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**(2004) 06 KL CK 0061**

**High Court Of Kerala**

**Case No:** IT Ref. No. 113 of 1998

Commissioner of Income Tax

APPELLANT

Vs

Hotel Classic

RESPONDENT

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**Date of Decision:** June 10, 2004

**Acts Referred:**

- Income Tax Act, 1961 - Section 271(1)

**Citation:** (2004) 191 CTR 19

**Hon'ble Judges:** S. Sankarasubban, J; A.K. Basheer, J

**Bench:** Division Bench

**Advocate:** P.K.R. Menon, for the Appellant; A.K. Jayasankar, Antony Dominic and Anil D. Nair, for the Respondent

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### **Judgement**

S. Sankarasubban, J.

This IT reference is on reference by the Tribunal, Cochin Bench, u/s 256(1) of the IT Act. The questions referred are as follows :

"1. Whether, on the facts and in the circumstances of the case, and in the light of Expln, 1 to Section 271(1)(c), the Tribunal is right in law and fact in cancelling the penalty ?

2. Whether, on the facts and in the circumstances of the case, is not the order of the Tribunal vitiated for not considering the case in the light of Expln. 1 to Section 271(1)(c) and placing the burden of proof on the Revenue ?"

The facts of the case are as follows :

2. The assessment year is 1989-90, During the previous year, the assessee was carrying on the business of running a bar attached hotel at Trivandrum, On 28th Aug., 1989, the assessee had shown a loss of Rs. 2,16,430 under the head "business". The AO noticed various defects in the books of accounts produced by the assessee. Further, there were also credits which were not proved, In view of the

discrepancies in the accounts, the AO rejected the same and estimated the income at Rs. 50,000. He also levied penalty of Rs. 2,66,430 u/s 271(1)(c) which actually represented the difference between the returned loss of Rs. 2,16,430 and the assessed income of Rs. 50,000.

3. The appeal filed was dismissed. The matter was taken before the Tribunal. The Tribunal noticed that though there was justification for rejecting the books of account and making the assessment on estimate basis in view of the defects in the accounts, that did not mean that concealment of income had been proved. The Tribunal referred to certain decisions.

4. We heard learned counsel for the IT Department and learned counsel for the respondent.

5. Sri Raveendranatha Menon, learned counsel for the IT Department, brought to our notice Explan. 1 to Section 271(1)(c) of the IT Act and contended that the burden is on the part of the assessee to explain as to why penalty should not be levied. He also contended that u/s 271(1)(c) of the IT Act, on the basis of the income concealed, penalty can be levied. Learned counsel for the assessee submitted that the Tribunal held that it does not know on what basis the income of Rs. 50,000 was fixed.

6. After hearing both sides, we are of the view that it was not right on the part of the Tribunal to vacate the order of penalty. As rightly submitted by the learned counsel for the Revenue, the burden was on the assessee and he has not discharged the burden. Learned counsel for the assessee then submitted that the assessee should be given an opportunity to show that there is no basis for the imposition of penalty and for deriving the income of Rs. 50,000.

7. After hearing both sides, we are of the view that the matter should be considered again by the Tribunal after giving an opportunity to the assessee to discharge the burden. We do so. According to us, both the questions raised are same and the burden is on the assessee to prove that there has been no concealment. Hence, the judgment of the Tribunal is set aside and the matter is remanded to the Tribunal.

IT reference is disposed of as above.