, a penalty of Rs. 8,680 calculated on the basis of tax as on unregistered firm could be levied in this case when no tax was payable by it as a registered firm ? "

2. Assessment years involved are 1965-66 and 1966-67. There being separate penalty orders for the two years and separate appeals by the assessee before the AAC, Ranchi Range, Ranchi, and the Income Tax Appellate Tribunal, "B" Bench, Patna, and two references, although by a common order, have been made by the

Tribunal, in this court also the references in question have been registered as two taxation cases, one for the assessment year 1965-66 and the other for the assessment year 1966-67. A Bench of this court consisting of S.K. Jha and A.K. Sinha JJ. heard the matter and on March 31, 1983, noticed that on the question as to what should be the period for which there can be said to be a default for levying penalty in terms of Section 271(1)(a) of the I.T. Act, 1961, the two Hon'ble Judges of this court, namely, S.P. Sinha J. (as he then was) and S. Sarwar Ali J. were in disagreement in the case of Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal, . They, accordingly, thought it desirable that the matter should be heard by a Full Bench for an authoritative exposition of law.

3. Admitted facts, inter alia, are as follows : The assessee is a registered firm. As provided u/s 139(1)(a) of the I.T. Act, 1961 (hereinafter referred to as "the Act"), it could file its return of income by June 30, 1965, for the assessment year 1965-66, but it failed to do so. Similarly, for the assessment year 1966-67, its return of income was due on June 30, 1966. It did not, however file the return within time. The assessee was given a notice by the ITO concerned as provided under Sub-section (2) of Section 139 of the Act to furnish a return of its income for the assessment year 1965-66. The assessee did not respond to this notice. The assessee submitted a return for the assessment year 1965-66 on October 17, 1966, and for the assessment, year 1966-67 on August 28, 1968, u/s 139(4) of the Act. Penalty proceedings were initiated for not filing the return of income by the due date u/s 139(1) of the Act and notices were issued u/s 274/271(1)(a) of the Act which were duly served on the assessee. The ITO concluded that the assessee failed to submit its return of income for these two years by the due date and delayed the filing of return without reasonable cause. He, accordingly, imposed a penalty of Rs. 8,310 being two per cent, of the tax assessed as on unregistered firm for every month of default for the assessment year 1965-66 and Rs. 8,680 being two per cent, of the assessed tax as on unregistered firm for the assessment year 1966-67, after deducting the advance tax already paid, for every month during which the default continued. The assessee preferred appeals before the AAC, Ranchi Range, Ranchi, and its appeals having been dismissed by the AAC, it appealed before the Appellate Tribunal. The Appellate Tribunal also found no merit in the appeals as to the question that no liability to pay penalty existed but it found force in the arguments of the assessee's counsel that in determining the quantum of penalty, payments of advance taxes should have been considered. It, accordingly, directed the ITO to re-compute the penalties after due consideration and adjustment of advance taxes paid for both the years under appeal and both the appeals were partly allowed. The assessee then moved the Tribunal for a reference u/s 256(1) of the Act.

4. The assessee had paid advance taxes leviable on a registered firm for the assessment years 1965-66 and 1966-67. For the year 1966-67, it had paid its tax liabilities as a registered firm in full. Its contention on that basis was that since no tax was payable by it for the assessment year 1966-67, no penalty could be imposed upon it for that year and, accordingly, the penalty of Rs. 8,680

calculated as the amount of 2% of the tax assessed as an unregistered firm could not be levied. Third question under reference is, therefore, confined to the assessment year 1966-67 only.

5. Mr. K.N. Jain, learned counsel appearing for the assessee, at the first instance suggested that the question, "whether penalty u/s 271(1)(a) could be imposed even after charging interest u/s 139 for the delayed submission of return," requires reframing so as to include other aspects of law. According to him, the wider and real issue involved in the case is : "Whether, on the facts and in the circumstances of the case, penalty u/s 271(1) is leviable or not ?" As to whether penalty u/s 271(1)(a) could be imposed even after charging interest u/s 139 or not, is only one of the aspects of the real question as to whether, on the facts and in the circumstances of the case, exercise of power to impose penalty u/s 271(1)(a) is legal or not. Penalty can be levied after interest is charged upon the tax payable, at the best, is a ground like several other grounds to show that the imposition of penalty upon the assessee is invalid. Mr. B.P. Rajgarhia, learned senior standing counsel of the Income Tax Department appearing for the Commissioner of Income Tax, Bihar, however, seriously objected to the reframing of the question on the ground that if the question is reframed, as suggested by Mr. Jain, it shall not be one arising but of the Tribunal's order.

6. Until the decision of the Supreme Court in the case of Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , there was no judgment of the Supreme Court as to what precisely may be the meaning and import of the words "any question of law arising out of" the Tribunal's order. A wide divergence of judicial opinion required a review of the various judgments of the High Courts and, accordingly, after doing so, the Supreme Court said (p. 606):

" It will be seen from the foregoing review of the decisions that all the High Courts are agreed that Section 66 creates a special jurisdiction, that the power of the Tribunal to make a reference and the right of the litigant to require it, must be sought within the four corners of Section 66(1), that the jurisdiction of the High Court to hear references is limited to questions which are properly referred to it u/s 66(1), and that such jurisdiction is purely advisory and extends only to deciding questions referred to it. The narrow ground over which the High Courts differ is as regards the question whether it is competent to the Tribunal to refer, or the High Court to decide, a question of law which was not either raised before the Tribunal or decided by it, where it arises on the facts found by it. "

7. The Supreme Court noticed that one view was that the words "any question of law arising out of" the order of the Tribunal signify that the question must have been raised before the Tribunal and considered by it, and the other view was that all questions of law arising out of the facts found would be questions of law arising out of the order of the Tribunal. The Supreme Court summed up as follows (p. 611):

" (1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order.

(2) When a question of law is raised before the Tribunal but the Tribunal fails to deal with it, it must be deemed to have been dealt with by it, and is, therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order.

(4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the findings given by it.

Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order. "

8. While applying the above said law to the facts of the case before them, the Supreme Court further observed (p. 611):

" Now the only question on which the parties were at issue before the Income Tax authorities was whether the sum of Rs. 9,26,532 was assessable to tax as income received during the year of account 1945-46. That having been decided against the respondents, the Tribunal referred on their application u/s 66(1), the question, whether the sum of Rs. 9,26,532 was properly included in the assessee-company's total income for the assessment year 1946-47, and that was the very question which was argued and decided by the High Court. Thus it cannot be said that the respondents had raised any new question before the court. But the appellant contends that while before the Income Tax authorities the respondents disputed their liability on the ground that the amount in question had been received in the year previous to the year of account, the contention urged by them before the court was that even on the footing that the income had been received in the year of account, the proviso to Section 10(2)(vii) had no application, and that it was a new question which they were not entitled to raise. We do not agree with this contention. Section 66(1) speaks of a question of law that arises out of the order of the Tribunal, Now a question of law might be a simple one, having its impact at one point, or it may be a complex one, trenching over an area with approaches leading to different points therein. Such a question might involve more than one aspect, requiring to be tackled from different standpoints. All that Section 66(1) requires is that the question of law which is referred to the court for decision and which the court is to decide must be the question which was in issue before the Tribunal. Where the question itself was under issue, there is no further limitation imposed by the section that the reference should be limited to those aspects of the question which had been argued before the Tribunal. It will be an over-refinement of the position to hold that each aspect of a question is itself a distinct question for the purpose of Section 66(1) of the Act. That was the view taken by this court in COMMISSIONER OF Income Tax, BOMBAY SOUTH, BOMBAY Vs. OGALE GLASS

WORKS LTD., and in *Zoraster and Co. Vs. The Commissioner of Income Tax, Delhi, Ajmer, Rajasthan and Madhya Bharat (Now) Madhya Pradesh*, , and we agree with it. As the question on which the parties were at issue, which was referred to the court u/s 66(1), and decided by it u/s 66(5) is whether the sum of Rs. 9,26,532 is liable to be included in the taxable income of the respondents, the ground on which the respondents contested their liability before the High Court was one which was within the scope of the question, and the High Court rightly entertained it."

9. The Supreme Court thus clarified that a question of law in issue should not be taken to be inhibited by the grounds or contentions which are raised before the Tribunal. If the question framed by the Tribunal has got the effect of narrowing down the controversy to only one of the several contentions which can be raised to question the validity of the imposition of penalty u/s 271(1)(a), applying the law laid down by the Supreme Court, it must be held that the real issue may escape if other or alternative contentions are not permitted to be raised. As the question referred to us in the inhibited form covers only a part of the real controversy, it is pertinent and reasonable to argue that the question should be reframed, so that the real issue arising out of the order of the Tribunal may be decided. Some contentions like the one, to which I shall presently advert, although arise out of the order of the Tribunal, were not argued before it. The real controversy relates to the question as to whether the assessee is liable to penalty u/s 271(1)(a) or not. Merely because some contentions were not raised before the Tribunal, the assessee cannot be denied the opportunity to raise such contentions.

10. Mr. Rajgarhia placed reliance on the judgment in the case of *Mrs. Kusumben D. Mahadevia Vs. The Commissioner of Income Tax, Bombay*, as also on some judgments of the High Courts and contended that a question of law which may become available from the facts before the Tribunal cannot be allowed to be raised if it was not raised before the Tribunal and decided by it. He submitted that a question can be framed by this court only if the contention sought to be raised is co-extensive with the question of law referred to this court by the Tribunal or is one which may be said to be included in it. Observations of Hidayatullah J. in *Mrs. Kusumben D. Mahadevia Vs. The Commissioner of Income Tax, Bombay*, , as also in the other cases decided by the Supreme Court as to the true scope of the jurisdiction of the High Court have been noticed by the Supreme Court in the case of *Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd.*, , and as analysed by Venkatarama Aiyar J., who spoke for the majority including Justice Hidayatullah, found nothing in those cases that runs counter to the conclusions referred to above. It may be an over-refinement of the position to hold that each aspect of a question is itself a distinct question. In the words of one of the distinguished judges of this court :

" It is an accepted principle of law that where the question referred for opinion did not cover the real controversy in issue, the High Court could reframe the

question and decide the real controversy. It cannot be gainsaid that a controversy may involve different approaches for its solution. Where the real controversy is, whether the penalty levied u/s 271(1)(a) was legal and valid, it can be viewed from different angles."

(See Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal,).

11. I am in respectful agreement with these observations. In the instant case, the real controversy in issue as to whether penalty could be levied u/s 271(1)(a) or not has been approached by the Tribunal from a particular angle, which approach the learned counsel for the assessee says requires no consideration by this court. Mr. Jain has fairly conceded that statutory interest realised under s. 139(8) has got no bearing or effect upon the powers of the competent authorities to impose penalty u/s 271(1)(a). Liability to pay penalty is not controlled by the provisions u/s 139(8). The only answer to question No. 1 referred to this court by the Tribunal, therefore, is that the penalty u/s 271(1)(a) could be imposed even after charging interest u/s 139 for delayed submission of return. But the real issue can still be approached from another angle. In such a situation, on being reframed, it will not be a new question of law, rather it shall be a new point of view on the same question which has been decided by the Tribunal. Both Mr. Jain and Mr. Rajgarhia addressed us at length on the question as reframed, i.e., whether, on the facts and in the circumstances of the case, penalty u/s 271(1)(a) is leviable or not. According to Mr. Jain, Section 271(1)(a) speaks of the default in furnishing the return of total income under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 and the failure to furnish it within the time allowed and in the manner required by Sub-section (1) of Section 139 or by such notice, as the case may be. u/s 139(1), every person, if his total income or the total income of any other person in respect of which he is assessable under the Act exceeded the maximum amount which is not chargeable to Income Tax during the previous year is obliged to furnish a return of his income or the income of such other person during the previous year in accordance with law before the expiry of four months from the end of the previous year or where there is more than one previous year from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th June of the assessment year, whichever is later, if the person concerned is one whose total income includes any income from business or profession, and in the case of every other person by the 30th day of June of the assessment year. If no return is filed on or before the due date there is a default. Except in accordance with the proviso to Section 139(1), in no other case the return of income required to be filed u/s 139(1) can be filed after the due date. A return filed u/s 139(2) or u/s 139(4) cannot be said to be a return filed u/s 139(1). Thus, even if a return is filed u/s 139(4), the default in filing the return u/s 139(1) is not removed. In fact, the beginning and the end of the default in the filing of the return u/s 139(1) coincide. Either the return u/s 139(1) is filed or not filed at all. That being the position, according to Mr. Jain, it is not possible to quantify the amount of penalty on the basis of the

amount of the tax payable by the defaulting assessee for every month during which the default continued. In other words, once there is a default in filing the return u/s 139(1) of the Act, there is no continuity attached to it and if there is any, it is ad infinitum. In the absence of a terminus provided u/s 271 and/or any other provision of the Act, imposition of penalty is neither practicable nor possible. Mr. Rajgarhia, on the other hand, contended that the qualifying expression, return of total income of the assessment year concerned must be deemed to be satisfied either by the filing of the return u/s 139(4) of the Act or if no return is filed at all with the conclusion of the assessment proceeding because the penalty is leviable upon the assessed tax in addition to the amount of the tax payable. After detailed arguments from both the sides were heard, Mr. Jain, however, indicated that he was not pressing his contention. In view of this stand of Mr. Jain, perhaps, we are not required to probe into it, but to leave this controversy at that will mean to leave this court's controversial view in the judgment of S.P. Sinha J. "The default cannot be carried over beyond the assessment year. Like an assessment of income to Income Tax which must remain confined to an assessment year, the assessment of penalty must also remain confined to an assessment year", as it is. The very purpose for which we constituted the Full Bench would stand defeated if we do not predicate into this question. I propose, therefore, to deal briefly, but not dismissively, with this aspect.

12. Mr. Jain started by reminding us the well-settled principle of construction of taxing statutes that when a provision is ambiguous or is capable of two meanings, the construction beneficial to the citizen should be adopted and referred to a Division Bench decision of the Calcutta High Court in Commissioner of Income Tax Vs. Vegetable Products Ltd., and the judgment of the Supreme Court affirming the said Calcutta decision in The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., for this purpose. Without disputing this rule of interpretation of statutes, Mr. Rajgarhia, on the other hand, drew our attention to the judgment of the Supreme Court in Rajputana Agencies Ltd. Vs. Commissioner of I.T., Bombay, to read a passage from Maxwell on the Interpretation of Statutes, 10th edition, page 284, which is quoted with approval in the said case:

" The tendency of modern decisions, upon the whole, is to narrow down materially the difference between what is called a strict and beneficial construction."

13. This and like rules of interpretation of statutes have been variously stated.

14. No doubt one has to look merely on what is clearly said in a taxing statute. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing has to be read in, nothing has to be implied, one can only look fairly at the language used. (See Cape Brandy Syndicate v. IRC [1921] 1 KB 64). Even so the fundamental rule of construction is the same for all statutes, whether fiscal or otherwise. To arrive at the real meaning, it is always

necessary to get an exact conception of the aim, scope and object of the whole Act. [See Heydon's case [1584] 3 Co Rep 7b ; Att. Gen. v. Carlton Ban [1899] 2 UB 158]. With these cautions, I shall now proceed to read the words of the relevant provisions of the Act and to test the correctness or otherwise of the contention of Mr. Jain.

15. Section 139, in its relevant parts, as existing in the relevant year, runs as follows :

"139. (1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this 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--

(a) in the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act, includes any income from business or profession, before the expiry of six months from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year, whichever is later;

(b) in the case of every other person, before the 30th day of June of the assessment year:

Provided that, on an application made in the prescribed manner, the Income Tax Officer may, in his discretion, extend the date for furnishing the return--

(i) in the case of any person whose total income includes any income from business or profession the previous year in respect of which expired on or before the 31st day of December of the year immediately preceding the assessment year, and in the case of any person referred to in Clause (b), up to a period not extending beyond 30th day of September of the assessment year without charging any interest;

(ii) in the case of any person whose total income includes any income from business or profession the previous year in respect of which expired after the 31st day of December of the year immediately preceding the assessment year up to the 31st day of December of the assessment year without charging any interest; and

(iii) up to any period falling beyond the dates mentioned in Clauses (i) and (ii), in which case, interest at six per cent, per annum shall be payable from the 1st day of October or the 1st day of January, as the case may be, of the assessment year to the date of the furnishing of the return--

(a) in the case of a registered firm or an unregistered firm which has been

assessed under Clause (b) of section 183, on the amount of tax which would have been payable if the firm had been assessed as an unregistered firm ;

(b) in any other case, on the amount of tax payable on the total income, reduced by the advance tax, if any, paid or by any tax deducted at source, as the case may be.....

(2) In the case of any person who, in the Income Tax Officer's opinion, is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income Tax Officer may, before the end of the relevant assessment year, serve a notice upon him requiring him to furnish, within thirty days from the date of service of the notice, 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 ;

Provided that on an application made in the prescribed manner, the Income Tax Officer may, in his discretion, extend the date for the furnishing of the return, and when the date for furnishing the return, whether fixed originally or on extension, falls beyond the 30th day of September or, as the case may be, the 31st day of December of the assessment year, the provisions of Sub-clause (iii) of the proviso to Sub-section (1) shall apply.....

(4) Any person who has not furnished a return within the time allowed to him under Sub-section (1) or Sub-section (2) may, before the assessment is made, furnish the return for any previous year at any time before the end of the four assessment years from the end of the assessment year to which the return relates, and the provisions of Sub-clause (iii) of the proviso to Sub-section (1) shall apply in every such case.....

(7) No return under Sub-section (1) need be furnished by any person for any previous year, if he has already furnished a return of income for such year in accordance with the provisions of Sub-section (2).

(8) Notwithstanding anything contained in Clause (iii) of the proviso to Sub-section (1), the Income Tax Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any person under any provision of this section."

16. This section has undergone some amendments and, as it stands today in its relevant part, it runs as follows:

" Return of income.--(1) Every person, if his total income or the total income of any other person in respect of which he is assessable under this 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--

(a) in the case of every person whose total income, or the total income of any other person in respect of which he is assessable under this Act, includes any income from business or profession, before the expiry of four months from the end of the previous year or where there is more than one previous year, from the end of the previous year which expired last before the commencement of the assessment year, or before the 30th day of June of the assessment year, whichever is later;

(b) in the case of every other person, before the 30th day of June of the assessment year:...

(2) In the case of any person who, in the Income Tax Officer's opinion is assessable under this Act, whether on his own total income or on the total income of any other person during the previous year, the Income Tax Officer may, before the end of the relevant assessment year, issue a notice to him and serve the same upon him requiring him to furnish, within thirty days from the date of service of the notice, 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 :

Provided that, on an application made in the prescribed manner, the Income Tax Officer may, in his discretion, extend the "date for furnishing the return, and, notwithstanding that the date is so extended, interest shall be chargeable in accordance with the provisions of Sub-section (8)...

(4)(a) Any person who has not furnished a return within the time allowed to him under Sub-section (1) or Sub-section (2) may, before the assessment is made, furnish the return for any previous year at any time before the end of the period specified in Clause (b) and the provisions of Sub-section (8) shall apply in every such case.

(b) The period referred to in Clause (a) shall be--

(i) where the return relates to a previous year relevant to any assessment year commencing on or before the 1st day of April, 1967, four years from the end of such assessment year;

(ii) where the return relates to a previous year relevant to the assessment year commencing on the 1st day of April, 1968, three years from the end of the assessment year ;

(iii) where the return relates to a previous year relevant to any other assessment year, two years from the end of such assessment year.....

(8)(a) Where the return under Sub-section (1) or Sub-section (2) or Subsection (4) for an assessment year is furnished after the specified date, or is not furnished, then [whether or not the Income Tax Officer has extended the date for furnishing the return under Sub-section (1) or Sub-section (2)], the assessee shall be liable to pay simple interest at twelve per cent, per annum, reckoned

from the day immediately following the specified date to the date of the furnishing of the return, or, where no return has been furnished, the date of completion of the assessment u/s 144, on the amount of the tax payable on the total income as determined on regular assessment as reduced by the advance tax, if any, paid, and any tax deducted at source :

Provided that the Income Tax Officer may, in such cases and under such circumstances as may be prescribed, reduce or waive the interest payable by any assessee under this Sub-section."

17. In the instant case for the year 1965-66, the return of income was due by June 30, 1965, and it was filed on October 17, 1966, and for the year 1966-67, the return was due on June 30, 1966, and it was filed on August 28, 1968. Evidently the law applicable was as existed for the years 1965-66 and 1966-67 as quoted above.

18. Mr. Jain has submitted that in a case in which there is a default in furnishing the return under Sub-section (1) or Sub-section (2) of Section 139, for the purpose of interest, the terminus is indicated in the words " reckoned from the date immediately following the specified date to the date of the furnishing of the return or where no return has been furnished, the date of completion of the assessment u/s 144, on the amount of the tax payable on the total income as determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source ", in Sub-section (8)(a) of Section 139. Under the Explanation at the foot of Sub-section (8)(a) of Section 139, " specified date ", in relation to a return for an assessment year, has been defined. Thus, according to Mr. Jain, both the date from which the interest shall be reckoned and the date up to which it shall be charged are indicated and this leaves no ambiguity in so far as the charging of the interest is, concerned. Such words, however, are not available in Section 271(1) and/or any other provision of the Act in respect of the imposition of penalty.

19. Section 271(1) at the relevant time read as follows :

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

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under Sub-section (1) of section 139 or by notice given under Sub-section (2) of section 139 or section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by Sub-section (1) of Section 139 or by such notice, as the case may be, or..... he may direct that such person shall pay by way of penalty,--

(i) in the cases referred to in Clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent, of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent, of the tax ; "

20. Subsequently Clause (i) was substituted by the Direct Taxes (Amendment) Act, 1974, with retrospective effect from the date of the commencement of the 1961 Act, the effect being to substitute "assessed tax" for "tax" and to insert the Explanation. After the amendment, this provision reads as follows :

" Failure to furnish returns, comply with notices, concealment of income, etc.--
(1) If the Income Tax Officer or the Appellate Assistant Commissioner or the Commissioner (Appeals), in the course of any proceedings under this Act, is satisfied that any person--

(a) has without reasonable cause failed to furnish the return of total income which he was required to furnish under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by Sub-section (1) of Section 139 or by such notice, as the case may be, or

(b) has without reasonable cause failed to comply with the notice under Sub-section (1) of Section 142 or Sub-section (2) of Section 143 or fails to comply with a direction issued under Sub-section (2A) of Section 142, or

(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,--

(i) in the cases referred to in Clause (a),--

(a) in the case of a person referred to in Sub-section (4A) of Section 139, where the total income in respect of which he is assessable as a representative assessee does not exceed the maximum amount which is not chargeable to Income Tax, a sum not exceeding one per cent, of the total income computed under this Act without giving effect to the provisions of Sections 11 and 12, for each year or part thereof during which the default continued;

(b) in any other case, in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent, of the assessed tax for every month during which the default continued.

Explanation.--In this clause, "assessed tax" means tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C."

21. According to Mr. Jain, his case will be one falling u/s 271(1)(a)(i)(b). "A sum equal to 2 per cent, of the assessed tax for every month during which the default continued ", can be determined and quantified only if the date on which the default shall cease is known. Sub-section (4) of Section 139, Mr. Jain has submitted, is sui generis, A return filed u/s 139(4) is not a return either u/s 139(1) or u/s 139(2). Section 271(1)(a) has referred to Section 139(1) and (2) but has not referred to Section 139(4). It has also not referred to the default ending either with the filing of the return u/s 139(4) or with the date of

completion of the assessment u/s 144 as provided u/s 139(8). It will be going beyond the words of a penal provision in a taxing statute to read a terminus with the filing of the return or the completion of the best judgment assessment u/s 144.

22. The above argument is both ingenious and intelligent but, as I shall presently demonstrate, has got no merit. Before Mr. Jain's argument is accepted, it shall have to be concluded that a return of total income for a particular year of assessment under Sub-section (1) of Section 139 or under Sub-section (2) of Section 139 is different from the return of total income which the assessee may file u/s 139(4). Reference to Sub-section (1) of Section 139 or to the notice under Sub-section (2) of Section 139 has been made in Section 271(1)(a) for the only purpose of identifying the default which shall attract the penalty. These sections, inter alia, are referred to for reckoning the date from which the default shall be calculated. Inclusion or reference to these sections makes the beginning of the default known. The default is caused on account of non-filing of the return of total income. Once the return is filed u/s 139(4), the ITO is obliged to take that return into consideration for the purpose of assessment. Provision for best judgment assessment as engrafted u/s 144 shall not be attracted in such a case. The default in filing the return of income comes to an end no sooner a return is filed under Sub-section (4) of Section 139.

23. In a case in which return of income is not filed at all, not even under Sub-section (4) of Section 139, the ITO is still required to make an assessment u/s 144. The default on account of non-filing of the return of income shall automatically come to an end with the best judgment assessment. This process has to be repeated year after year. One assessment will be followed by another assessment. Each assessment year shall require filing of a return of income. The default shall remain attached to the return of income of each assessment year.

24. Will then, like a return of income remaining confined to an assessment year, the default shall also remain circumscribed within 12 months of the relevant assessment year ? According to S.P. Sinha J. (as he then was), in the case of Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal, , the default cannot be carried over beyond the 12 months of the relevant assessment year. According to S. Sarwar AH J., in that very case, the period of default for the purpose of levying penalty cannot be confined to an assessment year.

25. Before I deal with the question posed above, I propose to advert to yet another aspect of the matter. Mr. Jain has emphasised that the imposition of penalty is linked with the tax payable. If the tax is not payable by the assessee, no penalty can be imposed. As I have pointed out earlier, the assessee is a registered firm. Admittedly, the assessee paid advance tax for the assessment year 1965-66 as also assessment year 1966-67. For the assessment year 1966-67, the advance tax paid was enough to discharge the tax liability of the firm. As to whether the quantification of the penalty for the said assessment year is in accordance with the law or not, I shall separately examine while examining

the third question referred to us. Confining to the question as to whether the imposition of a penalty on a registered firm shall still be permissible, even if there is no tax liability, I find it difficult to accept Mr. Jain's contention. In the case of KHUSIRAM MURARILAL Vs. COMMISSIONER OF Income Tax, CENTRAL, CALCUTTA., , the question which fell to be determined was whether imposition of a penalty on a registered firm u/s 28(1)(b) of the Indian I.T. Act, 1922, was justified in law. It was urged in that case on behalf of the assessee that inasmuch as u/s 28(1)(b), a person can be made liable to pay penalty in addition to the amount of Income Tax and super tax, if any, payable by him in cases falling under Clauses (b) and (c), no order for payment of penalty can be made against a registered firm, because under the I.T. Act, no tax is made payable by the firm. It was a case where no tax liability had been created on a registered firm although individuals constituting the firm were each separately liable to pay the taxes. The court observed (p. 580): ".....even when construed by its own language, the concluding paragraph of Section 28(1) cannot be said to make it a condition precedent that a person must be liable to pay some Income Tax or it may be also super-tax if he is to be made liable for a penalty." It was also observed : " It was not really necessary for Clause (d) of the proviso to enact specifically that a registered firm would be liable to pay a penalty despite the fact that it could not be charged and was not, in fact, charged to Income Tax or super tax. The whole argument of Dr. Sen Gupta was that the concluding paragraph of Section 28(1) had left a gap which had been attempted to be filled up by Clause (d) of the proviso, but the attempt had not been successful. In my view, the gap which undoubtedly existed in the concluding paragraph of Section 28(1) was only an absence of a provision regarding the quantum of the penalty that could be levied on a registered firm because the quantum depends upon the amount of Income Tax payable."

26. In the case of Commissioner of Income Tax, Madras, and Another Vs. S.V. Angidi Chettiar, , the above-quoted observations of the Calcutta High Court were approved by the Supreme Court and the law was stated in the following words (p. 744):

" In our view, the learned Chief Justice was right in so enunciating the law. u/s 23(5) of the Indian Income Tax Act, before it was amended in 1956, in the case of a registered firm, the tax payable by the firm itself was not required to be determined but the total income of each partner of the firm including therein the share of its income, profits and gains of the previous year was required to be assessed and the sum payable by him on the basis of such assessment was to be determined. But this was merely a method of collection of tax due from the firm.

The penalty provisions u/s 28 would, therefore, in the event of the default contemplated by Clause (a), (b) or (c) be applicable in the case of assessment of a registered firm. If a registered firm is exposed to liability of paying penalty, by committing any of the defaults contemplated by Clause (a), (b) or (c) by virtue of Section 44, notwithstanding the dissolution of the firm, the assessment

proceedings are liable to be continued against the registered firm, as if it has not been dissolved."

27. It is noticeable that in computing the quantum of penalty, the amount of the tax payable has to be kept in mind and as provided under Sub-section (3), Clause (d) of Section 271, the penalty imposed must not exceed in the aggregate twice the amount of the tax sought to be evaded. It must be the sum payable at the time of imposition of the penalty. If at that time, original assessment was there, it shall be calculated on that basis. If, on the other hand, it was not there and there has been a reassessment, it shall vary accordingly.

28. In the case of *The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd.*, , interpretation of Section 271(1)(a)(i) had fallen for consideration. In that case, for the assessee's assessment for the assessment year 1960-61, the relevant account year ending on December 31, 1959, the ITO issued a notice u/s 22(2) of the Indian I.T. Act, 1922, on June 1, 1960. The same was served on the assessee on June 13, 1960. The notice required the assessee to submit its return on or before July 18, 1960. On July 18, 1960, the assessee moved for extension of time for submitting its return. The ITO extended the time by two months and at the same time, he informed the assessee that no further time would be allowed. The assessee failed to furnish his return within the extended time. Thereafter, a notice u/s 28(3) of the 1922 Act was served on the assessee on January 16, 1961. On the very next date, viz., January 17, 1961, the assessee filed its return for the assessment year in question. The assessment was completed by the ITO on October 31, 1962. Meanwhile, on April 1, 1962, the I.T. Act, 1961, came into force. As under the provisions of Section 297(2)(g) of the Act, the proceedings for the imposition of the penalty had to be initiated and completed under the (new) Act, a fresh notice u/s 274(1) of the Act was served on the assessee. The assessee objected to the validity of the notice. In determining the penalty due from the assessee, the ITO took into consideration not the amount demanded u/s 156 of the Act but the amount assessed u/s 143 of the Act. In appeal, the AAC confirmed the order of the ITO. On further appeal, the Tribunal came to the conclusion that the penalty u/s 271(1)(a)(i) is to be levied on the tax assessed minus the amount paid under the provisional assessment order. On the basis of that finding, it determined the penalty payable by the assessee. It was contended on behalf of the Revenue before the Supreme Court that on a proper construction of Section 271(1)(a)(i), it would be seen that the penalty had to be determined on the basis of the tax assessed u/s 143 of the Act. It was submitted that if that is not the true construction, then the effectiveness of the section may be taken away by the assessee paying the tax due by him a day before the demand notice is served on him. This contention found support from the decisions of the Lahore High Court in (1938) 6 ITR 616 and the Delhi High Court in *The Commissioner of Income Tax, Delhi Vs. Hindustan Industrial Corporation, New Delhi*, , Assessee's contention on the other hand was that the penalty can be imposed only on the amount payable u/s 156. This view found support from a decision of the Mysore High Court in *M.M.*

Annaiah Vs. Commissioner of Income Tax, Mysore, . Submission on behalf of the assessee further was that if the interpretation placed by the Revenue on Section 271(1)(a)(i) is accepted as correct, the result would be that the advance tax paid or taxes deducted at the source cannot be taken into consideration in determining the penalty payable. The Supreme Court observed (p. 195) 1

" There is no doubt that the acceptance of one or the other interpretation sought to be placed on Section 271(1)(a)(i) by the parties would lead to some inconvenient result, but the duty of the court is to read the section, understand its language and give effect to the same. If the language is plain, the fact that the consequence of giving effect to it may lead to some absurd result is not a factor to be taken into account in interpreting a provision. It is for the legislature to step in and remove the absurdity. On the other hand, if two reasonable constructions of a taxing provision are possible, that construction which favours the assessee must be adopted. This is a well-accepted rule of construction recognised by this court in several of its decisions. Hence, all that we have to see is, what is the true effect of the language employed in Section 271(1)(a)(i). If we find that language to be ambiguous or capable of more meanings than one, then we have to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty. "

29. The Supreme Court determined the meaning of the expressions used u/s 271(1)(a)(i) and held (p. 196) :

" The word " assessed " is a term often used in taxation law. It is used in several provisions in the Act. Quantification of the tax payable is always referred to in the Act as a tax " assessed ". A tax payable is not the same thing as tax assessed. The tax payable is that amount for which a demand notice is issued u/s 156. In determining the tax payable, the tax already paid has to be deducted. Hence, there can be no doubt that the expression " the amount of the tax, if any, payable by him" referred to in the first part of Section 271(1)(a)(i) refers to the tax payable under a demand notice. We next come to the question what is the meaning to be attached to the words " the tax " found in the latter part of that provision. It may be noted that the expression used is not " tax " but " the tax ".

The definite article "the" must have reference to something said earlier. It can only refer to the tax, if any, payable by the assessee mentioned in the first part of Section 271(1)(a)(i).....

That expression can be reasonably understood as referring to the expression earlier used in the provision, namely, " the amount of the tax, if any, payable by the assessee. At any rate, the provision in question is capable of more than one reasonable interpretation. Two High Courts, namely, Calcutta and Mysore, have taken the view that the expression "the tax", in Section 271(1)(a)(i) refers to " the tax, if any, payable" (by the assessee) mentioned in the earlier part of the section. It is true that the Lahore and Delhi High Courts have taken a different view. But the view taken by the Calcutta and Mysore High Courts cannot be said

to be an untenable view. Hence, particularly in view of the fact that we are interpreting not merely a taxing provision but a penalty provision as well, the interpretation placed by the Calcutta and Mysore High Courts cannot be rejected. Further, as seen earlier, the consequences of accepting the interpretation placed by the Revenue may lead to harsh results."

30. There is no difficulty in recognising as to when the default would arise. Section 271(1)(a) has indicated the three situations, namely, (i) non-furnishing of return as required under Sub-section (1) of Section 139, or (2) non-furnishing of return even after notice under Sub-section (2) of Section 139 or Section 148, or (3) non-furnishing of return within the time allowed by the ITO. Similarly Clause (b) of the said section states about the default caused by non-compliance with a notice under Sub-section (1) of Section 142 or Sub-section (2) of Section 143 or a direction issued under Sub-section (2A) of Section 142. Clause (c) of the said section refers to the Act of concealment of the particulars of income or furnishing of inaccurate particulars of such income. Liability as to penalty for not filing the return of income as provided under Sub-section (1) of Section 139 is unconnected with the liability created on account of not filing the return of income in response to the notice under Sub-section (2) of Section 139. Default in not filing the return of income as required under Sub-section (1) Section 139 shall, however, survive until the return of income is filed in response to the notice u/s 139(2) or u/s 139(4). The return of income is the same whether filed u/s 139(1) or in response to a notice u/s 139(2) or u/s 139(4). S.P. Sinha J. in Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal, , has said in this regard (p. 904):

" The provisions of this section, in so far as it concerns the idea of default, are clear and unambiguous. Whenever an assessee fails either completely or partially to furnish, without any reasonable cause, the return of total income which he was required to furnish under Sub-section (1) or Sub-section (2) of Section 139 or u/s 148 of the Act within the time allowed, he is in default. The difficulty, however, arises in so far as it concerns the period of default, i.e., how long the default will continue. The starting point of default is known, being the day following the date on which he should have furnished the return but failed to do so. The termination point, however, is not specified."

31. Mr. Jain has advanced a similar argument as one considered by S. P. Sinha J. that for the levy of interest in terms of Section 139(8) of the Act, it is specifically provided " from the day immediately following the specified date to the date of the furnishing of the return, where no return has been furnished, the date of completion of the assessment u/s 144,".

32. No difficulty in computing the period of" default for the purpose of penalty would have arisen had there been similar provisions made in this regard. He has submitted on this basis that the provisions contained in Section 271(1)(a)(i) are unworkable and even if the legislature intended to levy penalty for default in filing the return of income, the intention has failed. Sinha J., in this context,

observed (p. 906) :

"The plain meaning of the provisions contained in Sub-clause (i) u/s 271(1)(a), as it appears to me, is that for default u/s 271(1)(a), the quantum of penalty shall be 2% of the assessed tax for every month of default and may go up to 50% of the assessed tax. The said provision only describes the limits within which the quantum of penalty would vary. It has no bearing on the question as to how long could the default go. I, therefore, think that the provisions contained in Sub-clause (i) u/s 271(1)(a) do not provide the answer to the question in issue."

33. After saying so, Sinha J. proceeded further and said (p. 907): " I, therefore, think that the period of default for the purpose of levying penalty in terms of Section 271(1)(a)(i) is determinable." "In substance, therefore, I think, for levying penalty in terms of Section 271(1)(a) of the Act, the period of default starts on the day following the due date for compliance with the terms of Section 139(1) or Section 139(2) of the Act and remains circumscribed within the twelve months of the relevant assessment year. Similar would be the position where steps have been taken to tax an escaped income u/s 148 of the Act. There also the period of default in filing the required return of income will remain circumscribed within twelve months of the year in which steps for reassessment of escaped income have been taken. "

34. Is it so that the answer to the question in issue is not provided in Section 271(1)(a)? The relevant and pregnant words are, " for every month during which the default continued". It is the default in filing the return, of income as provided in the words " failed to furnish the return of total income ". So long as the return of total income of a particular assessment year is not filed, the default continues. The day it is filed, may be u/s 139(4), it ends. If it is not filed at all and assessment is completed u/s 144, the default must be assumed to have come to an end because in lieu of the return of the total income, the taxing officer, at this stage, is required to make the assessment of the total income or loss to the best of his judgment, before determining the sum payable by the assessee or refundable to the assessee on the basis of such assessment. It is thus obvious that a return of income or the assessment of the amount of income or loss u/s 144 of the Act shall alone terminate the default. This conclusion, in my opinion, is in no way against the interest of the assessee. The maximum limit of the quantum of penalty is prescribed. The default may be found to have continued for several years, yet the penalty cannot exceed the ceiling imposed under the Act. But if it is kept confined to the period of twelve months of the assessment year, a sum equal to 2% of the assessed tax may not even touch the ceiling. Unless some change is made in the language of the section, it is not possible to circumscribe the period of penalty to twelve months only. The Madhya Pradesh High Court considered a case in which a return of income was not filed as provided u/s 139(1). No return was filed even after a notice u/s 139(2), but was filed much later, evidently u/s 139(4). It concluded that default as prescribed u/s 271(1)(a) continued till the date of filing of the return. Incidentally a Patna case

in Additional Commissioner of Income Tax Vs. Bihar Textiles, was considered by the Madhya Pradesh High Court. The Patna view was that once notice under s, 139(2) of the Act has been issued to the assessee, there cannot be any penalty u/s 271(1)(a) for failure to furnish the return as required by Section 139(1). The Madhya Pradesh Court noticed that almost every other High Court held against it (See Chunnilal and Bros. Vs. Commissioner of Income Tax,). Commenting upon the said Patna view, the Bombay High Court said in Commissioner of Income Tax, Poona Vs. D.V. Save, :

"However, in the face of all the above catena of decisions, a discordant note was struck by the Patna High Court...The arguments which appealed to the Patna High Court which have been extracted in the paragraph quoted above have been fully dealt with in the judgments of the Rajasthan, Delhi and Andhra Pradesh High Courts. All the other refinements of the various arguments and their several facets which could have been urged on behalf of the assessee, have been studiously considered by these High Courts and properly dealt with. None of these arguments, nor any of the facets thereof, have been accepted by these High Courts and in our view these three High Courts have taken the correct view of the statutory provision and the interpretation put on the provision and the view taken by the Patna High Court applying the same does not qualify as a reasonable and possible interpretation which would bring into play the principle in The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd., . "

35. I have given my careful consideration and I have no manner of doubt that the defaults envisaged by Section 271(1)(a) are not to be classified, as Mr. Jain has been trying to do, by referring to the particular provisions of Sections 139(1) 139(2) or Section 148. A penalty for a default u/s 139(1) can be imposed even if a return u/s 139(2) or u/s 139(4) is filed. Similarly, a default caused on account of not responding to the notice u/s 139(2) or Section 148 can attract penal consequences. In my view, the period of default reckoned from the due date for filing the return has to be taken to have come to an end with the filing of the return of income, if it is filed before the best judgment assessment u/s 144 and within the period prescribed u/s 139(4) and in a case of no return of income filed at all with the assessment of income as prescribed u/s 144. In this respect, I am in respectful disagreement with the view taken in the case of Additional Commissioner of Income Tax Vs. Bihar Textiles, and the view taken by S, P. Sinha J. in Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal, . The view that I have taken must necessarily lead to answering the first question referred to us against the assessee, both in its original form as also reframed. The penalty on the facts and in the circumstances of the case is leviable u/s 271(1) even after charging interest u/s 139. Period of default is not circumscribed by the period of assessment year and it ends either with the filing of the return of income in accordance with law or with the assessment of income in lieu thereof u/s 144. The provisions as made, suffer from no ambiguity and is sufficiently workable keeping in view the ceiling on the quantum of penalty.

36. Mr. Jain has stated that, on the facts and in the circumstances of this case, the second question, namely, whether, on the facts and in the circumstances of this case; the Income Tax Officer has forfeited his rights to impose penalty u/s 271(1)(a) by not completing the assessment u/s 144 does not arise. This question, therefore, needs no discussion.

37. There is no manner of doubt that the right to impose penalty cannot be forfeited except in the case in which it is barred under some law like the law of limitation. This question has to be answered against the assessee.

38. Mr. Jain has, however, pressed the third question referred to us by the Tribunal, namely, whether, on the facts of the case, a penalty of Rs. 8,680 calculated on the basis of tax as on unregistered firm could be levied in this case when no tax was payable by it as a registered firm. This amount of penalty calculated on the basis of 2 per cent, of the tax for every month during which the default continued has been imposed for the assessment year 1966-67. The assessee's case in this regard is that it paid advance taxes as a registered firm and its entire tax liability for the assessment year 1966-67 had been fully discharged by the payment of advance taxes. In the case of *The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd.*, the Supreme Court has already held that if no tax is payable, no penalty can be imposed. According to Mr. Jain, the only mode of calculating the amount of penalty for the assessment year 1966-67 will be one provided u/s 271(1)(i)(b) read with the Explanation. The clear mandate of the Legislature is that the penalty will be a sum equal to 2 per cent, of the assessed tax for every month during which the default continued. The assessed tax has been defined in the Explanation to mean "tax as reduced by the sum, if any, deducted at source under Chapter XVII-B or paid in advance under Chapter XVII-C", The assessee paid advance taxes under Chapter XVII-C and thus there was no assessed tax available to the authority concerned upon which he would have determined the quantum of penalty. In this view of the matter, imposition of penalty for the assessment year 1966-67 is illegal. Mr. Jain has further submitted that assessed tax in the case of the assessee will be the tax payable as a registered firm. Advance taxes were to be paid, accordingly, by the assessee and it so paid the tax to satisfy its tax liability. According to Mr. Jain, Sub-section (2) of Section 271 opens with the words, "when the person liable to penalty is a registered firm". This liability to penalty is evidently to be assessed on the assessed tax, that is to say, tax as reduced by the sum paid in advance. He has supported his submissions by a decision of the Gauhati High Court in *Commissioner of Income Tax, Etc. Vs. Maskara Tea Estate*. It has been held in the said case that the non-obstante clause in Section 271(2) does not override the provisions of Section 271(1)(i) and if a person committing a default under Clause (a) of Section 271(1) is a registered firm, its case does not fall automatically under Sub-section (2) of Section 271. Section 271(1)(i) does not exclude registered firms but incorporates "all persons". One cannot skip over the relevant Clause (i) and jump to Section 271(2) to stamp the registered firm with liability in the absence of any

clear intendment expressed in the section. The Gauhati High Court has followed the Madras High Court in *ADDITIONAL COMMISSIONER OF Income Tax, MADRAS-II Vs. MURUGAN TIMBER DEPOT.*, , and dissented from the view of the Gujarat High Court in *Commissioner of Income Tax, Gujarat Vs. R. Ochhavlal and Co.*, . It has, however, not referred to a judgment of the Calcutta High Court in *Commissioner of Income Tax Vs. Priya Gopal Bishoyee*, . After expressing the view as above, the Gauhati Court had said (p. 965): " The view that we have expressed finds ample support from the observations of their Lordships in *The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd.*, ". The Calcutta High Court considered the question, whether in the case of a registered firm which was liable to penalty u/s 271(1)(a) read with Section 271(2) of the I.T. Act, 1961, the principle of the decision in *The Commissioner of Income Tax, West Bengal 1, Calcutta Vs. Vegetables Products Ltd.*, , is not applicable for computing the penalty and answered it in the negative. Sabyasachi Mukhari J., speaking for the court, noticed the view of the Supreme Court that the expression " the amount of tax, if any, payable by, him " in the earlier part of Section 271(1)(a)(i) referred to the tax payable under the notice of demand and the words " the tax " in the latter part of the provision would only refer to " the tax ", if any, " payable " by the asses-see mentioned in the earlier part of Section 271(1)(a)(i) of the Act and a retrospective amendment subsequent to the decision of the Supreme Court in the Act by the Direct Taxes (Amendment) Act, 1974, under which Explanation was added to Section 271(1)(i) defining assessed tax to mean tax as reduced by the sum, if any, deducted in advance. The legal fiction that is created by Sub-section (2) of Section 271 was noticed by him upon which he concluded (p. 781) : " Therefore, for the purpose of imposition of penalty, the firm, even if it is registered, and if it has committed a default as contemplated u/s 271, it would be treated on the same basis as if it was an unregistered firm ". Before the Calcutta High Court, it was a case in which at the date when the penalty was imposed, there would have been no assessed tax if it was a registered firm, but if it was an unregistered firm and for the purpose of determination of imposition of penalty it would be treated as an unregistered firm and if it was so treated, fictionally there was a tax liability. Mukharji J. said (p. 781) :

" In this case, default upon which penalty was imposed was the delay in the submission of the return. Therefore, the fact is that payment of the assessed tax on the basis of a registered firm would not exonerate the assessee from the imposition of the penalty on the basis that it was an unregistered firm calculating the default for the months for which the default had continued. "

39. A similar question was considered by the Madhya Pradesh High Court. The answer given by it in the case of *Delux Publishing Co. Vs. Addl. Commissioner of Income Tax*, , is (p. 786):

"By Section 271(2) of the Act, a fiction is created and even if the person liable to penalty is a registered firm, the penalty imposable u/s 271 of the Act shall be the

same amount as would be imposable on that firm if that firm were an unregistered firm. Therefore, in the case of a registered firm the tax assessable has to be worked out as if it were an unregistered firm and on that basis the penalty has to be calculated because the fiction created has to be carried to its logical extent.... In our opinion, in cases covered by Section 271(2) of the Act, in order to calculate the penalty, the tax payable by the assessee on the income assessed has to be determined on the basis that the assessee is an unregistered firm and the penalty has to be calculated on the tax so determined. "

40. A similar view has been expressed by the Bombay High Court in Commissioner of Income Tax, Poona Vs. India Automobiles, . In the words as used in the said decision (p. 776) :

" Now, on a perusal of Sub-section (2) of Section 271, it appears to us that where a registered firm becomes liable to penalty, for the purpose of determining the penalty imposable, a fiction is introduced by the said Sub-section that the said registered firm is to be treated as an unregistered firm. If such a fiction is introduced, there is no reason why it should not be carried to its logical conclusion, which would be that, in the computation of its total income, the assessee-firm would be entitled to a deduction of an amount equivalent to the annuity deposit which it would have had to pay had it been an unregistered firm. Once a firm is treated for the purposes of penalty as an unregistered firm, there is no reason why it should be denied such benefits by way of deduction as are available to an unregistered firm. It is true that, being a registered firm, it was really not required to pay any annuity deposit at all, but that, to our mind, would make no difference and it would be entitled to a deduction, in the computation of its total income for the purposes of determination of the tax payable, on which penalty is based, of the amount of the annuity deposit which it would have been required to pay, had it, in fact, been an unregistered firm."

41. The Bombay High Court was really considering the question as to whether deduction u/s 280-O of the amount of annuity deposit which the assessee might have paid if it was an unregistered firm, whether paid or not, could be permitted to be deducted or not in computing the penalty imposable on the assessee (registered firm) u/s 271(1)(a) read with Section 271(2) of the I.T. Act. The Punjab High Court in Commissioner of Income Tax Vs. Hari Chand Hans Raj, , has held : " even though a registered firm has been granted certain concessions under the provisions of the Act regarding the payment of Income Tax, yet the Legislature in its wisdom thought that if such a firm misuses the concession given, so as to default and incurs the imposition of penalty, in that case the concession given shall be withdrawn. This has been precisely provided in Sub-section (2) of Section 271." In Jain Bros. and Others Vs. The Union of India (UOI) and Others, , the Supreme Court held that the levy of penalty on a defaulting registered firm as if it was unregistered does not involve discrimination. In the words of the Supreme Court (p. 118) :

" It was, however, open to the legislature to say that once a registered firm

committed a default attracting penalty, it should be deemed or considered to be an unregistered firm for the purpose of its imposition. No question of discrimination under Article 14 can arise in such a situation. We fully share the view of the High Court that there was nothing to prevent the legislature from giving the benefit of a reduced rate to a registered firm for the purpose of tax but withhold the same when it committed a default and became liable to imposition of penalty. "

42. In view of the provisions particularly made for imposition of penalty upon a registered firm, it is irresistible to conclude, in terms of the language of Section 271(2) that while quantifying the penalty, the assessed tax is not to be taken as one payable by the assessee as a registered firm but as if it is an unregistered firm. Any other meaning given to it shall cause serious violence to the non-obstante clause and the words " notwithstanding anything contained in other provisions of this Act shall lose its purpose."

43. Commissioner of Income Tax, Etc. Vs. Maskara Tea Estate, , has proceeded on the basis that to attract the non-obstante clause, the main Sub-section must be applicable. The liability of the person must be determined and in doing so, one has to look at the preceding Sub-section (1). On due scrutiny of Section 271(1)(a) as well as Clause (i), if a person is liable and if it happens to be a registered firm, Sub-section (2) is attracted. The conditions precedent for the applicability of Sub-section (2) are the two clauses of defaults referred to in Section 271(1)(a) and (i) as Sub-section (2) is applicable only to " person liable to penalty " and also that Section 271(1)(a)(i) does not exclude registered firms but incorporates all persons. This view, I am afraid, cannot be accepted. Legal fiction which is created by Sub-section (2) of Section 271 is independent of the tax liability. Once it is found that there is a default so as to attract the penal provisions u/s 271(1)(a), Sub-section (2) of Section 271 shall come into play. If the assessee is a registered firm, the legal fiction created by it shall not permit to give to the assessee benefits of its being a registered firm. The assessee must answer the requirements as if it is not a registered firm. Its assessed tax for the purpose of imposition of penalty shall be that which shall be determined on the footing that it is not a registered firm. There is no abuse of the non-obstante clause involved if it is applied in this manner. Person liable to penalty is one who has committed a default as envisaged u/s 271(1). If it is a registered firm, it shall be in the same equation with unregistered firms as a person liable to penalty. Section 271(1)(a)(i) has to be read along with Section 271(2) and not separately as if Section 271(1)(a)(i) has got a different purpose. In my view, Section 271 shall operate in the case of a registered firm at the time of quantification of the penalty u/s 271(1)(i)(b) and tax determined to be payable by it as an unregistered firm shall be the tax for the computation of the penalty.

44. For the view that I have taken, I am unable to agree with the answer provided by Commissioner of Income Tax, Etc. Vs. Maskara Tea Estate, and the cases taking views similar to the one taken in that case. In my opinion, the

question under reference has to be answered in the affirmative. The amount of penalty calculated on the basis of tax on an unregistered firm is valid.

45. To conclude, I hold that on the facts and in the circumstances of the case penalty u/s 271(1) is leviable upon the assessee and the amount of penalty of Rs. 8,680 calculated on the basis of tax as on unregistered firm has been validly levied on the assessee for the assessment year 1966-67. It is thus obvious that all the questions referred to this court have to be answered against the assessee. The question as to whether penalty u/s 271(1)(a) could be imposed even after charging interest u/s 139 for delayed submission of return in all its aspects including the broad question as reframed, whether in the facts and in the circumstances of the case, penalty u/s 271(1) is leviable or not is answered in the affirmative. The second question whether, on the facts and in the circumstances of this case, the ITO had forfeited his right to impose penalty u/s 271(1)(a) by not completing the assessment u/s 144 is answered in the negative. The third question whether, on the facts of the case, a penalty of Rs. 8,680 calculated on the basis of tax as on unregistered firm could be levied in this case when no tax was payable by it as a registered firm is answered in the affirmative. All the questions are thus answered against the assessee and in favour of the Revenue.

46. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be sent to the Income Tax Tribunal, Patna Bench, as required u/s 260(1) of the I.T. Act. The parties shall bear their own costs.

Nazir Ahmad, J.

47. I have gone through the order of P.S. Mishra J. and I am to say that question No. 1, as referred by the Income Tax Appellate Tribunal, B Bench, Patna, in R.A. Nos. 51 and 52 (Pat) of 1974-75 is as follows :

"(1) Whether penalty u/s 271(1)(a) could be imposed even after charging interest u/s 139 for delayed submission of return ? "

48. I also agree with him that Mr. K. N, Jain, learned advocate appearing for the assessee, at first suggested that question No. 1, as mentioned above, requires a reframing. He wanted a reframing of the question as follows:

" Whether, on the facts and in the circumstances of the case, penalty u/s 271(1) (a) is leviable having in view the provisions of Section 139 of the Income Tax Act, 1961 ?"

49. P.S. Mishra J. has pointed out the contention raised by Mr. Jain. His contention was that Section 271(1)(a) of the I.T. Act, 1961 (hereinafter referred to as the said " Act"), speaks of the default in furnishing the return of total income under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 and the failure to furnish it within the time allowed and in the manner required by Sub-section (1) of Section 139 or by such notice, as the case may be. According to Mr. Jain, u/s 139(1), a definite period has been

fixed for filing the return and if no return is filed on or before the due date, there is a default, and so a return filed u/s 139(2) or u/s 139(4) cannot be said to be a return filed u/s 139(1) of the said Act and, thus, even if the return is filed u/s 139(4), the default in the filing the return u/s 139(1) is not removed and so, according to Mr. Jain, in fact the beginning and the end of the default in filing the return u/s 139(1) coincide and either return u/s 139(1) is filed or not filed at all and that being the position, according to Mr. Jain, it is not possible to quantify the amount of penalty on the basis of the amount of the tax payable by the defaulting assessee for every month during which the default continued. In other words, once there is a default in filing the return u/s 139(1) of the said Act, there is no continuity attached to it and if there is any, it is ad infinitum and that in the absence of terminus provided u/s 271 and/or any other provision of the said Act the imposition of penalty is neither practicable nor possible. The entire argument of Mr. Jain has been quoted by P.S. Mishra J. in paragraph 7 of his judgment.

50. The question which Mr. Jain actually wanted to reframe is the question whether, on the facts and in the circumstances of the case, the penalty u/s 271(1)(a) of the said Act is leviable having in view the provision of Section 139 of the said Act, and for this purpose he wanted that question No. 1 referred by the Tribunal for decision of this court be redrafted and so, subsequently, he suggested as follow"s :

" Whether, on the facts and in the circumstances of the case, penalty u/s 271(1) (a) is leviable ?"

51. Such wider question was never raised before the Tribunal nor a reference on such a wider question was asked for. The question which Mr. K.N. Jain had originally raised was a question which was different from the question referred by the Tribunal.

52. It is evident from the order of the Appellate Tribunal that the first contention on behalf of the assessee was that the ITO having charged interest u/s 139 cannot impose penalty u/s 271(1)(a) of the said Act. The Tribunal held that this contention was not acceptable, because it is the intention of the Legislature to charge both interest and penalty for default of delayed return. Thus it is evident that no argument was advanced on the point that the ITO had no jurisdiction to impose the penalty as no terminus has been provided u/s 271 and/or the imposition of penalty is neither practicable nor possible. In my opinion, this cannot be a different aspect of the question, because the question now raised goes to the root of the jurisdiction of the ITO to impose a penalty. Challenging the jurisdiction of the ITO is not a different aspect of the same question but a different and new question altogether. Moreover, P. S. Mishra J. has also clearly pointed out towards the end of paragraph 7 that Mr. Jain indicated that he was not pressing his contention and thus Mr. Jain ultimately withdrew his claim for reframing question No. 1 as suggested by the Tribunal. This will be another point to be considered whether when, the assessee does not raise an issue, can this court suo motu raise a question and decide the same.

53. The Allahabad, High Court in the case of AMRIT BANASPATI CO. LTD. Vs. COMMISSIONER OF Income Tax, U.P., has pointed out that the Tribunal in that case referred the following question (p. 230) :

" Whether, on the facts and in the circumstances and on a true interpretation of the provisions of Clause (ii) of Sub-section (2) of Section 10 of the Income Tax Act, the assessee was entitled to deduction of the expenses of a capital nature included in the cost of repairs to the premises of which he was a tenant ?"

54. In this decision, it was suggested that the question referred by the Tribunal should have been whether carrying out the three items of works amounted to repairing the godown and not the question formulated by the Tribunal. It was held under such circumstances that the court in exercise of its power of re-drafting a question cannot substitute a question which was not sought to be referred in the application made u/s 66(1); it cannot answer a question which was not mentioned in the application u/s 66(1) itself and that the court has no jurisdiction to amend the question referred by the Tribunal by substituting in its place a different question.

55. P. S. Mishra J. has relied on the case of Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., , a decision of the Supreme Court. In this decision, it was held that the jurisdiction of the High Court in a reference u/s 66 of the I.T. Act is a special one, different from its ordinary jurisdiction as a civil court and the High Court hearing a reference under that section does not exercise any appellate or revisional or supervisory jurisdiction over the Tribunal and that it acts purely in an advisory capacity, on a reference which properly comes before it u/s 66(1) and (2) and that it gives the Tribunal advice, but ultimately it is for the Tribunal to give effect to that advice. It has also been held in this decision that it is of the essence of such a jurisdiction that the court can decide only questions which are referred to it and not any other questions: the Tribunal should have had an occasion to consider the question so that it may decide whether it should refer it for the decision of the court. It has also been held in this decision that the power of the court to issue a direction to the Tribunal u/s 66(2) of the I.T. Act is in the nature of a mandamus and it is well settled that no mandamus will be issued unless the applicant had made a distinct demand on the appropriate authorities for the very reliefs which he seeks to enforce by mandamus and that had been refused. It has also been held that the power of the court to direct a reference u/s 66(2) is subject to two limitations--the question must be one which the Tribunal was bound to refer u/s 66(1) and the applicant must have required the Tribunal to refer it. It has also been pointed out that the form prescribed under Rule 22A of the I.T. Rules for an application u/s 66(1) shows that the applicant must set out the questions which he desires the Tribunal to refer and that, further, those questions must arise out of the order of the Tribunal, and that u/s 66(2), the court cannot direct the Tribunal to refer a question unless it is one which arises out of the order of the Tribunal and was specified by the applicant in his application u/s 66(1). At page 602 of this

decision an observation has been quoted with approval of the Patna High Court in the case of MAHARAJ KUMAR KAMAL SINGH Vs. COMMISSIONER OF Income Tax., , to the effect that the provisions of Sections 66(1) and 66(2) do not confer upon the High Court a general jurisdiction to correct or to decide a question of law that may possibly arise out of the Income Tax assessment and that the section, on the contrary, confers a special and limited jurisdiction upon the High Court to decide any specific question of law which has been raised between the assessee and the Department before the Income Tax Tribunal and upon which question the parties are at issue. At page 603 of this decision, an observation has been quoted with approval from the case of CHAINRUP SAMPATRAM Vs. COMMISSIONER OF Income Tax WEST BENGAL., , that the Indian I.T. Act has not charged the High Court with the duty of setting right in all respects all assessments that might come to its notice; its jurisdiction is not either appellate or revisional; nor has it a general power of superintendence u/s 66 and that its sole duty is to serve as the appointed machinery for resolving any conflict which may arise between an assessee or the Commissioner on the one hand and the Tribunal on the other regarding some specific question or questions of law. This clearly goes to show that unless a dispute is raised by the assessee or the Commissioner, the court cannot redraft a question to decide a matter which is no longer in issue between the parties. It has also been held at page 605 of this decision, while quoting an observation of Chagla C.J., that if the Tribunal does not refer a question of law u/s 66(1) which arises out of the order, then the only jurisdiction of the court is to require the Tribunal to refer the same u/s 66(2) and that it is true that the court has jurisdiction to resettle questions of law so as to bring out the real issue between the parties but it is not open to the court to raise new questions which have not been referred to it by the Tribunal. It has been observed at page 610 of this decision that if it is held that the court can allow a new question to be raised on the reference, that would in effect give the applicant a right which is denied to him u/s 66(1) and (2), and enlarge the jurisdiction of the court so as to assimilate it to that of an ordinary civil court of appeal. It has also been held in this decision that the correct view to take is that the right of the litigant to ask for a reference, the power of the Tribunal to make one, and the jurisdiction of the court to decide it are all co-extensive and, therefore, a question of law which the applicant cannot require the Tribunal to refer and one which the Tribunal is not competent to refer to the court, cannot be entertained by the court u/s 66(5). It was observed at page 612 that as the question on which the parties were at issue, which was referred to the court u/s 66(1) and decided by it u/s 66(5) is whether the sum of Rs. 9,26,532 is liable to be included in the taxable income of the respondents, the ground on which the respondents contested their liability before the High Court was one which was within the scope of the question, and the High Court rightly entertained it. Thus, from this decision, it is evident that unless a question is at issue between the parties, it cannot be redrafted by this court. When Mr. K. N. Jain withdrew his claim for re-drafting the question, the court has no right to re-draft the question, specially when the effect of re-drafting will be that the assessee claims that the

ITO had no jurisdiction to impose penalty in view of the provisions of Section 271(1)(a) read with Section 139 of the I.T. Act, 1961. This clearly goes to show that it is not a different aspect of the same question but the two questions are independent of each other.

56. In the case of B.B. Iranee (Legal Representative of B.R. Iranee, deceased) Vs. Commissioner of Income Tax, Bombay City II, , it has been held that though in the assessee's application u/s 66(2) of the I.T. Act, one of the questions raised related to the earlier losses ascertained in 1946 and the facts relating thereto were narrated, the High Court directed the Tribunal to refer only the question whether the Tribunal erred in law or misdirected itself in rejecting the assessee's claim to set off the alleged losses of 1941 of the Hong Kong business against the income of the assessment year 1947-48. On a reference, the High Court held that the question as framed was confined to losses of the year 1941, but in deference to counsel's argument considered the contention that the loss suffered by the assessee during the period 1941 to 1945 was ascertained only in 1946, and that it must be deemed to have been incurred only in that year. Under these circumstances, the Supreme Court held that the assessee was not entitled to raise the question relating to ascertainment of the loss only in 1946, as it was a question entirely different from that propounded for the decision of the High Court.

57. In the case of T.D. Kumar and Brothers (P.) Ltd. Vs. Commissioner of Income Tax, Calcutta, , the appellant applied to the Tribunal for a reference, inter alia, of the question whether having regard to the decision of the Tribunal in the relevant assessment proceedings, an order imposing penalty u/s 28(1)(c) could be made. The Tribunal refused to state a case and the appellant applied to the High Court under s. 66(2) for an order directing the Tribunal to state a case, and argued, that even if the facts found by the Tribunal be correct, Section 28(1)(c) was not attracted, "regard being had to the proper meaning of the word "income" in that section. In those circumstances, their Lordships of the Supreme Court held that the question on which a reference was sought was a limited question which did not arise out of the Tribunal's order and that the question sought to be raised before the High Court was a new question and was not an aspect of any question raised before the Tribunal and the High Court was right in rejecting the application u/s 66(2), and it was also observed that it is only a question that has been raised before and decided by the Tribunal that can be held to arise out of its order and that in respect of a question which was not raised or argued before the Tribunal, or decided by it, a reference u/s 66(2) cannot be asked for.

58. In the case of SETH PUSHALAL MANSINGHKA (P.) LTD. Vs. COMMISSIONER OF Income Tax, DELHI, RAJASTHAN AND MADHYA PRADESH., , it was held by their Lordships of the Supreme Court at page 168 that when a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of the order of the Tribunal and the High Court will be acting beyond its jurisdiction in dealing with any such question.

59. It has been held in the case of Commissioner of Income Tax, West Bengal, Calcutta Vs. Smt. Anusuya Devi, by their Lordships of the Supreme Court at pages 756 and 757 that it is well settled that the High Court may decline to answer a question of fact or a question of law which has no bearing on the dispute between the parties or though referred by the Tribunal does not arise out of its order. It has been observed at page 757 that the power to reframe a question may be exercised to clarify some obscurity in the question referred or to pinpoint the real issue between the taxpayer and the Department or for similar other reason ; it cannot be exercised for reopening an enquiry on questions of fact or law which are closed by the order of the Tribunal.

60. It has been held in the case of Commissioner of Income Tax, Andhra Pradesh Vs. Krishna and Sons, by their Lordships of the Supreme Court that the jurisdiction of the Supreme Court arising in appeal over the judgment of the High Court on a reference under the I.T. Act is also advisory, and the Supreme Court can only record its opinion on questions which are referred; not on questions which could have been, but have not been referred.

61. It has been held by their Lordships of the Supreme Court at page 196 in the case of Commissioner of Income Tax, Uttar Pradesh Vs. Devi Prasad Vishwanath Prasad, that it was not open to the High Court to direct the Tribunal to state a case on a question which was never raised before or decided by the Tribunal at the hearing of the appeal.

62. It has been held in the case of Lakshmiratan Cotton Mills Co. Ltd. Vs. Commissioner of Income Tax, Uttar Pradesh, by their Lordships of the Supreme Court that the High Court had no power to call for a statement of the case on questions which were incorporated neither in the application u/s 66(1) nor in the application u/s 66(2) of the said Act and the power u/s 66(4) might be exercised to call for a supplementary statement only when the court is satisfied that the statements of case referred u/s 66(1) and (2) were not sufficient to enable it to determine the question raised by that statement and that Section 66(4) did not confer a power to raise any additional question and to call for a statement of a case on the question not referred by the Tribunal.

63. In the case of The Commissioner of Income Tax, Rajasthan, Jaipur Vs. Indra and Co., Jodhpur, , it has been pointed out at page 707 by the Rajasthan High Court that an argument had been addressed that if interest has been charged for any period during which the default continued, penalty cannot be imposed. The question referred by the Tribunal was : "Whether the Tribunal rightly held that the orders of penalties in question u/s 271(1)(a) of the Income Tax Act, 1961, were tenable in law?" In those circumstances, it was held that this aspect of the matter had not been referred to the High Court and so they refused to make any pronouncement relating to it.

64. In the case of Commissioner of Income Tax, Andhra Pradesh Vs. Kotrika Venkataswamy and Sons, the question referred was: " Whether, on the facts and

in the circumstances of the case, and on a true appreciation of the material on record, was the Appellate Tribunal justified in coming to the conclusion that the department did not prove concealment of income in respect of the following additions, viz., inflation of purchase transaction in the name of K. Venkateshaiah Chetty, Rs. 21,500, (2) speculation losses in the names of seven persons, Rs. 26,789 ?" It was contended before their Lordships of the Supreme Court that the question which was submitted by the Tribunal for reference to the High Court was itself wide enough to include the question about the jurisdiction of the Tribunal to reach a conclusion different from that which it had reached in the assessment proceeding. The Supreme Court held that the form of the question submitted clearly shows that what the Tribunal was asked to do was to submit a case to the High Court on the question whether the Tribunal was justified in coming to the conclusion on the facts and in the circumstances of the case that no concealment was proved by the department and that question cannot include an enquiry whether the Tribunal had jurisdiction to reach a question different from the conclusion it had reached in the proceeding for assessment.

65. In the case of *Karnani Properties Ltd. Vs. The Commissioner of Income Tax, West Bengal*, , the question referred was: "Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the services rendered to the tenants by supplying electrical energy, hot and cold water and maintenance of lifts and other amenities, constituted a business activity of the assessee and as such the income arising there from was assessable u/s 10 of the Indian Income Tax Act, 1922 ?" It was held by the Supreme Court that in the absence of a question whether the findings were vitiated for any reason being before the High Court, the High Court has no jurisdiction to go behind or question, the statement of facts made by the Tribunal.

66. In the case of *Agha Abdul Jabbar Khan Vs. Commissioner of Income Tax, M.P.*, , the question referred by the Tribunal was "Whether the income from the property transferred to the assessee's wife for a consideration of Rupees one lakh could be assessed in his hands u/s 16(3) of the Indian Income Tax Act, 1922 ?" The High Court, instead of answering the question, formulated two other questions, viz, whether there could be in law an oral transfer of the property in lieu of Rupees one lakh due as dower debt and if so whether the income from the property was liable to be included in the assessable income of the assessee u/s 16(3). In these circumstances, the Supreme Court held that the High Court had no jurisdiction to raise new questions of law : the questions raised by it did not flow from the question referred by the Tribunal and that if the High Court thought that the question referred to it did not bring out the real point in issue, it was open to it to call for a fresh statement of the case and direct the Tribunal to submit for its opinion, the real question arising for a decision and that the High Court was not entitled to deal with the reference as if it was dealing with an appeal before it.

67. In the case of *The Commissioner of Income Tax, Bihar and Orissa, Patna Vs. S.P. Jain*, , their Lordships of the Supreme Court at page 395, have pointed out that the answer to question No. 1 had not been pressed and, hence, no answer to it was given.

68. In the case of *Madras Machine Tools Manufacturers Ltd. Vs. Commissioner of Income Tax*, , it has been pointed out at page 125, that the assessee at whose instance the reference on the third question has been made does not want to prosecute the same and so it is unnecessary to consider that question and express any opinion thereon and that when the party who has caused a reference does not want to press the same, the court should refrain from answering the said question.

69. It has been held in the case of *Jagan Nath Pyare Lal Vs. Commissioner of Income Tax*, by the Punjab and Haryana High Court that where a question of law is neither raised before nor considered by the Tribunal, it will not be a question arising out of its order notwithstanding that it arises on the findings given by it. In the case before their Lordships it was held that the question whether registration could be refused to a partnership business on the ground that the application for registration had not been signed by one of the partners was neither raised before nor considered by the Tribunal and the High Court could not go into the question on a reference.

70. It has been held in the case of *Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal*, that it is an accepted principle of law that where the question referred for its opinion does not cover the real controversy in issue, the High Court can re-frame the question and decide the real controversy. Similar view has been taken in the case of *Commissioner of Income Tax, Hyderabad Vs. G.M. Chennabasappa*, .

71. From the aforesaid decisions, it is evident that when Mr. K.N. Jain did not press the question which he argued and when he specifically mentioned that he did not want reframing of question No. 1 referred by the Tribunal and that the question referred by the Tribunal may be answered, then it cannot be said that there is any controversy between the assessee and the department in connection with the matter for which a redrafting of question No, 1 was suggested. Moreover, before the Tribunal the only dispute was that no penalty can be imposed when interest has been charged. Before the High Court, Mr. K.N. Jain for the assessee tried to raise a question that the ITO had no jurisdiction to impose the penalty in view of the provisions of Section 271(1)(a) read with Section 139(1) which was in effect a different and new question. Even if a question is redrafted to the effect whether penalty can be imposed u/s 271(1)(a), then it will be a wider question than what was raised before the Tribunal and such a question cannot be redrafted as such a question was not raised before the Tribunal and, in such a case, it cannot be said that it is a different aspect of the same question.

72. The other point which needs clarification is that the default u/s 271(1) (a)/139(1) is complete when the return is not filed on the due date and so the law on the date the return is due will be applicable and not the present law.

73. It has been held in the case of Commissioner of Gift-tax Vs. C. Muthukumaraswamy Mudaliar, by the Madras High Court that where the infringement is said to be the failure to furnish the return in time, the offence is complete when the return is not filed on the due date and in such cases the offence having taken place on the date fixed for furnishing the return, the law as on that date has to govern the levy of penalty.

74. It has been held in the case of Smt. Indu Barua Vs. Commissioner of Wealth-tax, North Eastern Region, by the Gauhati High Court that the quantum of penalty must be determined on the basis of the law prevailing on the day when the default was committed and that failure to file returns in time is not a continuing offence and infringement of law is complete on the date when the assessee fails to file a return u/s 14(1) of the W.T. Act, 1957, and the quantum of penalty for default must be determined with relation to the law prevailing on the day when the default was committed and the law applicable on that date in regard to the penalty will be applicable and not the law amended from time to time.

75. It has been held in the case of Commissioner of Wealth-tax Vs. M.R. Mahajan, by the Punjab and Haryana High Court that the late filing of a return as contemplated by Section 18(1)(i) of the W.T. Act, 1957, is not a recurring offence and the offence is complete on the date when the return is not filed as prescribed by law and the offence is committed when the return is not filed on the due date and the penalty is to be computed in accordance with the provisions of law as it prevailed at the time of the commission of the offence.

76. It has been held in the case of CWT v. Ram Narain Agrawal [1917] 106 ITR 965 by the Allahabad High Court that the law operative on the date when the infringement takes place is the law applicable unless it is made applicable ex post facto and that the default in cases of non-filing of returns takes place after the expiry of time or notice.

77. It has been held in the case of Commissioner of Wealth-tax Vs. Chunni Lal Anand, by the Allahabad High Court that for the assessment year 1968-69, the wealth-tax return was due on or before June 30, 1968, and, therefore, for the purpose of levy of penalty for delay in submission of the return, the law as it stood on that date would be applicable and not the law as on the date of the beginning of the assessment year, namely, April 1, 1968, or the date on which the return was actually filed.

78. It has been held in the case of Addl. Commissioner of Wealth Tax Vs. Smt. Manjuladevi Muchhal, by the Madhya Pradesh High Court that the assessee committed default in the filing of the returns on the dates fixed for filing the returns, i.e., 30th June, 1961, 30th June, 1962, and 30th June, 1963, and the

law for the purpose of penalty that would be applicable would be the law in force on those dates and not the law which had been brought into force on April 1, 1969.

79. The aforesaid views expressed by the different High Courts have been finally set at rest by their Lordships of the Supreme Court in the case of Commissioner of Wealth Tax, Amritsar Vs. Suresh Seth, , where their Lordships of the Supreme Court have held that where the default complained of is one falling u/s 18(1)(a) of the W.T. Act, 1957 (e.g., failure to file the return of wealth before the due date without reasonable cause), penalty has to be computed in accordance with the law in force on the last day on which the return in question had to be filed and neither the amendment made in 1964 nor the one made in 1969, to Clause (i) of Section 18(1) has retrospective effect. It has also been held that non-performance of any of the acts mentioned in Section 18(1)(a) gives rise to a single default and to a single penalty, the measure of which, however, is geared up to the time lag between the last day on which the return has to be filed and the date on which it is filed; and that the default, if any, committed, is committed on the last date allowed to file the return and the default cannot be one committed every month thereafter and that the words " for every month during which the default continued" indicate only the multiplier to be, adopted in determining the quantum of penalty and do not have the effect of making the default in question a continuing one, nor do they make the amended provisions modifying the penalty applicable to earlier defaults in the absence of necessary provisions in the amending Acts. It has also been held in this decision that the distinctive nature of a continuing wrong is that the law that is violated makes the wrongdoer continuously liable for penalty and a wrong or default which is complete but whose effect may continue to be felt even after its completion is, however, not a continuing wrong or default.

80. P.S. Mishra J. has already quoted the relevant provisions of Sections 139 and 271 of the said Act as they were in force in the assessment years 1965-66 and 1966-67, which are assessment years involved in the present cases and, hence, repetition is not necessary.

81. As regards question No. 1, as referred by the Tribunal, the learned advocate for the assessee, Mr. K.N. Jain, did not press it. The question which has been referred is to the effect whether the penalty u/s 271(1)(a) of the I.T. Act, 1961, could be imposed even after charging interest u/s 139 for the delayed submission of return. In this connection, it has been held in the case of Express Newspapers (P.) Ltd. Vs. Income Tax Officer, Administration and Collection and Another, by the Madras High Court that when the statute provides a time-limit for filing a return, it can also provide a penalty for non-submission of the return in time, and in addition, the statute can also provide as a compensatory measure that interest should also be paid on the amount of tax for the period of delay and, therefore, the provision for payment of penalty as well as interest for the delayed submission of return cannot be said to offend any constitutional

provision.

82. It has been held in the case of T. Venkata Krishnaiah and Co. Vs. Commissioner of Income Tax, by the Andhra Pradesh High Court that the ITO was competent to levy a penalty u/s 271(I)(a) although he had levied interest under Clause (iii) of the proviso to Section 139(1) as the imposts are different and distinct and they have been provided to meet different situations and contingencies and that the mere fact that under the Act the assessee can file the return before the assessment is made or a revised return at any time before the assessment is made does not absolve the assessee from the levy of "penalty under Clause (a) of Sub-section (1) to Section 271.

83. It has been held in the case of Narandas Paramanand Das Vs. Income Tax Officer and Others, by the Calcutta High Court that the legislature had made a distinction between the interest which is payable u/s 139, proviso (iii) of the said Act, where the return is not filed within the statutory time or within the time as extended by the ITO and the penalty which is leviable u/s 271 only if the Income Tax authority is satisfied that without reasonable cause the assessee failed to file the return of the total income within the time prescribed and the provision for calculation of the interest is not of the nature of penal interest and that penalty proceeding is a quite different proceeding and the levy of interest will not prohibit the levy of penalty and that penalty can be levied even if the return is filed before the assessment is made but after the prescribed time.

84. It has been held in the case of D.B. Navalgundkar and Co. Vs. Commissioner of Income Tax, Mysore, by the Karnataka High Court that there is nothing in the I.T. Act, 1961, to indicate that Section 139 of the Act prescribing the interest to be charged, and Section 271(1)(a) prescribing the penalty to be levied for delay in submission of a return are alternative and not cumulative and, therefore, it is competent on the part of the ITO to levy penalty u/s 271(1)(a) of the said Act even where interest has been charged u/s 139 of the said Act.

85. It has been held in the case of Kerala Tile and Clay Works Vs. Commissioner of Income Tax, by the Kerala High Court that for failure to file a return in time as required by Section 139(1) of the said Act, penalty can be imposed as well as penal interest and that what is levied u/s 271(1)(a) is penalty for the default and attempted evasion of tax and it is a punishment for failure of the assessee to comply with the statutory duty imposed by Section 139(1), and it is deterrent in character and the liability to pay interest arises u/s 139 and, no doubt, the two consequences arise out of the same default and one is compensatory and the other punitive and each is complementary to the other and both are provided for by the Act.

86. It is in view of these aforesaid decisions that Mr. K. N. Jain, learned advocate for the assessee, did not press question No. 1 as referred by the Tribunal and so it is to be answered against the assessee and in favour of the Revenue.

87. As regards the finding of P.S. Mishra J. that the period of default u/s 271(1)

(a) reckoned from the due date of filing the return has to be taken to have come to an end with the filing of the return of income, if it is filed before the best judgment assessment under s, 144 and within the period prescribed u/s 139(4) and in a case of no return of income filed at all with the assessment of income, as prescribed u/s 144 of the said Act. I agree with this finding. There are various decisions to support this view.

88. It has been held in the case of C. Vs. GOVINDARAJULU IYER v. COMMISSIONER OF Income Tax, MADRAS., by the Madras High Court that once the assessment proceedings have commenced with the general notice u/s 22(1) of the Indian I.T. Act, 1922, they can only come to an end by either an order of assessment or an order declaring that no assessment can be made and where there is no such order and eventually the proceedings are taken u/s 34 of the aforesaid Act, such proceedings must be deemed to relate to the proceedings which commenced with the public notice u/s 22(1).

89. It has been held in the case of The Commissioner of Income Tax, Rajasthan, Jaipur Vs. Indra and Co., Jodhpur, at page 705 by the Rajasthan High Court that the default is in not furnishing the return and as soon as the return is furnished, there is an end of the default. It has also been held in this decision that it has been expressly laid down in Section 139(7) that no return under Sub-section (1) need be furnished by any person for any previous year if he has already furnished the return of income for such year in accordance with the provisions of Sub-section (2) and that in all the cases mentioned in Section 271(1)(a) of the said Act, the default continues only till the time when the return has been furnished or if no return has been furnished at all, it continues till the assessment is completed, but, if the return has been furnished, the default ceases whether such return is furnished under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 or u/s 148 and that it is immaterial for the purpose of cessation of default that the return has been filed in obedience to any particular provision of law.

90. In the case of Chunnilal and Bros. Vs. Commissioner of Income Tax, , the Madhya Pradesh High Court has approved the finding in The Commissioner of Income Tax, Rajasthan, Jaipur Vs. Indra and Co., Jodhpur, , where it has been held that in all cases mentioned in Section 271(1)(a), the default continues only till the time when the return has been furnished or if no return has been furnished at all, it continues till the assessment is completed and that if the return has been furnished, the default ceases where such return is furnished under Sub-section (1) of Section 139 or by notice given under Sub-section (2) of Section 139 or u/s 148 and that it is immaterial for the purpose of cessation of default that the return has been filed in obedience to any particular provision of law.

91. It has been held in the case of P.N. Sikand Vs. Commissioner of Income Tax, New Delhi, by the Delhi High Court that a default is for not filing the return in time and the period of default starts the moment the statutory period within

which the return has to be filed is over, and continues till the filing of the return or assessment, whichever is earlier, and that the issue of a notice u/s 139(2) cannot per se have the effect of wiping out the earlier period of default and that this can be done only by expressly condoning the delay.

92. It has been held in the case of *Laxmi and Co. Vs. Commissioner of Income Tax*, by the Allahabad High Court that the default of not filing a return u/s 139(1) continues till the time when the return has been furnished or if no return has been furnished it continues till the assessment is made and that the assessee is liable to pay penalty under this provision for not having filed a return voluntarily u/s 139(1) even if he files a return subsequently in pursuance of a notice u/s 139(2).

93. In the decision in the case of *Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal*, a view has been taken by S. P. Sinha J. (as he then was), that there is no provision under the I.T. Act for carrying over the default in filing the return beyond the limits of an assessment year and that like an assessment of income to Income Tax which must remain confined to an assessment year, the assessment of penalty must also remain confined to an assessment year, and that the default cannot be carried over beyond that assessment year. It has also been held in the decision that in terms of Section 271(1)(a), the period of default starting on the day following the due date for compliance with the terms of Section 139(1) or Section 139(2) of the said Act remains circumscribed within 12 months of the relevant assessment year and that similar would be the position where steps have been taken to tax an escaped income u/s 148 of the said Act, and there also the period of default in filing the required return of income will remain circumscribed within 12 months of the year in which steps for reassessment of the escaped income have been taken. The entire finding of S. P. Sinha J. (as he then was) appears to be not correct, as the provision u/s 271(1)(a) read with Clause (i) in the cases referred to in Clause (a) in addition to the amount of tax, if any, payable by the assessee a sum equal to 2 per cent, of the tax for every month during which the default continues but not exceeding in aggregate 50 per cent, of the tax itself shows that the default can continue but the only limit is that it cannot exceed 50 per cent, of the tax and this shows that the default continues till the filing of the return or the assessment and so the view taken in the decision mentioned above is not a correct view in view of the aforesaid decisions and, in this connection, I agree with the findings of P.S. Mishra J. and the observations of S.P. Sinha J. (as he then was), in the case of *Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal*, aforesaid has to be reversed.

94. I also agree with P.S. Misra J. as regards the findings that the view taken in the case of *Additional Commissioner of Income Tax Vs. Bihar Textiles*, of the Patna High Court is not a correct view. In this connection, I am supported by various decisions.

95. It has been held in the case of *The Commissioner of Income Tax, Rajasthan*,

Jaipur Vs. Indra and Co., Jodhpur, by the Rajasthan High Court that an assessee is liable to penalty for not submitting his return as required u/s 139(1) of the said Act, even though he subsequently files a return in pursuance of a notice u/s 139(2) of the said Act and an assessment is made on the basis of that return.

96. It has been held in the case of The Commissioner of Income Tax, Delhi Vs. Hindustan Industrial Corporation, New Delhi, by the Delhi High Court that the plain language of Section 139(2) of the said Act cannot be strained to hold either that the assessee is absolved of his statutory obligation to file a return of his income voluntarily u/s 139(1) and that the default committed in not filing a return voluntarily u/s 139(1) cannot be taken note of for initiating proceedings for imposition of penalty if a notice u/s 139(2) is issued, or that the period of default shall cease from the date when the notice u/s 139(2) is served on the assessee.

97. It has been held in the case of Additional Commissioner of Income Tax, Gujarat Vs. Santosh Industries, by the Gujarat High Court disagreeing with the Tribunal and rejecting the contention of the assessee, that the second clause of Section 271(1)(a) of the said Act applies where a person failed to furnish a return of income within the time allowed strictly under Sub-section (1) or Sub-section (2) of Section 139, and filing of the return after expiration of such time but before expiration of four years from the end of the assessment year u/s 139(4) did not save him from penalty for the default contemplated under the second clause to Section 271(1)(a) of the said Act and the words "within the time allowed by Sub-section (1) of Section 139 " in the second clause of Section 271(1)(a), according to their plain natural meaning, must be taken to refer to the time specified in Sub-section (1) of Section 135 or extended by the ITO under the proviso to that Sub-section and not so as to include the time within which the return of income may be filed under Sub-section (4) of Section 139.

98. It has been held in the case of Mullapudi Venkatarayudu Vs. Union of India (UOI), by the Andhra Pradesh High Court that the argument for the petitioner that, u/s 271(1)(i) of the said Act, penalty can be levied for the period during which the default continued, and that as no return was filed by the assessee u/s 139(1), the default continued indefinitely and no definite period could have been arrived at by the ITO to determine the quantum of penalty, was without any merit. It was also held in this decision that the continuance of the default would be up to the date on which the return was filed either u/s 139(2) or Section 139(4) of the said Act, and that the petitioner had filed his return u/s 139(2), It has also been held in this decision that because the ITO issues a notice u/s 139(2) after the termination of the period prescribed by Section 139(1), the ITO cannot be deemed to have condoned the non-compliance to furnish a return u/s 139(1) of the said Act.

99. It has been held in the case of CIT v. Gangaram Chapolia [1916] 103 ITR 613 by the Full Bench of the Orissa High Court that even if the return of the assessee had been filed in the manner prescribed, as it was not filed within the

time allowed u/s 139(1) of the said Act, and as such one of the two conditions prescribed in Section 271(1)(a) of the said Act had not been fulfilled, the assessee would be liable to penalty. It has also been held in this decision that it cannot be contended that as the assessee filed the return within the time allowed u/s 139(4) of the said Act, he should be deemed to have filed the return within the time allowed u/s 139(1) of the said Act and, consequently, no penalty u/s 271(1)(a) was imposable and that Section 139(4) was in the nature of a proviso to Section 139(1) for all purposes under the said Act, and that the concession given u/s 139(4) is restricted to the assessment and cannot be availed of by the assessee for all purposes under the Act including a penalty proceeding and that if the assessee's contention was to be accepted, the time-limit prescribed in Section 139(1) would be otiose and wholly unnecessary except for the purposes of charging interest.

100. It has been held in the case of *Metal India Products, Hathras Vs. The Commissioner of Income Tax, Lucknow*, by the Full Bench of the Allahabad High Court that where the assessee did not file his return within the time prescribed by Section 139(1) of the said Act and where no notice was issued by the ITO to the assessee u/s 139(2) of the said Act, even if the assessee filed his return u/s 139(4), that is, within four years from the end of the assessment year and before the assessment order was passed, the assessee is liable to pay the penalty u/s 271(1)(a) of the said Act for not having filed a return within the time prescribed in Section 139(1) of the said Act and the time given u/s 139(2). It has also been held in this decision that for the purpose of penalty, the filing of the return within the time prescribed by Sub-section (4) of Section 139 cannot be treated as a return filed within the time prescribed by Sub-section (1) and that the emphasis of Section 271(1)(a) is for checking evasion of the time prescribed by Sub-section (1) or Sub-section (2) of Section 139. -It has also been held in this decision that if the time prescribed by Sub-section (1) or (2) passes, default takes place attracting the liability for penalty.

101. It has been held in the case of *G.S. Atwal and Co. Vs. Commissioner of Income Tax, Central*, by the Calcutta High Court that penalty can be imposed on an assessee u/s 271(1)(a) of the said Act for delay in furnishing returns, even though the returns were filed before completion of the assessment and that once a default has been committed in complying with Section 139(1), the fact that a notice u/s 139(2) has been served subsequently on the assessee would not make any difference to the date of default and that the default would start from the date on which the return of income became due u/s 139(1) of the said Act.

102. It has been held in the case of *Chunnilal and Bros. Vs. Commissioner of Income Tax*, by the Madhya Pradesh High Court that an assessee's default in not furnishing his return within the time allowed and in the manner specified in Section 139(1) of the said Act exposes him to penalty u/s 271(1)(a) and the imposition of penalty would not be invalid merely because the assessee subsequently filed a return in response to a notice u/s 139(2) or Section 148. It

has also been held in this decision that the default u/s 139(1) ceases only on the filing of the return in response to a notice u/s 139(2) or Section 148 or in compliance with Section 139(4) and that in the absence of an express order of condonation of default, a mere issue of a notice u/s 139(2) to a person who has not filed the return u/s 139(1) would not amount to condonation of the default u/s 139(1) and that the notice under 139(2) neither arrests nor wipes out the default u/s 139(1). It has also been held in the case of Commissioner of Income Tax, Poona Vs. D.V. Save, by the Bombay High Court that where an assessee does not file a return as provided u/s 139(1) of the said Act and the ITO issues a notice" to the assessee u/s 139(2), whereafter the assessee files the return, the assessee will not be absolved from the payment of penalty for not filing a return as provided in Section 139(1) and penalty will be payable from the date fixed u/s 139(1) for filing the return or the date to which the time for filing the return might have been extended by the ITO up to the date on which the return is finally filed by the assessee.

103. It has been held in the case of P.N. Sikand Vs. Commissioner of Income Tax, New Delhi, by the Delhi High Court that Sub-sections (1) and (2) of Section 139 of the said Act deal with two different situations and the first imposes an obligation to file the return suo motu and the second to furnish a return in compliance with the notice u/s 139(2), and that it is true that in terms of Section 139(7), only one return is required to be filed, but that cannot have the effect of wiping out the earlier obligation to file the return suo motu u/s 139(1) of the said Act.

104. It has been held in the case of Laxmi and Co, v. CIT [1981] 128 ITR 269 by the Allahabad High Court that the failure to furnish a return voluntarily u/s 139(1) of the said Act is distinct and separate from the failure to file a return in pursuance of a notice u/s 139(2) and the legal consequences of the omission or failure to file the return u/s 139(1) as well as that of not complying with the notice u/s 139(2) are dealt with in Section 271 and that an analysis of Section 271(1)(a) of the said Act shows that penalty becomes imposable the moment the default takes place and that an assessee is liable to pay penalty under this provision for not having filed a return voluntarily u/s 139(1) even if he files a return subsequently in pursuance of a notice u/s 139(2) of the said Act.

105. It has been held in the case of Commissioner of Income Tax Vs. Dehati Co-operative Marketing-cum-Processing Society, by the Punjab and Haryana High Court that it cannot be said that once a notice requiring the assessee to furnish a return u/s 139(2) or Section 148 of the said Act, is issued, penalty cannot be imposed for failure to furnish the return u/s 139(1) of the said Act.

106. In view of the aforesaid decisions it has to be held that the decision in the case of Additional Commissioner of Income Tax Vs. Bihar Textiles, of the Patna High Court to the effect that once a notice under Sub-section (2) of Section 139 of the said Act has been issued to an assessee during the relevant assessment year, there cannot be any penalty u/s 271(1) for failure to furnish the return as

required by Sub-section (1) of Section 139 and that where the return is filed beyond the time given in the notice u/s 139(2) of the said Act, penalty will have to be calculated only from the expiry of the time fixed for filing the return in the notice u/s 139(2) of the said Act is not a correct decision.

107. In view of my findings and discussions above, it is thus evident that an assessee is liable to penalty for not submitting his return as required under Sub-section (1) of Section 139 of the said Act, even though he subsequently files a return in pursuance of a notice u/s 139(2) of the said Act and an assessment is made on the basis of the return and so the decision in the case of Additional Commissioner of Income Tax Vs. Bihar Textiles, has also to be reversed.

108. I also agree with P.S. Mishra J. that questions Nos. 2 and 3 as referred by the Tribunal have also to be answered against the assessee and in favour of the Revenue.

109. Although I agree that the two decisions of this court, namely, the decisions in the case of Additional Commissioner of Income Tax Vs. Bihar Textiles, and in the case of Addl. Commissioner of Income Tax Vs. Dongarsidas Biharilal, , have not been correctly decided and they require to be reversed, I am of the view that only for the purpose of reversing these two decisions, the court should not redraft question No. 1 for which I have already given my reasons above. I have given findings on other issues as P. S. Mishra J. and S.K. Jha J. have not agreed with my view that redrafting of question No. 1 as referred by the Tribunal cannot be made for the reasons discussed above.

S.K. Jha, J.

110. I agree with brother P.S. Mishra J.