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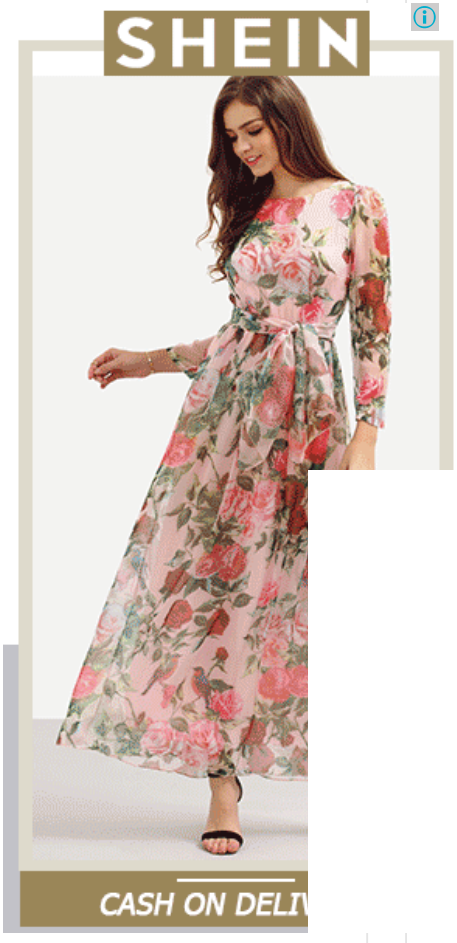

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Penalty u/s 271(1)(c): A Comprehensive Analysis

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Penalty u/s 271(1)(c): A Comprehensive Analysis

Shri. K. C. Singhal, Advocate

Penalty u/s 271(1)(c) is one of the most hotly contested provisions in the Act. There has been a bewildering array of judgements from the apex court on the issue, several of them inconsistent with each other. The author, a former Vice President of the Tribunal, has used his rich experience at the Bench and the Bar to meticulously

analyze the controversies in the law and provided clear-cut answers to the problems.

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Requirement for "Satisfaction":

A bare look at the provisions of the section 271(1)(c) of I.T. Act 1961 (in short '1961 Act) shows that satisfaction of the concerned tax authority to the effect that the assessee (in short 'A') has either concealed the particulars of income or furnished inaccurate particulars of income is **the condition precedent** for levy of penalty and such satisfaction must be arrived at in the course of any proceeding under the Act. This view was taken by the apex court long back in the case of **CIT vs. Angidi Chettiar** 44 ITR 739 while construing the similar provisions of section 28(1)(c) of I.T. Act 1922 (in short '1922 Act) and reiterated in the case of **D.M. Manasvi** 86 ITR 557 (SC) while construing the provisions of section 271(1)(c) of 1961 Act. Full Bench of Punjab & Haryana High court, in the case of **CIT vs. Mohinder Lal** 168 ITR 101, held that it is the **satisfaction** of the ITO in the course of assessment proceedings regarding the concealment of income which constitutes **the basis and foundation** of the proceedings for levy of penalty. Thus, this condition must be satisfied.

Subsequently, a question arose as to whether such satisfaction must be recorded in the assessment order. Divergent views have been expressed by the High Courts. It has been held in the following cases that **recording of satisfaction** for the AO in the assessment order **is sine qua non** for initiating penalty proceedings under the above section. Mere observations "penalty proceedings are being initiated separately" is not enough.

.. it is clear that satisfaction of the tax authority is still a condition precedent which must be discernible from the order of assessment. Further, such satisfaction must be based on some material on record .. there must be a clear finding about the charge of penalty. It is incumbent upon the AO to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income. In the absence of such finding, the order would be bad in law

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8. Dhanjibhai Kanjibhai 189 ITR (Bom)
9. Rampur Engg. Co 309 ITR 143 (del)(FB)

However contrary view has been taken in the following case

1. Becker Gary & co 112 ITR 503 (Cal)
2. Sham Biri Works 259 ITR 625 (All)
3. Nainu Mal Hetram 294 ITR 185 (All)

The majority view is based on the decisions of the apex court in the cases:-

1. D.M.Manaswi-v-CIT 86 ITR 557 SC
2. CIT-v- S.V.Angidi Chettiar 44 ITR 739 SC

In view of the above decisions expressing divergent views, **the legislature has inserted sub section (1B) in section 271** by Finance Act 2008 wef 1.4.89 which provides that a **direction for initiation of penalty proceeding in the order of assessment shall be deemed to constitute such satisfaction.** Constitutional validity of this provision was challenged before hon'ble Delhi High Court in the cases of Madhushree Gupta & British Airways **317 ITR 143(Del)**.The scope of the amendment was explained at page 146 as under:-

> *"In our opinion, the impugned provision only provides that an order initiating penalty cannot be declared bad in law because it states the penalty proceedings are initiated, if otherwise it is discernible from record that the AO has arrived at prima facie satisfaction for initiation of penalty proceedings.* ***The issue is of discernibility of the "satisfaction" arrived at by the AO***

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> ***during the course of proceeding before him."***
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> *"The **presence of prima facie satisfaction** for initiation of penalty proceedings was and **remains a jurisdictional fact which cannot be wished away as the provision stands even today, i.e post amendment**." (P 147)*
>
> *"If there is **no material** to initiate penalty proceedings; an assessee will be entitled to recourse to a court of law ."(P 147)*

On the basis of this legal position, in my opinion, penalty for concealment can not be levied where any income arising outside the books of account is disclosed voluntarily in the original return. For example, where 'A' had acquired shares ten years back out of undisclosed money but sold during the year resulting in capital gain and such capital gain is disclosed in the original return then penalty for concealment can not be levied. Even a receipt of doubtful nature or a receipt in respect of which, no satisfactory explanation can be given, can be declared as income in the original return without inviting any penalty.

In view of the above judgment, it is clear that satisfaction of the tax authority is still a condition precedent which must be discernible from the order of assessment. Further, such satisfaction must be based on some material on record.

Finding on charge for penalty

Penalty proceeding can be initiated on two charges i.e. (1) concealment of particulars of income and (2) furnishing of inaccurate particulars of income. If proceedings are initiated on charge of concealment then penalty can not be levied on the charge of furnishing of inaccurate particulars of income and vice versa.(CIT-v- Lakhdhir lalji 85 ITR 77(Guj)).

Thus, there must be a clear finding about the charge of penalty. It is incumbent upon the AO to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income. In the absence of such finding, the order would be bad in law.—

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Manu engg. Works 122 ITR 306(Guj), New Sorathia Engg. Co 282 ITR, 642(Guj), Padma Ram Bharali 110 ITR 54(Gau). Thus, basis of satisfaction can not be altered subsequently by IAC.—CIT-v-Kejriwal Iron Stores 168 ITR 715 (Raj). Even penalty can not be levied for different item—CIT-V- C.K.Nehra & Bros 117 ITR 19 Cal. However, it is to be noted that the Explanation is part of the main provision and therefore, can be invoked by the AO even if it is not invoked at the time of initiation of penalty proceeding.—K.P.Madhusudan-v-CIT 251 ITR 99 (SC).

Distinction between "concealment of particulars of income" and "furnishing of inaccurate particulars of income"

At this stage, it is necessary to understand the distinction between the two charges on the basis of which penalty can be levied i.e. (1) concealment of particulars of income and (2) furnishing of inaccurate particulars of income. It is the particulars of income which is the common subject matter of both the charges which will be discussed later. The word **'conceal'** as per Webster's Dictionary means "to hide, withdraw, or remove from observation; cover or keep from sight; to keep secret; to avoid disclosing or divulging. That means **non disclosure** of particulars of income. **On the other hand, where particulars are disclosed but such disclosure is not correct, true or accurate, it would amount to furnishing of inaccurate particulars of income.** For example, in case of businessman, if a particular transaction of sale is not shown in the books, it would amount to concealment of particulars of income while sale is shown but at a lesser value, it would amount to furnishing of inaccurate particulars of imcome.

"Particulars of income" – meaning of

It is pertinent to note that **thrust** of the legislature is upon the particulars of income which are either concealed or furnished inaccurately by the assessee. Therefore, one must understand the meaning of the words "particulars of income". Recently, the Income tax tribunal had to consider the meaning of the expression "furnishing of inaccurate particulars of income" appearing in section 271(1)(c) in the case of Kanbay Software **India (P) Ltd**. 122 TTJ 721(Pune).

It was held that the **expression 'particular' refers to facts, details, specifics or the information about someone or something. Thus, the details or information about the income would deal with factual details of income and cannot be extended to areas which are subjective such as status of the taxability of an income, admissibility of a deduction and interpretation of law.** Accordingly, it was held that mere rejection of 'a' legal claim would not amount to furnishing of inaccurate particulars of income. This view is now fortified by the recent Supreme Court Judgment in the case of Reliance Petroproducts 322 ITR 158 SC. In this case, the claim of 'A' u/s 36(1)(iii) was rejected by the A.O. and the order of A.O. was upheld by the tribunal. As a result thereof, the penalty u/s 271(1)(c) was imposed **on account of furnishing of inaccurate particulars of income**. The penalty was held to be illegally imposed by the tribunal since factual details of income furnished by the 'A' were found to be correct. The matter ultimately reached the SC and the hon'ble court upheld the view of the tribunal by holding that **"mere making of the claim*, which is not sustainable in law*, by itself, will not amount to furnishing inaccurate claim of furnishing inaccurate particulars regarding the income of the assessee."**(The author of tribunal decision in Reliance case was Mr. P.K.Bansal).

At this stage, it is important to note that **Explanation 1 to section 271(1)(c)** can not be applied where charge against the 'A' is furnishing of inaccurate particulars of income since **it provides a deeming fiction qua concealment of particulars of income only and consequently can not be extended to a case where charge against the 'A' is furnishing of inaccurate particulars of income.**

On the other hand, where charge against the 'A' is **concealment** of particulars of income, the AO has to **establish** either that 'A' has not disclosed the particulars of income under the main provisions or the case of 'A' falls within the scope of the deeming fictions created under the Explanations. For example, the 'A' might not disclose particular sales or dividend income or income from any source. Such instances would fall under the main provisions itself. In such cases, the burden is on the AO to establish the existence of the charge on the basis of material on record.

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Deeming provisions

Explanation 1 creates a legal fiction and raises a presumption against the 'A". It provides that if in respect of any **fact** which is material to the computation of total income, 'A' (i) does not offer an explanation or offers an explanation which is found to be false by AO, OR (ii) offers an explanation which he is not able to substantiate and fails to prove that such explanation is bona fide and that all material facts have been disclosed then, the amount added or disallowed shall be deemed to be income in respect of which particulars are concealed. **It is pertinent to note that this Explanation is restricted to a case where 'A' is unable to offer an explanation or is unable to substantiate the explanation offered by him in respect of factual detail of the income. Therefore, even this Explanation does not and cannot apply to a case where addition/disallowance has been made by mere rejection of legal claim made by AO.** This view has also been taken by Pune Bench of the Tribunal in the case Kanbay Software (supra). Therefore bona fide of legal claim is not the subject matter of the Explanation 1. In my view, the ratio of the apex court, in the case of Reliance Petroproducts (supra), to the effect that mere rejection of legal claim would not invite the penalty would also apply where the charge against the 'A' is concealment of particulars of income.

Event of concealment/furnishing of inaccurate particulars of income

Before discussing the deemed concealment as per the provisions of Explanations 3, 5 and 5A, it would be appropriate to understand as to when the act of concealment or furnishing of inaccurate particulars of income takes place. **Concealment** takes place on the date when return is filed without disclosing the particulars of income of that year as held by the apex court in the case of **Brijmohan-v-CIT** 120 ITR 1 SC. It is further held that the **law which prevails on date of filing such return would be applicable for levy of such penalty.** Impliedly it would mean that offence of concealment can not be said to have committed before filing of the return. **Mere non filing of return**, therefore, would not amount to concealment as held by Madras High Court in the case of S.Santosh Nadar –v-

Addl. ITO 46 ITR 411 and by Karnatak High Court in Add.CIT-v-Bagalkoti & sons115 ITR 131. On the basis of this legal position, **in my opinion**, penalty for concealment can not be levied where any income arising outside the books of account is disclosed voluntarily in the original return. For **example**, where 'A' had acquired shares ten years back out of undisclosed money but sold during the year resulting in capital gain and such capital gain is disclosed in the original return then penalty for concealment can not be levied. Even a receipt of doubtful nature or a receipt in respect of which, no satisfactory explanation can be given, can be declared as income in the original return without inviting any penalty.

Similarly, penalty can not be levied where unaccounted income is detected in the course of survey u/s 133A pertaining to the year of survey, for instance-unaccounted stock or cash and the same is declared in the original return filed thereafter. The reason is that in such cases, the act of concealment can not be said to have taken place in view of above decision of the apex court. It may be noted that none of the deeming provisions are applicable in such case.

Explanation 3

In order to overcome this difficulty, the legislature introduced Explanation 3 to section 271(1) w.e.f. 1.4.75. After the insertion of Explanation.3, the 'A', not previously assessed to tax , was deemed to have concealed the particulars of income if (i) the 'A' had the taxable income, (ii) but not filed the return, without reasonable cause, within the time prescribed u/s 153(1) and (iii) until the expiry of the period u/s 153(1), no notice u/s 139(2) or section 148 had been issued notwithstanding the fact that such income was declared in the return u/s 148. This Explanation was further amended w.e.f. 1.4.89 by omitting the words *"who has not previously been assessed under this Act*" and by substituting the words "*under sub section (2) of section 139*"by the words "*under clause (i) of sub section (1) of section 142".* After this amendment, the penalty can be levied even if the 'A' was previously assessed to tax.

Impliedly, it would mean that Explanation 3 would not apply where (i) the period specified u/s 153(1) has not expired and the return is filed (ii), such period has expired but notice u/s

142(1)(i) or u/s 148 has been issued before the date of expiry of such period.

Explanation 5 was inserted w.e.f 1.10.84. It applies where search is initiated before 1.6.2007. It provides that assessee shall be **deemed** to have concealed the particulars/ furnished inaccurate particulars of income **in respect of any unaccounted assets found in the course of search** which are **claimed** to have been acquired out of the income of any previous year ending prior to date of search which has not been disclosed so far or out of the income of the year ending on or after the date of search **notwithstanding that such income has been declared in the return furnished** on or after the date of search **unless** he makes a statement u/s 132(4) in the course of search that such assets have been acquired out of his income not disclosed so far and **also specifies the manner** in which such income has been derived and pays the tax together with interest in respect of such income. This raises presumption against the assessee as well as provides the immunity to the assessee from the levy of penalty.

Case Law

(1) **Surender Paul-v- CIT 297 ITR 223 PH:-** it has been held that payment of tax must be made before the due date of filing the return irrespective of availability of funds.

(2) **Ashok Kumar Gupta-v- CIT 287 ITR 376 PH**—held penalty leviable where tax and interest not paid along with the return. Contention of the assessee that there was no requirement of payment of tax along with return was rejected. The decision of Raj. High court in the case of **Gebilal Kanhayalal 270 ITR 523 was dissented.**

(3) Indus Engg Co-v-CIT 184 Taxman 269(Bom)—Income declared u/s 132(4) in respect of hawala commission but the manner in which such income was derived was not disclosed. Held that immunity was not available.

Comment: This Explanation is applicable with reference to assets found in the course of search and therefore can not be invoked with reference to any other income based on any

entry in any books of account or other document or transaction not yet disclosed if such income is unconnected with any asset found in search. There may be some situations where penalty may not be leviable. For example, no asset is found in the course of search but material seized may indicate unaccounted income of the previous year in respect of which no return is filed and the provisions of Explanation 3 are not applicable then such case may be out of the mischief of the provisions of this Explanation.

However, it is clarified that quantum of penalty in respect of A.Y. 2007-08 and onwards would be in accordance with the provisions of section 271AAA.

Explanation 5A applies to cases where search is initiated on or after1.6.2007. If any asset is found in the course of such search and it is claimed that such asset has been acquired by utilizing the income of any P.Y., OR if any income based on any entry in any books of account ,document or transactions is found in such search and it is claimed that such entry represents his income for any P.Y. which has ended before the date of search and the due date for filing of return has expired and the 'A' has not filed the return then notwithstanding that such income is declared in the return filed on or after the date of search, the assessee shall be deemed to have concealed the particulars/ furnished inaccurate particulars of such income.. The immunity available earlier is no more applicable as per this Explanation

.. this provision would not apply where 'A' can claim that asset was acquired out of the income of year in respect of which due date for filing of the return is not yet expired and the return is yet to be filed .. There is another lacuna. It may be that unaccounted assets are found acquisition of which can not be related to any year ending before the date of search. In such case, the 'A' can be assessed only u/s 69A in the year ending on or after the date of search and the provisions of Explanation 5A would not apply. Consequently, penalty may not be leviable if the same is declared in the original return

Comment: The features of this Explanation are different from Explanation 5. This Explanation does not refer to all the previous years ending before the date of search since it

restricts to that year in respect of which due date for filing of return has expired and the return has not been filed. Thus, if source of unaccounted asset relates to the previous year in respect of which the return has already been filed, the provisions of Explanation would not apply. In such case, the issue will have to be decided as per the main provisions of section 271(1)(c).

This section also does not refer to the current year in which search is made. Therefore, if the 'A' declares that an asset, found in the course of search, has been acquired out of the income of the current year then this section would become inapplicable and consequently, penalty would not be leviable if disclosed in the return for the current year. However care should be taken to ensure that such asset was capable of being acquired in the current year. If there is evidence to the effect that asset was acquired in earlier year(s) then either this deeming provision or the main provisions would apply and penalty may be leviable.

Further, this provision would not apply where 'A' can claim that asset was acquired out of the income of year in respect of which due date for filing of the return is not yet expired and the return is yet to be filed. In such cases, unaccounted income can be declared in the original return which may be filed after the search. The precaution to be taken is that there is sufficient nexus between the asset found and income of such year.

There is another lacuna. It may be that unaccounted assets are found acquisition of which can not be related to any year ending before the date of search. In such case, the 'A' can be assessed only u/s 69A in the year ending on or after the date of search and the provisions of Explanation 5A would not apply. Consequently, penalty may not be leviable if the same is declared in the original return.

However, it may be noted that quantum of penalty would be in accordance of the provisions of section 271AAA.

Note: It is important to note that the provisions of Explanations 5 & 5A are applicable to search cases and have no application where requisition is made u/s 132A.

Explanation 2 r/w section 271(1A)

Where the source of any receipt, deposit, outgoing or investment in any year is claimed to be the amount added to the total income of any preceding year but no penalty was imposed then to the extent of such adjustment, the 'A' shall be deemed to have concealed or furnished inaccurate particulars of income of that year in which so called addition was made and the AO would be entitled to initiate penalty proceedings notwithstanding that assessment of that year has been completed.

Quantum of penalty (Explanation 4 r/w section 271(1)(iii) and 271AAA)

Section 271(1)(iii), as originally enacted, provided that in addition to tax payable, penalty shall be leviable equal to the amount which shall not be less than but shall not exceed twice the amount of tax sought to be evaded. Maximum amount was increased to three times w.e.f. 1.4.89.**Explanation 4** defines the expression "**the amount of tax sought to be evaded".** Clause (a) relates to a case where returned figure is loss. In such cases, it would be the amount of tax that would have been chargeable on the amount in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income. Clause (b) applies to a case where Explanation 3 applies. In such cases, it would mean tax on total income less advance tax paid and tax deducted/collected at source. Clause (c) is the residuary clause. In such cases, it would mean the difference between the tax on total income assessed and the tax on total income reduced by the amount in respect of which penalty is sought to be levied.

Prior to 1.4.2003, clause (a) was differently worded. According to old provisions, in case where the amount of income in respect of which particulars had been concealed or inaccurate particulars had been furnished exceeded the total income assessed, the tax sought to be avoided would mean the tax that would have been chargeable on the income in respect of which particulars had been concealed or inaccurate particulars had been furnished had such income been the total income.

The hon'ble SC had to consider the old provisions in the case of Virtual Soft System Ltd **289 ITR 83 SC.** The question before the court was whether penalty could be levied where returned income as well as assessed income was loss. It was held that in such case, penalty could not be levied since no tax was payable by the 'A' which was condition precedent in terms of section 271(1)(iii).

This Explanation was amended by Finance Act 2002 so as to levy penalty in case of loss to loss cases and to nullify the effect the decision of the apex court in the case of Virtual Soft System(supra). Recently, the apex court in the case of Gold Coin Health Food **304 ITR 308 SC has held that the amendment was merely clarificatory and therefore would apply retrospectively**.

Section 271AAA inserted w.e.f 1.4.2007. This is a non obstante provision. It provides that 'A' shall pay a penalty @ 10% of the undisclosed income of the specified year in cases where search is initiated on or after 1.4.2007. Specified year means (a) the p.y which has ended before the date of search but due date of return has not expired and the return has not been filed and (b) year in which search is conducted. However immunity is provided in such cases if 'A' has admitted UDI in the statement u/s 132(4) and specifies and substantiates the manner in which such income is derived and pays the tax together with interest in respect of such UDI. No separate penalty would be leviable u/s 271(1)(c). Thus, this section is applicable maximum for two years i.e. the year in which search is conducted and the immediate preceding year if due date for filing return has not expired. Consequently, immunity will be restricted to these years only.

Nature and burden of proof

It is pertinent to note that the decisions rendered earlier in the cases: ***Anwar Ali, Hindustan Steels*** *and* ***Ananthram Veerasinghiah*** *were also*

The judicial decisions are to the effect that such proceedings are **penal in nature** and **burden to prove the mens rea** and that the receipt in the hands of assessee constitutes income is on the revenue. The

> *rendered by the benches of three judges. In all these cases it was clearly held that proceedings under section 271(1)(c) are quasi criminal in nature ... It is also the settled law that when a particular view is taken by the court then the different view can not be taken by a bench of the same strength. Therefore, in my humble opinion, the observations of the court in the case of* ***Dharmendra Textiles*** *(supra) to the effect that proceedings u/s 271(1) (c) are civil in nature requires reconsideration.*

assessee is not required to prove his innocence. This was held, considering the old provisions of section 28(1)(c) of Indian I.T. Act, 1922, by the hon'ble Bombay High Court in the case of Gokuldas Harivallabhdas 34 ITR 98 which was **approved** by the apex court in the case of Anwar Ali 76 ITR 696 SC. It was also held by the apex court that penalty proceedings are independent proceedings and, therefore, findings recorded in assessment proceedings, though may be relevant, but would not be conclusive. Mere rejection of explanation of assessee in assessment proceedings would not be sufficient for levy of penalty. Subsequently, the court had to consider the levy of penalty under the provisions of Orissa Sales Tax Act for **failure to register** as a dealer. It was held that an order imposing penalty **for failure to carry out a statutory obligation is the result of quasi criminal proceedings and** penalty would not ordinarily be imposed unless the party obliged, either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest or acted in conscious disregard of its obligation. The view taken in the case of Anwar Ali has been **followed** in **Khoday Eswarsa** and sons 83 ITR 369 SC, in **Anantharam Veerasighaiah & co** 123 ITR 457 SC, in **T.Ashok Pai** 292 ITR 11 SC and in Dilip N. Shroff 291 ITR 519. It is to be noted that the provisions of sec 271(1)(c) as considered by the apex court in the case of **Anwar Ali** (supra) were identical to the provisions under the old Act of 1922. In the case of **Sir Shadilal Sugar & General Mills** 168 ITR 705 SC, it was held that penalty could not be imposed merely because the 'A' agreed to be assessed on a particular income. The decision of the apex court was based on the provisions as they were originally enacted.

The view taken by the division bench in the case of Dilip N. Shroff was **doubted and overruled in** UOI-v-Dharmendra Textiles Processors **306 ITR 277 SC** by holding that-penalty

under the above provision is a civil liability and therefore willful concealment is not an essential ingredient for attracting the civil liability. It was pointed out that the division bench in the case of Dilip N Shroff failed to notice conceptual and contextual difference between sec 271(1)(c); and sec 271C. Further, it approved the other decision of the division bench in the case of **Chairman SEBI** (2006) 5SCC 361.

It is pertinent to note that the decisions rendered earlier in the cases: Anwar Ali, Hindustan Steels and Ananthram Veerasinghiah were also rendered by the benches of three judges. In all these cases it was clearly held that proceedings under section 271(1)(c) are quasi criminal in nature. It is this view which was followed by the division bench in Dilip's case. It appears that the above three decisions were not cited before the court. It is also the settled law that when a particular view is taken by the court then the different view can not be taken by a bench of the same strength. Therefore, in my humble **opinion,** the observations of the court in the case of Dharmendra Textiles (supra) to the effect that proceedings u/s 271(1) (c) are **civil in nature requires reconsideration.**

No doubt, it is also the settled legal position that mens rea is not the essential ingredient for levy of penalty under all the penal provisions as held by the Constitution Bench of the apex court in the case of **Joshi-v-Ajit Mills** (19770 4 SCC 110: 40 STC 497. It was held therein that the classic view that 'no mens rea, no crime' has long been eroded and several laws in India and abroad have created severe punishments even where the offences have been defined to exclude mens rea.

It is to be noted that **the word' deliberately' has been deleted wef 1.4.64. Further various Explanations have been added to sec 271(1)(c) which provides for deemed concealment/furnishing of inaccurate particulars of income**. By Finance Act 1964, the **Explanation** was added which provided that if the returned income was less than 80% of the assessed income then assessee shall be deemed to have concealed the particulars of income or furnished inaccurate particulars of income unless he proved that failure to return correct income did not arise from any

fraud or willful neglect on his part. These provisions were considered by the PH high court in the case of **Vishwakarma Industries 135 ITR 652 (PH)(FB**). It was held that where returned income was less than 80% of assessed income, initial onus on the revenue stood shifted to the assessee to prove that failure to return the correct income was not on account of any fraud or gross/willful neglect on his part. This could be proved by the material already on record or by bringing fresh material. If the assessee failed to discharge such onus then deeming provisions would apply and penalty would be leviable. However, if such onus is discharged then assessee would be out of the mischief of the Explanation unless the deptt is able to establish afresh that assessee had in fact concealed the particulars or furnished inaccurate particulars of income. This view has been **approved by the apex court in Musadilal Ram Bharose 165 ITR 14 SC, CIT-v-K.R.Sadayappan 185 ITR 49 SC and in Chuharmal 172 ITR 250 SC**. However it is held by the court that onus is not discharged by any fantastic explanation. The explanation must be acceptable to the fact finding body. Further, in the case of **Jeevan Lal Sah 205 ITR 244 SC** it was held that decision in the case of Anwarali (supra) is **no more good law** in view of the said Explanation.

The above Explanation was replaced by new Explanations 1 to 4 by Taxation Laws Amendment Act 1975 wef 1.4.76. Explanation 5 has been inserted wef 1.10.84.while Expl. 5A has been inserted wef 1.6.2007. Explanations 6 & 7 were inserted wef 1.4.89 and 1.4.2002 respectively. Some of the Explanations have been amended from time to time. These Explanations provide the circumstances, already discussed hereinabove, under which the assessee shall be deemed to have concealed the particulars of income or furnished inaccurate particulars of income. The burden of proof has been shifted to the assessee and therefore it is now for assessee to prove that his case does not fall under the provisions of such Explanations, if invoked by the AO. On the other hand, if he is able to discharge such burden then, as per the decisions of the apex court, the revenue shall have to prove that case of assessee falls under the main provisions of the section.

At this stage, it would be appropriate to refer the latest decision of SC in the case of Dharmendra Textiles **(supra**)

wherein it has been held-(i) the Explanations appended to section 271(1)(c) indicate the element of strict liability,(ii) the object behind the enactment shows that it provides for remedy for loss of revenue,(iii)that penalty under the section is civil liability,(iv)willful concealment is not an essential ingredient for attracting penalty (v) no discretion with the authority imposing penalty. Hence, revenue is not required to prove the element of mens rea on the part of assessee. This decision was understood to mean that levy of penalty is automatic.

The above decision has been explained by the SC in subsequent decision in the case of UOI-v- Rajasthan Spg & Wvg Mills **224 CTR 1 SC** wherein it is **explained** that levy of penalty is **not automatic**. If the conditions specified in the section are satisfied then alone, penalty is leviable. Facts of each case would determine whether such conditions are satisfied or not. Mere non payment of excise duty in each case would not entail the penalty. **Where extended period is to be invoked u/s 11AC of the Central Excise Act then, the revenue must prove that non payment of duty was result of fraud, collusion or willful mis-statement or suppression of facts.** The ratio of the judgment in the case of **Dharmendra Textiles** (supra) has been explained again by the apex court recently in the case of **Reliance Petroproducts 322 ITR 158 SC** by observing that the said decision is an **authority only for the proposition that element of mens rea stands excluded from the scope of the provisions of section 271(1)© and it is only to this extent the decision in the case of Dilip N shroff stands overruled**. It is further held that **conditions of that section must exist before levy of penalty**. It is for **revenue to establish that such conditions exist**. It is only the element of mens rea which is not required to be proved by the revenue.

In the case of ACIT-v- VIP Industries **122 TTJ 289** (Mum), the effect of above decision was considered by the tribunal. It was opined that SC has not held that in all cases where addition is made, the penalty shall automatically follow. The true effect is that mens rea is not to be proved by the revenue. If the 'A' can successfully prove his bona fide by tendering a valid explanation then, penalty cannot be levied. Hence, in case of genuine difference between AO and 'A', penalty cannot be levied. Same view has been taken by

Pune bench in the case **of Kanbay Software India 122TTJ 721.**

In the case of CIT-v- Sidhartha Enterprises **184** Taxman 460 PH, the 'A' suffered loss on sale of machinery which was set off against other incomes. AO disallowed such claim & initiated penalty proceedings u/s 271. Tribunal deleted the penalty. The HC held that Dharmendra's case cannot be read as laying down that in every case where particulars are inaccurate, penalty must follow. What has been held is that the qualitative difference between criminial liability u/s 276C and penalty u/s 271(1)© must be kept in mind. The concept of penalty has not been changed by the said decision. Penalty is imposed only when there is some element of deliberate default and not when there is merely a mistake or bona fide claim.

Other decisions

Shree Krishna Electricals 2009-23VST249 (SC)

Penalty cannot be levied merely because exemption claimed by 'A' was disallowed.

CIT-V-Reliance Petroproducts P.L. **322 ITR 158 (SC)**

'Particulars' means details of the claim maid Where information given is not found to be incorrect, 'A' cannot be held guilty of furnishing inaccurate particulars of income for the purpose of levying penalty u/s 271(1)(c). further held that mere making a wrong claim does not amount to furnishing inaccurate particulars. In the absence of finding that any details supplied by 'A' is incorrect or false, penalty cannot be levied.

Cement Marketing co of India-v- ACST 124 STC 15 (SC)

Bona fide belief that that freight is not includible in total turnover-penalty cannot be levied. If 'A' is unable to offer any explanation, the court may infer that return is false.

CIT-v-Hari Machine 311 ITR 285 Del—'A' reduced its share capital from 25 to 20 lakhs under the Companies Act and claimed deduction while computing income. AO disallowed

the same and levied penalty. The court held that penalty not leviable since all relevant material had been disclosed and there was no allegation of fraud or negligence for invoking Expl.

T Ashok Pai-v-CIT 292 ITR 11 SC—'A' acted on the basis of wrong legal advice-no penalty-Exlanation can not be invoked.

CIT-v-Auric Investment 310 ITR 121 Del—loss in shares was adjusted against income which was disallowed on the ground that it was speculative loss-penalty not leviable since all material facts disclosed.

CIT-v-Dhanbal 309 ITR 268 Del—AO allowed claim of 'A' u/s 80HHE @ 80% as against 100%-claim of 'A' based on auditors certificate-penalty not leviable.

CIT-v-Nath Bros 288 ITR 670 Del—dividend income treated as business income and claimed deduction u/s 80HHC-penalty not leviable.

CIT-v-Budhewal Sugar Mills 312 ITR 92 PH-claim u/s 80P disallowed-no penalty since full disclosure made. Again followed in CIT-v- Sidhartha Enterprises 322 ITR 80PH and in CIT-v- Shahabad co-op Sugar Mills 322 ITR 73 PH.

Jhaver Properties-v- ACIT 317ITR(AT)278 mum—disallowance u/s 40A(2)(b)—No penalty since all relevant facts disclosed.

Revised return

If the act of concealment or furnishing of particulars of income is committed while filing original return, the revised return by itself would not mitigate the default.—171 ITR 390 All, 163 ITR 440 Raj, 32 ITR 677 Bom, 84 STC 271 Del, 96 STC 6 MP,178 ITR 643 Pb,178 ITR 430 Ker,186 ITR 571 SC.

If the revised return u/s 139(5) has been filed voluntarily before detection and conduct of 'A' is bona fide then penalty

would not be leviable.—100 ITR 524 Guj,107 ITR 423 Ori,129 ITR 703 Del,156 ITR 638 Mad,145 ITR 439 Cal,108 ITR 746 All,113 ITR 74 Gau,151 ITR 333 Raj,144 ITR 259Pb, 226CTR 533del.

If revised return is filed after investigation by deptt , penalty can be levied.—149 ITR 737 Ker,110 ITR 602 Mad.

If such return is filed under amnesty scheme or under any beneficial circular, penalty can not be levied.210 ITR 292 Raj,131 ITR 643 Guj.

If disclosure is not true in revised return, penalty can be levied.172/575Guj.

Note –In the case of **Suresh Chander Mittal** 241 ITR 124 MP, disclosure was made in revised return in pursuance of notice u/s 148 after search. Facts of the case shows that revised returns were filed in respect of earlier years and not in respect of the year of search. Further, there was no search material in respect of earlier years. The revised returns were filed just to avoid litigation. The HC, following SC decision in the case of **Sir Shadilal** 168 ITR 705, held that penalty was not leviable. This judgment has been affirmed by SC by passing a short order (251 ITR 9). The apex court in the case of **K.P.Madhusudan** 251 ITR 99 has held that decision in **Shadilal's** case is no more good law after insertion of Expl-1. Further, in the case of **G.C.Aggarwal** 186 ITR 571 SC, the court had upheld the penalty where higher income was disclosed in revised return without any justification. In my humble opinion, the decision in case of **Suresh Chand Mittal** does not lay down the preposition that no penalty is leviable where correct income is shown in the revised return. The decision is to be seen on the facts of that case which revealed that there was no material against the 'A'. Further, the decision of HC rested on the decision of SC in the case of Sir Shadi lal which has been declared no more a good law in view of insertion of the Explanation. In my humble opinion, the lrvy of penalty would depend on the facts of each case. If the revised return falls within the ambit of section 139(5) i.e. to crrect the bona fide mistake, penalty would not be leviable but if revised return is filed to cover the income detected by the revenue then levy of penalty would be justified.

Limitation

Section 275 provides the period of limitation beyond which order of penalty u/s 271(1)© cannot be passed. Sub section (1) of this section provides that where the relevant assessment order or other order is the subject matter of appeal to the CIT(A) or ITAT then, order of penalty can not be passed after the expiry of the FY in which the proceedings, in the course of which action for imposition for penalty has been initiated, are completed, or six months from the end of month in which the order of CIT(A) or the Tribunal is received by the Chief comm. or the Comm. , whichever period expires later.

A proviso has been added wef 1.6.2003. it provides that where order of assessment or other order is subject matter of appeal before CIT (A) and CIT (A) passes an order after 1.6.2003 then, order of penalty can not be passed after the expiry of the FY in which the proceedings, in the course of which action for imposition for penalty has been initiated, are completed, or six months from the end of month in which the order of CIT(A) is received by the Chief comm. or the Comm. , whichever is later.

Sub section (b) provides that where assessment or other order is subject matter of revision u/ 263/364, penalty order shall not be passed after the expiry of six months from the end of of the month in which order of revision is passed.

Sub section (c) of provides that in any other case, penalty order shall not be passed after the expiry of the FY in which the proceedings, in the course of which action for imposition for penalty has been initiated, are completed, or six months from the end of month in which action for imposition of penalty is initiated, whichever period expires later.

Case law

(1) **Royala Corporation vs. UOI 288 ITR 452 Mad**—In this case assessment was challenged before the Tribunal. Penalty proceedings were initiated by AO while completing assessment. The ‘A’ had requested the AO to keep the penalty proceedings in abeyance till the order of the tribunal. The AO rejected this request by observing that in view of the

proviso to section 275(1)(a), the period of limitation can not be extended beyond the expiry of one year from the end of the FY in which order of CIT(A) is received by the comm. or expiry of the FY in which the proceedings, in the course of which action for imposition for penalty has been initiated, are completed, whichever is later. The 'A' filed the writ petition before the High Court challenging the observations of the AO. It was held by the court that the proviso cannot curtail the period of limitation prescribed in the main provisions and the proviso would apply only where no appeal is filed against the order of CIT(A). Similar view is taken by the Tribunal in the case of **Trilochan Singh-v-ITO 114 TTJ 82(Asr)**. In this case, it was contended that order of penalty could not be passed beyond the period prescribed in the proviso. This contention was rejected by the tribunal by holding that period of limitation as main provisions of section 275(1)(a) would apply.

(2) **Eicher Goodearth Ltd vs. ACIT 112 TTJ 268 (Del)** In this case, the CIT(A) allowed partial relief against the addition made by AO . The disallowance of depreciation was upheld. Both the parties filed appeal before the tribunal but disallowance of depreciation was not challenged. In penalty proceedings, it was contended before the tribunal by the 'A' that no penalty could be sustained qua the disallowance of depreciation since period of limitation would be as per the proviso in as much as no appeal was filed before the tribunal on such issue. This contention was rejected by the Tribunal by holding that period prescribed in the main provision would apply as the appeal to the tribunal was filed u/s 253.

(3) **Naresh Kumar Gupta-**v- **ITO 122 TTJ 286 (Del)** In this case, the appeal against the assessment order was not entertained by the CIT(A) since filed beyond time. The penalty order was passed within the time prescribed in the proviso to section 275(1)(a) but beyond the time prescribed in sec 275(1)(c). the tribunal held that assessment order cannot be said to be subject matter of appeal and therefore the limitation prescribed in the said proviso would not apply. Hence, penalty order was quashed.

(4) **Silicon graphics system** vs. **ACIT 122 TTJ 800 (Del)** In this case, fresh assessment was made in pursuance of ITAT order in the course of which penalty proceedings were

initiated. No appeal was filed against this order. Penalty order was passed within the time prescribed in sub section (1)© with reference to the date of fresh order. The 'A' contended that penalty order should have been passed within the time prescribed in sub section (a) since assessment was subject matter before the Tribunal. The Tribunal rejected this contention by holding that in order to attract the provisions of sub section 1(a), the order in the course of which penalty proceedings were initiated must be subject matter of appeal. It was also observed that penalty proceedings initiated in the course of original assessment proceedings did not survive after the order of the tribunal. Hence limitation prescribed in clause(c) would apply.

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very good article and discussion thereafter

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January 14, 2017 at 6:45 pm

Thank you very much very good article

Reply

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January 10, 2017 at 2:37 pm

whether addition u/s 56(2)(vii) attract penalty u/s 271(1)(c)?