

**ALLAHABAD HIGH COURT**

Raghunandan Prasad Mohan Lal

Vs.

. Income Tax Appellate Tribunal

Civil Misc. Writ No. 789 of 1968

(Satish Chandra, T.P. Mukerjee and R.L. Gulati, JJ.)

3.11.1969

**JUDGMENT**

**R. L. Gulati, J.**

1. This is a petition under Article 226 of the Constitution and the facts giving rise to it are briefly these.

2. The petitioner is a partnership firm which runs a flour, oil and rice mill at Bareilly, in the name and style of M/s. Raghunandan Prasad Mohan Lal. On December, 29, 1959, it filed its return for the assessment year 1959-60 showing a net profit of Rs. 22,674. Later, a revised return was filed by it on February 1, 1962, showing a loss of Rs. 3,940, on the ground that in the earlier return the liability for sales tax had not been deducted. The Income-tax Officer did not accept the petitioner's return and by his order dated March 30, 1964 assessed it a net income of Rs. 82,662. The petitioner appealed. At the time of the hearing of the appeal the Appellate Assistant Commissioner of Income-tax found that there were certain deposits in the petitioner's bank account which had not been properly explained, and the partners had not withdrawn any amount from the partnership accounts for their personal expenses. The Appellate Assistant Commissioner of Income-tax after calling for a remand report from the Income-tax Officer came to the conclusion that the petitioner had earned an income of Rs. 1,03,500 from undisclosed sources and finally computed the petitioner's total income at Rs. 1,69,350 by his order dated April 5, 1965. On the same day he issued a notice under Section 274 of the Income-tax Act, 1961, calling upon the petitioner to show cause why penalty under Section 271 (c) should not be imposed upon it for having concealed its income or having furnished inaccurate particulars thereof. By his order dated December 31, 1966 the Appellate Assistant Commissioner of Income-tax imposed a penalty of Rs. 52,500 which was reduced on appeal to Rs. 10,000 by the Income Tax Appellate Tribunal by its order dated December 17, 1967. One of the contentions raised by the petitioner before the Income Tax Appellate Tribunal was that Section 297 (2) (g) of

the Act was ultra vires. The Income-tax Appellate Tribunal relying upon the decision of the Supreme Court in *K. S. Venkataraman and Co (P) Ltd. v. State of Madras*<sup>1</sup>, declined to adjudicate upon that contention of the petitioner, because the Supreme Court in that case had held that an

<sup>1</sup>(1966) 60 ITR 112

authority constituted under a Statute was not competent to pronounce upon the validity of a provision of that Statute. The petitioner then filed the present writ petition and amongst others, raised a ground about the constitutional validity of Section 297 (2) (g) of the Act.

3. This petition came up for hearing before a Division Bench of this Court of which one of us was a Member. In support of his contention that Section 297 (2) (g) was ultra vires, the learned counsel for the petitioner relied upon a decision of the Bombay High Court in *Shakti Offset Works v. Inspecting Asst. Commissioner of Income Tax*<sup>2</sup>, and also on certain observations of the Supreme Court in *Jalan Trading Co. v. Mill Mazdoor Sabha*<sup>3</sup>, and contended that an earlier decision of this Court in *Income-tax Officer v. Firm Madan Mohan Damma Mal*<sup>4</sup>. required reconsideration. As the Bench considered the question to be of considerable importance and not free from difficulty, it referred this petition to a larger Bench and that is how it has now come up before the Full Bench.

4. In this petition the petitioner has not only challenged the penally proceeding, but has also challenged the orders of the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal passed in appeal against the assessment order. We cannot allow the petitioner to agitate any question relating to the assessment, because the petitioner has already availed of the statutory remedies and at its instance a reference under Section 66 (1) of the Income-tax Act, 1922 is pending in this Court. Any question arising out of the order of the Income-tax Appellate Tribunal can be decided in that reference and cannot be entertained by this Court under Article 226 of the Constitution. We shall, therefore, confine ourselves to the grounds relating to the imposition of penalty.

5. Mr. Raja Ram Agarwal, appearing for the petitioner has attacked the imposition of penalty upon the following grounds:

- (1) The finding that there was concealment of income in the assessment proceedings was without jurisdiction and could not form the basis of penalty proceedings.
- (2) Section 297 (2) (g) of the Income-tax Act, 1961, violates Article 20 (1) of the Constitution.
- (3) Section 297 (2) (g) offends against Article 14 of the Constitution, and
- (4) Section 271 of the Act was inapplicable in terms and the penalty order based upon that provision was, therefore, without jurisdiction.

6. As regards the first contention, in our opinion, the petitioner is not entitled to raise the same

before us. The petitioner had taken the matter in appeal before the Income-tax Appellate Tribunal and it was open to it to have raised this question before it, and in case the Tribunal decided that question against the petitioner, to have asked the Tribunal to make a reference to this Court on any question of law arising out of the order of the Tribunal. The petitioner cannot be permitted to by-pass that procedure. If the petitioner has not sought a reference against the order of the Tribunal on such a question, we cannot permit such a question to be raised before us in a petition under Article 226 of the Constitution.

<sup>2</sup>(1967) 64 ITR 637 (Bom)                      <sup>4</sup>(1968) 70 ITR 293 (All)

<sup>3</sup>AIR 1967 SC 691

7. Before we proceed to examine the remaining contentions of the learned counsel for the petitioner, we think it appropriate to enumerate briefly the legislative history. Prior to April 1, 1962, the Income-tax Act, 1922 (hereinafter referred to as the old Act) was in force. On April 1, 1962 the Income-tax Act of 1961 (hereinafter referred to as the new Act) came into force and repealed the old Act. The new Act being prospective in operation would govern all assessments from the assessment years 1962-63 onwards. For the assessments for the earlier years some provision had to be made. Sub-section (2) of Section 297 enumerates such provisions. The material portion of Section 297 for our purpose is its sub-section (1) and Clauses (a), (b), (f) and (g) of sub-section (2) which are reproduced below:

"297. Repeals and savings - (1) The Indian Income-tax Act, 1922, (XI of 1922), is hereby repealed.

(2) Notwithstanding the repeal of the Indian Income-tax Act, 1922 (XI of 1922) (hereinafter referred to as the repealed Act),-

(a) where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act had not been passed;

(b) where a return of income is filed after the commencement of this Act otherwise than in pursuance of a notice under Section 34 of the repealed Act by any person for the assessment year ending on the 31st day of March, 1962, or any earlier year, the assessment of that person for that year shall be made in accordance with the procedure specified in this Act;

(f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962 may be initiated and any such penalty may be imposed as if this Act had not been passed;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act."

8. A perusal of this section discloses the scheme with regard to the assessment of tax and imposition of penalty relating to assessment years prior to the year 1962-63. The scheme in short is that the pending proceedings were to be dealt with under the old Act or the new Act according as the returns were filed by the assessee before or after April 1, 1962. Where the return had been filed before that date the assessment proceedings as also the subsequent proceedings by way of appeals etc. were to be taken under the old Act and in cases where the returns were filed after that date such proceedings were to be taken under the new Act. Clauses (f) and (g) relate to penalty proceedings. According to Clause (f) the penalty was to be imposed in accordance with the old Act if the assessment giving rise to the penalty came to be made before April 1, 1962, while according to Clause (g) the penalty proceedings were to be taken under the new Act if the relevant assessment came to be made after that date.

9. The petitioner has challenged the constitutional validity of Clause (g) on the ground that it violates Article 20 of the Constitution because by virtue of this clause the penalty provisions of the new Act have been made applicable which are more onerous than the corresponding provisions of the old Act. It is urged that according to the guarantee contained in Article 20 of the Constitution, the petitioner could not be subjected to greater penalty than that which might have been inflicted under the law in force at the time the offence was committed. It is not necessary to examine at this stage as to whether the penalty provisions under the new Act are more harsh and onerous than the corresponding provisions under the old Act, because in our opinion, Article 20 has no application to the facts of the case. Article 20 reads as under:-

"20 (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

This Article affords protection against conviction and punishment for an offence by a court of law. Penalties are imposed by the Income-tax authorities and cannot be regarded as punishment awarded for an offence. In fact, prosecution for an offence under the Income-tax Act is provided separately under the two Acts. Section 52 of the old Act provides for a prosecution and conviction before a Magistrate with regard to offences enumerated therein. Similar provisions are to be found in the new Act in Chapter XXII of the new Act. The Supreme Court in *Maqbool Hussain v. State of Bombay*<sup>5</sup>, held that the Article 20 contemplates proceedings of the nature of criminal proceedings and the prosecution in this context means an initiation of proceedings of a criminal nature. The first part of Article 20 (1) prohibits a conviction while the second part deals with penalty that may be inflicted on conviction by way of punishment.

10. The first contention based on the alleged violation of Article 20 is accordingly rejected.

11. The next question is as to whether Section 297 (2) (g) offends against Article 14 of the Constitution. It has been urged that penalty provisions contained in the new Act are more onerous and harsh to the assesseees in comparison to the penalty provisions contained in the old Act and Section 297 (2) (g) makes applicable the provisions of the new Act to a certain class of assesseees leaving other assesseees similarly situated to be dealt with under the old Act. It is pointed out that this discrimination is not based upon any reasonable classification. Article 14 of the Constitution guarantees equal protection of the laws. The Article itself does not speak of any classification, but it is now well settled that while Article 14 prohibits class legislation, it does not prohibit reasonable classification. The classification permissible under Article 14 must, however, satisfy the following two conditions:

(i) It must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the ground, and

<sup>5</sup> AIR 1953 SC 325

(ii) the differentia must have a rational relation to the objects sought to be achieved by the Statute in question. (See *Budhan Choudhry v. State of Bihar*<sup>6</sup>).

12. Now looking at Clauses (a) and (b) of Section 297 (2), it becomes immediately apparent that a classification was made amongst the assesseees whose cases for the assessment year prior to the year 1962-63 were pending when the new Act came into force repealing the old Act. The classification is based on the date of filing of the returns. Those assesseees who had filed their returns prior to 1st April, 1962 were to be dealt with for the purposes of assessment under the old Act, while those who had filed their returns after that date were to be dealt with under the new Act. This classification for purposes of assessment appears to be well defined and reasonable even though the better basis for the classification would have been the commencement of the assessment proceedings. The assessment proceedings under the Income Tax Act commence against an assessee when he files a voluntary return or when a notice is issued to him calling for a return. Had that basis been adopted, all pending assessments would have been dealt with under the old Act. However, it was for the Parliament to have chosen the basis of the classification and as, in its wisdom, it chose the date of the filing of the return to be the dividing line, no fault can be found with such a classification.

13. In that class of assesseees whose assessments were pending for the years prior to the year 1962-63, there existed a section of assesseees who had rendered themselves liable to penalty and a separate provision was made with regard to them. Under clause (f) penalty was to be imposed in accordance with the provisions of the old Act, if the assessment giving rise to the penalty was made prior to April 1, 1962, while clause (g) provided that penalty was to be imposed in accordance with the provisions of the new Act if the relevant assessment came to be made after that date. As a result of these two provisions the class of assesseees who were liable to penalties was split in two. The question that falls for consideration, therefore, is as to whether this sub-

classification is valid.

14. In order that a classification should be permissible for purposes of Article 14, it must satisfy the dual test already indicated above, viz. that it must be founded on an intelligible differentia and the differentia must have a rational relation to the object sought to be achieved by the Statute. In our opinion, the classification brought about by clauses (f) and (g) does not satisfy the second test based as it is on the date of the completion of the assessment, which has no rational nexus with the object sought to be achieved.

15. It is open to the legislature to form a classification on the basis of time just as much as it can have a basis on geographical or territorial considerations. But if the legislature brings about a classification on the basis of time, the point of time selected must be for some rational and intelligible consideration. A purely arbitrary or capricious selection of time cannot possibly form the basis of a rational classification.

16. Now, the object of penalty provisions in a taxing statute like the Income Tax Act is to punish and prevent evasion of tax. The measure of penalty depends upon the nature and gravity of the default committed by an assessee. Under both the Acts the quantum of penalty varies according to the tax which is quantified by an assessment order. The imposition of penalty has thus some relation to the assessment of tax, but the time of

<sup>6</sup> AIR 1955 SC191 at p. 193

making the assessment has no bearing whatsoever upon the penalty itself. The default for which the assessee is to be penalised is neither aggravated nor mitigated by the time when the assessment comes to be made. The time for making the assessment is neither an attribute or a quality of the assessee, nor does it have any relation to the nature or gravity of the default for which penalty is to be imposed. In fact the making of an assessment order is a fortuitous circumstance over which the assessee has no control. It is difficult to understand how the class of assessee otherwise similarly situated can be sub-divided into two classes depending upon the time of the making of the assessment order.

17. In *Shree Meenakshi Mills Ltd. Madurai v. A. V. Vishvanatha Sastri*<sup>7</sup>, the Supreme Court had to deal with a similar classification based on time. Out of the class of tax evaders those whose cases had been referred by the Central Government to the Investigation Commission by September 1, 1948 under Section 5 (1) of Act XXX of 1947, were to be dealt with under the provisions of that Act while others were to be dealt with under Section 34 of the Income Tax Act. The procedure for assessment of escaped income under the two Acts was materially different. That classification was held by the Supreme Court to be violative of Article 14 of the Constitution. Mahajan, C. J., who delivered the judgment of the Court, at page 719 (of ITR) : (at pp. 17-18 of AIR); observed:

"As regards the first contention canvassed by the learned Attorney General, it seems to us

that it cannot stand scrutiny. The class of persons alleged to have been dealt with by Section 5 (1) of the impugned Act was comprised of those unsocial elements in society who during recent years prior to the passing of the Act had made substantial profits and had evaded payment of tax on those profits and whose cases were referred to the Investigation Commission before 1st September, 1948. Assuming that evasion of tax to a substantial amount could form a basis of classification at all for imposing a drastic procedure on that class, the inclusion of only such of them whose cases had been referred before 1st September, 1948, into a class for being dealt with by the drastic procedure, leaving other tax evaders to be dealt with under the ordinary law, will be a clear discrimination for the reference of the case within a particular time has no special or rational nexus with the necessity for drastic procedure." (underlining ours)

18. Dealing with another case of similar nature, in *M. Ct. Muthiah v. Commissioner of Income Tax*<sup>8</sup>, the Supreme Court reiterated its earlier view in the following observations at page 402 (of ITR) .

"It is, therefore, clear that the period originally fixed for the reference of the cases of substantial evaders of income-tax for investigation by the Commission, viz., 30th June, 1948 or the extended period viz. 1st September, 1948, provided in Section 5 (1) of Act XXX of 1947 or the period fixed by the new Section 34 (1-A) of the Indian Income-tax Act viz. 31st day of March, 1956, was not a necessary attribute of the class of substantial evaders of income-tax but was merely in accident and a measure of administrative convenience and was not an element in the formation of the particular class of substantial evaders of income-tax.

<sup>7</sup>(1954) 26 ITR 713

<sup>8</sup>(1956) 29 ITR 390

(underlining ours)

In *M/s. Jalan Trading Co. (P) Ltd.*, AIR 1967 Supreme Court 691 (supra) the Supreme Court struck down a provision of the Payment of Bonus Act, 1965, as violative of Article 14 of the Constitution because as a result of the classification brought about by it similarly situated industrial concerns were subjected to differential treatment depending on the pendency of an industrial dispute between the industrial undertaking and its employees before a particular date. It held at page 708:

"Assuming that the classification is founded on some intelligible differentia, which distinguishes an establishment, from other establishments, the differentia has no rational relation to the object sought to be achieved by the statutory provision viz. of ensuring peaceful relations between capital and labour by making an equitable distribution of the surplus profits of the year."

19. The latest case of the Supreme Court on this point is the *State of U. P. v. Kishan Chand Dhaun*<sup>9</sup>, In that case as a result of the operation of Rule 30 (a) of the Higher Judicial Service Rules, 1953, officers recruited prior to July 4, 1931 and confirmed after December 31, 1950, got higher salary than those officers who, even though appointed prior to July 4, 1931, were confirmed before December 31, 1950. The rule was struck down as violative of Article 14 of the Constitution with the following observations:

"The object of Rule 30, admittedly was to preserve to the officers who entered service prior to July 4, 1931, their previous pay scale. We have to examine the validity of the classification made under the said rule having in mind the object intended to be achieved. One can appreciate any difference made in service conditions between those officers who entered service prior to July 4, 1931, and those entered service thereafter. But what is not understandable is why there should be any difference between those who were confirmed as Civil and Sessions Judge before December 31, 1950 and those confirmed thereafter."

20. A Full Bench of the Nagpur High Court in *Balabhau Manaji v. Bapuji Satwaji*<sup>10</sup>, struck down Section 242 (3) of the Madhya Pradesh Land Revenue Act, 1954 as offending Article 14 of the Constitution because as a result of that provision a classification was made in respect of pending suits for pre-emption. Those suits which were filed before March 25, 1954 were to remain alive, but those filed after that date were to be dismissed. Chief Justice Chagla, speaking for the Full Bench, held that the classification was arbitrary not permissible by Article 14 of the Constitution.

21. The case which directly deals with the point involved in the present case is that of the Bombay High Court in *Shakti Offset Works*, (1967) 64 ITR 637 (Bom) (supra). While striking down, as ultra vires, Section 297 (2) (g) of the Income Tax Act, 1961, the Bombay High Court observed at p. 657:

<sup>9</sup> Civil Appeal No. 1832 of 1968, D/-12-12-1968 (SC)

<sup>10</sup>(1958) 60 Bom LR 18 : AIR 1957 Bom 233

"The date of completion of the assessment makes no difference, so far as this aspect is concerned. In fact, it has no impact either on incurring of the liability or for imposition of penalty. We are, therefore, unable to see how the classification made by Clause (g) of sub-section (2) of Section 297 of the Income-tax Act of 1961 can be justified either as relevant or having any relation to the subject with which it is concerned. So far as making a provision for imposing a penalty is concerned, there is no difference between the assesseees who have filed returns but in whose cases the assessment was completed prior to April 1, 1962, and assesseees who have filed returns but in whose cases assessment was not completed or could not be completed till April 1, 1962."

We are in respectful agreement with the observations of the Bombay High Court as extracted above.

22. On behalf of the opposite side reliance was placed on *Ramji Lal v. Income Tax Officer*<sup>11</sup>, to support the contention that pending proceedings and fresh proceedings could be the basis of a valid classification. There, however, the basis for the classification was that the pending proceedings should be concluded according to the law applicable at the time when the rights or liabilities accrued and proceedings commenced. Such a classification would indeed be a reasonable classification. In fact, the classification brought about by Clause (a) of sub-section (2) of Section 297 is founded on that basis and we have already observed that such a classification is permissible and valid. But Clause (g) makes a departure from that principle inasmuch as unlike Clause (f) it seeks to apply the law other than that which was in force at the time the liability to penalty was incurred. That case is, therefore, clearly distinguishable and on the same ground is distinguishable the case of this Court in *Ram Ram Kumar Bhargava v. Commissioner of Income Tax*<sup>12</sup>, which followed the case of *Ramji Lal*, AIR 1951 Supreme Court 97 (supra).

23. After having held that the classification brought about by Clause (g) is arbitrary having no rational nexus with the objects of the Act, the next question that falls for consideration is as to whether the penalty provisions in the new Act are more onerous than the corresponding provisions contained in the old Act. The penalty provisions in the new Act are contained in Chapter XXI comprising Sections 270 to 275. Besides penalty is also provided in Section 221 (1) for non-payment of tax. The corresponding provisions under the old Act are contained respectively in Sections 44-E (6), 44-F (5), 28, 25 (2), 18-A (9) and 46 (1). Sub-section (2) of Section 274 and Section 275 of the new Act are new having no corresponding provisions under the old Act. Section 274 (2) provides that in cases falling under Clause (c) of Section 271, the penalty shall be imposed by the Inspecting Assistant Commissioner of Income Tax, if the minimum penalty imposable exceeds Rs. 1,000, while Section 275 prescribes a limitation for the imposition of penalty, the limitation being two years from the date of the completion of the proceedings giving rise to the penalty.

24. The main penalty provisions under the new Act are contained in Section 271 which corresponds to Section 28 of the old Act. Since we are concerned mainly with these two

<sup>11</sup> AIR 1951 SC 97

<sup>12</sup> AIR 1963 All 451

provisions, it would be better to reproduce them in full.

25. Section 271 of the new Act as amended upto April 1, 1968 reads 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) has without reasonable cause failed to furnish the return of total income which he was

required to furnish under sub-section (1) of Section 139 or by notice given under subsection (2) of Section 139 or Section 148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of Section 139 or by such notice, as the case may be, or

(b) has without reasonable cause failed to comply with a notice under sub-section (1) of Section 142 or sub-section (2) of Section 143, 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) in the cases referred to in clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent, of the tax;

(ii) in the cases referred to in Clause (b), in addition to any tax payable by him, a sum which shall not be less than ten per cent, but which shall not exceed fifty per cent, of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income;

(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 the income in respect of which the particulars have been concealed or inaccurate particulars have been furnished.

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 wilful neglect on his part, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purpose of Clause (c) of this sub-section.

(2) When the person liable to penalty is a registered firm or an unregistered firm which has been assessed under Clause (b) of Section 183 then, notwithstanding anything contained in the other provisions of this Act, the penalty imposable under subsection (1) shall be the same amount as would be imposable on that firm if that firm were an unregistered firm.

(3) Notwithstanding anything contained in this section -

(a) no penalty for failure to furnish the return of his total income under sub-section (1) of section 139 shall be imposed under subsection (1) on an assessee whose total income does not exceed the minimum amount not chargeable to tax in his case by one thousand five hundred rupees;

(b) where a person has failed to comply with a notice under sub-section (2) of Section 139 or Section 148 and proves that he has no income liable to tax, the penalty imposable under sub-section (1) shall not exceed twenty five rupees;

(c) no penalty shall be imposed under subsection (1) upon any person assessable under Clause (i) of sub-section (1) of Section 160 read with Section 161, as the agent of a nonresident for failure to furnish the return under sub-section (1) of Section 139.

(4) If the Income Tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership on the basis of which the firm has been registered under this Act, and that any partner has thereby returned his income below its real amount, he may direct that such partner shall in addition to the tax, if any, payable by him, pay by way of penalty a sum not exceeding one and a half times the amount of tax which has been avoided or would have been avoided if the income returned by such partner had been accepted as his correct income; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(4-A) Notwithstanding anything contained in Clause (i) or Clause (iii) of sub-section (1) the Commissioner may, in his discretion -

(i) reduce or waive the amount of minimum penalty imposable on a person under Clause (i) for failure, without reasonable cause, to furnish the return of total income which such person was required to furnish under sub-section (1) of Section 139, or

(ii) reduce or waive the amount of minimum penalty imposable on a person under Clause (iii) of sub-section (1), if he is satisfied that such person -

(a) in the case referred to in clause (i) of this sub-section has, prior, to the issue of notice to him under sub-section (2) of Section 139 voluntarily and in good faith, made full disclosure of his income; and in the case referred to in Clause (ii) of this sub-section has, prior to the detection by the Income Tax Officer, of the concealment of particulars of income in respect of which the penalty is imposable, or of the inaccuracy of particulars furnished in respect of such income, voluntarily and in good faith, made full and true disclosure of such particulars;

(b) has co-operated in any enquiry relating to the assessment of such income; and

(c) has either paid or made satisfactory arrangements for payment of any tax or interest payable in consequence of an order passed under this Act in respect of the relevant assessment year:

Provided that if in a case the minimum penalty imposable under Clause (i) or, as the case may be, Clause (iii) of sub-section (1) in respect of the relevant assessment year, or where such disclosure relates to more than one assessment year, the aggregate of the minimum penalty imposable in respect of those years, exceeds a sum of rupees fifty thousand, no order reducing or waiving the penalty shall be made by the Commissioner unless the previous approval of the Board has been obtained.

(4-B) An order under sub-section (4-A) shall be final and shall not be called in question before any court of law or any other authority."

26. Section 28, as it stood immediately prior to the commencement of the new Act, was as under:

"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 -

(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 comply with a notice under sub-section (4) of Section 22 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 person shall pay 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 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 income as returned by such person had been accepted as the correct income;

Provided that -

(a) no penalty for failure to furnish the return of his total income shall be imposed on an assessee whose total income is less than three thousand five hundred rupees unless he has been served with a notice under sub-section (2) of Section 22;

(b) where a person has failed to comply with a notice under sub-section (2) of Section 22 or section 34 and proves that he has no income liable to tax, the penalty imposable under this sub-section shall be penalty not exceeding twenty-five rupees;

(c) no penalty shall be imposed under this sub-section upon any person assessable under Section 42 as the agent of a person not resident in the taxable territories for failure to furnish the return required under section 22 unless a notice under sub-section (2) of that section or under Section 34 has been served on him;

(d) when the person liable to penalty is a registered firm or an unregistered firm which has been assessed under clause (b) of sub-section (5) of Section 23, then, notwithstanding anything contained in the other provisions of this Act, the amount of income tax and super-tax payable by the firm, itself shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in Clauses (b) and (c), the amount of the income-tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm.

(2) 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 the profits of a registered firm have been distributed otherwise than in accordance with the shares of the partners as shown in the instrument of partnership registered under this Act governing such distribution, and that any partner has thereby returned his income below its real amount he or it may direct that such partner shall in addition to the income-tax and super-tax, if any, payable by him pay by way of penalty a sum not exceeding one and a half times the amount of income-tax and super-tax which has been avoided, or would have been avoided if the income returned by such partner had been accepted as his correct income; and no refund or other adjustment shall be claimable by any other partner by reason of such direction.

(3) No order shall be made under subsection (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard.

(4) No prosecution for an offence against this Act shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

(5) An Appellate Assistant Commissioner or the Appellate Tribunal on making an order under sub-section (1) or sub-section (2) shall forthwith send a copy of the same to the Income Tax Officer.

(6) The Income Tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner."

On a comparison of the two sets of provisions under the new and old Act, it cannot be doubted that they differ materially from each other.

27. Mr. N. A. Palkhivala in the 6th Edition of his book on Income Tax has correctly summarized the changes brought about by the new Act in the law relating to penalty and the same may be reproduced with advantage.

"(a) Unlike Section 28 of the 1922 Act this section does not confer any power on the Appellate Tribunal to impose a penalty, (b) In cases of concealment of income where the minimum penalty imposable exceeds Rs. 1,000 the Inspecting Assistant Commissioner alone is empowered to impose a penalty (S. 274 (2),) whereas under the 1922 Act the Income Tax Officer had the power to impose a penalty even in such cases.

(c) Under the 1922 Act the Income Tax Officer could not impose any penalty without the previous approval of the Inspecting Assistant Commissioner. Under this Act the Income Tax Officer does not have to take the sanction of the Inspecting Assistant Commissioner in any case.

(d) This section provides that if any penalty is imposed, it should not be less than the minimum prescribed (subject to the Commissioner's power of reduction or waiver); there was no such minimum prescribed under the 1922 Act.

(e) The maximum penalty imposable has been reduced in cases falling within Clauses (a)

and (b) of Section 271 (1); and it has to be computed by reference to the amount of income concealed, and not the tax avoided, in cases falling within Clause (c).

(f) The burden of proof is thrown on the tax payer where the income returned is less than 80 per cent of the income assessed.

(g) There was no time limit for commencement of penalty proceedings under the 1922 Act. This Act requires penalty proceedings to be commenced before the completion of those proceedings in which the Income Tax Officer or the Appellate Assistant Commissioner is satisfied that the default attracting a penalty has been committed (S. 275).

(h) There was no time limit in the 1922 Act for the passing of penalty order, but a time limit is now imposed by Section 275.

(i) No prosecution could be instituted under the 1922 Act in respect of the same facts on which a penalty was imposed. Under this Act a penalty can be imposed and a prosecution launched on the same facts."

There can be no doubt that some changes are advantageous to the assesseees but on the whole the penalty provisions in the new Act appear to us to be definitely more harsh and stringent for the following reasons:

(i) Under the old Act, no penalty could be imposed by the Income Tax Officer without the prior approval of the Inspecting Assistant Commissioner of Income Tax. Under the new Act no such previous permission is required, except that in cases of concealment of income, the penalty is imposed by the Inspecting Assistant Commissioner of Income Tax himself, where the minimum imposable penalty exceeds Rupees 1,000/-. It is true that in big cases of concealment, the penalty is to be imposed by a higher officer. But this little advantage is offset by the fact that the assessee loses the right of appeal to the Appellate Assistant Commissioner of Income-tax because against the order of the Inspecting Assistant Commissioner of Income-tax only one appeal is provided to the Income Tax Appellate Tribunal: (vide Section 253 (1) (b) of the new Act).

(ii) In cases involving concealment of income, the minimum penalty provided by clause (iii) of Section 271 (1) is equal to the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished, the maximum being twice that amount. This measure of penalty is undoubtedly drastic. It can work great hardship in petty cases. For example, in a case where the income shown in the return is Rs. 2,000/- which is below the taxable limits and the assessment comes to be made at Rs. 10,000/-, the minimum penalty imposable would be Rs. 8,000/-, maximum being Rs. 16,000/, even though the tax which the assessee may have tried to evade would be about Rs. 500/-. Under the old Act the maximum penalty of Rs. 750 could have been imposed in such a case even though the assessee could have been let off with a nominal penalty of Rs. 50 or so, there being no minimum limit.

(iii) By the Finance Act of 1964, two significant changes have been made in Section 271:

The word 'deliberately' has been omitted from Clause (c) and an explanation has been added at the end of Clause (iii). The combined result of these two changes is that an assessee would be liable to penalty for furnishing inaccurate particulars of income even if the inaccurate particulars are furnished accidentally and not deliberately. The newly added Explanation makes a drastic change in the procedure inasmuch as the onus is cast upon the assessee where the income returned by him turns out to be less than 80% of the income assessed. The proceedings for the imposition of penalty are of quasi criminal nature and under the old Act, it was a settled law that in penalty proceedings the onus lay upon the Revenue to prove that income had been concealed or inaccurate particulars thereof had been furnished deliberately. This position no longer holds good. It is now settled law that the guarantee of equal protection applies against substantive laws as well as procedural laws, (See: *Lachmandas v. State of Bombay*<sup>13</sup>, *State of West Bengal v. Anwar Ali*<sup>14</sup>,

(iv) The time limit fixed for the imposition of penalty by Section 275 may seemingly appear to be beneficial to the assesseees but in practice it would work to their disadvantage. Under the old Act the imposition of penalty, could be deferred until the assessment order giving rise to the penalty became final after the decision of the assesseees' appeals etc. Under the new Act, however, the Income Tax Officer shall be compelled to pass the penalty order, if the proceedings by way of appeals etc. are not concluded within two years. This would result in multiplicity of proceedings and the assessee would be exposed to coercive processes of recovery in case he is unable to pay the penalty within the prescribed time. Moreover, under the old Act even though no limitation was fixed for passing the penalty order, the appellate authorities as also the courts could always intervene to give relief to the assesseees, where the penalty was sought to be imposed after inordinate delay not attributable to the assesseees. This court in *Mohd. Atiq v. Income Tax Officer, Kanpur*<sup>15</sup>, quashed the penalty order which was passed after the lapse of fourteen years.

(v) The fixing of the minimum amount of penalty is another feature which makes the provisions of the new Act more onerous. The Bombay High Court in the case of *Shakti Offset Works*, (1967) 64 ITR 637 (Bom) (supra), has, at page 651 given an illustration to demonstrate the drastic consequences of this provision showing that in a given case a penalty of not less than Rs. 1,40,000 will have to be imposed as the minimum penalty even though under the corresponding provisions of the old Act the penalty may have been a sum of Rs. 5,000 or even less.

28. It is, of course, true that under sub-section (4A) of Section 271 added by the Income Tax Amendment Act of 1965 the Commissioner has been vested with the power to reduce or waive the amount of minimum penalty imposable in cases falling under Clauses (i) and (iii) of sub-section (1) of Section 271 on conditions enumerated therein. The conditions themselves are of onerous nature inasmuch as the assessee has to make a confession of concealment before the

concealment is detected by the Income Tax Officer and he has to pay or make arrangement for the payment of the tax for the relevant assessment year. This provision may seem to soften the rigour of the provision requiring the imposition of a minimum penalty, but the small advantage that it seems to confer upon assesseees is more than offset by sub-section (4B) which provides that an order under sub-section (4A) would be final and shall not be called in question before any court of law or any other authority. It is doubtful if an assessee would avail himself of the remedy provided in sub-section (4A) firstly because the conditions imposed are onerous and secondly because once he moves in that direction, he places himself entirely at the mercy of the Commissioner against whose order he will have no remedy whatsoever.

29. At this stage it may be mentioned that clause (iii) of sub-section (1) prescribing the minimum amount of penalty in cases of concealment equal to the amount of income

131952 SCR 710 at p. 726 : ( AIR 1952 SC 235 at p. 242) 15(1962) 46 ITR 452 (All)

14 AIR 1952 SC 75 and AIR 1955 SC 13

concealed came into force with effect from April 1, 1968 after its amendment by Finance Act of 1968 and would not ordinarily be applicable to the pending assessments for the assessment years prior to 1962-63 covered by Clause (g) of sub-section (2) of Section 297 because the assessments for those years would normally be completed before March 31, 1966 and the penalty proceedings would also be completed before March 31, 1968 by reason of the period of limitation prescribed for assessment and imposition of penalty (four years for assessment under the old Act and two years for penalty under the new Act). But this amended provision would catch in its net the assessments which are set aside on appeal or revision and are to be made afresh and also the cases where the penalty is imposed by the Appellate Assistant Commissioner of Income Tax where the reassessment is made or the appellate proceedings are concluded after April 1, 1968. This would bring about yet another sub-classification amongst the assesseees otherwise similarly situated. So long as Clause (g) is on the Statute book, such a situation cannot be prevented and there appears to be no good reason why persons falling in the above sub-classification should be subjected to the drastic treatment envisaged by the amendment of 1968. It is true that the petitioner does not fall in that category and in its case the penalty was imposed under the law as it stood prior to the amendment of 1968. That, however, makes no difference because in testing the constitutionality of a provision on the touchstone of Article 14 we are entitled to take into consideration all the consequences that may flow from the operation of the offending provision.

30. Assuming that the amendment of 1968 is to be left out of consideration, the position would be no better. Clause (iii) before its amendment stood as under:

"(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 twenty percent, 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."

The maximum limit is the same as under the old Act, but the condition with regard to the minimum penalty makes this provision more onerous, as we have already shown above.

31. The last major difference between the two sets of provisions is that while under the old Act immunity was given to an assessee from prosecution for a default in respect of which a penalty was imposed upon him (section 28 (4)) there is no such immunity under the new Act, so that for the same default an assessee may be penalised under Chapter XXI and may also be prosecuted and punished under Chapter XXII.

32. It is true that Clause (g) makes only the penal provisions of the new Act applicable and the provisions for prosecution contained in Chapter XXII would not be attracted in pending cases. But in cases governed by Clause (g) the provision for prosecution contained in Section 52 of the old Act would be attracted by virtue of Section 6 of the General Clauses Act as has been held by the Supreme Court in *T. S. Baliah v. T. S. Rangachar*<sup>16</sup>: The immunity granted by Section 28 (4) of the old Act would not be available in such case because the immunity under that provision is extended only to cases where penalty is imposed under the old Act. In cases falling under Clause (g) the penalty is imposable under the new Act.

<sup>16</sup>Criminal Appeals Nos. 130 to 133 of 1968, D/-12-12-1968 (reported in AIR 1969 SC 701)

33. Mr. Gopal Behari, learned counsel for the Department drew our attention to the fact that with regard to the penalty for non-payment of tax, the new Act is more liberal inasmuch as an appeal against such a penalty can be filed without depositing the arrears of tax while under the old Act such an appeal was available only after the tax had been paid. This, no doubt, is a minor advantage to the assessee but it has no impact on the quantum of penalty. It merely makes the remedy of appeal more efficacious. We, therefore, hold that Clause (g) of Section 297 (2) is ultra vires.

34. The fourth and the last contention on behalf of the petitioner is that even if Clause (g) of sub-section (2) of Section 297 of the new Act is intra vires, Section 271 is inapplicable in terms and no penalty could have been imposed under that section. This contention of the learned counsel also appears to be well founded.

35. According to its opening words Section 271 applies only "if the Income-tax Officer or the Appellate Assistant Commissioner, in the course of any proceeding under this Act", is satisfied that any person has committed the defaults enumerated in Clauses (a) to (c) of sub-section (1) of that section. The reference to "this Act" is to the new Act. The condition precedent for an action under this section, therefore, is the satisfaction of the officer concerned in the course of proceedings under the new Act. It has been noticed above that by virtue of Clause (a) of sub-section (2) of Section 297, the pending cases where the return was filed prior to April 1, 1962, were to be disposed of in accordance with the provisions of the old Act. In such cases there would be no proceedings under the new Act. In the instant case also the assessment was made

under the old Act and the appeal was also instituted and disposed of under the old Act. The Appellate Assistant Commissioner of Income-tax who initiated the penalty proceedings and levied the penalty came to be satisfied about the concealment of income by the petitioner only in the course of the appeal which admittedly was under the old Act. In fact, no proceedings can be said to have been pending before him under the new Act. In the circumstances the initiation of the proceedings under Section 274 and the levy of penalty under Section 271 of the new Act was without jurisdiction.

36. It was suggested by the learned counsel for the opposite parties that the satisfaction referred to in Section 271 (1) may be reached by the authority concerned during the course of the proceedings for the imposition of penalty itself and that such proceedings can be initiated by a notice under Section 274 of the new Act. This contention is plainly wrong. A bare reading of Section 271 shows very clearly that the proceedings referred to in Section 271 during the course of which the authority concerned is to be satisfied about an assessee having rendered himself liable to penalty are proceedings other than the penalty proceedings. In fact, the penalty proceedings are taken in consequence of those proceedings. This is borne out by Section 275 which says that no order imposing a penalty shall be passed after the expiration of two years from the date of the completion of the proceedings in the course of which the proceedings for the imposition of penalty have been commenced. A similar phraseology is to be found in Section 28 of the old Act. Under that provision also the penalty could be imposed if the officer concerned was satisfied during the course of any proceeding that an assessee had rendered himself liable to penalty. There is ample authority for the proposition that when penalty is to be levied by the Income-tax Officer, the proceedings in the course of which he is to be so satisfied mean the assessment proceedings and similarly the Appellate Assistant Commissioner of Income Tax and the Income Tax Appellate Tribunal have to be satisfied in the course of appellate proceedings pending before them. There was some doubt as to the time when penalty proceedings could be initiated. It was held by some High Courts that the officer imposing the penalty had to initiate the penalty proceedings before the proceedings giving rise to the penalty were completed.

37. The Supreme Court in *Commissioner of Income-tax, Madras v. S. V. Angidi Chettiar*<sup>38</sup>, has set at rest that controversy by holding that the satisfaction has to be acquired during the assessment proceedings where the penalty is to be imposed by the Income Tax Officer. Reference may be made to the following observations at page 745 (of ITR) :

"The power to impose penalty under Section 28 depends upon the satisfaction of the Income Tax Officer in the course of proceedings under the Act; it cannot be exercised if he is not satisfied about the existence of conditions specified in Clause (a), (b) or (c) before the proceedings are concluded. The proceeding to levy penalty has, however, not to be commenced by the Income Tax Officer before the completion of the assessment proceedings by the Income Tax Officer. Satisfaction before conclusion of the proceedings under the Act, and not the issue of notice of initiation of any step for imposing penalty is

a condition for the exercise of the jurisdiction. There is no evidence on the record that the Income Tax Officer was not satisfied in the course of the assessment proceeding that the firm had concealed its income. The assessment order is dated the 10th of November, 1961, and there is an endorsement at the foot of the assessment order by the Income Tax Officer that action under section 28 had been taken for concealment of income indicating clearly that the Income Tax Officer was satisfied in the course of the assessment proceeding that the firm had concealed its income."

Moreover, in the instant case the contention that the Appellate Assistant Commissioner was satisfied about the default of the assessee in proceedings other than the appellate proceedings pending before him is factually incorrect inasmuch as in paragraph 24 of his appellate order dated April 5, 1965 he recorded his satisfaction thus:

"Since the assessee has concealed the particulars of his income and has deliberately furnished inaccurate particulars thereof, a notice under Section 274 of the Income Tax Act, Act 1961 has also been issued to show cause why penalty may not be imposed under Section 271 (1) (c) of the Act."

This shows very clearly that his satisfaction was reached during the hearing of the appeal and he recorded the same in the appellate order itself.

38. We are also unable to agree with the argument that Section 297 (2) (g) is a charging section in the sense that penalty can be imposed by its own force. Notwithstanding, the use in this provision of the expression "any such penalty may be imposed under this Act", it is merely an enabling provision. It provides for neither the measure of penalty nor does it contain the defaults in respect of which penalty may be levied nor indeed does it specify

<sup>17</sup>(1962) 44 ITR 739

the authorities empowered to levy the penalty. All these provisions are to be found in Chapter XXI which becomes applicable by virtue of this provision.

39. The view that we are taking is supported by the Bombay High Court in (1967) 64 ITR 637 (Bom); by the Gujarat High Court in *Commissioner of Income Tax v. Hira Lal Mohan Lal Shah*<sup>18</sup>, and *D. M. Mansavi v. Commissioner of Income Tax*<sup>19</sup>, and by the Calcutta High Court in its unreported decision in *Narendra Sharma v. Income Tax Officer*<sup>20</sup>,

40. With respect we cannot subscribe to the contrary view taken by this Court in *Madan Mohan Damma Mal*, (1968) 70 ITR 293 (All) (supra); by the Madhya Pradesh High Court in *Kishan Lal v. Commissioner of Income Tax, M. P.*<sup>21</sup>, and in *Commissioner of Income Tax v. Champalal Sukhram*<sup>22</sup>, and the Delhi High Court in its unreported decision in *M/s. Jain Brothers v. Union of India*<sup>23</sup>,

41. Lastly it was contended that no injustice had been caused to the petitioner inasmuch as the

penalty of Rs. 10,000 ultimately levied by the Tribunal was less than the minimum of 20% prescribed by Section 271 and, therefore, this Court should not interfere. We are not impressed by this argument. Justice has to be done in accordance with law. If the penalty has been imposed with the aid of a provision which is unconstitutional and under a law which is inapplicable, the penalty is clearly unauthorized and without jurisdiction and cannot be upheld even if the amount of penalty happens to be less than the minimum prescribed under the law. Whether the penalty could be levied under the old Act is a question which does not arise in this case and need not be decided. Moreover, it is not possible to speculate as to what would have been the amount of penalty if the petitioner had been proceeded against under the old Act. In the circumstances, we are not prepared to accept the suggestion that the petitioner has not been prejudiced or that no injustice has been caused to him.

42. For the reasons stated above, we allow this petition and quash the order of the Appellate Assistant Commissioner dated December 31, 1966 (Annexure 6) and the order of the Income-tax Appellate Tribunal dated December 17, 1967 (Annexure 7) and direct that the amount of penalty, if realized be refunded to the petitioner. The other reliefs claimed by the petitioner are refused.

43. In the circumstances of the case, we make no order as to costs.

### **Satish Chandra, J.**

44. A Bench of this Court referred this writ petition to a Full Bench principally because it involved the constitutional vires of Section 297 (2) (g) of the Income-tax Act, 1961.

45. The petitioner is a partnership firm. It runs a flour, oil and rice mill at Bareilly. For the

<sup>18</sup>(1968) 69 ITR 312 (Guj)

<sup>20</sup> Matter No. 213 of 1966, D/-5-3-1969 (Cal)

<sup>19</sup>(1969) 72 ITR 17 (Guj)

<sup>21</sup>(1967) 64 ITR 285 (Madh Pra)

<sup>22</sup>(1969) 72 ITR 417 : AIR 1969 Mad Pra 7)

<sup>23</sup> Civil Misc. Writ No. 1247 of 1967, D/-24-2-1969 (Delhi).

assessment year 1959-60 the firm filed a return on 29th December, 1959, showing a net profit of Rs. 22,674. On 1st February, 1962, the firm filed a revised return showing an overall loss of Rs. 3,940. The Income-tax Officer on 30th March, 1964, assessed the petitioner on a total income of Rs. 82,662. The petitioner preferred an appeal. At the hearing of the appeal the Income-tax Officer brought to the notice of the Appellate Assistant Commissioner that there were several discrepancies between the assessee's bank pass-books and the bank account in the Khata Bahi. The Commissioner asked the Income-tax Officer inter alia to check the bank accounts in the assessee's ledger for the financial year 1958-59 with their pass-books and submit a detailed report in regard to the discrepancies if any. The Income-tax Officer submitted a report on 30th December, 1964. The Appellate Assistant Commissioner felt that there were large

amounts of undisclosed income. He consequently issued a notice of enhancement to the assessee on 14th January, 1965. The petitioner firm in its reply to the notice admitted concealment to the extent of Rs. 56,000. The Commissioner examined the matter in detail and came to the conclusion that the unexplained amounts of deposits, remittances and expenses came to Rs. 1,03,500. This represented the petitioner's concealed income from undisclosed sources. Ultimately he assessed the petitioner's total income at Rs. 1,69,350. At the end of his order dated 5th April, 1965, the Commissioner held that since the assessee had concealed the particulars of its income and deliberately furnished inaccurate particulars thereof, a notice under Section 274 of the Income-tax Act, 1961, was also being issued requiring the assessee to show cause why penalty may not be imposed under Section 271 (1) (c) of the Act. The same day the requisite notice was issued to the assessee.

46. The petitioner went up in appeal to the Tribunal. The Tribunal by its order dated 18th June, 1966, reduced the amount of income from undisclosed sources, which was fixed by the Commissioner at Rs. 1,03,500 to Rs. 80,000. It also made certain alterations in other items and the total assessable income of the petitioner was fixed at Rs. 1,07,902.

47. On 29th December, 1966, the petitioner filed a reply to the penalty notice. He took the plea that in view of the assessable income as finally determined by the Tribunal and in view of the fact that certain items were still disputed by way of reference, if the disputed amounts are excluded, then the income as finally determined by the Tribunal remains the same as assessed by the Income-tax Officer. As the firm had already been heavily assessed, it requested that a lenient view of the case be taken and it may be exempted from the imposition of penalty.

48. In his order dated 31st December, 1966, the Appellate Assistant Commissioner held that this is a case where concealment of income of at least Rs. 80,000 had not only been established but also admitted by the assessee. It was a case of deliberate concealment of income to which clause (c) of Section 271 (1) of the Act was attracted. He imposed a penalty in the sum of Rs. 52,500. The Commissioner observed that this sum was equal to nearly half of the maximum amount of penalty leviable in this case. The petitioner felt aggrieved and went up in appeal to the Tribunal. Before the Tribunal it was argued for the assessee that Section 297 (2) (g) of the Income-tax Act, 1961, violated Article 14 of the Constitution. This plea was repelled by the Tribunal on the strength of the Supreme Court decision in (1960) 60 ITR 112 in which it was held that the authorities created under a statute could not consider questions relating to the constitutional vires of that Act. The Tribunal, therefore, declined to go into this question. On the basis of several decided cases of various High Courts, the Tribunal held that the findings reached in assessment proceedings as to the undisclosed income, were prima facie sufficient to support a finding on that question in penalty proceedings, though such findings are not conclusive. It then observed that "the assessee has not brought on record any material to show that the finding arrived at in the assessment proceedings was erroneous". It held that those findings were rightly acted upon in these proceedings. The Tribunal observed that after giving anxious thought to the question of the amount of penalty the ends of justice would be met by imposing a penalty of Rs. 10,000 only.

This order of the Tribunal dated 17th December, 1967, is sought to be quashed in the present writ petition.

49. It appears that the petitioner applied for reference to the High Court of several questions of law arising out of the Tribunal's order passed in the assessment proceedings. The Tribunal on 15th September, 1967, referred one question of law relating to the credit balance in the petitioner's sales tax account, which had been treated as an income. The petitioner filed an application in this Court under Section 66 (2) of the Income-tax Act, 1922, for reference of two other questions of law relating to items of income which had been added to the trading account and on account of the personal expenses of the partners. No other finding appears to have been challenged in this application. This application was rejected by this Court on 13th February, 1968.

50. In the writ petition the petitioner has prayed that the order of the Appellate Assistant Commissioner as well as of the Tribunal passed in assessment proceedings be quashed in so far as they relate to the addition of income on the finding that it was concealed income from undisclosed sources. The order of the Commissioner merged in that of the Tribunal. The order of the Tribunal dated 18th June, 1966, was specifically questioned by the petitioner by way of an application under Section 66 (2). This Court dismissed that application on 13th February, 1968. Thus, the orders on the regular assessment side have become final so far as this Court is concerned. They cannot be questioned in this Court even under Article 226 of the Constitution.

51. Mr. Raja Ram Agarwal, appearing for the petitioner attacked the orders passed in penalty proceedings on the following grounds :-

1. The finding that there was concealment of income in the assessment proceedings was without jurisdiction and could not form the basis of penalty proceedings.
2. Section 297 (2) (g) of the Income-tax Act, 1961, violates Article 20 (1) of the Constitution.
3. Section 297 (2) (g) infringes the guarantee of equality enshrined in Article 14 of the Constitution.
4. Section 271 of the Act was inapplicable.

52. In my opinion the petitioner is not entitled to raise the first ground. The Income-tax Act provides for a reference for the opinion of the High Court of a question of law arising out of the order of the Tribunal. The Supreme Court in *Commissioner of Income Tax v. Scinclia Steam Navigation Co. Ltd*<sup>24</sup>, held that a question of law not raised before the Tribunal and not dealt with by it in its order cannot be said to arise out of its order, even if

<sup>24</sup>(1961) 42 ITR 589

on the facts of the case stated in the order, the question fairly arises. The same view was taken by the Supreme Court in *Ramanathan Chettiar v. Commissioner of Income Tax*<sup>25</sup>, and *T. D. Kumar*

*and Brothers (P.) Ltd. v. Commissioner of Income Tax*<sup>26</sup>, When Parliament has enacted that a question of law ought to be raised before the Tribunal before the High Court can give an opinion on it, it will not be right for this Court to circumvent the legislative mandate, by exercising the discretionary jurisdiction in favour of an assessee who did not raise the question before the Tribunal, either in the assessment or the penalty proceedings, and who has not in the present petition given any explanation for the omission. This Court has held that a litigant is not entitled to raise a question of jurisdiction for the first time in a writ petition unless he satisfactorily explains why he did not raise the plea before the appropriate authority. (See *J. K. Iron and Steel Co. Ltd. v. Labour Appellate Tribunal*<sup>27</sup>, *Supdt. of Police v. R. M. Singh*<sup>28</sup>, and *K. N. Halwai v. Registrar Co-operative Society U. P.* (Relying on *Pannalal Binjraj v. Union of India*<sup>29</sup>,

53. Clause (g), Section 297 (2) of the Income-tax Act, 1961, makes the new Act applicable to penalty proceedings in respect of an assessment for the year ending on 31st March, 1962, or any earlier year, provided the assessment is completed on or after 1st April, 1962. It was urged that this provision violates Article 20 (1) of the Constitution because the new Act provides for a greater penalty than that which might have been inflicted under the law in force at the time of a commission of the offence. Section 28 of the 1922 Act did not prescribe any minimum, whereas clause (iii) of Section 271 (1) (c) of the 1961 Act prescribes that a minimum of 20 per cent of the penalty must be imposed. The maximum penalty is the same under the old as well as the new Act for some classes of defaults, while it is lower now for other classes. Even this minimum can be waived or reduced by the Commissioner under Section 271 (4-A). Previously it was left to the Income-tax Officer to determine the reasonable amount of penalty to be awarded in each case, but under the new Act, Parliament by fixing a minimum seems to say that anything below it will not be reasonable. This is only guiding the discretion of the officer, and not imposing a greater penalty.

54. The Supreme Court in *K. Satwant v. State of Punjab*<sup>30</sup> held that a law which provides for a minimum sentence of fine on conviction cannot be read as one which imposes a greater penalty than that which might have been inflicted under the law under which there was no limit as to the extent of the fine. This Court in (1968) 70 ITR 293 (All) and the High Courts of Kerala in *P. Ummali Umma v. Inspecting Assistant Commissioner of Income Tax*<sup>31</sup>, and *Rajasthan in Indra and Co. v. Union of India*<sup>32</sup>, have held that the Act of 1961 does not provide for a greater penalty. So, Article 20 of the Constitution is not violated.

55. But assuming that the new Act tends to impose a greater penalty, yet Article 20 would not be attracted to penalty proceedings. Article 20 (1) states :-

"20 (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

<sup>25</sup>(1967) 63 ITR 458 : ( AIR 1967 SC 657 <sup>27</sup> AIR 1953 All 624 <sup>29</sup> AIR 1957 SC 397 at p. 412

<sup>26</sup>(1967) 63 ITR 67 (SC).

<sup>28</sup> AIR 1959 All 710

<sup>30</sup>(1960) 2 SCR 89 at pp. 111, 113 : ( AIR 1960 SC 266 at pp. 276, 277)

<sup>31</sup>(1967) 64 ITR 669 (Ker) and Bom in (1967) 64 ITR 637 (Bom)    <sup>32</sup>(1967) 64 ITR 664

(2) No person shall be prosecuted and punished for the same offence more than once....."

The Supreme Court in AIR 1953 Supreme Court 325 observed that :-

"Article 20 (2) incorporates within its scope the plea of 'autrefois convict' as known to the British jurisprudence or the plea of double jeopardy as known to the American Constitution but circumscribes it by providing that there should be not only a prosecution but also a punishment in the first instance in order to operate as a bar to a second prosecution and punishment for the same offence."

It held that the article contemplates proceedings of the nature of criminal proceedings and the prosecution in this context means an initiation of proceedings of a criminal nature. The first part of Article 20 (1) prohibits a conviction while the second part deals with penalty that may be inflicted on conviction. The word "penalty" has been used to denote the sentence of punishment. Like sub-article (2), sub-article (1) also contemplates proceedings of a criminal nature.

56. It is well known that the Legislature can impose both a criminal as well as civil sanction for the same act or omission. In *Halvering v. Mitchell*<sup>33</sup>, it was held that civil sanctions are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the tax-payer's fraud. Similarly Jackson J. said in *Spies v. United States*<sup>34</sup>, that the civil sanction consists of additions to the tax upon determinations of fact made by an administrative agency and with no burden on the Government to prove its case beyond a reasonable doubt, whereas criminal sanction consists of penal offences enforced by the criminal process in the familiar manner. Invocation of one does not exclude resort to the other. Relying upon these decisions the Kerala High Court in *P. Ummali Umma's case*, (1967) 64 ITR 669 (Ker) held that the object of the penalty proceedings was to render evasion unprofitable and to secure to the State compensation for damages caused by attempted evasion.

57. Chapter XXI of the 1961 Act deals with penalty. A separate chapter No. XXII provides for offences and prosecutions. Penalty is imposed by the revenue authorities. Prosecution for the offences has to be launched, in view of Section 292, in the regular criminal court, which alone can convict and sentence. The authorities impose penalty if they are satisfied that a default has been committed. The revenue does not have to prove its case beyond all reasonable doubt. In prosecution under Chapter XXII the Revenue will have to prove its case beyond all reasonable doubt, because that is a fundamental principle prevailing in the criminal courts. All these features indicate that prosecutions under Chapter XXII are criminal proceedings, but penalty proceedings constitute a civil sanction. They are Revenue in nature, to which Article 20 of the Constitution

does not apply.

58. The next submission of Mr. Agarwal, learned counsel for the petitioner, was that

<sup>33</sup>(1938) 303 US 391

<sup>34</sup>(1943) 317 US 492

section 297 (2) (g) of the Act violated Article 14 of the Constitution. It was urged that the penalty provisions of the 1961 Act are more onerous and adverse to the assessee in comparison to the penalty provisions of the 1922 Act. Section 297 (2) (g) classifies assesseees for application of the 1961 Act without any reasonable basis. The vice of discrimination is hence imported into this provision. The learned counsel relied upon the decision of the Bombay High Court in (1967) 64 ITR 637 (Bom) where this submission was accepted.

59. Section 297 of the Income-tax Act of 1961 provides for repeals and savings. Subsection (1) repeals the Income-tax Act of 1922. Sub-section (2) mentions the saving clauses. Clauses (a), (f) and (g) are relevant. They state :-

"2. Notwithstanding the repeal of the Indian Income-tax Act, 1922 (XI of 1922) (hereinafter referred to as the repealed Act) :-

(a) where a return of income has been filed before the commencement of this Act by any person for any assessment year, proceedings for the assessment of that person for that year may be taken and continued as if this Act had not been passed;

.....

(f) any proceeding for the imposition of a penalty in respect of any assessment completed before the 1st day of April, 1962, may be initiated and any such penalty may be imposed as if this Act had not been passed;

(g) any proceeding for the imposition of a penalty in respect of any assessment for the year ending on the 31st day of March, 1962, or any earlier year, which is completed on or after the 1st day of April, 1962, may be initiated and any such penalty may be imposed under this Act;

.....

These provisions classify the application of the new Act on the basis of the date of filing the return for purposes of assessment proceedings, and the date of the completion of the assessment, for purposes of initiating and imposing penalty.

60. In AIR 1952 Supreme Court 75 S. R. Das, J. (page 93) observed that Article 14 forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed. The question hence would be whether the new Act confers greater privileges on the

Revenue or imposes more onerous liabilities on the assessee than the 1922 Act? If no, Article 14 will not be attracted.

61. In the present case we are concerned with the provisions of the 1961 Act as it stood prior to the 1968 amendments. The acts and omissions for which penalty can be levied are the same under both the 1922 and the 1961 enactments. In matters of procedure and consequence the two Acts differ.

62. Kanga and Palkhivala's Commentary on the 1961 Act (5th Edition, p. 938) states :-

"The main changes effected by this section namely Section 271 and Sections 274 and 275 are as follows :-

(a) Unlike Section 28 of the 1922 Act, this section does not confer any power on the Appellate Tribunal to impose a penalty.

(b) In cases of concealment of income where the minimum penalty imposable exceeds Rs. 1,000 the Inspecting Assistant Commissioner alone is empowered to impose a penalty (S. 274 (2)), whereas under the 1922 Act the Income-tax Officer had the power to impose a penalty even in such cases.

(c) Under the 1922 Act the Income-tax Officer could not impose any penalty without the previous approval of the Inspecting Assistant Commissioner. Under this Act the Income-tax Officer does not have to take the sanction of the Inspecting Assistant Commissioner in any case.

(d) This section provides that in certain cases if any penalty is imposed, it should not be less than the minimum prescribed; there was no such minimum prescribed under the 1922 Act.

(e) The maximum penalty imposable has been reduced in cases falling within Clauses (a) and (b) of Section 271 (1).

(f) There was no time limit for commencement of penalty proceedings under the 1922 Act. This Act requires penalty proceedings to be commenced before the completion of those proceedings in which the Income-tax Officer or the Appellate Assistant Commissioner is satisfied that the default attracting a penalty has been committed (S. 275).

(g) There was no time limit in the 1922 Act for the passing of a penalty order, but a time limit is now imposed by Section 275.

(h) No prosecution could be instituted under the 1922 Act in respect of the same facts on which a penalty was imposed. Under this Act a penalty can be imposed and a prosecution launched on the same facts."

Mr. Gopal Behari, appearing for the Department, pointed out that in addition, it may be stated that the minimum prescribed penalty can be waived or reduced by the Commissioner under the new Act (vide section 271 (4-A)). Another significant departure relates to appeals. Under the

proviso to Section 30 of the 1922 Act, no appeal lay against an order imposing a penalty under Section 46 (1), unless the tax had been paid. There is no such fetter to the right of appeal against similar orders under the 1961 Act.

63. The Bombay High Court in Shakti Offset case, (1967) 64 ITR 637 (Bom) held (page 650) :-

"In our opinion, the protection that is given to an assessee governed in the matter of penal proceedings under the Act of 1922 in the Income-tax Officer not being able to initiate proceedings or inflict penalties except after concurrence of the Inspecting Assistant Commissioner is a valuable guarantee given to the assessee. Similarly, the immunity from prosecution on the basis of facts which have led to a penalty being imposed under Section 28 of the Act of 1922, which is absent from the provisions of the Income-tax Act of 1961, is a material departure from the scheme of liability for the penalty under the two Acts. These features along with the provisions of punishment cannot therefore be lost sight of in a case where there is any ground for complaint of discrimination between two assesseees similarly situated." Thus, the immunity from prosecution and sentence, and the interposition of a superior officer like the Inspecting Assistant Commissioner for initiating penalty proceedings, were considered to be the main privileges available to the assessee under the old Act, which have been taken away by the new Act and, therefore, the new Act was held to be more onerous.

64. The Act of 1961 is prospective. Section 297 (2) states the exceptions. Clause (g) makes the penalty provisions of this Act operate retrospectively. Section 297 (2) does not touch Chapter XXII which deals with offences and prosecutions. This chapter also operates prospectively, and will not apply to past acts or omissions. The provisions in Chapter XXII expressly make acts and omissions mentioned in the various stated sections of the 1961 Act as offences. There is no provision anywhere in the 1961 Act which makes punishable, defaults or omissions in relation to the provisions of the 1922 Act. An assessee covered by Section 297 (2) (g) does not become liable to prosecution under the new Act.

65. In the case of T. S. Baliah, C. A. Nos. 130 and 133 of 196S, D/-12-12-1968 : (reported in AIR 1969 Supreme Court 701) the Supreme Court has held that Section 297 (2) was not exhaustive. There was nothing in that provision or in any other provision of the 1961 Act which expressed an intention to exclude the application of Section 6, General Clauses Act. Hence that section will apply to the repeal of the 1922 Act. The provisions of the 1922 Act, which provided for prosecution (like section 52) would survive the repeal and would be available for dealing with the liability to prosecution incurred prior to the repeal. It may be said that since, in view of Clause (g) of Section 297 (2) penalty would be imposable on him under the 1961 Act, his case would not be governed by Section 28 (4) which provides that an assessee will not be liable to prosecution for the same acts or omissions for which a penalty has been imposed "under this section". In such a case penalty is not imposed under Section 28 and, therefore, he will be liable to prosecution, though if his assessment had been completed before 1st April, 1962, he would

have been immune from prosecution in view of Section 28 (4).

66. According to this Supreme Court decision the prosecution provisions of the old Act survive the repeal. Section 28 (4) provides a condition precedent to the launching of prosecutions. That section would necessarily survive the repeal.

67. The liability to penalty is incurred under Section 28 when the default is committed. But, though the liability was incurred under Section 28 of the old Act, Clause (g) of Section 297 (2) enables the proceedings to be taken therefor under Section 271 of the new Act. Thus, the award of penalty is the result of the combined action of Section 28 of the old Act and Section 271 of the new Act. In the eye of law the penalty is imposed under Section 28 read with Section 271. Thus, such a case would also be within the ambit of Section 28 (4) and where penalty has been so imposed, the assessee cannot be prosecuted on the same facts. The assessee remains immune from prosecution as before.

68. As regards the inter-position of the Inspecting Assistant Commissioner under the 1922 Act, the position is, in my opinion, no worse under the new Act. Previously the Income-tax Officer had to refer every case to the Inspecting Assistant Commissioner for sanction to initiate penalty proceedings. After sanction he decided every case himself. In view of Section 274 (2), in cases of concealment of income, which is really the substantial head for imposition of penalty, the Income-tax Officer has to refer to the Inspecting Assistant Commissioner every case entirely if the minimum penalty imposable exceeds Rs. 1,000. So except in petty cases, the Income-tax Officer cannot take action himself. A superior officer like the Inspecting Assistant Commissioner has to initiate and complete the proceedings. So, in a majority of cases, the inter-position is more effective. The safeguard to the assessee is beneficial rather than onerous and he cannot complain of discrimination.

69. In *Charanjit Lal Chowdhury v. Union of India*<sup>35</sup>, S. R. Das, J. (page 66) observed:

"It is plain that every classification is in some degree likely to produce some inequality, but mere production of inequality is not by itself enough. The inequality produced, in order to encounter the challenge of the Constitution, must be 'actually and palpably unreasonable and arbitrary'".

That being the test, could it be said that leaving to the Income-tax Officer the discretion to initiate proceedings himself in petty cases, is palpably unreasonable and arbitrary? Before answering this query, the impact of the other changes, on the assessee, may also be noted.

70. Previously penalty proceedings could not only be initiated, but also completed, without any limit of time. The assessee was perpetually under this threat; but under the new Act they cannot be commenced after the completion of the proceedings, in the course of which the satisfaction was reached. Further, the new Act has imposed a limit of two years from the date of the completion of the assessment, for completing penalty proceedings. In this respect Parliament has

provided to the assessee, a safeguard of great magnitude. Then, if an assessee has crossed through the stages of the Income-tax Officer and the Appellate Assistant Commissioner, he is immune, because he is in no danger of facing penalty proceedings at the instance of the Appellate Tribunal under the new Act, though he was liable to an action by the Tribunal also under the 1922 Act. This is another concession to the assessee. Again, under the old Act as assessee could not appeal against an order imposing penalty under Section 46 (1) without paying the tax, while under the new Act he has an unfettered right of appeal against a similar order. Here also the Legislature has relaxed the provisions in favour of an assessee. These substantial safeguards given to an assessee, in my opinion, more than offset the sting of the loss of immunity from an action of penalty being taken by the Income-tax Officer himself in some cases. As seen above, the prescribing of a minimum does not impose a greater burden on the assessee.

71. It may be said that previously the penalty was imposed by the Income-tax Officer; the assessee hence had two rights of appeal. Now the penalty is imposed by the Appellate Assistant Commissioner. He stands to lose a right of appeal. The new Act, therefore, adversely affects the assessee. This is true; but, on the other hand, the assessee gains the advantage that the proceedings for penalty are not taken by the same officer who had already recorded a finding against the assessee on the question of concealment of income which is the basis for the penalty. Under the new Act the penalty proceedings are initiated not only by a superior officer but by an officer who cannot be deemed to have pre-judged the issue and who would apply a fresh mind to the case. This, in my opinion, balances the loss of one right of appeal.

72. Looking broadly, Parliament did not change the substantive provisions. Penalty was  
35 AIR 1951 SC 41

even now imposable for the same acts or omissions; but the machinery has been tightened to make the scheme more fair and efficient. I am unable to hold that the new Act confers better privileges upon the revenue or imposed greater liabilities on the assessee, on the topic of penalty. The inequality produced by the new Act, if any, is not palpably unreasonable or arbitrary. Section 297 (2) (g) has not been enacted with an evil eye and an unequal hand. It does not import the vice of discrimination.

73. Even if it is assumed for the sake of argument that the new Act is more prejudicial to the assessee, the further question would be whether the classification is invalid. The Supreme Court has formulated several principles to determine the validity of classifications for the purposes of Article 14 of the Constitution. It has been laid down that:

1. In permissible classification mathematical nicety and perfect equality are not required. Similarly, not identity of treatment, is enough. *State of Bombay v. F. N. Balsara*<sup>36</sup>, and 1952 SCR 284 at pp. 349-50 : ( AIR 1952 Supreme Court 75 at pp. 98-99).
2. The legislature is free to recognize degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest. (*R. K. Dalmia v. Justice S. R. Tendolkar*<sup>37</sup>, , proposition (d)).

3. It must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds. (Dalmia's case, AIR 1958 Supreme Court 538 proposition (c)).

4. In order to sustain the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived (Dalmia's case, AIR 1958 Supreme Court 538 proposition (e)).

5. The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like (Dalmia's case, AIR 1958 Supreme Court 538).

6. Permissible classification must satisfy two conditions, namely,

(i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and

(ii) the differentia must have a rational relation or nexus to the object sought to be achieved by the statute, ( AIR 1951 Supreme Court 41, AIR 1955 Supreme Court 191).

7. If the two tests are satisfied it is not for the courts to see to the wisdom of the basis for the classification. It may be demonstrated that the scheme is not the best in the circumstances, and the choice of the legislature may be shown to be erroneous, but the classification will not be subject to judicial interference on these grounds (vide Shah, J., speaking for the majority in AIR 1967 Supreme Court 691 paragraph 27).

8. A general classification cannot be justified on the basis of exceptional cases: Civil Appeal No. 1832 of 1968, decided by the Supreme Court on 12-12-1968

361951 SCR 682 at pp. 709-10 : ( AIR 1951 SC 318 at pp. 326-327)

37 AIR 1958 SC 538

(SC).

(In other words, general classification cannot fail because of exceptional cases.)

9. Tax Laws are not immune from Article 14, but in the application of the principles of classification the Courts, in view of the inherent complexity of fiscal adjustment to diverse elements, permit a larger discretion to the Legislature in the matter of classification. The power of the Legislature to classify is of wide range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. (*Khandige Sham Bhat v. Agricultural Income-tax Officer*<sup>38</sup>).

Thus, it is for the legislature to choose the basis for classification. It is not for the Courts to judge whether the chosen basis was the best or the wisest or a different basis may have served the purpose better.

74. The Courts are confined to seeing that the twin tests of differentia and nexus are satisfied. The classification would, therefore, not be bad simply because the legislature chose the event of

completion of the assessment to be the basis of the classification of assessee, for penalty proceedings, though the date of the filing of the return may have been better, and though the latter was fixed for classifying assessment proceedings.

75. In (1968) 70 ITR 293 (All) this Court upheld the classification underlying Clause (g) of Section 297 (2) of the Act. Bishambhar, Dayal, J. observed that :-

"Since penalty has to be calculated and then imposed according to the tax assessed, the penalty being proportionate to the tax, the imposing of penalty must necessarily follow the assessment. The question of imposition of penalty thus arises after the assessment has been completed and, therefore, the provision that in cases where assessment has been completed after the new Act had come into force, the penalty would be imposed according to the new Act, appears to be a reasonable classification."

So, the event which enabled the impossible penalty to be found out was considered an intelligible differentia. It had, nexus, because it enabled the application of the new Act.

76. It is well known that generally the finding regarding satisfaction that the default attracting penalty has been committed, is recorded in the assessment order. The event of the completion of the assessment hence crystallises or fixes the liability for drawing up proceedings for penalty. It furnishes a material part of the cause of action for it. The fact that a material part of the cause of action has accrued before or after the commencement of the new Act is a quality or characteristic or differentia which is intelligible, for founding the classification of assessee for initiating penalty proceedings under the old or the new Act. This differentia is rationally related to the object of Clauses (f) and (g), namely to apply the Act which was in force when penalty proceedings are normally to commence. In those cases where the proceedings are to be drawn up after the commencement of the new Act, the provisions of the new Act were made applicable. This classification satisfies the twin tests and is valid. The view of this Court in (1968) 70 ITR 293 (All) that Clauses (f) and (g) does not violate Article 14 of the Constitution has been accepted by the Delhi High Court in Writ Petn. No. 1247 of 1967, D/-24-2-1969 (Delhi)

<sup>38</sup> AIR 1963 SC 591

and the Madhya Pradesh High Court in *Gopichand Sarjuprasad v. Union of India*<sup>39</sup>, These Courts have dissented from the Bombay view expressed in Shakti Offset case, (1967) 64 ITR 637 (Bom). I think the consensus of opinion is better.

77. Mr. Agarwal appearing for the petitioner relied upon the decision of the Supreme Court in AIR 1967 Supreme Court 691. There the majority struck down Section 33 of the Payment of Bonus Act, 1965, as infringing Article 14 of the Constitution. Under it the classification was based on the pendency of disputes. It was held that this basis was under the peculiar circumstances neither logical nor reasonable. That case is, in my opinion, not applicable because the classification in the present case is not dependent upon the pendency of a dispute, but upon the occurrence of a material part of the cause of action for penalty proceedings.

78. However, a classification which is not valid for one purpose may nonetheless be valid for another. The classification of assesseees on the basis of pending proceedings and fresh proceedings was upheld by the Supreme Court in AIR 1951 Supreme Court 97. Similarly a classification based on pending proceedings was held valid by this Court in AIR 1963 Allahabad 451. This case related to Section 3 of the Income-tax (Amendment) Act of 1950.

79. In *M. Parmanand v. Addl. Income-tax Officer*<sup>40</sup>, the Income-tax (Amendment) Act (XXV of 1953) was challenged as discriminatory. The basis of classification for applying the amended Act was the event of the completion of the assessment. The classification was upheld by the Mysore High Court.

80. The last submission raised on behalf of the petitioner was that Section 271 while, on its terms, does not apply to the present case. Under Section 271 (1) (c) penalty can be levied if the officer is satisfied (that the assessee has concealed income) in the course of proceedings under this Act. Hence, this section will not apply where the satisfaction is reached in the course of the proceedings under the 1922 Act, as in the present case. The second ground emphasised was that under Clauses (a) and (b) of Section 271 (1) penalty can be imposed for omissions or defaults in relation to the mentioned sections of the Act of 1961 alone and not for non-compliance with the provisions of the old Act. This submission was accepted by the Gujarat High Court in (1968) 69 ITR 312 (Guj) and (1969) 72 ITR 17 (Guj), but was rejected by this Court in (1968) 70 ITR 293 (All) and by the Madhya Pradesh High Court in (1967) 64 ITR 285 (Madh Pra) as well as in (1969) 73 ITR 263 : AIR 1969 Madhya Pradesh 220.

81. In Gopichand's case, (1969) 73 ITR 263 : AIR 1969 Madhya Pradesh 220 (supra) the Madhya Pradesh High Court held that after the commencement of the Act of 1961 assessment proceedings initiated under the 1922 Act were allowed to continue under it only by force of Section 297 (2) (a) of the Act of 1961, and hence they were proceedings under the 1961 Act itself; consequently, the satisfaction reached by the Income-tax Officer about the concealment of the income on the part of the assessee attracting penalty was in the course of proceedings under the 1961 Act. With respect, this reasoning appeals to me. But the matter may be considered from the alternative view point that such

<sup>39</sup>(1969) 73 ITR 263 : AIR 1969 Mad Prad 220

<sup>40</sup> AIR 1958 Mys70

proceedings are not "under this Act."

82. Section 297 (2) (g) not only authorises the initiation of proceedings but also expressly empowers the imposition of the penalty. It is hence in the nature of a charging provision as well. It makes the penalty provisions operate retrospectively, because it empowers the imposition of penalty under the Act of 1961 for defaults committed before its commencement. Section 271 on its terms authorises the levy of penalty if the satisfaction is reached in the course of assessment

proceedings held under the Act of 1961. Clause (g) however applies Section 271 to cases where the satisfaction is reached in proceedings held under the old Act. These are mutually conflicting provisions on the same subject. They cannot co-exist or stand together. In this situation the doctrine of implied repeal will apply. The doctrine says that when two provisions on the same subject-matter directly collide, that is obedience to one is not possible without disobedience to the other, and the co-existence of the two is destructive of the object sought to be achieved by the later enactment, then the earlier provision is repealed. The basis of this doctrine is that the legislature is presumed to know the existing law, and it is not deemed to intend to create confusion in the law by retaining conflicting provisions in the statute. In applying the doctrine, the Courts do no more than give effect to the intention of the legislature (see *Municipal Council Palai v. Joseph*<sup>41</sup>,

When repeal operates by implication, the earlier provision goes, to the extent of repugnancy (see *Zaverbhai Amaldas v. State of Bombay*<sup>42</sup>, Section 297 (2) (g) comes later in the Act. It will repeal the offending part of section 271. The troublesome words in Section 271 are "under this Act" occurring in the phrase "in the course of proceedings under this Act." They will be deemed nonexistent in the application of Section 271 to cases governed by Section 297 (2) (g).

83. It is often said that Courts do not favour implied repeal. The doctrine is not applied unless the two provisions cannot be reconciled. One rule of construction relating to conciliation was laid down by the Madras High Court in *Rangiah v. Appaji Rao*<sup>43</sup>, the Bench held :-

"It is a well known canon of construction that the Courts should construe the provisions of legislative enactments in such a way as not to impute inconsistency to the Legislature. Where the provisions are reconciliable the Courts should try to reconcile. They should not attach importance to a single phrase or clause in one section and overlook the clear provision in other sections which are of a general character."

This principle may well apply here. For cases covered by Clause (g), the words "under this Act" in section 271 will have to be disregarded.

84. The same kind of thing was said by the Madhya Pradesh High Court in Kishanlal's case, (1967) 64 ITR 285 (Madh Pra) while dealing with the argument that Clauses (a) and (b) of Section 271 (1) entitle the imposition of penalty only if there has been a default in

<sup>41</sup> AIR 1963 SC 1561 1565 (Para 10) <sup>43</sup>AIR 1927 Madr 163. At page 164

<sup>42</sup> AIR 1954 SC 752 (Para 11)

relation to sections like 139, 142, 143 and 148 of the 1961 Act, which are expressly mentioned in them. The Court observed that the defaults for which penalty can be imposed under the various clauses of Section 28 of the 1922 Act are precisely the same for which penalty can be levied under Section 271 (1) of the 1961 Act. It was held that :-

"The substance of the matter is the nature of the acts and omissions of the assessee for

which he is liable to penalty and not the particular provisions, whether of the 1922 Act or the 1961 Act, under which the assessee is required to do those acts or is restrained from doing them."

It was then observed that Section 271 (1) has to be construed in harmony with Section 297 (2) (g), and not in a manner so as to render Clause (g) meaningless or redundant.

85. Be that as it may, this argument cannot be used by the petitioner. Here Clause (c) of Section 271 (1) is applicable. This clause states :-

"(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income."

This clause does not refer to any section of any Act. Its application cannot be ousted on this ground.

86. Even if it is held that technically Section 271 was not attracted and only Section 28 of the old Act could be used, yet the petition cannot succeed. The Appellate Assistant Commissioner said that a penalty of Rs. 52500 was nearly half of the maximum leviable. The Tribunal reduced it to Rs. 10,000 which was much below the minimum of 20% prescribed by Section 271. If the petitioner had raised the technical objection that Section 271 was not applicable in reply to the show cause notice, the Revenue may have satisfied this objection by taking proceedings under Section 28 of the old Act. As seen above, there is no limitation for penalty proceedings under the old Act. Penalty can even now be levied under the old Act. The petitioner cannot escape altogether. He cannot be heard to say that Rs. 10,000 (merely 10% of the maximum) was not reasonable for deliberate concealment. Article 226 of the Constitution confers a discretionary jurisdiction. It is to be exercised primarily to advance the interests of justice, and not merely to feed a technicality. The findings as to concealment are clear. No material whatsoever was adduced by the petitioner to prove his innocence. The petitioner has already paid the amount of penalty. Even if it be held that Section 28 of the old Act and not Section 271 of the new Act was applicable, this will, in my opinion, not be a fit case for interference.

87. In the result, the petition fails and is dismissed with costs.

BY THE COURT

In view of the majority opinion the petition is allowed. The order of the Appellate Assistant Commissioner dated 31st December, 1966, and of the Income Tax Appellate Tribunal dated 17th December, 1967, are quashed. The amount of penalty, if realised, will be refunded to the petitioner. The other reliefs claimed by the petitioner are refused. There will be no order as to costs.

Petition allowed.