
(1983) 05 DEL CK 0003

In the Delhi High Court

Case No : Income Tax Reference No"s. 131 of 1974 and 65 of 1975

The Additional Commissioner of Income Tax

APPELLANT

Vs

Joginder Singh

RESPONDENT

Date of Decision : 20-05-1983

Acts Referred:

Citation : (1984) 40 CTR 385 : (1984) 40 CTR 285 : (1983) 15 TAXMAN 569

Hon'ble Judges : S. Ranganathan, J;Leila Seth, J

Bench : Division Bench

Advocate : K.K. Wadhera, P.N. Misra, K.S. Suri and S.S. Madan, for the Appellant;

Judgement

S. Ranganathan, J.

(1) It is well settled that for the purposes of assessment to income tax the law to be applied is the law that is in force in the assessment year; in other words, the Income Tax Act as it stands amended on the first day of April of a financial year will apply to the assessment for that year. This principle enunciated by the Privy Council in (1945) 13 ITR 221 (Privy Council) has since been reiterated by the supreme Court in Karimtharuvi Tea Estate Ltd. Vs. State of Kerala, and Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., and other decisions. The two references presently under consideration raise a similar question regarding the law applicable in regard to the levy of a penalty for concealment u/s 271(1)(c) of the Income Tax Act, 1961.

(2) So far as the penalty provisions are concerned, there have been material changes in the statute in several respects and these have brought to the forefront a good deal of controversy in regard to the particular provision of law that would be applicable in a particular case. These issues have arisen in the context of three major changes regarding the imposition of levy of penalty under the Income Tax Act. The first set of changes was heralded by the substitution of the Income Tax Act, 1961 in the place of Indian Income Tax Act, 1922. So far as

this change was concerned, however, the statute itself made certain provisions in Sections 297(2)(f) and (g) to these provisions. Notwithstanding this, there were some conflicts and controversies that were set at rest by the Supreme Court in the case of Jain Bros. and Others Vs. The Union of India (UOI) and Others, . The second set of changes was effected by the Finance Acts of 1964, 1968 and 1975. The Finance Act of 1964 deleted the word "deliberately" in Section 271(1)(c). and also introduced an Explanation casting the onus of proof on the assessed in cases where the difference between the returned income and the assessed income exceeded a particular margin. The Finance Act of 1968 amended the quantum of, penalty that was impossible in cases of concealment. Under the pre-1968 provisions the quantum of penalty was measured with reference to the tax which was sought to be avoided by means of the concealment that was being penalised, i.e., by the amount of difference between the tax on assessed income and that on the returned income The penalty varied from 20 percent to 150 percent of the tax sought to be avoided. The new provision as substituted with effect from 1-4-1968 by the Finance Act of 1968 provided for the computation of the penalty at figures varying between 1,00 percent and 200 percent of the amount of income in respect of which there has been concealment. Several cases have arisen in regard to the applicability of these provisions to particular cases and it is this aspect of the controversy that arises in these two references as well. The same type of questions will also arise in respect of the amendments made with effect from 1-4-1976 by the Taxation Laws (Amendment) Act, 1975 which restored the original measure and restricted the penalty to between 100 percent to 200 percent of the amount of tax sought to be avoided as defined in the new Explanation 4. The third major change made in the Act was represented by the amendments to Sections 274 and 275 of the Income Tax Act. Section 274 originally provided that in cases of concealment where the minimum penalty imposable exceeded Rs. 1,000, the penalty was to be imposed by-the Inspecting Assistant Commissioner and Section 275 provided that an order of penalty was to be passed before the expiration of two years from (to put it briefly) the date of completion of the assessment. These provisions were, however, amended by the Taxation Laws (Amendment) Act, 1970 with effect from 1st April, 1971. Section 274(2) was amended to provide that the Inspecting Assistant Commissioner will be the authority to levy the penalty in cases where the amount of income in respect of which concealment was alleged exceeded the sum of Rs. 25,000 and Section 275(2) was amended by extending the period of limitation to two years from the end of the financial year in which the proceedings in the course of which action for the imposition of penalty had been initiated were completed or six months from the end of the month in which the appeal against the assessment before the Appellate Assistant Commissioner or the Tribunal is disposed of The details of the amendments are not relevant for our present purposes. It may also be mentioned that with effect from 1-4-1976, Section 274(2) has been omitted and the power to impose penalty in all cases has been restored to the Income tax Officer. This series of amendments has also given rise to a large number of Judicial decisions taking different views. We are mentioning these three sets of

controversies here because, in our view, the principles applicable to the three sets of controversies are different and in order to make it clear that the judicial decisions relating to the first or the third sets of controversies which have also been cited before us) are not to much help in deciding the issue in the present reference which relate only to the second aspect which has been referred to earlier. We shall, Therefore, in our discussion, confine ourselves to this group of cases in coming to a conclusion on the issues raised before us.

(3) Before proceeding further it may be useful to give a brief narration of the relevant facts. Both the references relate to the assessment year 1967-68, the previous year being the financial year 1966-67. In Itr 131174 the assessed. Shri Joginder Singh, filed a return showing an income of Rs. 8,451. (This figure mentioned in the reassessment order may be a mistake for Rs. 4,481 which figure was also repeated by the assessed in the return u/s 148 referred to below). The exact date of this return is not available but it was admittedly filed prior to 1-4-1968. The assessment was also completed on 10-1-1969 on an income of Rs. 8,481 (From the figures given in the reassessment order, it appears that an addition to Rs. 4,000 may have been made while determining the income from a truck). Subsequently, the Income Tax Officer had reason to believe that the income of the assessed had escaped assessment. He issued a notice u/s 148 in response to which the assessed filed his return of income on 7-7-1970 showing an income of Rs. 4,481 as before. The assessment was completed on a total income of Rs. 14,481 which included the further addition of a sum of Rs. 6,000 (representing a proportionate part of the cost of construction of a house property the sources for which had not been properly explained to the satisfaction of the Income Tax Officer) which was treated as the assessed's unexplained income for the assessment year in question. The re-assessment was completed on 5-10-1970. Simultaneously, with the re-assessment the Income Tax Officer initiated penalty proceedings u/s 271(1)(c) which were referred to the Inspecting Assistant Commissioner, who by an order dated 19-9-1972, imposed a penalty of Rs. 6,000 by reference to the addition made to the returned income as representing the unexplained investment. The assessed preferred an appeal to the Tribunal. Though the assessed contended that the facts of the case did not bring out any concealment on his part in respect of which a penalty could be imposed, this contention was repelled by the Tribunal. Indeed, it appears that before the Tribunal it was conceded on behalf of the assessed that in view of the decision of the Delhi High Court in the case of Durga Timber Works Vs. Commissioner of Income Tax, the reliability of a penalty in the circumstances of the case could not be challenged. The only question that was raised for the consideration of the Tribunal was whether the amount of penalty [which the Inspecting Assistant Commissioner had put at 100 percent of the concealed income on the basis of the provisions of section 271(1)(c) as amended with effect from 1-4-1968] was properly levied or whether the amount of penalty livable should be computed with reference to the provisions of Section 271(1)(c) as they stood prior to 1-4-1968. This question was answered by the Tribunal by

stating that since the penalty related to the assessment year 1967-68, the amendment made to Section 271(1)(c) which was effective from 1-4-1968 could not be applied. In reaching this conclusion the Tribunal relied on the decision of the Kerala High Court in HAJEE K. ASSAINAR Vs. COMMISSIONER OF Income Tax, KERALA., and an earlier decision reached by one of the Delhi Benches of the Tribunal. In this view of the matter the Tribunal while upholding the penalty directed that its quantum should be reduced to the minimum under the provisions as they stood prior to the amendment of 1968. In other words, the Tribunal directed that the penalty amount should be reduced to 20 percent of the tax attributable to the amount of income concealed. It is against this conclusion of the Tribunal that the Commissioner of Income tax has come up in reference to this court. The question of law referred to this court is in the following terms :

"WHETHER the Tribunal was right in law in holding that the provisions (of) to section 271(1)(c) before their amendment as and from 1-4-1968 were only applicable in the instant case?"

Turning now to Itr 65/75 the facts are somewhat similar. The first return of income of this assessed, Shri Hari Ram, was filed on 1-9-1967 showing an income of Rs. 1,026. On 4-9-1968 a revised return was filed declaring a total income of Rs. 3,016. Yet another revised return of income was filed on 20-1-1-1968 wherein the income was shown at Rs. 7,726. The assessment was, however, completed on a total income of Rs. 17,700. In the assessment order dated 25-9-1969 the Income Tax Officer referred to the return showing an income of Rs. 5,016. He mentioned that the assessed had purchased a truck for Rs. 42,638. In explaining the sources for this investment the assessee had pointed out that he had advanced a sum of Rs. 8,000 to some party which had been returned to him with interest of Rs. 5,200 on 13-7-1966, i.e., during the previous year. The Income Tax Officer completed the assessment by taking a sum of Rs. 3,750 as income from plying of the truck, Rs. 5,200 as interest income and a sum of Rs. 8,750 as share income from a firm. At the time of the completion of the assessment the Income Tax Officer also issued a notice u/s 271(1)(c) and referred the matter to the Inspecting Assistant Commissioner u/s 274(2). The Inspecting Assistant Commissioner after considering the facts of the case came to the conclusion that the sum of Rs. 5,200 by way of interest had been concealed by the assessed from the two returns filed on 1-9-1967 and 4-9-1968 and had been disclosed only in the return filed on 20-11-1968. He pointed out that the return of income filed on 1-9-1967 got merged into the revised return filed on 4-9-1968. In the return dated 4-9-1968 the assessed had omitted to include the sum of Rs. 5,200. This being so the Inspecting Assistant Commissioner was of opinion that the assessed had concealed the sum of Rs. 5,200 from the return dated 4-9-1968. In his opinion a penalty of Rs. 5,200 was imposable in respect of this concealment. This amount was computed on the basis of the provisions of Section 271(1)(c) as amended on 1-4-1968. The assessed preferred an appeal to the Tribunal. The Judicial Member of the Tribunal was of the opinion that so far as the applicability of the penal provisions was

concerned it was clear that the assessed had concealed the particulars of his income but that "since the offence pertains to the assessment year 1967-68, the accounting period being 1-4-1966 to 31-3-1967, we do not think the amended penal provisions would be held to be applicable in respect of the case of the assessed." In his view the penalty livable should be the minimum penalty under the law as it stood prior to 1-4-1968. The Accountant Member concurred with this conclusion, namely, that the penalty should be calculated on the basis of the provisions as they stood prior to 1-4-1968 but his reason for coming to this conclusion was on the ground that the first return of income had been submitted on 1-9-1967. Thus, both the members, though for different reasons, agreed that the amount of penalty imposed should be reduced and it is against this conclusion that the Commissioner of Income Tax has come up in reference before us. The question of law referred to us in this reference reads as follows :

"WHETHER on the facts and in the circumstances of the case, the Tribunal was right in holding that minimum penalty u/s 271(1)(c) of the Incometax Act. 1961 would be livable under the law prior to 1 -4-1968?"

(4) From the above narration of facts it will be seen that the question to be decided in both the cases is whether the penalty has to be calculated with reference to provisions of Section 271(1)(c) as they stood before 1-4-1968 or with reference to those provisions as they stood amended with effect from 1-4-1968. If the former provision is to be applied ,the penalty will be computed cm the basis of the tax sought to be avoided which will be comparatively less, whereas, if the later provisions were applicable, the penalty would be computed on the basis of the amount concealed which is a much larger figure.

(5) We have pointed out earlier that the Tribunal in Itr 131/74 and the Judicial Member in Itr 65/75 rested their conclusion in favor of the applicability of the unamended provisions on the simple ground that since the penalty related to the assessment year 1967-68 and the previous year was 1966-67, the amendment to those provisions with effect from 1-4-1968 would not be applicable to the case of the two assessed now before us. Apparently the line of argument or reasoning on which this conclusion is based is the same which was applied by the Supreme Court in the case of Karirntharuvi Tea Estate Ltd. (supra) regarding the provisions applicable to an assessment under the Income Tax Act. This view of the Tribunal, however, cannot be said to be correct in view of the decision of the Supreme Court in the case of Brij Mohan Vs. Commissioner of Income Tax , New Delhi, . The same decision also answers the contention of the learned counsel for the Revenue that, since the concealment is detected at the time of the assessment, it is the law in force at the time of completion of the assessment that would be applicable. Since this a direct decision of the Supreme Court touching the point at issue before us; it is necessary to refer to this in some detail In that case, the assessed had filed a return of income for the assessment year 1964-65 on 24-4-1968 showing a share income from one of two firms in which he was a partner. He did not, however, show the share income from the

other firm. The Income Tax Officer issued a notice u/s 143(2) but, there having been no compliance therewith, made a best judgment assessment and added certain other items of income. On appeal, there was a reduction but the figure of concealed income was determined by the Appellate Assistant Commissioner at Rs. 7,357. The Income Tax Officer instituted penalty proceedings which were referred to the Inspecting Assistant Commissioner. The Inspecting Assistant Commissioner on the basis that the concealed income was Rs. 7,357, imposed the penalty of a like sum on the basis of the amendment to Section 271(1)(c) with effect from 1-4-1968. On appeal, the Appellate Tribunal confirmed the levy of the penalty by reference to the amended provision but reduced the amount of penalty on the merits. The assessed applied for a reference and a direct reference was made by the Tribunal to the Supreme Court on the question as to whether the Tribunal was, in law, right in sustaining the penalty by applying the provisions of Section 271(1)(c)(iii) of the Income Tax Act, 1961, as amended with effect from April 1, 1968. "The Supreme Court answered this question in the affirmative and in favor of the revenue. The Court rejected the contention urged on behalf of the assessed that the penalty must be governed by the law pertaining to the assessment year. It observed:

"IN our opinion, the assessment of the total income and the computation of tax liability is a proceeding which, for that purpose, is governed by entirely different considerations from a proceeding for penalty imposed for concealment of income. And this is so notwithstanding that the income concealed is the income assessed to tax. In the case of the assessment of income and the determination of the consequent tax liability, the relevant law is the law which rules during the assessment year in respect of which the total income is assessed and the tax liability determined. The rate of tax is determined by the relevant Finance Act. In the case of a penalty, however, we must remember that a penalty is imposed on account of the commission of a wrongful act, and plainly it is the law operating on the date on which the wrongful act is committed which determines the penalty. Where penalty is imposed for concealment of particulars of income, it is the ruling on the date when the act of concealment takes place which is relevant. It is wholly immaterial that the income concealed was to be assessed in relation to an assessment year in the past. We do not think that the cases to which the Tribunal has referred can be said to differ on this. The concealment of the particulars of his income was effected by the assessed when he filed a return of total income on April 24, 1968. Accordingly, it is the substituted clause (iii), brought in by the Finance Act, 1968 which governs the case. That clause came into effect from April 1, 1968."

(6) Before the Supreme Court, it was also argued by the assessed that, under Section. 139, the return of income should have been filed by the end of September, 1964, It was argued that though the return put in by the assessed was filed as late as 1968 it was accepted by the Income Tax Officer and so it should be deemed that the return was treated as filed within time or in other words that the return had been filed by 30-9-1964. On the basis of this fiction it

was contended that the concealment must be deemed to have taken place prior to 1-4-1968. This contention was also rejected by the learned Judges observing : This contention is also without force. Under S. 139 of the Act, although the statute itself prescribes the date by which a return of income must be filed, power has been conferred on the ITO to extend the date of furnishing the return. A return filed within the extended period is a good return in the sense that the ITO is bound to take it into consideration. But nowhere does S. 139 declare that where a return is filed within the extended period it will be deemed to have been filed within the period originally prescribed by the statute .On the contrary, the section contains a provision for payment of interest where the return is filed beyond the prescribed date even though within the extended period. That is evidence of the fact that the return filed during the extended period is not regarded by the statute as filed within the time originally prescribed."

(7) It will be observed that the Supreme Court has laid down the principle applicable to such cases in Very simple terms. The penalty is levied for an offence committed by the assessed, namely, the conscious omission of certain income from the return. The law relating to penalty will, Therefore be the law as it stands on the date of the commission of the offence for which the penalty is sought to be levied. Since the offence comprises of concealment or omission of income from a return, it is the date of the relevant return that will govern the determination of the issue. In the case before the Supreme Court there was only one return and hence there was no difficulty in holding that the law as it stood on the date of that return was applicable on the facts of the case. The two references before us, however, involve a further complication in the facts which creates a certain amount of difficulty in straightway applying the principle laid down by the Supreme Court to the facts of these cases. The complication arises out of the circumstance that, in the references before us, the assessed has filed not one but more than one return, ana there has been a concealment or omission in more than one return. The question Therefore now arises before us as to which of these returns and which of these concealments or omissions should be taken into account in determining the law that is applicable in these particular cases. We shall, Therefore, proceed to address ourselves to this issue.

(8) It will be clear at the outset that the above question may arise in two types of situations. The first is where, in the course of the assessment proceedings before the Incometax Officer the assessed has filed a. number Of returns, the first of which may be described as the original return, the other(s) being what are, or purport to be, revised. returns u/s 139(5) of the Act. The other type of cases is where there are different sets of proceedings before the Income Tax Officer, one the original proceedings and the other(s), the proceedings for reassessment initiated u/s 148 of the Act (which may be one or more Khan one). There may be one return (onset of returns) in the original proceedings and another return (or set of returns) in the course of the reassessment proceedings. We shall consider these situations separately taking up for consideration, for the sake of simplicity, a case where there are two returns only one the original return

and the second one, a revised return; or, one a return at the time of the original assessment and the other a return at the stage of reassessment. Also, with a view to simplifying matters, we shall use in the discussion below, the compendious expressions "concealed", "concealed income". and their variations to refer to all cases. of understatement of income in a return in such circumstances as to attract penal action u/s 271(1)(c) instead of repeating, over and over again, the formula "conceals or furnishes inaccurate particulars of income" used in the section or referring specifically to all the situations" covered by these words read with the several Explanations .

(9) The first situation may be thought to lend itself to a very simple solution for a short reason. Where there is only one set of assessment proceedings before the Income Tax Officer, viz.. the original assessment proceedings, the returns filed filed an assessed . will fall either under sub-sections (1) to (4) or under sub-section (5) of Section 139 of the Act. It is only in the latter class of these cases that a question of more than one return will arise. Under the scheme of Section 139, the legislature: itself permits an assessed to file a revised return. The clear intendment is that, where a proper revised return is filed, it should take the place of the original return and be treated as the return for the assessment year which is to form the basis for all further proceedings by the Income Tax Officer. In other words, once a proper revised return is filed, the earlier return has to be treated as having been superseded and, Therefore, as non est for all practical purposes. So, if can be suggested, all that is necessary in such case is to find out whether the second or subsequent return filed by the assesses can be properly called a revised return u/s 139(5). If the answer is in the affirmative, then its effect, under the statute, is to virtually supersede the earlier return. It will be the return on the basis of which the officer will have to complete the assessment and, to most intents and purposes, will govern the assessed's liabilities under the statute including the issue of penalty. If, on the other hand, the subsequent return is not a proper return u/s 139(5), it will not have the status of a "revised return" at all and the liabilities and obligations of the assessed will have to be judged by reference to the earlier return filed by him. A subsequent return will be a proper return u/s 139(5) if it falls within the terms of that sub-section.

(10) This appears to be a simple solution which can be easily applied to the circumstances of any particular case But, in order to decide whether this simple solution can be accepted, it is necessary to examine, a little more deeply, the scope of Section 139(5). Prima facie, the language of this sub-section is so wide as to cover practically any second return filed before the assessment is made and within the time mentioned. For every such return will change or modify the particulars submitted in the earlier return (s) and thus purport to revive the earlier one in regard to an "omission or wrong statement" therein whatever might have been the reason for such omission or wrong statement. Even where an assessed has deliberately concealed any item of income in a return but files another return of income including it, after the Income Tax Officer has detected it, he could urge that he had made a "wrong statement" in the original return

which he wished to set right by the second return and that, Therefore, the second return should be treated as a valid return u/s 139(5). If this interpretation of Section 139(5) were to be accepted, the solution suggested above would provide a heaven to all assesseds for they would be able to avoid penalty action even where they have deliberately concealed income in the first return if, subsequently and even after the officer has detected the concealment, they can manage to file a return disclosing the concealed income before an assessment is actually made. Such result would be very inequitable and unintended. Judicial decisions have, Therefore, attempted to avoid such a result in one or two ways. They have either held that the benefit of this provision Section 139(5) can be availed of only to rectify or revise innocent and unintentional omissions and wrong statements made in the earlier returns. It cannot be made use of by a person who has made a false return, knowing it to be false to "revise" the return so as to show the income concealed earlier; in other words, that such a return cannot be properly termed a revised return u/s 139(5). Or they have held that a penalty for concealment in a return cannot be avoided merely because a return is filed subsequently disclosing income previously. "concealed" (it being immaterial whether such a return could be called a "revised" return within the meaning of Section 139(5) or not) although the filing of such a return and the circumstances in which it is filed are taken into account for deciding whether there was a "concealment" which merits a penalty as well as the quantum of the penalty to be imposed. The following cases may be referred to as illustrative of these principles : *Vadilal Ichhachand Vs. Commissioner of Income Tax, Bombay North, Kutch and Saurashtra, Ahmedabad*, , *Dayabhai Girdharbhai Vs. Commissioner of Income Tax, Madhya Pradesh and Bhandara, Nagpur*, , *COMMISSIONER OF Income Tax, HYDERABAD Vs. ANGARA SATYAM.*, , *Sivagaminatha Moopnar and Sons Vs. Commissioner of Income Tax, Madras*, , *Commissioner of Income Tax Vs. Ramdas Pharmacy*, . *Whittle Anderson Ltd. Vs. Commissioner of Income Tax, Bombay City I*, , *F.C. Agarwal Vs. Commissioner of Income Tax*, , *Padma Ram Bharati v. Commissioner of Income Tax 1977 110 Itr 55*, *Sulemanji Ganibhai Vs. Commissioner of Income Tax*, , and *Kumar Jagadish Chandra Sinha Vs. Commissioner of Income Tax*, .

(11) We think it is unnecessary, for deciding the issue before us, to discuss the precise scope of Section 139(5); for it seems to us that, on any view of the matter, the answer to the present issue suggested earlier on the basis of Section 139(5) will be impracticable. If, on the one hand. Section 139(5) is given a wide interpretation so as to cover revision of concealed items as well, the solution will lead to the anomalous and unintended result which has been pointed out earlier and which judicial decisions have consistently and persistently been trying to avoid. The consensus and, indeed, unanimity of judicial opinion is to the effect that in such cases penalty should be levied with reference to the original return containing the concealment and the so-called revised return u/s 139(5) if it can be so called should be ignored. On the other hand, if Section 139(5) is given a restricted meaning and confined to cases where the second or subsequent

return only seeks to rectify or revise unintentional and innocent omissions and wrong statements of the earlier return, the position will be no different. It must be pointed out. at the outset, that, on this narrower interpretation, the status of a second return as a "revised" return would depend not on. whether the original or the second return contains concealments of income but on the purpose of the second return vis-a-vis the first return. To illustrate, an assessed may have concealed an item of income from both the first and second returns and the "revised" return may only rectify certain patent errors in the earlier one in so far as disclosed items are concerned. The second return in such a case would be a revised return notwithstanding that some items of concealed income are omitted- from both. On the contrary, if an assessed has deliberately left out an item in the earlier return and files a second return before assessment to include it because of actual or of fear of in spending ,discovery, the second return can hardly be called a revised return and the offence earlier committed is not wiped out by belated repentance. A case where the second return has a combined objective partly to correct a patent error and partly to disclose what had earner been concealed -would have to be treated as falling in the second category referred to above qua the disclosure of concealed items. If we examine the solution indicated in the light of this position it will be seen that the solution suggested is illogical and would result in discriminatory treatment of assesseds in like situations. It appears to us erroneous in principle to say that the penalty imposable on an assessed who is found to have concealed an item of income in a return filed by him should be made to vary and become more or less because of the accidental circumstance that he has filed a revised return setting right certain omissions or errors or wrong statements in the first return that have no connection or nexus with the items of income concealed by him. To say, for example, that an assessed who returned only a salary income of Rs. 30,000 but concealed his business income in a return filed prior to 1-4-1968 should be called upon to pay a higher penalty merely because he found that the salary income should have been Rs. 38,000 and revised the return in this respect after 1-4-1968 does not seem to make sense particularly because no amount of repentance on his part for the concealment of business income can help. him to file a "revised" return showing the business income so as to avoid penalty in respect of his earlier concealment. Likewise, after the amendment of 1975, there would be no equity in holding a person who has concealed an income in a return filed prior to 1-4-1976 liable for a smaller penalty merely because he has filed a revised return after that date rectifying certain other errors or mistakes that had crept into his earlier return unconnected with the concealed income. This illustration will show the illogicality in principle of trying to correlate the offence of concealment to a revised return when such revision has no nexus to the concealment and cannot help the assessed to remedy the concealment or make amendments for it. The concealment in the original and revised returns can be treated as independent offences, if at all, only if Section 139(5) can be said to permit a revised return setting right earlier false statements or concealments, for, then it could be said that the assessed, despite having had an opportunity to

revise the returns and show the concealed income, failed to do so and thus committed the offence of concealment over again; but we have pointed out how it will be anomalous to base the penalty with reference to the "revised return" even on such an interpretation.

(12) A proper interpretation of Section 271 should steer clear of the above anomalies. That apart, it is necessary to bear in mind that the basic obligation of an assessed is only one, viz., to file a proper and correct return of income for a particular assessment year. It seems appropriate that the offence should be correlated to the point of time when the first return is filed in which concealment took place and that subsequent returns, though they may, in a sense, be said to be repetitions of the concealment, should be left out of consideration. It is the law on the date of the first return in which the income is concealed that should be held to govern the calculations of levy of penalty in such cases.

(13) We shall now turn to the second category of cases where penalty proceedings are initiated in the course of reassessment proceedings. Here, a first reaction would be that it is the date of the return filed in the course of the reassessment proceedings that would be relevant to determine the law that will govern the penalty proceedings. The issue would have been that simple if one could say that a penalty could be imposed in the course of re-assessment proceedings" only for a concealment or offence committed in the course of such proceedings. But, on this issue, there is a long line of decisions", which have received the approval of the Supreme Court in *N.A. Malbari and Bros. Vs. Commissioner of Income Tax, Bombay*, to the effect that it is open to the Income Tax Officer in the course of re-assessment proceedings, to initiate penal action for an offence committed at the time of original assessment. This line of decisions is also based on sound logic which can be illustrated by a simple example. Suppose an assessed, at the time of original assessment, has concealed an item of income but, when called upon u/s 148, files a return which includes the same, there has clearly been no concealment in the course of the reassessment proceedings. To hold that a penalty in the course of reassessment proceedings can be levied only in respect of a concealment during such proceedings would lead to the result that the assessed would escape penalty for an admitted act of concealment for the simple reason that, at this point of time, no imposition of penalty would be at all possible by reference to the original assessment proceedings as such penalty proceedings should have been commenced before the completion of those assessment proceedings. Courts, for this reason, have taken the view that penal proceedings can be initiated in the course of reassessment proceedings", not only for offences or concealment in the course of these proceedings, but also for offences or concealment effected in the course of the original proceedings but detected only in the course of the reassessment proceedings. This principle introduces an element of difficulty in applying the simple test referred to earlier and necessitates a deeper consideration of the position in this category of cases.

(14) Once this principle is recognised, it will be clear that penalty proceedings, even if initiated in the course of reassessment proceedings should be correlated to the return made in the course of the original assessment proceedings and not that filed during the reassessment proceedings. In order to facilitate an easier understanding one may take, as a concrete example, an assessed whose real income is Rs. 50,000 but who, conceals a part thereof. The following types of situations could arise for consideration : (a) The assessed returns Rs. 10,000 which is accepted. However, when notice u/s 148 is given, he returns the income Rs. 50,000 and is assessed thereon. (b) The assessed returns his income as Rs. 10,000 at the time of the original assessment which is accepted by the Income-tax Officer. When notice is given u/s 148; he again returns Rs. 10,000 but the income is determined at Rs. 50,000. (c) He returns Rs. 10,000 for original assessment. The Income Tax Officer does not accept it and completes assessment at Rs. 20,000. When notice u/s 148 is given, the assessed returns Rs. 20,000 but is assessed on Rs. 50,000. (d) The assesses returns Rs. 10,000 but the assessment is completed on Rs. 20,000. In response to the notice u/s 148 he returns Rs. 50,000 and is assessed thereon.

(15) In all these cases, there has been concealment by the assessed in the course of the original assessment proceedings. In two of these cases, the concealment is partly detected at the time of the first assessment and the assessed may or may not have been penalised therefore. In two of the cases, the assessed repeats the offence even at the stage of the reassessment proceedings but in two of them he repents and return the correct income for purposes of reassessment. In all the cases he can be proceeded against for concealment at the stage of the reassessment but such proceedings, in cases (a) and (d) clearly relate only to the original proceedings, for there is no concealment at the stage of the reassessment proceedings. In cases (b) and (c), however, there has been concealment at both the stages. Here, though the penalty proceedings are , and the penalty is imposed only , the course of the reassessment proceedings, it will be only logical to hold that the penalty is being levied only with reference to the act of concealment in the return filed during, the original assessment proceedings which the Income Tax Officer has power to do. . This is because though concealment is detected in the course of reassessment, it has obviously been there whether discovered or not even at the time of the original assessment. Though the proceedings are separate, the assessment year is one and the assessed's offence of concealment is referable to the extent to which the assessed has avoided payment of tax on the total income as finally determined by returning it at the lower figure shown in the first return filed by him. Clearly, in the cases (a) and (d) given above, there is no reason why the assessed should escape penalty for the concealment at the initial stage, if he has not been penalised in respect thereof earlier. The position is similar in cases (b) & (c). In these two cases, penalty will -be based Or the original return if the concealment at the stage of the first assessment has not been penalised. Even if it has been penalised, the penalty will be levied on like basis although, to avoid duplication of

penalty, the earlier penalty will have to be taken into account or "recalled" in view of the decision of the Supreme Court in N.A. Malbari and Bros. Vs. Commissioner of Income Tax, Bombay, . It seems ,Therefore quite reasonable and proper to hold that the substantive penal provisions of the statute that would govern any particular case will be those that were prevalent on the date of the return filed at the time of the original assessment, even though the penal proceedings may themselves be initiated in the course of the reassessment proceedings. To hold to the contrary would not only lead to an assessed escaping a penalty for concealment if, when it is detected and reassessment proceedings are initiated, he returns the previously concealed income. There would also be partial escape from penalty in cases where an addition is made in the original assessment in circumstances not calling for penalty but there is clear evidence in the course of reassessment proceedings that the assessed had concealed income to that extent or even more. Again, if it be postulated that it will be left to the Income Tax Officer to levy the penalty either with reference to the original return or with reference to the return u/s 148, that will leave the Officer with an unguided and arbitrary discretion to choose the date of the "offence" which he would like to penalise, a discretion which he will perhaps always, naturally, exercise in a manner most profitable to. the Revenue. A construction which would avoid such a baseless exercise of discretion should be considered more appropriate and acceptable. We are, Therefore, of opinion that even in this class of cases, the levy of penalty should be governed by the law as it stood on the date of the return filed in the course of the original assessment proceedings.

(16) We will now refer briefly to the judicial decisions which counsel have cited before as : Commissioner of Income Tax Vs. Ram Achal Ram Sewak, (20), Addl. Commissioner of Income Tax Vs. Krishna Subh Karan, , Addl. Commissioner of Income Tax Vs. Jiwan Lal Shah, (22), Addl. Commissioner of Income Tax Vs. Mewa Lal Sankatha Prasad, , Commissioner of Income Tax Vs. A. Rahman, , Commissioner of Wealth-tax Vs. M.V. Rajamma, , Addl. Commissioner of Income Tax v. Atma Singh Steel Rolling Mills 1979 12 Itr 590, Commissioner of Income Tax Vs. Ram Singh Harmohan Singh, , Dwarkadas Rameshwar Goenka Vs. Commissioner of Income Tax, Madras, and Commissioner of Income Tax, Tamil Nadu-III Vs. S.S.K.G. Arthanariswamy Chettiar, have decided that in cases of penal action initiated on reassessment u/s 148, the provision of law as on the date of the return filed at the time of original assessment would govern even though concealment was there in both sets of returns. This is also the conclusion which we have arrived at. We may. however mention: (i) An anomaly about double penalty pointed out by the Allahabad High Court in Commissioner of Income Tax Vs. Ram Achal Ram Sewak, at one of the consequences of accepting the department's contention would not arise in view of the ratio of the Supreme Court in the case of Malabary Bros. (supra). (ii) The decision of the Orissa High Court in B.N. Sharma Vs. Commissioner of Income Tax, that in such a case the law in force on the date of completion of reassessment will govern is not good law after Brij Mohan's case 1979 Itr 120 1. (iii)In Addl. Commissioner of Income

Tax Vs. Medisetty Ramarao, (31) the same proposition was upheld but the position was much simpler as the returns filed u/s 148 were accepted. (iv) The Madhya Pradesh High Court has taken the contrary view in Additional Commissioner of Income Tax Vs. Balwant Singh Sulakhanmal, , Addl. Cit v. Gopaldas Amarnomel 1980 3 Taxman 502, and Addl. Commissioner of Income Tax v. Brijmohan Jaiswal (1980) 3 Taxman 285 . Reference may also be made to Addl. Commissioner of Income Tax v. Manilal Tribhuvandas (1983) 139 Itr 189. The position in regard to revised returns has been discussed in Amjad Ali Nazir Ali v. CIT (1977) 110 Itr 410, , Commissioner of Income Tax Vs. J.K.A. Subramania Chettiar, , Commissioner of Income Tax Vs. Parmanand Advani, , Sulemanji Ganibhai Vs. Commissioner of Income Tax, , Addl. Commissioner of Income Tax Vs. Radhey Shyam, and Ganga Prasad Vs. Commissioner of Income Tax, . The view taken in these cases is that where there is a proper revised return u/s 139(5), the law on the date of the revised return will govern but that the law on the date of the original return will be applicable where there is no proper revised return within the meaning of Section 139(5). In Addl. Commissioner of Income Tax Vs. Mewa Lal Sankatha Prasad, the court, while laying down that in the case of a reassessment u/s 148, the return filed in the original assessment proceedings will alone be relevant, distinguished the case of revised returns and observed, following is a valid rang Amjad Ali Nazir Ali (supra), that, where the revised return turn ,the penalty will be with reference to it but not otherwise. To a similar effect are the observations of the same High Court .ini Ganga Prasad Vs. Commissioner of Income Tax, . In Commissioner of Income Tax v. Rameshwar and Company the finding that the concealment in the revised return was only due to a repetition of the earlier return and did not amount to a fresh act of concealment was accepted as a finding of fact given by the Tribunal and the penalty based on the law as at the date of the original return upheld. In F.C. Agarwal Vs. Commissioner of Income Tax, the Gauhati High Court was concerned with an allied issue. In that case the original return had been filed after 1-4-1964 and the revised returns were held to be not properly within the scope of Section 139(5) and a penalty on the basis of the original return was upheld. There are observations in Dhampur Sugar Mills Ltd. Vs. Commissioner of Income Tax, , following its earlier decision in GOPALDAS PARSHOTTAMDAS Vs. COMMISSIONER OF Income Tax, C. P. and U. P., and in, Kumar Jagadish Chandra Sinha Vs. Commissioner of Income Tax, which suggest that even where a amended return is filed which discloses income concealed in the earlier return, such amended return will be a revised return u/s 22(3) of the 1922 Act[139(5) of the 1961 Act and cannot be ignored by the officer in completing the assessment.

(17) We have, however, for reasons earlier discussed, come to a contrary conclusion in regard to this type of cases. In our opinion, the penalty provisions as on the date of the first return file for the year should govern in such cases and not that on the date of the revised return. In this context, our attention was drawn to the decision in Commissioner of Income Tax v. Sucha Singh Anand

1972 ITR 174 rendered on 16-11-1981 by a Bench of this court. In that case, the assessee filed a return for assessment year 1963-64 on 2-9-1963 showing an income of Rs. 1,10,711. He revised this return on 22-11-1967 to show an income of Rs. 1,21,763. The assessment was completed on 20-3-1968 on a total income of Rs. 2,13,698. The Income Tax Officer mitigated penalty proceedings and referred the matter to the Inspecting Assistant Commissioner who levied a penalty of Rs. 45,000. In doing this, he relied on the provisions of Section 271(1)(c) as amended in 1964 and the question was whether he could do so. This court after referring to *Brij Mohan Vs. Commissioner of Income Tax, New Delhi*, and the decisions in *Addl. Commissioner of Income Tax Vs. Krishna Subh Karan*, *Commissioner of Income Tax Vs. A. Rahman*, came to the conclusion that the date of the original return would only be relevant. The decision in *Additional Commissioner of Income Tax Vs. Balwant Singh Sulakhanmal*, was not found acceptable. The court also did not find it relevant to consider whether the second return was filed in response to the notice u/s 148 or not and was of opinion that the same principle as had been applied in the case of reassessment u/s 148 by the Patna and Allahabad High Courts should apply here also. Looking at the matter from another point of view, the court followed the line of reasoning of the Allahabad High Court in *Amjad Ali Nazir Ali Vs. Commissioner of Income Tax*. It pointed out that there had been concealment in the original return and that the mere fact that there was a difference between the two returns did not mean that the offence of concealment occurred only on 22-11-1967. In the result, the Tribunal's view that the law applicable would be that as on the date of the first return was upheld.

(18) A closer look at the above decision will show that it supports the line of reasoning we have discussed earlier. In that case, technically speaking, the return filed on 22-11-1967 would appear to have been a revised return u/s 139(5) as it only purported to revise the figure of income already shown and if the line of reasoning that, in all cases of proper revised returns, the revised return should be taken as the basis for determining the law applicable is to be adopted, that would have been a case governed by the post-1964 law. But this was not the decision. What this court has, therefore, held in *Anand's* case is that, in the case of revised returns also, as in the case of the returns u/s 148, it is the law applicable on the date of the original return that will apply. Having held thus, the Court also approached the case from another point of view. If the revised return discloses the income concealed, it may not be a revised return and cannot, in any event, obliterate the offence committed earlier. If it revises certain other errors and defects but still conceals certain income, it may be called a revised return which can form the basis of assessment but still cannot be treated as an occasion of a second concealment for reasons already discussed. The decision in the *Sucha Singh Anand* case does not, therefore, run counter to the conclusions we have arrived at.

(19) For the reasons discussed above, we are of opinion that, in both the types of cases referred to earlier, the substantive provisions of law relating to penalty

applicable in a particular case would be those in force at the date of the original return from which income has been concealed and that the filing of a subsequent return u/s 139(5) or u/s 148 in which the act of concealment may be "repeated" would not alter the position. In both ITRs 131174 and 65175, such a return was filed before 1-4-1968. We, Therefore, uphold the conclusion of the Tribunal that the pre-1968 provisions should govern the imposition of the penalty in each of these cases. The question referred to us in each of the references is answered in the affirmative and in favor of the assesses. However, having regard to the difficult and controversial nature of the issue raised, we make no order as to costs.