



Principles from decisions of SC on penalties and select issues under penal provisions

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Provisions of Chapter XXI

Section	Heading of the section
270A	Penalty for under-reporting and misreporting of income
270AA	Immunity from imposition of penalty, etc.
271AAA	Penalty where search has been initiated [in respect of search initiated from 1.7.2007 to 30.6.2012]
271AAB	Penalty where search has been initiated [in respect of search initiated on or after 1.7.2012]
271AAC	Penalty in respect of certain income
271AAD	Penalty for fake invoice
271D	Penalty for failure to comply with the provisions of section 269SS
271DA	Penalty for failure to comply with provisions of section 269ST
271E	Penalty for failure to comply with provisions of section 269T

Provisions of Chapter XXI

Section	Heading of the section
271C	Penalty for failure to deduct tax at source
271CA	Penalty for failure to collect tax at source
271DB	Penalty for failure to comply with provisions of section 269SU
271F	Penalty for failure to furnish return of income
271FA	Penalty for failure to furnish statement of financial transaction or reportable account
271FAA	Penalty for furnishing inaccurate statement of financial transaction or reportable account
271FAB	Penalty for failure to furnish statement or document by an eligible investment fund
271G	Penalty for failure to furnish information or documents u/s 92D
271GA	Penalty for failure to furnish information or document u/s 285A

Provisions of Chapter XXI

Section	Heading of the section
271GB	Penalty for failure to furnish report or for furnishing inaccurate report under section 286
271H	Penalty for failure to furnish statements, etc.
271I	Penalty for failure to furnish information or furnishing inaccurate information under section 195
271J	Penalty for furnishing inaccurate information in reports or certificates
272A	Penalty for failure to answer questions, sign statements, furnish information, returns or statements, allow inspections, etc.
272AA	Penalty for failure to comply with the provisions of section 133B
272B	Penalty for failure to comply with the provisions of section 139A
272BB	Penalty for failure to comply with the provisions of section 203A
272BBB	Penalty for failure to comply with the provisions of section 206CA
273	False estimate of, or failure to pay, advance tax

Provisions of Chapter XXI

Section	Heading of the section
273A	Power to reduce or waive penalty, etc. in certain cases
273AA	Power of Pr. CIT or CIT to grant immunity from penalty
273B	Penalty not to be imposed in certain cases
274	Procedure
275	Bar of limitation for imposing penalties

What is penalty?

- Corpus Juris Secundum, volume 85, page 580, paragraph 1023 states –
 - "A penalty imposed for a tax delinquency is a civil obligation, remedial and coercive in its nature, and is far different from the penalty for a crime or a fine or forfeiture provided as punishment for the violation of criminal or penal laws."
- Supreme Court in **Gujarat Travancore Agency v. CIT [(1989) 177 ITR 455 (SC)]** has held that mens rea is not required to be proved in proceedings under s. 271(1)(a) of the Act.
 - Section 271(1)(a), provides that a penalty may be imposed if the ITO is satisfied that any person has without reasonable cause failed to furnish the return of total income, and section 276C provides that if a person wilfully fails to furnish in due time the return of income required under section 139(1), he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine.

Gujarat Travancore Agency v. CIT [(1989) 177 ITR 455 (SC)]

- *It is clear that in the former case what is intended is a civil obligation, while in the latter case what is imposed is a criminal sentence. **There can be no dispute that having regard to the provisions of section 276C, which speaks of wilful failure on the part of the defaulter and taking into consideration the nature of the penalty, which is punitive, no sentence can be imposed under that provision unless the element of mens rea is established.** In most cases of criminal liability, the intention of the Legislature is that the penalty should serve as a deterrent. The creation of an offence by statute proceeds on the assumption that society suffers injury by the act of omission of the defaulter and that a deterrent must be imposed to discourage the repetition of the offence. **In the case of a proceeding under section 271(1)(a), however, it seems that the intention of the Legislature is to emphasise the fact of loss of the revenue and to provide a remedy for such loss, although no doubt an element of coercion is present in the penalty.** In this connection the terms in which the penalty falls to be measured is significant. **Unless there is something in the language of the statute indicating the need to establish the element of mens rea it is generally sufficient to prove that a default in complying with the statute has occurred.** There is nothing in section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under the provision.*

Addl. CIT v. I M Patel & Co. [(1992) 196 ITR 297 (SC)]

- Supreme Court in **Addl. CIT v. I M Patel & Co. [(1992) 196 ITR 297 (SC)]** has held as under –
 - *“In view of the decision of Supreme Court in Gujarat Travancore Agency v. CIT [(1989) 177 ITR 455], later on applied in CIT v. Kalyan Das Rastogi [(1992) 193 ITR 713 (SC)], it was no longer open to argument whether mens rea was required to be established under section 271(1)(a). As held by Supreme Court in Gujarat Travancore Agency's case (supra) there is nothing in section 271(1)(a) which requires that mens rea must be proved before penalty can be levied under that provision.*
 - *Hence, the ITO was justified in levying penalties for the assessment years in question.”*

Is mens rea required to be established in context of s. 270A

- A question arises as to whether 'mens rea' is required to be established in the context of section 270A?
- Considering the provisions of sub-section (2) of section 270A and also the fact that the provisions of section 276C impose a criminal liability if the tax on under-reported income is in excess of Rs 25 lakh, it appears that the ratio of the above decisions will apply and following the ratio of the above mentioned decisions of the Supreme Court it can be concluded that mens rea is not required to be established for levying penalty under section 270A of the Act.

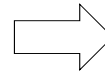
Principles of interpretation of penal provisions

- Interpretation of penal provisions should follow the rules of interpretation of penal laws - *Jain (NK) v. Shah (CK) [AIR 1991 SC 1289]* and *Antulay (AR) v. Ramdas Srinivas Nayak [AIR 1984 SC 718]*
- A penalty provision in a taxing statute is distinguished from a provision creating an offence and the former does not involve the concept of mens rea - *Gujarat Travancore Agency v. CIT (supra) as explained in Medical Land v. CIT [(2014) 363 ITR 81 (Ker)]*
- No person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than with which he might have been inflicted under the law in force at the time of the commission of the offence - *Dayal Singh v. State of Rajasthan [(2004) 5 SCC 721]*

Principles of interpretation of penal provisions ...

- **Penalty is not to be imposed if there is no conscious breach of law**

- 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 guilty of conduct, contumacious or dishonest, or acted in conscious disregard to 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. ***Hindustan Steel Ltd. v. State of Orissa [(1972) 83 ITR 26 (SC)]***



Principles of interpretation of penal provisions ...

- In view of the nature and character of a **penal provision** it **must be construed strictly regardless of the hardship that such a construction may cause either to the treasury or to the taxpayer**. If a subject falls squarely within the letter of the law he must be penalised, howsoever inequitable consequences may appear. If, however, the revenue seeking to penalise a subject cannot bring him within the letter of the law, subject will not be liable no matter that such a construction may cause grave prejudice to the revenue. Equitable construction is out of place in respect of a penal provision and such a construction is not permissible in interpreting a charging provision of a taxing statute. The golden rule is that **if the provision is capable of two alternative meanings, the court should lean in favour of the subject; if the provision lacks in clarity that no meaning is reasonably clear, the courts will be unable to regard it as of any effect, and, naturally, the subject cannot be penalised**. This is precisely what has been ruled in a number of decisions of the Supreme Court including ***CIT v. Vegetable Products [(1973) 88 ITR 192 (SC); CIT v. Maskara Tea Estate [(1981) 130 ITR 955 (Gauh.)]***

Principles of interpretation of penal provisions ...

- The true construction of a charging provision including a provision for charging penalty must receive the construction ruled by Rowlatt, J in *Cape Brandy Syndicate v. IRC* [(1921) 1 KB 64]. **If a statute intends to impose a penalty or a charge, it must be expressed in clear and unambiguous language. If the provision is reasonably clear, the courts have no jurisdiction to mitigate harshness.** However, if the provision is capable of alternative meanings, the courts will lean in favour of the subject. If the provision is so wanting in clarity, that no meaning is reasonably clear, the courts will be unable to regard it as of any effect. **The sound general rule is that a penalty shall not be considered to be imposed without a plain declaration of the Legislature. One is simply to go on the Act itself to see that the penalty claimed is that which the Legislature has enacted. No penalty can be levied on any doctrine of "the substance of the matter" as distinguished from its legal signification, as a subject is not liable to penalty on "supposed spirit of law or by inference or by analogy".** Lord Sumner observed in *Ormand Investment Co. v. Betts* [(1928) AC 143] "the Crown does not tax by analogy but by statute." - *CIT v. Maskara Tea Estate* [(1981) 130 ITR 955 (Gauh)].

Principles of interpretation of penal provisions ...

- In construing a penal statute, the object of the law must be clearly borne in mind - *Pratap Singh v. State of Jharkhand* [(2005) 3 SCC 551]
- If two constructions are possible upon the language of the statute, the Court must choose the one which is consistent with good sense and fairness, and eschew the other which makes its operation unduly oppressive, unjust or unreasonable, or which would lead to strange, inconsistent results or otherwise introduce an element of bewildering uncertainty and practical inconvenience in the working of the statute - *Dilip Kumar Sharma v. State of Madhya Pradesh* [AIR 1976 SC 133]
- Penalty provision should be interpreted as it stands and in case of doubt in a manner favourable to the taxpayer. If the Court finds that the language of a taxing provision is ambiguous or capable of more meaning than the one, then the Court has to adopt the interpretation which favours the assessee, more particularly so, where the provision relates to the imposition of penalty - *CIT v. Vegetable Products Ltd* [(1973) 88 ITR 192 (SC)] and *C.A. Abraham v. ITO* [(1961) 41 ITR 425 (SC)]

Significance of the expression “shall” or “may”

- It may be true that use of the expression “shall or may” is not decisive for arriving at a finding as to whether statute is directory or mandatory. **But the intention of the Legislature must be found out from the scheme of the Act.** It is also equally well settled that **when negative words are used the Courts will presume that the intention of the Legislature was that the provisions are mandatory in character** – **Nasiruddin v. Sita Ram Agarwal [AIR 2003 SC 1543 (1552)]**
- **The question as to whether a statute is mandatory or directory would depend upon the statutory scheme.** It is now well known that **use of the expression “shall” or “may” by itself is not decisive.** The Court while construing a statute must consider all relevant factors including the purpose and object the statute seeks to achieve [**Ashok Lanka v. Rishi Dixit, AIR 2005 SC 2821 at p. 2834**]

Kehar Singh v. State [AIR 1988 SC 1889]

- The Supreme Court of India laying down the law with reference to interpretation of statutes held in **Kehar Singh v. State [AIR 1988 SC 1889]** –
 - *“... In the past, the Judges and lawyers spoke of a golden rule by which statutes were to be interpreted according to grammatical and ordinary sense of the word. They took the grammatical or literal meaning unmindful of the consequences. Even if such a meaning gave rise to unjust results which legislature never intended, the grammatical meaning alone was kept to prevail. They said that it would be for the legislature to amend the Act and not for the court to intervene by its innovation. During the last several years, the golden rule has been given a go-by. **We now look for the intention of the legislature or the purpose of the statute. First, we examine the words of the statute. If the words are precise and cover the situation in hand, we do not go further. We expound those words in the natural and ordinary sense of the words. But, if the words are ambiguous, uncertain or any doubt arises as to the terms employed, we deem it as our paramount duty to put upon the language of the legislature rational meaning. We then examine every word, every section and every provision. We examine an Act as a whole. We examine the necessity which gave rise to the Act. We look at the whole situation and not just one-to-one relation. We will not consider any provision out of the framework of the statute. We will not view the provision as abstract principles separated from the motive force behind. We will consider the provisions in the circumstances to which they owe their origin. We will consider the provisions to ensure coherence and consistence within the law as a whole and to avoid undesirable consequences.”***

Principle of natural justice

- Natural justice should not be treated in the abstract. It should be treated in the practical context of administration of justice and what is natural or not, depends a good deal on the particular facts and circumstances of each case. This consideration was emphasized by the Supreme Court in **Rampyari Devi Saraogi v. Commissioner of Income-tax [(1968) 67 ITR 84, 89 (SC)]**, where the following observations occur:

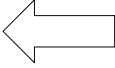
- *"The assessee, in our view, has not in any way suffered from the failure of the Commissioner to indicate the results of the enquiries, mentioned above. Moreover, the assessee will have full opportunity of showing to the Income-tax Officer whether he had jurisdiction or not and whether the income assessed in the assessment orders which were originally passed was correct or not".*

Principle of natural justice

- *Where an order of the Tribunal is impugned before the High Court, **the order must be read as a whole** to find out if it is valid and according to law, and **the observation made by the Tribunal cannot be picked out for the purpose of criticising its order on the ground that principles of natural justice have been violated**. If the order cannot be supported except on grounds with regard to which it may legitimately be urged that the principles of natural justice had been violated, the order must be struck down. But if **the order can be supported on grounds apart from those which may be held to be bad for violating the principles of natural justice, it cannot and should not be interfered with** - **Bagsu Devi Bafna v. Commissioner of Income-tax [(1967) 63 ITR 333 (Cal.)]**.*

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

Chairman, SEBI v. Shriram Mutual Fund & Other [(2006) 68 SCL 216 (SC)]

- In this case before the Apex Court, SEBI preferred an appeal against the order of SAT (Securities Appellate Tribunal) raising an important question of law viz. whether once it is conclusively established that the Mutual Fund has violated the terms of the Certificate of Registration and the statutory Regulations i.e. SEBI (Mutual Funds) Regulations, 1996 (hereinafter referred to as 'the Regulations') the imposition of penalty becomes a sine qua non of the violation. 
- The Chairman, SEBI in exercise of the powers conferred on it under Section 15(l) of the said Act and Rule 3 of the SEBI (Procedure for Holding Enquiry and Imposing Penalty by Adjudicating Officer) appointed an Adjudicating Officer to enquire into the violations of exceeding by the respondents of the permissible limit of 5% of aggregate purchases and sales of securities made by the Mutual Fund in all its Schemes, as prohibited under Regulations 25(7)(a) of the said Regulations.

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- The Adjudicating Officer, after hearing the parties, imposed penalty of Rs. 5 lakh under Section 15E on respondent No. 2 for failure to comply with Regulations 25 (7)(a) of SEBI (Mutual Funds) Regulations, 1996 with regard to routing of transactions through associate brokers.
- The Adjudicating Officer also imposed a penalty of Rs. 2 lakh under Section 15D(b) of SEBI Act, 1992 on respondent No.1 for its failure to comply with the terms and conditions of Certificate of Registration granted to it.
- The Tribunal set aside the order of the Adjudicating Officer on the purported ground that the penalty to be imposed for failure to perform a statutory obligation is a matter of discretion.
- Section 15E of the Act levying penalty read as under -
 - "Where any asset management company of a mutual fund registered under this Act fails to comply with any of the regulations providing for restrictions on the activities of the asset management companies, such asset management company ***shall be liable*** to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less."

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- The Apex Court observed that Section 15A to Section 15HB are in the form of mandatory provisions imposing penalty in default of the provisions of the SEBI Act and Regulations. The provisions of penalty for non-compliance of the mandate of the Act is with an object to have an effective deterrent to ensure better compliance of the provisions of the SEBI Act and Regulations, which is crucial for the appellant Board in order to protect the interests of investors in securities and to promote the development of the securities market.
- The legislature in its wisdom had not included mens rea or deliberate or wilful nature of default as a factor to be considered by the Adjudicating Officer in determining the quantum of liability (sic penalty) to be imposed on the defaulter. Sections 15A to 15H and 15HA employ the words "shall be liable" and, therefore, mandatorily provides for imposition of monetary penalties for respective breaches or non-compliance of provisions of the SEBI Act and the Regulations.

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- The Scheme of the SEBI Act of imposing penalty is very clear. Chapter VI nowhere deals with criminal offences. These defaults for failures are nothing, but failure or default of statutory civil obligations provided under the Act and the Regulations made thereunder. It is pertinent to note that Section 24 of the SEBI Act deals with the criminal offences under the Act and its punishment. Therefore, the proceedings under Chapter VI A are neither criminal nor quasi-criminal. The penalty leviable under this Chapter or under these Sections, is penalty in cases of default or failure of statutory obligation or in other words breach of civil obligation.
- There is no element of any criminal offence or punishment as contemplated under criminal proceedings. Therefore, there is no question of proof of intention or any mens rea by the appellants and it is not essential element for imposing penalty under SEBI Act and the Regulations.

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- The important question of law which arises for consideration in the present appeal is whether the Tribunal was justified in allowing the appeals of the respondent herein and that whether once it is conclusively established that the Mutual Fund has violated the terms of the Certificate of Registration and the statutory Regulations i.e. the SEBI (Mutual Funds) Regulation, 1996, the imposition of penalty becomes a sine qua non of the violation.
- In other words, **the breach of a civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not.**
- The Tribunal set aside the order passed by the Adjudicating Officer on the ground that **the penalty to be imposed for failure to perform a statutory obligation is a matter of discretion which has to be exercised judicially and on a consideration of all the relevant facts and circumstances. The Tribunal also held that the Adjudicating Officer has to be satisfied with the material placed before him that the violation deserves punishment.**

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- The Apex Court held that the Tribunal has miserably failed to appreciate that by setting aside the order of the Adjudicating Officer the Tribunal was setting a serious wrong precedent whereby every offender would take shelter of alleged hardships to violate the provisions of the Act. In our opinion, **mens rea is not an essential ingredient for contravention of the provisions of a civil act.** In our view, the **penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial.**
- **The breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not. This apart that unless the language of the statute indicates the need to establish the element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred.**

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- Once the contravention is established, then the penalty has to follow and only the quantum of penalty is discretionary. **Discretion has been exercised by the Adjudicating Officer as is evident from imposition of lesser penalty than what could have been imposed under the provisions. The intention of the parties is wholly irrelevant** since there has been a clear violation of the statutory Regulations and provisions repetitively, covering a period of 6 quarters.
- It is settled law that when a penalty is imposed by an Adjudicating Officer, it is done so in adjudicatory proceedings and not by way of fine as a result of prosecution of an accused for commission of an offence in a criminal proceeding.
- Mens rea : Whether an essential element for imposing penalty for breach of civil obligations? **This Court in a catena of decisions have held that mens rea is not an essential element for imposing penalty for breach of civil obligations.**

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- The Apex Court considered the ratio of the earlier decisions in –
 - Director of Enforcement v. MCTM Corporation Pvt. Ltd. & Ors., [(1996) 2 SCC 471];
 - J.K. Industries Ltd. & Ors. v. Chief Inspector of Factories and Boilers & Ors., [(1996) 6 SCC];
 - R.S. Joshi Sales Tax Officer, Gujarat & Ors. v. Ajit Mills Ltd. & anr. etc., [(1977) 4 SCC 98]
 - Gujarat Travancore Agency, Cochin v. C.I.T., [(1989) 3 SCC 52];
 - Swedish Match AB and Anr. v. SEBI & anr., [(2004) 11 SCC 641];
 - SEBI v. Cabot International Capital Corporation, [(2005) 123 Comp. Cases 841 (Bom)].

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- The Apex Court held that –
 - the Tribunal has erroneously relied on the judgment in the case of **Hindustan Steel Ltd. Vs. State of Orissa, [AIR 1970 SC 253]** which pertained to criminal/quasi-criminal proceeding. That Section 25 of the Orissa Sales Tax Act which was in question in the said case imposed a punishment of imprisonment up to six months and fine for the offences under the Act. The said case has no application in the present case which relates to imposition of civil liabilities under the SEBI Act and Regulations and is not a criminal/quasi-criminal proceeding.
 - in our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulation is established and hence the intention of the parties committing such violation becomes wholly irrelevant. **A breach of civil obligation which attracts penalty in the nature of fine under the provisions of the Act and the Regulations would immediately attract the levy of penalty irrespective of the fact whether contravention was made by the defaulter with guilty intention or not.** We also further hold that unless the language of the statute indicates the need to establish the presence of mens rea, it is wholly unnecessary to ascertain whether such a violation was intentional or not.

Chairman, SEBI v. Shriram Mutual Fund & Other - SC

- The Apex Court held that –
 - **the imputing mens rea into the provisions of Chapter VIA is against the plain language of the statute and frustrates entire purpose and object of introducing Chapter VIA to give teeth to the SEBI to secure strict compliance of the Act and the Regulations.**

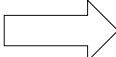
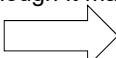
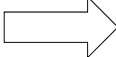

Propositions from the decisions of SC

- Penalty under section 271(1)(c) is a civil liability and for attracting such civil liability, wilful concealment is not an essential ingredient as is case in matter of prosecution under section 276C – **Union of India v. Dharmendra Textile Processors [(2008) 306 Taxman 277 (SC)]**
- 'Concealment' refers to a deliberate act on part of assessee; if explanation given by assessee with regard to mistake committed by him has been treated to be bonafide and it has been found as a fact that he has acted on basis of wrong legal advice, question of his failure to discharge his burden in terms of Explanation appended to section 271(1)(c) would not arise – **T. Ashok Pai v. CIT [(2007) 292 ITR 11 (SC)]**
- Where the additions made in the assessment order, on the basis of which penalty for concealment was levied, are deleted, there remains no basis at all for levying the penalty for concealment, and therefore, in such a case no such penalty can survive and the same is liable to be cancelled. **Ordinarily, penalty cannot stand if the assessment itself is set aside. Where an order of assessment or reassessment on the basis of which penalty has been levied on the assessee has itself been finally set aside or cancelled by the Tribunal or otherwise, the penalty cannot stand by itself and is liable to be cancelled – K. C. Builders v. ACIT [(2004) 265 Taxman 562 (SC)]**

Propositions from the decisions of SC

- SC in **CIT v. Reliance Petroproducts (P.) Ltd. [(2010) 322 ITR 158 (SC)]** held -
 - a mere making of claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding income of assessee;
 - merely because assessee had claimed expenditure, which claim was not accepted or was not acceptable to revenue, that by itself would not attract penalty under section 271 (1)(c).
- Where tax audit report filed along with return unequivocally stated that provision for payment of gratuity was not allowable under section 40A(7) but due to a bona fide and inadvertent error, assessee failed to add provision for gratuity to its total income, assessee could not be held to be guilty of furnishing inaccurate particulars of income for levying penalty under section 271(1)(c) – **Price Waterhouse Coopers (P.) Ltd. v. CIT [(2012) 348 ITR 306 (SC)]**
- When tax was calculated under section 115JB, penalty under section 271(1)(c) could not be imposed in respect of addition / disallowance made in assessment under normal procedure – **CIT v. Nalwa Sons Investment Ltd. [(2012) 21 taxmann.com 184 (SC)]**



Issues for consideration w.r.t. section 270A

- Is the power to initiate and / or levy penalty mandatory or discretionary? If it is discretionary, the scope thereof? 
- Are the seven situations mentioned in seven clauses of sub-section (2) exhaustive or can it be contended that apart from these seven situations, if there is some other case of under-reporting then such a case shall also be covered though it may not fall within any of the seven clauses stated in sub-section (2). 
- Will mere presence of an item of under-reported income arising as a consequence of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income? 
- Is it mandatory for the Authority issuing a notice for levy of penalty under section 270A to specify the sub-clause of sub-section (9) which is sought to be invoked or would it be sufficient if the order initiating penalty / notice issued under section 274 merely states that the penalty is proposed to be levied for under-reporting of income in consequence of misreporting thereof. 

Issues for consideration w.r.t. section 270A

- Can it be contended, on behalf of the revenue, that the ratio of the decisions rendered in the context of s. 271(1)(c) e.g. **CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Karnataka)** and/or **CIT v. SSA'S Emerald Meadows [2016] 73 taxmann.com 248 (SC)** is not applicable to the provisions of section 270A because unlike section 271(1)(c), there is only one offence in section 270A viz. under-reporting of income.

Issues for consideration w.r.t. section 270AA

- Can the Assessing Officer reject the application for grant of immunity on the ground that the penalty has been initiated in the circumstances mentioned in sub-section (9) when the notice issued under section 274 merely states that the proceedings have been initiated for under-reporting?
- If the Assessing Officer proposes to reject the application for immunity under section 270AA, on the ground that the penalty proceedings have been initiated in the circumstances referred to in sub-section (9) of section 270A and the assessee in the course of hearings makes out a case that, on facts, its case is not covered by sub-section (9), can the Assessing Officer still grant immunity? 
- In which situation does the Assessing Officer have a discretion to reject an application for grant of immunity? Non-satisfaction of conditions mentioned in sub-section (1) would be a case covered by sub-section (3). What is the role of sub-section (4) of section 270AA? 

Decisions of Bombay High Court in the context of penalty under Sections 271D/E

Triumph International Finance (I) Ltd. – Bombay HC

- In this case the court was concerned with the case of an assessee who had repaid the loan taken by it by way of a journal entry adjusting the payment due towards the repayment of the loan with the amount due to it from the lender towards sale of shares.
- Prior to 1st April 2002, the assessee had accepted a sum of Rs. 4,29,04,722/- as and by way of loan/inter-corporate deposit from the Investment Trust of India which was repayable during the assessment year 2003-2004. On 3rd October 2002 the assessee transferred 1,99,300 shares of Rashal Agrotech Limited held by it to the Investment Trust of India for a consideration of Rs. 4,28,99,325/-. Thus, in the AY in question, the assessee was liable to repay the loan/inter-corporate deposit amounting to Rs. 4,29,04,722/- to the Investment Trust of India and receive Rs. 4,28,99,325/- from Investment Trust of India towards sale price of the shares of Rashal Agrotech Limited sold by the assessee to the Investment Trust of India.

Triumph International Finance (I) Ltd. – Bombay HC

- Instead of repaying the loan/inter-corporate deposit to the Investment Trust of India and receiving the sale price of the shares from the Investment Trust of India, both the parties agreed that the amount payable/receivable be set-off in the respective books of account by making journal entries and pay the balance by account payee cheque. Accordingly, after setting off of the mutual claim through journal entries, the balance amount of Rs. 5,397/- due and payable by the assessee to the Investment Trust of India was paid by a crossed cheque dated 19th February 2003 drawn on the Citibank.
- The AO after issuing show cause notice levied a penalty under section 271E of the Act amounting to Rs. Rs. 4,28,99,325/- on the ground that the assessee had repaid the loan/inter-corporate deposit to the extent of Rs. 4,28,99,325/- in contravention of the provisions of Section 269T of the Act.
- Aggrieved, assessee preferred an appeal to the CIT(A) who confirmed the action of the AO.

Triumph International Finance (I) Ltd. – Bombay HC

- **The Tribunal** allowed the appeal filed by the assessee by **following** its decision in the case of **V N Parekh Securities Private Limited and Ketan V Parekh** and **held that the payment through journal entries do not fall within the ambit of Section 269SS or 269T of the Act** and consequently no penalty can be levied either under Section 271D or Section 271E of the Act.
- Aggrieved, the revenue preferred an appeal to the High Court where on behalf of the assessee it was contended that –
 - Section 269T of the Act has been enacted to curb the menace of giving false explanation of the unaccounted money found during the course of search and seizure. He submitted that the bona fide transaction of repayment of loan or deposit by way of adjustment through book entries carried out in the ordinary course of business would not come within the mischief of the provisions of Section 269T of the Act

Triumph International Finance (I) Ltd. – Bombay HC

- Sections 269SS and 269T were not meant to hit the genuine transactions and the legislative intent is to mitigate any unintended hardships caused by the provisions to genuine transactions.
- Genuineness of the transactions entered into by the assessee with the Investment Trust of India is not in doubt.
- Section 269T postulates that if a loan or deposit is repaid by an outflow of funds, same has to be by an account payee cheque or demand draft. He submitted that discharge of the debt in the nature of loan or deposit in a manner otherwise than by an outflow of funds would not be hit by the provisions of Section 269T.

Triumph International Finance (I) Ltd. – Bombay HC

- Instead of repaying the amount by account payee cheque/demand draft and receiving back the amount by way of demand draft/cheque, the parties as and by way of commercial prudence have settled the account by netting off the accounts and paid the balance by account payee cheque. Relying on a decision of the Apex Court in the case of *J.B. Boda & Co. (P.) Ltd. v. CBDT* [1997] 223 ITR 271, counsel for the assessee submitted that **the two-way traffic of forwarding bank draft and receiving back more or less same amount by way of bank draft was unnecessary** and, therefore, in the facts of the present case, no fault could be found with the repayment of loan through journal entries.
- Section 269T, if plainly read, supports the contention of the Revenue that each and every loan or deposit has to be repaid only by an account payee cheque or draft. However, such literal interpretation, if accepted, would lead to absurdity because, by such interpretation not only mala fide transactions but even the genuine transactions would be affected.

Triumph International Finance (I) Ltd. – Bombay HC

- Relying on the judgments of the Apex Court in the case of *Asstt. Director of Inspection (Investigation) v. Kum. A.B. Shanthi* [(2002) 255 ITR 258; and *CIT v. J.H. Gotla* [(1985) 156 ITR 323 (SC)] counsel for the assessee submitted that **if a strict and literal construction of a statute leads to an absurd result, that is, a result not intended to be sub-served by the object of the legislation ascertained from the scheme of the legislation and if another construction is possible apart from the strict and literal construction, then, that construction should be preferred to strict literal construction.**
- Referring to the provisions contained in the Code of Civil Procedure and books on accountancy, counsel for the assessee submitted that **set off of the claim/counter-claim otherwise than by account-payee cheque or bank draft are legally permissible in commercial transactions as also in the accounting practice.** Therefore, **it must be held that genuine transactions like the transaction in the present case involving repayment of loan through journal entries do not violate Section 269T of the Act.**

Triumph International Finance (I) Ltd. – Bombay HC

- Having regard to the commercial dealings between the parties it must be held that **there was reasonable cause for repaying the loan through journal entries and in view of Section 273B of the Act penalty was not imposable under Section 271E of the Act.**
- In support of the above contention, reliance was placed on the decision of the Delhi high Court in the case of ***CIT v. Noida Toll Bridge Co. Ltd.* [(2003) 262 ITR 260 (Delhi)]**, decision of the Gujarat High Court in the case of ***CIT v. Shree Ambica Flour Mills Corpn.* [(2008) 6 DTR 169 (Guj.)]**, and a decision of this Court in the case of ***CIT v. Motta Constructions (P.) Ltd.* [(2011) 338 ITR 66 (Bom.)]**.

Triumph International Finance (I) Ltd. – Bombay HC

- The Court observed that –
The basic question to be considered in this appeal is, whether repayment of loan of Rs. 4,28,99,325/- by making journal entries in the books of account maintained by the assessee is in contravention of Section 269T of the Act, and, if so, for failure to comply with the provisions of Section 269T, the assessee is liable for penalty under Section 271E of the Act.

Triumph International Finance (I) Ltd. – Bombay HC

- The question is, whether such repayment of loan/deposit is in contravention of the modes of repayment set out in Section 269T ? The argument advanced by the counsel for the assessee that **the bonafide transaction of repayment of loan/deposit by way of adjustment through book entries carried out in the ordinary course of business would not come within the mischief of Section 269T cannot be accepted, because, the section does not make any distinction between the bonafide and non-bonafide transactions and requires the entities specified therein not to make repayment of any loan/deposit together with the interest, if any otherwise than by an account payee cheque/bank draft if the amount of loan/deposit with interest if any exceeds the limits prescribed therein.** Similarly, the argument that only in cases where any loan or deposit is repaid by an outflow of funds, Section 269T provides for repayment by an account payee cheque/draft cannot be accepted because Section 269T neither refers to the repayment of loan/deposit by outflow of funds nor refers any of other permissible modes of repayment of loan/deposit, but merely puts an embargo on repayment of loan/deposit except by the modes specified therein. Therefore, in the present case, where loan/deposit has been repaid by debiting the account through journal entries, it must be held that the assessee has contravened the provisions of Section 269T of the Act.

Triumph International Finance (I) Ltd. – Bombay HC

- It is relevant to note that with a view to mitigate the hardship that may be caused to the genuine business transactions on account of the bar imposed under Section 269T and the penalty imposable under Section 271E, the legislature, by the Taxation Laws (Amendment & Miscellaneous Provisions) Act 1986 has introduced Section 273B with effect from 10th September 1986. Section 273B inter alia provides that notwithstanding anything contained in Section 271E, no penalty shall be imposed on the person or the assessee as the case may be for any failure referred to in the said Section, if such person or assessee proves that there was reasonable cause for such failure.

Triumph International Finance (I) Ltd. – Bombay HC

- Thus, reading Section 269T, 271E and 273B together it becomes clear that -
 - (a) under Section 269T it is mandatory for the persons specified therein to repay loan/deposit only by account payee cheque/draft if the amount of loan/deposit together with interest, if any, exceeds the limits prescribed therein;
 - (b) non-compliance of the provisions of Section 269T renders the person liable for penalty under Section 271E; and
 - (c) section 273B provides that no penalty under Section 271E shall be imposed if reasonable cause is shown by the concerned person for failure to comply with the provisions of Section 269T of the Act.

Triumph International Finance (I) Ltd. – Bombay HC

- The argument advanced on behalf of the assessee that if Section 269T is construed literally, it would lead to absurdity cannot be accepted, because, repayment of loan/deposit by account payee cheque/bank draft is the most common mode of repaying the loan/deposit and making such common method as mandatory does not lead to any absurdity.
- No doubt, that in some cases genuine business constraints may necessitate repayment of loan/deposit by a mode other than the mode prescribed under Section 269T.
- To cater to the needs of such exigencies, the legislature has enacted Section 273B which provides that no penalty under Section 271E shall be imposed for contravention of Section 269T if reasonable cause for such contravention is shown.

Triumph International Finance (I) Ltd. – Bombay HC

- The expression 'reasonable cause' used in Section 273B is not defined under the Act. **Unlike the expression 'sufficient cause' used in Section 249(3), 253(5) and 260A(2A) of the Act, the legislature has used the expression 'reasonable cause' in Section 273B of the Act. A cause which is reasonable may not be a sufficient cause. Thus, the expression 'reasonable cause' would have wider connotation than the expression 'sufficient cause'. Therefore, the expression 'reasonable cause' in Section 273B for non-imposition of penalty under Section 271E would have to be construed liberally depending upon the facts of each case.**
- The Tribunal was not justified in holding that repayment of loan/deposit through journal entries did not violate the provisions of Section 269T of the Act. However, **in the absence of any finding recorded in the assessment order or in the penalty order to the effect that the repayment of loan/deposit was not a bonafide transaction and was made with a view to evade tax, we hold that the cause shown by the assessee was a reasonable cause** and, therefore, in view of Section 273B of the Act, no penalty under Section 271E could be imposed for contravening the provisions of Section 269T of the Act.

Ajitnath Hi-tech Builders (P.) Ltd. – Bombay HC

CIT v. Ajitnath Hi-tech Builders (P.) Ltd. [(2019) 412 ITR 316 (Bombay)]

- In this case, penalty under section 271D was levied on the assessee for accepting loans by a journal entry. The CIT(A) upheld the action of the AO.
- The Tribunal noted that neither genuineness of receipt of loans/deposits by way of an adjustment through journal entries carried out in ordinary course of business had been doubted in the regular assessment proceedings and transaction by way of journal entries was undisputedly done to raise funds from sister concerns, to adjust or transfer balances to consolidate debts, to correct clerical errors etc. It held that penalty under section 271D was not imposable in view of section 273B as there was a reasonable cause for the failure to comply with section 269SS.

Ajitnath Hi-tech Builders (P.) Ltd. – Bombay HC

- On merits of the issue, both parties agreed that the Tribunal was correct in holding that receipt of any advance/loan by way of journal entries is in breach of section 269SS as the decision of the High Court in *CIT v. Triumph International Finance (I) Ltd. [(2012) 345 ITR 270 (Bom.)]* is binding upon it.
- The revenue's grievance was with the impugned order of the Tribunal further holding that no penalty under section 271D is imposable in view of section 273B in the present facts.
- This is so as the Tribunal holds that the failure to comply with section 269SS was on account of reasonable cause on the part of the assessee. This finding of reasonable cause was on the application of parameters laid down by this Court in *Triumph International Finance (supra)* to determine reasonable cause for not complying with the provisions of section 269SS.

Ajitnath Hi-tech Builders (P.) Ltd. – Bombay HC

- Section 273B will have no application as the test of reasonable cause is not satisfied for the reasons that the decision of this Court in *Triumph International Finance (supra)* will have no application as that was case of only one transaction while in this case, there are numerous transactions reflected through the passing of journal entries; the reasons set out for taking advances/deposits by way of journal entry would not satisfy the test of reasonable cause; and the non-satisfaction of showing reasonable cause as required under section 273B gives rise to a question of law.

Ajitnath Hi-tech Builders (P.) Ltd. – Bombay HC

- The Tribunal has held that in the present facts, neither the genuineness of receipt of loans/deposits by way of an adjustment through journal entries carried out in the ordinary course of business has been doubted in the regular assessment proceedings.
- It held in the present facts the transaction by way of journal entries was undisputedly done to raise funds from sister concerns, to adjust or transfer balances to consolidate debts, to correct clerical errors etc.
- Further, the Tribunal records that journal entries constituted a recognized mode of recording of transactions and in the absence of any adverse finding by the authorities that the journal entries were made with a view to achieve purposes outside the normal business operations or there was any involvement of money, then, in these facts there was a reasonable cause for not complying with section 269SS.

Ajitnath Hi-tech Builders (P.) Ltd. – Bombay HC

- The test of reasonable cause cannot, in the present facts be determined on the basis of the number of entries. If there was a reasonable cause for making the journal entries, then, the number of entries made, will not make any difference. Besides, on facts, the Tribunal was satisfied with the reasons given by the assessee for reasonable cause and this finding is not shown to be perverse. Finally, the issue of there being a reasonable cause or not is an issue of fact. No inference of law and/or issue of interpretation is to be made.
- Thus, there was reasonable cause for assessee to receive deposit/loan through journal entries. This non-compliance with section 269SS would certainly be a reasonable cause under section 273B for non imposition of penalty under section 271D
- The view taken by the Tribunal in the impugned order holding that no penalty can be imposed upon the assessee as there was a reasonable cause in terms of section 273B for having received loans/deposits through journal entries is at the very least is a possible view in the facts of the case.

Ajitnath Hi-tech Builders (P.) Ltd. – Supreme Court

- Against the decision of the Bombay High Court in the case of Ajitnath Hi-tech Builders (P.) Ltd - the revenue preferred an SLP to the Supreme Court.
- The Supreme Court in an order reported in **[(2019) 102 taxmann.com 57 (SC)]** did not admit the SLP of the revenue against the decision of the Bombay High Court.

Jai Laxmi Rice Mills Ambala City – Supreme Court

CIT v. Jai Laxmi Rice Mills Ambala City - [(2015) 64 taxmann.com 75 (SC)]

- When the original assessment order itself was set aside, the satisfaction recorded therein for the purpose of initiation of the penalty proceeding under section 271E would also not survive
- In respect of assessment year 1992-93, assessment order was passed on the basis of CBI information informing the department that the assessee was engaged in large scale purchase and sale of wheat, but it was not filing return of income.
- While framing the assessment, the Assessing Officer opined that the assessee had contravened the provisions of section 269SS and because of this the Assessing Officer was satisfied that penalty proceedings under section 271E were to be initiated.
- The Commissioner (Appeals) allowed assessee's appeal and set aside the assessment order with a direction to frame the assessment *de novo*.

Jai Laxmi Rice Mills Ambala City – Supreme Court

- After remand, the Assessing Officer passed fresh assessment order. In said assessment order, however, no satisfaction regarding initiation of penalty proceedings under section 271E was recorded. It so happened that on the basis of the original assessment order, show cause notice was given to the assessee and it resulted in passing the penalty order.
- The Tribunal as well as the High Court held that when the original assessment order itself was set aside, the satisfaction recorded therein for the purpose of initiation of the penalty proceeding under section 271E would also not survive. The impugned penalty order was accordingly set aside.
- Insofar as fresh assessment order is concerned, there was no satisfaction recorded regarding penalty proceedings under section 271E, though in that order the Assessing Officer wanted penalty proceeding to be initiated under section 271(1)(c). Thus, in so far as penalty under section 271E is concerned, it was without any satisfaction and, therefore, no such penalty could be levied.

Issuance of show cause notice

What is a notice?

- The dictionary meaning of **notice is intimation**, instruction, warning, announcement, news, a written paper or placard conveying these matters.
- **Notice is given to a person to inform, instruct or intimate something which has happened or about to happen and of which the noticee may or may not be fully aware.**
- Generally **notice means a communication**, warning or advice **in formal language to bring to attention of a person** of actual or **intended decision of a matter or proceeding in which the noticee has interest** or intimation of something which the authority is bound to communicate or the noticee has a right to know.
- Notice has been stated to be a direct, clear and unmistakable statement as distinguished from supplying materials from which the existence of such a thing may be inferred [**Burgh v. Legge 8LJ Ex 258; Vallee v. Dumergue 4 Ex 290**].
- Notice may also refer to a commonly known fact which a court or the Government may take into evidence.
- The Supreme Court held that notice meant communication of material since none can meet an unknown ground [**Mohinder Singh Gill v. The Chief Election Commissioner AIR 1978 SC 851**]

What is a notice?

- The Supreme Court has also held that **in any proceeding, irrespective of whether it is judicial, quasi judicial or administrative in nature, a person, whose rights are adversely or prejudicially affected by an order of an authority is entitled to pre-decisional notice.** [I. J. Rao, Asst. Collector of Customs v. Bibhuti Bhusan Bagh [(1989) 3 SCC 202].
- In fact, **the court may strike down a decision for lack of pre-decisional notice. The main object of the judgment is to afford a fair hearing to the person affected or likely to be affected by the order.**

Particulars required in a valid notice

- Name, complete address and description of the person - [**CIT v. Bibhuti Bhusan Mallick (1987) 165 ITR 107 (Cal.)**]
- Notice should be in writing
- Notice should be given by a competent person
- Notice should mention the provision of law
- Notice to contain description of enquiry / cause of action - It has been held by the Supreme Court that a person against whom an order prejudicial to him is passed, should be informed of the allegation and the charges against him [**Union of India v. Tulsiram Patel AIR 1985 SC 1416**]
- A notice should also mention the points on which the noticee is required to reply [**B. D. Gupta v. State of Haryana [AIR 1972 SC 2472]**]
- Notice should indicate date and place of issue and also of hearing
- Notice has to be specific and opportunity to show cause real

Propositions w.r.t. issuance of notice

- **Issuance of notice is not a formality**
- Issuance of notice is not a mere formality and the despatch of notice merits due care. Despatch of notice should be done in such a manner that would ensure its service on the addressee. Unless the notice is served on the proper person the service becomes inadequate and the authority issuing the notice will not have the jurisdiction to act on the basis of the notice not properly served - **S K Manekia v. CST [1997 STC 426 (Bom.)]**
- **Service of notice on illiterate person**
- Where the signature on the notice belonged to some other person and the notice was on an illiterate person who was incapable of putting his signature on the notice, such notice cannot be said to have been served on him personally - **Orissa Industrial Infrastructure Development Corporation v. Supai Munda [(2004) 12 SCC 306]**
- **Error in service of notice does not affect jurisdiction of authority**
- In a case under the Income-tax Act, the Supreme Court held that if there has been an error or mistake in the service of notice, such error or mistake does not affect the jurisdiction of the Competent Authority [**CIT v. Pearl Mechanical Engineering and Foundry Works (P.) Ltd. [(2004) 4 SCC 597]**]



Commissioner of Sales-tax v. Subhas & Co. [(2003) 3 SCC 454]

- Supreme Court in **Commissioner of Sales-tax v. Subhas & Co. [(2003) 3 SCC 454]** while discussing the alleged violation of the principles of natural justice by improper service of notice in a sales-tax appeal held that -
 - non-issue or mistake in the issue of notice does not affect the jurisdiction of the assessing officer, if otherwise reasonable opportunity of being heard has been given;
 - issue of notice as prescribed in the Rules constitutes a part of reasonable opportunity of being heard;
 - if prejudice has been caused by non-issue or invalid service of notice, the proceeding would be vitiated. But irregular service of notice would not render the proceeding invalid; more so, if the assessee by his conduct rendered service impracticable or impossible;
 - in a given case when the principles of natural justice are stated to have been violated, it is open to the Appellate Authority in appropriate cases to set aside the order and require the assessing officer to decide the case de novo.
- In **Naresh Chandra Agarwal v. Bank of Baroda [(2001) 3 SCC 163]**, SC reiterated the importance of proper mode and manner of serving notice in which it observed that the service of notice is not a mere formality; it must be carried out in reality.

Amrit Foods v. Comm. of Central Excise – Supreme Court

- Supreme Court in **Amrit Foods v. Commissioner of Central Excise, U.P. [(2005) 13 SCC 419]** has held as follows:—
 - "5. The Revenue has preferred an appeal from the order of the Tribunal setting aside the imposition of penalty under Rule 173-Q of the Central Excise Rules, 1944. The Tribunal has set aside the order of the Commissioner on the ground that neither the show-cause notice nor the order of the Commissioner specified which particular clause of Rule 173-Q had been allegedly contravened by the appellant. We are of the view that the finding of the Tribunal is correct. **Rule 173-Q contains six clauses, the contents of which are not same. It was, therefore, necessary for the assessee to be put on notice as to the exact nature of contravention for which the assessee was liable under the provisions of Rule 173-Q. This not having been done, the Tribunal's finding cannot be faulted.** The appeal is, accordingly, dismissed with no order as to costs."

Basanti Properties (P.) Ltd.

Pr. CIT v. Basanti Properties (P.) Ltd. - [(2020) 114 taxmann.com 540 (Cal. HC)]

- Tribunal deleted penalty imposed on assessee on ground that while issuing notice under section 271, read with section 274, no details of any charge were provided to assessee.
- High Court upheld order passed by Tribunal
- SLP preferred by the revenue against the decision of Calcutta High Court was dismissed on account of low tax effect – **Pr. CIT v. Basanti Properties (P.) Ltd. - [(2020) 114 taxmann.com 541 (SC)]**

Basanti Properties (P.) Ltd.

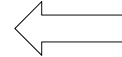
Pr. CIT v. Basanti Properties (P.) Ltd. - [(2020) 114 taxmann.com 540 (Cal. HC)]

- The Calcutta High Court, noted the observations of the SC in para 5 of the Order in the case of **Amrit Foods v. Commissioner of Central Excise, U.P. (supra)** and **also the decision of** a Division Bench judgment of Calcutta High Court in *Dr. CIT v. Dr. Murari Mohan Koley*, ITAT No. 306 of 2017, dated 18th July, 2018 which relying on a judgment of the Tribunal made on 4th April, 2018 which in turn relied upon judgments of the Karnataka and Bombay High Courts, came to the conclusion that unless the charge against the assessee was specific, the same could not be maintained.
- The Calcutta High Court held that the Tribunal has correctly deleted the penalty of Rs. 1,46,16,904/- for the same reason that no details of any charge were provided to the assessee in the impugned notice.
- The Court clarified that it has only gone into the question of technical defect in the notice dated 31st March, 2015 stated to have been issued under Section 271 read with Section 274 of the Income Tax Act, 1961 and the consequences thereof.

Language mistake in notice will not invalidate it

Language mistake in notice will not invalidate it

- The issuance of notice is an administrative device for informing the assessee about proposal to levy penalty. Mere mistake in the language used or mere non-striking off of inaccurate portions cannot by itself invalidate the notice - **CIT v. Smt. Kaushalya [(1994) 75 Taxman 549 (Bom.)]**



Section 271AAD – an analysis

Explanatory Memorandum to FB, 2020

- Section 100 of the Finance Act, 2020 has introduced section 271AAD in the Act. The Explanatory Memorandum, attached to the Finance Bill, 2020 explains the rationale of introducing the provision as under:

“Penalty for fake invoice.

In the recent past after the launch of Goods & Services Tax (GST), several cases of fraudulent input tax credit (ITC) claim have been caught by the GST authorities. In these cases, fake invoices are obtained by suppliers registered under GST to fraudulently claim ITC and reduce their GST liability. These invoices are found to be issued by racketeers who do not actually carry on any business or profession. They only issue invoices without actually supplying any goods or services. The GST shown to have been charged on such invoices is neither paid nor is intended to be paid. Such fraudulent arrangements deserve to be dealt with harsher provisions under the Act.”

S. 271AAD – Reason for introduction / Salient Features

- The explanation inserting this section is given in the Explanatory Memorandum under the caption **“Penalty for fake invoice”**. The marginal note to the section is captioned **“Penalty for false entry, etc. in books of account”**. Therefore, a cursory look at the caption in the Memorandum and the title as stated in the Marginal Note suggests that the scope of the provision is much wider than what has been stated in the Explanatory Memorandum.
- Section 271AAD is inserted in Chapter XXI of the Act which is captioned “Penalties Imposable”. Salient features of the provision, are as under –
 - the provisions of this section are without prejudice to any other provisions of the Act;
 - the penalty under this section can be imposed by the Assessing Officer;
 - there has to be a finding during any proceeding under the Act;

S. 271AAD – Reason for introduction / Salient Features

- the finding has to be to the effect that in the books of account maintained by any person there is –
 - a false entry; or
 - an omission of any entry which is relevant for computation of total income of such person, to evade tax liability;
- the term “false entry” is defined in the Explanation to this section;
- the levy of penalty appears to be discretionary;
- the quantum of penalty is a sum equal to the aggregate amount of such false or omitted entry;
- any other person who causes the person to make a false entry or omits or causes to omit any entry can also be directed to pay a penalty of a sum equal to the aggregate amount of such false or omitted entry;
- since this is a provision in Chapter XXI, provisions of sections 274 and 275 are applicable to penalty under this section.

S. 271AAD – who can impose?

- **Who can impose the penalty:** The Assessing Officer may direct that a person shall pay a penalty under this section. Unlike section 270A, the Commissioner (Appeals), Principal Commissioner or Commissioner does not have a power to direct payment of penalty under section 271AAD.
- In a case where jurisdiction has been conferred on a Joint Commissioner or an Additional Commissioner to do an assessment then in such a case, such a Joint Commissioner or Additional Commissioner will be an ‘Assessing Officer’ and consequently will be empowered to levy penalty under section 271AAD.
- Since the penalty under section 271AAD is based on a finding during ‘**any proceeding under this Act**’, a question arises as to **how can an Assessing Officer direct penalty in the course of appellate proceedings or revision proceedings. Does one conclude that it can be based on a finding in the proceedings before the Assessing Officer?** In order to avoid litigation on this aspect, it is advisable that a suitable amendment be made to the language of the provision or in the alternative, CBDT may clarify that the provisions of this section will apply only in the course of proceedings before the Assessing Officer and not any other tax authority.

What is the penalty u/s 271AAD levied for?

What is the penalty under section 271AAD levied for?

- As has been stated earlier, the penalty under this section is for
 - a false entry; or
 - an omission of any entry which is relevant for computation of total income of such person, to evade tax liability.
- in the books of account maintained by a person.
- The term “false entry”, for the purposes of this section, is defined in the Explanation to section 271AAD inclusively as follows –
 - “false entry” **includes** use or intention to use –
 - (a) forged or falsified documents such as a false invoice or, in general, a false piece of documentary evidence; or
 - (b) invoice in respect of supply or receipt of goods or services or both issued by the person or any other person without actual supply or receipt of such goods or services or both; or
 - (c) invoice in respect of supply or receipt of goods or services or both to or from a person who does not exist.

S. 271AAD : Quantum of penalty and effective date

- **Quantum of penalty** - A sum equal to the aggregate amount of such false or omitted entry.

Since when is the provision effective

- The Supreme Court in **Dayal Singh v. State of Rajasthan [(2004) 5 SCC 721]** has held that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of that act charged as an offence, nor be subjected to a penalty greater than with which he might have been inflicted under the law in force at the time of the commission of the offence.

S. 271AAD : Quantum of penalty and effective date

- **Since when is the provision effective** - Section 1(2) of the FA, 2020 provides that save as otherwise provided in this Act sections 2 to 104 shall come into force on 1.4.2020. S. 100 of the FA, 2020 inserts section 271AAD. There is nothing contrary stated in s. 100 of the FA, 2020. Therefore, **the provisions of section 271AAD are inserted with effect from 1.4.2020**. The EM attached to the FB, 2020 states that this provision will take effect from 1.4.2020. **A question arises as to whether the provision is effective from AY 2020-21 and therefore it will also apply to even acts done before the enactment of the provision**. Since this is a penal provision which has not been expressly made retrospective a better view appears to be that this section will apply to entries made or omission of an entry after the date of enactment of the provision. **It is a settled principle of interpretation of a penal provision that the penalty on the date of committing the offence will apply**. In cases covered by section 271AAD the offence is recording of a false entry or omitting an entry which is relevant for computation of total income with a view to evade tax liability. **In the event the act or omission is before 1.4.2020, it is possible to argue that the provisions of section 271AAD should not be made applicable to such acts / omission.**

`without prejudice to any other provisions of the Act'

- **Without prejudice to any other provisions of this Act** - The provisions of section 271AAD are without prejudice to any other provisions of the Act meaning thereby that the penalty under section 271AAD can be in addition to any other penalty, if any, to be levied under any other provision of the Act. In other words, **penalty under section 271AAD cannot be avoided on the ground that a penalty under some other provision of the Act has already been levied on the person**.
- Delhi High Court in *Apogee International Ltd. v. UOI [(1996) 220 ITR 248 (Delhi)]* has, for the purpose of section 143(2) of the Act, explained the meaning of "without prejudice to" as follows –
 - *"From a bare reading of clause (i) to sub-section (1)(a) of section 143, it is evident that giving of intimation in terms of provisions is 'without prejudice' to the provisions of sub-section (2), which means that an intimation sent to the assessee specifying the sum payable by him in terms of that sub-section does not preclude the operation of the provisions of sub-section (2). By force of the expression 'without prejudice', the jurisdiction of the assessing authority to proceed under sub-section (2) of section 143 is preserved despite intimation under sub-section (1)."*

`without prejudice to any other provisions of the Act'

- Madhya Pradesh High Court, in **CIT v. Regional Soyabean Products Co-op. Union Ltd., [(1999) 239 ITR 217 (MP)]**, cited in **CIT v. H.E.G. Ltd. [(2002) 255 ITR 251 (MP)]** has, for the purpose of section 143(1) of the Act, held as under –
 - *“But, the expression `without prejudice to the provisions of sub-section (2)’ appearing in the section would mean that once a notice has been issued under sub-section (2), then in that case the Assessing Officer shall not resort to section 143(1)(a)(i). **The expression `without prejudice to the provisions of sub-section (2)’ means that it saves the action already initiated under section 143(2) of the Act. If the Legislature really intended to give full power to the Assessing Officer under section 143(1)(a)(i), then they would not have saved the action under section 143(2). In fact, this expression has carved out an exception that the Assessing Officer can send intimation to the assessee if the Assessing Officer has not exercised the power under section 143(2) of the Act.”***
- It appears that the penalty under this section will be irrespective of the fact that a penalty under any other provision of the Act has been initiated or levied. Action taken under this section shall not be adversely affected by the action taken under any other provision of the Act.

`during any proceeding under this Act'

- **`during any proceeding under this Act'** – The phrase *`during any proceeding under this Act'* is very wide and can mean proceedings for assessment, survey, search, appeal, revision, rectification, passing an order to give effect to an appellate order, etc. They would even cover proceedings under section 133(6). However, **since the power to direct payment of penalty is only with the Assessing Officer** and not the other authorities like Commissioner (Appeals) or the Principal Commissioner or Commissioner **it is debatable as to whether this phrase should be read to mean only those proceedings which are before the Assessing Officer.** Taking a different view would mean that the **Assessing Officer can direct payment of penalty on the basis of finding of a different authority.**

'books of account maintained by any person'

- **books of account maintained by any person'** – The penalty is not on an assessee but on a person. While every assessee is a person, every person may not necessarily be an assessee. The person should be maintaining books of account. The term '*books or books of account*' is defined in section 2(12A) of the Act.
- A question arises as to whether penalty can be levied for a false entry or for omission of an entry from the books of accounts in a case where a person is not mandatorily required to maintain books of accounts say e.g. a case where a person chooses to be governed by the provisions of presumptive taxation or where the requirement of maintaining books of account is not applicable to the person. Such a person may choose to maintain books of account to comply with the requirements of some other law. In such a case, will such a person be liable for penalty under this section, in case there is a false entry in such books of account or an omission of an entry which is relevant for computation of total income of such person to evade tax liability.

'may direct'

- '**may direct**' – The language of the section is the Assessing Officer '*may direct*'. This is similar to the language of section 271 and several other penalty provisions.
- In the context of provisions of levy of penalty under section 271(1)(c) of the Act, the phrase '*may direct*' has been explained to confer a discretion on the Assessing Officer.
- It appears that here also the phrase 'may direct' will mean that a discretion has been conferred on the Assessing Officer.
- Therefore, **in a case where an Assessing Officer has, exercising the discretion, not levied penalty no fault may be found with such an action of the Assessing Officer.**

Is scope confined to only cases of fake invoice?

- **Is scope of the section confined to only cases of 'fake invoice'** – The EM states the rationale for introduction of this section under the caption 'Fake Invoice' as - *“certain racketeers are issuing invoices without supplying goods or services so as to enable a person who receives such an invoice to claim Input Tax Credit on the basis of the invoice so issued. The GST on the supply mentioned in such invoice is not paid to the government. However, the person in whose books purchase entry is recorded on the basis of such an invoice fraudulently claims ITC. It is with a view to punish such persons harshly that the provision has been introduced.”*
- However, sub-section (1) provides that **the penalty under this section may be levied** in one of the two situations mentioned in sub-section viz. (i) there is a false entry in the books of account maintained by any person; or (ii) in the books of account maintained by a person there is an omission of any entry which is relevant for computation of total income of such person, to evade tax liability. **Entries other than those of recording fake invoice could also qualify as 'false entry'**. Moreover, **the term 'false entry' has been inclusively defined**. Therefore, **the scope of the provision is much wider than what has been explained in the Explanatory Memorandum**.

Meaning of 'false entry'

Will the courts hold that the scope of the provision be restricted to the intention mentioned in the Explanatory Memorandum?

- In view of the clear language of the provision it appears that it may be difficult to hold that the scope of the provision be restricted only to those cases which are covered by the Explanatory Memorandum.
- **Meaning of 'false entry'** – Having a false entry in the books of accounts maintained by a person and such a false entry being found in the course of any proceeding under the Act empowers the Assessing Officer to direct levy of penalty under section 271AAD.
- As has been stated, the term '*false entry*' has been inclusively defined in the Explanation to the section. **The three cases mentioned in clauses (a) to (c) of the Explanation are undoubtedly cases of 'false entry' but it may be argued, on behalf of the revenue, that even a case other than the one covered by the three clauses of the Explanation is also covered by the term 'false entry' since the definition is inclusive and not exhaustive**. It appears **that though the term 'includes' has been used, the definition has to be taken as an exhaustive definition and not an inclusive definition**.

Is the definition of 'false entry' exhaustive?

- A definition which uses the word 'includes' can also be regarded as an exhaustive definition if the words which follow the word 'includes' are those which would be covered by the natural meaning of the term sought to be defined.
- Since the three circumstances mentioned in inclusive part of the definition contained Explanation would have even otherwise been covered by the natural meaning of the term 'false entry', relying on the ratio of the following decisions it is possible to argue that the definition is an exhaustive definition:
 - **Commissioner of Customs v. Caryaire Equipment India Private Limited [(2012) 4 SCC 645 (SC)];**
 - **Urmila Devi v. U P Power Corporation and Ors. [2003 (53) ALR 643];**
 - **Jeramdas Vishendas v. Emperor, [AIR 1934 Sindh 96].**
- In other words, it appears to be possible to contend that only in the three cases mentioned in the Explanation be regarded as cases of 'false entry' and not any other case.

Meaning of 'omission'

- While clause (ii) of sub-section (1) dealing with omission to make an entry, makes a reference to an entry which is relevant for computation of total income and also that the omission is to evade tax liability, these two pre-requisites are missing in clause (i).
- Therefore, even if a false entry is not relevant for computation of total income and/or it is inadvertently recorded in the books of account, still the requirement of clause (i) of sub-section (1) will be regarded as having been satisfied and the person will be covered by the provisions of this section.

Meaning of 'omission'

- While the term 'false entry' is defined, 'omission' is not defined. Webster's Dictionary explains the meaning of 'omission' as "1. The act of omitting; 2. The state of being omitted. 3. Something left out, not done, or neglected; an important omission in a report."

Meaning of `omission`

- The Advanced Law Lexicon, 3rd Edition, 2005, explains the meaning of `Omission`, inter alia, as –
 - **“Omission” with reference to the performance of a duty involves the idea of conscious or wilful omission.** *Lond & S. W. Ry. V. Flower. 45 LJCP 54. See also 11CPLR (Cr.) 16.*
 - *For the purposes of s. 153(1) of the Employment Protection (Consolidation) Act 1978 (c. 44) “omission” has to be given its ordinary and natural meaning, so that the non-payment of money or the denial of a benefit can be an “omission”, notwithstanding that there was no obligation on the part of the employer to make the payment or grant the benefit (National Coal Board v. Ridgway [(1987) 3 All E.R. 582]*

Meaning of `omission`

- *The expression `omission` does not connote any obligation. `Omission` is a colourless word which merely refers to the not doing of something and if the assessee in fact does not make a return, it is an omission on his part, whether the law casts any obligation upon him to make a return or not. **Pannalal Nandlal Bhandari v. CIT, [AIR 1956 Bom 557, 558]** - [Income-tax Act (11 of 1922), S. 34(1)].*
- *A person cannot be said to have omitted or failed to disclose something when, of such thing, he had no knowledge. **P. R. Mukherjee v. CIT, [AIR 1956 Cal. 197, 200].***
- **An “omission” to perform a duty involves the idea that the person to act is aware that performance is required or needful** (*London & South Western Railway Flower, [1 CPD 77]. See DONE. Cp. Somerset v. Wade, [(1894) 1 QB 574], cited SUFFER. See also per KENNEDY J., Nathan v. Rous, [(1905) 1 KB 527], cited BY WHOSE.”*

Meaning of 'omission'

- In the circumstances, it appears that the “**omission**” referred to in clause (ii) of sub-section (1) **is not recording an entry which a person was obliged to record** and therefore, **if there is no duty on a person to record a particular entry, omission thereof may not qualify for levy of penalty.** Therefore, the proposition that, in a case where a person is not required to maintain books of accounts such a person cannot be said to have omitted all the entries appears to be an arguable proposition.
- Clause (ii) of sub-section (1) refers to omission of an entry which is relevant for computation of total income of such person and is to evade tax liability. Therefore, **omission of an entry which is not to evade tax liability will not attract the rigors of section 271AAD.**

Penalty under other provisions

- **Penalty under other provisions** – An entry / omission which qualifies for levy of penalty under section 271AAD may also attract penalty under other provisions of the Act. Therefore, a question arises as to whether a person can be penalised twice for the same offence. Relying on Article 20 of the Constitution an argument of ‘double jeopardy’ may be taken up. While double jeopardy is an argument which will work in criminal proceedings / criminal offences, it has been stated in H. M N. Seervai : Constitutional Law of India (3rd Edition), Vol. 1, p. 759, quoted in **Shiv Dutt Rai Fateh Chand and Others v. Union of India [(1983) 3 SCC 529 (SC)]** that “... Article 20 relates to the constitutional protection given to persons who are charged with a crime before a criminal court. In the following cases, it has been held that ‘double jeopardy’ does not apply to tax cases –
 - **ITO v. Sultan Enterprises [(2002) 256 ITR 185 (Bombay)];**
 - **CIT v. Ram Chandra Singh [(1976) 104 ITR 77 (Patna)].**

Amount of penalty; appeal and reasonable cause

- **Amount of penalty** – The amount of penalty is aggregate amount of false entry or omitted entry. Since the penalty under this section is in addition to penalty under other provisions of the Act, the penalty is draconian and in several cases may even lead to a financial disaster as the amount of penalty is not linked to the profit which one has made but to the amount of the entry / omission.
- **Appeal against order levying penalty:** An appeal against the order imposing penalty under section 271AAD shall lie to CIT(A) by virtue of the provisions of Section 246A(1)(q) of the Act.
- **No amendment to section 273B:** A penalty which is leviable under the sections mentioned in section 273B of the Act shall not be levied if a person has reasonable cause. Consequent to insertion of section 271AAD no amendment has been made to section 273B. Therefore, it appears that `reasonable cause` as a plea cannot be taken as a statutory right.
- **Opportunity of being heard:** Section 274 and 275 shall apply to a penalty to be levied under section 271AAD and therefore, before penalty is levied an opportunity of being heard shall be provided to the person.

Penalty on other person as well

- **Penalty on other person as well** – Sub-section (2) of the section is without prejudice to the provisions of sub-section (1). Under sub-section (2) any person who causes the person referred to in sub-section (1) [hereafter referred to as "other person"] to make a false entry or omits or causes to omit any entry then such other person shall also be liable to pay penalty equal to aggregate amount of such false or omitted entry.
- While implementing the provisions of sub-section (2) an issue may arise as to whether the Assessing Officer of a person in whose books a false entry is recorded or an omission of an entry is found, and who comes to a conclusion that `other person` has caused the person to make a false entry and such other person also needs to be penalised under sub-section (2), then how will such an Assessing Officer levy penalty on the other person because the Assessing Officer may not have jurisdiction over the other person and/or there may be no proceedings which may be going on in the case of the other person unless of course the conclusion is arrived at in the course of a survey on the other person or in proceedings under section 133(6), etc. However, even in such cases the issue of jurisdiction could still be there.

Miscellaneous propositions w.r.t. penal provisions

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Kedia Power Ltd. – Supreme Court

CIT v. Kedia Power Ltd. - [(2013) 37 taxmann.com 55 (SC)]

- **Where revenue contended that penalty order was passed within period of limitation as penalty was initiated in assessment order itself, grievance of revenue was required to be answered first by Tribunal**
- The Court, vide order dated 11th July, 2011, while issuing notice, had stated two specific questions raised by the Revenue for the first time before the Court. The questions raised by the Revenue were as follows –
 - *Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal failed to appreciate that the period of limitation in the instant case is governed by the provisions of Section 275(1) as the penalty was initiated in the assessment order itself and the penalty order was issued within time in accordance with the provisions of Section 275(1)(a) of the Income Tax Act, 1961?*

Kedia Power Ltd. – Supreme Court

- *Whether on the facts and in the circumstances of the case the Income Tax Appellate Tribunal was justified in coming to the conclusion that the order of penalty was barred under provisions of Section 275(1)(c) and failed to consider that penalty was initiated in the assessment order itself and the same was issued within time and in accordance with Section 275(1)(a) of the Income Tax Act, 1961?*
- The Court held that these two questions are required to be answered first by the Tribunal.
- The SC allowed the appeal and set aside the judgment(s) and Order(s) passed by the High Court and the Tribunal. It remanded the matter back to the Tribunal with a request to decide the aforesaid questions of law after affording opportunity of hearing to both the parties.

Gebilal Kanhaialal HUF – Supreme Court

ACIT v. Gebilal Kanhaialal HUF - [(2012) 25 taxmann.com 214 (SC)]

- **Where assessee surrendered a certain sum under section 132(4) but failed to pay tax on time, SC held that the assessee is entitled to immunity under Explanation 5 from payment of penalty, since no time-limit for payment of tax is prescribed - [Explanation 5 to section 271(1)(c)]**

Facts

- Search operation was conducted at premises of assessee-Karta of HUF and some assets and incriminating documents were seized.
- The assessee made a statement under section 132(4) on 1-8-1987 and surrendered certain sum. However, he failed to file return of income and pay tax and interest.
- The department initiated penalty proceeding.
- The assessee claimed for immunity from penalty.
- The Department denied immunity under clause (2) of *Explanation 5* to section 271(1)(c) on ground of non-compliance of condition of payment of tax in time.

Gebilal Kanhaialal HUF – Supreme Court

Issue involved

- Whether the assessee was entitled to immunity in terms of clause(2) of *Explanation 5* to section 271(1)(c)?

Decision of the Court

- Three conditions have got to be satisfied by the assessee for claiming immunity from payment of penalty under clause (2) of Explanation 5 to section 271(1)(c) viz.
 - the first condition was that the assessee must make a statement under section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in section 139(1). Such statement was made by the Karta during the search which concluded on 1-8-1987. It is not in dispute that condition No.1 was fulfilled.

Gebilal Kanhaialal HUF – Supreme Court

- the second condition for availing of the immunity from penalty under section 271(1)(c) was that the assessee should specify, in his statement under section 132(4), the manner in which such income stood derived. Admittedly, the second condition, in the present case also stood satisfied. According to the Department, the assessee was not entitled to immunity under clause (2) as he did not satisfy the third condition for availing the benefit of waiver of penalty under section 271(1)(c) as the assessee failed to file his return of income on 31-7-1987 and pay tax thereon particularly when the assessee conceded on 1-8-1987 that there was concealment of income.
- the third condition under clause (2) was that the assessee had to pay the tax together with interest, if any, in respect of such undisclosed income.
- However, no time limit for payment of such tax stood prescribed under clause (2). The only requirement stipulated in the third condition was for the assessee to 'pay tax together with interest'.

Gebilal Kanhaialal HUF – Supreme Court

- The Court held that in the present case, the third condition also stood fulfilled. The assessee has paid tax with interest up to the date of payment. The only condition which was required to be fulfilled for getting the immunity, after the search proceedings got over, was that the assessee had to pay the tax together with interest in respect of such undisclosed income up to the date of payment. Clause (2) did not prescribe the time limit within which the assessee should pay tax on income disclosed in the statement under section 132(4).
- For the above reasons, SC held that the assessee was entitled to immunity under clause (2) of Explanation 5 to section 271(1)(c).

Mitsubishi Corporation – Supreme Court

Mitsubishi Corporation v. JCIT [(2010) 190 Taxman 88 (SC)]

- In a writ petition assessee challenged show-cause notice issued for reviving penalty proceeding which were dropped earlier.
- High Court held that in a writ wherein determination of jurisdictional fact is involved, High Court should not exercise its writ jurisdictional power because such jurisdictional fact can be raised at first instance before competent authority.
- High Court, accordingly, directed assessee to move Assessing Officer in penalty proceedings.
- SC held that the High Court was justified in its decision and that the matter needed re-examination by Assessing Officer in terms of judgment in case of CIT v. Eli Lilly & Co. (India) (P.) Ltd. [(2009) 312 ITR 225 (SC)]

Sandeep Chandak – Supreme Court

Sandeep Chandak v. PCIT [(2018) 93 taxmann.com 406 (SC)]

- **Provisions of section 271AAB are automatically attracted in a case where assessee in the course of search admits undisclosed income and manner in which such income has been derived.**
- **FACTS**
- A search was carried out in case of assessee. In the course of search, assessee made a statement admitting certain undisclosed income.
- Assessing Officer added said amount to assessee's taxable income - Thereupon, Assessing Officer issued a notice for initiating penalty proceedings to which assessee submitted his reply.
- Assessing Officer having rejected assessee's explanation, passed a penalty order under section 271AAB.
- Tribunal proceeding on presumption that penalty proceedings had been initiated under section 271(1)(c), set aside penalty order.

Sandeep Chandak – Supreme Court

- High Court took a view that where **assessee in course of search admits undisclosed income and the manner in which such income has been derived**, then provisions of section **271AAB would automatically be attracted**.
- High Court further opined that since **opportunity of hearing** as prescribed under section 271AAB **had been given to assessee**, **penalty order passed by Assessing Officer was to be restored**.
- Supreme Court held that, on facts, there was **no ground to interfere with impugned order passed by High Court** and, therefore, instant petition was to be dismissed

Sandeep Chandak – Allahabad High Court

Sandeep Chandak v. PCIT [(2018) 93 taxmann.com 405 (All. HC)] : AY 2014-15

FACTS

- In the course of search on the assessee, various incriminating documents were seized. In the statement recorded under section 132(4), the assessee surrendered undisclosed income of Rs. 4 crores.
- The Assessing Officer completed assessment wherein said amount was added to assessee's income. Thereupon, the Assessing Officer initiated penalty proceedings by issuing a notice to assessee.
- In response to said notice, assessee submitted his reply which was not accepted. The Assessing Officer thus passed a penalty order under section 271AAB
- The Tribunal proceeding on basis that penalty proceedings had been initiated under section 271(1)(c), set aside penalty order

Sandeep Chandak – Allahabad High Court

- The Court observed that, the penalty notice had been issued under section 274, read with section 271. Section 274 provides that no order imposing a penalty shall be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. The penalty notice issued clearly indicated that the opportunity of being heard is provided to the assessee and therefore, the penalty notices has been issued under section 274 read with section 271 calling upon the assessee to show cause in writing or in person which fulfils the requirement of section 274 of the Act.
- The Court held that, in the present case, the provisions of section 271AAB are fully applicable as the conditions stipulated are satisfied as (i) a search has been initiated under section 132; and (ii) during the course of search the statement of the assessee has been recorded under section 132(4), and (iii) in the statement so recorded, the assessee admitted undisclosed income and specified the manner in which such income has been derived.

Sandeep Chandak – Allahabad High Court

- On perusal of contents of the penalty notice the Court observed that in the penalty notice, which issued under section 274 read with section 271, the AO has clearly indicated that the proceedings under section 271AAB are being initiated and the reply to the show-cause notice in writing on or before the date so as indicated will be considered before any such order is made under section 271AAB.
- The Court found substance in the submission of the department that the order passed by the Commissioner (Appeals), affirming the order of the penalty, is fully justified where the Commissioner (Appeals) has recorded a categorical finding with regard to the statement of assessee during the search and the issuance of the penalty notice under section 271AAB, which is relevant.
- Since admittedly, no proceeding under section 271(1)(c) were initiated by the AO during the course of the assessment proceeding under section 143(3), the impugned penalty proceedings under section 271AAB were held to be fully justified and are initiated in accordance with law.



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