

PENALTIES
under the
Income Tax Act, 1961
Kanpur, 14th Dec. 2013

- CA Rajiv Mehrotra, DISA (ICAI), Kanpur



*Penalty is a Tax for
Doing Wrong
Tax is a penalty for
Doing right*

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Penalty proceedings



- ✓ Every addition to the income of the assessee does not warrant penalty.
- ✓ Mere affirmation of an addition by the appellate authorities does not automatically make the assessee liable for penalty.
- ✓ Fresh evidence can be resorted to in the case of penalty proceedings.

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Penalty Proceedings



- ✓ Law at the time of filing of original return to prevail.
- ✓ Right to be heard- Statutory right of the assessee else proceedings bad in law.
- ✓ Reasonable cause (Section 273B): where the assessee *proves* that there was a 'reasonable cause' for non compliance, no penalty is imposable-
- ✓ Has to be to the satisfaction of the A.O.

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Penalty Proceedings



- ✓ Substantive: Based on tax sought to be evaded : 271(1)(c), 271AAB- No reasonable cause, section 273B not applicable, section 273A applicable. Also 271D, 271E where 273B benefit is available- this is a procedural default not based on tax sought to be evaded.
- ✓ Procedural: Other sections: Delay, non-filing, non appearance etc.Others , Section 273B i.e. “Reasonable cause”, applicable- Mainly factual and automatic.

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Section 273B



- Penalty Not to be imposed where the person or assessee proves that the failure to comply was on account of a ‘Reasonable Cause’
- Section applies to all penalty sections except sections 271AAB and 271(1)(c) i.e in respect of concealment of income

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Reasonable Cause-the Legal View



Reasonable cause, as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. The expression 'reasonable' is not susceptible of a clear and precise definition; for an attempt to give a specific meaning to the word 'reasonable' is trying to count what is not number and measure what is not space. It can be desired as rational according to the dictates of reason and is not excessive or immoderate.

*As held in **Azadi Bachao Andolan v. Union of India** [2001] 252 ITR 471 (Delhi), affirmed by the SC.*

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Reasonable Cause-the Legal View



*In **WOODWARD GOVERNORS INDIA (P.) LTD. v. CIT** [(2001) 118 TAXMAN 433], it has been held that*

*“‘Reasonable Cause’ as applied to human action is that which would constrain a person of **average intelligence and ordinary prudence**. It can be described as a probable cause. It means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that the same was the right thing to do.”*

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Hindustan Steel's case 83 ITR 26 A landmark decision



- Penalty proceedings are quasi criminal proceedings.
- Penalty not imposable unless assessee acted deliberately or in defiance of law.
- Assessee ought to be guilty of conduct contumacious or dishonest, or must have acted in conscious disregard of its obligation.
- Penalty will not also be imposed merely because it is lawful to do so.
- A **technical or venial breach** of the provisions of the Act or a breach due to *bona fide* belief ought not to be penalised.

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Penalties Other than Procedural

Referred section	Nature	Penalty Section	Quantum of penalty
132	In respect of undisclosed income found in course of search	271AAB	10% /20/30% of undisclosed income
269SS	Acceptance of Loans & Deposits in excess of Rs.20000/- otherwise than by account payee cheque/DD	271D	Sum equal to the amount of loan or deposit.
269T	Repayment of loans & deposits in excess of Rs.20000/- otherwise than by account payee cheque/DD.	271E`	Sum equal to the amount of loan or deposit.
-	Concealment of income/ furnishing of inaccurate particulars	271(1)(c)	100-300% of the tax sought to be concealed

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Section 271AAB



- Introduced by Finance Act 2012 w.e.f. 01.07.2012
- Applicable in respect of Search conducted on or after 01.07.2012.
- Penal consequences where disclosure is not voluntary in cases of search.

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The Section



Sub Section (1):

Penalty

- *Surrender during search -10% of undisclosed income.*
- *Surrender while filing of return u/s 153A- 20% of undisclosed income*
- *No surrender- 30% of undisclosed income*

- *No benefit for returns u/s 153C.- Important.- 271(1)(c) applicable.*

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The section –Contd.



- (i) *in the course of the search, in a statement under sub-section (4) of section 132, **admits the undisclosed income and specifies the manner in which such income has been derived;***
- (ii) ***substantiates the manner in which the undisclosed income was derived; and***
- (iii) ***pays the tax, together with interest, if any, in respect of the undisclosed income.***

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The section –Contd.



(b) *“specified previous year” means the previous year—*

- (i) *which has ended before the date of search, but the date of filing the return of income under sub-section (1) for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or*
- (ii) *in which search was conducted.*

In other years explanation 5A to section 271(1)(c).

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Penalty u/s 271(1)(c)

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Section 271(1) (c)



271(1) If The AO or the Commissioner(A) or the Commissioner in the course of any proceedings under this Act is satisfied that any person-

(C) has concealed the particulars of his income or furnished inaccurate particulars of such income ..

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

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Essential Ingredients



- Penalty is imposable when
- Section 271(1)(c)
 - in the course of **proceedings under this Act:**
 - There is a finding as to ***concealment of particulars of income*** by the assessee or
 - The assessee has furnished ***inaccurate particulars of his income***.

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Essential Ingredients



- The AO must state whether penalty was being levied either for concealment or for furnishing of inaccurate particulars of income. In the absence of such finding, the order would be bad in law.—*Manu engg. Works 122 ITR 306 (Guj), New Sorathia Engg. Co 282 ITR 642 (Guj)*,
- Basis of satisfaction can not be altered subsequently by AAC, *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.*

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Essential Ingredients



- Penalty is imposable when
- Section 271(1)(c)

Explanation 1 (history)

- *facts material to the computation of the total income* of any person under this Act,
The assessee offers an explanation which is found to be *'false'*
- Offers an explanation which he fails to substantiate and fails to prove that the explanation is *bonafide*.

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Concealment



Defined as:

“to hide or keep secret. The word ‘conceal’ is con+celare which implies to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of.”

The offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the income tax authorities and thus necessarily implies mens rea.

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Inaccurate Particulars



Webster's Dictionary, "inaccurate" has been defined as:

"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript."

- Here again a positive inference that the assessee has given inaccurate particulars has to be arrived at.

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'False' Explanation



- Allahabad High Court in the case of Singh Traders 101 STC 203, in context of a sales tax legislation, has interpreted the word 'false' as:

"false means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue"

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Bonafide Belief



Bonafide : means in good faith , without fraud or deception, honestly .

As distinguished from bad faith i.e. Bonafide again implies not a deliberate mistake. i.e presence of Mens Rea

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Earlier views of Apex Court



K.C. Builders (265 ITR 562) succinctly brings out this point. It has been held in this case that the word 'concealment' inherently carries with it the element of 'mensrea'. The Court also held that even though the word 'deliberately' has been omitted from the expression 'deliberately furnished inaccurate particulars of such income', it is implicit in the word 'concealed' that there has been a deliberate act on the part of the assessee. The Court held that in order that a penalty u/s 271(1)(c) may be imposed if it has to be proved that the assessee has consciously made the concealment or furnished inaccurate particulars of his income. Levy of the penalty is not automatic.

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Apex Court in Dilip N. Shroff



- Levy of the penalty is not automatic.
- The order imposing the penalty is quasi criminal in nature.
- The word inaccurate signifies a `deliberate' act of omission on the part of the assessee.
- Such deliberate act must be for the purpose of concealment of income or furnishing inaccurate particulars.
- *The primary burden of proof is on the revenue.*

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Dharmendra Textiles 306 ITR 277(SC)

I don't
wanna
hear
anything



On 271(1)(c).-

'The judgment in Dilip N. Shroff' case [2007] 8 Scale 304 (SC) has not considered the effect and relevance of section 276C of the Income-tax Act. The object behind the enactment of section 271(1)(c) read with the Explanation indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Willful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under section 276C of the Income-tax Act.'

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View Of Lower Courts On Dharmendra Textiles' Case



Kanbay Software India (P) Limited Vs. DCIT reported in [2009] 22 DTR (Pune) (Trib) 481..

“However, there is still a third scenario in which an addition is made to the income but it is established, or can be reasonably inferred, that assessee’s conduct and explanation is bonafide. These are the situations in which the assessee is able to establish his innocence. In such a situation, in accordance with the undisputed scheme of section 271(1)(c), neither the penalty was leviable prior to Hon’ble Supreme Court’s judgment in the case of Dilip Shroff, nor is it leviable after the Dharmendra Textile Processors’ case.”

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Dharmendra Textiles – Clarified by Hon’ble S.C.



Rajasthan Spinning & Weaving Mills 180 Taxman 609(SC)

“From the said decision, one could fail to see how section 11C would apply to every case of non payment or short payment of duty regardless of the conditions expressly mentioned in the section for its application.

“Therefore be understood to mean that though the application of section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case, the concerned authority would have no discretion in quantifying the amount and the penalty must be imposed equal to the duty determined under section 11A(2).”

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Onus on the Assessing Officer



- *CIT vs. M.P. Narayanan (1998) 149 CTR (Mad) 1:(2000) 244 ITR 528 (Mad)*: The Hon'ble Madras High Court categorically held that it is for the Department to prove that there was conscious and deliberate concealment on the part of the assessee and the amount added represented assessee's income. Mere agreement to an addition or inability to substantiate claim is not enough.
- *Asstt. CIT vs. Shiva Poly Plast (P) Ltd. (ITA No. 710/Luck/2006)*- held that there should be some discussion in the assessment order that assessee is guilty of contumacious conduct or addition is based on some positive material reflecting that assessee had filed inaccurate particulars of income or has concealed the particulars of income.

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Onus- On whom does it lie?



K.P. Madusudhanan vs. CIT 251 ITR 99 (SC):

Held that once a notice u/s 271(1)(c) is issued to the assessee, it implies that the A.O. makes the assessee aware of the provisions including the explanation to the section. It partially shifted the burden of proof on the assessee. (Also held in Kanbay) .

The initial burden lies on the assessee. Thus the department has not to prove Mens Rea initially.

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Some good Rulings of the ITAT



- Oasis Securities 37 SOT 63
- GACL 30 SOT 360

Concealment of 'particulars' of income vis-à-vis concealment of Income.

“Therefore, both in cases of concealment and inaccuracy the phrase 'particulars of income' are used. It will be noted that as regards concealment, the expression in clause (c) is 'has concealed the particulars of his income' and not 'has concealed his income'. The expressions "has concealed the particulars of income" and "has furnished inaccurate particulars of income" have not been defined either in section 271(1)(c) or elsewhere in the Act.

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Some good Rulings of the ITAT



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.”*

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Oasis Securities & GACL's Case



What and how the particulars are to be given.

Section 139(1) return of Income to be submitted in **prescribed form** and **verified in the prescribed manner** and setting forth such other **particulars** as may be **prescribed**.

The word 'prescribed' defined in section 2(33) means, 'prescribed by the rules'. The forms are, accordingly, prescribed by the rules framed under the Act (Rule 12). Section 140 lays down as to by whom such return can be signed and verified.

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Oasis Securities & GACL's Case



Explanation 1- Is a deeming fiction and the onus to establish that the explanation offered was bona fide and all facts relating to the same and material to the computation of his income have been disclosed is on the assessee. The Explanation for the purpose of avoidance of penalty must be an acceptable explanation; it should not be a fantastic or fanciful one. The burden is on the assessee. If he fails to discharge that burden, the presumption that he had concealed the income.”

Explanation 1 applies to only concealment of income and not to furnishing of inaccurate particulars ? View?

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Oasis Securities & GACL's Case



“Where the assessee offers some explanation, it is only the proving by the Assessing Officer of the explanation to be false, that Part A of the explanation may be attracted. Mere non-acceptance of explanation offered by the assessee cannot form a basis for the satisfaction of ITO to the effect that the assessee has concealed particulars of his income. The ITO must have some *definite evidence to refuse the assessee's claim or evidence or explanation.*”

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Oasis Securities & GACL's Case



“ Thus two things emanate

- a) that it is the duty of the assessee to furnish particulars of income, simultaneously he has the right to claim all exemptions and deductions provided in the Act, according to the assessee for which he is entitled.
- b) It is the duty of the AO to assess real and correct income in accordance with law. The CBDT in its Circular No. 14(XL35) of 1955, dated 11-4-1955 'regarding departmental attitude towards' - stated that *officers of the Department must not take advantages of ignorance of an assessee as to his rights, it is one of their duties to assist a taxpayer in every reasonable way.*”

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Subsequent Decision of the Apex Court



CIT Vs Reliance Petroproducts P Ltd. 322ITR 158 (17.3.10)

- a) Merely because the assessee had claimed an expenditure, which claim was not accepted or was not acceptable to the Revenue, that by itself would not, attract penalty under Section 271(1) (c)
- b) There can be no dispute that everything would depend upon the Return filed because that is the only document, where the assessee can furnish the **particulars** of his income. When such particulars are found to be inaccurate, the liability would arise.

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.... Reliance Petroproducts



“As the assessee had furnished all the details of its expenditure as well as income in its Return, which details, in themselves, were not found to be inaccurate nor could be viewed as concealment of income on its part, it was up to the authorities to accept its claim in the Return or not.”

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.... *Reliance Petroproducts*



- “Particular” means detail or details
- In Webster's Dictionary, the word "inaccurate" has been defined as:-

"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript".

- “Reading the words in conjunction, they must mean the details supplied in the Return, which are not accurate, not exact or correct, not according to truth or erroneous.”

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CIT V. Zoom Communication Pvt. Ltd. 191 Taxman 179 (DEL) Dated 24.5.10



“The Court cannot overlook the fact that only a small percentage of the Income Tax Returns are picked up for scrutiny. If the assessee makes a claim which is not only incorrect in law but is also wholly without any basis and the explanation furnished by him for making such a claim is not found to be bona fide, it would be difficult to say that he would still not be liable to penalty under of the Act”

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CIT V. Zoom Communication Pvt. Ltd. 191
Taxman 179 (DEL) Dated 24.5.10



“If we take the view that a claim which is wholly untenable in law and has absolutely no foundation on which it could be made, the assessee would not be liable to imposition of penalty, even if he was not acting bona fide while making a claim of this nature, that would give a licence to unscrupulous assesseees to make wholly untenable and unsustainable claims without there being any basis for making them, in the hope that their return would not be picked up for scrutiny”

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Now PWC Coopers Pvt Ltd (SC)
348ITR306



*“Notwithstanding the fact that the assessee is undoubtedly a **reputed firm** and has **great expertise** available with it, it is possible that **even the assessee could make a “silly” mistake**. ...All that happened in the present case is that through a **bona fide and inadvertent error** failed to add the provision for gratuity to its total income. This can only be described as a **human error** which we are all prone to make. The **calibre and expertise** of the assessee has little or **nothing** to do with the **inadvertent error**.”*

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Madras High court 12.11.2013



- CIT – Chennai vs Gem Granites (Karnataka)
- “Referring to the decision in the case of *Dharmendra Textile Processors, (supra)*, the Hon'ble Supreme Court pointed out that in the background of Section 271(1)(c) of the Act, there is no necessity of *mens rea being shown* by the Revenue, however referring to the Explanation to Section 271(1)(c) penalty being a multiple liability, the bonafide of the conduct of the assessee necessarily assumes significant, even though willfulness of the assessee may not be a criteria, the conduct is to be considered.”

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Implication Of All Decisions



- As a Rule, a difference between the returned and assessed income, give rise to a suspicion of concealment.
- (Though there is a difference between concealment of 'Income' and 'Particulars of Income' the department invariably interprets "concealment of Income")
- The primary burden that an assessee's case falls u/s 271(1)(c) is of the revenue by giving a satisfaction (though the revenue is not required to prove *mens rea* at this stage)

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... Contd



- The responsibility for rebutting such inference is squarely on the tax payer.
- The assessee is expected to offer an explanation for the difference. Absence of any explanation, by itself, will merit penalty.
- Explanation where offered, should not be found to be false.
- Mere failure of an assessee to substantiate his explanation, may not necessarily make him liable for penalty, if such explanation is *bona fide* and he has disclosed all the facts relating to the same and material to the computation of his total income. (Thus *mens rea* should be there)

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... Contd



- That all the particulars of Income should be submitted as prescribed and even if there is some concealment of Income but there has been no concealment as to the particulars of Income no penalty can be levied.
- That the assessee has right to claim all deductions and exemptions and just because they have not been it shall not attract penalty.
- Recent case – no penalty can be attracted in case of disallowance u/s 40A(2)(b) as there is no column prescribed for such a disclosure. Jhaveri Prop 123ITD 429.

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Recording Of Satisfaction



Several cases have concluded that satisfaction has to be recorded by the A.O. for initiation of penalty proceedings

- **Ram Commercial Enterprises** 246 ITR 568,
- **Diwan Enterprises** 246 ITR 571 confirmed by SC in the case of Dilip N Shroff.

Insertion of section 271(IB) w.e.f 1.4.89. states that “said order **contains a direction for initiation of penalty proceedings under clause (c)** of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the A O for initiation of the penalty proceedings under the said clause”

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Recording Of Satisfaction



Constitutional validity of proviso inserted challenged – Held in **Madhushree Gupta & British Airways 317 ITR 143(Del)**.-

“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 (visibility) of the “satisfaction” arrived at by the AO during the course of proceeding before him.

“

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Recording Of Satisfaction



“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.” (P147)

“If there is no material to initiate penalty proceedings; an assessee will be entitled to recourse to a court of law.” (P 147)

The court upheld the constitutional validity of the provision but it can still be argued that satisfaction is still a condition precedent which must be discernible from the order of assessment and the satisfaction must be based on some material on record.

Also **CIT v. Jyoti Ltd. (2013) 216 Taxman 64(Mag.) (Guj)(HC)-concealment or furnishing inaccurate particulars**

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Recording Of Satisfaction



S. 271(1)(c) : Penalty – Concealment – Satisfaction.

In CIT vs. Fibro Tech Chemicals, S.L.P No. 6703 of 2010 dt. 22-2-2010 (2010) 325 ITR 12 (St.)

CIT vs. Frontline Solutions (Baroda) Ltd. S.L.P. No. 8187 of 2009 dt. 22-2-2010 (2010) 325 ITR 12 (St.)

the High Court's had held that on a perusal of the assessment order, the Assessing Officer had not recorded the satisfaction that proceedings under section 271(1)(c), required to be initiated against the assessee. **S.L.P of Department rejected.**

The retrospective amendment in section 271(1B) was inserted by Finance Act, 2008.

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Loss Cases-Settled Position- Unsettled Again



- Position after A.Y.2003-2004: Clear due to amendment in the Act. Income includes 'Loss' hence 271(1)(c) is applicable where returned loss is reduced upon assessment.
- Prior to A.Y.2003-04: Penalty not attracted where returned and assessed income is a Loss
 - Prithipal Singh and Co. 183 ITR 69
 - Virtual Soft Systems Limited (289 ITR 83)

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Loss Cases-Settled Position- Unsettled Again



CIT v. Gold Coin Health Food P. Ltd., 304 ITR 308 (SC):

" . . . This Court held with reference to the charging provisions of the statute that the expression 'income' should be understood to include losses. The expression 'profits and gains' refers to positive income, whereas losses represent negative profit or in other words minus income.

"The above being the position, the inevitable conclusion is that Explanation 4 to S. 271(1)(c) is clarificatory and not substantive. The view expressed to the contrary in Virtual's case (2007) 9 SCC 665 is not correct."

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Assessee's Claim Rejected- Whether Penalty Imposable?



- *Burmah Shell Oil Storage & Distributing Co. of India Ltd. v. ITO (1978) 112 ITR 592 (Cal.)*: Legal contention bona fide raised, whether it is ultimately accepted or rejected, will not generally be an act of fraud or wilful negligence attracting the penal provisions of section 271(1)(c).
- *Impulse India (P) Ltd. v. ITO (1991) 40 ITD 36 (Del.)*: rejection of a claim for deduction does not by itself mean that the claim was based on false premises.

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Original Return- penalty imposable



The offence of concealment is committed at the time of filing of the return. **Mere non filing of return**, therefore, would not amount to concealment *S.Santosh Nadar v Addl. ITO 46 ITR 411 (Mad) & in Add.CIT v Bagalkoti & Sons 115 ITR 131(Kar)*.

It implies that penalty for concealment can not be levied where any income arising outside the books of account is disclosed voluntarily in the original return. (that is why section 271AAB).

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Original Return- Penalty Imposable



Similarly no levy of penalty if any unaccounted income is detected during the course of survey for the years for which no return has been filed and such undisclosed income is declared in the original return filed thereafter.

Dy. CIT vs. Satish B. Gupta (Dr.) 42 SOT 48 (Hyd). In Brijmohan-v-CIT 120 ITR 1 SC it has been held **Concealment** takes place on the date that when return is filed without disclosing the particulars of income of that year.

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Original Return- Explanation -3



Explanation 3 added and amended to prevent the same. As it stands now Explanation 3 would not apply where

- (i) the period u/s 153(1) has not expired and the return is filed and where
- (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.

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Revised Return



- Facts are important and it will depend on the fact that whether revision is voluntary, bonafide and before actual detection. *G.C. Agarwal Vs CIT 186 ITR 571 (SC)*.
- *Suresh Chandra Mittal (2001) 251 ITR 9 (SC)*: Penalty under s. 271(1)(c) cannot be levied when assessee surrendered additional income by way of revised returns once the revised returns have been regularised by revenue and the explanation of the assessee was that he has declared additional income to buy peace and to come out of vexed litigation.

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Revised Return



If the revised return u/s 139(5) has been filed voluntarily before detection and conduct of assessee is bona fide then penalty would not be leviable.- *100 ITR 524 Guj, 107 ITR 423 Ori, 156 ITR 638 Mad, 145 ITR 439 Cal, 108 ITR 746 All, 151 ITR 333 Raj, 144 ITR 259 Pb, 226 CTR 533 del.*

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

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Explanation-2 to section 271(1)(c)



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 assessee 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.

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Voluntary Surrender of Income



- The Deciding factor- time of surrender- whether before or after detection? Again depends of facts and circumstances of each case.
- Detection vis-à-vis general information/belief.
- **Sir Shadilal Sugar and General Mills Ltd. v. CIT [1987] 168 ITR 705:** *"There may be a hundred and one reasons for such admission, i.e., when the assessee realises the true position, it does not dispute certain disallowances, but that does not absolve the Revenue from proving the mens rea of a quasi-criminal offence"*
- **Santosh Narain Kapoor vs DCIT Citation 115 TTJ 402 (Luc)**

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Voluntary- Meaning



- **230 ITR 855: Bhairav Lal Verma Versus Union of India**, A full bench of Allahabad High Court while interpreting the word 'voluntarily' given in Section 273A held that 'voluntarily means out of free will without any compulsion.'

"But it cannot be held as a principle of law that the disclosure of income made after the search/raid cannot be voluntary. It is a question which has to be decided by the Department in each case on the basis of the material on the record."

"If on record there is incriminating material with regard to the disclosed income, the disclosure cannot be voluntary. But if the Department has no incriminating material with regard to the income disclosed, the disclosure is liable to be treated as voluntary...."

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Voluntary Surrender of Income



"For example, if an assessee is having five accounts and the Department has incriminating material with regard to one of those accounts only, the disclosure of income relating to four accounts with regard to which the Department has no incriminating material, is voluntary, because it was made without any constraint or compulsion, even though the disclosure of the income relating to the account regarding which the Department has incriminating material, is liable to be treated as non-voluntary."

Also Bajrang Glass Emporium.v. CIT 213 Taxman 25(Mag.) (All) (HC)

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Voluntary surrender



- **MAK Data P. Ltd Versus CIT-II (SC) dt. 30/10/2013**

“The AO, in our view, shall not be carried away by the plea of the assessee like “voluntary disclosure”, “buy peace”, “avoid litigation”, “amicable settlement”, etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income.

Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise.”

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Voluntary surrender



- **MAK Data P. Ltd Versus CIT-II (SC) dt. 30/10/2013**

“It is trite law that the voluntary disclosure does not release the Appellant-assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty.”

“We are of the view that the surrender of income in this case is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee.

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Estimated income



CIT vs Raja Bans Singh 276 ITR 351 (All) it was held that in absence of any material or evidence merely estimate of income does not attract penal provisions

In case of estimated additions, penalties are continued to be levied in almost every case on wrong view that every addition should entail penalty. In CIT v. Dhillon Rice Mills [2002] 256 ITR 447 (P&H), the High Court held that in a case of addition based upon estimated higher yield in manufacture and low gross profit, there can be no penalty unless the Income- Tax Department brings some thing on record to indicate that there has been concealment on the part of the assessee.

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Estimated income



CIT v. M.M. Rice Mills (2002) 253 ITR 17 (P&H):

Merely because the addition had been made to income under the proviso to section 145(1) of Income Tax Act, 1961 by adopting the view that the gross profit shown in the books of account was too low as there were defects in the method of accounting employed, it would not automatically lead to the conclusion that there was failure to return the correct income by means of fraud or gross or willful neglect.

Also see **CIT v. Whitelene Chemicals (2013) 214 Taxman 93(Mag.) (Guj.)(HC), 219 Taxman 93(Alld)(mag)**

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When 115JB applicable



Sec. 271(1)(c) : Penalty – Concealment - Book Profits - Income Computed less than Book Profits - (S. 115JB) - No Penalty

- *S. V. Kalyanam vs. ITO 327 ITR 477*
- *219 Taxman 90(Alld) (mag).*

Taxability u/s 115JB, loss under normal provisions, concealment, if any did not lead to tax evasion thus penalty under section 271(1)(c) could not be imposed.

- *CIT vs. Nalwa Sons Investments Ltd. 235 CTR 209*
- *ACIT v. SREI Infrastructure Finance Ltd. (2013) 154 TTJ 111 / 85 DTR 361 (Delhi)(Trib.)*

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Deemed Income 50C



“The AO has not questioned the actual consideration received by the assessee but the addition is made purely on the basis of deeming provisions of the Income Tax Act, 1961. The AO has not given any finding that the actual sale consideration is more than the sale consideration admitted and mentioned in the sale agreement . Thus it does not amount to concealment of income or furnishing inaccurate particulars of income.”

Renu Hingorani Vs ACIT (ITAT Mum).

CIT v. Madan Theatres Ltd (2013) 260 CTR 75(Cal.)(HC)

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Difference of Opinion



- ***CIT v. Vibros Organics Ltd. (2006) 206 CTR (Del) 582:*** Penalty deleted since there was a bonafide difference of opinion between assessing officer and assessee on the question of depreciation.
- ***CIT v. Harshvardhan Chemicals & Minerals Ltd. (2003) 259 ITR 212 (Raj)-*** when the assessee has claimed some amount though debatable, in such cases, it cannot be said that the assessee has concealed any income or furnished inaccurate particulars for evasion of the tax

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Disallowance of expenses



2009-TIOL-625-ITAT-DEL DCIT, Circle 13(1), New Delhi vs M/S Nokia India Pvt Ltd.

Penalty u/s 271(1)(c) - AO makes disallowance of various types of expenses and initiates penalty - CIT(A) does not agree - held, merely because some expenditures are disallowed, penalty cannot be imposed. Then, most of the disallowances are not sustainable, and therefore, no penalty is called for.

Also ***Dabwali Transport Company vs. ACIT (2010) 38 DTR 434 / 3 ITR 785 (Chd.)(Trib.)***

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Other Cases



S. 271(1)(c) : Penalty – Concealment - Affidavit of Chartered Accountant.

Assessee having offered an explanation as to why the impugned contract receipts could not be included in the relevant assessment year which is supported by an affidavit of his chartered accountant as well auditor's report in Form No. 3CD, CIT(A) and the Tribunal were justified in accepting the same and setting aside the penalty under section 271(1)(c).

- **CIT & Anr. vs. N. Nagaraj Ballal (2010) 33 DTR 156 (Kar.).**
CIT v. Somany Evergreen Knits Ltd. (2013) 352 ITR 592(Bom) (HC). Be cautious about section 278.(prosecution)

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Other Cases



S. 271(1)(c) : Penalty – Concealment - False Claim of Depreciation.

Assessee having entered in to an artificial arrangement of purchase and lease back transaction to evade tax liability and the transaction having found to be bogus penalty under section 271(1)(c) is leviable.

Ultramarine & Pigments Ltd. vs. ACIT (2010) 38 DTR 42 / 130 TTJ 31 (Mum.)(Trib.)

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Other Cases



- Low household expenses on estimate do not justify penalty *243 ITR 812 (Guj)*.
- Where no books are maintained penalty u/s 271A can be imposed but no penalty u/s 271B can be imposed . *Commissioner of Income Tax , Bareilly vs Bisuali Travels 299ITR 219 (All)*.

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Limitation proviso to section 275(1) Insertion w.e.f. 01.06.2003



- Contradictory Views
- It applies to all cases whether an appeal has been filed with the ITAT or not *Tarlochan Singh & Sons (HUF) V. ITO. 2008-(114)-TTJ-0082 (ASR)*
- It applies only to cases where finality has been achieved by CIT(A) and no order is pending with ITAT **2009-TIOL-554-ITAT-DEL**
- High Court (Mad) **288 ITR 452 Rayala Corpn.Vs Union of India**. Has taken a similar view in a writ petition.

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Limitation proviso to section 275(1) Insertion w.e.f. 01.06.2003



- Order of CIT(A) part relief not contested by both the parties in ITAT balance issues contested. Assessee argued that for the part the limitation has expired as per proviso held against that the main provision shall apply- *Eicher Goodearth Ltd vs. ACIT 112 TTJ 268 (Del)*

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Miscellaneous Issues



- Whether assessee is entitled to a fresh notice, fresh opportunity upon change of incumbent?
- Whether penalty proceedings are valid even after the death of the assessee and are enforceable through the legal heir?
- Whether Penalty proceedings can be initiated upon a direction being issued by the CIT by invoking provisions of section 263?
- No penalty when summons issued to firms or companies and not to specified person. 58ITD85

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Penalty For Non Compliance Of Provisions Of Section 269SS And 269T

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Objective of Sections 269SS and 269T



The Apex Court in the matter of *A.D.I (Investigation) v. Kumari A. B. Shanthi [2002] 255 ITR 258* said :

"The object of introducing section 269SS is to ensure that a taxpayer is not allowed to give false explanation for his unaccounted money, or if he has given some false entries in his accounts, he shall not escape by giving false explanation for the same. During search and seizures, unaccounted money is unearthed and the taxpayer would usually give the explanation that he had borrowed or received deposits from his relatives or friends and it is easy for the so-called lender also to manipulate his records later to suit the plea of the taxpayer. The main object of section 269SS was to curb this menace.

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Reasonable Cause- Penalty Not Leviable

- *CIT v. Manoj Lalwani [2003] 260 ITR 590 (Raj)*: where cash loan was taken and deposited in bank to meet out urgent demand for time bound supply.
- *CIT v. T.R.Rangarajan [2005] 279 ITR 587 (Mad)*: Cash loan taken from a relative on a Sunday.

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Reasonable Cause- Penalty Not Leviable



- *CIT v. Kundrathur Finance and Chit Co. 283 ITR 239*: borrowings from persons who did not have bank accounts.
- *Jitu Builders Pvt Ltd Vs ACIT, Surat*- Assessee, real estate developer negotiates land deal, borrows cash fund to close the deal on beneficial terms. The deal falls through and cash is deposited in bank and an account payee cheque issued to the entity which lent the cash to the assessee.

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Issues



- Advance received in cash against supplies- whether liable for penalty u/s 271D?

CIT v. Khairati Lal and Co. (2004) 270 ITR 445 (P&H)

- Share application money received in cash, whether liable for penalty u/s 271D?

Favour: Jagvijay Auto Finance (P.) Ltd. v. Asstt. CIT [1995] 52 ITD 504 (Jp.),

- Share Application money *bonafide* belief that not a loan or advance- no penalty 304 ITR 417 (Mad).

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Miscellaneous Penalties

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Miscellaneous Penalties



Section	Nature of default	Quantum
271(1)(b)	Failure to comply with notice issued u/s 142(1), 143(2) etc.	10000/- for each failure
271A	Failure to keep, maintain or retain books of account, documents etc. as required by section 44AA	25000.00
271AA	Penalty for failure to keep and maintain information and document in respect of international transaction or SDT, failure to report such transaction or furnishing of incorrect information or document.	2% of the value of each international transaction
271B	Failure to get accounts audited u/s 44AB	0.50% of turnover or Rs.150000, whichever is lower
271B	Failure to furnish tax audit report as required by section 44AB	

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Miscellaneous Penalties



Section	Nature of default	Quantum
271BA	Failure to furnish a report of international transactions/SDT as required u/s 92E	Rs.100,000/-
271F	Failure to Furnish Return of Income before end of assessment year	5000.00
271FA	Failure to furnish AIR within prescribed time, prior to issue of notice	Rs.100/- per day of default
271FA	Failure to furnish AIR within time prescribed in notice issued u/s 285BA(5)	Rs.500/- per day of default
271G	Failure to furnish information in respect of an international transaction or a SDT as required u/s 92D	2% of the value of each international transaction

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Miscellaneous Penalties



Section	Nature of default	Quantum
272A(1)(a)	Refusal to answer questions put up by an Income tax authority w.r.t. his assessment	10000/- for each failure/ Default
272A(1)(b)	Refusal to sign any statement that he may legally be required to sign	
272A(1)(c)	Failure to attend, produce books of accounts/documents at the place and time specified in a summons issued u/s 131(1)	
272A(2)	Several procedural lapses, for example a. Failure to furnish information as required u/s 94(6) b. Failure to give notice of discontinuance of business or profession u/s 176(3). c. Not allowing inspection of registers of a company by an Income tax authority u/s 134 etc.	Rs.100 per day of default

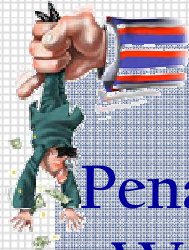
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Miscellaneous Penalties



Section	Nature of default	Quantum
272B	Failure to obtain PAN required u/s 139A or failure to quote PAN as prescribed, quoting of incorrect PAN	10000/-
140A(3)	Failure to pay whole or any part of the tax payable on self assessment	Amount up to the tax in arrears
221(1)	Failure to make payment of tax within prescribed time	Amount up to the tax in arrears

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Penalty For Non Compliance With TDS/TCS Provisions

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Penalties



Section	Nature of default	Penalty
272B		
272BB(1)	Failure to obtain TAN within prescribed time	10000.00
272BB(1A)	Quoting of wrong TAN in certificates, challans or statements	10000.00
271C	Non Deduction of tax at source	Amount of TDS not/ short deducted
271C	Short deduction of tax at source	
271CA	Failure to collect Tax at source	Amount of TCS
221(1)	Failure to deposit tax deducted at source	Amount upto TDS amount
271H	Non Filing of Quarterly Return of TDS	Rs.10000 to Rs.1 lac
271H	Late Filing of Quarterly Return of TDS- If filed after one year from the time prescribed for filing	

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THANK YOU

 ***Please mail your
comments to
carajivmehrotra@gmail.com*** 

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