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**(1990) 11 CAL CK 0002**  
**In the Calcutta High Court**  
**Case No : IT Reference No. 296 of 1980**

Kaliprasad Pathak

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

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**Date of Decision :** 21-11-1990

**Acts Referred:**

Income Tax Act, 1961 — Section 256(1), 271(1)(c), 274, 274(2)

**Citation :** (1994) 72 TAXMAN 130

**Hon'ble Judges :** Bhagabati Prasad Banerjee, J;Ajit K. Sengupta, J

**Bench :** Division Bench

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## Judgement

Ajit K. Sengupta, J.—In this reference u/s 256(1) of the income tax Act, 1961 ("the Act") at the instance of the assessee, the following question of law has been referred for the opinion of this Court for the assessment year 1964-65:

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in confirming the penalty imposed u/s 271(1)(c), read with Explanation of the income tax Act, 1961 notwithstanding amendment in section 274(2) of the Act, with effect from 1-4-1971 ?

Shortly stated, the facts are that the income tax return for the assessment year 1964-65 was filed by the assessee on 5-1-1971, showing a total income of Rs. 1,000 and the assessment was completed on 7-8-1971. The ITO added a sum of Rs. 12,500 under the head "Income from other sources" with the following observations:

... Accordingly I would hold that the source of aforesaid sum of Rs. 22,500 invested in the lorry remained unexplained. Thus, the sum of Rs. 2,500 is therefore to be treated as assessee's income from undisclosed sources. The assessee's bank account shows a total deposit of Rs. 10,000 during the year. As regards source of these deposits, the explanation given was earning from the grocery shop and also from transport business, the transport business was started in December 1963 and in the remaining 4 months of the year the

assessee paid a sum of Rs. 5,412 to the financier as investments for the lorry. The assessee cannot reasonably be accepted to have any savings after paying the instalments as referred to above. I have already stated above that the assessee can have no savings from the grocery shop after meeting his family and personal expenses. In the circumstances the source of Rs. 10,000 deposited in bank account remains unexplained. Accordingly, this sum is also to be treated as assessee's income from undisclosed sources.

2. On appeal against the said assessment, the AAC reduced the addition to Rs. 7,500, thus, granting a relief of Rs. 5,000. The total income of the assessee was finally assessed for the said year at Rs. 10,180. In course of penalty proceedings, nobody appeared before the ITO in spite of several opportunities granted to the assessee. Even no explanation was filed on behalf of the assessee. The ITO levied a penalty of Rs. 7,500 u/s 271(1)(c), read with section 274(2), of the Act on the ground that concealed income was Rs. 7,500. The AAC declined to interfere with the penalty order. On further appeal before the Tribunal, it was submitted on behalf of the assessee that there was no concealment of income on the part of the assessee. It was submitted that the assessee was living with his father and his family consisted of self, wife and his minor brother. Out of grocery shop, the assessee was able to save Rs. 1,000 per annum and, thus, the assessee was able to save Rs. 10,000. Another sum of Rs. 2,500 was his personal savings and in this manner he invested a sum of Rs. 12,500 for the purchase of the truck. It was further submitted that there was no evidence on record save and except the rejection of explanation furnished by the assessee and, therefore, no penalty u/s 271(1)(c) could be levied on that basis. It was alternatively submitted that the assessee had furnished his return on 5-1-1971. At the time when the return was furnished, the IAC alone was competent to impose the penalty. Since the minimum penalty imposed in this case exceeded Rs. 1,000, the ITO was not competent to levy penalty in this case. It was, therefore, submitted that the penalty order passed by the ITO was without jurisdiction and was not sustainable. On behalf of the department, it was submitted before the Tribunal that in spite of several opportunities granted by the ITO, the assessee neither appeared nor furnished any explanation. It was further submitted that it was not possible for the assessee to save Rs. 1,000 per annum from the grocery shop and, therefore, the investment of Rs. 12,500 made by the assessee remained unexplained. The Tribunal held that the assessee failed to discharge the onus that lay on him and, accordingly, upheld the order of penalty.

With regard to the question of jurisdiction it was submitted on behalf of the department that this was a matter of procedure. In view of the amendment in section 274 with effect from 1-4-1971, the Tribunal held that the ITO alone was competent to levy penalty in this case, since the amount of concealed income did not exceed Rs. 25,000. The Tribunal felt that the question of jurisdiction was a part of procedural law and the law applicable was one which was in force at the time when the assessment was completed and/or the penalty proceedings were

initiated.

The Tribunal has recorded a finding of fact that the assessee had a family of four to support in a city like Calcutta. His income from grocery business was not such as to enable him to save Rs. 1,000 per annum after meeting his domestic expenses. The Tribunal further observed that it was not clear as to wherefrom the assessee could save another sum of Rs. 2,500. In the view of Tribunal, the whole story of savings from grocery shop was incredible. The Tribunal also referred to the Explanation to section 271(1)(c) which was applicable in this case and found that the assessee could not discharge the burden which lay on it under the said Explanation. It is also recorded by the Tribunal that the assessee did not come forward to offer any explanation either before the ITO or before the AAC in the course of the penalty proceedings in spite of several opportunities given to him. None of these findings of fact has been challenged by the assessee by raising any appropriate question in this respect.

In Commissioner of Income Tax Vs. Mussadilal Ram Bharose, Supreme Court held that where the total income returned by the assessee is less than 80 per cent of the total income as assessed, the Explanation to section 271(1)(c) shifts the burden to the assessee to show that the difference was not owing to fraud or gross or wilful neglect on his part. The burden placed upon the assessee is not discharged by any fantastic explanation. Nor is it the law that any and every explanation by the assessee must be accepted. It must be an explanation acceptable to the fact-finding body. The conclusion of the Tribunal in this respect is a conclusion of fact.

As regards the question of jurisdiction to levy penalty, we find that section 274(2) prior to its amendment by the Taxation Laws (Amendment) Act, 1970 clearly provided that if the minimum penalty imposable u/s 271(1)(c) in any particular case exceeded Rs. 1,000, the ITO shall refer the case to the IAC, who shall for the purpose have all the powers for the imposition of penalty. The Taxation Laws (Amendment) Act, 1970 amended section 274(2) with effect from 1-4-1971. After the amendment, a reference to the IAC is required to be made only when the amount of concealed income exceeds a sum of Rs. 25,000. In this case, the assessment was completed on 7-8-1971 and the penalty proceedings were initiated on 8-7-1971. The penalty was actually levied on 1-3-1974. Therefore, both at the time when the penalty proceedings were initiated as well as at the time when the penalty order was actually passed, it was the ITO alone who had the jurisdiction to impose the penalty leviable u/s 271(1)(c) in cases where the minimum penalty imposable exceeded Rs. 1,000. In this view of the matter the ITO alone had the jurisdiction to levy the penalty in this case inasmuch as the concealed income did not exceed Rs. 25,000. Since the penalty was levied by the ITO by his order dated 1-3-1974, we do not find any lack of jurisdiction in this case. We, accordingly, answer the question in the affirmative and in favour of the revenue.

There will be no order as to costs.

Banerjee, J.

I agree.