virtue of the second sentence of that rule in three respects viz.—

(a) whereas those authorities can revise even an original order imposing a penalty, they can review only an appellate order;

(b) whereas the revision has to be only of some order passed by an officer subordinate to the revising authority, the power of review vests in the authority which passed the order under review or his predecessor; and

(c) whereas the grounds on which an order may be revised are not limited in any manner, the power of review is circumscribed by the limitations laid down in the rule itself, i.e., if either fresh light is thrown on the case or the conduct of the employee establishes a case for mitigation of the penalty imposed; and

(ii) the mere non-mention of the relevant statutory rule in the order passed under that rule does not invalidate the order, which is otherwise valid.

(10) No other point has been argued in this case. This writ petition, therefore, fails and is dismissed though without any order as to costs.

B. S. G.

INCOME TAX REFERENCE

Before D. K. Mahajan and Prem Chand Jain, JJ.

R. B. LALA JODHA MAL KUTHIALA AND SONS, SIMLA—*Applicant.*

versus

THE COMMISSIONER OF INCOME TAX, DELHI-3, NEW DELHI,—*Respondent.*

Income Tax Reference No. 28 of 1971.

January 19, 1972.

Income-tax Act (XI of 1922)—Section 22—Income-tax Act (XLIII of 1961) –Sections 271 and 297—Assessee firm registered under Income-tax Act,

1922 *and so assessed to tax—Penalty for the delayed filing of the assessment return—Whether can be imposed under section* 271(2) *of Income-tax Act,* 1961—*Firm—Whether would be deemed to be unregistered—Partnership firm taxed as registered firm but treated as unregistered for the purpose of penalty—Advance tax paid by the partners qua their shares of the income derived—Whether deemed to have been paid as advance tax on behalf of the firm—Penalty of two per cent per month under section* 271(1)(*a*)—*Whether absolute and cannot be reduced.*

Held, that all assessments are made on the basis of the status of the assessee because the liability to tax varies with the status of the assessee and, therefore, if the asseseee has suffered an assessment on the basis of a particular status and has not disputed that status, it is not open to the assessee to dispute it for the purposes of the penalty proceedings. The cases falling under clause (b) of sub-section (2) of section 297 of Income-tax Act, 1961, the return is filed under section 22 of Income-tax Act, 1922 while the assessment has to be completed under the provisions of 1961 Act. It is only the procedure of 1961 Act which steps in to complete the assessment. By reason of section 297(2) (g), the provisions of section 271 of 1961 Act come into operation. Those provisions must be taken to their logical end and there can be no stopping half-way. The section as a whole will apply and not only the part of it. At the time when the penalty proceedings are initiated, the Income-tax Officer determines who is the assessee who has committed the default. It is open to the assessee to say that he did not commit the default but so far as the status of the assessee is concerned it was finalised as soon as the assessment was made. In the penalty proceedings there is no score for the revision of that status. The penalty has to be imposed in accordance with the provisions of section 271, for a default committed under the 1922-Act by virtue of section 297(2) (g) of the 1961 Act. In the matter of penalty, section 271 is to apply with its full vigour provided there is a default which calls for the application of section 271 or brings that provision into play, but once that provision applies it will apply with its full vigour. To take a different view would be to nullify both section 297(2)(g) and also section 271 of the 1961-Act. Hence where an assessee firm is registered under 1922 Act is so assessed, the penalty for delayed filing of assessment return can be imposed under section 271(2) of 1961 Act. The firm will be deemed to be as un-registered under this section. (Para 12).

Held, that the benefit of deduction of advance tax can only be given to the assessee whose income has been assessed. The partners' income is assessed in their own individual capacities. The firm's income is also assessed in its own individual capacity. Therefore, there can be no

question of giving benefit to one individual for the act of another individual. Hence in computing the tax payable by a registered firm, the tax paid by the partners in respect of their share in the firm cannot be deemed as advance tax paid by the firm. The assessed tax of the firm cannot be reduced on this score for the purpose of imposing penalty under section 271(1)(a) of 1961 Act. (Para 16).

Held, that by using the expression "equal to two per cent" in section 271(1)(a) of 1961 Act, the legislature has conveyed the same meaning as it is conveyed by the use of the expression "not less than". Hence the rate of penalty of two per cent per month under section 271(1)(a) is absolute and it cannot be reduced. The Income-tax Officer has no discretion to impose minimum penalty below two per cent. (Para 19).

Reference made under section 256(1) *of the Income-tax Act,* 1922 *by the Income Tax Appellate Tribunal Chandigarh Bench 'A',—vide order dated* 20th *April,* 1971 *for opinion on the following questions of law arising out of R.A. No.* 65 *of* 1970-71 *in I. T. A. No.* 18745 *of* 1967-68, *during the assessment year* 1960-61.—

(1) *Whether the firm was to be deemed as unregistered in view of Sec.* 271(2) ?

(2) *If the answer to the above question be in the affirmative whether in computing the tax payable by the unregistered firm the tax paid by the partners in respect of their share in the firm have to be reduced for the purposes of S.* 271(1)(a) ?

(3) *Whether the rate of* 2 *per cent per month under section* 271(1)(a) *was absolute or it could be reduced* ?

(4) *Whether the penalty for the default prior to* 1st *April,* 1962 *could be levied at the rate prescribed by the Income-tax Act,* 1961 ?

H. L. Chadda, Advocate, M. M. Punchhi, Advocate with him, *for the applicant.*

D. N. Awasthy, Advocate, B. S. Gupta, Advocate with him, *for the respondent.*

JUDGMENT

MAHAJAN, J.—The principal dispute in this reference relates to the quantum of penalty. There are two other matters that have also been agitated which will be presently noticed.

(2) The assessee, Messrs R. B. Jodhamal and Sons, Simla admittedly was assessed as a registered partnership. It was registered under section 26-A of the Indian Income-Tax Act, 1922 (hereinafter referred to as the 1922-Act). This was a case where the assessee fiiled a delayed return. The assessment year in question is 1960-61, the accounting period ended on 31st May, 1959. The assessee did not file any return under section 22(1) of the 1922-Act. Notice under section 22(2) was issued to the assessee on 11th October, 1960. It was served on the 9th of December, 1960. The assessee was required to file the return by the 15th of January, 1961. However, the return was filed on 30th May, 1962. Thus, there was a delay of 15 months in filing the return. The assessee disclosed an income of Rs. 2,99,323 for purposes of assessment, but the Income-tax Officer assessed the income at Rs. 3,11,234 and made the assessment on 24th November, 1965. The assessee was required to pay a tax amounting to Rs. 20,761.

(3) It will be necessary to mention that the Income-tax Act, 1961 (hereinafter referred to as the 1961-Act) came into force on the 1st of April, 1962. The return was filed, as already observed, on 30th of May, 1962. Therefore, under the provisions of section 297(2)(b) of 1961-Act, the assessment had to be made in accordance with the procedure prescribed in the 1961-Act. Thus the assessment was made under the said Act.

(4) The Income-tax Officer initiated the penalty proceedings for filing of the delayed return on 24th March, 1965. The proceedings were initiated under section 271(1)(a) read with section 297(2)(g) of the 1961 Act. The assessee filed his reply to the notice on 1st of Jaunary, 1967, and urged the following contentions, which I have *verbatim* reproduced from the order of the Income-tax Officer dated 20th March, 1967 :—

(i) That provisions of 1961-Act for initiating penalty proceedings have been resorted to on the presumption that there was an intention on the part of the Legislature to make this provision applicable to pre-1962-63 assessments, but according to the assumption, because :—

(a) the retrospective operation should not be given to a statute and if the enactment is expressed in a language

which is fairly capable of either interpretation it ought to be construed as prospective only. The assessee has quoted Maxwell on 'The Interpretation of Statutes' in support of this contention.

(b) The scheme of the Act is crystal clear to show that there was no intention on the part of the Legislature to apply any of the substantive provisions of the new Act to pre-1962-63 assessments.

(ii) Even if it is assumed that the Legislature did so intend then it having failed to use the appropriate language, has 'plainly missed fire'. The assessee amplifies the contention by saying that section 271 refers to penalty in compliance with, *inter alia,* sub-sections (1) and (2) of section 139 and, therefore, it cannot be invoked in the case of proceedings under the Act of 1922 or in respect of defaults with the provisions of section 22(1) and 22(2) and in section 297(2)(g) itself there are no words to the effect that for the purpose of that section references in section 271 of the Act, 1961 or sub-sections (1) or (2) of section 139 were references either to the proceedings of the 1922-Act or to section 22(1) and 22(2) thereof.

(iii) The assessee contends that there is no warrant to read the aforesaid fiction (namely that in section 297(2)(g) reference to section 271 of the 1961-Act should be read as references to the corresponding proceedings of the 1922-Act in section 297 (2) (g) by implication. The assessee elaborated his argument by quoting various rulings to bear out the point that 'legal fictions are for a definite purpose and limited to purpose for which they are created and should not be extended beyond their legitimate field.'

"(iv) The assessee contends that section 297(2) (g) contravenes Article 14 of the Constitution and also Article 20(1) of the Constitution.

(v) It has been contended by the assessee that there has been no proper initiation of proceedings in accordance with the new Act in as much as the words in the assessment order

are 'Issue notice' whereas keeping in view the provisions of section 275 it should have been issued before the assessment order was passed.

(vi) Coming to the merits of the case the assessee has stated that the organisation set up by Kuthialas to deal with Income-tax matters was unavoidably pre-occupied with the preparation and submission of appeals and, therefore, the return was delayed. According to the assessee it was a sufficient cause for not filing the return in time. It has been further stated that the penalty, for whatever period the levy of penalty be considered unavoidable, should not be greater than what would have been imposed under the old Act."

(5) All these contentions were repelled by the Income-tax Officer and on the basis of a default in filing the return for a period of 15 months, the tax on total income assessed worked out to Rs. 2,14,100. This was by reason of the result of application of section 297(2) (g) read with section 271(2) and a penalty was levied at the rate of 2 per cent per month which came to Rs. 64,230. The assessee preferred an appeal against this order to the Appellate Assistant Commissioner of Income-tax. The Appellate Assistant Commissioner rejected the appeal.

(6) The assessee then moved the Income-tax Appellate Tribunal. Before the Tribunal, the assesseé raised the following contentions:—

1. The firm cannot be deemed to be unregistered firm under section 271(2) for levying the penalty: the penalty must be computed on the tax actually paid by the assessee, viz., Rs. 20,761 instead of a deemed tax on an unregistered firm which is Rs. 21,41,003.

2. The rate of 2 per cent per month is not absolute. It can be varied and it should be raised in the present case.

3. If the firm be treated as unregistered then it should be consistently so treated and the tax paid by the partners should be considered and allowed for.

4. And, finally, if the above legal arguments fail, then the firm had a reasonable cause for not filing the return and the period of default should be suitably reduced, if not taken as nil."

Except the contention as to reasonable cause for delay in filing the return, all the other contentions of the assessee were rejected. The Tribunal came to the conclusion that there was reasonable cause for the assessee for not filing the return for a period of 7 months, but there was no justification for not filing the return for the remaining period of 8 months. Thus, the penalty had to be imposed at the rate of 2 per cent for a period of 8 months on the tax of Rs. 2,14,100.

(7) The assessee being dissatisfied with the order of the Tribunal made an application under section 256(1) of the 1961-Act requiring the Tribunal to refer the following questions of law for the opinion of this Court :—

"On the facts and in the circumstances of the case—

(1) Whether the firm was to be deemed as unregistered in view of section 271(2) ?

(2) If the answer to the above question be in the affirmative, whether in computing the tax payable by the unregistered firm the tax paid by the partners in respect of share in the firm have to be reduced for the purposes of section 271 (1) (a) ?

(3) Whether the rate of 2 per cent per month under section 271 (1) (a) was absolute or it could be reduced ?

(4) Whether the penalty for the default prior to 1-4-1962 could be levied at "the rates prescribed by the Income-tax Act, 1961 ?"

(8) Before I proceed to deal with these questions, I may mention that the attorney for the assessee, Shri H. L. Chadha did not press the fourth question. In fact, he stated that no answer be returned to this question. This question has, therefore, not been dealt with and no answer to it is returned. The only questions that were hotly debated before us are the first three questions. I now propose to deal with them in their chronological order.

Question No. 1 :

(9) The contention of Shri Chadha on this part of the question is rather novel. In order to appreciate his contention, it will be proper to set out the relevant provisions of the 1961-Act.

They are :—

"2(39). In this Act, unless the context otherwise requires,—

'registered firm' means a firm registered under the provisions of clause (a) of sub-section (1) of section 185 or under that provision read with sub-section (7) of section 184,"

"271(1) : If the Income-tax Officer or the Appellate Assistant Commissioner in the course of any proceedings under this Act, is satisfied that any person—

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

(b) ....

(c) ....

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

(i) in the cases referred to in clause (a), in addition to the amount of the tax, if any, payable by him, a sum equal to two per cent of the tax for every month during which the default continued, but not exceeding in the aggregate fifty per cent of the tax.

(ii) ....

(iii) ....

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

(3) ....

(4) ....

"(4A) Notwithstanding anything contained in clause (i)...... of sub-section (1) the Commissioner may, in his discretion—

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

(ii) ...."

"297(1) : The Indian Income-tax Act, 1922 (XI of 1922), is hereby repealed. (2) Notwithstanding the repeal of the Indian Income-tax Act, 1922 (XI of 1922) (hereinafter referred to as the repealed Act),—

(a) ....

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

(c) ....

(d) ....

(e) ....

(f) ....

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

(The remaining part of the section is not relevant).

(10) The contention of Mr. Chandha, is that the provisions of section 297(2)(9) no doubt make the provisions of section 271 applicable in the matter of penalty; in the present case, the provisons of sub-section (2) of section 271 do not apply, because it cannot be said that the assessee firm is registered under the 1961—Act. In other words, the contention is that a firm has to be registered under the 1961-Act, before sub-section (2) of section 271 can come into play. Therefore, though the assessee firm was registered under the 1922 Act and it was so assessed to tax, the penalty can only be imposed on the tax to which it was assessed under section 271(1). He buttresses his contention by recourse to some well-known propositions, namely that a taxing statute should be strictly construed, that if two interpretations are possible, the interpretations benefitting the tax-payer should be adhered to, and that the fiction employed in section 271(2) cannot be employed in the case of a firm not registered under the 1961 Act.

(11) After carefully examining the contentions of the learned counsel, I am clearly of the view that they have simply to be stated to be rejected. In fact, the matter is concluded by the decision of the Supreme Court in *Jain Brothers and others* v. *Union of India and others* (1), and reference in this connection may be made to the following paragraph therein: —

"We are further unable to agree that the language of section 271 does not warrant the taking of proceedings under that section when a default has been committed by failure to comply with a notice issued under section 22(2) of the Act of 1922. It is true that clause (a) of sub-section (1) of section 271 mentions the corresponding provisions of the Act of 1961, but that will not make the part relating to

(1) 77 I.T.R. 107.

payment of penalty inapplicable once it is held that section 297(2)(g) governs the case. Both sections 271(1) and 297(2)(g) have to be read together and in harmony and so read the only conclusion possible is that for the imposition of a penalty in respect of any assessment for the year ending on March 31, 1962, or any earlier year, which is completed after first day of April, 1962, the proceedings have to be initiated and the penalty imposed in accordance with the provisions of section 271 of the Act of 1961. Thus the assessee would be liable to a penalty as provided by section 271(1) for the default mentioned in section 28(1) of the Act of 1922, if his case falls within the terms of section 297(2)(g). We may usefully refer to this court's decision in *Third Income tax Officer, Mangalore* v. *Damodar Bhat* (2), with reference to section 297(2)(j) of the Act of 1961. According to it in a case falling within that section in a proceeding for recovery of tax and penalty imposed under the Act of 1922, it is not required that all the sections of the new Act relating to recovery or collection should be literally applied, but only such of the sections will apply as are appropriate in the particular case and subject, if necessary, to suitable modifications. In other words, the procedure of the new Act will apply to cases contemplated by section 297(2)(j) of the new Act *mutatis mutandis*. Similarly, the provision of section 271 of the Act of 1961, will apply *mutatis mutandis* to proceedings relating to penalty initiated in accordance with section 297(2)(g) of that Act."

(12) This decision clearly rules that the penalty has to be imposed in accordance with the provisions of section 271, for a default committed under the 1922 Act, by virtue of section 297(2)(g) of the 1961 Act. I fail to see how we can apply only a part of that section and not the other part of that section. In fact, this is what Mr. Chadha would like us to do. Moreover, all that section 271(2) says is that when an assessee is a registered firm, it has to be treated as an unregistered firm for purposes of penalty. Of course, an assessee can to one under the 1961 Act, as well as under the 1922 Act. In the present case, the procedure of the 1961 Act was applied to the assessee and in a way the assessee is one under the 1961 Act.

(2) 71 I.T.R. 806 (S.C.);

The assessee was assessed as a registered partnership and, therefore, the status of assessee having become final, being not challenged at any stage of the proceedings before the Department or the Tribunal, it is not open to the assessee to say that it is not a registered firm because there is no registration under section 2(39) of the 1961, Act. In the matter of penalty, section 271 is to apply with its full vigour provided there is a default which calls for the application of section 271 or brings that provision into play, but once that provision applies it will apply with its full vigour. To take a different view would be to nullify both section 297(2)(g) and also section 271 of the 1961 Act. In fact, Mr. Chadha is on the horns of a dilema, for if the assessee is to be treated as an unregistered firm for it is not a registered firm as Mr. Chadha contends, then of course it is an unregistered firm and in that situation the same result would follow. For purposes of an unregistered firm, the tax liability has been calculated at Rs. 2,14,100 and the tax penalty under section 271 will have to be paid on that basis. The true position is and it was also conceded by Mr. Chadha that in the case falling under clause (b) of sub-section (2) of section 297, the return has to be filed under section 22 of 1922 Act, while the assessment has to be completed under the provisions of 1961 Act. This is even clear from the combined reading of clauses (a) and (b) of sub-section (2) of section 297 and section 3 of the Income-tax (Removal of Difficulties) Order, 1962 (hereinafter referred to as the 1962 Order) which are in the following terms:—

"297. (1) * * * * * * *.

* * * * * *.

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

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

(b) where a return of income is filed after the commencement of this Act otherwise than in pursuance of a notice under section 34 of the repealed Act by any person for the assessment year ending on the 31st

day of March, 1962, or any earlier year, the assessment of that person for that year shall be made in accordance with the procedure specified in this Act.

* * * * * *."

* * * * * *."

(3) Completion of Assessment in cases covered by section 297(2)(b) of the repealing Act.—

In cases covered by clause (b) of sub-section (2) of section 297 of the repealing Act, the assessments shall be made, *inter alia,* in accordance with the procedure specified in the following sections of the repealing Act, in so far as they may be relevant for this purpose:—

Sections 131 to 136, 140 to 146, 153 (except sub-section (2) and clause (iii) of sub-section (3), 156 to 158, 185, 187 to 189, 282 to 284 and 288."

Under section 3 of 1962 Order, the provisions of section 158 have also been made applicable which provide that whenever a registered or unregistered firm is assessed under the provisions of clause (b) of section 183, the Income-tax Officer shall notify to the firm by an order in writing the amount of its total income assessed and the apportionment thereof between several partners. It is under this provision that the income-tax officer must have notified the amount of its total income assessed. Because, the assessment was suffered as a registered firm. All assessments are made on the basis of the status of the assessee because the liability of tax varies with the status of the assessee and, therefore, if the assessee has suffered an assessment on the basis of a particular status and has not disputed that status, it is not open to the assessee to dispute it for the purposes of the penalty proceedings. As earlier observed, it is only the procedure of 1961 Act, which has stepped in to complete the assessment and by reason of section 297(2)(g), the provision of section 271 come into operation. Those provisions must be taken to their logical end and there can be no stopping half way. At the time when the penalty proceedings were initiated, the Income-tax Officer had to determine, who was the assessee, who committed the default. It was open to the assessee to say that he did not commit the default,

but so far as the status of the assessee is concerned it was finalised as soon as the assessment was made. In the penalty proceedings there is no scope for the revision of that status. It is unfortunate that by reason of the application of section 271 the penalty is much more than the tax paid; but then it is open to the legislature to aim towards such a result. This Court can only interpret a legislative provision. It cannot give relief where the provisons of the statute are clear and unambiguous. It is not for a Court to legislate.

(13) The contention of Mr. Chadha that there is a lacuna in the Act is also void of any merit. In fact, there is no fiction created in the matter of application of penalty. The provision is direct, namely section 297(2)(g). It straightaway makes section 271 applicable and sub-section (2) of section 271 merely works out an enhanced penalty in the case of a firm which is registered. The expression 'registered firm' in section 271(2) will have to be given a meaning in the context of proceedings to which the sub-section is applied, namely if it is being applied to an assessment after the 1961 Act came into force, the registered firm has to be one as defined in section 2(39), but if it is with reference to proceedings for assessment when the 1922 Act held the field, the registered firm will have to be the one as defined in section 26-A of that Act.

(14) I have refrained from referring to a large number of decided cases cited by Mr. Chadha at the Bar for the general propositions that a taxing statute is to be strictly construed, that a fic-ion cannot be extended by another fiction and that if there are two interpretations possible in a taxing statute the interpretation beneficial to the assessee must prevail. These propositions are unexceptional, but they do not advance the assessee's case.

(15) In this view of the matter, the first question referred is to be answered in the affirmative, i.e., in favour of the Department and against the assessee.

Question No. 2.

(16) The contention of Mr. Chadha on the second question is still more fantastic. The contention is that no doubt the firm was taxed as a registered firm, but inasmuch as under section 271(2) it is being treated as an unregistered firm for the purposes of penalty, any advance tax paid by the partners *qua* their shares of the income

derived from the firm must be deemed to be paid as advance tax on behalf of the firm, and, therefore, the tax due for purposes of sub-section (2) of section 271 would be the sum of Rs. 2,14,100 minus the amount of advance tax so paid. It was conceded by Mr. Chadha, that the firm had not paid any advance tax or that the tax determined had not taken into account the advance tax paid by the firm that tax being Rs. 20,761. It is not even contended that the tax of Rs. 2,14,100 has not been calculated after giving benefit to the firm of any advance tax paid by it, but what is maintained is that the amount of tax so determined should be further reduced by the amount of advance tax paid by the partners, representing their share of profits in the firm. This argument cannot be accepted. The benefit of deduction of advance tax can only be given to the assessee whose income has been assessed. The partners' income was assessed in their own individual capacities. The firm's income was assessed in its own individual capacity. Therefore, there can be no question of giving benefit to one individual for the act of another individual. If the argument of Mr. Chadha was to be accepted, this result would necessarily follow. There is no dispute that the tax due is one which is qualified after the return has been processed and credit has been given for the advance tax. .See in this connection *Venkatachalam* v. *Bombay Dyeing and Manufacturing Co. Ltd.* (3) and *Commissioner of Income-tax, Delhi* v. *S. Teja Singh* (4). But this principle has no application to the facts of the present case.

(17) The view I have taken of the matter finds ample support from the observations of Bishambar Dayal C. J. of the Madhya Pradesh High Court in *Commissioner of Income-tax, M.P. and Nagpur* v. *Chhotelal Kanhaiyalal* (5), which are in the following terms:—

> "After hearing learned counsel for both the parties, I have come to the conculsion that the contention of the department is correct. The fiction created by section 271(2) of the Act of 1961 is merely to this extent that for the purpose of calculating the penalty imposable on the firm the basis will be the same which would have been applied if the firm had not been registered. This fiction must be applied to the existing facts. It cannot

(3) 34 I.T.R. 143.
(4) 35 I.T.R. 408.
(5) 80 I.T.R. 656.

further be supposed that the advance deposits made by the individual partners were deposits made by the firm. Such a supposition would not be a mere extension of a original fiction created by section 271(2) but would be a new fiction, for which there is no warrant in law.

Moreover, an advance deposits is made by an assessee during the financial year in which income is earned, calculating it on the basis of his income in the year before such financial year. So the advance depsoits made by the partners were based on their personal income in the financial year 1956-57 and no portion of such deposits can be said to be referable to the share of profit received from this firm in the financial year 1957-58. The argument of learned counsel for the assessee that a part of the advance deposit made by the partners was referable as payment in respect of the share of income received from the firm in the financial year 1957-58 is not supportable. Whatever advance deposit is made by each partner, it is made for his own benefit and can only be utilised to reduce his own tax liability, ultimately determined in the assessment year 1958-59, and if the deposit is in excess he would be entitled to a refund. But there is no warrant for allowing credit to be given to the firm for any deposit made by the partners individually. For income-tax purposes the firm and the partners have to be treated as separate entities and an advance deposit made by one cannot be treated as made by another."

Singh J., who agreed with the learned Chief Justice, observed as follows:—

"On the language of section 18-A(11), it is clear that credit for the advance tax is given to the assessee in the regular assessment who has paid the tax. If advance tax is paid by a partner, it is in the partner's assessment that credit will be given. It is no doubt true that the income on which a partner of a registered firm pays advance tax will include his share in the profits of the firm; but the advance tax so paid is paid by the partner and not by the

firm and adjustment of this payment can be given to the partner in his final assessment and not to the firm. Will the legal position be different when a registered firm is assessed on the footing that it is an unregistered firm for imposing penalty? Section 271(2) of the Income-tax Act, 1961, creates a statutory fiction by directing a registered firm to be treated as an unregistered firm for the computation of penalty. It has been well said that the rules of construction 'hunt in pairs'. So, in construing a provision creating a statutory fiction, two rules operate; the statutory fiction, should be carried to its logical conclusion, but the fiction cannot be etxended beyond the language of the section by which it is created or by importing another fiction. The solution is found by harmoniously applying the rules. The logical conclusion of the fiction created by section 271(2) is to treat a registered firm as an unregistered firm and to assess the tax on the total income of the firm for the purpose of imposing penalty. But the language used in the section does not permit the extention of this fiction by treating advance tax paid by the partners of such a firm as advance tax paid by the firm. Extension of this nature would amount to creating a fiction upon fiction which is not permissible. It is true that sometimes the minimum penalty, which is now fixed by section 271(1), may, when so computed, look disproportionate to the lapse which is sought to be penalised in cases where the partners may have paid substantial advance tax on the income of the firm. But considerations of equity have seldom, if ever, any application in construing an Act like the Income-tax Act. Hardship of any indivdual case can, however, be avoided by the Income-tax Officer or the Appellate Assistant Commissioner deciding in his discretion not to impose any penalty or the Commissioner reducing or waiving the amount of minimum penalty by exercising his power under subsection 4-A)."

(18) In this view of the matter, the answer to the second question has to be returned in the negative, i.e., in favour of the Department and against the assessee.

Question No. 3.

(19) So far as this question is concerned, the contention is that the phrase "a sum equal to two per cent. of the tax" does not mean

that this is the absolute minimum. It is urged that two per cent. is outside minimum and there is discrection left with the Income-tax Officer to impose the minimum tax even below two per cent. The short question is what does the expression "equal to" mean ? Does it mean less than two per cent ? In Shorter Oxford English Dictionary, Volume I (third addition), the word "equal" means neither less nor greater. Mr. Chadha for his contention that the phrase "equal to two per cent" can mean less than two per cent, resorted to the use of the language in clauses (ii) and (iii) of section 271(1)(c). In both these clauses, the expression used is "shall not be less than ten per cent." "and shall not be less than twenty per cent" respectively. On the basis of the aforesaid two expressions, he spelled out the argument that where the legislature intended that the minimum were irreducible it used the expression "not less than" and the employment of this expression in clause (1) would indicate that the "two per cent" specified therein was a reducible minimum. It appears to me that by using the expression "equal to two per cent" the legislature has conveyed the same meaning as it conveyed by the use of the expression "not less than" for "equal to", as already stated, in its dictionary meaning means "neither less nor more". This view of mine finds full support from the decision of the Rajasthan High Court in *Commissioner of Income-tax, Rajasthan* v. *Venichand Maganlal* (6) wherein or a similar question it is observed thus: —

> "Section 271(1)(i) speaks in unequivocal terms that in the cases referred to in clause (a) a sum equal to 2 per cent of the tax for every month during which the default continues, but not exceeding in the aggregate 50 per cent of the tax was to be the amount of penalty. This means that the penalty to be imposed is to be calculated at 2 per cent of the tax for every month during which the default continues, but the maximum limit was 50 per cent of the tax. The view taken by the Tribunal is that clause (i) does not lay down any minimum limit as has been provided in section 271(1)(iii), just as in section 271(1)(iii) both the minimum and maximum limits have been prescribed, and, therefore, it can be any sum which is less than 2 per cent of the tax for every month during which the default continues. This argument is fallacious. In arithmetic

(6) 78 I.T.R. 120.

"equal to a particular number" means not less than that particular number as also not more than that particular number. It conveys the idea that it must be exactly the same. Thus it cannot be said that section 271(1)(i) does not prescribe the lower limit for imposing the penalty. When this section says that the quantum of penalty imposed must be equal to 2 per cent of the tax for every month during which the default continued, it means that it canont be less than 2 per cent of the tax for every month during the default continues because it cannot be more. There is also an upper limit which is that, irrespective of the months of default, it cannot exceed 50 per cent of the tax."

(20) Therefore, the answer to the third question is that the rate of 2 per cent per month under section 271(1)(a) is absolute and it cannot be reduced.

(21) The question referred to us are, therefore, answered as indicated above. In the circumstancs of the case, we make no order as to costs.

JAIN, J.—(2) I agree.

N. K. S.

CIVIL MISCELLANEOUS

Before R. S. Narula, J.

CHHOTE LAL PATWARI,—*Petitioner.*

versus

THE STATE OF HARYANA, ETC.,—*Respondents.*

Civil Writ No 72 of 1968

January 31, 1972.

Punjab Revenue Patwaris, Class III Service Rules (1966)—Rule 14—Patwari working on probation for more than three years against a post not made permanent—Whether can claim confirmation—Presumption of automatic confirmation—Whether applies.