learned Additional Sessions Judge are set aside, restoring that of the learned Judicial Magistrate. It is directed that the learned Judical Magistrate will try and expedite the trial of the case . He will preferably complete the trial within one year from the date of receipt of the order. The parties are directed to appear before the learned Judicial Magistrate at Patiala on 2nd July, 1997.

S.C.K.

Before Ashok Bhan and N.K. Agrawal, JJ.

COMMISSIONER OF INCOME TAX, HARYANA,—*Petitioner*

versus

JASWANT RAI,—*Respondent*

I.T.C. No. 61 of 1991

31st October, 1996

Income Tax Act, 1961—Ss. 256(2) and 271(1)(c)—Reference—Levy of penalty—Assessee agreeing to certain additions in assessment year 1984-85 though only part of income related to that year—Assessee subjecting himself to higher tax by agreeing to addition in one assessment year—This course adopted by assessee to buy peace of mind and to avoid litigation and on an assurance that no further proceedings for levy of penalty would be initiated—No assurance in writing—Not material—Presumption arises—Appellate Court setting aside order of penalty—Tribunal also maintaining order in appeal and refusing reference on question of law—Findings of fact recorded by Tribunal and refusal to refer question which does not raise any question of law—Application u/s 256(2) of the Act liable to be rejected.

Held, that the assessee had, in each case, agreed for certain additions in the assessment year 1984-85 though only part of the income related to this year. By agreeing for the addition to be made in the assessment year, the assessee subjected himself to higher tax. It gives rise to a natural presumption that the agreement was conveyed to the Assessing Officer during the course of the assessment proceedings so as to buy peace of mind and to avoid litigation or an understanding and assurance that no further proceedings for the levy of penalty would be initiated. This finding of fact given by the Tribunal does not give rise to any question of law.

(Para 14)

R.P. Sawhney, Senior Advocate with
Mahavir Ahlawat, Advocate, *for the Petitioner*

G.S. Sandhawalia, Advocate, *for the Respondent*

JUDGMENT

N.K. Agrawal, J.

(1) These are three applications (ITCs Nos. 61, 65 and 66 of 1991) filed under section 256(2) of the Income Tax Act, 1961 (for short, the Act), seeking a direction to the Income-Tax Appellate Tribunal (for short, the Tribunal) to refer a similar question of law in each application for opinion of this High Court. The question sought to be referred in each of the aforesaid three applications is common though the three petitions relate to three different assessees but for the same assessment year. The question relates to the leviability of penalty under section 271(1)(c) of the Act. The amount of penalty in each case is different. The following question of law has been sought to be referred in I.T.C. No. 61 of 1991 (in the case of Shri Jaswant Rai for the assessment year 1984-85):—

> "Whether, on the facts and in the circumstances of the case, the learned Tribunal is right in law in upholding the order of the CIT (A) in cancelling the penalty imposed under section 271(1)(c) amounting to Rs. 26,334 ?

(2) The amount of penalty in ITC No. 65 of 1991 (in the case of M/s. Raunaq Ram Om Parkash) is Rs. 1,28,296 and in ITC No. 66 of 1991 (in the case of M/s. Miri Ram Prem Chand) is Rs. 59,448.

(3) The assessee Jaswant Rai was a partner with one-third share in the partnership-firm M/s. Miri Ram Prem Chand and with 15 per cent share in the partnership-firm M/s. Raunaq Ram Om Parkash. Thus, he derived income mainly from his share as a partner in those two firms. Return of income was filed for the assessment year 1984-85 showing total income at Rs. 12,560. The accounting year of the assessee ended on 31st March, 1984. A search and seizure operation took place at the residential premises of the assessee Jaswant Rai on 28th July, 1984. Certain documents were seized. The assessee filed replies explaining those documents. He, however, agreed for certain additions as under:—

		Rs.
(i)	On account of rental income of this year and the earlier years, as recorded in a note-book seized from the residential premises of the assessee (Rs. 8,774—Rs. 1,462 for repairs at 1/6th)	7,312
(ii)	On account of expenditure incurred on the marriage of the assessee's son:	10,000
(iii)	On account of investment made in the FDRs purchased in assessee's name and in the names of the family members in this year and in the earlier years: (Rs. 24,550—7,312 rental income utilized)	17,238
(iv)	On account of deposits made in Banks in the names of wife and children in this year and the earlier years:	7,000
	Total :	41,550

(4) Assessment was made on the total income of Rs. 1,06,230. In addition of Rs. 41,550 brought to tax on account of undisclosed and unaccounted income, one-third share income from M/s. Miri Ram Prem Chand (Rs. 35,297) and 15 per cent share income from M/s. Raunaq Ram Om Parkash (Rs. 29,890) were thus assessed.

(5) In the case of the partnership M/s Raunaq Ram Om Parkash, return was filed for the assessment year 1984-85 showing total income of the firm at Rs. 49,240. The accounting year of the firm ended on 31st March, 1984. Search and seizure operations had also taken place in the business premises of this firm on 28th July, 1984 and certain papers were seized. Replies were filed by the assessee, explaining those papers. However, the assessee-firm agreed, during the course of assessment proceedings, for the following additions:—

		Rs.
(a)	On account of profit at the rate of 12.5 per cent on unaccounted sales of machinery parts at Rs. 2,00,000, as recorded in a document seized from the residence of the partner, Jaswant Rai:	25,000

(b)	On account of investment made in the unaccounted sales:	15,000
(c)	On account of cash advance to several agriculturists as per peak amount worked on the basis of the seized document (Rs. 1,33,076—Rs. 25,000 on account of profit as above):	1,08,076
(d)	On account of cash payments made to various persons as recorded in a seized document:	48,922
	Total:	1,96,998

(6) In the case of M/s Miri Ram Prem Chand, return was filed for the assessment year 1984-85 showing total income of Rs. 18,490. This firm was also a registered partnership-firm and derived income from the purchase and sale of cloth on retail basis. The accounting year ended on 31st March, 1984. Survey operations under section 133-A of the Act had taken place on 28th July, 1984 and certain papers were seized. Physical verification of the stock, as available in the shop, was also done. During the course of assessment proceedings, the assessee-firm agreed for the following additions:—

		Rs.
(i)	On account of excess stock found at the time of survey:	90,000
(ii)	On account of profit at the rate of 12.5 per cent on undisclosed sales of Rs. 2,41,613 as recorded in a note-book:	30,202
(iii)	Investment made in sales:	15,000
		1,35,202
	Less credit given for the amount of profit of Rs. 30,202 covered in the excess stock:	(–) 30,202
	Total addition :	1,05,000

(7) Penalty proceedings were initiated by the Assessing Officer, after finalizing the assessments, upon the three assessees, as aforesaid, on the ground that they had concealed particulars of income and had agreed to the additions on that account. The assessees filed replies in the penalty proceedings, explaining that they had agreed for certain additions in order to earn peace of mind

and to avoid litigation and on an undertaking that no penalty would be imposed. It was also stated in the reply that some income related to the earlier years but the assessee had agreed for being assessed in the assessment year 1984-85 in order to avoid formalities and litigation. The Assessing Officer, however, did not agree and imposed penalty in the cases of all the three assessees.

(8) All the three assessees went in appeal against the levy of penalty before the Commissioner of Income-Tax (Appeals) and put forward the same plea as they had given in their replies before the Assessing Officer. Their appeals were accepted. The Assessing Officer went in appeal against the cancellation of penalty before the Tribunal but did not succeed. Applications were filed for reference of the question of law before the Tribunal but that too were rejected.

(9) Shri R.P. Sawhney, learned Senior Counsel for the Commissioner, has contended that the concealment of income was apparent and, since the penalty has been cancelled, a question of law does arise.

(10) The learned counsel for the assessees, has opposed the plea of the Department on the ground that the assessees had agreed for the additions on an assurance and undertaking that no penalty proceedings shall be initiated. Though there was no agreement in writing but certain additions were agreed to be made in this year on that assurance and undertaking only. As per the narrations made in respect of the additions made to the income in the assessment order, it is evident that the entire income by way of additions did not relate to the assessment year 1984-85 but only part of the income related to this year. This fact itself made out a clear case that the assessee had agreed for the additions on an assurance and understanding to the effect that no panalty shall be levied. It has been contended that the finding given by the Commissioner as well as the Tribunal is a finding of fact and, in this light, no question of law arose from the controversy.

(11) Shri R.P. Sawhney, learned Senior Counsel for the Department, has put forward the proposition that, where an assessee himself, during the course of assessment, filed a revised return and owned a disputed amount to be his income, the onus on the Department stood discharged and, in that situation, penalty could be levied. In *Mahavir Metal Works* v. *Commissioner of Income Tax, Punjab* (1), the assessee had owned a disputed amount to be

(1) (1973) 92 I.T.R. 513

his income and, since he failed to show in the penalty proceedings that the admission made by him during the course of assessment proceedings was wrongly or illegally made or was incorrect, the Income Tax Department was held justified in levying the penalty on him under section 271(1)(c) of the Act.

(12) The question, whether cancellation of the penalty would give rise to a question of law or not, has been examined by the Supreme Court in *Additional Commissioner of Income-Tax, Gujarat* v. *Chandravilas Hotel* (2), After considering the facts of the case, it was observed by the Supreme Court that the finding of the Tribunal, that the assessee was not guilty, of any fraud or gross or wilful neglect in his return of income as a figure less than 80 per cent of the income assessed was arrived at without considering the entire material on record, did give rise to a question of law. In that case, certain questions were sought for reference and, looking to the facts and circumstances of that case, it was held that it was desirable to call for a statement of the case. The facts and circumstances, on the basis of which penalty had been levied, have not been discussed and, therefore, it cannot be said, on the basis of the aforesaid decision of the Supreme Court, That in every case of levy of penalty a question of law would naturally arise.

(13) Where there is an agreement between the assessee and the income-tax authorities, it would not be appropriate that an order, based on an agreement, should give rise to grievances and could be agitated in appeal. This High Court in *Banta Singh Kartar Singh* v. *Commissioner of Income-Tax, Patiala* (3), had an occasion to examine a case where the assessee had agreed to the levy of penalty of Rs. 32,188 but he subsequently challenged it on the ground that the penalty levied was not the minimum leviable according to law. Since there was an agreement, it was held that it could not be challenged in appeal. The learned counsel for the assessees has, on the basis of the ratio of the aforesaid judgment, put forward a proposition that in the case of the present assessees too there was an agreement and, in such a situation, nothing should be done beyond and outside that agreement. The very nature of the agreement and the circumstances around it indicated that no penalty proceedings would be initiated.

(14) From the finding given by the Tribunal, it is apparent that the assessee had, in each case, agreed for certain additions in

(2) (1978) 115 I.T.R. 119
(3) (1980) 125 I.T.R. 239

the assessment year 1984-85 though only part of the income related to this year. By agreeing for the addition to be made in one assessment year, the assessee subjected himself to higher tax. It gives rise to a natural presumption that the agreement was conveyed to the Assessing Officer during the course of the assessment proceedings so as to buy peace of mind and to avoid litigation on an understanding and assurance that no further proceedings for the levy of penalty would be initiated. This finding of fact given by the Tribunal does not give rise to any question of law.

(15) In the result, all the applications are rejected.

R.N.R.

Before Sat Pal and N.C. Khichi, JJ.

RAVI KUMAR,—*Petitioner.*

versus

SANTOSH KUMARI,—*Respondents*

Crl. R. 44 of 92

22nd April, 1997

*Code of Criminal Procedure, 1973—S. 125—Wife's claim for maintenance u/s 125 Cr. P.C.—Stands extinguished when decree for restitution of conjugal rights is passed against her by the Civil Court after framing a specific issue whether 'without sufficient reason the wife refuses to live with her husband' and giving opportunity to the parties to lead evidence—However, right to maintenance would arise on passing of decree of divorce—*Ex parte *decree of restitution of conjugal rights would not bind the Criminal Court in proceedings u/s 125 Cr. P.C.—Whether decree for restitution of conjugal rights is passed after order of maintenance is made u/s 125 Cr. P.C., wife is not disentitled to maintenance and husband can apply u/s 125(5) for cancellation of order of maintenance.*

Held, that the wife against whom a decree of restitution of conjugal rights has been passed by the Civil Court, shall not be entitled to claim allowance u/s 125 of the Code of Criminal Procedure if in the proceedings of restitution of conjugal rights before the Civil Court, a specific issue has been framed that whether without sufficient reason, the wife refuses to live with the husband, and the parties have been given an opportunity to lead evidence