THE HIGH COURT OF DELHI AT NEW DELHI

Judgment pronounced on: 29. 07.2005

ITA 72/2002

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S C.L. BATRA ...Respondent

Advocates who appeared in this case:

For the Appellants : Mr Sanjiv Khanna, Mr R.D.Jolly, Ms Prem Lata Bansal, Mr Sanjiv Sabharwal, Mr J.R. Goel, Ms Rashmi and Mr Rajiv Avasthi.

For the Respondents : Mr R. Santhanam, Mr Ajay Vohra, Mr P.N. Monga, Mr N.N. Sawhney, Ms Kavita Jha and Mr V.P. Gupta.

CORAM:-

HON'BLE MR JUSTICE B.C. PATEL, CHIEF JUSTICE
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

BADAR DURREZ AHMED, J

For judgment, see ITA 205/2001.

Sd/-
BADAR DURREZ AHMED
JUDGE

Sd/-
CHIEF JUSTICE

July 29, 2005.
j

THE HIGH COURT OF DELHI AT NEW DELHI

Judgment pronounced on: 29.07.2005

ITA 205/2001

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S ADITYA CHEMICALS LTD & OTHERS ...Respondent

WITH

ITA 183/2001

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S WELCOMES SEEDS LIMITED ...Respondent

WITH

ITA 1/2002

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S VINOD PAPER MILLS LTD. ...Respondent

WITH

ITA 72/2002

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S C.L. BATRA ...Respondent

WITH

ITA 301/2003

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S SEQUENCE ESTATE P. LTD ...Respondent

WITH

ITA 106/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S KRISONS ELECTRONICS SYSTEM ...Respondent

WITH

ITA 107/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S MONTARI CHEMCARE INVESTMENT ...Respondent

WITH

ITA 108/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S jHALANI TOOLS INDIA LTD. ...Respondent

WITH

ITA 146/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S SAXONS FARMS ...Respondent

WITH

ITA 223/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S BRAMCO INDIA PVT. LTD. ...Respondent

WITH

ITA 252/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S MAHAVIR ALUMINIUM LTD. ...Respondent

WITH

ITA 254/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S TRIAN QUEBEC GEARS LTD. ...Respondent

WITH

ITA 340/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S VIRTUAL SOFT SYSTEMS LTD. ...Respondent

WITH

ITA 362/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S MOSER BAER INDIA LTD. ...Respondent

WITH

ITA 376/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S MODEX INTL. SECURITIES PVT. LTD. ...Respondent

WITH

ITA 403/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S PROGRESSIVE CASTING PVT. LTD. ...Respondent

WITH

ITA 409/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S GROVER OVERSEAS PVT. LTD. ...Respondent

WITH

ITA 414/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S FIRST STONEX LIMITED ...Respondent

WITH

ITA 420/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S VEGA ENTERPRISES PVT. LTD. ...Respondent

WITH

ITA 448/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S SWEDESHI CREDITS PVT. LTD. ...Respondent

WITH

ITA 449/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S VECO INDIA LTD. ...Respondent

WITH

ITA 452/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S SIMON INDIA LIMITED ...Respondent

WITH

ITA 462/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S BST MANUFACTURING LTD. ...Respondent

WITH

ITA 500/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S SAPNA TOURS TRAVELS AND LEAS ...Respondent

WITH

ITA 503/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S SAPNA TOUR AND TRAVELS AND LEAS ...Respondent

WITH

ITA 585/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S MAIDEN CIRCUITS LTD. ...Respondent

WITH

ITA 628/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S JAGAN LAMPS LIMITED ...Respondent

WITH

ITA 639/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S CORAL NEWSPRINTS LIMITED ...Respondent

WITH

ITA 669/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S BHARAT HOTELS LIMITED ...Respondent

WITH

ITA 670/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S BHARAT HOTELS LTD. ...Respondent

WITH

ITA 672/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S BHARAT HOTELS LTD. ...Respondent

WITH

ITA 673/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S BHARAT HOTELS LTD. ...Respondent

WITH

ITA 674/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S BASI AGRICULTURAL FARM PVT. LTD. ...Respondent

WITH

ITA 676/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

- versus -

M/S RATAN CHAND HARJAS RAM PVT. LTD. ...Respondent

WITH

ITA 710/2004

COMMISSIONER OF INCOME TAX, DELHI-1 ...Appellant

3. Whether the judgment should be reported in Digest?

BADAR DURREZ AHMED, J

"..if life is not logic, income-tax is much less so.."[1]

1. This batch of appeals under section 260A of the Income Tax Act, 1961 (hereinafter referred to as the Act) arises out of separate orders of the Income Tax Appellate Tribunal (hereinafter referred to as "ITAT") in different matters. However, the questions and issues involved are common and, therefore, we are disposing of all these appeals by this common judgement. At the commencement of the hearing, it was agreed upon by all the learned counsel appearing in these appeals that ITA 205/01 shall be taken as the lead case and be representative of the other cases. The questions which need to be answered in these appeals are:

1) Whether the ITAT was right in deleting the penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 on the ground that the total income of the assessee has been assessed at a minus figure/loss?

2) Whether the ITAT was justified in holding that the judgements in Prithipal Singh's case (183 ITR 69 and 249 ITR 670) will apply even after insertion of Explanation 4 to section 271 (1)(c) of the Income Tax Act, 1961 with effect from 1.4.1976?

Facts and Question 2:

2. To supply some factual content it would be sufficient for us to refer to the facts in the case of ITA 205/01. For the assessment year 1989-90 the assessee filed its return of income showing a loss of Rs. 2.36 crores and the assessment was completed at a loss of Rs.1.21 crores. The Assessing Officer initiated penalty proceedings for concealment of income. After considering the response to the

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1Chagla C.J. in ***Elphinstone Spinning And Weaving Mills Co. Ltd. v. Commissioner Of Income-tax, Bombay City: 28 ITR 811 (Bom).***

notices for the penalty proceedings, the Assessing Officer fixed a penalty of] 1.68 crores. On appeal, the CIT(Appeals) confirmed the penalty to the extent of Rs. 56.01 lakhs and cancelled the balance amount. Both, the assessee and the revenue, approached the ITAT by way of separate appeals. These appeals were disposed of by the common order dated 23.2.2001. It is a short order and the relevant portion is set out below:-

> "We have heard the rival submissions. It is a case of assessee who filed return showing loss and astt. was completed at reduced amount of loss. The Hon'ble Punjab & Haryana High Court in the case of Prithipal Singh vs CIT, 183 ITR 69 has concluded that in a case where returned income and assessed income is loss then no penalty for concealment of income u/s 271(1)(c) is leviable. The Hon'ble Supreme Court has dismissed the appeal filed by the Department and this fact has been conceded by the Ld.DR who has simply prayed that reference to the decision of Hon'ble Karnataka High Court in the case of P.R. Vasappa[2] & Sons Vs. CIT, 243 ITR 776 may be made in which the view is contrary to the view of Punjab & Haryana High Court referred to above. However, the fact remains that Hon'ble Supreme Court has confirmed the view taken by the Hon'ble Punjab & Haryana High Court and has become trite law on the subject. Accordingly, no penalty u/s 271(1)(c) could be imposed on the facts and circumstances of the case. Accordingly penalty u/s 271(1)(c) confirmed by the CIT(A) is cancelled. Consequently, the appeal filed by the revenue has no force and the same is also dismissed.
>
> 4. In the result, the appeal filed by the assessee is allowed and that of revenue is dismissed."

Clearly, the ITAT deleted the penalty thinking that the decisions in Prithipal Singh's case of the Punjab & Haryana High Court (183 ITR 69) and of the Supreme Court (249 ITR 670) were applicable and that the decision of the Karnataka High Court in P.R. Basavappa & Sons v. CIT (243 ITR 776) was not. To fully appreciate the scope an ambit of the questions raised in these appeals it would be necessary to examine what was exactly decided in the two Prithipal Singh cases and in what context those decisions were rendered. In ***CIT v. Prithipal Singh & Co: 183 ITR 69 (P&H)*** the assessee, for the assessment year

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2(sic), should be Basavappa.

1970-71, filed its return declaring loss of Rs. 3,35,830. The Income-tax Offic found that it was a case of concealment and suppression of income as the assessee had furnished inaccurate particulars of its income. He computed the assessee's income at Rs. 147,978 and, in the course of the assessment proceedings, started penalty proceedings under section 271(1)(c) of the Act. The assessee went in appeal to the Appellate Assistant Commissioner against the order of the Income-tax Officer and the Appellate Assistant Commissioner determined the loss at Rs. 34,164 against the returned loss of Rs.3,35,830. In the penalty proceedings, the Inspecting Assistant Commissioner (Central), Ludhiana, imposed a penalty of Rs. 3,50,000 for concealment. The assessee went in appeal to the ITAT which was allowed holding that no penalty could be imposed upon the assessee when it had returned a loss and it had also been assessed finally on a loss figure. Ultimately, a reference was made to the Punjab & Haryana High Court which was disposed of by the decision in ***Prithipal Singh*** *(P&H) (supra)*. The court held:-

> "Penalty imposed is paid in addition to the tax payable. When there is no tax payable, the question of any penalty does not arise. In fact, evasion of tax is the sine qua non for imposition of penalty. Clause (iii) deals with cases referred to in clause (c) under sub-section (1) of section 271 of the Act and it clearly provides therein that the penalty or further sum payable by a person would be in addition to any tax payable by him. Explanations 3 and 4 annexed to the said provision of law also presuppose taxable income with regard to the assessment year in question. If there is no taxable income or tax assessed for payment during a particular year, the question of evasion and consequently penalty do not arise. As is obvious from annexure "B", the assessee was assessed finally at a loss figure amounting to Rs.34,164 as pointed out at page 33 of the record. Thus, there was no income and so the motive to avoid tax during the year in question is completely missing. May be, it may give a benefit to the assessee in the coming year as the loss could be carried forward but, by no stretch of imagination, can it be said that, during the assessment year in question, the assessee had concealed its income.
>
> "Income" has been defined in section 2(24) of the Act which clearly includes profits, gains, dividends or other benefits derived only. Loss cannot possibly be termed as income. Under section 139(1) of the Act, a person is required to furnish a return only if his total income

during the previous year exceeded the maximum amount which is not chargeable to income-tax. If the same falls short of the maximum amount which is not chargeable, which has been the case here as per final assessment, he need not file a return. A person who sustains a loss, however, may file a return in view of sub-section (3) of section 139 of the Act if he wants to claim that the loss or any part thereof should be carried forward. The penal provisions of section 271(1)(c), therefore are attracted only in the case of an assessee having positive income and not loss, as the question of concealment of income to avoid payment of tax would arise only in the former case. Penalty is a deterrent measure to prevent evasion of tax and when there was no tax payable, there could not be any such evasion so as to provide a scope for levying any penalty. In the present case, only the loss has been reduced and it cannot be said that the assessee had suppressed any income which would have attracted liability to tax. The question of imposition of penalty, therefore, did not arise. Thus, on the facts and in the circumstances of the case, the Appellate Tribunal has acted rightly in law in holding that the provisions of the Explanation to section 271(1)(c) will not be attracted to the present case. The word "income" occurring in clause (c) and (iii) of section 271(1) of the Act refers to positive income only and that no penalty could be levied against the assessee."

3. Being aggrieved by this decision, the revenue went up in appeal before the Supreme Court which, disposed the same (***CIT v. Prithipal Singh & Co: 249 ITR 670 (SC)***) by the following order:-

"We have heard learned counsel and find that on the facts of this case, no interference is called for.

The civil appeal is dismissed.

No order as to costs."

It is pertinent to note that the assessment year involved in Prithipal Singh's case (supra) was 1970-71. Much before the 1976 amendment came into force on 1.4.1976 whereunder Explanation 4 was added to section 271(1) of the Act. And, although there is mention of this Explanation 4 in ***Prithipal Singh*** *(P&H) (supra)* it did not arise for consideration therein as the relevant assessment year was 1970-71 when this Explanation 4 was not even in the statute book. So, ***Prithipal Singh*** *(P&H) (supra)* cannot be cited as a precedent or authority with regard to the interpretation of the said Explanation 4. Therefore, the dismissal of the appeal

from the decision in ***Prithipal Singh*** *(P&H) (supra)* by the Supreme Court w have no bearing in those cases which have arisen after 1.4.1976 when the said Explanation 4 took effect. There was quite a lot of argument on the issue as to whether the order in ***Prithipal Singh*** *(SC) (supra)* could at all be regarded as a binding precedent in view of the very wordings used in the order to the effect:-

"..on the facts of this case, no interference is called for"

Particularly, when there is no discussion in the Supreme Court order on the reasons or the legal principles involved. It was argued with some degree of vehemence by Mr Sanjiv Khanna on behalf of the revenue that the Supreme Court order had to be viewed only as a decision on the facts of the case in Prithipal Singh and did not constitute a binding precedent. However, without going into these issues, it is clear that the Punjab & Haryana High Court was dealing with the assessment year 1970-71 when the said Explanation 4 did not even exist. Therefore, its observations on the said Explanation 4 and its impact on the interpretation of section 271(1)(c) of the Act would be obiter dicta. And, dismissal of the appeal from such decision by the Supreme Court in the manner aforesaid would not entail otherwise.

We agree with the Karnataka High Court's observation in ***Basavappa*** *(supra)* to the following effect:-

> "6. It is contended that income in s.271(1)(c) should be of positive figure. In CIT vs. Prithpal Singh & Co. (1990) 85 CTR (P&H) 26 : (1990) 183 ITR 69 (P&H) TC 50R.236 the Punjab & Haryana High Court held that the income as envisaged in s. 271(1)(c) means positive income. If the loss declared has been reduced penalty under s.271(1)(c) cannot be levied. This decision is in respect of asst. yr. 1970-71 i.e., before the insertion of above explanation and hence cannot help the case of the assessee. For the same reason the decisions given in CIT vs. India Sea Food (1976) 105 ITR 708 (Kar) : TC 50R.148, asst. yr. 1968-69, CIT vs. C. R. Niranjan (1991) 187 ITR 280 (Mad) : TC 50R.1014, asst. yr. 1969-70 and CIT vs. Jaora Oil Mill (1981) 129 ITR 423 (MP) : TC 50R.486, asst. yr. 1968-69, are not applicable."

Of course, when these observations were made, the Supreme Court ord dismissing the appeal in ***Prithipal Singh*** *(SC) (supra)* had not come. But, as indicated above the passing of the Supreme Court order did not alter the position that in prithipal singh's case the said Explanation 4 did not at all come up for interpretation. This being the position, the answer to question no.2 has to be in the negative.

4. Before parting with the discussion of the Prithipal Singh cases, we would like to comment on another aspect of the matter. If we closely examine the decision in Prithipal Singh (P.&H.) (supra) we find that the Court also decided the case on merits with regard that existence of "concealment" as an issue of fact. This becomes clear from the following observations:-

> "As is obvious from annexure "B", the assessee was assessed finally at a loss figure amounting to Rs 34,164/- as pointed out at page 33 of the record. Thus, there was no income and so the motive to avoid tax during the year in question is completely missing. May be, it may give a benefit to the assessee in the coming year as the loss could be carried forward but, by no stretch of imagination, can it be said that, during the assessment year in question, the assessee had concealed its income."

So, Prithipal Singh's case was one where the Punjab and Haryana High Court held that the assessee had not concealed its income. Though, with respect, we disagree with the generalisation that as the assessed income was a loss figure the assessee could not have a motive for concealment, the said Court found as a fact that there was no concealment. Obviously, where such a finding is recorded on merits, the question of penalty would not arise. Perhaps, this explains the said words used in the Supreme Court order to the effect:-

".....on the facts of this case, no interference is called for."

Question 1:

5. With the Prithipal Singh decisions out of the way, let us now examine question 1 which is the core issue. It would be necessary to set out the relevant provisions of section 271 of the Act as it existed after 1.4.1976 and for the period

relevant to the assessment years involved in the present appeals. After 1976 the was an amendment carried out in 1989 but that does not change the 1976 position much. Finally, there was an amendment (by Finance Act, 2002 w.e.f. 1.4.2003) whereby, inter alia, new clause (a) of Explanation 4 to section 271 (1) of the Act was substituted in place of the existing one. However, we are concerned with the post-1976 and pre-2003 position. The relevant provisions of section 271 as it stood then are as under:-

> **"271. FAILURE TO FURNISH RETURNS, COMPLY WITH NOTICES, CONCEALMENT OF INCOME, ETC.**
>
> (1) If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person -
>
> (a) * * * *; or
>
> (b) * * * *; or
>
> (c) has concealed the particulars of his income or furnished inaccurate particulars of such income,
>
> he may direct that such person shall pay by way of penalty, -
>
> (i) * * * *
>
> (ii) * * * *
>
> (iii) in the cases referred to in clause (c), in addition to any tax payable by him, a sum which shall not be less than but which shall not exceed twice, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income:
>
> * * * *
>
> **Explanation 3 :** Where any person who has not previously been assessed under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, fails, without reasonable cause, to furnish within the period specified in sub-clause (iii) of clause (a) of sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on

or after the first day of April, 1974, and, until the expiry of the period aforesaid, no notice has been issued to him under sub-section (2) of section 139 or section 148 and the Assessing Officer or the Deputy Commissioner (Appeals) or the Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (c) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.

Explanation 4 : For the purpose of clause (iii) of this sub-section, the expression "the amount of tax sought to be evaded", -

(a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished exceeds the total income assessed, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;

(b) in any case to which Explanation 3 applies, means the tax on the total income assessed;

(c) in any other case, means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished.

* * * * *"

We are concerned with the interpretation of section 271 (1)(c), 271(1)(iii) and Explanation 4 to section 271 (1). A plain reading of these provisions makes it clear that the liability to penalty arises if any person has concealed the particulars of his income or furnished inaccurate particulars of such income. The liability for penalty is not in any manner linked with whether total income assessed is postive or negative. Or, to put it differently, whether any tax is payable on the total income assessed. Once the liability to penalty arises, the next question is -- how much? Sub-clause (iii) of section 271(1) deals with the computation of the

penalty. It says that the penalty shall be in addition to any tax payable by him and it shall be a sum which shall not be less than but which shall not exceed twice *the amount of tax sought to be evaded* by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income. Now, the expression "*the amount of tax sought to be evaded*" is not to be considered in general terms because a specific meaning has been ascribed to it by the said Explanation 4. This Explanation 4 deals with three different and distinct situations under clauses (a), (b) and (c) thereof. Clause (a) of Explanation 4 pertains to a situation where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished (hereinafter referred to as "concealed income") *exceeds* the total income assessed. Clause (b) of Explanation 4 deals with a situation where Explanation 3 applies. By virtue of Explanation 3, since no return is filed before a specified date, the entire taxable income is deemed to be the concealed income as the returned income is taken to be zero, notwithstanding the fact that a return may in fact be filed after the stipulated date. Clause (c) of Explanation 4 is the residual clause and deals with all cases of concealed income which do not fall under clauses (a) or (b).

6. Let us examine as to under what conditions each of the three clauses would be attracted. For this purpose, let us use a little symbology and some mathematics. Let x be the extent of concealed income; y represents total income assessed and z stands for returned income or declared income. Because concealed income is the difference between total income assessed and returned income we get the following equation:

$$x = y - z$$

(concealed income = total income assessed – returned/declared income)

Clause (a) applies to situations where the concealed income exceeds the total income assessed, or where $x - y > 0$. This can only happen if z is negative. This is so because, from the above equation we can derive the following equation:

$$x - y = -z$$

And, if $x - y > 0$ it means that $-z > 0$ (because $x - y = -z$) and, that can only happen if $z < 0$ (ie., there is a negative returned income or, to put it differently, there is a returned loss). The following table (Table 1) makes this clear. We have assumed that the total income assessed (y) is 50 throughout. However, the different returned income (z) values have been taken between -100 (loss of 100) to 100 (positive income of 100) at increments of 10.

Table 1

Concealed Income x	***Total Income assessed*** y	***Returned Income*** z	***Difference between Concealed Income and total Income assessed*** $x-y$
150	50	-100	100
140	50	-90	90
130	50	-80	80
120	50	-70	70
110	50	-60	60
100	50	-50	50
90	50	-40	40
80	50	-30	30
70	50	-20	20
60	50	-10	10
50	50	0	0

40	50	10	-10
30	50	20	-20
20	50	30	-30
10	50	40	-40
0	50	50	-50
-10	50	60	-60
-20	50	70	-70
-30	50	80	-80
-40	50	90	-90
-50	50	100	-100

Looking at the table, one can immediately discern that the moment z becomes positive (or greater than 0), $x - y$ becomes negative which means that x no longer exceeds y. But, clause (a) of Explanation 4 applies only to cases where the concealed income (x) exceeds the total income assessed (y). That, only happens when the declared or returned income is negative or a loss. As the following table (Table 2) demonstrates, it does not matter whether the total income assessed (y) is positive or negative; as long as the returned income (z) is negative and it is less than the total income assessed (y), the concealed income (x) is postive and it is in excess of the total income assessed (see the $x - y$ column; it is 100 throughout!).

Table 2

Concealed Income x	***Total Income assessed*** y	***Returned Income*** z	***Difference between Concealed Income and total Income assessed*** $x-y$
0	-100	-100	100
10	-90	-100	100
20	-80	-100	100
30	-70	-100	100
40	-60	-100	100
50	-50	-100	100

60	-40	-100	100
70	-30	-100	100
80	-20	-100	100
90	-10	-100	100
100	0	-100	100
110	10	-100	100
120	20	-100	100
130	30	-100	100
140	40	-100	100
150	50	-100	100
160	60	-100	100
170	70	-100	100
180	80	-100	100
190	90	-100	100
200	100	-100	100

So, from the above table it becomes clear that the entire data range depicted therein (barring where $x = 0$), falls under clause (a) of Explanation 4. The penalty therefore will have to be computed in terms of clause (a) which merely stipulates that the "*amount of tax sought to be evaded*", under the fictional meaning given to it by the said clause (a), would the tax on x, taking x to be the total income assesed. Once this is calculated, the penalty amount would be ranging between such tax amount and the double of it. It is clear that we have been able to compute the penalty amount without much difficulty and without any discussion as to whether the penalty is payable when the total income assessed is a loss or not. That, in our view, is a discussion which is irrelevant to the scheme of the provisions.

7. Section 271(1) has two limbs. Under the first limb, the liability of penalty is fixed. The second limb pertains to the computation of the penalty. When the

liability to penalty is triggered under the first limb, there is no reference to whetl the total income assessed is positive or negative. And, insofar as the second limb is concerned, this is absolutely irrelevant as the computation of the fictional "*amount of tax sought to be evaded*" can be easily done in either case.

8. There is another way to look at the issue. This much is clear from the discussion above that clause (a) of Explanation 4 applies only to a situation where the returned income (z) is negative (a loss). The returned income could be -1 or -10000 or -100,00,000 ... So, situations, where the total income assessed (y) could be negative or postive, exist. And, under both situations, the computation is easily done. If the intention of the legislature was to shut out penalties in cases where the total income assessed was not positive, it would have not provided for such possibilities by specifying cases under different categories where concealed income exceeds the total income assessed [clause (a)] and where concealed income is equal to or less than the total income assessed [clause (c)]. Clause (c) of Explanation 4 applies only to cases where the total income assessed would be positive. Therefore, it would not be possible to hold that under clause (a) the legislature did not contemplate the imposition of penalty where the total income assessed was not a positive figure.

9. The special case of clause (b) of Explanation 4 essentially means a situation where $z = 0$ and, when this happens the entire total income assessed has to be

taken to be the concealed income. This is clear from the aforementioned equation:

$$x = y - z$$

if $z = 0$, then, substituting for z, the equation becomes : $x = y - 0$ which implies that $x = y$ (ie., concealed income = total income assessed). The following table (table 3) makes its clear that where returned income (z) = 0, the concealed income

(x) will always equal the total income assessed (y). And, therefore, we have t prescription in clause (b) that the "*amount of tax sought to be evaded*" means the tax on the total income assessed (y).

Table 3

Concealed Income ***x***	***Total Income assessed*** ***y***	***Returned Income*** ***z***	***Difference between Concealed Income and total Income assessed*** ***x-y***
0	0	0	0
10	10	0	0
20	20	0	0
30	30	0	0
40	40	0	0
50	50	0	0
60	60	0	0
70	70	0	0
80	80	0	0
90	90	0	0
100	100	0	0
110	110	0	0
120	120	0	0
130	130	0	0
140	140	0	0
150	150	0	0
160	160	0	0
170	170	0	0
180	180	0	0
190	190	0	0
200	200	0	0

10. Clause (c) of Explanation 4 deals with all other cases meaning, thereby, all those cases other than where $z < 0$. Therefore, clause (c) applies where the

returned income is zero or more. We have already seen that where the return income is negative or less than 0, clause (a) is applicable. In cases falling under clause (c), the expression "*amount of tax sought to be evaded*" means the difference between the tax on the total income assessed (y) and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished. Simply stated it means the difference between the tax on total income assessed (y) and the tax calculated on the returned income (z).

11. The following table (table 4) which pertains to cases under clause (c) of Explanation 4 would enable us to understand this better. Take the case where the returned income is 110 and the total income assessed is 210. In such a situation, the "*amount of tax sought to be evaded*" would be the difference between the tax on 210 (y) and the tax on 110 (z). To take this example further, let us assume a flat tax rate of 10%. The tax on 210 would be 21 and the tax on 110 would be 11. Accordingly, the "*amount of tax sought to be evaded*" would be the difference between 21 and 11, which comes to 10. The penalty, therefore, in this case could range from 10 to 20 (being twice the "*amount of tax sought to be evaded*").

Table 4

Concealed Income ***x***	***Total Income assessed*** ***y***	***Returned Income*** ***z***	***Difference between Concealed Income and total Income assessed*** ***x-y***
100	100	0	0
100	110	10	-10
100	120	20	-20
100	130	30	-30

100	140	40	-40
100	150	50	-50
100	160	60	-60
100	170	70	-70
100	180	80	-80
100	190	90	-90
100	200	100	-100
100	210	110	-110
100	220	120	-120
100	230	130	-130
100	240	140	-140
100	250	150	-150
100	260	160	-160
100	270	170	-170
100	280	180	-180
100	290	190	-190
100	300	200	-200

12. The scheme of section 271(1)(c) therefore is this. If a person conceals income in the sense we understand it, he becomes liable to pay penalty. The concealment triggers the liability to penalty. Once the liability arises, the only other thing to do is to quantify the amount of penalty. The minimum and maximum penalty amounts have been specified. In all cases of concealment where the concealed amount exceeds the total income assessed (or, in other words, where the declared or returned income is negative), clause (a) of Explanation 4 will apply and in all other cases (ie., where the declared or returned income is greater than or equal to zero), clause (c) would apply. Clause (b), would apply in the special case specified under Explanation 3. All the present appeals are in respect of cases falling under clause (a) of Explanation 4. The assessees (respondents) in all these appeals want us to read clause (a) as excluding those cases where, although the

returned income is negative and there is established concealment, the total inco assessed is negative and no tax is payable thereon. We are afraid, we do not discern any such intention on the part of the legislature in making any such exception. On the contrary, the only classification made by the legislature is between cases where the returned income is negative [clause(a)] and where the returned income is greater than or equal to zero [clause(b)]. And, of course, the special case of clause (b). The meaning of the provisions and in particular Explanation 4 are very clear. In our view, the legislative intent, and, that is what we are to gather, is that in respect of imposition of a penalty for concealment, the issue of the total assessed income being positive or negative does not arise at all.

We may note that there is also a logical[3] explanation for not excluding the cases of concealed income from the imposition of penalty where the returned and assessed incomes are both negative. Let us take an example. Assume that the returned income is a loss of Rs 3 crores and the assessed total income is a loss figure of Rs 1 crore because of a concealed income of Rs 2 crores. If the view expressed by the respondents were to be accepted then no penalty could be imposed although concealed income of Rs 2 crores has been unearthed. Now, let us take the case of an assessee who returned an income of Rs 2 lakhs and upon assessment it was increased to Rs 2.10 lakhs revealing a concealed income of Rs 10,000/-. Here, where the concealment is of only Rs 10,000/-, admittedly, penalty would be imposable. But, if the respondents' submission were taken to be correct, in the former example where the concealment was of Rs 2 crores, no penalty would be imposable. This does not appear to be equitable or logical. However, we must make it clear that our decision is not based upon any equitable

3Despite the caveat entered above: see footnote 1

considerations for in taxing statutes equity has a limited role to play, if at all[4]. C decision is based upon the plain understanding of the statutory provisions *proprio vigore* .

13. In ***Prithipal Singh (P&H)*** *(supra)* it was observed that:-

> "Penalty imposed is paid in addition to the tax payable. When there is no tax payable, the question of any penalty does not arise. In fact, evasion of tax is the sine qua non for imposition of penalty. Clause (iii) deals with cases referred to in clause (c) under sub-section (1) of section (1) of section 271 of the Act and it clearly provides therein that the penalty or further sum payable person would be in addition to any tax payable by him."

The learned counsel for the assessees/respondents argued in similar vein. But, we do not agree with this. The expression "*in addition to any tax payable*", in the context it is used, does not and cannot mean that there must be a tax payable before a penalty under the provision can be levied. It only means that the penalty amount will be over and above "*any tax payable*". The event that triggers a liability of penalty is entirely different and distinct from the taxable event[5]. The

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4See: ***Commr. of Sales Tax v. Shri Krishna Engg. Co.,(2005) 2 SCC 692***, **at page 706 :**

> **"33.** It is settled law that equity plays only a minuscule role in fiscal matters, even if such considerations were to be applied, there would still be no justification for an application adverse to the interest of the State..."

Also see: ***Union of India v Azadi Bachao Andolan: (2004) 10 SCC 1*** [para 114].

5Also see: ***CIT, Gujarat v. R. Ochhavlal & Co: 105 ITR 518 (Guj)*** wherein it was held:-

> This contention has found favour with the Tribunal. But it is difficult to comprehend what connection the penal liability has with the liability to pay tax. Penal liability contemplated by sub-section (2) of section 271 falls within any of the clauses (a), (b) or (c) of section 271(1). These three clauses contemplate three distinct types of defaults. The moment it is found that any one of these three defaults is committed by an assessee which is a registered firm the said assessee becomes "liable to penalty" within the meaning of sub-section (2). Clauses (a), (b) and (c) constitute the first part of sub-section (1) of section 271. This part shows when and under what circumstances a penal liability comes into existence. Second part of this sub-section is constituted by clause (i), (ii) and (iii). These clauses have nothing to do after the liability has already come into existence as their function is to provide for the method to quantify the different amounts of penalties with reference to the different defaults contemplated by clauses (a), (b) and (c). Thus, while the function of clauses (a), (b) and (c) is to create penal liability, the function of clauses (i), (ii) and (iii) is to quantify the said liability. Now, if the quantification if penal liability is based on the amount of tax, if any, payable by an assessee, and if, in a given case, the assessee is not found liable to pay any tax, the quantification of penal liability would be impossible; and in that case, no penalty is leviable; but that does not mean that penal liability under the first part of sub-section (1) was not incurred by that assessee. Impossibility of

charging section for tax under the Act is section 4 under Chapter II. Penalti including the penalty for concealment of income, fall under Chapter XXI "Penalties Imposable". There are several penalties where liability of tax is not even mentioned such as section 271A (Failure to keep, maintain or retain books of account, documents, etc.), 271B (Failure to get accounts audited), 271F (Penalty for failure to furnish return of income) etc.,. Therefore, as a general statement it cannot be said - "*when there is no tax payable, the question of any penalty does not arise.*" The context of the words must be seen. We agree with the contention of Mr Sanjiv Khanna, the learned counsel for the revenue, that words must be construed in the context in which they appear. He placed reliance on ***Shamrao Vishnu Parulekar v. D.M., Thana:*** ***AIR 1957 SC 23 (26)*** and ***CIT Bangalore v. Venkateswara Hatcheries (P) Ltd.:*** ***(1999) 3 SCC 632 (636)***[6]. Looking at the said provisions including the said Explanation 4, it does appear to us that the expression "*in addition to any tax payable*"merely signifies that the penalty payable is over and above any tax that may be payable. It does not mean that tax being payable is a condition precedent for the penalty being payable. It was agreed by all counsel appearing for the respondents that where the total income assessed was positive and there was concealed income found, penalty was imposable. In fact, it was argued by them and in particular by Mr Ajay Vohra that a case of change from a higher loss to a lower loss would not be covered under the

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quantifying penal liability would not obliterate the fact that the assessee had rendered himself liable to a penal action. It is, therefore, a mistake to say that if there is no tax liability and if, consequent to that, quantification of penal liability is not possible, there was never any penal liability incurred by the assessee."

6The Supreme Court held [at page 636] :

"It is a settled principle of interpretation that the meaning of the words occurring in the provisions of the Act must take their colour from the context in which they are so used. In other words, for arriving at the true meaning of a word, the said word should not be detached from the context. Thus, when the word read in the context conveys a meaning, that meaning would be the appropriate meaning of that word and in that case, we need not rely upon the dictionary meaning of that word."

said Explanation 4, but, a case where a returned loss is transformed into assessed positive income would fall under the said Explanation 4. Now, let us take an example of such a nature. Let us assume that the returned income was a loss of Rs 1 crore and the total income assessed was Rs 100/-. Here, no tax would be payable as the total income assessed of Rs. 100/- is way below the taxable limit. Yet, the concealment is of Rs. 1,00,00,100/-. Could it be said that even in such a situation no penalty was imposable as the tax payable was nil? We think not. So, the expression "*in addition to any tax payable*", in the setting in which it is used, only means that the penalty shall be over and above the the tax payable and not that the tax payable is a pre-condition for the penalty being imposed. This view of ours is not without precedent. We have already pointed out the Gujarat High Court decision in ***Ochhavlal*** *(supra)*. But, we find that the Supreme Court also had occasion to consider this expression which appeared in section 28(1) of the Income Tax Act, 1922. This section was the precursor to the present section 271 of the 1961 Act. The said Section 28 (1) of the 1922 Act (in so far as it is relevant) provides :

> "If the Income-tax Officer.... in the course of any proceeding under this Act is satisfied that any person -
>
> (a) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub-section (1) or sub-section (2) of section 22 or section 34 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by such notice, or
>
> (b) has without reasonable cause failed to furnish the return of his total income which he was required to furnish by notice given under sub -section (1) or sub-section (2) of section 23, or
>
> (c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,
>
> he or it may direct that such persons shall by way of penalty, in the case referred to in clause (a), in addition to the amount of the income -tax and super-tax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (b) and (c), **in addition to any tax payable by him**, a sum not exceeding one and a half times the amount of the income-tax and super-tax, if any, which would have been avoided if the if the

income as returned by such person had been accepted as the correct income."

(emphasis added)

When it was argued before the Supreme Court in the case of ***CIT, Madras v. S.V. Angidi Chettiar: 44 ITR 739 (SC)*** that use of the expression "any tax" meant that some tax must be payable before a penalty could be imposed, it repelled the same and held:-

> "The assumption that the expression "any tax" used in section 28 (1) is intended to indicate that there must be some tax payable by the assessee before penalty could be imposed is wholly unwarranted. The futility of the assumption is exhibited by the terms of clause (b). Penalty may be imposed for failure to comply with the notice under sub-section (4) of section 22 or sub-section (2) of section 23 even if the assessee has not assessable income. To the imposition of a penalty, liability to pay tax by the person against whom the penalty is sought to be imposed is therefore not a condition precedent."

14. We may note that the learned counsel appearing for the respondents spent a great degree of time attempting to show that "income" does not refer to loss unless otherwise specifically mentioned. They referred to the definitions of "income" and "total income" under sections 2(24) and 2(45) (respectively) of the Act. Many decisions were referred to. Under section 2(24) of the Act, "income" has been given an inclusive meaning. It includes items such as profits and gains, dividends, capital gains, value of perquisites etc. Section 2(45) of the Act, defines "total income" to mean "*the total amount of income referred to in section 5, computed in the manner laid down in this Act*". Section 5, with some differences as to whether it arises in India or abroad in respect of residents and non-residents, provides that the total income of any previous year of a person includes all income from whatever source derived. Section 14, which is the first section in Chapter IV (Computation of Total Income), prescribes that, save as otherwise provided by the Act, all income shall, for the purposes of charge of income-tax and computation of total income, be classified under the following heads of income: A. Salaries; *B.*

Interest on securities[7]; C. Income from house property; D. Profits and gains business or profession; E. Capital gains; F. Income from other sources. Obviously, the total income is computed by aggregating the "incomes" under each head of income. Let us assume that an individual has income only under the head "Profits and gains of business or profession". And, this year he has suffered a huge loss. Since he cannot set-off this loss this year, he can carry forward the same to the following assessment year in terms of the provisions of section 72 of the Act. But, to do so, as stipulated in section 80 of the Act, he would have to have the extent of the loss determined pursuant to a return filed in accordance with section 139(3) of the Act. Once such a return is filed under section 139(3), by virtue of this provision itself, all the provisions of the Act shall apply as if it were a return under section 139(1) of the Act. At this stage, we need to refresh the meaning ascribed to "total income" under section 2(45) of the Act. It means "*the total amount of income referred to in section 5, computed in the manner laid down in this Act*". The total amount of income referred to in section 5 and computed in the manner laid down in this Act, in the example that we have chosen, means the loss that the individual seeks to carry forward and for which he has filed a return under section 139(3) of the Act. So, even if we go by the definition, if the totalling of the income results in a negative figure (a loss), it would still be regarded as "total income". We may also note the opening words of section 2 of the Act -- "In this Act, *unless the context otherwise requires*". The context in which the expression "total income" is used is also of vital importance. This is the legislative mandate. But, even if any authorities were needed for this proposition we have ***Dooars Tea Co. Ltd. v. Commissioner Of Agricultural Income-tax, West Bengal: 44 ITR 6 (SC)***[8] and ***Reserve Bank of India v. Peerless General***

7Omitted by Finance Act, 1988, w.e.f. 1.4.1989

8The Supreme Court held that -- "What the word "income" denotes has to be determined in the

Finance and Investment Co. Ltd.: *[1987] 1 SCC 424*[9]. Now, various provisic were pointed out by the learned counsel for the respondents where the words "income or loss" were used. This was in an attempt to show that where the legislature intended, it used both the words and where it did not, it referred only to income or only to loss. As indicated above, the total amount of income can be a loss. The general meaning therefore ascribed to "total income" includes both income or loss. Specific mention of both "income or loss" in a provision must be seen in the context of that provision. Taking the textual and contextual meaning of "total income" appearing in clause (a) of Explanation 4 to section 271(1) of the Act, we find that the meaning is the same – it includes both a positive figure as well as a negative figure. The Supreme Court in the case of ***CIT (Central), Delhi v. Harprasad & Co. P. Ltd.:*** *99 ITR 118 (SC)*[10] had occasion to consider, inter alia, the terms "income" and "total income" in the context of the scheme of the 1922 Act. The Supreme Court considered Section 2, clause (15) of the 1922 Act which defines "total income" to mean total amount of income, profits and gains referred to in sub-section (1) of section 4 computed in the manner laid down in

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context of the said section itself."

9In this case it was held :-

"Interpretation must depend on, the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we now why it was enacted. With this knowledge, the statue must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statue is looked at in the context of its enactment, with the glasses of the statute maker provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With those glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a stature can be construed in isolation. Statutes have to be construed so that every word has a place and every thing is in its place..."

Also see: ***Jamshedpur Motor Accessories Stores v. Union Of India And Others:*** *189 ITR 70 (Pat).*

10*Also see:* ***Commissioner Of Income-tax, Tamil Nadu-ii, Madras V. Chelpark Company Ltd:*** *151 ITR 668 (Mad).*

this Act. Section 3 of that Act, captioned as "Charge of income-tax", emphasis that the income-tax shall be charged in respect of the total income of the previous year of every assessee. Section 4 of the 1922 Act defined the ambit of that total income and Section 6 thereof enumerated six heads of income, profits and gains chargeable to income-tax being (i) Salaries; (ii) Interest on securities; (iii) Income from property; (iv) Profits and gains of business, profession or vocation; (v) Income from other sources; (vi) Capital gains. After noticing these provisions, the Supreme Court observed:-

> "From the charging provisions of the Act, it is discernible that the words "income" or "profits and gains" should be understood as including losses also, so that, in one sense "profits and gains" represent "plus income" whereas losses represent "minus income". In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although section 6 classifies income under six heads, the main charging provision is section 3 which levies income-tax, as only one tax, on the "total income" of the assessee as defined in section 2(15). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the "total amount of income, profits and gains referred to in section 4(1)". Secondly, it must be "computed in the manner laid down in the Act". If either of these conditions fails, the income will not be a part of the total income that can be brought to charge."

Again, in ***Commissioner Of Income-tax, Bangalore V. J. H. Gotla: 156 ITR 323 (SC)***, the Supreme Court observed:

> "It can be accepted without much doubt that income would include loss."[11]

It must also be remembered that we have already held that for the purposes of imposition of penalty under section 271(1)(c) of the Act, it is not at all necessary that any tax is payable on the total income assessed. If it were linked to the payment of tax then it would be relevant to differentiate between positive income

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11 *Also see*: ***Commissioner Of Income-tax, Madras V. P. Doraiswamy Chetty: 183 ITR 559 (SC)*** where the view taken in ***Gotla's case (supra)*** has been followed; ***Commissioner Of Income-tax, Kerala-ii V. Smt. Mary Ignatius: 141 ITR 954 (Ker).***

or negative income (loss). But, as penalty is not linked to the factum of payme of tax, it is not necessary to specify whether total income assessed refers to positive income or negative income (loss). Therefore, the text as well as the context requires us to construe "total income" appearing in clause (a) of the Explanation 4 to section 271(1) as including loss also.

15. Several decisions were cited by the respondents on this aspect. However, there was none which could persuade us to take a different view. Some of those decisions require to be dealt with as specific arguments were raised based on them. In ***Commissioner Of Income-tax v. C. R. Niranjan: 187 ITR 280 (Mad)*** it was held:-

> "The relevant words are "the amount of income". The word "income" has been defined under section 2(24) of the income-tax Act, 1961. It is an inclusive definition and it takes into its fold not only the real income. But also such items which are not income in the natural sense of the word. Even in section 4, which is a charging section, nowhere is it stated that income includes loss, it is also significant to note that wherever it is necessary to consider loss as income, the Act specifically stated so. As can be seen from Explanation 2 to section 64. On the other hand, in sections 271(1)(c) and 271(1)(iii), nowhere is it stated that income includes loss.."

With great respect we cannot agree with this view. Section 4 of the Act is the section which creates the charge of income-tax. The tax is on positive income and not on loss. This is obvious. Income here means positive income and not loss. The context requires such an interpretation. Therefore, the absence of a statement to the effect that income includes loss is of no consequence. Furthermore, in the context of section 64, Explanation 2 was brought into effect on 1.4.1980. It was clarificatory in nature[12]. The position in law did not alter. "Income" in section 64,

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12*See:* ***Commissioner Of Income-tax, Kerala-ii V. Smt. Mary Ignatius: 141 ITR 954 (Ker)*** wherein the court held:-

"Though the Explanation comes into effect only with effect from April 1, 1980, by its very nature, it is clarificatory. The position of law as it stood prior thereto was not in any way

even prior to the introduction of the said Explanation 2, was construed including loss. Therefore, with regret, we cannot subscribe to the view that "*wherever it is necessary to consider loss as income, the Act specifically stated so.*" Nor can we agree with conclusion that "income" in section 271(1)(c) of the Act does not include loss. We consider next the Kerala High Court decision in the case of ***Commissioner Of Income Tax V. N. Krishnan: 240 ITR 47 (Ker)*** where it held:-

> "It is amply clear from the perusal of s. 271(1)(c) that penalty could be determined with reference to the amount of tax and unless tax is determined penalty could not be quantified. In the case of the assessee, assessment having been made at loss the question of determining the amount of tax did not arise and, therefore, no penalty could be determined. When penalty cannot be quantified in the absence of determination of tax, it goes without saying that no penalty could be imposed. Even if there were concealment, assessments having been made at loss, no penalty could be imposed."

If we examine the provisions of section 271(1)(c) and 271(1)(iii) of the Act, we find that the penalty prescribed therein is relateable to "*the amount of tax sought to be evaded*". This is an expression which has been ascribed a fictional meaning under Explanation 4 to Section 271(1). It does not refer to the actual tax payable. It refers to the tax "*that would have been chargeable*" on the concealed income had such concealed income been the total income. So, even if there is no tax payable on the actual total income, the "*amount of tax sought to be evaded*" is easily quantifiable as also pointed by us above. We are, therefore, unable to agree with the conclusion in ***V.N. Krishnan*** *(supra)*.

16. Mr Sawhney, the learned counsel for one of the respondents, urged with a great degree of vehemence that the decision of the Supreme Court in the case of ***CIT, Bombay City v. Elphinstone Spinning and Weaving Mills Co.: 40 ITR 142 (SC)*** clinched the issue that "total income" did not include "loss". As such, it

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different as we have indicated."

would be necessary to examine whether this contention is legitimate. Straig away, we may say that this supreme court decision is not apposite to the present appeals. The context of the expression "total income" in that decision is entirely different. The Supreme Court was considering the Finance Act, 1951. Section 2(7) of that act provided that -- "*For the purposes of this section and of the rates of tax imposed thereby, the expression 'total income' means total income as determined for the purposes of income-tax or super-tax, as the case mey be, in accordance with the provisions of the Income -tax Act.*" This is entirely different from the definition in section 2(45) of the Act. Moreover, the issue before the Supreme Court was whether additional-tax could be charged when there was no taxable income. The court held that "if there is no income, there is no question of applying a rate to the 'total income' and no income-tax or super-tax can possibly result." The court also held:-

> "The word 'additional' in the expression 'additional income-tax' must refer to a state of affairs in which there has been a tax before. The words 'charge on the total income' are not appropriate to describe a case in which there is no income or there is a loss."

We fail to see how these observations would be detrimental to the view that we have taken. The situation is different and the context is different. On the contrary there is indication in the said decision itself to show that 'total income' can be negative. For instance, at page 148 of the report it is observed -- "*but when the total income is a negative figure ...*". Therefore, this decision would also be of no help to the respondents.

17. Lastly, there was some discussion on the recent amendments to section 271 brought about by the Finance Act, 2002 with effect from 1.4.2003. Firstly, for the words "in addition to any tax payable" in section 271(1)(iii) the words "in addition to tax, if any, payable" have been substituted. Secondly, clause (a) of Explanation 4 to section 271(1) of the Act has been substituted by the following clause (a):-

7.

> "a) in any case where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, means the tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income;"

Mr Sanjiv Khanna, the learned counsel for the revenue, submitted that these amendments being declaratory in nature would be applicable to the present appeals and if that were so, a plain reading of these provisions would show that the penalty for concealment of income was clearly imposable in a situation where there is a declared loss and discovery of concealment results in a reduced assessed loss. He placed reliance on ***Commissioner Of Income Tax v. Podar Cement (P) Ltd. Etc.: 226 ITR 625 (SC)***, ***Allied Motors (P) Ltd. Etc. v. Commissioner Of Income Tax: 224 ITR 677 (SC)*** and ***Brij Mohan Das Laxman Das v. Commissioner Of Income-tax: 223 ITR 825 (SC).*** On the other hand, the counsel for the respondents argued that the amendments would not apply. They submitted that these amendments, though styled as declaratory, were, in fact, substantive. Accordingly, they submitted, that the amendments could not have retrospective operation. They relied upon ***Commissioner Of Wealth-tax, Lucknow v. Ram Narain Agrawal: 106 ITR 965 (All)***, ***Commissioner Of Income-tax, West Bengal I v. Vegetable Products Ltd: 88 ITR 192 (SC)***, ***K. M. Sharma v. Income-tax Officer: 254 ITR 772***, ***Brij Mohan v. Commissioner Of Income-tax, New Delhi: 120 ITR 1***, ***Gem Granites v. Commissioner Of Income-tax: 271 ITR 322***, ***CCE, Coimbatore v. Elgi Equipments Ltd: 2001 (128) ELT 52 (SC)***, ***B. N. Sharma v. Commissioner Of Income Tax: 226 ITR 442 (SC)***. However, we need not be drawn into this discussion as we have arrived at our conclusions indicated above without considering these amendments.

18. Hence, answering question 1 in favour of the revenue, we hold that the ITAT was not right in deleting the penalty imposed under section 271(1)(c) of the Income Tax Act, 1961 merely on the ground that the total income of the assessee has been assessed at a minus figure/loss. Question 2 has already been answered in the negative by us.

19. In all these appeals the ITAT decided against the Revenue and in favour of the assessee without going into the merits of the question in each case so as to return a positive finding of fact that the assessee in each case had "concealed the particulars of his income or furnished inaccurate particulars of such income." Nor did it examine the quantum of penalty in each case. The ITAT decided the appeals before it on the understanding that where there was a returned loss and a reduced loss was assessed there could be no question of imposition of penalty under Section 271 (1)(c) of the Act. This understanding, we have indicated above, does not hold good for the period between the said 1976 and 2003 amendments. This being the position, answering the questions as indicated above and allowing all the appeals, we remand all these cases to the ITAT for disposal of merits. No costs.

BADAR DURREZ AHMED
JUDGE

CHIEF JUSTICE

July 29,2005.
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