N.K.S.

FULL BENCH

Before S. S. Sandhawalia, C.J., P. C. Jain and K. S. Tiwana, JJ.

VISHWAKARMA INDUSTRIES,— *Appellant.*

versus

THE COMMISSIONER OF INCOME TAX, AMRITSAR,— *Respondent.*

Income Tax Reference Nos. 111 *to* 113 *of* 1976.

February 12, 1982.

Income Tax Act (XLIII of 1961) *(as amended by Finance Act* V *of* 1964)—*Section* 271 (1) (c) *Explanation—Penalty proceedings-Burden of proof of concealment of income—Explanation to Section*

271 (1) (c)—*Legislative intent, nature and scope thereof—Changes in law—Effect of.*

Held, that the language of explanation to section 271 (1) (c) of the Income Tax Act, 1961 would indicate that for the purposes of the levying of penalty the legislature here has made two clear-cut divisions. This has been done by providing a strictly objective and an almost mathematical test. The touch-stone therefore is the returned income by the assessee as against the assessed income by the Department and designated as correct income. A case where the returned income is less than 80 per cent of the assessed income can be squarely placed into one category. Where, however, such a variation is below 20 per cent that would fall into second category. To the first category, where there is 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. A close reading of the later part of the explanation would indicate that once it is held to be applicable to the case of an assessee, it straightaway raises three legal presumptions against him, namely (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 assessed income was due to fraud: or (iii) that the failure of the assessee to return the aforesaid correct assessed income was due to gross or wilful neglect on his part. It would follow from this that in essence the explanation is a rule of evidence. 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 the 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. (Paras 13, 15 and 16).

Additional Commissioner of Income Tax *vs.* Karnail Singh (1974) 94 I.T.R. 505,—
OVERRULED.

Held, that with the extinction of the word 'deliberately' from clause (c) of section 271 of the Act, requirement of a designed

furnishing of inaccurate particulars of income was obliterated. When the legislature designedly 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 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 addition of the explanation thereto, it necessarily neutralised the provisions of clause (c) by taking out therefrom the word 'deliberately' and the consequential requirement of a designed mental element.

(Para 11).

Held, that it seems plain that the statute visualised the assessment proceedings and the penalty proceedings as wholly distinct and independent to each other, at least so far as the applicability of the explanation is concerned. The assessment proceedings necessarily precede and herein indeed is 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 the arithmetical test is rested basically on the assessed income 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 80 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 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.

(Para 12).

Reference under section 256(1) *of the Income Tax Act*, 1961 *made by the Income-tax Appellate Tribunal, Amritsar Bench, Amritsar referring to this Hon'ble Court for the opinion on the following questions of law which are arising out of its order passed in I.T.A. No.* 27 *of* 1975-76 *for the assessment year* 1969-70 *and I.T.A. Nos.* 23 *and* 24 *of* 1975-76 *for the assessment years* 1970-71 *and* 1971-72 :—

R. A. No. 61(*Asr.*)/175-76 (*filed by the assessee*) :

(i) "*Whether on the facts and in the circumstances of the case, the Tribunal relied upon any irrelevant evidence in upholding the imposition of the penalty of Rs.* 31,500

under section 271(1)(c) *of the Income-tax Act*, 1961, *in respect of the Assessment Year* 1969-70 ?"

R.A. Nos. 85 *and* 86 *(Asr.)*/1975-76 *(filed by the Department)*

(*ii*) *"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in cancelling the penalties imposed under section* 271(1)(c) *in respect of the assessment years* 1970-71 *and* 1971-72 ?"

Ashok Bhan, Advocate with Ajay Mittal, Advocate, *for the Petitioner.*

D. N. Awasthy, Advocate, *for the Respondent.*

JUDGMENT

S. S. Sandhawalia, C.J.

1. The true legislative intent in adding the explanation to section 271(1)(c) of the Income-tax Act by the Finance Act No. 5 of 1964 as also the nature and scope thereof is the core question which has necessitated this reference to the Full Bench. Even more pointedly at issue the correctness of the construction placed thereon by the Division Bench in *Additional Commissioner of Income-Tax Punjab* v. *Karnail Singh* (1).

2. Messrs Vishwakarma Industries is a registered firm carrying on business in the manufacture and sale of ball-bearings. For the assessment year 1969-70 it declared a total income of Rs. 99,098 in the return filed on the 5th of September, 1969. The examination of its books of accounts by the Income-tax Officer revealed cash-credits totalling Rs. 30,000 in the name of M/s. Jagan Nath and Sons, Ludhiana. The assessee-firm urged that these credits were genuine and in support thereof filed confirmatory letters from the said party. The Income-tax Officer, accepted the assessee's contention and completed the assessment for the year 1969-70 on an income of Rs. 1,02,437.

3. After the completion of the above assessment it came to light in the context of the assessment of other assessees that the loans appearing in the name of M/s. Jagan Nath and Sons were not genuine.

(1) (1974) 94 I.T.R. 505.

Indeed Shri Jagan Nath of the said firm gave a categoric statement on the 16th of December, 1971, that he was a mere name lender and later he filed another affidavit dated the 21st December, 1971, before the Income-tax Officer. Ludhiana affirming that all his business had been fictitious and that he had never paid any loan to any party whatsoever. Further enquiries conclusively established that Shri Jagan Nath during the course of 4-5 years had purported to effect loans to the tune of about Rs. 25 lakhs whilst he was having no business whatsoever from 1963 onwards. His family consisted of 10-12 members and the balance available with him in his bank account was nominal. A house was found to have been purchased by his wife in 1967 for Rs. 10,000 on which a mortgage of Rs. 4,000 affected by the previous owner still subsisted and that mortgage he had not been able to redeem. Shri Jagan Nath further disclosed his *modus operandi* for the *hawala-hundi* business which he operated by putting his signatures on *hundies* at the instance of brokers without even caring to enquire if they were complete or not. All these documents were drawn merely to give a colour of genuineness to the *hundi* transaction and he denied that he was ever paid interest on those *hundi* loans. Instead he was allowed to retain some paltry commission. His stand was that the atmosphere at Ludhiana at the time was such that the parties and their brokers were apprehensive of raids by the Income-tax authorities. In essence Shri Jagan Nath totally denied having ever lent any genuine loan to any party and was otherwise conclusively found to be a man of straw.

3. When the aforesaid startling disclosures became public, the assessee-firm submitted a letter dated the 25th of March, 1972, before the Income-tax Officer Jalandhar. Therein it was mentioned that it had cash credits in its books of accounts in the name of M/s. Jagan Nath and Sons for the accounting periods relevant to the assessment years 1969-70 and 1971-72. Further it was stated that the statement made by Shri Jagan Nath, though of a general nature, has put the assessee in a very embarassing position and despite the fact that Shri Jagan Nath had executed an affidavit that the transactions between him and the assessee were true and correct, yet it apprehended some departmental action against itself on the basis of the aforesaid statement of Shri Jagan Nath. Finally it was stated that in order to avoid any controversy and the consequential harassment which might result therefrom the assessee was filing revised returns for the assessment years 1970-71 and 1971-72 surrendering the cash

credits in both these years for tax purposes. Particularly with regard to the assessment year 1969-70 on which the assessment had already been completed, an amount of Rs. 30,000 was surrendered to be included in the income of that year and assessment thereon was sought. Pursuant to this letter revised returns for all the three assessment years 1969-70, 1970-71 and 1971-72 were filed. For the assessment year 1969-70 the income disclosed was Rs. 1,32,446 as against Rs. 99,098 shown in the original return. Corresponding figures for the remaining two assessment years were also indicated. The Income-tax Officer completed the assessment for the above three years on a total income of Rs. 1,33,941, Rs. 1,91,457 and Rs. 1 46,263, respectively.

4. Simultaneously with the completion of the assessment of the above three years the Income-tax Officer initiated penalty proceedings against the assessee and forwarded the same to the Inspecting Assistant Commissioner for levy thereof under section 271(1)(c) of the Income-tax Act, 1961.

5. The Inspecting Assistant Commissioner came to the conclusion that the statement recorded by Shri Jagan Nath had revealed that the deposits in the assessee's books were not genuine and that in fact constituted its income from undisclosed sources. He observed that the assessee's conduct in filing the revised returns amount to admission that those amounts actually belonged to it. The Inspecting Assistant Commissioner placed reliance on the explanation added to section 271(1)(c) of the Income-tax Act with effect from the 1st of April, 1964, in respect of the assessment years 1969-70 and 1970-71. Consequently the following penalties were imposed:

Assessment year	*Penalty*
1969-70	Rs. 31,500
1970-71	Rs. 17,550
1971-72	Rs. 30,400

Aggrieved by the above-mentioned imposition of penalties the assessee filed appeals before the Income-tax appellate Tribunal and on their behalf *inter-alia* reliance was placed on Karnail Singh's case (supra). The Tribunal upheld the penalty for the assessment year 1969-70 but cancelled the penalties imposed for the assessment years 1970-71 and 1971-72.

6. Against the judgment of the Tribunal, both the assessee and the Commissioner of Income-Tax sought reference on a number of questions. The Tribunal found that the following two questions of law arose and referred the same to the High Court for opinion –

(i) Whether on the facts and in the circumstances of the case, the Tribunal relied upon any irrelevant evidence in upholding the imposition of the penalty of Rs. 31,500, under section 271 (1) (c) of the Income-tax Act, 1961, in respect of the Assessment year 1969-70? (Filed by the assessee);

(ii) "Whether on the facts and in the circumstances of the case, the Tribunal was right in law in cancelling the penalties imposed under section 271 (1) (c) in respect of the assessment years 1970-71, and 1971-72" (filed by the Department).

7. When the aforesaid matter came up before the Division Bench, learned counsel for the parties took up opposite stnds on the real import of the explanation added to Section 271(1) (c) of the Act. The firm stand of the Revenue was that this explanation was intended to make a deliberate change in the existing law and, therefore, the ratio of the judgment in *Commissioner of Income Tax, West Bengal* v. *Answar Ali* (2), (which had only interpreted earlier predecessor Section 28 of the Indian Income Tax Act, 1922) was not attracted and in any case could no longer hold the field. On the other hand the learned counsel for the assessee canvassed the stand that the decision in *Anwar Ali's* case was still applicable to the amended Section 271(1) (c) and basic reliance for this stand was on observations to the same effect in *Karnail Singh's* case (supra). The correctness of the view expressed in *Karnail Singh's* case was frontally assailed on behalf of the Revenue before the Division Bench and apparently finding merit therein, it referred the case to the Full Bench for its reconsideration.

8. It would be manifest from the above that the crucial issue herein is the true legislative intent in adding the explanation to section 271(1) (c) and the construction to be placed thereon. 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

(2) (1970) 76 I.T.R. 696.

principle in this context. Nevertheless in view of the sharp cleavage of judicial opinion in the various High Courts, the question has to be examined both against the backdrop of its legislative history as also on the language of the statutory explanation itself.

9. Adverting first to the legislative background, it calls for notice that the corresponding provision of the present section 271 of the Act was Section 28 of the Indian Income Tax, 1922. When the earlier statute was repealed and 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 highligting that in constructing the provisions of section 28 of the 1922 Act, and the un-amended section 271(1)(c) of the present Act, there came to the fore two distinct judicial schools of thought. One was represented by the judgment of the Allahabad High Court in *Lal Chand Gopaldass* v. *C.I.T.* (3). Ranged on the other side was the view of the *Bombay High Court in C.I.T.* v. *Gokal Dass Harivallabh Dass* (4), and the judgments of Gujarat and Patna Courts taking a *similar view.* The latter view was tilted heavily in favour of the assessee.

9-A. 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 view, 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 those of the ssessee, provided certain specific conditions were satisfied. The under-lying purpose for doing so is evident from the following para 17 of the memo explaining the provisions of the Finance Bill of 1964 (extracted):—

"(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 90 per cent, of the assesseed 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*

(3) (1966) 59 I.T.R. 135.

(4) 1958 (34) I.T.R. 98.

to penalty accordingly unless he produces proof to establish his bona fides *in the matter.*"

The objects and purposes of the legislature in doing so seem to be manifest from the following note in 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 90 per cent of the assessed income, the assessee shall be deemed to have concealed his income or furnished incorrect particulars thereof and be liable to penalty accordially, unless he furnishes evidence to prove his *bona fides* in the matter."

10. 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 wrought by the legislature in this context it becomes necessary to juxta pose 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)	(2)	(3)
(1) If the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course	(1) If the Income-tax Officer, the Appellate Assistant Commissioner in the course of any proceedings under	(1) If the Income-tax Officer, the Appellate Assistant Commissioner, or the Commissioner (Appeals) in the

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of any proceedings under this Act, is satisfied that any person:	this Act, is satisfied that any person—	course of any proceedings under this Act, is satisfied that any person—
(a) * * *	(a) * * *	(a) * * *
(b) * * *	(b) * * *	(b) * * *
(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 super-tax, if any, payable by him, a sum not exceeding one and a half times that amount, and in the cases referred to in clauses (b) & (c). in addition to any tax payable by him, a sum not exceeding	he may direct that such person shall pay by way of penalty— (i) * * * * (ii) * * * * (iii) in the cases referred to in clause (c) in addition to any tax payable by him, a sum which shall not be less than 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	He may direct that such person shall pay by way of penalty,— (i) * * * * (ii) * * * * (iii) in the cases referred to in clause (c) in addition to any tax payable by him, a sum which shall not be less than but which shall not exceed twice, the amount of the income in respect of which the particulars have been concealed or inaccu-

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one and a half times the amount of income-tax and super tax, if any, which would have been avoided if the income as returned by such person had to be accepted as the correct income: Provided * * *	if the income as returned by such person had been accepted as the correct income. (2) * *".	rate 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 correct income) as assessed under section 143 or section 144 or section 147 (reduced by the expenditure incurred bona fide by him for the purposes 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

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		concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of clause (c) of this sub-section."

11. Now confining oneself first to the change made in clause (c) alone, the significant thing that meets the eye is the designed omission o 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 designedly 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 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 addition of the explanation thereto, it necessarily neutralised the provisions of clause (c) by taking out there from the word "deliberately" and the consequential requirement of a designed mental element. This aspect has to be permanently kept in mind in construing the explanation which was added to clause (c) thereof.

12. Before adverting to the language of the 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 the penalty proceedings as wholly distinct and independent to each other, at least so far as the applicability of the explanation is concerned. The assessment proceedings necessarily precede and herein indeed is 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 the arithmetical test (which would be elaborated hereafter) is raised basically on the assessed income 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 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. It is no doubt true that some times even during the assessment proceedings itself a notice to show cause why the penalty be not imposed is issued when the disparity in the returned income and the likely assessed income is glaringly patent, and this may not perhaps be possible in the case where the difference between the returned income and the assessed income is only marginal. 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.

13. Turning now to the language of the explanation, an analysis thereof would indicate that for the purposes of the levying of penalty the legislature here has made clear cut divisions. This has been done by providing a strictly objective and if one may say so an almost mathematical test. The touch-stone therefor is the returned income by the assessee as against the assessed income by the Department and designated as correct income. A case where the returned income is less than 80 per cent of the assessed income

can be squarely placed into one category. Where, however, such a variation is below 20 per cent that would fall into second category. To the first category, where there is larger concealment of income, the provisions of the newly added explanation become atonce applicable with the resultant attraction of the presumptions against such as 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.

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

15. A close reading of the later part of the explanation would indicate that once it is held to be applicable to the case of an assessee it straightway 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 assessed income was due to fraud; or

(iii) that the failure of the assessee to return the aforesaid correct assessed income was due to gross or wilful neglect on his part.

16. Now it would follow from 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 this explanation as also by a plethora of precedent holding to the same effect. 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 the 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 case would fail. It must, however, be reiterated that the presumption raised herein is only an initial presumption, which is rebuttable. The burden of discharging an onus to prove thereunder would again be like the one of ordinary civil proceedings, i.e., it can be so discharged by preponderance of evidence. Again this must not be insisted upon that there is any necessary or mandatory requirement of leading evidence by any 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.

17. It is apt to highlight that in the penalty proceedings within the tax field as such, there is no room for bringing in the rules of criminal law and of discharging the burden beyond all reasonable doubt. In this context it is well to recall the observations of the Full Bench in *The Commissioner of Income-tax, Patiala-II, Patiala vs. M/s. Patram Dass Raja Ram Beri, Rohtak*, (5) wherein after a full discussion of the principle and precedent it was concluded as follows:—

> "In view of the aforesaid authoritative enunciations, it is unnecessary to elaborate the matted further and it would be

(5) I.T.R. 56 of 1975 decided on 28th July, 1981.

evident that generally penalty proceedings in 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."

18. 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.

19. 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 cases 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:

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

Consequently in cases of blatant evasion the legislature was compelled to take off the impossible burden of establishing facts which were obviously in 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 into 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.

20. The stage is now set for adverting to precedent and as already notice there is no dearth thereof. It would appear that barring some marginal discordant notes there appears to be a near unanimity of authority for the view that the added explanation to section 271(1) (c) introduced by the Finance Act of 1964 was intended to make a clear change in the earlier law and had spelled 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 fore-front herein is the constant 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. Commissioner of Income Tax* v. *Ram Parkash*, (6) in the following words :—

> "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 the 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 definance 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

(6) 128 I.T.R. 559.

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 particulars thereof, but in a very distinct matter. The burden of proof on the assessee is that the failure to return the correct income 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."

Totally in consonance with the above are the observations of the Division Benches of the Allahabad High Court in *Commissioner of Income-tax* v. *Zeekoo Shoe Factory* (7), *Addl. Commissioner of Income-tax, Lucknow* v. *Quality Sweet House* (8), *Commissioner of Income-tax, Lucknow* v. *Chiranji Lal Shanti Swarup* (9) *and Mohd. Ibrahim Azimulla* v. *Commissioner of Income-tax* (10).

21. In the Patna High Court Chief Justice Untwalia speaking for the Bench in *C.I.T. Bihar* v. *Patna Timber Works* (11) after an exhaustive discussion observed as follows:—

"****. I shall, therefore, first proceed to find out what is the meaning of the explanation. If a case is not covered by

(7) 127 I.T.R. 837.
(8) 130 I.T.R. 309.
(9) 130 I.T.R. 651.
(10) 131 I,T.R. 680.
(11) 106 I.T.R. 452.

the explanation, the burden to prove facts to attract the imposition of penalty under section 271(1)(c) is still on the Department. But in a case which is covered by the explanation, the burden has been thrown on the assessee to prove absence of certain ingredients, otherwise it will be permissible to draw the presumption of fact that the assessee has concealed the particulars of his income or furnished inaccurate particulars of such income. In a case where there is a difference of more than 20 per cent in the income return by any person and the total income as assessed under the various provisions of the Act, the explanation is attracted."

The aforesaid view has been adhered to in the Patna High Court in the later Division Bench judgments in *C.I.T. Bihar* v. *Parmanand Advani* (12); and *Addl. C.I.T. Bihar* v. *South Gobindpur Colliery Co.* (13) *as also C.I.T. Bihar* v. *Gopal Vastralaya* (14).

22. In the Orissa High Court whilst adopting the aforementioned view the Division Bench in *C.I.T. Orissa* v. *K. C. Behere and others* (15) expressly opined in the following words that *Anwar Ali's case* would no longer hold the field in the context of the amended provision:—

"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 providing concealment of the particulars of the income on the revenue as was done in *Anwar Ali's case* (supra). The explanation now places the burden of proving that the failure to return the correct income did not arise from any fraud or gross of wilful neglect of 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

(12) 119 I.T.R. 464.
(13) 119 I.T.R. 472.
(14) 122 I.T.R. 527.
(15) 103 I.T.R. 470.

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."

A later Division Bench of the Orissa High Court in *C.I.T. Orissa* v. *Puran Mal Prabhu Dayal* (16) has again conformed to the earlier view.

23. In a recent judgment in *C.I.T.* v. *Rupabani Theatres P. Ltd.* (17), the Calcutta High Court has exhaustively considered this aspect and taking an identical view has observed as follows:—

"*** 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 of 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 along after the Explanation had come into effect, but to implement the legislative policy which was felt necessary to ensure implementation of these provisions."

24. The other High Courts also seem to have taken a stand consistent with the above. A Division Bench of the Gujrat High Court in *C.I.T. Gujrat* v. *Drapco Electric Corporation* (18) and later followed in *Kantilal Manilal* v. *C.I.T. Gujarat* (19) expressed an identical opinion. To the same effect is the judgment of the Madhya Pradesh High Court in *Addl. C.I.T. M.P.* v. *Bhartiya*

(16) 106 I.T.R. 675.
(17) 130 I.T.R. 747.
(18) 122 I.T.R. 341.
(19) 130 I.T.R. 411.

Bhandar (20) and that of the Rajasthan High Court in *C.I.T. Jaipur* v. *Dr. R. C. Gupta and Co.* (21).

25. Faced with a stone wall of principle and precedent, Mr. Ashok Bhan with illimitable fairness conceded that the explanation to section 271(1)(c) was undoubtedly intended to bring a change in the law and to shift the burden of proof on to the assessee in the cases falling within the category where the returned income is less than 80 per cent of the assessed income. It would inevitably follow and in fact it was not disputed by Mr. Ashok Bhan that because of the change in the low effected by the insertion of explanation the ratio of *Anwar Ali's case* (which pertained only to the earlier provisions of section 28 of the Income-tax Act 1922) would no longer be applicable to the amended section 271(1)(c). However, the core of the stand taken by Mr. Ashok Bhan was that in penalty proceedings so far as the issue of the assessed income being the income of the assessee himself, the burden was still on the Department to prove the same. According to him even after the insertion of the explanation the revenue must prove afresh in the penalty proceedings that the assessed income in the earlier assessment proceedings was in fact that of the assessee and of no other person and the quantum thereof was correct. Counsel argued that the presumption with regard to the fraud or gross or wilful neglect would arise only after the Department had discharged the initial onus of proof afresh in the penalty proceedings that the assessed income was really the assessee's income.

26. I am unable to accept this hypertechnical contention which does not seem to have either the support of principle or precedent. Even when pointedly asked Mr. Ashok Bhan conceded that no judgment [apart from the observations in *Karnail Singh's case* (supra), which will be dealt with in detail hereafter] has directly pronounced that the burden of proving that the assessed income was that of the assessee himself is on the Department in penalty proceedings afresh. Only by way of analogy Mr. Ashok Bhan had attempted to place reliance on *C.I.T. Gujarat* v. *S. P. Bhatt* (22). However, a close perusal of that judgment would indicate that the observations

(20) 122 I.T.R. 622.

(21) 122 I.T.R. 567.

(22) 97 I.T.R. 440.

therein are directly against the stand of Mr. Ashok Bhan as is evident from the following:—

> "***. The explanation then says that the assessee shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income within the meaning of section 271(1)(c). The explanation raises a legal fiction and the assessee is straightaway brought within the ambit of section 271(1)(c). It is then not necessary for the revenue to show affirmatively by producing the material that the assessee has in fact concealed the particulars of his income or furnished inaccurate particulars of such income. The fact of the total returned income being less than eighty per cent., of the total income assessed is sufficient to bring the assessee within the penal provision enacted in section 271(1)(c). That is achieved by the legal fiction enacted in the explanation. But, this legal fiction can be displaced if the assessee proves that the failure to return the correct income, that is the total income assessed, did not arise from any fraud or gross or wilful neglect on his part. If the assessee wants to repel the legal fiction and throw the burden of bringing the case within section 271(1)(c) again on the revenue, as it would be in the absence of the explanation, the assessee has to show—— and this burden is upon him —— that his failure to return the correct income did not arise from any fraud or gross or wilful neglect on his part."

In view of the above and indeed from a closer perusal of the judgment in *S. P. Bhatt's* case itself it appears to be plain that a rebuttable presumption that the assessed income is in fact the income of the assessee himself is equally raised by the explanation.

27. One must now inevitably turn to *Karnail Singh's* case, the challenge to the ratio of which had indeed necessitated this reference to the Full Bench. It is manifest that the inherent fallacy therein seems to have crept in from a chronological misapprehension with regard to *Anwar Ali's* case. It deserves highligting that the explanation was added by the Finance Act with effect from the 1st of April, 1964. However, *Anwar Ali's* case was decided more than

six years later on the 29th of April, 1970. Consequently no question of the legislature wishing to override the ratio of *Anwar Ali's* case could possibly arise at the stage of the enactment of the Finance Act of 1964. Nevertheless the Bench had pressed the counsel for the revenue to show from the objects and reasons of the Finance Act that the real intention was to get over the decision of the Supreme Court in *Anwar Ali's* case and on his obvious inability to do so took an adverse inference against the revenues stand which seems to colour the whole judgment. It deserves reiteration that *Anwar Ali's* case being later in point of time looking for such an indication in the objects and reasons of the Finance Act of 1964 was a futile and indeed an erroneous exercise. Again it is manifest that in *Anwar Ali's* case the assessment pertained to the year 1947-48 and it is undisputed that their Lordships were, therefore. applying only section 28(1) (c) of the Income-tax Act, 1922 which was then applicable. At no stage whatsoever even remotely the Finance Act of 1964 or the added explanation to section 271(1) (c) fell for consideration. As seems to be plain from the exhaustive discussion in the preceding part of the judgment the real issue herein is the nature and scope of this explanation which was not even by implication adverted to in *Anwar Ali's* case. With the greatest respect, therefore, the view expressed in *Karnail Singh's* case that no change whatsoever had been effected by the amendment in clacse (c) of section 271(1) and the addition of the explanation thereto, is untenable. The massive weight of precedent noted above is directly contrary to such a view.

28. Equally it calls for notice that the Bench in *Karnail Singh's* case altogether failed to take notice of the designed omission of the word 'deliberately' from clause (c) of section 271(1). That this amendment was meaningful and relevant is undisputed and consequently the failure to consider the same also tends to warp the reasoning in the case.

29. Further the observations made in *Karnail Singh's* case that despite the presumption raised against the assessee by the explanation in the category coming within its ambit it was still incumbent in penalty proceedings on the Deparment to prove that the assessed income was truly the income of the assessee is a corollary of its earlier view and consequentially is erroneous. Indeed taking such a view would remove the very corner stone of the explanation and

render it nugatory. This is so because of the fact that unless the assessed income is accepted as the correct income of the assessee himself (and the explanation in terms says so) the very question of the application of the explanation could not arise. The anvil on which the attraction of the explanation is rested is the twin criteria of the income returned by the assessee on the one hand and that assessed by the Department on the other.

30. It would inevitably follow from the above that because of the designed amendments which were wrought in Section 271(1) (c) by the Finance Act of 1964 and the insertion of the explanation thereto, the reasoning of *Anwar Ali's* case (which had construed the earlier and different provisions of Section 28(1) of the 1922 Act) would now no longer be applicable for the construction of section 271(1) (c) as amended.

31. Equally it is well to recall the *Karnail Singh's* case was expressly referred to by the Full Bench in *C. I. T. Kerala* v. *Gujarat Travancore Agency*, (23) and was expressly dissented from. Similarly in *C.I.T. Bihar* v. *Patna Timber Works*, (supra) *Karnail Singh's* case was again considered and not followed. With the greatest deference, therefore, I am constrained to hold that *Karnail Singh's* case does not lay down the law correctly and is hereby overruled.

(32) To conclude, it must be held that the patent intent of the legislature in amending section 271(1) (c) and in 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 provision of section 28 (1) of the 1922 Act is no longer attracted. The true legal import of the explanation is to shift the burden of proof from the Department 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 15 of this judgment. The onus of proof for rebutting these presumptions lies on the assessee. This burden,

(23) 103 I.T.R. 149.

however, can be discharged (as in civil cases) by the preponderance of evidence. Equally it would be permissible in the penalty proceedings for the assessee to show and prove that on the existing material itself the presumption raised by the explanation stands rebutted. On these points *Karnail Singh's case* (supra) does not lay down the law correctly.

33. In the light of the aforesaid legal proposition one may now advert to the two questions referred by the Tribunal and noticed in full in paragraph 6 above. As regards question (i) it was not disputed before us that for the assessment year 1969-70 the income returned by the assessee was less than 80 per cent of the assessed income. The explanation to section 271 (1) (c) was, therefore, clearly attracted to the case for this assessment year. The Department had placed reliance *inter alia* on the statement of Shri Jagan Nath who had categorically admitted that the cash credits to which he was a party far from being genuine were totally fictitious. This in a way was virtually admitted on behalf of the assessee in its letters to the Department and also the subsequent filing of the revised returns. Learned counsel for the assessee could not even remotely urge that all this material was in any way irrelevant for the consideration of the imposition of penalty. In view of the explanation three adverse presumptions arose against the assessee and the onus lay on them to rebut the same. The Tribunal came to a clear-cut finding that the assessee had failed to discharge this burden. No meaningful challenge against this finding could be raised before us. We would, therefore, answer question No. (i) in the negative and in favour of the revenue.

34. Considering question No. (ii) it has to be borne in mind that as regards the assessment years 1970-71 and 1971-72 the assessee filed the revised returns long before the assessment therefor was closed. On behalf of the assessee a meaningful objection was also raised which has been noticed in the following terms by the Tribunal :—

> "* * *. There is a technical objection as well from its side that the Income-tax Officer had not observed at the time of the forwarding of the penalty proceedings to the Inspecting Assistant Commissioner that the penalty amounts exceed Rs. 25,000. We find that in the

> copies of the Income-tax Officer's order supplied to the assessee, the amounts of concealment are mentioned as Rs. 25,000. If that was so, the penalty proceedings thereof could have proceeded before the Income-tax Officer. There have been of course some additions in the original orders of the Income-tax Officer in his file which tend to show that he mentioned that the penalty amounts exceeded Rs. 25,000, because of the interest on those deposits. We are not certain when these additions were affected. The benefit of the same is given to the assessee."

On the present record, Mr. Awasthy was unable to firmly assail the aforesaid observations of the Tribunal. That being so, we are unable to hold that the reasons which prevailed with the Tribunal in not imposing the penalty for the two subsequent years are not tenable. As a necessary consequence, the answer to question (ii) is rendered in the affirmative, i.e., in favour of the assessee and against the revenue.

Prem Chand Jain, J.—I agree.

Kulwant Singh Tiwana, J.—I agree.