

SUPREME COURT OF INDIA

Dilip N. Shroff

Vs.

Joint Commissioner of Income Tax, Mumbai & Anr

CIVIL APPEAL NO. 2746 OF 2007

(S.B. Sinha & P.K. Balasubramanyan)

18/05/2007

JUDGEMENT

S.B. SINHA, J:

1. Leave granted.

2. The Appellant herein is an assessee under the Income Tax Act. It is an HUF. For the assessment year 1998-99, an income of Rs.30,80,030/- was declared by it, inter alia, showing a long term capital loss of Rs.34,12,000/- . The said capital loss was said to have arisen on account of sale of property being land and building known as 'Jekison Niwas', 220 Walkeshwar Road, Mumbai. Admittedly, the Appellant had 1/4th share therein. It entered into an agreement for sale of undivided 1/4th share in the said property for a sum

of Rs.8 crores with one M/s Layer Exports Pvt. Ltd.. For the purpose of valuation of the said property, one Shri U.D. Chande, a registered valuer, was appointed. On 01.04.1981, the value of the said 1/4th share in the property was determined at Rs. 2,52,00,000/-. In the said valuation report,

it was stated that the purpose was valuation for computation of capital gains. The report was filed in the prescribed form. All the required particulars/

information were furnished. In the said report, description of the property, location thereof, whether situated in residential/commercial/mixed/industrial area, and classification thereof were shown. As regard, proximity to civic amenities, it was stated that the plot is very close to "Raj Bhawan". All other amenities except cinema were within 1 k.m. Means and proximity to surface communication by which the locality is served were also stated. All other requisite particulars, as specified, were stated.

3. After noticing that the total development area of land is 4605 sq. yds with an F.S.I. of 1.33, it was stated "I am informed that the land was reserved for a vegetable & retail market before 1965. I am of the opinion that it is possible to get this reservation modified or waived and hence I consider the effect of this on the value of the property negligible. In any event there will be no loss of F.S.I. even if reservation is retained for the purpose of my valuation of share in the property. Based on the sales instances the prices given in "Accommodation Times" I am of the opinion and feel that the rate of the Residential Apartment in the area in 1981 would be in between Rs.2500 to Rs.3000/- per S.FT. I think that the lower value of Rs.2500 per S.FT. as fair and reasonable. This rate will be fair and reasonable for the share of property belonging to Late Mr. Natwarlal Shroff & Late Mrs. Sonabai Shroff as the title of their holding is clear and Marketable. I am appointed to give value of the share of the property belonging to the Late Mrs. Sonabai Shroff i.e. 1/4th share of the property. As regards (valuation of) 1/4th share of Mr. Bhagwandas Dwarkadas Shroff and 1/4th share of Mr. Madhavdas Dwarkadas I am informed that there is suit pending in courts regarding title to the property and tenancy rights. Each of the other holders will fetch the reports of valuation for their respective shares separately. In 1981 the cost of construction may be taken at Rs.275/- per S.FT. Further, considering the Builder's Profit Rs.700/- per S.Ft. and deducting both the value of cost of construction and the Builder's profits from the above stated works out to Rs.1, 525/- per S.FT of saleable area. Considering that it is a jointly owned property, I take it as fair and reasonable. As these rate the value of the share of the property belonging to late Mr. Natwarlal Shroff comes to - $16536.5 \times 1525.00 = \text{Rs.} 2, 52, 18,165.05$ Say Rs.2, 50, 00,000.00. (I) Though the building itself is old and dilapidated, I consider the scrap value of it at Rs.50/- per S.FT. As the Built up area is 16000 S.FT. The scrap value of structure comes to Rs.8,00,000.00. The value of the share of Late Mr. Natwarlal Shroff of this scrap value is Rs, 8, 00,000.00. The value of the share of Late Mr. Natwarlal Shroff of this scrap value is = Rs.2,00,000.00. (II) Therefore value of the property belonging to Late Mr. Nartwarlal Shroff works out to (I)+(II). Rs.2,50,00,000.00+Rs.2,00,000.00 = Rs.2,52,00,000.00 I therefore value the share of the above property belonging to Late Mr. Natwarlal Shroff at Rs.2,52,00,000.00 (Rs. Two Crore Fifty Two Lakhs Only) as on 1/4/81"

4. As regard existence of sale instances, however, although a sheet was said to have been attached thereto, no such thing was done. As against column 40, namely, 'if sale instances are not available or not relied upon, the basis of arriving at the land rate', it was stated : "In addition to Sales Instances & "Accommodation Times" are used."

The Valuer in his report, inter alia, stated: "When I inspected the premises I found the building in a dilapidated condition. In fact part of the building has collapsed. I am informed that in 1981 the building was in similar condition I am therefore inclined to consider only the scrap value of the building and the value of only land as the basis of my valuation."

5. In the year 1997 by reason of a consent decree passed in Suit No.3845 of 1997, 1/4th undivided share in Jekison Niwas was sold and possession was transferred to M/s Layer Export Pvt. Ltd. against final payment.

6. The return filed by the Appellant on 30.09.1998 came up for scrutiny before the First Respondent, who in exercise of its power under Section 55A of the Income Tax Act, 1961 (for short, 'the Act') referred the matter for valuation of the said 1/4th undivided share of the Appellant as on 01.04.1981 to the District Valuation Officer; whereupon the District Valuation Officer submitted a report dated 29.06.2000 wherein the 1/4th undivided share of the Appellant in the said property as on 01.04.1981 was determined at

Rs.1, 14, 92,907, the basis whereof is said to be as under:"Name of Property Land along with Bungalow known as "Jekinson Niwas" 220-Walkeshwar Road,

Mumbai-400 0061 Land Area as per records 5250 sq. yds. = 4389.63 sq. mt.

2. Land rate adopted @ Rs.12842/- sq. mt. (897/- x 1.33 x 10.764)

3. Consideration of land component Rs.5,63,71,628 (A)

4. Built-up Area existing as on 1-4-81 (Gr.+I upper floor bungalow structures) 16,000 sq. ft.

5. Salvage/Scrap value (16000 sq. ft @ Rs.100/- sq. ft.) as adopted by the Regd. Valuer Rs.16,00,000/- (B)

6. Total consideration (A) + (B) Rs.5, 79, 71,628/-

7. 1/4th share of the above (6) Consideration as Fair Market Value Rs.1,44,92,907/-

Say Rs.144.93 lakhs"

7. For the aforementioned purpose the land rate was taken at Rs.897/- sq. ft. on the basis of the following sale instances :"

Sl. No.

Date of

Sale

Name of Property

Consideration

Area

Rate

1

27.11.79

Land Survey No. 218

(Pt) Street No.25, 27,

27(A) at Narayan

Dhabolkar Rd. Off N.S.

Rd., Mumbai

Rs.3,15,00,000/

7114.08

sq. mt.

Rs.4428/-

sq. mt.

2

19.10.82

Flat No.302, 3rd floor at

Sanudeep CHS Ltd. Plot

No.631 (Pt) at Altamount

Road, Mumbai

Rs.68,00,000/-

346.60

sq. mt.

Rs.1823/-

sq. ft.

By comparing and considering the sale instances property with the subject property after taking into account size-shape, time-gap, location-situation and also the factors like physical, social legal and economical, the land FSI rate as on 1.4.81 is Rs.897

sq. ft is considered to be fair and reasonable."

8. As regard the Registered Valuer's Report, whereupon the Appellant relied upon, the District Valuation Officer commented:"8.0 Comments on Regd. Valuer's report:

The assessee have submitted Regd. Valuer Shri Uday D Chande's report dated 25.6.96 valuing the subject property 1/4th share as Rs.2,52,00,000/- as on 1.4.81. The Regd. Valuer has simply adopted the rates published in local paper (Accommodation Times). These rates cannot be considered as authentic. The valuer has not based his valuation on any actual sales instance. As such, the Regd. Valuer's report cannot be accepted."

9. The First Respondent having regard to the aforementioned valuation report of the District Valuation Officer passed an order of assessment on 08.08.2000 holding:

"The cost of acquisition as on 1.4.1981 is therefore, adopted at Rs.1, 44, 92,907/- as per the report of the Dist. Valuation Officer-II, Mumbai. Accordingly, the Long Term Capital Gain is worked out as under: Less: Cost of acquisition as on 1.4.81 as per the Dept. Valuer's report as discussed is Rs 1, 44, 92,907 Indexed cost = 1, 44,907 x 331 100

Rs.8, 00, 00,000

Rs.4, 79, 71,522

3, 20, 28,478

Less

Expenses incurred in relation to

Sale of property:

Solicitor's fees : Rs.2, 50,000

Brokerage : Rs.8, 00,000

LONG TERM CAPITAL GAINS

Rs. 10, 50,000

Rs.3, 09, 78,478

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The claim of the assessee for deduction of Rs.22, 200/- being expenses incurred on account of fees paid to Uday Chande is not admissible as it cannot be said to be related to sale of property. Accordingly, the same is not allowed.

6. Subject to the above remarks, the total income of the assessee is computed as under:

Property Income:	Rs
As per statement	64,664
Long term Capital Gains:	
As discussed above	3, 09, 78,478
Income from Other Sources:	
Interest income as per Statement	30, 31,364

TOTAL INCOME	3, 40, 59,506
Rounded off	3, 40, 59,510

7. Assessed accordingly. Give credit for prepaid taxes. Charge interest u/s 234B and 234C. Initiate penalty proceedings u/s 271(1)(c) of the Act. Issue demand notice and challan."

10. Thus, in the said order, valuation of the land as made by the District Valuation Officer was adopted and on the basis thereof long term capital gain was determined to be Rs.3,09,78,478 by taking the valuation of the 1/4th undivided share of the Appellant as Rs.1,44,92,907 as on 01.04.1981. In view of the said order of assessment, a show cause notice under Section 274 read with Section 271 of the Act was served to which a reply was filed by the Appellant on or about 14.08.2000 claiming that there was no concealment of income as all the details of property were submitted along with the return of income and the difference in the matter of valuation of the 1/4th share of the appellant does not amount to concealment. It was stated therein : "3. All the material facts in respect of the 1/4th share of the sale of property has been disclosed when the return was filed. It is the difference of opinion in respect of value of the property as of 1.4.1981 between the Registered Valuer and Divisional Valuation Officer with regard to value of the property as of 1.4.1981 does not amount to concealment.

4. The Valuation Report by the Divisional Valuer of the department has been arrived at by using his best judgment and perception. The value determined by him as of .4.1981 has been on the basis of concepts and methods adopted by him, without taking into account the objections and suggestions made by the assessee. The difference between the value as determined by the Registered Valuer and Department's Divisional Valuation Officer does not change the basis character or the details of valuation, hence there is

no concealment whatsoever. You are therefore requested to drop the penalty proceedings initiated u/s 271(1)(c) and oblige. Our client for the sake of mental peace and in order to co-operate with the Department does not wish to go in to appeal and dispute the assessment done by you. He does not want to contest the assessment completed by you.

He will pay the demand of Rs.94, 97,657.00 as per the demand notice and will show you the Challan of having made the payment shortly.

You are once again requested to decide the fate of penalty U/s 271(1)(c) immediately as desired by the assessee, since I am leaving the country for good and intend to prefer an appeal against the order of Penalty if passed."

11. The First Respondent, however, in his order dated 23.08.2000 purported to be in exercise of its power under Section 271(1)(c) of the Act, held : "The assessee, it would appear, has not filed an appeal against the order under Section 143(3) of the Act and hence the conclusions drawn as regards the computation of total income in this case are final. By no stretch of imagination a property in a

posh locality like Walkeshwar, Mumbai would have resulted in loss after substitution of indexed cost of acquisition. The intention of assessee in obtaining the valuation report is obviously under the head Capital Gains. In the circumstances, the assessee is considered to have furnished inaccurate particulars of income in respect of the amount added under the head capital gains. The amount of tax sought to be evaded is worked out as per clause (a) to Explanation 4 to Sec. 271(1)(c) of the Act at 20% of Rs.3,43,90,478 i.e. Rs.68,78,095. Accordingly, a minimum penalty of Rs.68,78,095 is levied under Section 271(1)(c) of the Act."

12. The Appellant preferred an appeal thereagainst before the Commissioner contending: ".There is no concealment of particulars of income or furnishing inaccurate particulars of such income nor there deemed income to represent the income in respect of which particulars have been concealed."

13. The said appeal was, however, dismissed by the Commissioner of Income Tax by an order dated 13.11.2000 holding : " To summarize differences between two reports cannot be attributed universally to a single reason i.e. difference of opinion. I have already stated in case a report is incorrect for any reason the assessee is expected not to rely upon it because he cannot shift the burden of concealment u/s 271(1)(c) to any other person who might have helped him in the matter of preparation of the return and drawing the statement of income. It was further held : "This is very strange way of valuing the land after first arriving at the value of the building and deducting therefrom the value of the superstructure instead of directly calculating value of land with reference to sales instances."

9. Secondly I find that the basis adopted by the Registered Valuer to rely upon a newspaper is totally unacceptable and does not conform to the accepted principles of valuation.

10. As such the report is therefore unacceptable and at clear variance with the accepted principles of valuation. It is totally incorrect and wrong, if not outrageous.

11. I find the Departmental Valuer's report is based on specific sales instances and computation of land value which constituted the major portion of the report is based on direct sales instances of land. It is not a circuitous method as adopted by the Registered Valuer."

12. The Appellant preferred an appeal before the Income Tax Appellate Tribunal being aggrieved by and dissatisfied with the said order. He also affirmed an affidavit stating that he had honestly relied on the professional advice of the Registered Valuer and the Chartered Accountant and had not approached the Valuer for the purpose of obtaining the report at any specified value in order to avoid

paying taxes. The Income Tax Appellate Tribunal, however, dismissed the said appeal and confirmed the order of the Commissioner of Income Tax by an order dated 10.08.2001, holding : "It was also frankly admitted that the words "sales instances" mentioned against Col. 40 of the report were incorrectly mentioned. It was further held : "We are afraid that the above arguments cannot be accepted what is enjoined upon the assessee is a duty to make a correct and complete disclosure of his income and not only of the material facts such as disclosure of

the details of the property and factum of sale thereof as in the assessee's case. As stated earlier the assessee disclosed long term capital loss of Rs.34,12,000/- and claimed carry forward thereof to the subsequent year as against taxable long term capital gain of Rs.3,09,78,428/-. The disclosure made of the particulars of income in the return under the head capital gain by the assessee is certainly incorrect for which the impugned penalty is exigible. The assessee cannot take shelter under a report of a registered valuer which is found by the revenue authorities to have been prepared without due regard to the accepted principles of valuation" It was also held : "Acceptance by the assessee of the value of his share of property as on 1.4.1981 estimated in the DVO's report for computation of capital gains is an important factor to be noticed. In the case before us, the difference in the valuation between the registered valuer and the DVO arose on account of incorrect application of the principles of valuation or non adherence thereto by the registered valuer as against the valuation made by the DVO as per accepted norms of valuation which valuation has been accepted by the assessee. As stated earlier, perusal of the orders of the revenue authorities will make it abundantly clear that the impugned penalty has been levied upon the assessee for furnishing inaccurate particulars of income under the main clause of sec.271 (1)(c)."

13. Indisputably, the Appellant deposited a sum of Rs.68,78,095/- towards penalty. An appeal preferred by him before the High Court in terms of Section 260A of the Act was dismissed in limine, stating : "We are not persuaded by the submission of the learned counsel for the assessee. The revenue authorities as well as the Income Tax Appellate Tribunal have concurrently held that the assessee furnished inaccurate particulars. This finding is based on the aspect that the valuation report submitted by the assessee did not reflect the correct cost of acquisition. What is the market value of the property as on 01.04.1981 is an aspect of the fact and the value furnished by the assessee was held to be factually incorrect. If the computation of the long term capital gains by the assessee was found to be wrong obviously, the finding of the revenue authorities and the Tribunal that the assessee furnished inaccurate particulars cannot be faulted..."

14. Mr. Anil B. Dewan, the learned Senior Counsel appearing on behalf of the Appellant, would contend that the First Respondent in the order of assessment, did not record his satisfaction that the assessee had concealed the particulars of his income or furnished inaccurate particulars which were conditions precedent for initiating penalty proceeding under Section 271(1)(c) of the Act. The show cause notice also was issued in a standard form without deleting therefrom inappropriate words and paragraphs and it showed total non-application of mind on the part of the Assessing Officer. It was contended that the penalty proceeding had been initiated on all possible grounds although in the order of assessment the only ground taken was the alleged furnishing of inaccurate particulars of income. The Commissioner of Income Tax as also the Income Tax Appellate Tribunal while passing the impugned orders having failed to record any finding in their respective orders that there had been any conscious act on the part of the Appellant in furnishing the inaccurate particulars with

intention to evade tax, the penalty orders are vitiated in law. The assessee having furnished all material facts and furthermore having appointed a registered valuer recognized for the purpose of valuation of property specifically under the provisions of the Wealth Tax Act, cannot be said to have the requisite mens rea which is the sine qua non for imposition of penalty. It was argued that whereas the registered valuer relied upon the figures mentioned in the Accommodation Times, the Departmental Valuation Officer relied upon two sale instances, one of the year 1979 (rate approximately Rs.500/- per sq. ft.) and another of the year 1982 (rate Rs.1,823/- per sq. ft.) and arrived at a figure of Rs.897/- per sq. ft. without any objective basis. Valuation being based on estimate and, thus, being a matter of opinion can always vary. The Appellant having availed the services of an expert, could not have gone into the correctness thereof as has been observed by the Commissioner of Income Tax in his impugned order. In view of the fact that the explanation offered by the assessee was bona fide, no penalty proceeding could have been initiated.

15. Mr. Gopal Subramaniam, the learned Additional Solicitor General appearing on behalf of the Respondents, on the other hand, would take us through the legal history of the provision of section 271(1)(c) of the Act; and furthermore draw our attention to the fact that neither the sheet showing the sale instances had been annexed with the return nor the particulars thereof had been furnished; and even no copy of the Accommodation Times had been annexed, wherefrom it could be inferred that deliberate attempt had been made on the part of the Appellant in providing inaccurate particulars. It was submitted that the show cause notice issued by the authority will have to be read with the order of assessment and so read it would appear that the notice was issued upon due application of mind. It was submitted that the factors governing concealment of income and furnishing of inaccurate particulars overlap with each other and as such it may not be possible for the authority while issuing notice to specify whether it is a concealment of income or furnishing of inaccurate particulars. Existence of mens rea is no longer an essential element for initiating the penalty proceeding having regard to the amendments made in the Act.

16. Before advertent to the rival contentions, we may notice the legal history of the provisions of Section 271(1)(c) of the Act. In the Income Tax Act, 1922, the provision for penalty was provided in Section 28(1)(c) which dealt with the matter relating to imposition of penalty in the following terms : "28. Penalty for concealment of income or improper distribution of profits. (1) If the Income Tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal in the course of any proceedings under this Act,

is satisfied that any person (c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income"

17. Interpreting the said provision some of the High Courts were of the opinion that the burden of proof and the onus lay upon the department to establish that the assessee was guilty of concealment of the particulars of income and even if the assessee had given a false explanation, the same by itself would not prove that the receipt necessarily constituted income of the assessee. However, some High Courts opined differently, holding that the penalty proceeding is included in the expression 'assessment' and the true nature of penalty had been held to be additional tax.

18. The said question came up for consideration before this Court in Commissioner of Income Tax, West Bengal vs. Anwar Ali [(1970) 2 SCC 185], wherein it was held :

"The section is penal in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the Legislature considers to be against the public interest. It is significant that in C.A. Abraham case this court was not called upon to determine whether penalty proceedings were penal or of quasi-penal nature and the observations made with regard to penalty being an additional tax were made in a different context and for a different purpose. It appears to have been taken as settled by now in the sales tax law that an order imposing penalty is the result of a quasi-criminal proceedings: (Hindustan Steel Ltd. v. State of Orissa⁷). In England also it has never been doubted that such proceedings are penal in character; Fattorini (Thomas) (Lancashire) Ltd. v. Inland Revenue Commissioner"

19. In Commissioner of Income Tax, Ahmedabad v. Gokuldas Harivallabhas, [34 ITR 98], as regard onus of proof, it was opined : "That the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income and, therefore, the Department must establish that the receipt of the amount in dispute constitutes income of the assessee."

20. As regard the question as to whether a finding given in the order of assessment that particular receipt is income after rejecting the explanation given by the assessee as false, would prima facie be sufficient for establishing in proceedings under Section 28 that the disputed amount was the assessee's income, it was observed : "It must be remembered that the proceedings under Section 28 are of a penal nature and the burden is on the Department to prove that a particular amount is a revenue receipt. It would be perfectly legitimate to say that the mere fact that the explanation of the assessee is false does not necessarily give rise to the inference that the disputed amount represents income. It cannot be said that the finding given in the assessment proceedings for determining or computing the tax is conclusive. However, it is good evidence. Before penalty can be imposed the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars."

21. Vaidialingam, J. followed the said dicta in Commissioner of Income Tax v. M/s Khoday Eswarsa & Sons [(1971) 3 SCC 555], in the following terms : "19. From the above it is clear that penalty proceedings being penal in character, the Department must establish that the receipt of the amount in dispute constitutes income of the assessee. Apart from the falsity of the explanation given by the assessee, the Department must have before it before levying penalty cogent material or evidence from which it could be inferred that the assessee has consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars in respect of the same and that the disputed amount is a revenue receipt. No doubt the original assessment proceedings, for computing the tax may be a good item of evidence in the penalty proceedings; but the penalty cannot be levied

solely on the basis of the reasons given in the original order of assessment."

22. When the law stood thus, the new Income Tax Act in 1961 was enacted wherein Section 271(1)(c) was couched in the following language : "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)

(b)

(c) Has concealed the particulars of his income or deliberately 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 any tax payable by him, a sum which shall not be less than twenty per cent, but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income."

23. An amendment thereto was carried out in the year 1964, where by and hereunder the word 'deliberately' occurring in clause (c) of Section 271 (1) was omitted and an explanation was inserted thereto; as a result whereof the said provision reads thus:

"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)

(b)

(c) Has concealed the particulars of his income or furnished inaccurate particulars of such income."Explanation.- Where the total income returned by any person is less than eighty per cent of the total income (hereinafter in this Explanation referred to as the correct income) as assessed under section 143 or section 144 or section 147 (reduced by the expenditure incurred bona fide by him for the purpose of making or earning any

income included in the total income but which has been disallowed as a deduction), such person shall, unless he proves that the failure to return the correct income did not arise from any fraud or any gross or willful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of clause (c) of this sub-section."

24. While the things stood thus, the Government of India appointed a Committee of Experts headed by Justice Wanchoo, the former Chief Justice of India, and in his report, it was observed : "2.75. Several persons who appeared before us urged the need for deleting the Explanation to clause (c) of sub-section (1) of section 271 of the Income Tax Act, 1961, for various reasons. The primary objection against this Explanation is that it is being invoked indiscriminately and penalty proceedings are initiated in all cases where the income shown in the return is less than eighty per cent of the assessed income. This Explanation was introduced in order to cast on the assessee the burden of proving that the omission to disclose true income did not proceed from any fraud, or gross or willful neglect. A similar Explanation was also introduced in the Wealth-tax Act, 1957. This was sequel to the recommendation made by the Direct Taxes Administration Enquiry Committee (1958-59), based on a similar provision in the United Kingdom law. We understand that in a number of cases that came up on appeal, the appellate authorities were not inclined to uphold the penalties imposed on the basis of this Explanation, since they were of the view that the Department will still under obligation to prove the concealment. The difference between the assessed income and the returned income can be due to a variety of reasons some technical, like estimate of gross profit and others purely arithmetical and in our opinion, it would not be correct to initiate proceedings in every case where the difference exceeds twenty per cent. In the United Kingdom itself, the provision on which this Explanation was based has not been dropped. In any event, if past experience is any indication, we feel that the Explanation has failed to serve any useful purpose. On the other hand, it has resulted in unwarranted harassment to the taxpayers, and too much of paper work caused by indiscriminate initiation of penalty proceedings and consequent appeals. We recommend that Explanation to clause (c) of sub-section (1) of section 271 of the Income-tax Act, 1961, and also Explanation I to clause (c) of sub-section (1) of section 18 of the Wealth Tax Act, 1957, may be deleted. 2.76. While we are of the view that penalties should not be draconian, we also strongly feel that those who are tempted to resort to concealment of income should not be allowed to get away with tenuous legal interpretations. We would recommend the following changes in the Income Tax Act in this regard : (a) Presumption of concealment where

explanation found false Several officers of the Department invited our attention to the Supreme Court's decision in the case of Commissioner of Income-tax, West Bengal v. Anwar Ali (76 ITR 696). It has been held by the Court that penalty for concealment of income cannot be imposed merely because the explanation given by an assessee is found to be false. While this decision was given in the context of clause (c) of sub-section (1) of section 28 of the Indian Income Tax Act, 1922, it is not reasonably certain that it would not apply to penalties under the Income Tax Act, 1961. We would, therefore, recommend as a measure of abundant caution, that an Explanation to sub-section (1) of section 271 of the Indian Income Tax Act, 1961, may be inserted to clarify that where a taxpayer's explanation in respect of any receipt, deposit, outgoing or investment is found to be false, the amount represented by such receipt, etc., shall be deemed to be income in respect of which particulars have been concealed or inaccurate particulars have been furnished within the meaning of clause (c) of sub-section (1) of section 271 of the Income Tax Act, 1961."

25. In the year 1975 by reason of Section 61 of the Taxation Laws (Amendment) Act, 1975, Explanation to Section 271(1)(c) was deleted and four Explanations were inserted with effect from 01.04.1976. Section 271(c) reads as follows : "271.Failure to furnish returns, comply with notices, concealment of income, etc. (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person

(a)

(b)

(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, -

Explanation 1.- Where in respect of any facts material to the computation of the total income of any person under this Act, or

(A) such persons failed to offer an explanation or offers an explanation which is found by the Income Tax Officer or the appellate Assistant Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate, then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section, be deemed to represent the income in respect of which particulars have been concealed : Provided that nothing contained in this explanation shall apply to a case referred to in Clause (B) in respect

of any amount added or disallowed as a result of the rejection of any explanation offered by such person, if such explanation is bona fide and all the facts relating to the same and material to the computation of his total income have been disclosed by him.

Explanation 2.

Explanation 3.

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."

26. The provision which is relevant for the purpose of this case, namely, Assessment year 1998-99, reads as under : "271. Failure to furnish returns, comply with notices, concealment of income, etc.

(1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person -

(a) [Omitted]

(b)

(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, -in the cases referred to in clause (c), in addition to tax, if any, payable by him, a sum which shall not be less than , but which shall not exceed three times, 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 1.- Where in respect of any facts material to the computation of the total income of any person under this Act, -

(A) Such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false, or

(B) such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him,then, the amount added or disallowed in computing the total income of such person as a result thereof shall, for the purposes of clause (c) of this sub-section be deemed to represent the income in respect of which particulars have been concealed.

Explanation 2.

Explanation 3.

Explanation 4.- For the purposes 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 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;

(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."

27. Explanation 1, therefore, is applicable to the facts of the case.

28. The correctness of the orders passed by the Assessing Officer, Commissioner of Income Tax as also the Income Tax Appellate Tribunal must be judged in the aforementioned context.

29. We have noticed hereinbefore that the main contention raised on behalf of the revenue justifying the levy of penalty against the Appellant, inter alia, is that although as against Item No.38 of the report, a sheet was purported to have been attached but in fact the same had not been done and furthermore no land rate was adopted for valuation and as against Item No.40 in addition to the Accommodation Times, which was a local newspaper, no other sale instance was taken, and even a copy thereof had not been furnished; nor the sale instances had been mentioned. The explanation of the assessee was that in the instant case, Explanation to Section 271(1)(c) was never invoked.

30. Section 271(1)(c) of the Act is in two parts. Whereas the first part refers to concealment of income, the second part refers to furnishing of inaccurate particulars thereof. In the instant case, the penalty has been levied upon the Appellant under the second part of Section 271(1)(c) of the Act. One of the questions which arise for consideration is as to whether Explanation 1 is applicable in respect of both the parts or in respect of the first part only.

31. Let us also assume that later part of clause (c) of Section 271(1) did not invite any investigation into whether it was done deliberately or willfully or not; but let us leave final consideration of this nicety of application thereof in a more appropriate case and apply the element of deliberation in the fact of the present case.

32. However, according to the assessee the omission to annex the sheet as mentioned against column No. 38 as also to enclose a copy of the 'Accommodation Times' was a clerical error and no significance could have been attached thereto inasmuch no sale instance was relied upon by the Valuer and, thus, by reason thereof no inaccurate particulars thereof can be said to have been furnished. It is not a case where the Appellant is alleged to have concealed the income as the authorities proceeded on the basis that the penalty was to be levied upon the Appellant only on the ground of furnishing inaccurate particulars.

33. We are not oblivious that some decisions point out that the principles of Mens Rea may have application only in certain categories of cases Some of which are::

In *Sherras v. De Rutzen* (1895) 1 QB 918, it was suggested that Mens Rea is an essential ingredient in every offence except in three cases; i) Cases not criminal in any real sense but which in the public interest are prohibited under a penalty, e.g. Revenue Acts; ii) Public Nuisances; iii) Cases criminal in form but which are really only a summary mode of enforcing a civil right. In 85, *Corpus Juris Secundum*, Paragraph 1023, it is stated: "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws." In *Director of Enforcement v. MCT M Corp. Pvt. Ltd.* [(1996) 2 SCC 471] it was suggested that what applies to "tax delinquency" equally holds good for the "blameworthy" conduct for the contravention of the provision of FERA. In *Addl. CIT v. Dargapandinath Taljaya and Co.* (1977) 107 ITR 850, it was suggested that Section 271(1)(a) does not take in mens rea which forms part of Section 276 C which creates offence of willful failure. This was the view taken in *Gujarat Travancore Agency v. CIT* (1989) 177 ITR 455 (SC). In *Lim Chin Aik v. The Queen* (1963) Appeal Cases 160, notices that where "public welfare offences" are concerned, there was a presumption of strict liability and the presumption of mens rea was displaced. In *Ummali Umma v. Inspecting Assistant Commissioner of Income Tax* [64 ITR 669 (Kerala)], it was stated: "I cannot say that the penalty imposed under Section 28 of the repealed Act or under Section 371 of the Act was or is imposed on the basis that it was or is an offence. For the offence punishment was or is prescribed such as imprisonment, fine or both. The imposition of penalty on the basis of an act or omission by an assessee is not because the act or omission constitutes an offence, but because that act or omission would constitute an attempt at evasion. Therefore, penalty is exacted not because an act or omission is an offence but because it is an attempt at evasion of tax on the part of the assessee."

Stallybrass in (1936) *The Law Quarterly Review* at page 66 suggests that: "In the case of modern statutory offences the maxim has no general application and the statutes are to be regarded as themselves prescribing the mental element which is a pre-requisite to a conviction. The learned author suggests that much of the confusion can be avoided if reference to mens rea in modern statutory offences is avoided."

34. Thus, it appears that there is a distinct line of authorities which clearly lay down that in considering a question of penalty, mens rea is not a relevant consideration. Even assuming that when the statute says that one is liable for penalty if one furnishes inaccurate particulars, it may or may not by itself be held to be enough if the particulars furnished are found to be inaccurate is anything more needed but the question would still be as to whether reliance placed on some valuation of an approved valuer and, therefore, the furnishing of inaccurate particulars was not deliberate, meaning thereby that an element of mens rea is needed before penalty can be imposed, would have received serious consideration in the light of a large number of decisions of this Court.

35. The question, however, in a case of this nature, would be whether it was a fit case where

discretionary jurisdiction was properly exercised or not.

36. The legal history of Section 271(1)(c) of the Act traced from the 1922 Act prima facie shows that explanations were applicable to both the parts. However, each case must be considered on its own facts. The role of explanation having regard to the principle of statutory interpretation must be borne in mind before interpreting the aforementioned provisions. Clause (c) of sub-section (1) of Section 271 categorically states that the penalty would be leviable if the assessee conceals the particulars of his income or furnishes inaccurate particulars thereof. By reason of such concealment or furnishing

of inaccurate particulars alone, the assessee does not ipso facto become liable for penalty. Imposition of penalty is not automatic. Levy of penalty not only is discretionary in nature but such discretion is required to be exercised on the part of the Assessing Officer keeping the relevant factors in mind. Some of those factors apart from being inherent in the nature of penalty proceedings as has been noticed in some of the decisions of this Court, inheres on the face of the statutory provisions. Penalty proceedings are not to be initiated, as has been noticed by the Wanchoo Committee, only to harass the assessee. The approach of the assessing officer in this behalf must be fair and objective.

38. Clause (iii) of sub-section (1) of Section 271 again provides for a discretionary jurisdiction upon the assessing authority inasmuch as the amount of penalty may not be less than the amount of tax sought to be evaded by reason of such concealment of particulars of his income, but it may not exceed three times thereof. The factors which are material for the purpose of computation of total income as is sought to be emphasized in Explanation-1, refer to computation of income on the part of the assessee which is directly relatable to : (a) failure to offer an explanation and/ or offering an explanation which is false; and (b) which he is not able to substantiate and fails to prove that such explanation is bona fide.

39. Only in the event the factors enumerated in clauses (A) and (B) of Explanation-1 are satisfied and a finding in this behalf is arrived at by the Assessing Officer, the legal fiction created thereunder would be attracted.

40. For the purpose of invoking Clause (iii) of sub-section (1) of Section 271, the expression "amount of tax sought to be evaded" is set out in Explanation 4. This sub-clause would be attracted when a finding is arrived at that some amount of tax was sought to be evaded by the assessee as envisaged by Clause (a) thereof. Explanation appended to Section 271 (1)(c) is an exception to the general rule. It raises a legal fiction by reason whereof a presumption is raised against an assessee as a result whereof the burden of proof shifts from the department to the assessee. Legal fiction, however, as is well-known must be given its full effect when the conditions precedent therefor are satisfied and not otherwise. [Ashok Leyland Ltd. v. State of T.N. and Another, (2004) 3 SCC 1]

41. What would be the scope of such 'explanation' has been considered by this Court in *S. Sundaram Pillai, etc. v. V.R. Pattabiraman* [AIR 1985 SC 582] wherein object of the explanation is stated in the following terms :

"53. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is

"(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) It cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same.""

[See also *Swedish Match AB and Another v. Securities & Exchange Board of India and Another*, (2004) 11 SCC 641]

42. If the ingredients contained in the main provisions as also the explanation appended thereto are to be given effect to, despite deletion of the word 'deliberate', it may not be of much significance.

43. The expression "conceal" is of great importance. According to Law Lexicon, the word "conceal" means:"to hide or keep secret. The word "conceal" is con+celare which implies to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of. The offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the income tax authorities."

In Webster's Dictionary, "inaccurate" has been defined as:

"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript."

44. It signifies a deliberate act or omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income or furnishing of inaccurate particulars.

45. The term 'inaccurate particulars' is not defined. Furnishing of an assessment of value of the property may not by itself be furnishing of inaccurate particulars. Even if the explanations are taken recourse to, a finding has to be arrived at having regard to clause (a) of Explanation 1 that the Assessing Officer is required to arrive at a finding that the explanation offered by an assessee, in the event he offers one, was false. He must be found to have failed to prove that such explanation is not only not bona fide but all the facts relating to the same and material to the income were not disclosed by him. Thus, apart from his explanation being not bona fide, it should have been found as of fact that he has not disclosed all the facts which was material to the computation of his income.

46. The explanation, having regard to the decisions of this Court, must be preceded by a finding as to how and in what manner he furnished the particulars of his income. It is beyond any doubt or dispute that for the said purpose the Income Tax Officer must arrive at a satisfaction in this behalf. [See Commissioner of Income Tax v. Ram Commercial Enterprises Ltd., 246 ITR 568 and Diwan Enterprises v. Commissioner of Income Tax, 246 ITR 571]

47. It is furthermore of some significance that the Commissioner in its order dated 30.11.2000 made a terse comment that the assessee cannot shift the burden of concealment to any other person, meaning thereby, the registered valuer. He, furthermore, made a comment that the registered valuer had adopted a strange way of valuing although no reason, far less than sufficient or cogent reason, has been assigned in support thereof. The said comments were unwarranted.

48. Primary burden of proof, therefore, is on the revenue. The statute requires satisfaction on the part of the assessing officer. He is required to arrive at a satisfaction so as to show that there is primary evidence to establish that the assessee had concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the department. [See D.M. Manasvi v. Commissioner of Income Tax, Gujarat,-II [(1973) 3 SCC 207]

49. While considering as to whether the assessee has been able to discharge his burden, the assessing officer should not begin with the presumption that he is guilty.

50. Once the primary burden of proof is discharged, the secondary burden of proof would shift on the assessee because the proceeding under Section 271(1)(c) is of penal nature in the sense that its consequences are intended to be an effective deterrent which will put a stop to practices which the Parliament considers to be against the public interest and, therefore, it was for the department to establish that the assessee shall be guilty of the particulars of income. [See Anwar Ali (supra) and M/s Khoday Eswarsa (supra)].

51. The order imposing penalty is quasi-criminal in nature and, thus, burden lies on the department to establish that the assessee had concealed his income. Since burden of proof in penalty proceedings varies from that in the assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceeding constitute good evidence in the penalty proceeding. In the penalty proceedings, thus, the authorities must consider the matter afresh as the question has to be considered from a different angle. [See Anantharam Veerasinghaiah & Co. v. C.I.T., Andhra Pradesh, 1980 Supp SCC 13].

52. The Appellant herein in the penalty proceedings had produced relevant particulars to show that they were materials in support of the report, although a part of which was not annexed with the report.

53. Before, thus, a penalty can be imposed, the entirety of the circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had furnished inaccurate particulars thereof.

54. We have noticed hereinbefore that the quantum of penalty has been increased from time to time under the 1922 Act. Maximum penalty which could be imposed was only 20% of the tax sought to be evaded whereas, in terms of the provisions as it stands now, the penalty can be imposed to the extent of three times of the tax sought to be evaded.

55. It is now a well-settled principle of law that more stringent the law, more strict construction thereof would be necessary. Even when the burden is required to be discharged by an assessee, it would not be as heavy as the prosecution. [See P.N. Krishna Lal and Others v. Govt. of Kerala and Another, 1995 Supp (2) SCC 187]

56. It is one thing to say that the valuation based on a newspaper is totally unacceptable, but it is another thing to say that by reason of the return, the assessee furnished inaccurate particulars. The question which was inter alia required to be posed was whether the method adopted by the registered valuer was wholly unknown to law or was contrary to all modes of valuation. Whether the particulars sought to have been concealed were necessary for the purpose of arriving at a correct valuation or otherwise misleading? Whether the method of valuation adopted by the registered valuer resulted in a grossly unfair valuation which could not have been done by any reasonable person? Was the methodology adopted totally wrong?

57. The methods of valuation, as we know, may be different. A registered valuer is supposed to know as to which method or mode should be adopted for the purpose of valuing particular land or a building having regard to a large number of factors involved therein. The tax on capital gains does not envisage that the valuation given must be true and exact market value. Even the market value of a property may be found to be different having regard to the locale thereof. There was no direct sale instance. The sale instances relied upon by the District Valuer was of 1979 and 1982.

58. In *Union of India v. Pramod Gupta (Dead) By LRs. and Others* [(2005) 12 SCC 1], this Court observed:

"24. While determining the amount of compensation payable in respect of the lands acquired by the State, the market value therefor indisputably has to be ascertained. There exist different modes therefor.

25. The best method, as is well known, would be the amount which a willing purchaser would pay to the owner of the land. In absence of any direct evidence, the court, however, may take recourse to various other known methods. Evidences admissible therefor inter alia would be judgments and awards passed in respect of acquisitions of lands made in the same village and/or neighbouring villages. Such a judgment and award, in the absence of any other evidence like the deed of sale, report of the expert and other relevant evidence would have only evidentiary value."

It was further observed:

"78. We have earlier noticed that one of the modes of computing the market value may be based on a judgment or award in respect of acquisition of similar land, subject of course to such increase or decrease thereupon as may be applicable having regard to the accepted principles laid down therefor and as may be found applicable."

59. This Court therein noticed a large number of decisions where different principles of arriving at a market value have been noticed but it has also been noticed that even while determining market value under the Land Acquisition Act, some guess-work may be inevitable.

60. It is furthermore interesting to note that this Court in D.M. Manasvi (supra) categorically opined that it would be the satisfaction of the Income Tax Officer in the course of the assessment proceedings regarding the concealment of income which would constitute the basis of foundation of the proceedings for levy of penalty. It was furthermore observed :

"It may also be observed that what is contemplated by Sections 271 and 274 of the Act is that there should be, prima facie, satisfaction of the Income Tax Officer or the Appellate Assistant Commissioner in respect of the matters mentioned in sub-section (1) before he hears the assessee or gives him an opportunity of being heard. The final conclusion on the point as to whether the requirements of clauses (a), (b) and (c) of Section 271(1) have been satisfied would be reached only after the assessee has been heard or has been given a reasonable opportunity of being heard."

61. It may be true that the legislature has attempted to shift the burden from revenue to the assessee. It may further be correct that different views have been expressed as regard construction of statutes in the light of the changing legislative scenario, but the tenor of a penal proceeding remains the same.

62. At this juncture, we may examine the question as to the effect of the amendments carried out in Section 271(c) of the Act and for the said purpose we may notice a few decisions of this Court.

63. In Sadhu Singh vs. District Board [(1969) RCR 156] while upholding the notification of exemption granted in favour of the District Board, before this Court a distinction was sought to be made that whereas in the Madras Act which was applicable in the case of P.J. Irani vs. State of Madras [(1962) 2 SCR 169], the expression used was "unreasonable eviction of tenants"; in the Punjab Act, the expression used was "eviction of tenants". But this Court found no distinction between the two Acts as one of the objects of the Acts was eviction of unreasonable tenants and the expression "unreasonable" thus was held to be read in the title of the Rent Act.

64. It is interesting to note that this Court in *The Workmen of M/s Firestone Tyre & Rubber Co. of India P. Ltd. v. The Management and Others* [AIR 1973 SC 1227], despite insertion of Section 11A in the Industrial Disputes Act, 1947 by reason of the Industrial Disputes (Amendment) Act, 1971, held :

"At the time of introducing Section 11-A in the Act, the legislature must have been aware of the several principles laid down in the various decisions of this Court referred to above. The object is stated to be that the Tribunal should have power in cases, where necessary, to set aside the order of discharge or dismissal and direct reinstatement or award any lesser punishment"

65. The omission of the word "deliberate", thus, may or may not be of much significance but what is material is its application.

66. Section 271(1)(c) remains a penal statute. Rule of strict construction shall apply thereto. Ingredients of imposing penalty remains the same. The purpose of the legislature that it is meant to be deterrent to tax evasion is evidenced by the increase in the quantum of penalty, from 20% under the 1922 Act to 300% in 1985.

67. 'Concealment of income' and 'furnishing of inaccurate particulars' are different. Both concealment and furnishing inaccurate particulars refer to deliberate act on the part of the assessee. A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi. Although it may not be very accurate or apt but suppressio veri would amount to concealment, suggestio falsi would amount to furnishing of inaccurate particulars.

68. The authorities did not arrive at a finding that the consideration amount fixed for the sale of property was wholly inadequate. The authorities also do not show that what are the inaccurate particulars furnished by the Appellant. They also do not state that what should have been the accepted principles of valuation. We, therefore, do not accept the submissions of the learned Additional Solicitor General that concealment or furnishing of inaccurate particulars would overlap each other, the same would not mean that they do not represent different concepts. Had they not been so, the Parliament would not have used the different terminologies.

69. We have noticed hereinbefore that even the Wanchoo Committee laid emphasis on the fact that explanation appended to Sub-section (1) of Section 271 should be inserted to clarify that where a tax payer's explanation in respect of any receipt, deposit, outgoing or investment is found to be false, the amount represented by such receipt, etc. shall be deemed to be income in respect of which

particulars have been concealed or inaccurate particulars have been furnished. What was, therefore, necessary to be found out in respect whereof the assessing officer was required to arrive at a satisfaction was 'falsity' in furnishing of explanation by the assessee. Explanation 1, therefore, categorically states that such explanation must either be false or not otherwise substantiated. Even in explanation 4, the expression "evaded" finds place.

70. In *Commissioner of Income Tax v. Mussadilal Ram Bharose* [(1987) 2 SCC 39], this Court while holding that the onus would lie on the assessee to discharge the same, in the case, the difference between the income returned and income assessed was less than 80%, meaning thereby, a rebuttal presumption arose against the assessee, opined :

"10. It is clear that if the Income Tax Officer and the Appellate Assistant Commissioner were satisfied that the assessee had concealed the particulars of his income or furnished inaccurate particulars of such income, he can direct that such person should pay by a penalty the amount indicated in sub-clause (ii) of clause (c) of Section 271(1) of the Act. Before the amendment, difficulty arose and it is not necessary to trace the history, under the law as stood prior to the amendment of 1964, the onus was on the revenue to prove that the assessee had furnished inaccurate particulars or had concealed the income. Difficulties were found to prove the positive element required for concealment under the law prior to amendment; this positive element had to be established by the revenue. To obviate that difficulty the Explanation was added. The effect of the Explanation was that where the total income returned by any person was less than 80 per cent of the total income assessed, the onus was on such person to prove that the failure to file the correct income did not arise from any fraud or any gross or wilful neglect on his part and unless he did so, he should be deemed to have concealed the particulars of his income or furnished inaccurate particulars, for the purpose of Section 271(1). The position is that the moment the stipulated difference was there, the onus that it was not the failure of the assessee or fraud of the assessee or neglect of the assessee that caused the difference shifted on the assessee but it has to be borne in mind that though the onus shifted, the onus that was shifted was rebuttable. If in an appropriate case the Tribunal or the fact-finding body was satisfied by the evidence on the record and inference drawn from the record that the assessee was not guilty of fraud or any gross or wilful neglect and if the revenue had not adduced any further evidence then in such a case the assessee cannot come within the mischief of the section and suffer the imposition of penalty. That is the effect of the provision."

71. The said decision was followed in *Commissioner of Income Tax, Madras v. K.R. Sadayappan* [(1990) 4 SCC 1].

72. In the proceedings under the Income Tax Act, there would be cases and cases of imposition of tax; capital gains being only one of them. It is not disputed that the registered valuers are appointed in terms of the provisions of the Wealth Tax Act, 1957. Sections 16A thereof provides for reference to Valuation Officer.

73. In terms of sub-section (2) of Section 16A, the Valuation Officer may serve a notice upon the assessee. Sub-section (4) thereof empowers the Valuation Officer to serve a notice on the assessee intimating the value which he proposes to estimate and giving the assessee an opportunity to state when he is of the opinion that the value of the asset is higher than the value declare in the return made by him. The Valuation Officer in terms of Wealth Tax Act, therefore, is conferred with a statutory power.

74. Section 34AB occurring in Chapter VIIB of the Act provides for registration of valuers. For the purpose of such a registration, the valuer must possess the qualifications prescribed in that behalf. Certain conditions are also imposed in terms of the Act while registering such valuation.

75. Rule 8A lays down the qualifications of registered valuers. Rule 13 of the said rules provides that a registered valuer can be deregistered if the circumstances so warrant.

76. It is in the aforementioned premise, provisions of the Act, the imposition of tax relating to 'capital gain' are required to be taken into consideration. Section 48 of the Act, inter alia, provides that the income chargeable under the head "capital gains" shall be computed by deducting full value of the consideration received or accruing as a result of transfer of capital assets the following amounts, namely, the cost of the acquisition of the assets and cost of any improvement thereto. The second proviso appended to the said section provides for indexed cost. Such methodology for valuing the property for the purpose of capital gains by way index cost is taken recourse to having regard to the rate of inflation in mind. Explanations (iii) and (v) of the second proviso appended thereto also play an important role which are as under :

"(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later;"(v) "Cost Inflation Index", in relation to a previous year, means such Index as the Central Government may, having regard to seventy-five per cent of average rise in the Consumer Price Index for urban non-manual employees for the immediately preceding previous year to such previous year, by notification in the Official Gazette, specify, in this behalf."

77. Yet again Section 55(2)(b) refers to 'any other capital asset' in the following terms:

"(b) in relation to any other capital asset,--]

(i) where the capital asset became the property of the assessee before the 1st day of April, [1981], means the cost of acquisition of the asset to the assessee or the fair market value of the asset on the 1st day of April, [1981], at the option of the assessee;

(ii) where the capital asset became the property of the assessee by any of the modes specified in sub-section(1) of section 49, and the capital asset became the property of the previous owner before the 1st day of April, [1981], means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of April, [1981], at the option of the assessee ;

(iii) where the capital asset became the property of the assessee on the distribution of the capital assets of a company on its liquidation and the assessee has been assessed to income-tax under the head "Capital gains" in respect of that asset under section 46, means the fair market value of the asset on the date of distribution:

78. Section 55A of the Act provides for reference to Valuation Officer. A bare perusal of the said provision will clearly go to show that the reference to a Valuation Officer is optional. The said provision is for the purpose of making an estimate. Such reference is made, if in the opinion of the Assessing Officer the value of the assets as claimed by the assessee in accordance with the estimate made by a registered valuer is less than its fair market value. Clause (b) of Section 55A refers to any other case which goes to show that the assessee had two options, namely, to get the value of the assets prepared through index value or take any other known mode of valuation.

79. The assessee could get the valuation done through any other mode of index value, or the assessee could have engaged any other valuer other than a registered valuer also. In the instant case, the assessee had chosen to obtain the opinion of a registered valuer.

80. The registered valuer has arrived its opinion on certain basis. He while making the valuation report, disclosed all the particulars. He disclosed that he had chosen to the index value method. He did not rely upon any sale instance. He might have referred to the valuation of the property as mentioned in a local newspaper. But it is not in dispute that he did not furnish any inaccurate particulars. It is true that he has not enclosed the sheet showing sale instance but nothing turns out thereupon as he had not relied upon any sale instances.

81. There can be a genuine difference of opinion between two experts.

The District Valuer, as noticed hereinbefore, having regard to the sale instances of 1979 wherein the value of the land was fixed at Rs.500/- per sq. ft., took notice of the fact that the valuation in terms of another sale instance of 19.10.1982 wherein the land was valued at about Rs. 1823/- per sq. ft. A valuation was to be arrived at on 01.04.1981. He picked up a figure of Rs.897/- per sq. ft. No reason had been assigned in support thereof. No other or further sale instances had been given. We do not know as to whether any other sale instances were available. He merely stated that such valuation had been arrived at after taking into account the time size-shape, time gap, location-situation and also the factors like physical, social, legal and economical. Some other officer could have picked up holes in the said report. On the other hand, the opinion of the registered valuer, as would appear from the report, was that he had taken into consideration the value of the shop as Rs.1525/- per sq. ft.

82. A duty may be enjoined on the assessee to make a correct disclosure of income but if such disclosure is based on the opinion of an expert, who is otherwise also a registered valuer having been appointed in terms of a statutory scheme, only because his opinion is not accepted or some other expert gives another opinion, the same by itself may not be sufficient for arriving at a conclusion that the assessee has furnished inaccurate particulars.

83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars. Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice. [See *Malabar Industrial Co. Ltd. v. Commissioner of Income Tax, Kerala State*, (2000) 2 SCC 718]

85. We have, however, noticed hereinbefore that the Income Tax Officer had merely held that the assessee is guilty of furnishing of inaccurate particulars and not of concealment of income; which finding was arrived at also by the Commissioner of Income Tax and the Income Tax Appellate Tribunal.

86. In *K.C. Builders and Another v. Assistant Commissioner of Income Tax* [(2004) 2 SCC 731], this Court formulated the following questions for consideration:

"8. On the above pleadings and facts and circumstances of the case, the following questions of law

arise for consideration by this Court:

(a) Whether a penalty imposed under Section 271(1)(c) of the Income Tax Act and prosecution under Section 276-C of the Income Tax Act are simultaneous?

(b) Whether the criminal prosecution gets quashed automatically when the Income Tax Appellate Tribunal which is the final court on the facts comes to the conclusion that there is no concealment of income, since no offence survives under the Income Tax Act thereafter?

(c) Whether the High Court was justified in dismissing the criminal revision petition vide its impugned order ignoring the settled law as laid down by this Court that the finding of the Appellate Tribunal was conclusive and the prosecution cannot be sustained since the penalty after having been cancelled by the complainant following the Income Tax Appellate Tribunal's order no offence survives under the Income Tax Act and thus the quashing of the prosecution is automatic?

(d) Whether the finding of the Income Tax Appellate Tribunal is binding upon the criminal court in view of the fact that the Chief Commissioner and the assessing officer who initiated the prosecution under Section 276-C(1) had no right to overrule the order of the Income Tax Appellate Tribunal? More so when the Income Tax Officer giving the effect to the order cancelled the penalty levied under Section 271(1)(c)? (e) Whether the High Court's order is liable to be set aside in view of the errors apparent on record?

In *K.C. Builders* (supra), this Court noticed the dictionary meaning of the explanation and held:

"4. The respondent assessing authority treated the difference between the income as per original return and revised income as concealed income. The Assistant Commissioner of Income Tax levied penalties under Section 271(1)(c) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for all the aforesaid four assessment years. Accordingly, penalty proceedings were initiated. The first appeal against the order of penalties levied for concealment of income against the appellants were confirmed by the CIT (Appeals). As per the directions of the Chief Commissioner of Income Tax, four complaints were filed in the Court of the Additional Chief Metropolitan Magistrate, Egmore, Chennai for offences under Sections 276-C(2), 277 and 278-B of the Act and Sections 120-B, 34, 193, 196 and 420 of the Indian Penal Code."

87. The learned Additional Solicitor General, however, submitted that although on the facts of the case the decision rendered is correct but the view of the court that unless there is some evidence to

show or some circumstances found from which it can be gathered that the omission was attributable or the part of the assessee to conceal his income so as to evade income tax thereon may not correct. As at present advised, we do not intend to go into the said question; as in the facts and circumstances of the case, there are enough material to show that the action on the part of the appellant may not be said to be such which would attract the penal provision under Section 271(1)(c) of the Act.

88. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of this case, there shall be no order as to costs.