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**Court :** Guwahati

**Decided On :** Aug-21-1990

**Judge :** A. Raghuvir, C.J. and M. Sharma, J.

**Acts :** [Income Tax Act, 1961](#) - Sections 271(1)

**Appeal No. :** Income-tax Reference No. 7 of 1987

**Appellant :** Metal Stores

**Respondent :** Commissioner of Income-tax

**Advocate for Def. :** D.N. Choudhury and K.H. Choudhury, Adv.

**Advocate for Pet/Ap. :** J.P. Bhattacharjee, R.P. Agarwalla, R.L. Jain, M.K. Sharma, H. Rahman and Y. Doloi, Adv.

**Prior history :** A. Raghuvir, C.J. 1. The reference in this case arises under the Income-tax Act, 1961. The assessee-firm, in its return for 1974-75, disclosed an income of Rs. 26,000. The Income-tax Officer, in his order, enhanced the income to Rs. 1,40,860 in that Rs. 1,14,860 was determined to be income from other sources. Further, the following outstandings of Rs. 20,000 in the name of Kashi Prasad Sah, Rs. 40,000 in the name of Mohanlal Jaichandlal, Rs. 14,000 in name of Tikomchand Jain and Rs. 40,000

**Judgement :**

A. Raghuvir, C.J.

1. The reference in this case arises under the Income-tax Act, 1961. The assessee-firm, in its return for 1974-75, disclosed an income of Rs. 26,000. The Income-tax Officer, in his order, enhanced the income to Rs. 1,40,860 in that Rs. 1,14,860 was determined to be income from other sources. Further, the following outstandings of Rs. 20,000 in the name of Kashi Prasad Sah, Rs. 40,000 in the name of Mohanlal Jaichandlal, Rs. 14,000 in name of Tikomchand Jain and Rs. 40,000 in the name of Punamchand Ratanlal, Rs. 60,000 in the name of the firm, Assam Metals, Rs. 1,24,000 in the name of Assam Tubes, are not true and, therefore, levied a 'protective penalty' of Rs. 1,14,000. The assessee thereupon unsuccessfully filed appeals before the Commissioner of Income-tax and the Tribunal. Finally, at the instance of the assessee, the following question is referred for the opinion of this court:

'Whether, on the facts and in the circumstances of the case, the Tribunal was justified in maintaining the penalty of Rs. 1,14,000 under Section 271(1)(c) of the Income-tax Act, 1961, imposed on a protective basis?'

2. In the two appeals, the assessee assailed the notices issued on September 15, 1977, and February 7, 1980, as they were defective. The former notice was assailed as it was not served on the assessee. The latter was not signed by the Income-tax Officer. It is not clear from the statement of the case as to whether the former notice was served on the assessee. The other notice unsigned is placed before the court. The two contentions

were not determined by the Commissioner of Income-tax and by the Tribunal though, in the two orders, the contentions raised by the assessee are noted. The case in Umashankar Mishra v. CIT : [1982]136ITR330(MP) of the Madhya Pradesh High Court and in B. K. Gooyee v. CIT : [1966]62ITR109(Cal) of the Calcutta High Court, dealt with similar contentions and held that under Section 282, notices have to be served as prescribed in the Code of Civil Procedure (Act 5 of 1908). In Sub-rule (3) of Rule (1) of Order 5 of the Code, every notice must be signed and served. Since the appellate authorities have failed to determine the facts, we are put to the necessity of dealing with the legality of the issue in the question referred.

3. The Calcutta High Court in CIT v. Super Steel (Sales) Co. : [1989]178ITR451(Cal) considered a like issue as in the instant case and held :

'There can be a protective assessment but there cannot be any protective penalty'.

4. When a similar issue arose in CIT v. Behari Lal Pyare Lal before the Punjab and Haryana High Court, the Revenue conceded that protective penalty, in law, cannot be levied. We are in agreement with the conclusion in these two cases and cite one or two cases decided by the Supreme Court of India.

5. The nature of the penalties under the Income-tax Act, 1961, was considered by the courts times out of number and, in many cases', it is seen that the issue is raised by the Revenue that penalties are in the nature of civil sanctions. When penalties are levied, the Revenue contended that the assessee is not prosecuted. When enquiries are made, proceedings do not partake the character of quasi-criminal proceedings. When penalties are levied, a contention was raised that the assessee is not sentenced. Similar views were also expressed before Parliament (see the Debates on the Budget after February 29, 1988, in Parliament). In a brochure by J. W. Pandey published in 1988 under the aegis of the Directorate of Income-tax, numerous attempts made by the Revenue are recounted in that brochure. Such attempts are made and reiterated in the instant case on behalf of the Revenue. The assessee, however, contends that, in law, there is nothing like protective penalty and seeks an answer in favour of the assessee.

6. Conceptually, civil sanctions and penalties are different and, therefore, cannot be grouped together. In penalty proceedings, the norms that are observed are founded in criminal law. The standard of proof expected is that of the standard required in criminal proceedings. These concepts are well entrenched in the decided cases and it may be too late in the day to retrieve them from the field of criminal law. To start with, we may look at the definition of penalties in Corpus Juris Secundum, Volume 70, page 387, which contains a comprehensive definition of the word : 'Penalty is an elastic term with many different shades of meaning. The term involves the idea of punishment, either corporal or pecuniary, or civil or criminal, although its meaning is generally confined to pecuniary punishment. In its broad sense, it includes fines as well as other kinds of punishment. Whether an exaction is a penalty is determined, not by the name or designation given to it in the statute, but by the intrinsic nature of the exaction, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution . . . 'penalty' is also frequently used to denote an equivalent by way of damages for a civil wrong and is, in this sense, sometimes applied to stipulated damages for breach of private contracts, wholly independent of statute ....'

7. What norms are observed while penalties are levied are discussed in the case of Hindustan Steel Ltd. v. State of Orissa : [1972]83ITR26(SC) . In that case, the Supreme Court held that for failure to carry out a statutory obligation ordinarily 'penalty is not imposed unless the assessee is guilty of contumacious or dishonest conduct. Penalty is not imposed merely because it is lawful to do so.' It is pointed out in that case that, if facts so warrant, penalties may not be imposed. Even if a minimum penalty is prescribed, penalty may not be imposed if 'there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.' In another case, Anantharam Veerasinghaiah and Co. v. CrT : [1980]123ITR457(SC) penalty proceedings were characterised as quasi-criminal proceedings. The mere falsity of the explanation, it was explained, per se, was not sufficient to impose penalty. To a like effect, observations are found in the case of CIT v. Khoday Eswarsa

and Sons : [1972]83ITR369(SC) (see para 19) and in CIT v. Distributors (Baroda) P. Ltd. : [1972]83ITR377(SC) .

8. In the case of Jain Bros. v. Union of India : [1970]77ITR107(SC) there is a discussion as to when penalty proceedings can be invoked. In that case, a notice was served, on May 26, 1960, to submit a return under the 1922 Act. The return was filed on November 18, 1961, and, finally, penalty was levied after the 1961 Act came into force. The assessee complained of discrimination and what was argued in that case is apposite for the present discussion in the instant case. The argument was that, in the 1961 Act, both penalty and prosecution could be launched. In the repealed Act, prosecution was not contemplated. The approval of the Inspecting Assistant Commissioner was contemplated in the repealed Act but not in the repealing Act. The repealed Act did not prescribe a minimum penalty as is found in the repealing Act. The repealed Act did not prescribe any limitation as is found in the 1961 Act.

9. The Supreme Court explained that penalties are levied after assessments are completed and not before or never before. The complaint that penalty is left to the discretion of the officers was refuted and, therefore, it was held that there was no violation of the equality principle. That case was followed in Maya Rani Punj v. CIT : [1986]157ITR330(SC) . A case which took a different view was overturned and is referred in the latter case.

10. The above discussion shows that penalties are levied after assessment orders and not before the assessment orders. The protective penalty thus, we are of the view, is conceptually antithetical and cannot be conceived in law.

11. The question referred for the aforesaid reasons is answered in the negative, against the Revenue and in favour of the assessee. No costs.

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