PATNA HIGH COURT

Commissioner of Income-Tax

Vs

Nathulal Agarwala

(S Sandhawalia, C.J. U Sinha and N Ahmad , JJ.)

12.03.1985

JUDGMENT

Sandhawalia, C.J.

1. Whether the ratio of *CIT v. Anwar Ali*[1] still holds the field despite the designed deletion of the word "deliberately" from Section 271(1)(c) of the I.T. Act, 1961, and the pointed insertion of an exhaustive Explanation thereto by the Finance Act No. 5 of 1964 has come to be the focal question in this reference to the Full Bench. Equally at issue is the correctness of either one of the two strands of parallel judicial thought within this court itself.

2. Somewhat regretfully it must be noticed that the issues aforesaid arise from an assessment made way back for the year 1964-65. The assessee, M/s. Nathulal Agrawala & Sons, Hazaribagh, had declared its income at merely Rs. 22,116. The ITO, however, completed the assessment at a nearly four-fold figure of Rs. 82,378. He included in this assessment a sum of Rs. 26,000 purporting to be in the names of the wives of three of the partners of the assessee firm. Admittedly, the ITO had required the assessee to explain the nature and sources of these alleged cash credits. This was said to be furnished by the assessee but the same was categorically rejected and an amount of Rs. 26,000 was added to the income as accruing from undisclosed sources. On appeal to the AAC, this addition was in terms challenged, inter alia, but he also rejected the explanation of the assessee and upheld the addition. On further appeal by the assessee, the matter came up before the Tribunal which categorically held that the explanation offered by the assessee was rightly rejected by the taxing authorities. However, it accorded a relief of Rs. 7,500 in this account.

3. After the completion of the assessment, the ITO initiated penalty proceedings. Since the amount of penalty leviable exceeded Rs. 1,000, he forwarded the matter to the IAC. The latter issued a show-cause notice to the assessee to which certain explanations were offered including a written reply dated May 11, 1970. The assessee's representative was also heard in the matter. Thereafter, the IAC rejected the explanation and held that in view of the amended provisions of

the Finance Act of 1964, the added Explanation to Section 271(1)(c) of the I.T. Act, 1961, was clearly attracted. He, consequently, imposed a penalty of Rs. 12,000. The assessee came up in appeal to the Tribunal against the aforesaid penalty order. The Tribunal observed that undoubtedly the case was one where there was a difference of over twenty per cent. between the income assessed and the inqome returned and this had been done after rejecting the assessee's explanation offered by it with regard to the cash credits mentioned above. Nevertheless, it concluded as follows :

> "The assessee has maintained the books of account in the ordinary course of business but the same were not accepted and some estimate of sales and rate was made. No specific item of omission of sales or purchases was pointed out by the authorities below either in the assessment order or in the penalty order. In our opinion, the authorities below were not right in levying the penalty which is deleted. The amount, if paid, is directed to be refunded."

4. On the aforesaid facts, the following question of law has now been referred to this court by the Tribunal, at the instance of the Commissioner of Income-tax, Bihar:

> "Whether, on the facts and in the circumstances of the case, the Tribunal was legally correct in deleting the penalty of Rs. 12,000 levied by the Inspecting Assistant Commissioner under Section 271(1)(c) read with the Explanation to that section ?"

5. This case originally came up for hearing before a Division Bench consisting of my learned brothers, Uday Sinha and Nazir Ahmad JJ. It was forcefully urged before them that even within this court, there appeared to be two strands of thought with regard to the scope and ambit of the Explanation to Section 271(1)(c) of the I.T. Act, 1961 (hereinafter referred to as "the Act"), after the amendment by the Finance Act of 1964 and equally about the applicability of the ratio in Anwar Ali's case [1970] 76 ITR 696 (SC). In a very lucid reference order, it was noticed that even though Anwar Ali's case may no longer be applicable in the context where the Explanation was directly attracted, yet its ghost seems to permeate several decisions within this court as also in some other High Courts. In order to resolve the cleavage of judicial opinion and also to lay down the nature and content of the explanation which must be rendered by the assessee to rebut the statutory presumption now raised against it, the case has been referred to a Full Bench for an authoritative decision.

6. Mr. Rajgarhia, the learned counsel for the Commissioner of Income-tax, has plausibly and forcefully assailed the ambivalent stand of the Tribunal in deleting the penalty imposed. It was highlighted that it is common ground that in view of the wide divergence betwixt the income declared by the assessee and the correct income assessed under the Act, the Explanation to

Section 271(1)(c) of the Act was admittedly attracted in this case. The presumption against the assessee in the said Explanation had, therefore, to be mandatorily and statutorily raised against the assessee. The purported explanation by the assessee stood categorically rejected in the assessment proceedings concurrently by the Income-tax Officer, the Appellate Assistant Commissioner and the Tribunal itself. Equally in the penalty proceedings, the AAC rejected the explanation out of hand and the Tribunal had again in no way deviated from that conclusion. Nevertheless, for wholly unwarranted reasons, the penalty had been directed to be deleted. Counsel submitted with force and plausibility that despite the clear legislative intendment in the Finance Act No. 5 of 1964, the ghost of Anwar Ali's case [1970] 76 ITR 696 (SC) and the earlier precedents prior to the amendment still straddled the field. The judgments of this court either expressly or impliedly applying the ratio of Anwar Ali's case to the post-amendment law after 1964 were frontally assailed as patently erroneous.

7. It is manifest from the above that the crucial issue herein is the true legislative intent in deleting the word "deliberately" from Section 271(1)(c) and the addition of the Explanation thereto and the resultant construction to be placed on these amendments. Equally it is plain that there already exists a vast volume of legal literature on the import and scope of the added Explanation. It may, therefore, be unnecessary to launch an exhaustive dissertation on first principles in this context. Nevertheless, in view of the sharp cleavage of judicial opinion in other High Courts and, in particular, within our court itself, which has necessitated this reference, the question has to be examined both against the backdrop of its legislative history as also on the language of the statutory Explanation itself.

8. Inevitably one must first advert to the legislative background. Though it is well known, it calls for a pointed notice that the corresponding provision of the present Section 271 of the Act was Section 28 of the Indian I.T. Act, 1922. When the earlier statute was replaced by the present Act of 1961, Section 271 thereof retained the provisions of the earlier Section 28, virtually in pari materia therewith. It deserves highlighting that in construing the provisions of Section 28 of the 1922 Act and the unamended Section 271(1)(c) of the present Act (that is prior to 1964), there came to the fore two distinct schools of judicial thought. One was represented by the judgment of the Allahabad High Court in *Lal Chand Gopaldas v. CIT*[3] Ranged on the other side was the view of the Bomby High Court *in CIT v. Gokuldas Harivallabhdas*[3] and the judgments of the Gujarat High Court and our court taking a similar view. The latter view was tilted heavily in favour of the assessee.

9. Apparently faced with this conflict of judicial opinion and the almost impossible burden of proof which was laid on the Income-tax Department by the Bombay and the Gujarat views, the legislature envisaged, inter alia, an amendment of Section 271(1)(c) in order to shift the burden of proof in certain cases from the shoulders of the Department to clearly those of the assessee,

provided specific conditions were satisfied. The underlying purpose for doing so is evident from the following paragraph 17 of the Memo explaining the provisions of the Finance Bill of 1964 ([1964] 51 ITR (St) 102):

> "(17) Concealment of income.--It is proposed to provide that where the income declared by an assessee in the return furnished by him is less than 80 per cent. of the assessed income (reduced by expenditure incurred bona fide for earning the income but disallowed), the assessee shall be deemed to have concealed his income or furnished inaccurate particulars thereof and be liable to penalty accordingly, unless he produces proof to establish his bona fides in the matter."

10. The objects and purposes of the legislature in doing so seem to be manifest from the following note on Clause 40 of the amending Bill, which later came to be enacted as the Finance Act (No. 5 of 1964) :

> "Clause 40 seeks to amend Section 271 of the Income-tax Act to provide that where the income returned by an assessee is less than 80 per cent. of the assessed income, the assessee shall be deemed to have concealed the income or furnished inaccurate particulars thereof and be liable to penalty accordingly, unless he furnishes evidence to prove his bona fides in the matter."

11. It was to effectuate statutorily the aforesaid purpose that the first meaningful change made was by omitting the word "deliberately" from Clause (c) of Section 271(1) which had earlier existed both in Section 28 of the 1922 Act as also in the unamended Section 271 of the present Act. Thereafter, an elaborate change was made by the insertion of an exhaustive Explanation to Clause (c), which is now the primary subject-matter of interpretation. To precisely appreciate the language of the change which was designedly brought by the legislature in this context, it becomes necessary to juxtapose the earlier provisions of Section 28 of the 1922 Act and Section 271(1)(c) of the present Act as it stood prior to the amendment and subsequent thereto :

Section 28 of 1922 Act Section 271(1)(c) of 1961 Act: Before amendment After amendment (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 ...

(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 ...

(1) If the Income-tax Officer, the Appellate Assistant Commissioner, or the Commissioner, (Appeals) in the course of any proceedings under this Act, is satisfied that any person ...

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

such income,

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

(c) has concealed the particulars of his income or 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 supertax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (b) and (c), in addition to any tax he may direct that such person shall pay by way of penalty, ...

he may direct that such person shall pay by way of penalty, ...

(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 per cent, but which shall not exceed one and a half times the amount of the tax, if any, which would have been avoided if the income as returned by such person had been accepted as the correct income.

(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.

(2) ....."

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 purposes of clause (c) of this sub-section."

12. Now confining oneself first to the change made in Clause (c) of Section 271(1) alone, the significant thing that meets the eye is the designed omission of the word "deliberately" therefrom. It bears reiteration that this word had equally found place in the earlier Section 28 of the 1922 Act. With the extinction of the word "deliberately", the requirement of a designed furnishing of inaccurate particulars of income was obliterated. When the legislature pointedly deleted this word, it seems that it clearly did so in order to bring it in harmony and in consonance with the intent and purposes of the Explanation which was added thereto. As long as the word "deliberately" existed in Clause (c), a conscious mental element would have to be required to be

established thereunder and inevitably the burden of proving thereof would have to be on the Department. When the legislature contemplated a reversal, or in any case a change in this burden of proof by the addition of the Explanation thereto, it necessarily first neutralised the provisions of Clause (c) by taking out therefrom the word "deliberately" with the express intention of excluding a designed mental element. This aspect has to be permanently kept in mind in construing the Explanation, which was added to Clause (c) thereof.

13. Before adverting to the language of the inserted Explanation, certain broad characteristics in this context call for particular notice with regard to its nature and scope. It seems plain that the statute visualised the assessment proceedings and penalty proceedings as wholly distinct and independent of each other, at least so far as the applicability of the Explanation is concerned. The assessment proceedings necessarily precede and herein are the very foundation of the subsequent penalty proceedings, if any. In true essence, until the assessment proceedings in the shape of the final determination of the assessed income are completed, the provisions of the Explanation could hardly come into play. This is so because the objective and indeed virtually the arithmetical test (which would be elaborated hereafter) is raised basically on the income assessed which has been designated as correct income for this purpose. It is only when this correct income has been determined, that, by comparing it with the returned income of the assessee, the test of the same being less than eighty per cent. of the former can be applied. Again, it is only when this test is satisfied and the case squarely falls within the ambit of the higher levels of concealment that the later part of the Explanation would come into play. Therefore, the assessment proceedings and the penalty proceedings must be kept sharply distinct and independent from each other. Equally axiomatic it is that penalty would follow assessment or, in the reverse, assessment of income by the Department must precede the penalty thereafter, if any, to attract the provisions of the Explanation. It is no doubt true that sometimes, even during the assessment proceedings itself, a notice to show cause why the penalty be not imposed is issued when the disparity between the returned income and the income likely to be assessed is glaringly patent. However, to apply the Explanation in its full rigour and the raising of the demand against the assessee in a case where the returned income is less than eighty per cent. of the assessed income, penalty proceedings can truly be taken only if the correct income has been finalised. However, as the point is not directly before us (and, therefore, has not at all been debated) we do not in any way wish to opine about the validity of a penalty notice issued prior to the determination of the assessed income.

14. Adverting now to the language of the Explanation, an analysis thereof would indicate that for the purpose of the levying of penalty, the legislature has made two clear cut divisions. This has been done by providing an objective, and, if one may say so, an almost mathematical test. The touchstone therefor is the income returned by the assessee as against the income assessed by the Department and designated as correct income. A case where the returned income is less than

eighty per cent. of the assessed income can be squarely placed in one category. Where, however, such a variation is below 20 per cent., that would fall in the second category. To the first category, where there is a larger concealment of income, the provisions of the newly added Explanation become at once applicable with the resultant attraction of the presumptions against such an assessee. However, those falling in the second category, where the variation between the returned income and the assessed income is less or relatively marginal, that would be out of the net of the Explanation and continue to be governed by the law as it existed prior to the amendment and the insertion of the Explanation.

15. It would necessarily follow from the above that in order to determine the applicability of the Explanation, the first exercise is to see as to in which of the two categories the assessee would fall. As noticed earlier, the criterion here is purely arithmetical. If the difference between the returned income and the assessed income varies between 20 per cent. or more, then the assessee straightaway falls within the net of the newly added Explanation. Once this is so, the Explanation is attracted at once and what remains thereafter is to determine the consequences of its application.

16. A close reading of the later part of the Explanation would indicate that once it is held that it is applicable to the case of an assessee, it straightaway raises three legal presumptions against him. For clarity's sake, these may be formulated as under :

(i) that the amount of the assessed income is the correct income and it is in fact the income of the assessee himself ;

(ii) that the failure of the assessee to return the aforesaid correct income was due to concealment of the particulars of his income on his part; or

(iii) that such failure of the assessee was due to furnishing inaccurate particulars of such income.

17. Now, it would follow from the above, and the factum of the presumptions spelled out therein, that in essence the Explanation is a rule of evidence. This indeed appears to be well established both on the language and the principle of the Explanation as also by a mass of precedent holding to the same effect which does not need to be referred to. Further, it must at once be pointed out that the presumptions raised by the Explanation are not conclusive presumptions. These are only rebuttable presumptions. As is the rule under the civil law, the initial burden of discharging the onus of rebuttal is on the assessee. However, once he does so, he would be out of the mischief of the Explanation until and unless the Department is able to establish afresh that the assessee in fact had concealed the particulars of his income or furnished inaccurate particulars thereof. The nature of the initial onus placed on the assessee herein under the Explanation is not unlike the ordinary burden of proof placed on either party in judicial proceedings. The basic rule of

evidence is that if the person on whom the onus to prove lies is unable to discharge the same, his cause would fail. It must further be reiterated that the presumption raised herein is only an initial presumption, which is rebuttable by evidence. The burden of discharging an onus to prove thereunder would again be like the one in ordinary civil proceedings, i.e., it can be so discharged by preponderance of evidence. Again, it must not be insisted upon that there is any necessary or mandatory requirement of leading evidence by one of the parties. Such a burden can be discharged by existing material on the record in a specific case. As was pointed out earlier, the assessment proceedings and the penalty proceedings are distinct and separate. It would be permissible for an assessee under the penalty proceedings to show and prove that on the existing material itself, the presumption raised by the Explanation would stand rebutted.

18. It is apt to highlight that in penalty proceedings within the tax field as such, there is no room for bringing in the rules of criminal law and insist on a mens rea or proof beyond all reasonable doubt. In this context, it is apt to recall the observations of the Full Bench in CIT v. Patram Dass Raja Ram Beri [1981] 132 ITR 67 1 (P & H) [FB], wherein after a full discussion of the principle and precedent, it was concluded as follows (p. 682) :

"In view of the aforesaid authoritative enunciations, it is unnecessary to elaborate the matter further and it would be evident that generally penalty proceedings in a taxing statute are civil proceedings of remedial or coercive nature imposing an additional tax as a sanction for the speedy collection of revenue. Therefore, the imposition of penalty for a tax delinquency cannot possibly be equated with the conviction and sentence for a criminal offence."

19. It follows from the above that the penalty proceedings are separate and distinct from any nuances of criminality and it is, therefore, inapt to use the terminology of criminal law, like an offence, crime, or charge, etc., which should be scrupulously avoided.

20. Lastly, in this context, it appears that apart from the clear language of the Explanation, it also has the support of a sound rationale behind it. In case of concealment of income and tax evasion (it must be regretfully said that this seems to have, in a way, become a national syndrome) the modus of concealment is obviously within the special knowledge of the assessee. The settled, and virtually the hallowed, rule of evidence in this context is epitomised by Section 106 of the Evidence Act :

> "106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

21. It was in the light of the aforesaid rule of evidence and larger principle that Mr. Rajgarhia for the Revenue rightly assailed the trend of reasoning permeating some of the judgments discussed hereinafter to the effect that the assessee herein was required to prove the negative and,

consequently, the burden was almost impossible to discharge. It was pointed out that in most cases, if not in all, this would indeed be very far from the factual position, since inevitably the undisclosed income or concealed sources are themselves within the special knowledge of the assessee himself alone. Since under the Evidence Act itself, the burden of proving such facts is on the person having such special knowledge, the Legislature herein has also rightly placed the same on the assessee. Consequently, once the presumption of law under Section 271(1)(c) of the Act is raised against the assessee, it is for him to prove by adducing material or exhibiting from that already on the record for rebutting or dislodging such a presumption. To whittle down this presumption on the theory that herein the burden has been laid to prove the negative does not appear to me as justifiable.

22. Consequently, in cases of blatant evasion, the legislature was compelled to take off the impossible burden of establishing facts which were obviously within the special knowledge of the assessee alone. The onus was, therefore, rightly placed on the shoulders of the assessee who alone could reasonably discharge the same. It was apparently the inherent impossibility of discharging such an onerous burden placed on the Department (under the unamended provision and the interpretation placed thereon by some of the High Courts) that the Legislature was ultimately compelled to bring in the amendment by way of adding the Explanation by the Finance Act of 1964. That this was designedly done to effect a change in law appears to be a matter of little doubt. In fact, it has been nobody's case that the insertion of the Explanation and the omission of the word "deliberately" from Clause (c) of Section 271(1) was merely declaratory of the existing law. The changes were obviously brought in to remedy a particular mischief. To say that despite the amendment in Clause (c) and the insertion of the Explanation, no change was brought about in the law would be rendering the whole of these provisions nugatory and would be violating the settled

canon

of construction that a meaning must be given to every word in a statute. The rule of interpretation in the celebrated Heydon's case [1584] 3 Co. Rep. 7a, is thus clearly attracted. One must at once look to what was the state of the law before the making of the amendment and what was the mischief or defect for which the law did not earlier provide and what remedy has now been provided by the Legislature and equally the reasons for that remedy.

23. The stage is now set for adverting to precedent and inevitably pride of place must be given to *CIT v. Anwar Ali*[4] A perusal of the judgment therein makes it mainfest that the question that had arisen was with regard to the assessment year 1947-48 and, expressly, the law applicable was the unamended provision of Section 28(1)(c) of the Indian I.T. Act, 1922. The primary question which seems to have been determined was whether the imposition of penalty is in the nature of a penal provision, which was answered in the affirmative. The ancillary question was with regard

to the nature of the burden upon the Department for establishing that the assessee is liable to payment of penalty under the applicable provisions of Section 28(1)(c) of the 1922 Act. It was held that the mere fact that the explanation of the assessee is false did not necessarily give rise to the inference that the disputed amount represents his income and he was ipso facto liable to penalty though the same was good evidence for consideration in that context.

24. It is manifest from the above that in the case of *CIT v. Anwar Ali*[5] no question whatsoever of the interpretation of Section 271(1)(c) of the present Act and the specific change sought to be wrought therein by the amendment had even remotely arisen and in view of the fact that the assessment pertained to the year 1947-48, it could not possibly arise. As already noticed, the questions which fell for determination were altogether different and not even remotely analogous to what we are herein called upon to decide. It would inevitably follow that because of the amendments wrought in Section 271(1)(c) by the Finance Act of 1964 and the designed deletion of the word "deliberately" therefrom and the insertion of the Explanation thereto, the ratio and the reasoning of Anwar Ali's case which had construed the earlier and the different provisions of Section 28(1)(c) of the 1922 Act, cannot even remotely be applicable to the construction of Section 271(1)(c) as now amended.

25. Apart from principle, there appears to be a near unanimity of precedent (barring some marginal discordant notes) for the view that the deletion of the word "deliberately" and the addition of the Explanation to Section 271(1)(c) introduced by the Finance Act of 1964 were intended to make a clear change in the earlier law and have spelt out a categoric rule of evidence raising three rebuttable presumptions against the assessee in cases where the returned income was less than 80 per cent. of the assessed income. In the forefront herein is the consistent and unbroken line of precedent in the Allahabad High Court, whose earlier view seems to have been expressly accepted by the Legislature in preference to the contrary opinion prevailing in the Bombay High Court. The latest exposition thereof is by Satish Chandra C.J., in *Addl. CIT v. Ram Prakash*[6] in the following words (p. 562) ;

> "Taking up the last feature first, the position is that Clause (c) to Section 271(1) used the word 'deliberate' in connection with the phrase 'furnish inaccurate particulars of such income'. The word 'deliberate' was omitted by the Finance Act of 1964, which came into force on 1st April, 1964. Clause (c) as it stood after the amendment provided that if an assessee has concealed the particulars of his income or has furnished inaccurate particulars of such income, it is no longer necessary to establish that those actions were deliberate on the part of the assessee. The view that it is necessary to establish that the assessee deliberately acted in defiance of law, etc., is not tenable after 1st April, 1964.
>
> The Explanation which was added with effect from 1st April, 1964, completely reversed

the burden of proof in cases where the returned income was less than 80 per cent. of the assessed income. In this class of cases the Explanation provided that the assessee shall be deemed to have concealed the particulars of income or furnished inaccurate particulars of such income for the purpose of Clause (c) 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. In other words, the presumption is that the assessee has concealed or furnished inaccurate particulars. This presumption is rebuttable only if the assessee proves affirmatively that the failure to return the correct income was not due to fraud or any gross or wilful neglect on his part. Thus, the burden is squarely on the assessee, not in relation to concealment either of income or of particulars thereof, but in a very distinct matter. The burden of proof on the assessee is that the failure to return the correct income was not due to either of the three things, fraud or gross or wilful neglect. On this aspect, the burden cannot be shifted on to the Department by merely saying that the explanation offered by the assessee that the amount in question was not his income though not believable or acceptable, yet the mere disbelief will not lead to the conclusion that he was guilty of fraud or gross or wilful neglect. By saying so, in substance, the burden is shifted without any material."

26. Totally, in consonance with the above are the observations of the Division Benches of the Allahabad High Court in CIT v. Zeekoo Shoe Factory [1981] 127 ITR 837, Addl. CIT v. Quality Sweet House [1981] 130 ITR 309, CIT v. Chiranji Lal Shanti Swarup [1981] 130 ITR 651 and Mohd. Ibrahim Azimulla v. CIT [1981] 131 ITR 680.

27. In the Orissa High Court, whilst adopting a view in consonance with the above, the Division Bench in CIT v. K. C. Behera [1976] 103 ITR 479, expressly opined in the following words that Anwar Ali's case [1970] 76 ITR 696 (SC), would no longer hold the field in the context of the amended provision (p. 486) :

"That decision has no application to initiation of penalty proceedings subsequent to April 1, 1964. The Explanation brought in radical changes. The object of the Explanation was to get over the difficulty created by decisions which placed the burden of proving concealment of the particulars of the income on the Revenue as was done in Anwar Ali's case [1970] 76 ITR 696 (SC). The Explanation now places the burden of proving that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on the assessee. The object of the Explanation is to create a presumption in favour of the Revenue in a certain contingency. That is to say, where the total income returned is less than 80 per cent. of the total income assessed, the presumption would apply. The presumption is a rebuttable one and can be displaced by the assessee by proving that the failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part."

28. A later Division Bench of the Orissa High Court in CIT v. Puranmal Prabhudhayal [1977] 106 ITR 675 has again conformed to the earlier view.

29. In a recent judgment in CIT v. Rupabani Theatres P. Ltd. [1981] 130 ITR 747, the Calcutta High Court has exhaustively considered this aspect and taking an identical view has observed as follows (at p. 765 of the report) :

"In effect, this, in our opinion, makes explicit what was implicit in the previous Explanation and in an appropriate case, in our opinion, unless certain presumptions are made, that is to say, presuming it to be an income of the assessee for that year, no question of deeming to have furnished inaccurate particulars or concealed that income would arise. The Tribunal, therefore, in our opinion, was wrong in the legal approach that after the introduction of the Explanation, no change was intended which affected the observations of the Supreme Court. Change undoubtedly was intended to be effected, not to nullify the observations of the Supreme Court because those observations were made long after the Explanation had come into effect, but to implement the legislative policy which was felt necessary to ensure implementation of these provisions."

30. The other High Courts also seem to have taken a stand consistent with the above. A Division Bench of the Gujarat High Court in CIT v. Drapco Electric Corporation [1980] 122 ITR 341 and later followed in Kantilal Manilal v. CIT [1981] 130 ITR 411 expressed an identical opinion. To the same effect is the judgment of the Madhya Pradesh High Court in Addl. CIT v. Bhartiya Bhandar [1980] 122 ITR 622 and that of the Rajas-than High Court in CIT v. Dr. R. C. Gupta and Co. [1980] 122 ITR 567.

31. It remains to advert pointedly to the cleavage of judicial opinion within this court which necessitated the placing of this case before the Full Bench. As has been pointed out very forcefully by my learned brother, Uday Sinha J. in his lucid order of reference, it would seem that the ghost of Anwar All's case still permeates a number of judgments of this court despite the legislative mandate and the pointed amendments in Section 271(1)(c) by the Finance Act, 1964. This must be finally set at rest and the cobwebs in the penumbral area must be cleansed. Mr., B.P. Rajgarhia, the learned counsel for the Revenue, was not far wrong in his assertion that, despite the amendment, judicial thought has not been wholly able to free itself from the observation in Anwar Ali's case and earlier precedents which had construed the provisions of Section 28(1)(c) of the 1922 Act or the unamended provisions of Section 271(1)(c) of the present Act. Thus, there, appears to be two streams of parallel precedent running in this court even after the amendment--one rightly holding that after the radical change wrought by the amendment of Section 271(1)(c), the ratio of Anwar Ali's case and earlier precedents had ceased to apply to the situation. The other school of thought still clings in a way to the coat-tails of this ratio, and subjectively re-introduces the same by bringing in afresh the concept of deliberate fraud or

concealment by the assessee still to be established by the Department even in cases where the Explanation to Section 271(1)(c) is attracted subsequent to its amendment. It would be unnecessary to individually advert to the facts, reasoning and ratio of this line of cases. It perhaps suffices to mention that there was a long era in which Section 28(1)(c) of the Indian I.T. Act, 1922, and the unamended provisions of Section 271(1)(c) of the present Act (prior to 1964) had held the field and precedents had interpreted the same. However, it would seem that even after the amendment and the radical change in law, the earlier ghost has still continued to permeate judicial thought for a considerable time. Reference in this context may chronologically be made to Addl. CIT v. Kashiram Mathura Prasad [1979] 119 ITR 497 (Pat), CIT v. Gopal Vastralaya [1980] 122 ITR 527 (Pat), CIT v. Blnod Co. [1980] 122 ITR 832 (Pat) and CIT v. Chotanagpur Glass Works [1984] 145 ITR 225 (Pat). It calls for pointed notice that in CIT v. Gopal Vastralaya [1980] 122 ITR 527 (Pat), the Division Bench approved and followed the decision of the Punjab and Haryana High Court in Addl. CIT v. Karnail Singh V. Kaleran [1974] 94 ITR 505, which has been subsequently overruled by the Full Bench in its parent court in Vishwakarma Industries v. CIT[1982] 135 ITR 652 (P&H).

32. On the other hand, there is a clear and categoric view within this court that the amendment of Section 271(1)(c) was intended to bring a radical change and, in fact, to override the line of reasoning of earlier cases and later symbolised by Anwar Ali's case. Reference in this context may be made to CIT v. Parmanand Advani [1979] 119 ITR 464 (Pat), Addl. CIT v. South Gobindpur Colliery Co., [1979] 119 ITR 472 (Pat) and the later judgment in CJT v. Central Kooridih Colliery Company [1985] 153 ITR 311 (Pat) (Appx.), wherein it was categorically observed as under (p. 313) :

"After the addition of the Explanation, above quoted, with effect from April 1, 1964, the position in this respect has changed and the decision in the cases of Anwar Ali [1970] 76 ITR 696 (SC) and Hindustan Steel Limited [1972] 83 ITR 26 (SC) have no application. Therefore, the question is answered in favour of the Department and against the assessee."

33. I would unhesitatingly record my agreement with this line of reasoning and affirm the judgments of this court taking a similar view.

34. For the detailed reasons spelt out earlier and for purposes of clarity of precedent, it must be held with the deepest deference that the observations to the contrary--either explicitly or implicitly:--tending to apply the ratio and the reasoning of Anwar Ali's case [1970] 76 ITR 696 (SC) (even after the amendment of Section 271(1)(c)) in Addl. CIT v. Kashiram Mathura Prasad [1979] 119 ITR 497 (Pat), CIT v. Gopal Vastralaya [1980] 122 ITR 527 (Pat), CIT v. Binod Co. [1980] 122 ITR 832 (Pat) and CIT v. Chotanagpur Glass Works [1984] 145 ITR 225 (Pat), do not lay down the law correctly and I hereby overrule them on this point.

35. To conclude on this aspect, it must be held that the patent intent of the Legislature in amending Section 271(1)(c) and omitting the word "deliberately" therefrom and inserting the Explanation thereto by the Finance Act of 1964 was to bring about a change in the existing law. Consequently, the ratio of Anwar Ali's case, which had considered the earlier provisions of Section 28(1)(c) (1922 Act) is no longer attracted to the situation. The principal logical import of the Explanation is to shift the burden of proof from the Revenue on to the shoulders of the assessee in the class of cases where the returned income was less than 80 per cent. of the income assessed by the Department. In this category of cases, the Explanation raises three rebuttable presumptions against the assessee as spelt out in detail above in paragraph 14 (supra p. 302) of this judgment. The onus of proof for rebutting the presumptions lies squarely on the assessee. This burden, however, can be discharged (as in civil cases) by the preponderance of evidence. Equally it may not be inflexibly necessary to lead fresh evidence and it would be permissible in the penalty proceedings for the assessee to show and prove that on the existing material itself, the presumptions raised by the Explanation stand rebutted.

36. All that now remains is to consider the question rightly posed in the referring order whether it is enough for the assessee in a penalty proceeding to just set out any sort of explanation and whether the taxing authorities are obliged to accept that explanation without regard to its worth or credibility. It is plain that in the post-amendment situation after the Finance Act of 1964, the question is primarily one of fact to be decided by the courts competent to do so rather than one involving any niceties of the law. Once the Explanation is attracted, the law raises a legal presumption that the assessee was guilty of concealing the particulars of his income or of furnishing inaccurate particulars thereof. The onus to dislodge that presumption is thus placed squarely on the assessee and he has to show that this has not arisen from any fraud or gross or wilful neglect on his part. Therefore, it is for the courts of fact to arrive at a clear conclusion whether the assessee has discharged that onus and rebutted the presumption against him. The put it in other words, it is for them alone to either accept or reject the explanation or the evidence in support thereof. I am afraid that there appears to be some ambivalence on this point by the courts of fact which raises pointless complications thereafter. It would, therefore, be necessary and indeed most apt that wherever the Explanation is attracted, the ITO or the AAC or the Tribunal must record a clear and categoric finding whether the explanation of the assessee has been accepted and thereby he has discharged the onus laid upon him by law. If this were to be consistently done, much avoidable confusion would get out of the way. As to the nature of the explanation to be rendered by the assessee, it seems plain on principle that it is not the law that the moment any fantastic or unacceptable explanation is given, the burden placed upon him would be discharged and the presumption rebutted. It is not the law and perhaps hardly can be that any and every explanation by the assessee must be accepted. In my view, the explanation of the assessee for the purpose of avoidance of penalty must be an acceptable explanation. He may

not prove what he asserts to the hilt positively but as a matter of fact materials must be brought on the record to show that what he says is reasonably valid. It bears repetition that the issue is one for the courts of fact whether they will accept or reject the explanation and they should be explicit in recording a finding on the point.

37. Now, applying the law laid down above, the present case itself appears to be an example of the ambivalence displayed by the Tribunal itself. The AAC had in no uncertain terms rejected the explanation given by the assessee. In the impugned assessment proceedings, the Tribunal itself (vide annex. C) had unequivocally held that the explanation offered by the assessee was rightly rejected by the taxing authorities. However, in the penalty proceedings, the Tribunal, while not in any way deviating from the earlier finding of rejection of the explanation, has proceeded to observe that since the Revenue had not been able to show any specific item of omission of sales or purchases, the penalty imposed could not be sustained. Clearly enough, once the Explanation to Section 271(1)(c) was attracted, no burden lay on the Revenue and indeed it was squarely on the shoulders of the assessee which had remained undischarged. The Tribunal's setting aside of the penalty order was thus plainly unwarranted.

38. Accordingly, we answer the question of law referred to us (recorded at the end of paragraph 3 above) in the negative, that is, in favour of the Revenue and against the assessee.

Uday Sinha, J.

39. I agree.

Nazir Ahmad , J.

40. I agree.

Cases Referred.

1[1970] 76 ITR 696 (SC)
2[1963] 48 ITR 324
3[1958] 34 ITR 98
4[1970] 76 ITR 696 (SC)
5[1970] 76 ITR 696 (SC)
6[1981] 128 ITR 559 (All)