
(1980) 07 CAL CK 0044

In the Calcutta High Court

Case No : Income-tax Reference No. 355 of 1977

Rahmat Development and Engineering Corporation

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 07-07-1980

Acts Referred:

Income Tax Act, 1961 — Section 271(1), 69

Citation : (1981) 20 CTR 228 : (1981) 130 ITR 602 : (1981) 6 TAXMAN 260

Hon'ble Judges : Sudhindra Mohan Guha, J;Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : K. Roy and R.N. Dutta, for the Appellant;B.K. Bagchi and A.N. Bhattacharjee, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In the reference u/s 256(2) of the I.T. Act, 1961, as directed by this court, the Tribunal has referred to this court the following questions :

"1. Whether the Tribunal's finding of fact bearing on the question of penalty are perverse in that they are unsupported by and/or contrary to evidence ?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in upholding the order u/s 271(1)(c) ?"

2. This reference relates to four years, viz., assessment years 1966-67 to 1969-70. The assessee is a registered firm and is a manufacturer of machine parts, etc. The assessee also has and, at the relevant time, had income from house properties and other sources. According to the assessee, the assessee's accounts were accepted and acted upon by the revenue from year to year and the assessee further asserts that no serious challenge was ever made to their genuineness or that those were not kept regularly in the course of the assessee's business. The assessee started construction of a ten-storeyed building at No. 8/9, Bentinck Street, Calcutta, during the previous year relevant to the assessment year 1962-63. The cost of construction of the building up to

31st March, 1970, as appearing in the assessee's account books, was Rs. 14,14,410. The ITO, however, was of the view that the cost of construction was understated. He, therefore, made a reference regarding the cost of construction to the departmental valuer and in accordance with his estimate took the cost of construction of the building as Rs. 23,58,500. He considered it to be an unexplained cost of construction of the property for several years from undisclosed sources amounting to Rs. 1,60,002 for the assessment year 1966-67, Rs. 2,73,075 for the assessment year 1967-68, Rs. 1,46,490 for the assessment year 1968-69 and Rs. 1,34,412 for the assessment year 1969-70. These are the relevant assessment years.

3. But, in this connection, it has to be mentioned that in the assessment orders for the assessment years 1962-63 to 1965-66, the ITO had observed that "the assessee had failed to furnish the detailed extent of the construction work undertaken during the accounting period with particulars of the area constructed, with other necessary details and the nature of construction effected during the relevant accounting period so as to justify the investment shown or disclosed". The ITO further observed that "the expenses entered were in excess of supporting vouchers ". On the 15th March, 1970, in support of his contention, the assessee had submitted a report of the valuer, Sri B. K. Banerjee, dated March 15, 1970, in which he had estimated as the cost of construction up to the date, that is to say, March 15, 1970, at Rs. 15,97,346. According to the assessee's books of account up to 31st March, 1970, the cost of construction was Rs. 14,14,410 as mentioned hereinbefore. It is further stated that in the accounts for the years ending March 31, 1971, and March 31, 1972, a further sum of Rs. 2,11,226 was incurred for completing the construction. Therefore, the total expenditure incurred, according to the assessee's books of account, was Rs. 16,25,636.

4. As the ITO was not satisfied with the report of the valuation made by the assessee's valuer, there was a joint valuation some time in October, 1970, of the building by the departmental valuer, one Sri R. N. Roy Chowdhury, and another valuer appointed by the assessee, Sri S. R. Banerjee. According to the report of the valuer, Sri S. R. Banerjee, dated October 23, 1970, the cost of construction was Rs. 19,60,592. The estimate of Sri S. R. Banerjee was made on the basis of the West Bengal P.W.D. rates. On the 9th December, 1970, the departmental valuer, Sri R.N. Roy Chowdhury, submitted his report to the ITO and he valued the premises in question at Rs. 23,58,500. The estimate of Sri R. N. Roy Chowdhury was based on C.P.W.D. Schedule.

5. On behalf of the assessee, it was pointed out that there were mistakes in the report of the departmental valuer in the sense that he had not taken into consideration the fact that the building was not constructed for residential purpose and the cost of construction for several rooms and the partitions and separate rooms should not be taken into consideration in estimating the cost of construction incurred by the assessee. The ITO asked the assessee to reconcile

the difference between the amounts estimated by two of his approved valuers, viz., Sri B.K. Banerjee and Sri S. R. Banerjee and also to show cause why the difference amounting to Rs. 9,44,090 between Rs. 14,14,410 being the accounted cost of construction up to March 31, 1970, as appearing in the books of account of the assessee, and Rs. 23,58,500, being the estimated value of construction made by the departmental valuer, Sri R. N, Roy Chowdhury, should not be treated as the assessee's concealed investment.

6. The ITO has spread over what is considered to be concealed income of the assessee on account of the unexplained investments year-wise in the manner as follows :

F.Y. Amount as stated to have been spent by the assessee Cost of construction estimated in the Dept. Valuer's report (Proportionate) Difference

1 2 3 4

Rs. Rs. Rs.

1963-64 51,295 91,400 40,105

1964-65 2,23,125 3,97,800 1,74,675

1965-66 2,04,498 3,64,500 1,60,002

1966-67 3,49,175 6,22,250 2,73,075

1967-68 1,87,420 3,33,910 1,46,490

1968-69 1,71,737 3,06,150 1,34,413

1969-70 48,500

86,340

37,840

12,35,750 22,02,350 9,66,000

Up to F.Y.

1962-63 1,78,660 1,56,150 (--) 22,510

14,14,410 23,58,500 9,44,090

O/S. B.F. 57,075

7. He, thereafter, allocated for the relevant years under question the amounts which we have indicated before. In the assessment order for 1966-67, the ITO had observed, inter alia, as follows :

" The assessee has failed to substantiate his onus of proving the difference between the cost as shown and accounted for in his books of account and as estimated by the departmental valuer."

8. The ITO, therefore, held that the assessee must have spent Rs. 9,44,090, being the difference as appearing in the books of account of the assessee on March 31, 1970, and the cost of the building as estimated by the departmental valuer, as the concealed income of the assessee, invested towards the construction of the building. He added the said sums as mentioned hereinbefore in different years u/s 69 of the I.T. Act, 1961, and initiated penalty proceedings in respect thereof u/s 274(2) and Section 271(1)(c) of the I.T. Act, 1961. The ITO made similar additions in the assessments for the assessment years 1967-68, 1968-69 and 1969-70, on the basis of the same allocation as indicated before and initiated similar penalty proceedings in respect of such additions.

9. During the hearing of the appeals against the said four assessment orders, the AAC was furnished with a second report by the valuer, Sri S.R. Banerjee, in which the cost of construction was estimated at Rs. 17,47,490, which was stated to be based on mid-period average cost of West Bengal P.W.D. rates from 19'62 to 1970. His earlier report was stated to have been based on West Bengal P.W.D. rates, when the cost index for Calcutta was 246, which was more than 15% higher than in 1965-66 when the cost index was 208. On the 20th March, 1973, the AAC passed a consolidated order in the appeals preferred by the assessee against the assessment orders. He upheld the additions for all the four years as made by the ITO. As we have mentioned before, the ITO had initiated penalty proceedings and had referred the said proceedings to the IAC as he was obliged to do u/s 274 of the I.T. Act, 1961. In his order the IAC observed as follows:

The assessee could not satisfactorily explain the difference between the "value" given by his valuers and the value put by the " departmental representative. "

10. He, therefore, held that "as such it is quite clear that the difference between the returned and the assessed income was clearly due to his gross and wilful neglect to disclose the correct extent of investment". He, therefore, imposed penalties under the Explanation to Section 271(1)(c) of the I.T. Act, 1961, for the four years in the sums of Rs. 1,00,000, Rs. 1,00,000, Rs. 1,46,000 and Rs. 1,34,000, respectively, totalling to Rs. 4,80,000. For each of the first two years the amount of penalty imposed was roughly one-third of the statutory maximum while for each of the last two years it was exactly one-half of such maximum.

11. On the 20th December, 1973, in appeal against the AAC's order, the Tribunal rejected the report of the departmental valuer. The Tribunal also did not accept the second report of the valuer, Sri. S. R. Banerjee, in the absence of supporting material. The Tribunal accepted the first report of the valuer, Sri S. R. Banerjee, and made certain additions and alterations and determined the cost of construction on the basis of the materials available before it at Rs. 20,57,756. As a result of the Tribunal's order, the additions made by the ITO were reduced by about 42.5% in each of the four assessment years involved in this reference.

12. The assessee preferred appeals before the Tribunal against the orders of the IAC imposing penalties. In the said appeals it was contended (1) that the

penalties were based on additions made by the ITO and those additions were based on the departmental valuer's report. As the Tribunal had rejected that report, the very basis of the imposition of penalty had been knocked out. (2) The ITO had initiated penalty proceedings on the ground of concealment of income. The IAC had imposed the penalties on the ground of furnishing incorrect particulars of income. It was urged that the charge of concealment of income and the charge of furnishing inaccurate particulars of income were mutually exclusive and the ITO not having initiated proceedings on the ground of furnishing inaccurate particulars, the IAC had no jurisdiction to pass orders on this ground. (3) Lastly and thirdly, it was urged that the difference between the returned income and the assessed income had been properly explained and the assessee had proved that the failure to return the income assessed by the ITO did not arise from any fraud or wilful neglect on the part of the assessee. Upon these submissions, it was urged that the orders imposing the penalty were not sustainable. The Tribunal was, however, unable to accept the said contentions for the reasons recorded in its order dated 31st May, 1975, and upheld the penalty orders as passed by the IAC. Upon these, the aforesaid two questions have been referred to this court, as directed by this court.

13. Before us, mainly three submissions were canvassed, viz., that in this case the ITO had initiated the penalty proceedings on one ground, namely, that there had been concealment of income but the IAC had, according to the assessee, sought to impose penalty on the ground of furnishing inaccurate particulars. It was, therefore, submitted that the grounds of furnishing incorrect or inaccurate particulars of income and concealment of income were mutually exclusive and in the facts and circumstances of this case there was no question of either concealment of income or of furnishing inaccurate particulars. We may first deal with this submission. But before we do so, it would be appropriate to refer to some relevant provisions of the Act. Chapter XXI, as it stood at the relevant time, of the I.T. Act, 1961, dealt with the penalty imposable and Section 271 dealt with failure to furnish returns, comply with notices and concealment of the income, etc. Under Clause (c) of Section 271(1) of the I.T. Act, 1961, the ITO or the AAC if he was satisfied in course of the assessment proceedings that the assessee had concealed the particulars of his income or furnished inaccurate particulars of such income, could direct imposition of certain penalty in certain manner as indicated in Sub-clauses (i), (ii) and (iii). Prior to 1964, Clause (c) of Section 271(1) required that, to attract the penal provision, the assessee should be guilty of either concealing the particulars of his income or "deliberately" furnishing inaccurate particulars of such income. The expression "deliberately" has been omitted by Section 40(i) of the Act of 1964, with effect from 1st April, 1964, and an Explanation was added which provided that where the total income returned by any person is less than 80 per cent. of the total income as assessed u/s 143 or Section 144 or Section 147 reduced by the expenditure incurred bona fide by him for the purpose of making or earning any income included in the total income but which had been disallowed as a deduction the assessee should unless

he proved that the failure to return the correct income did not arise from any fraud or any gross or wilful neglect on his part be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of Clause (c) of this section. Section 274 enjoins that in the case of certain types of penalty notice or opportunity had to be given to the assessee and reference had to be made to the IAC. It is not necessary for our present purpose to set out in detail the said provisions. On behalf of the assessee it was sought to be urged that there was no question of any concealment of income in this case, The assessee, it was submitted, was not obliged by law to require to file or give any return of investment nor was the assessee obliged to furnish the particulars of his investments. In this case, as we have noted before, the addition was made u/s 69 of the I.T. Act, 1961. Section 69 deals with unexplained investment and provides that where in any financial year immediately preceding the assessment year, the assessee had made investments which are not recorded in the books of account, if any, maintained by him from any source of income and the assessee offers no explanation about the nature of the source of the investment or the explanation offered by him is not in the opinion of the ITO satisfactory, the value of the investment may be deemed to be the income of the assessee for such financial year. Therefore, the effect of Section 69 is that if there is an unexplained investment or unentered investment then the value of such investment would be deemed to have been earned by the assessee and would be the income of the assessee for that financial year. Now, in this case, as we have mentioned before, there was a building constructed by the assessee and for these sums of money, which admittedly had been spent by the assessee spread over a large number of years, 10 years to be precise, the assessee had accounted in his books of account, which undoubtedly were produced at the time of the assessment, as otherwise there could be no question of such books being available to the ITO, which indicated that a certain amount had been spent in the construction of that building. According to these books of account, which were produced before-the ITO, during the course of the assessment, the amount spent on investment of the building up to 31st March, 1970, appeared to be Rs. 14,14,410. On the other hand, the departmental valuer had found that the building had been constructed at a cost which he estimated at Rs. 23,58,500. Therefore, unless the assessee had given the source of investment of this additional amount, whatever be the amount, that amount must have come from some source of income of the assessee. In the facts of this case, as established, we are of the opinion that Section 69 of the Act was clearly attracted and if Section 69 was clearly attracted, the argument of the assessee, that the assessee was not obliged to furnish the particulars of his investment by law or to submit any particulars of return of investment by law and as such there cannot be any question of concealment of income or of furnishing inaccurate particulars arises, cannot be accepted. The moment Section 69 is attracted it becomes, by the fiction of law, the income of the assessee. If it becomes the income of the assessee and if that income is not returned then that return remains unreturned. The question is whether the expression "concealment" requires an element of

mens rea or deliberate act of secreting. It was urged that even though in the case of adding this amount as income of the assessee for the assessment year this might be considered to be the income of the assessee, yet for the purpose of attracting the penal provisions, the assessee must be found to be guilty of concealing. Now, the expression "concealed", it was urged, was not synonymous with failure to disclose the income. The assessee must know that it was his income and it was not deliberately included. It was contended also that the law which required that the furnishing of inaccurate particulars should be a deliberate act as it was the position before the amendment of 1964 still remained the position in view of the observations of the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, . That, however, was the position u/s 28(1)(c) of the Indian I.T. Act, 1922, which more or less dealt with the similar position as Section 271(1)(c) prior to its amendment by the Act of 1964 and prior to the addition of the Explanation. There, the Supreme Court had held that proceedings u/s 28 of the Indian I.T. Act, 1922, were penal in character. The gist of the offence was that the assessee had concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and the burden was on the revenue to establish that the receipt of the amount in question constituted the income of the assessee. If there was no evidence on the record except the explanation given by the assessee, which explanation had been found to be false, it did not follow that the receipt constituted his taxable income. It would be perfectly legitimate to say that the mere fact that the explanation of the assessee, according to the Supreme Court, was false did not necessarily give rise to the inference that the disputed amount represented income. It could not be said that the findings given in the assessment proceedings for determining or computing the tax was conclusive. The Supreme Court further reiterated that it was good evidence. Before a penalty could be imposed, the entirety of the circumstances must reasonably point to the conclusion that the disputed amount represented the income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars. It was submitted that the position in law has not changed with the addition of the Explanation. For this position, certain decisions were cited to which we shall presently refer.

14. It appears to us, however, that Section 69 of the I.T. Act, 1961, makes the unexplained investment to be the income of the assessee and that position has to be accepted in the penal proceedings because that has been confirmed though for a reduced amount by the Income Tax Appellate Tribunal in the quantum appeal which will be deemed to be the income of the assessee for that financial year. Therefore, it is not open, in our opinion, by virtue of Section 69, to say that it does not represent the income. The law deemed such an unexplained investment to be the income of the assessee. Therefore, once it was deemed to be the income of the assessee, the observations of the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, referred to hereinbefore, could not be of much assistance to the assessee

because it was no longer open to say that the inference of rejection of the assessee's explanation did not give rise to the fact that the disputed amount did not represent the income. The inference follows as the deeming provision makes such unexplained investment as the income of the assessee by the fiction of law and unless we boggle our imagination, against which the Supreme Court has repeatedly warned us, we must treat this unexplained investment as the income of the assessee for the year in question. If that is the position, then the next question that becomes relevant is whether there was any explanation for non-disclosure of income. There was certainly a non-disclosure of this income. That non-disclosure of income might not automatically be considered to be a concealment. But this aspect we shall presently consider.

15. There is another aspect upon which stress was laid by learned advocate for the assessee, that is to say, the finding that the inaccurate particulars had been furnished was inconsistent with the charge of concealment of income. If the income was concealed or was not returned even, it was argued, there could not be any question of furnishing any inaccurate particulars. It may be that in certain cases these two charges are exclusive in the sense that one may not stand with the other. But where, as in this case, the Tribunal seems to have proceeded that on the basis that inaccurate particulars of investment which were entered in the books of account of the assessee and which were furnished were the modus operandi to conceal the true and real income of the assessee and in such a case, no question of the charges being mutually exclusive to one another arises. There may be and very often there are cases where inaccurate particulars are furnished, in order to strengthen the concealment of income. Therefore, in that context, though the expressions are used in disjunctive terms, that is to say, there are two separate different offences, commission of one need not necessarily mean the commission of others but the commission of one does not exclude or does not eliminate the possibility of the commission of the other and very often, as we have mentioned before, inaccurate particulars are furnished in order to strengthen the concealment of income of a particular assessee. Therefore, we fail to see the significance of this argument upon which a great deal of stress was laid that these two charges are mutually exclusive. These two charges are separate. One does not necessarily follow from the other but these two charges can and very often do subsist together. Even in a particular case, whether the two charges simultaneously exist or not must depend upon the entirety of the circumstances and the entirety of the order. Now, in this case, as we have mentioned before, the ITO asked the assessee to reconcile the difference between the two accounts, viz., the accounts given by the valuer of the assessee as well as the amount given by the assessee and the assessee was asked to show cause why the difference, being the amount of cost found out as estimated cost by the departmental valuer and the cost shown in the books of account of the assessee, that is to say, the particulars furnished by the assessee should not be treated as the income of the assessee. The ITO has noted that the amount remained unexplained and has noted further that the assessee had

entered incorrect particulars in his books of account. The IAC in his order observed that there was gross and wilful neglect to disclose the correct expenditure of the investment, that is to say, the correct quantum of investment made from the concealed income. In that expression, in our opinion, the IAC was upholding both the charges, that is to say, if the assessee had disclosed the correct expenditure of the investment that would have tantamounted to the furnishing of the correct particulars which could have been deemed to have been the income of the assessee by virtue of Section 69 of the Act. Therefore, we are unable to see any inconsistency between the findings made by the IAC of the charges made by the ITO and the notice which the ITO had issued. As a matter of fact, some of the decisions, as we shall presently note, made this observation in the context where reasonable opportunity had not been given. Here the assessee was told clearly to reconcile the difference and was asked to explain why the difference amount should not be treated as his concealed income. Therefore, in the facts and circumstances of this case, there was no question of opportunity being given to meet one charge and the charge being upheld on other basis.

16. In this connection, reference may be made first to the decision of the learned single judge of the Madras High Court in the case of *S. SANTHOSA NADAR Vs. FIRST ADDITIONAL Income Tax OFFICER, TUTICORIN AND ANOTHER.*, . There, as a voluntary return was filed after the period of four years from the close of the assessment year, the same was not a valid return and it was held that such a case should be regarded as if no return had been filed at all. It could not be said in such a case that there had been concealment of the particulars of income or deliberate furnishing of inaccurate particulars and Section 28(1)(c) of the Indian I.T. Act, 1922, which is in pari materia with the present Section 271(1)(c), would not be applicable. According to the Madras High Court, the case would come only within the scope of Section 28(1)(a) which made it punishable if an assessee fails to file the return without reasonable cause. It was held that Section 28(1)(a) and Section 28(1)(c) were mutually exclusive. Now, Section 29(1)(a) deals with failure to file the return without reasonable cause of the total income and Section 28(1)(c) deals with the offence of concealment of income or deliberately furnishing inaccurate particulars. As would be apparent from the above narration of the facts of that case, the facts of this case with which we are concerned are entirely different from the facts before the Madras High Court. We are not concerned with Sections 28(1)(a) and 28(1)(c) of the Indian I.T. Act, 1922, but we are concerned with two different limbs of Sections 271(1)(a) and 271(1)(c) of the I.T. Act, 1961, which are in pari materia with Sections 28(1)(a) and 28(1)(c) of the Indian I.T. Act, 1922.

17. Next decision upon which reliance was placed was a Bench decision of the Gujarat High Court in the case of *Commissioner of Income Tax, Gujarat I Vs. Lakhdhir Lalji*, . There the ITO added a sum of Rs. 58,000 which he held that the assessee had realised by the sale of 1,383 bags of garlic and concealed, and issued a notice to the assessee u/s 274 of the I.T. Act, 1961, for levying penalty

for concealment of income. As the amount of penalty leviable would have been more than Rs. 1,000, he referred the case to the IAC. On appeal from the assessment order, the AAC had held that 1,383 bags of garlic were included in the stock of the assessee and that a sum of Rs. 34,000 should be added on the footing of under-valuation of the stock and not Rs. 58,000. " The IAC -took note of the AAC's order and levied a penalty of Rs. 7,400 u/s 271(1)(c) on the ground that the assessee had deliberately furnished inaccurate particulars of his income. On appeal from the IAC's "order levying penalty, the Appellate Tribunal held that the order of the IAC was without jurisdiction as his jurisdiction was restricted to those items of concealment of income with regard to which the ITO was satisfied that there was concealment of income. On a reference to the High Court it was held that the penalty proceedings had been commenced against the assessee on a particular footing, that is to say, concealment of income, but the final conclusion for levying the penalty was based on a different footing altogether, viz., on the footing of furnishing inaccurate particulars of income. Under the circumstances, it could not be said that the assessee had been given a reasonable opportunity of being heard before the order imposing the penalty was passed. The very basis for the penalty proceedings against the assessee initiated by the ITO disappeared when the AAC held that there was no suppression of income by the assessee. The conclusion of the Tribunal that the IAC had no jurisdiction to impose a penalty u/s 271(1)(c) for concealment of income was correct. Now, as would be evident from the narration of the facts of that case, there the basis upon which the Division Bench of the Gujarat High Court proceeded was that before imposing penalty reasonable opportunity had not been given to the assessee of the offence alleged against him. Now, in the facts and circumstances of this case and in the background that the assessee was asked to explain the difference between the two valuation reports and was further asked to explain why the difference between the estimated valuation of the departmental valuer and his own valuer should not be treated as concealed income and, thereafter, treating it on that basis, penalty was imposed and the IAC considering the explanation of the assessee upheld the findings that there was concealment of the particulars of income which was also revealed from his books of account, there was no question of the assessee being not heard or not giving a reasonable opportunity to the assessee in the facts of this case unlike in the case before the Division Bench of the Gujarat High Court. It is true that if notice is given in respect of one offence only and the finding is based on another then we could say that the law was not complied with. Further, it was found in that case that there was no concealment as such. In this case, the position is somewhat different. In this case, the concealment was found and the Tribunal upheld the decision though for a reduced amount. Therefore, in our opinion, the observations of the Division Bench of the Gujarat High Court would not be applicable to the facts and circumstances of the instant case.

18. Reliance was placed on a Division Bench decision of the Jammu and Kashmir High Court in the case of Additional Commissioner of Income Tax, Etc. Vs. Sadiq

Ali and Bros., , where the Chief Justice S. Murtaza Fazl Ali found that from a perusal of Section 271(1) of the I.T. Act, 1961, it was manifest that before this section could apply, the authority concerned must be satisfied that the assessee had concealed the particulars of his income or deliberately furnished inaccurate particulars of such income. Although the section did not require mens rea, yet, as the provisions were of a purely penal nature, some amount of culpable negligence or wilful omission on the part of the assessee must be established before penalty could be levied. In that case, in the assessment of the assessee, a registered firm, for the assessment years 1964-65 and 1965,66, the ITO, with the consent of the assessee, had made certain additions in the trading account of the assessee and certain "additions out of unexplained cash credits amounting to Rs. 96,630 and Rs. 91,970 in the two years respectively. The IAC had levied penalties u/s 271 of the I.T. Act, 1961, of Rs. 15,000 and Rs. 7,000 in respect of the two years. The Appellate Tribunal had deleted the penalties holding that it was a case of unproved cash deposits where the rule laid down by the Supreme Court in Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , as referred to hereinbefore, would apply. It was held by the Division Bench of the Jammu & Kashmir High Court that the decision of the Tribunal was correct and the assessee's conduct fell within the second part of Section 271(1)(c) of the Act and not the first part, that is to say, the assessee was alleged to have deliberately furnished inaccurate particulars of its income. As the assessee had filed its Income Tax returns and had already shown these amounts in its books of account, it could not be said that the assessee had concealed its income so as to bring its case within the four corners of the first part of the section. The word "satisfied " appearing in Section 271(1) which qualified both the clauses of Section 271 was a very strong term and suggested that the satisfaction must be based on cogent and proper materials. The Tribunal, after a consideration of the entire facts and circumstances, had come to a clear finding that the present case was not one of concealment but one of unproved cash deposits. The mere fact that the explanation given by the assessee was not proved to the satisfaction of the Income Tax department or was not correct, could not by itself be sufficient to invoke the penalty under the provisions of Section 271. Further, a part of the explanation submitted by the assessee was, in fact, accepted by the I.T. Dept. which clearly proved the bona fides of the assessee. Moreover, the Tribunal had drawn a clear inference that it was a case of unproved cash deposits and this being a finding of fact, no question of law arose for decision by the High Court.

19. So far as the last part of the finding of the Division Bench decision of the Jammu and Kashmir High Court is concerned, we are not concerned with it. But it appears to us that the facts, as found by the Tribunal and as are confirmed by the Division Bench, were entirely different. There, certain cash credits had been made. These credits were found in the books of account of the assessee. There could not be any question of not furnishing inaccurate particulars as was emphasised by the Division Bench of the Jammu and Kashmir High Court in that case. The fundamental fact that has to be borne in mind is that there the

addition that was made was with the consent of the assessee in most of the cases, as reiterated by the narration of the facts. In this case, the assessee was called upon to explain the discrepancy. The assessee denied that there was any discrepancy. The assessee stated that the amount it had claimed was explained in its books, where the aggregate amount of Rs. 2,11,226 had to be spent for the building for the year ending 31st March, 1971, and 31st March, 1972, and the assessee had given the explanation that certain portions had been constructed at the cost of the tenants. The ITO in his order noted that as to the claim put forward by the assessee before the department certain items of flooring and cubicles were made by the tenants at their own cost, the tenants were summoned u/s 131 upon intimation to the assessee, who appeared before him with their books of account, which were examined, and the deposition of the tenants' representatives and examination of their books were conducted in the presence of the authorised representative of the assessee and a significant note was recorded by the ITO that the authorised representative of the assessee did not cross-examine them. This is apparent from the order of the ITO for the assessment year 1966-67 as appearing at page 27 of the paper book. The ITO further records that it was confirmed by all of the tenants, who were summoned u/s 131, that only wooden removable partition walls, i.e., cubicles, were constructed by them at their own cost and no part of the permanent structure by brick walls was constructed by the tenants. It was also deposed by the tenants, except M/s. Industrial Abrasives, that no part of the flooring work was undertaken by them. It was M/s. Industrial Abrasives who supplied at their own cost 350 sq. ft. mosaic tiles which were set by the landlord and on this account credit a sum of Rs. 440 only may be allowed to the assessee against the estimate made by the departmental valuer during the relevant accounting period. It was also noted that the departmental valuer had included in his report cost of permanent structure only of 5"/3" brick walls for cubicles and no cost of providing temporary nature of partition, i.e., wooden glass, etc., had been included in his estimate. Therefore, it is apparent that the assessee had been asked to explain the difference. The explanation offered by the assessee seems to suggest that there was a certain difference which can be legitimately inferred to be the income of the assessee. The assessee gave an explanation for those differences by stating that the tenants had incurred certain expenses. The tenants were examined in the presence of the assessee. The authorised representative of the assessee was present, but he did not cross-examine the tenants, when they denied this version of the assessee." This conduct of the assessee has also to be borne in mind because, as reiterated by the Supreme Court in the case of Commissioner of Income Tax, West Bengal I, and Another Vs. Anwar Ali, , referred to hereinbefore, though the findings in the assessment proceedings are not conclusive, yet this is a material piece of evidence. The Supreme Court has again reiterated in the said decision that before the addition of the explanation, the entirety of the circumstances had to be taken into account. By the expression "entirety of circumstances", in our opinion, the nature of the additions made, the particulars given by the assessee, the

explanation offered by the assessee, the conduct of the assessee, these are the entirety which are to be taken into account in deciding whether there has been mere failure to disclose the correct income or that there has been concealment or positive act of concealment of income or of inaccurate particulars. Therefore, in our opinion, the decision of the Division Bench of the Jammu and Kashmir High Court, in the facts as found by the Tribunal in this case, do not support the assessee's contention.

20. Reliance was also placed on the decision of the Patna High Court in the case of Commissioner of Income Tax Vs. Patna Timber Works, , where the Division Bench of the Patna High Court was concerned with the case of penalty arising after the introduction of the Explanation to Section 271(1)(c) of the I.T. Act, 1961. It was observed that under the provisions of Section 271(1)(c) of the I.T. Act, 1961, as soon as it was found that there was a difference of more than 20% between the returned and the income assessed, Clause (c) came into operation by the rule of presumption engrafted in the Explanation and it was for the assessee to prove that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. If he succeeded in discharging that onus, no penalty could be imposed u/s 271(1)(c). When a case was covered by the Explanation, then on the failure of the assessee to discharge the onus of proving absence of certain ingredients, the rule of presumption not only covered the matter of conscious concealment or furnishing inaccurate particulars on the part of the assessee, but on a plain and grammatical meaning of the provision, it also ropes in the presumption of the assessed income being that of the assessee. It was difficult to bifurcate the rule of presumption into two and to say that it only affected the first part and not the second. If the Explanation was not attracted, then the onus to prove all the ingredients which were required to be proved even under the amended law is on the department, including the burden of proving that the income was that of the assessee. The charge of furnishing inaccurate particulars of such income could be found by recording a finding that the assessee had furnished such particulars as a result of his fraud, which meant, deliberately or consciously, or such furnishing was as a result of gross or wilful neglect on his part. The word "furnished" also imports some positive act on the part of the assessee. If, therefore, the assessee, while supplying the particulars of his income, gave inaccurate particulars as a result of his fraud or gross or wilful negligence, then and then only he could be subjected to the imposition of penalty under the second part of Clause (c). Unless such ingredients were found, on the finding of a mere difference in the particulars of the income and the figure of income assessed, it could not be said that the assessee furnished inaccurate particulars of such income. What would amount to furnishing of inaccurate particulars with an element of fraud or gross or wilful neglect on the part of the assessee, would depend on the facts and circumstances of each case ; mere negligence in furnishing the particulars which were found to be inaccurate was not enough. The neglect must be neglect of a kind where the neglect was mixed with a conscious, wilful or deliberate act of the assessee. In the case of gross

neglect, however, a conscious or deliberate act might not be there but yet the negligence must be of a severe type. As, for example, non-inclusion of a particular type of income or inclusion of a particular type of expense under the notion that the former was not taxable or the latter was allowable as a revenue expense, was as a result of gross negligence, that is to say, the act or omission was patently wrong in the eye of law and if the assessee had taken some care and exercised some diligence, he would not have committed the act or omission. In other words, the particulars furnished were inaccurate to the knowledge of the assessee at the time of the return or must be deemed to be inaccurate to his knowledge in the eye of law, because the act was done with wilful or gross neglect. The Division Bench of the Patna High Court further went on to observe that the standard of proof applicable to prove a positive fact and the one which was required to prove a negative fact could not be the same. A high standard was always applied for the proof of a positive fact while the standard of preponderance of probability was sufficient to prove a negative fact. The assessee, within the meaning of the Explanation, was required to prove that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part. Ordinarily and generally, there could not be any direct evidence to prove such a fact. The assessee merely had to place materials of the primary facts or the circumstances which in all reasonable probability would show that he was not guilty of any fraud or gross or wilful neglect. He might discharge this onus by placing the facts found in the assessment order to show that the facts found therein had not in the least given an inkling of fraud or gross or wilful neglect on the part of the assessee and, therefore, it must be held without proof of any other fact that there was no fraud committed by the assessee in his failure to return the correct income nor was he grossly or wilfully negligent. It might be necessary in certain cases for the assessee to prove further facts because the materials in the assessment order gave some inkling of fraud or of the assessee being grossly or wilfully negligent and in such a situation it would be necessary for the assessee, if his case was covered by the Explanation, to place some more materials in the shape of oral or documentary evidence or otherwise to prove the negative fact of absence of fraud or gross or wilful negligence. If he succeeded in doing so, then the onus would shift back on the department to prove the positive fact that the failure to return the correct income on the part of the assessee was as a result of his fraud or gross or wilful neglect. In that case, the assessee had filed a return showing an income of Rs. 29,508. Since the rate of gross profit shown in the trading account was low and the trading results were not verifiable, the ITO made an addition on that account. After disallowing certain expenses, the total income computed by the ITO chargeable to tax in the hands of the assessee was Rs. 80,586. The IAC had imposed a penalty of Rs. 6,000 by invoking the law engrafted in the Explanation appended to Clause (c) of Sub-section (1) of Section 271 of the Act. The Appellate Tribunal had set aside the penalty on appeal.

21. The High Court held that in the assessment order the ITO had disallowed two

items of expenses, viz., Rs. 1,000 and Rs. 500. The disallowance was such as would bring the case within the ambit of the words in the second parenthesis in the Explanation. The officer made an addition in the trading account on the ground that the assessee had not maintained any day to day manufacturing account or stock account; therefore, its performance was not amenable to verification. The officer applied the proviso to Sub-section (1) of Section 145 of the Act by enhancing the sale by a sum of Rs. 8,000. The gross profit shown by the assessee in its trading account was about 13 per cent. As against this, the officer estimated the gross profit at 25 per cent. and applied the flat rate. Thus, the materials in the assessment order itself enabled the assessee to discharge its onus of proving that its failure to furnish the correct income, that is, the assessed income, was not as a result of any fraud or gross or wilful neglect on its part. The officer did not find that it was possible for the assessee in the nature of its business to maintain day to day manufacturing account or his stock account, nor did he find any defect in the accounts maintained by the assessee. He did not reject the accounts. He merely applied the proviso to Section 145(1) of the Act which in terms did not attract Section 144. On the facts of the case, therefore, the denial of the assessee or its representative at the time of the argument before the IAC was sufficient and it was thereafter necessary for the department to place further materials to show that over and above the materials in the assessment order there were facts and circumstances on which the failure of the assessee to return the correct income could be attributed to its act of gross or wilful neglect. The Tribunal held that the assessee must be held to have discharged the initial onus of proving that there was no fraud or wilful neglect on his part while submitting the return and that the failure to return what the revenue had estimated as the correct income of the appellant was not as a result of any gross or wilful neglect on the part of the assessee and in the circumstances no penalty was attracted. Accordingly, the order of the Tribunal was upheld. As would be apparent from the above narration, the facts of that case were entirely different. But, at page 458 of the report [1977] 106 JTR 452, the High Court referred to the question as to what was the effect of the amendment of Section 271 in 1964. The High Court observed, after discussing the provisions, that there were some differences and when a case was covered by the Explanation then on the failure of the assessee to discharge the onus of proving absence of certain ingredients, the rule of presumption not only covered the matter of conscious concealment or furnishing of inaccurate particulars on the part of the assessee but on a plain and grammatical meaning of the expression it also roped in the presumption of the assessed income being that of the assessee. It was, therefore, difficult, according to the High Court, to bifurcate the rule of presumption into two and to say that it only affected the first part and not the second. Learned Chief Justice, who delivered the judgment, further observed that if the Explanation was -not attracted then the onus to prove all the ingredients which might be required to be proved even under the amended law was on the department including the burden of proving that the income was that of the assessee. His Lordship thereafter discussed the several cases mentioned

by us before and quoted with approval the following observations in the case of Commissioner of Income Tax Vs. K.C. Behera and Others, :

"It is to be noted that the penalty proceeding continues to be penal in nature even after the introduction of the "Explanation. The quantum of proof necessary to discharge the onus by the assessee would be as in a civil case, that is, by preponderance of probabilities. After applying the Explanation the taxing authorities would take into consideration all the facts and circumstances, pros and cons, and then determine whether the assessee has discharged the onus."

22. After the aforesaid observations, the learned Chief Justice discussed the facts of that case (Orissa) and came to the conclusion that the decision of the Tribunal was correct. Reliance was placed on the said decision in the instant case before us on the ground that here also the accounts had not been rejected. That is true. But, in the facts of this case, the explanation of the assessee in the assessment proceedings was a relevant factor. The assessee did not really dispute that there was a difference between the estimated value of the cost of construction, recorded cost in the assessee's books of account and the estimates submitted by the assessee's valuer as also the estimated cost of the valuation made by the department. The assessee sought to give an explanation. But that explanation was not accepted. The explanation was not so much that the income was not inflated but the money was spent from other source, viz., realisation from tenants which the assessee failed to prove with very cogent reasons as mentioned by the Tribunal. If that is the position then, in our opinion, the facts of this case would turn on a different footing, as the Supreme Court had often reiterated that though the rejection of an explanation in the assessment proceedings would not ipso facto make the assessed income the income of the assessee, the nature of the findings in the assessment proceedings were relevant piece of evidence and the Tribunal had taken that into consideration which could not be ignored at all as the entire circumstances had to be looked into.

23. Reliance was also placed on the observations of this court in the case of Commissioner of Income Tax Vs. Ananda Bazar Patrika P. Ltd., , where this court observed that when the original basis of initiation of the penal proceedings was altered or modified by the appellate authority, the authority initiating the penal proceedings had no jurisdiction thereafter to proceed on the basis of the findings of the appellate authority. The Calcutta High Court followed, in that case, the aforesaid observations of the Gujarat High Court, in the case of Commissioner of Income Tax, Gujarat I Vs. Lakhdhir Lalji, , which we have mentioned hereinbefore. In the case of Commissioner of Income Tax Vs. C.K. Naha and Bros., , this court again held that the IAC could only decide the particular charge of concealment of a particular income which was referred to him by the ITO and the revenue was obliged to prove that particular charge of concealment of that amount. In this case, the learned advocate for the assessee strenuously urged before us, as we have mentioned before, that as the report of the departmental valuer had been rejected, the entire basis was gone. We are unable to agree. The

basis was that the assessee had not returned its correct income or furnished his full income or concealed its entire income knowing it to be the income and further that the entries in the books of account were the devices of the modus operandi to conceal the said income and those books of account were furnished in the form of particulars submitted to the ITO when called upon to do so and that the quantum of income had been altered. But the basis of the charge before the ITO as well as the IAC and the ground upon which the Income Tax Tribunal had upheld the order of composition of penalty remained the same. The same view was reiterated in the case of Padma Ram Bharali Vs. Commissioner of Income Tax, , where it was observed that the two separate charges in respect of two separate offences could not be sustained. In the case of Commissioner of Income Tax, Gujarat I Vs. S.P. Bhatt, , it was not the case of the ITO that any particular entries in the books of account were false or any particular items of purchase or sale were omitted to be entered in the books of account. It was only because the figures of profit appearing in the books of account could not be verified by him on account of lack of verificatory records that the ITO estimated and the court held that there was no obligation on the assessee to maintain any verificatory records so that lack of maintenance of such records could not be regarded as neglect on the part of the assessee. But, in the instant case, that is not the position. Here, the assessee did maintain its record. That record and the entries in the books of account, on examination by the officer in the facts of this case, were found to be incorrect and incorrect to the knowledge of the assessee. Therefore, the ratio of the principles enunciated in that decision would not be applicable to the facts of this case. Reliance was placed on the case of Commissioner of Income Tax Vs. Narang and Company, . There, the court held that the assessee, in the peculiar circumstances, who was required to prove the negative, would be taken to have discharged the onus if he, in the absence of any proof to the contrary, could raise probabilities in his favour or point out circumstances which could create doubts, the benefit of which would be given to the assessee. The facts of that case, it may be reiterated, were entirely different. We have already discussed the other decisions cited. The last decision on this point was the decision in the case of Additional Commissioner of Income Tax Vs. Smt. V. Kanakammal, , where the court had observed that the burden that the assessee had to discharge was not that his true income was what he had returned nor even to establish that what had been assessed as his income had not been properly assessed. But, in this case, in view of Section 69 of the Act and the facts as found by the Tribunal, we are of the opinion that the said principles could not be applied in the facts and circumstances of this case. Reliance was also placed on the case of Tolaram Daga Vs. Commissioner of Income Tax, Assam, . There the court held that where in the accounts of a firm, a deposit was shown to have been made by a third party, the wife of a partner in the firm (the assessee), and who claimed the money as hers and that it was she who made the deposit and the genuineness and regularity of the accounts had not been challenged, the accounts were relevant and are prima facie proof of the entries and the correctness thereof u/s 34 of the Evidence Act and the entry

therein was prima facie proof that the amount in question was deposited by the person in whose name the deposit stood. The mere fact that the third party making the deposit happened to be the wife of the assessee did not ipso facto make the assessee come into the knowledge of the sources from which the money was realised. Under law, in the absence of any specific proof of that knowledge it could not be assumed that the assessee had the knowledge in question within the meaning of Section 106 of the Evidence Act. To require the firm or the partners thereof to adduce proof of the sources from which the deposit was made would be placing a burden on the firm which was not required or justified by law. The facts, as we have narrated before, in that case also were entirely different. Reliance was also placed on the case of Commissioner of Income Tax, Mysore Vs. Jewels Paradise, . There, the facts were that in the assessment of the assessee for the assessment year 1964-65, the ITO had included u/s 69A of the I.T. Act, 1961, an amount of Rs. 81,142 which had been assessed in the raids conducted in the assessee's shop and the residences of the partners, on September 6, 1963. The IAC imposed a penalty u/s 271(1)(c) of the Act. On appeal, the Appellate Tribunal set aside the penalty holding that apart from the fact that the amount was included by virtue of the provisions of Section 69A, there was no other material gathered by the IAC from which it could be inferred that the amount represented the income of the assessee for the accounting year ending on 30th June, 1963, and accordingly there was no concealment of income established. It was held that the amount was included in the assessment because the raid happened to be within the financial year 1964-65, and merely on that it did not follow that the amount represented the income of the previous year of the assessee for which it was bound to file the return and disclose the amount. Section 271(1)(c) could be invoked if the assessee had concealed the income which he was bound to disclose for the relevant assessment year and not in respect of the amount which was included by virtue of Section 69A in the assessment for the said assessment year. Therefore, the Tribunal was justified in cancelling the penalty. Here, the facts again were different. The provision of Section 69A was different. Section 69A itself makes the investment an income of the assessee for the year in question. If that is so, then in view of the Explanation read with Section 69, in our opinion, the facts of the instant case would distinguish on facts the other case mentioned just before. The same principle was reiterated by the Gujarat High Court in the case of Commissioner of Income Tax, Gujarat-III Vs. Vinaychand Harilal, , where at page 759, Chief Justice Diwan observed that the mere fact that there was some wealth in the hands of the assessee would not mean that there was accretion to the wealth of the assessee. Unless and until the department was able to bring home the fact that there was accretion to the wealth of the assessee there could not be any question of adverse inference being raised against the assessee. In this case, in view of the facts that had been found by the Tribunal upholding the order of the ITO, the fact which emerged was that there was an unexplained investment, that the valuation of investment was quantified in the assessment proceedings, the assessee was given an

opportunity, the assessee gave the explanation which was not only found to be unsatisfactory but also was found to be incorrect and false. In that light it was held that the provision of the Explanation was clearly attracted, the onus lay on the assessee and in our opinion the Tribunal was not unjustified in taking into consideration the explanation given by the assessee in the assessment proceedings. In the case of Commissioner of Income Tax Vs. Lal Babu, , the Patna High Court, more or less, reiterated the same principles, but in the background of different facts.

24. In that view of the matter, in our opinion, the Tribunal, in view of the Explanation, was justified in upholding the order of penalty. But the next question that arises is whether the order made by the Income Tax Appellate Tribunal upholding the quantum of penalty is valid in law or not. It has been held by the Supreme Court in the case of D.M. Manasvi Vs. Commissioner of Income Tax, Gujarat, II Ahmedabad, that the Income Tax Appellate Tribunal in disposing of the appeal was obliged to dispose of the appeal in accordance with the law even though the assessee did not press the appeal or was not present at the time of assessment. Reliance was also placed on the decision of this court in the case of Dilip Kumar Mitra Vs. Commissioner of Income Tax, . There the assessee, an individual, did not disclose the income from the business carried on by the firm, viz., Hindusthan Trading Co. The ITO included the income of the said firm on assumption. The AAC dismissed the appeal. The Tribunal found that the assessee admitted in earlier appeal that the business belonged to him. In that view of the matter, it upheld the inclusion of the income from the said business. In the penalty proceedings, the IAC held that the assessee had concealed the particulars of income and furnished inaccurate particulars thereof with regard to the income from the business of the firm and levied penalty u/s 271(1)(c). The levy of penalty was sustained by the Tribunal. On a reference, it was held that, in the facts and circumstances of the case, the lower authority was justified in levying the penalty on the assessee on the business income from the firm. On the second question the High Court refrained the question whether, on the facts and in the circumstances of the case, the Tribunal was justified in confirming the quantum of penalty. As in the quantum appeal, the Tribunal had remanded the case for ascertaining the question of inclusion of capital gains in the assessment, the High Court felt that the question must be answered in the negative. In the instant" case, the IAC had imposed penalty which was not the maximum penalty imposable taking into consideration the total amount that was assessed in the assessment year. In the quantum appeal, the Tribunal had reduced the amount of assessed income on the basis of income which escaped assessment but about the quantum of penalty, the Tribunal had upheld the entirety of the quantum. The Tribunal discussed as to whether there was any justification for varying the percentage and upheld the order of the IAC, who had maintained the percentage of the concealed income. The Appellate Tribunal, though it reduced the quantum of the escaped income, yet had maintained the same amount of penalty with increased percentage on the escaped income. This in our opinion, the Tribunal

was not justified in doing on the facts and circumstances of the case. Therefore, in that view of the matter, we would answer question No. 1 in the affirmative. So far as question No. 2 is concerned, we would say that the Tribunal was right in upholding the order of imposition of penalty but the Tribunal was not right in upholding the order of penalty in its entirety and the quantum that was imposed. We will direct the Tribunal in the light of the observations made in this judgment to recompute the amount of penalty imposable on the assessee. The question No. 2 is answered in the manner accordingly.

25. In the facts and circumstances of the case, each party will pay and bear its own costs.

Sudhindra Mohan Guha, J.

26. I agree.