

# Penalty u/s. 271 (1)(C) and other Penalties

**Upendra J Bhatt**

**Advocate**

## **1. PREAMBLE**

Now a days, if any addition is made in the returned income, the assessing officers invariably issue penalty notice u/s. 271 (1) (C) though the penalty is not leviable as per settled legal pronouncements. Such notices increase the work of assessee's, appellate authorities and tax recovery officers. In this penalty paper, I have tried to cover the decisions in favour of the assessee and against the assessee. Other view may be possible, so before relying on any judgment, the facts of the case of the assessee must be verified.

## **2. Section 271 (1) (C)**

**A.** As per the wordings of this section, "If the assessing officer or the commissioner appeals or the commissioner in the course of any proceeding under this act, is satisfied that any person-

has concealed the particular of his income or furnished inaccurate particulars of such income", penalty is leviable.

Minimum penalty leviable is 100% of the tax sought to be evaded and maximum penalty leviable is 300% of the tax sought to be evaded by reason of the concealment of particulars of income, or furnishing inaccurate particulars of such income.

**B.** As per explanation 1 of this section, if the assessee offers no explanation or the explanation offered by the assessee is found by the assessing officer, CIT (A) or CIT to be false or

**C.** Such person offers an explanation but is not able to substantiate and fails to prove that such explanation is bonafide and all the facts relating to the same and material to the computation of his total income have been disclosed by him, penalty will be leviable.

- D.** As per explanation 4 of this section, if on account of addition there is reduction of loss, such addition will be consider as positive income and penalty will be leviable.

Thus as per section 271 (1) (C), penalty is leviable for concealment of income or furnishing inaccurate particular of such income.

### **3. Word Concealment**

Word concealment has been discussed by Honorable Supreme Court in the case of **Dilip N. Shroff V/s. JCIT reported in 291 ITR 519 (relevant page 546).**

Word Conceal according to law lexicon is “to hide or keep secrete, to hide or withdraw from observation, to cover or keep from sight, to prevent the discovery of, to withhold knowledge of”.

A as per Webster’s Dictionary word “Inaccurate” has been defined as “Not accurate, not exact or correct, not according to truth, erroneous, as an inaccurate statement, copy of transcript”. Thus in concealment, there is direct attempt to hide an item of income or a portion thereof from the knowledge of the Income Tax authorities”.

In concealment there is suppression of truth by the assessee. In the case of **K.C. Builders V/s. ACIT reported in 265 ITR 562 S.C.,** it was held that word concealment inherently carried with it the element of **mens rea**. Concealment is attributable to an intention or desire on the part of the assessee to hide or conceal the income to avoid imposition of tax thereon. Thus if the income is not disclosed, it is the act of concealment but if the bogus transactions are recorded in the books of account and wrong deductions are claimed, it is the act of furnishing inaccurate particulars of income. In some cases there is element of concealment of income as well as furnishing inaccurate particulars of income. Where there is a failure of duty to disclose fully and truly particulars of income, the penal provision would operate as held in the case of **A.M. Shah & Co. V/s. CIT reported in 238 ITR 415 Gujarat High Court.**

As held in the case of **Peizer Ltd V/s DCIT by ITAT, Mumbai ‘C’ Bench reported in 146 TTJ 385**, “In concealment some income is not offered for taxation. Thus there is direct attempt to hide income or a part thereof. In furnishing in accurate particulars of income though certain income is offered for taxation but some other means have been employed for withholding the discloser thereof. This is indirect way of keeping back some part of income. In both the cases there is evasion of tax.

#### **4. Charge should be specific**

- A.** If there is offence of concealment of income as well as furnishing inaccurate particular of income thus when both the offences are committed by the assessee, the assessing officer should issue notice for both the offences. If the notice is issued for only one offence i.e. concealment of income, penalty for other offence i.e. furnishing of inaccurate particular of income cannot be levied. Such act of the assessing officer cannot be sustained in law. This was the view of Gauhati High Court in the case of **Padma Ram Bharali V/s. CIT reported in 110 ITR 54**.
- B.** If the notice of penalty for concealment of income is issued by the assessing officer, the IAC (at present known as Add CIT / JCIT) cannot levy penalty for furnishing inaccurate particulars of income. This was held in the case of **CIT V/s. Lakhdhir Lalji reported in 85 ITR 77 Gujarat High Court**. The same view was also expressed in the case of **K M Bhatia V/s. CIT reported in 193 ITR 379 Gujarat**.
- C.** Order of penalty must clearly state whether penalty levied is for concealment of income or for furnishing inaccurate particulars of income. If in the order it is mentioned that penalty is levied for one of the offences, such order is not valid. It was held in the case of **New Sorathia Engineering Co. V/S. CIT reported in 282 ITR 642 Gujarat**.

## **5. Satisfaction of the Assessing officer**

### **A. Satisfaction is basis for penal proceedings**

Before penalty notice is issued, person issuing notice must be satisfied that a person committed the default. Thus satisfaction of I T Authority constitutes the basis and foundation of the proceedings for levy of penalty. After satisfaction, charge must be specific that, there was concealment of income or furnishing of inaccurate particulars of such income. As held in the case of **D.M. Manasvi V/S. CIT- Gujarat II reported in 86 ITR 557 S.C.**

### **B. Satisfaction of Income Tax authority that default is committed by the assessee**

What is the crucial date for deciding levy of penalty ? The crucial date is the satisfaction of I T Authority in the course of any proceedings that a default has been committed by assessee which attracts the provision of penalty. In the case of **Maya Rani Punj V/S. CIT reported in 157 ITR 330 S.C. (THREE JUDGES) on 11-12-1985** return was relating to A.Y.1961-62 (under the I T Act of 1922) which was filed after 7 months. The penalty was leviable for late filing of return. It was held that penalty under the Act of 1961 u/s. 271 (1) (a) was leviable.

### **C. If satisfaction is missing in the assessment order, no penalty is leviable**

Satisfaction of the I T Authority regarding concealment of income or furnishing inaccurate particular must be clearly spelt out in the assessment order. If the satisfaction is missing in the assessment order, no penalty could be levied. It was held in the case of **CIT V/S. Super Metal Re-Rollers reported in 265 ITR 82 Delhi.**

### **D. Element of satisfaction should be apparent. Court cannot go in the mind or file of ITO**

Sometimes in many assessment orders, we find that there is no recording of satisfaction in the assessment order but it is mentioned

that, “penalty proceedings are separately initiated”. Element of satisfaction should be apparent on the order of the assessing officers. The courts cannot go into the mind of I T authorities or trace reasons from files of such authorities. Such order is ex facia invalid. This was the view in in the case of **Commissioner of Income Tax V/S. Vikas Promoters Pvt. Ltd. Reported in 277 ITR 337 Delhi.**

**E. A O to form his opinion. No opinion or satisfaction recorded. No penalty leviable**

In the case of **Commissioner of Income Tax V/S. Auto Lamps Ltd. reported in 278 ITR 32 Delhi**, it was held that assessing officer has to form his own opinion and record his satisfaction before initiating penalty proceedings. No opinion was formed or satisfaction was recorded by Assessing officer before or at the time of initiating penalty proceedings in this case. It was held that imposition of penalty was not justified.

**F. Indication in assessment order sufficient**

- i.** If in the assessment order the assessing officer mentioned that he is satisfied that the assessee has committed a default which is liable to penalty. This indication is sufficient. It was held in the case of **M. Sajjanraj Nahar Vs Commissioner of Income-Tax reported in 283 ITR 230 Madras.**

**ii. No particular form or manner of satisfaction**

Satisfaction need not be recorded in any particular manner. If there is note in assessment order that penalty proceedings are to be initiated, it is sufficient. This was the view of Allahabad High Court in the case of **Nainu Mal Het Chand Vs Commissioner of Income-Tax reported in 294 ITR 185 Allahabad.**

**G. Mistake of satisfaction cannot be rectified**

If Penalty is initiated for filing inaccurate particulars of income but levied for concealment of income, this mistake cannot be rectified u/s.

254(2) by ITAT. This was held in the case of **ITO V/s. Chhail Behari reported in 129 TTJ 389 Agra Bench.**

## **6. Intention of the assessee**

In penal proceedings, intention of the assessee is very important. If the intention of the assessee is found to be genuine but the default is on account of bona fide belief, the act of the assessee and subsequent conduct of the assessee etc. is also important and same should be kept in mind at the time of passing order of penalty for concealment. Land mark decisions were given in the following cases should be considered at the time of filing reply of penalty u/s. 271(1)(C).

### **A. Technical and venial default under bona fide belief**

**Hindustan Steel Ltd. V/S. State of Orissa reported in 83 ITR 26 S.C.**

In this case, the assessee was under bonafide belief that, he was not a dealer and failed to register as a dealer. The Honorable Supreme Court held that “An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will 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. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute”.

\* **This judgment is followed in number of cases. As per this decision, if there is deliberate defiance of law or conscious disregard of obligation, the penalty could be levied. Even if**

**minimum penalty is leviable the same should not be levied for technical or venial breach.**

**B. Freight not taxable under bona fide belief and not included in the turnover**

Some times the assessee does not include certain items in his amount if turnover under bona fide belief that the same do not form part of turn over i.e. amount of freight, cartage, insurance etc. If the assessee proves that under bona fide belief the same was not included in turnover, no penalty should be levied.

In the case of **Cement Marketing Co. V/S. Comm. of Sales Tax reported in 124 ITR 15 S.C.**, there was omission on the part of the assessee to include the amount of freight for the purpose of Sales Tax as per M.P. General Sales Tax Act. Act of the assessee was not deliberate. It was held by the Apex court that the return of the assessee was not false and no penalty could be levied. Same ratio is also application in Income Tax proceedings.

**C. Total mistake by accountant**

In old days when the accounts were maintained manually, totaling mistakes were noticed. Now almost all the accounts are maintained on computer so such mistakes hardly accure. Due to software problem ever other grater mistake may accure, but if it is proved by the assessee that the mistake was not committed with the consent or knowledge of partner / director, it is a reasonable cause and in such cases penalty is not leviable. Kindly refer **Commissioner of Income-Tax Vs Pitambardas Dulichand (Mp) reported in 273 ITR 271 M.P.**

Totaling mistakes does not happen in computer accounting but even more serious mistake may take place. In such cases this judgment can be useful.

**D. Claim on the basis of advise of counsel. Affidavit of counsel filed**

Assessee's claim exps. deductions exemptions, allowance etc in the return on the basis of advise of their tax consultants. If such claim is rejected, whether penalty is leviable ?

Under such circumstances the assessee should obtain affidavit of their counsel, admitting his mistake. If this is done, no penalty u/s. 271 (1) (C) is leviable.

In the case of **CIT V/s. Deepak Kumar reported in 232 CTR 78 P&H 0020** the assessee claimed his income exempted u/s. 10 (36) on the basis of advise of his counsel. Claim of exemption was rejected. In penal proceedings the assessee filed affidavit of his counsel admitting his mistake. Penalty was cancelled looking to the facts of the case.

**E. Rejected goods not included in the closing stock under bona fide mistake**

As per accounting practice, goods purchased or sold is required to be entered in the books of account. If this is not done, the book result does not reflect true and correct picture of income. If goods sold are rejected, the same is required to be shown in closing stock if not sold. If this is not done under bona fide mistake. Penalty is not leviable. Authority : **CIT Vs Jagjit Engineering Works P. Ltd. reported in 275 ITR 239 P&H.**

**F. Claim of wrong Index due to mistake by the assessee**

Sometimes while preparing computation of total income, small mistakes may take place like date of acquisition of asset cost inflation Index, gain on which security transaction tax paid / not paid etc. If the particulars are furnished in the computation but there is mistake in calculation, this act does not amount to concealment.

In the case of **Udayan Mukherjee Vs Commissioner of Income-Tax reported in 291 ITR 318 Calcutta**, it was held that if particulars are furnished and there is mistake in calculation, it does not amount to concealment. In this case wrong indexation was taken due to mistake



by the assessee. There is distinction between furnishing of wrong particulars and making a wrong calculation on the basis of particulars furnished.

**G. Claim on the basis of case law**

There are many judgments on the issues on which different High Courts have taken different views i.e. depreciation issue. Concept of put to use and ready to use etc. If assessee puts any claim of deduction / allowances / exps. etc on the basis of certain case law under bona fide belief, but the assessing officer makes addition on different interpretation, whether penalty for concealment could be levied ?

In the case of **CIT Vs Caplin Point Laboratories Ltd. reported in 293 ITR 524 Madras** the assessee company considered interest income as business income and claimed deduction u/s. 80HHC and 80I. Claim of assessee was not accepted and addition was made. It was held that, it cannot be said that the assessee concealment particulars of income or furnished inaccurate particulars of income.

**H. Bona fide claim of the assessee rejected**

When the entire facts are disclosed and there is no concealment of particular of income and bona fide claim of the assessee is rejected it does not amount to concealment.

Authority : **CIT Vs. Haryana Warehousing Corporation reported in 25 DTR Pg. 194 P&H.**

**7. Penalty is different from assessment**

**A. Finding in assessment proceedings not conclusive. Issue to be looked differently in penalty proceedings**

When in the assessment order, additions are made, it is the tendency of the assessing officer to impose penalty for concealment of income/furnishing of inaccurate particulars of income. At the time of levy of penalty, the approach of the assessing officer should be

judicious. In the assessment proceedings if there is claim of expenses, allowances, deductions etc. it is the duty of the assessee to prove that they are rightly claimed or the credits are genuine, In penalty proceedings, it is the duty of assessing officer to prove that the assessee concealed the particular of income/furnished inaccurate particular of such income. In the penalty proceedings the assessee can adduce additional/further evidence or proof. Finding in assessment proceedings are not conclusive. Disallowance in assessment order constitutes good evidence but the same cannot be regarded as conclusive for the purpose of penalty proceedings. This view was taken in the case of **CIT Madras V/S. Khoday Eswarsa & Sons reported in 83 ITR 369 S.C.** and followed in the cases of

1. CIT vs. Vinaychand Harilal  
120 ITR 752, Gujarat
2. Anathram Veerasinghaiah & Co. V/s. CIT  
123 ITR 457, S.C.
3. Banaras Textorium V/s. CIT  
169 ITR 782 Allahabad
4. National Textile V/s. CIT  
249 ITR 125, Gujarat

**B. Additional evidence / new evidence can be produced**

Penal proceedings are separate from assessment proceedings. The evidences which were not available or could not be produced during the assessment proceedings can be given/produced during penalty proceedings i.e. In case of cash credit, certain paper could not be furnished, can be furnished in penalty proceedings. Even new plea may be taken by the assessee as held in the case of **K.R.S. Guru Murthy V/s. CIT reported in 96 ITR 404 Madras**. The same view was expressed in the case of **Prasanna Enterprises V/S. CIT reported in 244 ITR 188 by Karnataka High Court**.

**C. Approach of the assessing officer. Penal proceedings not to be initiated to harass the assessee. A O to consider the matter afresh and from a different angle**

It is observed that, approach of the assessing officers in penal proceedings is not judicious though detailed reply is given by the assessee that no penalty is leviable looking to the facts of the case and settled position of law is also brought to the notice of the assessing officer. Still without passing a speaking order or dealing with the contentions of the assessee, the penalty orders are passed stating that the reply given the assessee is not convincing and the authorities relied are not applicable in the case of the assessee. This approach of the I T authorities requires total change.

It was held in the case of **Dilip N. Shroff V/S. Jt. CIT reported in 291 ITR 519 S.C.** that approach of the assessing officer has to be fair and objective in the matter of imposition of penalty. Imposition of penalty is not automatic. **Penalty proceedings are not to be initiated merely to harass the assessee.** In the penalty proceedings, the authority must consider the matter afresh as the question has to be considered from a different angle.

**D. Penalty proceedings are quasi-criminal in nature, and the matter is to be decided on a preponderance of probabilities**

Penalty proceedings are quasi-criminal in nature, and the matter is to be decided on a preponderance of probabilities. As penalty proceedings are different from assessment proceedings, the assessee can give evidence in penal proceeding to show that failure to return the correct income was not due to any fraud or gross or willful neglect on his part. This view was taken in the case of **CIT V/s. M Habibullah reported in 136 ITR 716 Allahabad.** The same view was taken in the case of **CIT V/s. Service Iron and Steel Rolling Mills reported in 178 ITR 589 P&H, CIT V/s. Sohanlal Savindersingh Jagadhri reported in 178 ITR 628 P&H, Hotel And Allied Trades P.Ltd V/s. CIT reported in 221 ITR 619 Kerala**

**8. If explanation of assessee found satisfactory in appeal no penalty leviable**

**A.** In assessment proceedings, if explanation of the assessee is not accepted, the additions are made and penalties are also levied. In appeal proceedings if the appellate authority is satisfied that the assessee discharged his onus with regard to addition made in the assessment order, the appellate authority will be justified in deleting penalty.

**B. Explanation of the assessee satisfactory in penal proceedings. No penalty leviable**

During assessment proceedings, any document / evidence / paper or account filed by the assessee is not found to be satisfactory to the assessing officer, the same is rejected and addition is made in the returned income and penal proceedings are initiated.

At appellate stage same papers which were filed at the time of assessment proceedings are found to be adequate or satisfactory to the appellate authority and the addition is deleted by him / her, no penalty will be leviable.

In the case of **Commissioner of Income-tax Vs Nipani Tobacco Stores reported in 145 ITR 128 Patna** explanation of the assessee with regard to cash credit was not accepted in the assessment proceedings and the amount of cash credit was assessed as income but at the appellate stage assessee's explanation in assessment proceedings was found to be sufficient to discharge onus. When no material was provided by the department proving concealment of income, the penalty was cancelled.

**C. Explanation of the assessee found to be bona fide and not false**

In the case of **CIT V/S. P. Govindasamy reported in 263 ITR 509 Madras** the explanation offered by the assessee was not found to be false and the same was found to be bona fide, in such circumstances levy of penalty was not justified.

**9. Burden on the department to prove concealment. If to be discharged by assessee, it is light**

Penalty proceedings are separate from assessment proceeding. In penalty proceedings, burden lies on the department to establish that assessee has concealed his income because order of imposing of penalty is quasi-criminal in nature. Even when the burden is required to be discharged by the assessee, it would not be heavy as that on the prosecution. This was the view of the Honorable Supreme Court in the case of **T. Ashok Pai V/S. CIT reported in 292 ITR page 11.**

**10. Disallowance of expenses**

- A.** When there is disallowance of exps., penalty u/s. 271 (1) (C) is invariably levied.
- B.** In the return of income if the assessee has made correct claim and which is not found to be incorrect by the assessing officer, and even if assessee has made incorrect claim, it does not amount to concealment of particulars of income.

**C. False / Incorrect Claim**

If information given in return is not found to be incorrect, simply by making incorrect claim, it does not amount to concealment of particulars. By no stretch of imagination, making an incorrect claim tantamount to furnishing inaccurate particulars. When the details supplied by the assessee in the return are not found to be incorrect or erroneous or false, there is no question to invite penalty u/s. 271 (1) (C). A claim which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars of income by the assessee. This was held in the case of **CIT V/s. Reliance Petroproducts repored in 322 ITR 158 S.C. / 230 CTR 210 S.C.**

**D. Revenue V/s. Capital expenditure**

If the expenses incurred by the assessee are claimed as revenue expenses in the return of income but the same are considered by the assessing officer of capital nature, it was held in the case of **CIT V/s.**

**Gujarat Textile Co. Pvt. Ltd. reported in 99 ITR 514 Gujarat** that no penalty u/s. 271 (1) (C) was leviable.

**E. Conscious and Deliberate Act**

Act of concealment should be conscious and deliberate. If there is inference that assessee has not furnished inaccurate particulars with regard to such items, simply on account of disallowance of claim of expenditure will not amount to furnishing inaccurate particulars of income.

Authority : **Additional Commissioner of Income-tax V/s. Delhi Cloth and General Mills Co. Ltd. reported in 157 ITR 822 Delhi.**

**F. Expenses not allowable from commercial point of view**

In the case of **CIT V/S. Inden Bislars reported in 240 ITR 943 Madras**, substantial amount was given as commission to the firms in which two of the partners were also partners. As there was no fraud and in absence of other evidence, the penalty was cancelled. It was held by Madras High Court that, if there are additions to income, it does not mean that there has been concealment of income. If a particular expenditure was not justifiable from a commercial point of view and addition is made in the income, penalty u/s. 271 (1) (C) could not be levied. In penalty proceedings the department has to prove that there was fraud or willful neglect on the part of the assessee. The dept. has to adduce evidence for concealment of income.

**G. Lease rent business for only 10 days**

**Payment of lease rent not disputed. Rejection of claim**

All the additions in the returned income does not automatically amounts to concealment even though the addition is not disputed in appeal. Other factors also need consideration before penalty is levied.

In the case of **Balaji Vegetable Products P. Ltd. Vs CIT (Kar) reported in 290 ITR 172 Karnataka**, the assessee entered into an agreement of leave and licence. The assessee ran the factory for hardly 10 days. As the licensor was heavily indebted to a bank, the bank took

possession of all the assets. The assessee claimed Rs.12 Lacs being payment towards lease rent. The assessing officer added Rs.12 Lacs. The assessee paid tax on this addition. The assessing officer also levied penalty.

The Karnataka High Court held that the circumstances must show that the assessee had an intention to conceal the income and to evade payment of tax. Payment of Rs.12 Lacs was not disputed by revenue. Simply because the claim of the assessee was refused by the revenue would not automatically justify levy of penalty.

#### **H. Expenses on vouchers**

##### **Survey. After survey revised return filed. Exps incurred**

Many times genuine expenses are incurred by the assessee for the purpose of business but in many cases the receipts is not obtained from the third party.

The expenses are incurred in the normal course of business and for the purpose of business the assessing officer get a chance to make lump sum addition on account of such reason. They also issue penalty notice u/s. 271 (1) (C). Whether penalty in such cases is leviable?

In the case of **CIT Vs Cafco Syndicate Shipping Co. (Mad) reported in 294 ITR 134 Madras**, the assessee filed original return declaring income of Rs.727150/-. There was a survey and in survey operation it was found that certain expenses were incurred on vouchers and not supported by third party receipts / vouchers. After survey, the assessee filed a revised return declaring income of Rs.2993050/-. Thus Rs.2265900/- was offered for tax.

It was held by Madras High Court that the expenditure was incurred by the assessee but it was not able to produce proper vouchers for exps. incurred but this would not amount to concealment of income.

**I. Expenses incurred. No proof that amount received back by the assessee**

**Income surrendered by assessee**

Assessee debits certain expenses in his books of accounts. The expenses are genuinely incurred. In scrutiny assessment the assessee is required to prove such exps. If the person to whom the payment of exps is made is either not willing to appear before the assessing officer or according to the view of assessee if such person is called on summons to appear before the assessing officer, his business with that person may suffer so in the interest of business and to maintain good relation with his business associate, he agrees for making addition of such income. Whether penalty u/s.271 (1) (C) is leviable in such cases ?

In the case of **Star International P. Ltd. V/S. ACIT reported in 308 ITR 33 Lucknow Bench**, commission was paid by bearer cheques on sale of machines. On inquiry by assessing officer, by issuing show cause notice, the assessee surrendered certain amount as income. It was not proved by the department that, the claim of commission was bogus or the amount was received back by the assessee. In these circumstances it was held that no penalty was leviable.

**J. Payment to sister concern, genuineness of expenditure not doubted**

Payments made to relative is required to be shown in Audit report. Assessing officer has power u/s. 40A 2 (b) to disallow unreasonable claim with regard to the fair market value of the goods, services or facilities for which payment is made. Before rejection the claim, the assessing officer should prove with cogent documents that the payment was not reasonable.

In the case **Jhavar Properties Pvt Ltd V/s. ACIT reported in 317 ITR 278 Mumbai ITAT**, Payment was made to Sister concern for job work done. It was held by the assessing officer that the payment was excessive and not allowable as per section 40A (2) (b).



It was the contention of the assessee that, the assessing officer restricted the quantum of amount u/s. 40A (2) (b). He has not doubted the reasonableness of payment made to the sister concern. The discloser of particular of the transaction was made by the assessee and it was sufficient in law. The assessee furnished correct details. The genuineness of the expenditure and the incurring of the expenditure was not disputed by the assessing officer. It was held in this case that disallowance of exps. u/s. 40A (2) (b) does not amount to furnishing of inaccurate particulars. No penalty u/s. 271 (1) (C) was leviable.

**K. Reduction of exps. on estimated basis**

**Estimate by assessee V/s. estimate by A O claim on the basis of advise of CA**

In the case of **Commissioner of Income-tax Vs Escorts Finance Ltd. (Del) reported in 328 ITR 44 Delhi**, the assessee claimed entertainment exps. @ 50% and the same was reduced @ 35% by the assessing officer. It was held by Delhi High Court that, the difference was only on account of estimate made by the assessee and the other estimate made by the assessing officer. It was the plea of the assessee that the claim was put on the basis of opinion of the chartered accountant. The claim was not bogus. Under such circumstances, penalty could not be levied.

**L. Claim of exps. in 1 year allowed in another year**

If the claim is disallowed in one year but the same is allowed in the subsequent year, penalty u/s. 271 (1) (C) is not leviable as held in the case of **AT&T Services India Pvt Ltd reported in 42 DTR 22 Delhi Tribunal**.

**M. Suppression of Purchases & Sales**

**Search case. Assessee could not prove suppression of purchases and sales**

If there is suppression of purchases / sales, it is the duty of the assessee to prove that there was no suppression of purchases or sales

and the difference was on account of guess work on the part of the assessing officer. In the case of **Commissioner of Income-Tax Vs Satish Medical Agencies reported in 277 ITR 394 Allahabad**, it was held that, the assessee could not prove that there was no willful or gross negligence on its part in disclosing the income. The onus cast on the assessee was not discharged by the assessee.

In this case there were search proceedings and purchases / sales were found suppressed. In this case penalty leviable was confirmed.

**N. Documents for expenses disallowable u/s.40(a)(ia) furnished by assessee, explanation also offered which was bona fide, no penalty leviable**

In the case of **ACIT V/s. Medersity Online Ltd. reported in 145 TTJ 398 Hyderabad**, it was held that, assessee having furnished all the relevant material facts and also filed audit report in the statutory form and also offered an explanation in relation to disallowance of expenses u/s. 40(a)(ia) which could not be said to be not bona fide. The assessee can not be said to be guilty of concealment of income or furnishing of inaccurate particulars thereof merely because certain expenses have been disallowance u/s. 40(a)(ia) and therefore, no case of imposition of penalty u/s. 271(1)(C) is made out.

**11. Addition on estimated basis**

In the assessment order, additions are made on account of estimation of income like rejection of yield, disallowance of expenses, GP addition etc. When notice for rejection of book result is received by the assessee and when the assessee is subject to audit under the I T Act, VAT Act. Essential commodities Act etc, it should be brought to the notice of assessing officer. Position with regard to penalty u/s. 271 (1) (C) is discussed here under :

**A. Estimate of income / Rejection of book result**

**i. No fraud or willful neglect**

Sometimes due to lack of knowledge of accounts or law, assessee are not maintaining proper books of accounts or proper details etc. In

such cases assessing officer has power to refer the case to the Chartered Accountant to get the books of accounts audited u/s. 142 (2A) to ascertain correct income of the assessee. If the case is small, he may estimate the income and assessee the income.

In the case of **CIT V/s. K.L. Mangal Sain reported in 107 ITR 598 Allahabad**, the books of accounts were not regularly maintained for Truck and Timber business and the assessing officer estimated income by applying flat rate and levied penalty. It was held that though the books of accounts were rejected, it could not be held that the assessee was guilty of fraud or gross or willful neglect. The penalty was rightly quashed by the Tribunal.

**ii. Accounting practice accepted by department for several years**

- a. In the case of **Naranbhai Virbhai And Co. V/s. CIT reported in 203 ITR 1017 Gujarat**. Assessee was doing agricultural activities as well as doing mfg of bricks. Accounting practice followed by the assessee was accepted by the department for several years. Assessing officer added certain amount being payment to self. It was held in this case that it could not be said that the assessee disclosed incorrect particulars or there was failure to return the correct income. There was no gross or willful neglect on the part of the assessee. Penalty could be levied.
- b. If looking to the nature of business, particular method of accounting is adopted by the assessee but the assessing officer is not satisfied with the method of accounts kept by the assessee and the book result is rejected, there is no failure to return correct income due to fraud, gross or willful neglect. This was held in the case of **CIT V/s. Mohammed Yakub Mohd. Ibrahim & Co. reported in 143 ITR 67 Bombay**.

**iii. Assessing Officer and ITAT adopted different estimates, there is no concealment**

Sometimes assessing officers estimate sales and gross profit of the assessee and assessee the income. Appellate authority adopts

different method and estimate the income. Whether penalty for concealment could be levied in such cases ?

In the case of **Harigopal Singh V/S. CIT reported in 258 ITR 85 P&H** the assessee filed his return disclosing income of Rs.52000/- on estimated basis. This income was assessed at Rs.207500/- by estimating assessee's Sales and GP. The Tribunal reduced it to Rs.150000/-. It was held by P&H High Court that, for levy of penalty u/s. 271 (1) (C), it is necessary that there must be concealment by the assessee of the particulars of his income or furnishing of inaccurate particulars of such income. As the assessing officer and ITAT adopted different estimates for income of the assessee, it could not be said that assessee concealed the particulars of his income so that to attract penalty u/s. 271 (1) (C).

**iv. Addition reduced in appeal. Case of estimate V/s. estimate by different authorities. No concealment**

In the case of **CIT V/S. Raj Bans Singh reported in 276 ITR 351 Allahabad**, the assessee was a lawyer and also having income from Truck business. Assessee declared net income of Rs.375/-. The assessment was completed on Rs.19350/- which was reduced to Rs.14350/-. In the subsequent year also there was addition to income which was reduced in appeal. It was the view of Tribunal that it was a case of an estimate against an estimate and there was no concealment. It was held by Allahabad High Court that there was finding of Tribunal that there was no concealment and hence penalty u/s. 271 (1) (C) was not leviable.

**v. Record seized by police. Assessing Officer not able to obtain papers from police. Income estimated. No penalty for furnishing in accurate particulars**

In some cases it is noticed that the record of the assessee is in the custody of some Central or State Government authorities like Excise department, Sales Tax department etc and in absence of such record

or limited record assessments are framed on estimated basis. Whether penalty u/s. 271 (1) (C) could be also levied ?

In the case of **Commissioner of Income-tax Vs Aero Traders P. Ltd. reported in 322 ITR 316 Delhi**, return of loss of Rs.8364468/- was filed in response to notice u/s. 148. In the note attached with the return of income, it was stated by the assessee that, it was impossible by assess to substantiate its claim of loss by way of any evidence as the relevant records were seized by police authorities. Even the assessing officer was not able to obtain copy to seized documents. The assessing officer on the basis of limited documents obtained / provided by the assessee assessed the income at Rs.6100000/-. Penalty u/s. 271 (1) (C) was also levied on the ground of furnishing inaccurate particulars of income. Both the appellate authorities decided in favour of the assessee on the basis of facts of the case. The same view was expressed by Delhi High deciding that it was a purely finding of fact.

**vi. Estimation of income on percentage basis, no concealment of income**

If the assessment is framed on the basis of estimation on certain percentage of turnover and there is finding of ITAT that difference in returned income and assessed income was on account of estimate of income by the assessing officer, no penalty u/s. 271 (1) (C) is leviable. This was held in the case of **CIT V/s. Madhab Ram Bora reported in 110 ITR 532 Gauhati**.

**vii. Search. No return by assessee. Ex party assessment. In appeal Relief by CIT (A). No further appeal by any party. Assessment on estimate. No penalty**

It has been noticed that sometimes due to non co-operation of the assessee, certain details are not furnished and on account of this, income of the assessee is estimated. Sometimes first appeal is filed

and after filing first appeal if the result of appeal is against the assessee, no second appeal is filed. What happens in such circumstances ?

In the case of **ITO V/S. Bombaywala Readymade Stores reported in 271 ITR 1 ITAT Part 1 (Third Member Decision)** the assessee was not maintaining day to day stock register. There was search u/s. 132. No return was filed by the assessee and the assessment was framed ex-parte. There was addition in income. The same was reduced by CIT(A). No further appeal was filed by either of the parties. Thus the quantum proceedings became final. It was held in this case that as the assessment was based on estimate basis, Penalty 271 (1) (C) could not be imposed, because there was no concealment of income.

**viii. G P low. Defects in the method of accounting. No failure to return correct income**

In the case of **CIT V/s. Metal Products of India reported in 150 ITR 714 P&H**, addition was made on estimated basis. Gross profit shown in the books of accounts was low as there were defects in the method of accounting. This cannot automatically lead to the conclusion that there was failure to return the correct income by means of fraud or gross or willful neglect. Penalty was not leviable.

**Addition on a/c of higher G P in the previous year**

G.P. of the assessee can not remain steady. It varies every year. There are many factors which affects G.P. If the same percentage of G.P. is shown every year, it is a case of doubt unless it is a business done on fixed percentage as per agreement with supplier / principal.

In the case of **CIT V/s. Nadir Ali & Co. reported in 106 ITR 151 Allahabad** the turnover of sales of the assessee was accepted by the assessing officer. Higher rate of profit was applied as per previous year by the I T Authorities. It was held that simply on the basis of higher G.P. in the previous year, no penalty could be levied u/s. 271 (1) (C).

**ix. N.P. not accepted by Assessing Officer**

If the net profit disclosed by the assessee is not accepted by the assessing officer and the assessing officer applied higher rate of net profit, simply on account of this addition, no penalty u/s. 271 (1) (C) could be levied. This was the view of **CIT V/s. Vijay Kumar Jain reported in 232 CTR 255 Chattisgad.**

**B. When returned income not accepted in all such cases penalty not leviable**

Excellent judgment was given by Delhi High Court in the case of **CIT V/S. Phi Seeds India Ltd. reported in 301 ITR 13 Delhi.** In this case the assessee earned interest which was taxable under the head “Income from other sources”. Against this income, it claimed deduction of interest paid on Agricultural income. It was held by Delhi High Court that, even if the claim of deduction is found to be erroneous, no penalty for concealment of income could be imposed u/s. 271 (1) (C). **It is attracted only in those instances where Assessee concealed the particulars of income or has furnished inaccurate particulars of such income with an intent to mislead the revenue. I.T. Act does not envisage or explicitly provide that in every case where return is not accepted as correct and assessment is framed at an income higher than that presented and offered for taxation by an Assessee in the form of its return, in such cases. Penalty proceedings must be initiated.** This proposition must logically follow from the word “**may**” in contradiction to “**shall**” in section 234.

**C. Day to Day Stock register**

- i.** In some business, goods are purchased in weight and sold on weight as well as on pieces basis. In such circumstances, quantity account or day to day stock could not be maintained. In such cases the assessing officers reject book result, estimate the income and also levy penalty for concealment of income.



In the case of **CIT V/s. Nawab and Others reported in 107 ITR 681 Allahabad**, the book result of the assessee was rejected as no day to day stock register was maintained and the assessment was framed by applying flat rate of profit. It was held by the court that only on this ground no penalty could be levied when it was not proved that the assessee was guilty of either fraud or willful neglect.

**ii. Business wholesale semi wholesale, No quantity register for retail business**

If the assessee is showing wholesale and retail sales and not maintaining quantity account or stock register. There is no obligation under the act to maintain stock register. Non maintenance of stock register is not attributable to gross or willful neglect of the assessee. Levy of penalty in such cases is not justified. This was held in the case of **CIT V/s. B.D. Ramchandra reported in 150 ITR 242 Bombay**.

**iii. Closing stock at reduced price**

In business, some portion of stock remains with the assessee for a long time and its market value is negligible. Due to damage, the value of stock reduces. To arrive at correct profit, assessee chooses to reduce the value of such stock. Such disclosure is also made in audit report. In such cases also assessing officers make addition by rejecting book result and also levy penalty u/s. 271 (1) (C).

In the case of **CIT V/s. H.P. State Forest Corporation Ltd. reported in 340 ITR 204 HP**, the assessee reduced cost of closing stock on account of deterioration of old stocks. Assessee disclosed all material facts. It was held that making such claim was not a ground to impose penalty.

**D. Books practicable as per business**

**No suppression of sales or inflation of purchases proved**

If the assessee maintains books of account which is practicable to do so and there is no finding by the assessing officer that there is suppression of sales or inflation of purchases and in assessment order the income is estimated, no penalty is leviable because there is no



failure to return correct income due to fraud, gross or willful neglect. This view was expressed by **CIT V/s. Devandas Perumal & Co. reported in 140 ITR 943 Bombay.**

**E. EX party assessment**

- i. Whether penalty could be levied u/s. 271 (1) (C) when the assessment order is passed u/s. 144 ? Even in the case of ex-party assessment, circumstances should be considered for levy of penalty. If the assessee has neither acted fraudulently nor was it guilty of any gross or willful default, then, no penalty is leviable. This was the view of **ACIT V/s. Swatantra Confectionery Works reported in 104 ITR 291 Allahabad.**
- ii. In case of best judgment assessment, when the expenditure is disallowed, it is to be seen that whether the assessee has discharged the burden of showing that in returning inaccurate particulars of income, it was not guilty of any fraud or gross willful neglect. If the assessee has proved satisfactorily, then no penalty is leviable. This was held in the case of **CIT V/s. Kedarnath Ramnath reported in 106 ITR 172 Allahabad.**

**iii. X party assessment books not produced**

**Reduction in income by CIT (A) & ITAT. No concealment and no willful neglect**

Assessment orders are passed u/s. 144 (X-party) on account of many reasons. The main reason is non production of books of account or any other evidence or material called by the assessing officer.

Sometimes due to dispute between partners, directors etc. the books are not produced and the assessing officer is left with no alternative but to pass X-party order. In X-party assessment relevant and irrelevant additions are also made.

In appeal many times additions are substantially reduced by CIT (A) or by ITAT.

In such cases no penalty u/s. 271 (1) (C) is leviable.

## **12. Disallowance of depreciation**

- A.** Under the Income Tax Act the assessee is entitled to claim depreciation on the asset owned by him/it and put to use for the purpose of business. As per section 38 (2) the assessing officer can restrict certain part of depreciation if he is of the view that the asset was not used exclusively for the purpose of business. It may be noted here that, if the assessee is assessed or assessable on presumptive basis u/s. 44AD of the IT Act, no such disallowance can be made for personal use because as per section 44AD (2), any deduction allowable under the provisions of section 30 to 38 shall be deemed to have been already given.
- B.** Sometime in the return of income, due to mistake or under bona fide belief, the assessee claims excess/higher depreciation which is disallowed during the course of assessment proceedings and on this account, penalty u/s. 271 (1) (C) is also levied for furnishing inaccurate particulars of income i.e. Depreciation claimed on motor vehicle @ 50% if acquired during certain period. Some case laws are discussed here under.
- C.** **Due to bona fide mistake higher depreciation claimed**

Imposition of penalty is not automatic. While levying penalty, the assessing officer must consider the conduct and deliberate intention on the part of the assessee in concealing his true income. Instead of deliberate mistake, the assessee under bona fide mistake calculates higher depreciation on the asset, penalty cannot be levied u/s. 271(1)(C). This was held in the case of **CIT Vs Skyline Auto Products P. Ltd. (MP) reported in 271 ITR 335 M.P. Indore.**

- \* While deciding this case, M P High Court relied on the case of **Hindustan Steel Ltd reported in 83 ITR 26 S.C.**

**D. Higher claim of depreciation**

**i. Lesser depreciation in subsequent year**

It was decided in the case of **CIT Vs Glow Tech Steels P. Ltd. reported in 280 ITR 133 Gujarat** that if the assessee is claiming higher depreciation due to oversight, in the subsequent year, he will be entitled to lesser depreciation. Thus no penalty could be levied u/s. 271 (1) (C) for claiming higher depreciation.

**ii. Any addition in income does not automatically lead to concealment**

In the case of **ACIT Vs. VIP Industries reported in 122 TTJ 289 Mumbai**, the assessee claimed depreciation @ 100% on the Car used for scientific research. The assessing officer restricted the depreciation @ 20%. The assessing officer imposed penalty u/s. 271 (1) (C) for wrong claim of depreciation. It was held by Mumbai ITAT that, **any addition made in the income does not automatically lead to concealment of income.**

**13. Disallowance of Exemption on the basis of conflicting judgments**

- A.** If the assessee discloses the entire facts without concealing any income and there is no allegation against the assessee that inaccurate particulars are furnished. The legitimate and bona fide claim of the assessee is rejected on account of conflicting decisions by different high courts, no penalty u/s. 271 (1) (C) is leviable. In the case of **CIT Vs. Haryana Warehousing Corporation reported in 314 ITR 215 P&H** the assessee disclosed Nil income claiming the income of Rs.10461330/- exempt u/s. 10 (29) but on account of conflicting decision by courts, the income was assessed at Rs.10461330/- and penalty u/s. 271 (1) (C) of Rs.10461330/- was levied. It was held in this case that if the claim of exemption was legitimate and bona fide and there was full disclosure of facts by the assessee, in such circumstances no penalty is leviable.

**B. Income claimed exempted u/s. 10 (36) on advise of counsel.**

**Affidavit of counsel filed**

In this case of **CIT V/s. Deepak Kumar reported in 232 CTR 78 P&H**, assessee claiming exemption of income u/s. 10(36) in respect of sale of share on the bona fide belief, and based on the advice of his counsel for which affidavit of the counsel, admitting his mistake was filed and accepted by the appellate authority, while dealing with the penalty P&H High Court held that. Under such circumstances, no penalty is leviable and no substantial question of law arises.

**C. Wrong computation of deduction u/s.10A**

In the case of **ACIT V/s. Pentasoft Technologies Ltd. reported in 145 TTJ 99 Chennai**, it was held that, in the above case no penalty for concealment was attracted on the ground that deduction u/s. 10A was wrongly computed and depreciation was wrongly claimed on non-compete fee.

**14. Estimate by DVO / Amendment with effect from 01/07/2012**

**A.** In case of construction of building, the matter is referred to the DVO for ascertaining the cost of construction.

**B.** Certain case laws are discussed here under :

In the case of **Commissioner of Income-tax Vs Apsara Talkies reported in 155 ITR 303 Madras**, Penalty u/s. 271 (1) (C) was levied on the basis of value estimated by department's valuer. It was held by the court that, penalty for concealment cannot be based on valuers estimate alone without evidence to show that assessee had understated construction expenses. The same view was expressed in the case of **CIT Wealth Tax V/s. Vishwnath SLP (Civil) Nos. 15761-15762 reported in 209 ITR 89 Statute News from SC and T P K Ramalingam V/s. CIT reported in 211 ITR 520 Madras.**

**C.** In the case of **CIT V/S. K.R. Chinni Krishna Chetty reported in 246 ITR 121 Madras**, it was held that mere revision of income to a higher figure by Assessing Officer does not automatically warrant inference of

concealment. Concealment implies some deliberate act on the part of the assessee in withholding the true facts from the authorities. There was no proof of concealment of cost of construction by the assessee. And thus no penalty was leviable.

- D.** As held in the case of **Deputy CIT V/s. JMD Advisors P. Ltd. reported in 310 ITR 280 Delhi ITAT**, valuation by D.V.O. alone cannot be basis to construed concealment of income, when there is material to prove inflation of cost of construction or that sale consideration received was more than declared. No concealment of income was proved and penalty was not justified.

**E. Amendment with effect from 01/07/12**

As per amendment in section 55A with effect from 01/07/2012, even in the cases where the assessee obtained valuation report of approved valuer for any property and as per the view of A.O., there is variance with its fair market value, he can refer the case to valuation cell. It is noticed that, in many cases the value adopted by DVO is higher than the cost of construction shown by the assessee and the additions are made on the basis of valuation report and penalties are also levied.

**15. Penalty in case of Cash Credit**

- A.** In the case of cash credit, it is the duty of the assessee to prove the transaction of cash credit to be genuine. Failing which, the amount credited in the books of accounts may be treated as undisclosed income of the assessee and penalty may be levied on the assessee. Difference situation and case laws in the case of cash credit are discussed here under.

**B. Simply on rejection of explanation no penalty**

In the case of **CIT V/s. Tezpur Roller and Flour Mills reported in 103 ITR 259 Gauhati**, credit in the books of the assessee was found. The assessee produced receipt with regard to this credit which was not believed by the Income Tax Officer and the amount was added as income of the assessee. There was no additional evidence except rejection of explanation given by the assessee. It was held that in

penalty proceedings the department has to establish that the receipt of the amount in dispute constituted income of the assessee. Before levy of penalty, department must have cogent proof / material from which it could be inferred that there was concealment / furnishing inaccurate particulars of income by the assessee. As nothing could be furnished by the department, the penalty could not be levied.

**C. When creditors not found even after repeated issue of summons and revised return filed in which credits offered for tax without admission of undisclosed income**

In the case of **CIT V/s. Amalendu Paul reported in 145 ITR 439 Calcutta**, the creditors were not found even after issue of summons and the assessee was not able to prove source of creditors. Under this circumstances, assessee filed revised return and included cash credit as income. The assessee no where admitted that the amounts were credited as undisclosed income. Under this circumstance it was held that no penalty is leviable.

**D. Addition of amount does not lead to concealment something more required with material**

If the amount is added in the assessment, it does not lead to a conclusion that the same represented assessee's income. For the purpose of levy of penalty, something more is required to be proved by the department with cogent material or circumstance. This was held in the case of **Commissioner of Income-tax Vs M.B. Engineering Works (P.) Ltd. (Cal) reported in 158 ITR 509 Calcutta**.

**E. Creditors admitting loan but not accepted by the A.O. No other material available with the A.O.**

In the case of **Commissioner of Income-tax Vs Shree Bajrang Trading and Supply Company reported in 187 ITR 299 Calcutta** the creditors admitted loans. The assessing officer did not believe the admission of creditors. There was no material available with the assessing officer to prove concealment of income. It was held in this case that no penalty u/s. 271 (1) (C) was justified.

**F. Lender subsequently denying loan, Revised return filed**

In the case of **Commissioner of Income-tax V/s. Appadurai Chettiar (J.V.) Co. reported in 221 ITR 0849 Madras**. Firstly the lenders submitted confirmation letter for the loans. Subsequently the lender denied for such loan. The assessee filed revised return including the amount of loan before the assessment was finalized. It was held in this case that, no penalty for concealment of income could be levied u/s. 271 (1) (C).

**G. Surrender of cash credit inability to produce creditor**

**Undisclosed income of the assessee not proved by the department**

**i.** In the case of **CIT V/S. Aggarwal Pipe Co. reported in 240 ITR 880 Delhi**, the assessee furnished confirmations for cash credit but as the assessing officer wanted the assessee to produce these creditors and there was inability by the assessee to produce creditors, the assessee surrendered cash credit. The act of the assessee does not amount to concealment of income. There was no material with the department that the amount of credit was undisclosed income of the assessee and the penalty was deleted.

**ii.** Similar view was expressed in the case of **Commissioner of Income-Tax Vs M. M. Gujamgadi reported in 290 ITR 168 Karnataka**

As the assessee was not able to produce creditors inspite of honest efforts.

**iii.** Similar view was expressed in the case of **Dinabandhu Pal V/S. Income Tax Officer reported in 293 ITR 199 Kolkatta ITAT**

In this case, cash credits were claimed by assessee to be loans and details of loans were furnished with confirmation of creditors. Explanation and confirmation was not proved to be false. Assessee was enable to produce creditors and hence offered credits as income. It was not a case of failure to substantiate explanation. It was not a case for levy of penalty for concealment.



**iv.** Similar view was expressed in the case of **CIT & Anr V/s. SLN Traders reported in 243 CTR 407 Karnataka.**

**H.** **Relation with the accountant strained who managed cash credit**

**No summons on accountant by A O in penal proceedings**

In the case of **National Textiles Vs Commissioner of Income-tax reported in 249 ITR 125 Gujarat**, in the course of assessment proceedings the accountant who had arranged the loan was not produced as he left the service and relations with him were strained. The amount of cash credit was added in the income which was justified in quantum proceedings. In penalty proceedings, no other effort was made by the department to summon the accountant. Thus it was not proved by the department that the explanation of the assessee was false. Imposition of penalty was cancelled.

**I.** **No past proof of earning undisclosed income**

In the case of **CIT V/S. Jalaram Oil Mills reported in 253 ITR 192 Gujarat**, explanation of the assessee regarding cash credit was not accepted by the revenue and addition u/s. 68 was made. In penalty proceedings no evidence was adduced to prove concealment of income.

There was no past history of the assessee to show that it had been earning business income outside the books nor in the year under consideration any instance pointed out by the department indicating any transaction outside the books. Penalty u/s. 271 (1) (C) was deleted.

**\* The above para is very important. In reply to penalty notice, the wordings mentioned in the para may be brought by the assessee to the notice of the assessing officer.**

**J.** **Share Application money. Amendment in budget of 2012-13**

In case of share application money it is the duty of the assessee to prove identity of the shareholder, genuineness of transaction and credit worthiness of shareholder.



- i. In case of share application, if the shareholder fails to comply the notice of assessing officer, it is the duty of the assessing officer to investigate credit worthiness of shareholders. Without making such efforts, no penalty could be levied in the case of the assessee. This was the view of **Delhi High Court reported in 299 ITR 268 Delhi in the case of**

**CIT V/s. Devine Leasing and Finance Ltd.**

**General Exports and Credits Ltd.**

**Lovely Exports Pvt Ltd**

**SLP of the department in the case of CIT V/s. Lovely Export was rejected. 319 ITR page 5/6 Statute News from S.C.**

- ii. In the case of **Commissioner of Income-Tax Vs Gobi Textiles Limited reported in 294 ITR 663 Madras**, the assessee was required to prove genuineness of share application money. In response to this notice, the assessee produced certain evidences like salary certificate, land holding etc. Still the assessing officer added the amount in the income of the company and levied penalty. The Madras High Court cancelled the penalty on the ground that, assessing officer failed to disprove claim of the assessee that the transaction was not genuine.

- \* **As per budget of 2012-13 amendment in section 68, the company as well as the share applicant (both) will be required to prove the genuineness of transaction, creditworthiness etc.**

## **16. Deeming provision and penalty**

- A. As per section 5 of the Income Tax Act, (Scope of total income) total income of the assessee who is a resident, includes all income from whatever sources derived which is received or deemed to be received in India or accrues or arises or deemed to be accrued or arise in India and accrues or arise to him outside India. The assessee is also required to include the income of spouse, minor child etc. as per section 64 of the Income Tax Act. If deeming income is not disclosed, the assessing officer will make addition of such income and may levy

penalty also. Some important cases on this issue are discussed here under.

**B. Penalty leviable**

In the case of **CIT V/s. Beharilal Pyarelal reported in 107 ITR 587 P&H**, Sales Tax refund was not shown as income as per provision of section 41 (1) under the deeming provision which is considered as income. Non-discloser of such income is liable to penalty u/s. 271(1)(C).

**C. Deeming provision can not be extended for levy of penalty**

In the case of **CIT V/s. Baroda Tin Works reported in 221 ITR 661 Gujarat**, it was held that sections 68, 69, 69A, 69B, 69C are all part of the same scheme where certain amounts though not proved to be income of the assessee are for the purpose of charging tax, required to be shown by the assessee and absolving department from its initial duty to prove that such income is of the assessee. The fiction created under sections 68, 69, 69A, 69B, 69C by itself cannot be extended to penalty proceedings to raise a presumption about concealment of such income.

**D. Without independent finding the department can not presume that there was concealment. Rejection of source of explanation was not a ground for levy of penalty**

**S. V. Kalyanam Vs Income-tax Officer reported in 327 ITR 477 Madras**, In this case assessee explained that the house property was jointly owned by him and his wife and his son also made contribution towards acquisition of property. His wife contributed by selling here Jewellery for acquisition of the property. The explanation of the assessee was not accepted by the assessing officer and addition was made u/s. 69 and penalty was also levied. There was reduction in addition at appellate stage. It was held by the High Court that, ITAT was not right in sustaining the addition as unexplained investment in the hands of the assessee. The addition was made u/s.69 of the I T Act which is a deeming provision and cannot be extended to penalty

proceedings. The department cannot presume that there was concealment unless there was independent finding. The source of investment was explained by the assessee and mere rejection of explanation would not be ground for levy of penalty.

#### **17. Assessment under MAT and penalty u/s. 271 (1) (C)**

As per the scheme of Income Tax Act 1961, when the provisions of MAT are applicable, firstly total income of the assessee is required to be computed under regular/normal provision of the Act and the tax on such income is required to be worked out. Afterwards book profit of the assessee is required to be worked out u/s.115JB. Tax payable on such income is worked out at prescribed percentage of the book profit. The higher of the two is regarded as total income. If the tax payable under normal provision is higher, such amount is the total income of the assessee, otherwise the book profits are deemed as the total income of the assessee. Thus the income computed as per the normal procedure is less than the income determined by legal fiction, namely the book profits, concealment of income would have no role to play and it will not lead to evasion of tax. In such circumstances penalty cannot be imposed on the basis of disallowance or additions made under the regular provisions. This was the view of Delhi High Court in the case of **CIT V/s. Nalwa Sons Investments Ltd. reported in 327 ITR 543**. The same view was also expressed in the case of **BSEL Infrastructure Realty Ltd. V/s. ACIT reported in 137 ITD 61 Mumbai**.

#### **18. When assessee agreed for addition**

- A.** It is the duty of the assessee to give proof regarding the expenses claimed or the amount credited in the books of accounts. In many cases it has been noticed that the expenses are incurred and rightly claimed in the books of accounts but for which no proper explanation could be offered or proof can be adduced. During the course of assessment proceedings the assessee agrees for addition for exps or credits. Whether penalty is leviable in such cases ? Circumstances under which the assessee agreed is to be kept in mind at the time of

levy of penalty. Whether it was voluntary? Whether it was before detection / whether it was after detection? Intention of the assessee to be considered before levy of penalty. Some important decisions on this issue are discussed here under.

**B. Explanation not substantiated. Bad facts**

Bad Facts brings bad judgment. The same happened in the case of **K.P. Madhusudan V/s. CIT reported in 251 ITR 99 S.C.** In this case, the assessee a partnership firm had taken certain bank drafts for payment to suppliers. The entry for these drafts was not made on the dates on which they were obtained but it was entered in the books few days later. The explanation of the assessee was that, sufficient cash balance was not available on those dates and it had obtained hand loans from friends and it had expected to repay such loans within a short time hence no entries were made in respect of such loans. The assessee also stated that since it was unable to furnish evidence for such loans, it offered the amount as additional income. The explanation of the assessee was not found satisfactory to the assessing officer.

It was held by the Honorable Supreme Court that the assessee was not able to substantiate the explanation offered by him and hence the penalty was rightly levied. **It was held by Honorable Supreme Court that, after addition of the explanation to section 271 (1), the judgment given in the case of Sir Sadilal Sugar and General Mills V/s. CIT reported in 168 ITR 705 was not a good law.**

**C. Admission by assessee of income but not the income for relevant year**

In the case of **CIT V/s. Vinaychand Harilal reported in 120 ITR 752 Gujarat** there was admission by the assessee that the amount of drafts encased by him was his income and the amount belonged to him. Still it does not amount to admission that it was income of relevant year. Revenue must establish that the amount was assessee's income of that relevant year. It is to be established that there was

accretion to the net wealth of the assessee during the relevant year under consideration.

**D. No particular item in books found to be false. Assessee agreed for addition. All income entered in books of account**

In the case of **Additional Commissioner of Income-tax V/s. Jeewandas Gyanchand reported in 144 ITR 0881 M.P.**, assessment was made after rejection of books. No particular item in books was found to be false. There was no evidence to show that any specific item of income was not entered in books. Assessee agreed to assessment to purchase peace. It does not amount to admission. Levy of penalty was not valid.

**E. Addition of unexplained investments by assessee to buy peace. Not proved by the department that it was concealed income of that year**

In the case of **Commissioner of Income-tax Vs Punjab Tyres reported in 162 ITR 517 M.P.** assessee agreed to addition of unexplained investments to purchase peace. It was not proved by the department by independent evidence that the amount represented the concealed income of the assessee earned during the relevant accounting year. The penalty was cancelled.

**F. Peak credit offered for taxation. No confession that peak credit was concealed income. No finding by department that it was concealed income**

In the case of **Jog Raj Vs State of Punjab reported in 164 ITR 763 Punjab**, Peak credit was offered for assessment to purchase peace with department. There was no confession from the assessee that peak credit was his concealed income. There was no finding by the department that the peak credit offered was concealed income of the assessee. It does not amount to concealment. No penalty for concealment leviable.

**G. Credit offered for assessment and also stated that penalty may be imposed on merits. Does not amount admission of concealment**

In the case of **Commissioner of Income-tax Vs Haji Gaffar Haji Dada Chini reported in 169 ITR 33 Bombay**, the assessee offered credits for assessment and also stated that penalty may be imposed on merits. The letter addressed to the officer does not amount to admission of concealment and levy of penalty on such basis was liable to be quashed.

**H. Best judgment assessment**

**i. Addition reduced in appeal. No finding of fraud or willful neglect**

In best judgment assessment officers are making additions on various accounts. Even the old credits of unsecured creditors are also added.

In appeal most of the additions are deleted.

In the case of **CIT V/s. Sibhash Trading Co. reported in 221 ITR 110 Gujarat**, best judgment assessment was framed and the book result was rejected. Sales were estimated, and gross profit was also estimated and the same was reduced in appeal. There was no finding that failure to return the correct income was on account of any fraud or gross or willful neglect on the part of the assessee. The penalty was rightly deleted.

**ii. Income returned bonafide to be proved by assessee**

As held in the case of **ACIT V/s. Chandravilas Hotel reported in 165 ITR 301 Gujarat**, when best judgment assessment order is passed and book result is rejected, the burden is on the assessee to prove that income returned was bona fide and proper. In this case, books of accounts were not reliable and still the assessee continued to maintain books on the same way. Assessee could not prove that the income returned was correct. Case was sent back to ITAT for further verification.

**I. Parties could not be traced. Not possible for the assessee to give proof hence agreed for addition**

In the case of **CIT V/S. S. Sankaran reported in 241 ITR 825 Madras**, the assessee was required to produce the books of accounts in relation to cash deposits in the name of Individuals. It was explained by the assessee that, it was not possible to ascertain the present whereabouts of those individuals and produce further documentary evidences to establish that those persons have given loans to the assessee. On this account, addition was made and penalty was levied. It was not proved by the department that it was concealed income of the assessee. The court relied on judgment of **Sir Sadilal Sugar and General Mills reported in 168 ITR 705 S.C.**

**J. Penalty leviable in agreed assessment. When explanation is vague or fanciful penalty can be levied. In all agreed assessment Sir Sadilal Sugar Mills case not applicable. Explanation of assessee should be acceptable**

In the case of **CIT V/s. Jugal Kishore Hargopal Das reported in 243 ITR 220 Kerala**, it was held that, in the case of **Sir Sadilal Sugar and General Mills reported in 168 ITR 705 S.C.**, the Supreme Court has not laid down any general principal that whenever there is an agreed addition there could not be levy of penalty or that the assessee was not required to explain the source of investments or credits. If the explanation is found acceptable, penalty may not be levied but if the explanation is vague or fanciful, then certainly it is open for the revenue to impose penalty. Thus even in agreed assessment penalty can be levied.

**K. Addition agreed subject to no penalty is levied. Explanation to be considered on merits**

- i.** In the case of **CIT V/s. D.K.B. & Co. reported in 243 ITR 618 Kerala**, it was held that, there is no estoppel against a statute. It is not automatic that whenever an amount has been offered by the assessee, as income penalty is not to be levied. If the assessee agrees



to addition provided no penalty is imposed, in such cases the department has to examine its acceptability and record a finding as to whether the explanation is acceptable or not. The explanation of the assessee has to be considered on the merits.

- ii. **Assessee agreed subject to no penalty is imposed. No concealment established. No penalty leviable**

In the case of **CIT V/S. Saran Khandsari Sugar Works reported in 246 ITR 216 Allahabad**, the assessee agreed to higher investment subject to no penalty was imposed. This statement by the assessee is a finding of fact. Similarly the finding that, no actual concealment was established is also a finding of fact. As no basis for estimating the income was given in this case, no penalty for concealment was leviable.

- L. **Assessee agreed for G.P. addition as the assessee was not able to vouch every detail of expense. Income estimated by applying G P. No penalty leviable**

In the case of **Shiv Lal Tak V/S. CIT reported in 251 ITR 373 Rajasthan**, addition was made to returned income by applying flat rate of G.P. This addition was agreed by the assessee as the assessee was not in a position to vouch each and every detail of exps, entered in books of a/c. Explanation of the assessee was not false but the explanation of the assessee was not accepted by Assessing Officer. Because assessee failed to substantiate it, it was held that penalty not to be levied in such cases.

- M. **Assessee agreed for addition in survey. No material with department to establish concealment. No penalty leviable**

In the case of **Commissioner of Income-tax Vs Careers Education and Infotech P. Ltd. reported in 336 ITR 257 P & H**, the assessee surrendered income in survey proceedings. There was finding of Tribunal that, there was no material for which concealment of income



could be inferred. In such circumstances no penalty could be imposed.

## **19. Admission of concealment by assessee**

### **A. Circumstances to be considered**

In assessment proceedings, if the concealment of income is detected and the assessee agrees for addition of such concealment, the circumstances under which the assessee agreed should be considered at the time of levy of penalty u/s. 271 (1) (C).

### **B. (i) Admission by assessee enough evidence for levy of penalty**

Generally admission by assessee is enough evidence for levy of penalty. This was held in the case of **India Sea Foods Vs. Commissioner of Income-tax reported in 114 ITR 124 Kerala.**

### **(ii) Assessee agreed for addition as he was not able to prove genuineness of credit. For penalty he requested A.O. to decide on merits. This is no admission by assessee**

In the case of **Commissioner of Income-tax Vs Haji Gaffar Haji Dada Chini (Bom) reported in 169 ITR 33 Bombay** the assessee agreed for addition of amount introduced in the books of accounts because he was not able to prove the genuineness of the cash credits and also mentioned that penalty may be decided on merits. It was held by Bombay High Court that, the letter addressed to the assessing officer did not amount to an admission of concealment of income. There was no material about concealment of income and thus penalty order was quashed.

## **20. Change in heads of income and levy of penalty**

In many cases it is noticed that, the income is disclosed by the assessee under one head while the same is assessed under other head i.e. transaction of shares shown under the head “Capital gain” and the same is assessed under the head “Income from business or profession”. On account of change in head of income penalties are levied for furnishing inaccurate particulars of income. Some of the cases are discussed here under.

**A. Change in head by appellate authority**

**Change in head of income in appeal. Penalty cannot be levied by Assessing Officer**

If the head of income is changed by appellate authority, then the penalty can be levied by appellate authority only and not by the income tax officer. In the case of **CIT V/s. Ananda Bazar Patrika reported in 116 ITR 416 Calcutta**, the addition was made under the head “Income from other sources” by the assessing officer. In appeal the appellate authority held that income was from, “Business or Profession”. Appellate authority also enhanced the income. It was held by the Calcutta high court that assessing officer cannot impose penalty on the basis of finding of appellate authority. When the original basis of initiation of the penalty proceedings is altered or modified by the appellate authority, the authority initiated penalty proceedings has no jurisdiction there after to proceed.

**B. Sale of debentures assessed as capital gains. In subsequent year assessed as Business Income**

In the case of **CIT Vs Vamchampuram and Agro Products reported in 284 ITR 408 Delhi**. Sale of debentures was treated as capital gain and taxed accordingly in the previous year so in the subsequent year same treatment was given to this income by the assessee under bona fide belief. “Capital gain” was assessed under the head “Income from business or profession”. It was held that, no penalty u/s. 271 (1) (C) could be levied.

**C. Dividend income treated as “Business income” & 80HHC claimed**

In the case of **CIT V/s Nath Bros. Exim International Ltd. reported in 288 ITR 670 Delhi**, the assessee claimed dividend income as business income and claimed deduction u/s.80HHC. The assessing officer disallowed the claim and levied penalty. It was held that the assessee disclosed all facts and therefore even though it had made erroneous claim which could not be justified in law, that by itself did not attract the penal provisions.

**D. (i) Loss claimed from business. Disallowed being speculative loss**

In the case of **CIT V/s. Auric Investment and Securities Ltd. reported in 310 ITR 121 Delhi**, Business loss was disallowed on the ground that it was from speculative business. This does not amount to concealment of income and no penalty could be imposed.

In the case of **CIT V/s. Bhartesh Jain reported in 323 ITR 358 Delhi**, Business loss was treated as speculation loss by the assessing officer and on this ground penalty u/s. 271 (1) (C) was levied. It was held that, mere change of treatment of loss would not amount to concealment and thus the penalty was cancelled.

**(iii)** Similar judgment was given in the case of **CIT V/s. DR. R. Gopalkrishnan reported in 239 CTR 558 Madras**.

**E. Business loss assessed as long term capital gains**

In this case of **Deputy CIT V/s. JMD Advisors P. Ltd. reported in 310 ITR 280 Delhi ITAT**, the assessee was engaged in the business of real estate and claimed loss as Business loss. This loss was assessed as long term capital gains by the assessing officer. It was held by Delhi ITAT that, change of head of income by the assessing officer cannot be construed as concealment. Penalty was not justified.

**21. Revised return and penalty**

**A.** As per section 139 (5), any person can file a revised return if the return of income was filed u/s. 139 (1) or in response to notice u/s. 142 (1). Revised return can be filed if any omission or wrong statement is discovered in the return filed. Time limit is prescribed for filling revised return in this section. In the course of assessment proceedings before detection by the assessing officer or voluntarily any omission or wrong statement is found, the assessee can file revised return. In some cases the assessee files revised return as the claim of expenses / cash credit etc though genuine could not be proved. Levy of penalty in such cases depends on facts of each case. Conduct of the assessee etc is also required to be considered before levy of penalty u/s. 271 (1) (C). Some important decisions are given here under.

**B. In favour of assessee**

**i. After search higher income disclosed and accepted**

In the case of **Commissioner of Income-tax V/s. Suresh Chandra Mittal reported in 251 ITR 0009 S.C.**, the assessee initially filed returns with meager income. After proceedings u/s. 132 and after issuance of notice u/s. 148, he filed revised returns showing higher income, **to purchase peace and avoid litigation**. The returns were regularized by the department and assessment orders were passed accordingly. Penalty u/s. 271 (1) (C) was levied. **In appeal, Appellate Tribunal held that department had not discharged its burden of proving concealment and simply rested its conclusion on the act of voluntary surrender done by the assessee in good faith.** Penalty was deleted by ITAT and High court. The Supreme Court also dismissed the appeal holding that, no interference with the order of the High Court was called for.

**ii. Revised return after notice from Assessing Officer to furnish details. No admission of concealed income**

In the case of **Commissioner of Income-tax V/s. Sureshchandra Gupta reported in 226 ITR 0613 M.P.**, the return of income was filed after letter from the assessing officer to furnish details of truck expenses. The assessee furnished revised return. Penalty u/s. 271 (1) (C) was levied. Against the order of penalty, the assessee filed appeal to ITAT which deleted the penalty relying on **Sir Sadilal Sugar and General Mills reported in 168 ITR 705 S.C.** As per this judgment there was admission of income but not admission of concealed income. It was held by Madhya Pradesh High Court that the penalty was rightly deleted by ITAT.

**iii. Filing of revised return before notice u/s. 148 issued**

In the case of **CIT V/S. Guru Ram Dass Fruit and Vegetable Agency reported in 254 ITR 361 P & H**, the assessee filed revised return prior to the date of issue of notice u/s. 148. In such circumstances no penalty u/s. 271 (1) (C) could be levied.

**iv. Revised return after intimation u/s. 143 (1)**

In the case of **CIT V/S. Gurbax Lal and Co. reported in 256 ITR 133 P&H**, revised return was filed after intimation u/s. 143 (1) was received. The Tribunal deleted the penalty as the assessee voluntarily furnished information after the assessment was completed. Thus there was no motive or malicious conduct attributable to the assessee. The High Court also confirmed the order of the Tribunal.

**v. Revised return after impounding of books and before recording of satisfaction of concealment**

In the case of **CIT V/S. Munish Iron Store reported in 263 ITR 484 P&H**, revised return was filed after impounding of books in the course of assessment proceedings. There was no recording of satisfaction regarding concealment of income. Deletion of penalty was justified. In this case, returned income was Rs.74155/- and income in revised return was shown at Rs.943155/-.

**vi. Wealth Tax. Higher value estimated by approved valuer. Revised return filed**

In the case of **CIT V/S. Hasmukhlal Gandlal reported in 264 ITR 42 Gujarat**, the case related to Wealth Tax assessment. Return of wealth was filed. The wealth tax officer directed the assessee to get the property valued by an approved valuer. The approved valuer estimated value of the property at higher figure. As the value was higher than the value disclosed in the return, revised return was filed before completion of assessment. Penalty u/s. 18 (1) (C) was levied. It was held by the court that, the assessee had no mala fide intention to furnish inaccurate particulars of wealth. Penalty was cancelled.

**vii. Claim on the basis of audit report of C A. No collusion of concealment proved**

In the case of **Commissioner of Income-Tax Vs Deep Tools Pvt. Ltd. reported in 274 ITR 603 P & H**, claim of deduction u/s. 80HHC was

made on the basis of audit report issued by the auditor. Mistake was pointed out by the assessing officer to the assessee. The assessee filed a revised return. It was held that there was no mala fides on the part of the auditor and the deduction was claimed by the assessee on the basis of the certificate. No collusion was proved in this case. Cancellation of penalty was justified.

- viii.** **All the necessary details filed / Facts disclosed. Exps disallowed in previous year confirmed by CIT (A). Revised return filed. Loss reduced. No deliberate act of concealment**

In the case of **CIT Vs Bacardi Martini India Ltd. reported in 288 ITR 585 Delhi**, assess furnished all the necessary facts / details in the return accompanied by Balance sheet, P&L a/c. etc. There was no suppression of facts or deliberate concealment of income or particulars by the assessee. Certain expenses were disallowed in the previous year and in appeal the additions were confirmed by CIT (A). The assessee accepted order of CIT (A) and filed a revised return reducing the loss. Looking to the facts of the case, Delhi High court deleted the penalty as there was no deliberate act on the part of the assessee to conceal the particulars of income or furnish inaccurate particulars of such income.

- ix.** **Claim of depreciation on solar equipment given up by filling revised return as the supplier was not maintaining proper books and record which could be produced. To avoid litigation revised return filed**

In the case of **V. V. Projects and Investments P. Ltd. Vs DCIT reported in 300 ITR 40 AP**, depreciation on Solar Equipment acquired was claimed at 50%. Revised return was filed giving up the claim for depreciation on Solar Equipment as the supplier of Solar Equipment did not properly maintain its record and books and expressed its inability to produce evidence for the equipment supplied. The assessee with a view to avoid litigation filed revised return which was accepted by the assessing officer u/s. 143 (3) and penalty u/s. 271 (1) (C) was levied. The High Court deleted the penalty on the

ground that the assessee filed revised return to avoid litigation and to buy peace with the department. There was no satisfaction on the part of the assessing officer to show that there was other material available with him to prove that assessee concealed its income.

- x. **Claim of exempted income in revised return on agricultural land. Later on claim surrendered. All facts disclosed. Dispute only in relation to availability of exemption**

In the case of **Commissioner of Income-tax Vs Videon reported in 301 ITR 260 Delhi**, the assessee disclosed capital gains on sale of agricultural land. Afterwards revised return was filed in which capital gain on sale of agricultural land was claimed as exempted on advice from Municipal Corporation and Thashildar. Subsequently the assessee admitted that the land was not agricultural land and surrendered its claim. Penalty u/s. 271 (1) (C) was levied. While deleting the penalty, the High Court held that, there was nothing to suggest that assessee concealed its income. Only dispute was in relation to exemption as claimed was available or not. There was no attempt on the part of the assessee to hide any material facts to the revenue. No penalty was leviable.

- xi. **After search amount in the bank accounts of family members surrendered in the case of assessee by filing revised return before issuance of notice u/s.148. Interest was assessed in the cases of family members**

In the case of **CIT V/s. Shankerlal Nebhumal Uttamchandani reported in 311 ITR 327 Gujarat**, after the assessments were completed, search proceedings u/s. 132 were carried out. Certain books of accounts, passbook etc were seized. In relation to bank accounts in the name of the family members, certain queries were raised. The assessee surrendered the amounts shown in the bank accounts in the names of the family members as his undisclosed income by filing a revised return. Notice u/s. 148 was issued and the returns were regularized by the assessing officer and the penalty was also levied.



While deleting the penalty it was held by the Honorable Gujarat High Court that, there was prima facie belief that the assessee has concealed his income and the process of detection was not complete. The amount standing in the names of the family members in the bank and the interest earned on such deposits was assessed by the department in the hands of the family members and there was no admission from the family members that they were benamidars of the assessee. Even the department was not certain as to the right person who was assessable to tax qua the said income. The Tribunal rightly deleted the penalty and the High Court confirmed the view of the Tribunal.

- xii.** **Sale consideration offered for tax on receipt of notice u/s. 148 to buy peace if mind. Not proved by department that explanation of assessee was not bona fide**

**Sureshchandra Mittal relied SLP of dept dismissed**

In the case of **CIT V/s.**

- 1. Rajiv Garg**
- 2. Siya Ram Garg**
- 3. Sanjay Garg**
- 4. Sushil Kumar Garg reported in 313 ITR 256 P & H**

Revised return was filed on receipt of notice u/s. 148 and the entire sale consideration on sale of shares was offered for tax to buy peace of mind and to avoid litigation and also to save from penalty. No finding was recorded in the assessment order that there was concealment of income. The additional income was offered in good faith. The revised return was regularized by the revenue. It was not proved by the department that, the explanation of the assessee was not bona fide. The penalty levied was cancelled. The court relied on the judgment of Sureshchandra Mittal 251 ITR 9 S.C.

- \* SLP of the department in this case was dismissed by the Supreme Court 313 ITR 29 News from Supreme Court.**



**C. Against the assessee**

**i. Revised return after summons issued**

In the case of **Union Engineering Co. V/s. CIT reported in 122 ITR 719 Kerala**, after the ITO issued summons to two persons mentioned by the assessee, the assessee approached the assessing officer to drop the examination of two persons and admitting discrepancy in stock and filed revised return. Under such circumstances, it could not be said that, the revised return was voluntary return u/s. 139 (5) of the I T Act. ITAT was right in not taking revised return into consideration. Penalty was rightly levied.

**ii. Revised return after conducting inquiry by the department**

In the case of **CIT V/s. K. Mahim reported in 149 ITR 737 Kerala**, when the assessee knew that the department was conducting investigation against him and he filed revised return, the act of assessee would not exonerate from liability of penalty.

**iii. In original return income disclosed. In response to notice u/s.148 Nil returns filed. Assessment on the basis of original return and undisclosed income. Original returns filed could not be ignored**

In the case of **Shree Asray Lal V/s. CIT reported in 223 ITR 705 Allahabad**, the assessee filed returns disclosing certain income and the assessments were completed on such income. During assessment proceedings for subsequent year, it was noticed by the assessing officer that the assessee was constructing house in the name of his wife. Reassessment proceedings were initiated in his case. In response to notice u/s. 148 the assessee filed returns for 3 years showing Nil income. Assessment orders were passed after taking into consideration the income in original return and undisclosed income.

It was held by Allahabad High Court that income shown in the original returns for first 3 years could not be rendered non-existent. **The original returns filed could not be ignored for the purpose of determining concealment.** The penalty could be levied on the

difference of income between income disclosed and the income assessed.

**All the facts and circumstances commencing with the filing of the original return and ending with the assessments should be taken into consideration for determining assessee's liability for penalty u/s. 271 (1) (C). Simply because the assessee filed the return in response to notice u/s. 148, the original returns filed by the assessee would not be extinguished nor the contents thereof effaced all to gather.**

**iv. Revised return filed after search and detection of undisclosed income**

In the case of **P.C. Joseph V/s. CIT reported in 243 ITR 818 Kerala**, the assessee filed revised return after search operation was conducted and after the difference was found in the books of accounts. It was held by Kerala High Court that, return filed in response to notice u/s. 148 after search cannot be treated at par with or compared to revised return.

**v. Revised return after search and admission of concealment by the accountant**

In the case of **CIT V/S. Dr. A. Mohd. Abdul Khadir reported in 260 ITR 650 Madras**, revised return was filed after search was conducted and admission of concealment by the accountant of the assessee. The act of the assessee cannot be treated as voluntary and penalty was rightly levied.

**vi. Word “before” detection by the department explained. Reaction of notice issued**

In the case of **Deepak Construction Co. Vs CIT reported in 293 ITR 285 Gujarat**, the word “before detection by the department has been explained”. As per this judgment, if the income tax officer has a prima facie belief that would not mean detection of concealment i.e. if the income tax officer has not found out any material to show that there has been concealment and he has only a prima facie belief that would

not be detection. In this case, revised return was filed and it was reaction of notice issued by the assessing officer. The revised return was accepted but it would not mean that the department had not detected the concealment. Imposition of penalty was justified.

**vii. Revised return after deletion. No burden on department to prove concealment**

In the case of **CIT and another V/s. Sangmeshwara Associates reported in 345 ITR 396 Karnataka**, Credits in account discovered to be untrue. Notice of reassessment. Return filed including amount representing credit. Admission of concealment. No burden on department to prove concealment. Penalty proceedings directed in assessment order. Sufficient satisfaction.

**22. Higher stock to bank and treatment of stock in books, addition and penalty**

**A.** For obtaining loans from Banks / Financial institutions etc. higher value of the stock is disclosed, while in the books of the accounts it is shown as per accounting practice adopted by the assessee. Whether penalty is leviable on account of such difference? Some of the important decisions are given here under :

**B. Undisclosed stock not properly explained with cogent evidences. Stock of driver who was having agricultural income. Penalty leviable**

In the case of **CIT V/s. Lal Chand Tirath Ram reported in 225 ITR 675 P & H**, it was held that, there was difference in stock kept with warehousing corporation and disclosed in the books of accounts. It was the explanation of the assessee that some stock belonged to Mr S who was having agricultural land and who was a truck driver. The explanation offered by the assessee was not substantiated by cogent and reliable evidences. Levy of penalty was upheld.

**C. Higher value of stock to Bank for taking loan. Only on this reason  
no penalty leviable**

In the case of **CIT V/S. Bharat Minerals Sales Corporation reported in 253 ITR 419 Calcutta**, it was held that, it is common for assesses to show exorbitant figures of stock to banks to get more amounts of loan. Penalty on the sole basis of figures given to the bank for taking more loan cannot be imposed.

**D. Certain items not disclosed due to mistake of accountant.  
Explanation of assessee bona fide**

In the case of **Bharat Rice Mill Vs Commissioner of Income-Tax reported in 278 ITR 599 Allahabad**, due to mistake of the accountant, closing stock of certain items was not shown. Non discloser of closing stock was not intentional. The explanation of the assessee was bona fide and also stood substantiated in subsequent year. Looking to the facts of the case, no penalty was leviable.

**E. Higher value of stock as per direction of bank. This fact not  
disputed. No penalty leviable**

In the case of **CIT V/S. Pioneer Breeding Farms reported in 295 ITR 78 Madras**, the difference between value disclosed to Bank & I.T. authorities was due to direction of bank who sanctioned a working capital. This fact was not disputed. As there was no concealment, no Penalty could be levied.

**F. Discrepancy in stock found during search surrendered in  
assessment proceedings to buy peace. Difference explained with  
corroborative proof. No penalty leviable**

In the case of **Commissioner of Income-tax Vs Harsh Talwar reported in 335 ITR 200 Delhi**, discrepancy in stocks was found during search operation. The same was voluntarily surrendered as income by the assessee during assessment proceedings to buy peace. Assessee placed evidence with corroborating proof explaining discrepancy in stock. There was deletion of penalty in identical

circumstances in case of firm of which assessee was a partner. No penalty was impossible.

- G. Discrepancy in stock and cash surrendered during survey and disclosed in the return. A O initiated proceedings u/s. 271 (1) (C) as surrender was not voluntary. Word in the course of any proceedings. No satisfaction recorded during survey but decision for penalty was taken while framing assessment. No penalty was leviable**

In the case of **Commissioner of Income-tax Vs SAS Pharmaceuticals reported in 335 ITR 259 Delhi**, survey was carried out and there was discrepancy in cash and stock. The assessee surrendered the amount during survey. In the return filed by the assessee, the amount disclosed in survey was shown. The assessing officer initiated proceedings u/s. 271 (1) (C) on the ground that surrender of stock was not voluntarily. If there was no survey, nothing would have been disclosed by the assessee. It was the view of the assessing officer that, as per wordings of section 271 (1), **“In the course of any proceedings under this act.....”**. When the survey was conducted, there was no question of satisfaction of the assessing officer or CIT (A) or CIT. No satisfaction was recorded during the course of survey. The decision to initiate penalty proceedings was taken while making the assessment order. Thus no penalty was leviable.

- H. Excess stock disclosed. Effect nullified**

In the case of **Tribhovandas Chelaram V/s. ACIT reported in 146 TTJ 578 A'bad CTR 59/II page 70**, during survey, excess stock was found and admitted by the assessee but excess stock was nullified by the assessee increasing value of opening stock. Penalty for concealment was rightly levied when the assessee had failed to disclose the amount both in the original return as well as in the return in response to notice u/s. 148.

### **23. Loss return / Reduction of loss in assessment and penalty**

**A.** As per section 271 explanation 4 (a), substituted by the Finance Act 2002 w.e.f. 01/04/2003, if the loss declared in the return is reduced or the loss is converted into profit, such reduction will be considered as total income and penalty will be leviable u/s. 271 (1) (C). Some importance decisions in this regard are given here under.

**B.** **Amendment retrospective**

In the case of **CIT V/s. Gold Coin Health Food P Ltd. reported in 304 ITR 308 S.C.**, it was held that provision for imposing penalty, even if after addition of concealed income there is no positive income, is clarificatory and retrospective in nature. Applies with effect from 01/04/1976.

The above judgment was followed in the cases of **CIT V/s. Moser Baer India Ltd. reported in 315 ITR 460 S.C. and JCIT V/s. Sahelileasing and Industries Ltd. reported in 324 ITR 170 S.C.**

### **24. Penalty for H H Exps.**

**A.** Addition on account of low house hold expenses is made on the basis of estimation of house hold exps. If the house hold expenses are totally not acceptable, like withdrawal in the last month i.e. March and there is no other source of income, the assessee cannot have any defence. If the assessee submits that looking to his life style, family size etc. and no other expenditure was incurred during the relevant year for acquiring any asset i.e. immovable or movable or any ceremony was performed etc. then it is the duty of the assessing officer to prove that the house hold expenditure disclosed by the assessee was higher than shown by the assessee. Some of the important decisions on this issue are discussed here under :

**B.** **No particulars of concealment given to the assessee**

In the case of **Commissioner of Income-tax Vs Ajay Hari Dalmia reported in 157 ITR 145 Delhi**, the H.H.exps. was estimated at Rs.35000/- by the assessing officer which was reduced to Rs.24000/-

by the Tribunal. Penalty u/s. 271 (1) (C) was levied. It was held by Delhi High Court that, no particulars of concealment was given to the assessee. In penalty proceedings it is the duty of the assessing officer to inform the assessee of the particulars of concealment and also to prove positively that there was such concealment. Non supply of information to the assessee was breach of principal of natural justice. No penalty was leviable.

**C. Burden on the department to prove deliberate concealment**

In the case of **Jumabhai Premchand (HUF) Vs CIT reported in 243 ITR 812 Gujarat**, it was held that, in penalty proceedings, burden of proof is on the department to prove deliberate concealment. Finding in assessment proceedings that H.H.Exps. of assessee were low is not conclusive. There was no evidence of concealment of income. If H.H.exps. were unbelievably low, the addition in assessment proceedings were proper but in penalty proceedings the burden is on the department to prove concealment of income. This was not discharged by the department. Penalty could not be levied.

**25. No penalty when quantum addition is deleted**

**A. CIT V/s. Bahri Brothers Pvt Ltd reported in 167 ITR 880 Patna.**

As per this judgment, When penalty is based on order of assessment and subsequently explanation of the assessee regarding addition is accepted and the addition is deleted, cancellation of penalty is valid.

The same view was adopted in the following cases :

- i. **174 ITR 402 Calcutta**  
**CIT V/s. Bengal Jute Mills Co Ltd**
- ii. **176 ITR 189 Calcutta**  
**CIT V/s. Madanlal Sohanlal**
- iii. **200 ITR 206 Allahabad**  
**ACIT V/s. Badri Prasad Kashi Prasad**
- iv. **211 ITR 470 Rajasthan**  
**CIT V/s. Roy Durlabhji**

## **26. Penalty when assessment set aside**

- A.** When the order of assessment or reassessment is made and penalty is levied but the assessment has been finally set aside or cancelled by any appellate authority, penalty cannot stand itself and the same has to be cancelled, as held in the case of **CIT V/s. Bhagwan Ltd. reported in 168 ITR 846 Calcutta.**

This view was followed in the following cases

- i. 180 ITR 175 Calcutta**  
**CIT V/s. Basumati P Ltd**
- ii. 183 ITR 59 Karnataka**  
**CIT V/s. Bedi and Co. Pvt Ltd**

## **27. Law applicable**

- A.** In case of change in law, if the order of assessment is passed under old act but the penalty order is required to be passed after amendment in act, which law will be applicable ? Some important decisions are discussed here under :

- B. Law applicable when return is filed**

In the case of **Brij Mohan Vs. Commissioner of Income-tax reported in 120 ITR 1 S.C.**, the question was in relation to quantum of penalty and Which law should be applicable ? It was held that, **Law applicable is the law operating on the date when return is filed.**

- C. Penalty leviable when the Assessing Officer was satisfied, when satisfaction is arrived**

In the case of **Maya Rani Punj V/S. CIT reported in 157 ITR 330 S.C. (THREE JUDGES) 11-12-1985**, the return was required to be filed under the Act of 1922 but the same was filed after the due date. There was delay of 7 months. The default occurred under the old Act but the penalty was leviable under the Act of 1961. It was held that the penalty was leviable when the assessing office was satisfied that



there was a default on the part of assessee. Thus the penalty was leviable under the new Act.

**D. Change in Law. Original return filed. Notice u/s. 148. Same income disclosed. Law applicable when original return is filed**

In the case of **CIT V/s. Onkar Saran And Sons reported in 195 ITR 1 S.C.**, there was change in law. Law prior to 1968 was based on quantum of tax avoided. Law after 1968 amendment based on quantum of income concealed. Original return of income was filed prior to 1968 in which certain income was not disclosed. In response to notice u/s. 148 same income was disclosed. The question arose with regard to concealment. What should be quantum i.e. tax avoided or income concealed. It was held by the S.C. that penalty to be levied was as per law as on the date when original return was filed.

**28. Penalty in relation to Gift received**

**A.** If the gift is received by the assessee, it is his duty to prove the identity of the person, genuineness of gift and credit worthiness of the donor. If this is not proved, the amount of Gift can be added as undisclosed income of the assessee and penalty may be levied.

**B. Gift from Dubai and credit in NRE a/c. of donor. Necessary proof produced by assessee. No evidence of concealment placed by Department. No penalty leviable**

In the case of **Commissioner of Income-Tax Vs Balbir Singh reported in 304 ITR 125 P&H** the gift was received from the person staying at Dubai. Firstly the amount was transferred from Dubai to his NRE account and from his NRE account the gift was given. The assessee produced necessary proof like Gift deed etc. The said gift was not believed by the assessing officer and added to the income of the assessee and penalty u/s. 271 (1) (C) was levied. It was held by P & H High Court that, the gift came through a banking channel and from an identifiable source i.e. NRE account. All the details/particulars in relation to gift were furnished by the assessee. No evidence with

regard to concealment was placed on record by the revenue. The penalty was rightly deleted.

**C. Donor died. Amount of gift surrendered as income. If gift is not proved to be bogus and necessary papers are given by the assessee. No penalty is leviable**

If after giving the gift, the donor died and the amount of gift is surrendered as income, whether penalty u/s. 271 (1) (C) is leviable? In the case of **Puneet Sehgal & Ors V/s. ITO reported in 123 TTJ 566 Delhi ITAT** it was held that, under such circumstances if nothing is brought on record by the assessing officer that gifts were bogus and all the necessary documents are given by the assessee, no penalty was impossible.

**D. Gift from NRI. Before assessment amount surrendered to buy peace and avoid litigation. No penalty leviable**

In the case of **Concept Creations V/s. Additional CIT reported in 125 TTJ 433 Delhi**, gift was received from NRI. Before the assessment was taken up, the assessee surrendered gift to buy peace and avoid litigation. It was held that, there was no concealment of income and no penalty was leviable.

\* **While giving this judgment, S.C. decision in the case of Sureshchandra Mittal was relied.**

**29. Time Limit for passing penalty order**

Section 275 is divided in three parts.

- A.** As per section 275 (1) (a), where the assessment order or any other order is challenged in appeal before CIT (A) or before Income Tax Appellate Tribunal, no order of penalty shall be passed after the expiry of Financial Year in which the order appeal against is completed or after the end of 6 months from the end of the month in which order of CIT (A) or ITAT is received by CCIT whichever period expires later.

As per proviso of this section which is made applicable w.e.f 01/06/2003, if the assessment order or any other order is challenged in appeal before CIT (A) and the order is passed by CIT (A) after 01/06/2003, in such cases, penalty order shall be passed before the end of the financial year in which the appeal is decided by CIT (A) or within 1 year from the end of the financial year in which the appeal order is received by Chief Commissioner of Income Tax or Commissioner of Income Tax, whichever period expires later.

Thus now penalty order is required to be passed after the order of CIT(A) is received within the time limit prescribed in this proviso.

- B.** As per section 275 (b), where the relevant assessment order or other order is in revision before Commissioner of Income Tax u/s. 263 or u/s. 264, no order of penalty shall be passed after the expiry of 6 months from the end of the month in which revision order is passed.
- C.** In any other case, no order of penalty shall be passed after the expiry of financial year when the proceedings on the basis of which penalty proceedings are initiated are completed or 6 months from the end of the month in which action for imposition of penalty is initiated whichever expires later.
- D.** As per section 275 (1A) w.e.f. 13/07/2006, where the assessment order or any other order is challenged in appeal before CIT (A) or before the Income Tax Appellate Tribunal or before the High Court or before the Supreme Court or before Commissioner of Income Tax in revision u/s. 263 or u/s.264 and the penalty order is passed before the issue is decided by the above named authorities, then the order of penalty shall be passed on the basis of the order passed by the above authorities.

Before passing order imposing penalty, enhancing penalty, reducing penalty, cancelling penalty or dropping penalty

- (1) Assessee shall be given a reasonable opportunity of being heard.

- (2) No order of penalty shall be passed after the expiry of 6 months from the end of the month in which order of CIT (A) or the Income Tax Appellate Tribunal or the High Court or the Supreme Court is received by Chief Commissioner or Commissioner or the order of revision u/s. 263 or u/s.264 is passed.

**E. If the matter is set aside for framing fresh assessment order**

If the case is set aside for framing fresh assessment order, time limit will start from the date of fresh assessment order.

**1. Seth Panchhi Ram and Co. v. Commissioner of Income-tax  
192 ITR 289 HP**

It was held in this case that, when the assessment is set aside and the matter is remanded for fresh order of assessment, date of fresh order of assessment is relevant for computing limitation for levy of penalty.

**2. Commissioner of Income-tax v. Smt. Santosh Mahey  
293 ITR 573 P&H**

In this case the word **completed assessment** was required to be interpreted. It was held that the assessment order during the course of which the penalty proceeding are initiated, is set aside and the case is remanded for fresh assessment, the assessment proceedings cannot be held to be completed till such time the order is passed in the remand proceedings.

In this case, original assessment order was passed on 28/03/1982 which was set aside and the matter was remanded to the assessing officer. The remand case was decided on 14/03/1986 and penalty order was passed on 16/03/1988. It was held that order was not time barred (The case was relating to A.Y.1977-78 to A.Y.1980-81).

**F. Time limit for penalty order and its rectification**

When the penalty order is passed within the prescribed limit, but afterwards any mistake is found in the penalty order, the time limit laid down u/s. 154 will apply to order of rectification and not time

limit prescribed u/s.275. This was held in the case of **Henri Isidore v. Commissioner of Income-tax reported in 240 ITR 247 Madras.**

### **30. Other issues in penalties**

#### **1. When 2 views on any issue view favorable to assessee to be preferred**

In the case of **CIT, West Bengal Vs. Vegetable Products Ltd. reported in 88 ITR 192 S.C.**, Penalty. Return of income. Failure to furnish in time without reasonable cause. Quantum of penalty. Percentage of tax assessed or of tax demanded. “Amount of tax, if any, payable” “The Tax” meaning of. Provisional assessment. Tax paid, whether to be deducted. Interpretation of statutes. Taxing statutes. Penalty provision. Two reasonable constructions. That favorable to assessee to be preferred.

#### **2. Interpretation of statute. No strict construction. Procedural in nature**

- a.** Section 275 provides the period of limitation for levy of penalty. Section 275 being a procedural section, principle of strict construction would not apply to it. This was decided in the case of **Commissioner of Income-tax v. Vakharia Cotton Traders reported in 161 ITR 441 Gujarat.**
- b.** Penalty proceedings are procedural in nature and it is to be governed by changed law. If there is change in law, the penalty proceedings will be governed by change of law as held in the case of **Haryana Iron and Steel Rolling Mills v. Commissioner of Income-tax reported in 164 ITR 779 P&H.**

#### **3. Principle of natural justice applies in penal proceedings**

- a.** In penalty proceedings, principle of naturel justice applies and if penalty order is passed without giving assessee an opportunity of being heard, the penalty order is not void ab initio. In such circumstances the matter can be set aside with a direction to afford opportunity to

the assessee of being heard. This was held in the case of **Thakur v. Hari Prasad v. CIT reported in 167 ITR 603 AP.**

- b. When the penalty proceedings are initiated and in reply to penalty proceedings, if the assessee makes a request to the assessing officer to summon witnesses, it is the duty of the assessing officer to summon witnesses. If this is not done, it is a breach of principle of natural justice. As held in the case of **Ramji Dass Ram Bilas v. Commissioner of Income-tax reported in 191 ITR 412 Delhi.**

4. **Limitation does not start from the date of draft order**

When the draft order is submitted to the commissioner of income tax and against such draft order assessee filed objection before commissioner of income tax, time of limitation does not start from the date of draft order but it starts from the date of final order. This was held in the case of **Shiv Shanker Sita Ram v. Commissioner of Income-tax reported in 199 ITR 169 Allahabad.**

5. **Single order for different offences can be passed. Levy of penalty by single order not illegal. IT proceedings are quasi criminal.**

**In IT proceedings principle of natural justice to be applied**

In the case of **Durga Dutt Chunnilal V/s. CIT reported in 67 ITR 33 Allahabad**, it was held that, Penal provisions under the I T Act are quasi/criminal. As per criminal procedure code, order for different offences is to be passed separately but it is not applicable to proceedings under the I T Act which is a code by itself. I T proceedings are to be conducted keeping in mind rules of natural justice. Provisions of evidence act are also not applicable to Income Tax proceedings. Contention of the assessee that single order for different offences cannot be passed was rejected. It was held by the High court that it is advisable to take separate proceedings but it is not correct to state that the offences cannot be disposed by a common order. The levy of penalty by single order was not illegal and was not prejudicial to the assessee.

**6. Satisfaction of assessing officer CIT (A) or CIT order of penalty to be passed by that authority only**

As per section 271 (1) the assessing officer, CIT (A) or CIT in the course of any proceedings is satisfied that the assessee has committed an offence which is liable to penalty, the notice should be issued. Thus there must be satisfaction of the respective officer. Penalty order is to be passed on the basis of the order passed by that authority i.e. A.O., CIT (A) or CIT.

If the income is enhanced in appellate proceedings or by CIT, then the penalty should be levied by that authority only on his/her satisfaction. Thus if the income is enhanced in appeal by CIT (A) or by CIT, notice u/s. 271 (1) (C) should be issued by that authority. If the income is enhanced by CIT (A) or CIT, the penalty order on enhanced income cannot be passed by the assessing officer.

It was held in the case of **CIT V/s. Shadiram Balmukund reported in 84 ITR 183 Allahabad** that the income tax officer has no jurisdiction to impose penalty when addition is made in the assessed income by appellate authority or CIT. Thus the penalty order of the assessing officer was quashed.

**7. No protective order for Penalty. Satisfaction of I T authority is required**

In the case of **CIT V/s. Beharilal Pyarelal reported in 141 ITR 32 P&H**, it was held that, a penalty cannot be imposed on protective basis under the law. Protective order of assessment can be passed but not a protective order of penalty. For levy of penalty, there must be finding and satisfaction of the I T authority.

**8. Material available after levy of penalty is not relevant**

In the case of **CIT V/s. Bhotica Textiles reported in 159 ITR 355 Calcutta**, it was held that, penalty is to be levied with reference to material available at the time of imposition of penalty. Any material available after imposition of penalty is not relevant.

In this case assessee proved identity, their credit worthiness in relation to cash credits. The creditors thereafter confessed that the loan transactions were bogus at the appellate stage. On the basis of subsequent statement, penalty cannot be levied because the penalty was not based on such findings. Cancellation of penalty was justified.

**9. Erasure in account books**

In the case of **Commissioner of Income-tax Vs Sardar Iqbal Singh reported in 190 ITR 51 Calcutta**, though there were mistakes or erasure in account books but that would not lead to the conclusion of falsity of accounts. It was not proved that there was fraud or gross or willful neglect on the part of the assessee. Levy of penalty u/s. 271(1)(C) not valid.

**10. Two views possible**

i. In the case of **CIT V/s. Garg Engineering Co. reported in 235 ITR 451 Allahabad**, it was held that, When there can be two views and out of that, one view is accepted by the department, no penalty u/s. 271 (1) (C) can be levied.

ii. In the case of **CIT V/s. Pradeep Agencies Joint Venture reported in 349 ITR 477 Delhi**, the assessee was AOP and distributed its income among members. There were two views possible, whether to assessee AOP or its member individually. In such case no penalty can be levied for disclose Nil income.

**11. Legal heir is deemed assessee**

In the case of **Smt. Tapatipal V/s. CIT reported in 241 ITR 468 Calcutta**, it was held that, when assessment is completed on legal heir of deceased, penalty can be imposed of legal heir.

**12. No appeal to be filed by department if amount is below the prescribed limit specified by CBDT**

In the case of **Commissioner of Income-Tax Vs Ashim Kumar Agarwal reported in 275 ITR 48 Jharkhand**, it was held that the revenue should not prefer appeal before ITAT if amount involved is



below limit prescribed for appeal by circular of CBDT. It was also further held that, no evidence of concealment or furnishing of inaccurate particulars was found by the department from which it could be gathered that the omission was attributable to intention or desire on the part of the assessee to hide or conceal the income so that to avoid imposition of tax thereon.

**13. Entry for amount payable in future can be passed in books. There is no concealment**

As held in this case of **India Cine Agencies Vs DCIT reported in 275 ITR 430 Madras**, there should be deliberate intend to prevent relevant facts from becoming known. Discount to be given to its customers which was to take effect in future years could be shown as amount due to Sundry debtors. This will not amount to concealment of income or furnishing of inaccurate particulars of income.

**14. Amendment with retrospective effect**

**Claim genuine when return filed. Retrospective amendment. No penalty leviable**

In the case of **Commissioner of Income-Tax Vs Premier Proteins Ltd. reported in 278 ITR 252 M.P.**, cash compensatory support was not included in income but was mentioned in note accompanying return. Cash compensatory support was not taxable when return was filed. Law amended with retrospective effect making it taxable. No penalty u/s. 271 (1) (C) is leviable.

**15. Bill issued in previous year and delivery of goods in next year**

In the case of **Rajarajan Electrical Equipments P. Ltd. Vs DCIT reported in 284 ITR 448 Madras**, invoice and delivery of challan was issued on 31/03/98 relevant to A.Y.1998-99. Actual delivery of goods was given in June 1998. Income tax on sale was paid voluntarily in A.Y.99-00. There was no concealment of income in A.Y.1998-99. Penalty was not leviable in A.Y.1998-99.

16. **Appeal Fees. Penalty appeals are different form assessments. It has no nexus with income. Appeal fees Rs.500/- for income assessed in negative**

As per decision given in the case of **Sri Bidyutkumar Sett V/S. Income Tax Officer reported in 272 ITR 75 ITAT Kolkatta Special Bench**, in case of appeal u/s. 271 (1) (C), appeal fees is payable on the basis of income assessed. This view was not accepted by the Patna High Court. In the case of **Dr. Ajith Kumar Pandey V/s. ITAT reported in 310 ITR 195 Patna**. Imposition of penalty having no nexus with total income of assessee. Appeal fees on the basis of income assessed is payable as per section 253(6)(a)(b)(c) but as far penalty is concern, it is covered by section 253(6)(d).

It is also worth noting here that, in case of total income assessed at negative figure, fees Rs.500/- is payable as held in the case of **Gilbs Computer Ltd. V/s. ITAT reported in 317 ITR 159 Bombay**.

17. **Penalty in block assessment**

- i. **Word other valuable articles or things covers unaccounted stock**

In the case of **CIT Vs. Bhandari Silk House reported in 242 CTR 443 P&H**, unaccounted stock was surrendered by the assessee in the statement recorded u/s. 132(4) on the date of search. It is covered by the word “other valuables articles or things” and therefore conditions enumerated under explanation 5 to section 271(1)[c] were fulfilled and no penalty u/s. 271(1) [c] was leviable.

- ii. **Penalty in block assessment. No liability on department**

In the case of **CIT V/s. Becharbhai P Parmar reported in 341 ITR 499 Gujarat**, it was held that there is distinction between section 271 (1) (C) and section 158BFA (2). In latter case, no burden is on department to prove concealment. Addition was made in block assessment on the basis of estimate. There is no ground to delete penalty.

**Note :-** With due respect, this judgment needs reconsideration. See Sr. No. III below though ITAT decision.

- iii. In the case of **Dr. Hakkeem S. A. Syed Sathar V/s. ACIT reported in 314 ITR 290 ITAT Chennai Bench**, it was held that even in case of block assessment, for levy of penalty u/s. 158BFA (2), it is to be proved beyond doubt that there was concealment of income. Penalty cannot be imposed without sufficient evidence.

It was also held in the case of **DCIT V/s. Coatex Infrastructure Ltd reported in 286 ITR 40 Mumbai ITAT** that looking to the voluminous record and sized material, it was not humanly possible to compute income from such documents / record and simply rejecting this explanation of the assessee, and the assessing officer not bringing any material on record and nowhere mala fide intention of the assessee was proved, levy of penalty u/s. 158BFA (2) was not proper.

- iv. **Silly mistake. In audit report provision for exps. not allowable but the same exps. claimed in the return of income**

In the case of **Price Waterhouse Coopers Pvt Ltd (PWC) v/s. CIT reported in 348 ITR 306 S.C.**, it was held that filling inaccurate particulars of income. Company providing multidisciplinary consultancy services having more than 100 employees. Filing statement of particulars with return of income showing provision towards gratuity as not allowable but deduction claimed in return. Inadvertent “silly” mistake. Assessing officer also not noticing. Peculiar facts. Penalty not leviable.

- v. **No time limit prescribed for payment of tax and interest for getting immunity**

In the case of **ACIT V/s. Gebilal Kanhaialal, HUF reported in 348 ITR 561 S.C.**, it was held that, for getting immunity from penalty, assessee has to pay tax with interest in respect of such undisclosed income but it did not prescribe the time limit within which the assessee should pay the tax on such income. In this case, the return of income was not filed u/s.139 (1) of the ACT and the tax payable on

such income was not paid in time. The assessee was entitled to immunity u/s. 271(1)(C) explanation (5).

**18. Delay in filling appeal to Supreme Court**

In the case of **Office of the Chief Post Master General V/s. Living Media India Ltd. and Others reported in 348 ITR 7 S.C.**, it was held on page 19 that, in our view, it is the right time to inform all the Government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the filed was kept pending for several months/ years due to considerable degree of procedural red-tape in the process. **The Government departments are under a special obligation to ensure that they perform their duties with diligence and commitment.** Condonation of delay in an exception and should not be used as an anticipated benefit for Government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for delay except mentioning of various dates, according to is, the Department has miserably failed to given any acceptable and cogent reasons sufficient to condone such a huge delay.

**Conclusion**

In this paper, I have tried to cover decisions upto 349 ITR. As stated in preamble, before relying on any judgment, facts of your case should be verified.

Hope that this paper will help my professional friends when we reply any penalty notice.