

"Penalties and Representations in Penalty Proceedings including introduction to prosecution under IT Act" - 06.8.14.

Penalty u/s. 271(1)(c)-

- 1) The penalty proceedings being separate & independent, the assessee is entitled to contend that the assessee has a meritorious case, in quantum proceedings. - ***Dharamchand Shah 204 ITR 462 (Bom.);Prasanna Enterprises 244 ITR 188 (Kar.);Dhirajlal mangilal Shah 125 ITD 313: 126 TTJ (Ahd.) (TM) 644: 4 ITR 313.***
- 2) The additions in the assessment proceedings have been made on the basis of rule(s) of preponderance of probabilities. The same principles cannot be pressed into service while deciding the penalty u/s. 271(1)(c) of the Act. {See:***A.Rajendran 127 ITD 361: 134 TTJ (Chennai) 498.***}.
- 3) Presumption under Expln. 1 to section 271(1)(c)***Roborant Investments {2006} 7 SOT 181 (Mum.)***

Penalty to be deleted where quantum is admitted by the HC- Nayan Builders ITXA/415/2012 dated 8th Julu'14. {Contrary Views}- Advaita Estate Development P. Ltd. 27 ITR (Trib.) 112 (Mum.); Vasant Thakoor 27 ITR (Trib.) 254 (Mum.)

- 4) MAK Data 352 ITR 1 (Del.)-affirmed by Apex Court. Subsequently explained in Gem Granites (Mad. HC)
- 5) **Distinction between 'concealment' and 'furnishing of inaccurate particulars'- CIT V/s. Whiteford (I) Ltd. 2014-TIOL-1104-HC-AHM-IT-** words "*inaccurate*

particulars of income/concealment of income" insufficient to give a clear finding.

Rustom Medora- 2014-TIOL-466-ITAT-AHM dt. 11th July 2014.-

Wrong Claim.

- 6) Where disallowance/addition is made on the facts supplied/disclosed by the assessee, then it cannot be said that the assessee has concealed any particulars and/or furnished inaccurate particulars. -***Walter Saldhana {2011} 44 SOT 26 (Mum.).{Reliance Petroproducts 322 ITR 158 (SC)}***.
- 7) **SALMAN KHAN ITA No.2559/Mum/2013dt. 30th July 2014-** Assessee had claimed deduction of legal expenses which were disallowed. Held *penalty to be deleted*.
- 8) Assessee had declared long term capital loss inclusive of loss incurred on sale of US 64 units—AO disallowed loss on sale US 64 units on ground that where income from particular source was exempt from tax then loss from such source could not be set off from another source under same head of income—AO initiated penalty proceedings – ***CIT V/s. Nalin Shah(HUF) ITXA(Lodg.)/49-51/2013 dated March 2013 (Bom HC)***.
- 9) ***LEARNING UNIVERSE PVT LTD.-_2014-TIOL-425-ITAT-DEL*** No doubt on the genuineness of the claimed expenditure, the only question was the treatment given by the assessee to those expenditure which was a debatable No penalty if a claim of assessee is disallowed- ***CIT V/s. Neenu Datta 357 ITR 525 (Del.)***.
- 10) Prior Period Exps- ***Hamlet Constructions ITA/5846/Mum./2011*** dated 28th June 2013- held that inadvertent mistake of the assessee in claiming prior period expense ought not to meet with penalty. Same view in ***Excel Apparels Exports P. Ltd.*** 2013-TIOL-1009-ITAT-MUM dt. 11.10.13.

11) Bogus Purchases- No penalty- **Reliance Indus ITA/1641/M/2011** dt.11.12.13.

12) Capital gains disclosed only on being confronted- Penalty justified- **Chandrikaben Patel 2013- TIOL-1137-ITAT-Ahm.**

Bonafide Error.

13) **Price Water House Cooper 348 ITR 306 (SC); Somany Evergree Knits Ltd. 352 ITR 592** dated 21st March 2013., affirming the decision of the Hon'ble Tribunal in **ITA/1783/Mum/2009** dated 22nd September 2010

14) Year of Taxability.-Disagreement over the year in which the amount is taxable- cannot lead to penalty u/s. 271(1)(c). **Manilal Tarachand 254 ITR 630 (Guj.); Metal Rolling Works 339 ITR 373 (Bom.); Ms. Aishwarya Rai 12 SOT 114 (Mum.); Otis Elevator 27 ITR (Trib.) 303 (Mum.).**

15) Penalty on addition on the basis of statement made in survey. concealment has to be seen vis-à-vis the return viz. whether from the return filed by the assessee, it can be found that some material has been concealed and/or inaccurate particulars have been furnished.-**CIT V/s. SAS Pharmaceuticals 335 ITR 259 (Del.)'** .

Addition on Estimate basis.

16) Assessment at flat rate viz. by estimation hence no question of penalty- **Naresh Chand Agarwal 357 ITR 514 (All.)**. Assessee filing revised P & L & agreeing to addition of 3% on account of cash deposits- **P. Rojes 356 ITR 703 (Mad.)**.

17) **JULIUS PEREIRA 2014-TIOL-410-ITAT-MUM.-** no finding that assessee was capable of earning that much of income from any specific source. She had consistently taken a plea that the money belongs to her father who in turn utilised his hard earned retirement funds for earning interest. There is no finding on record to suggest that the assessee had any other source from which she was capable of generating that much of income.

18) **SAMIR DIAMOND MFG PVT LTD.-2014-TIOL-417-ITAT-AHM-** disallowance made out of wage expenses by way of estimate only; it cannot be said that the assessee has admitted bogus payment & not a fit case for levy of penalty under section 271(1)(c).

19) Cash payments-levying penalty in connection with expenditures incurred in cash on the ground that they were not verifiable and hence amounted to 'concealment'. At best, the unverifiable vouchers pertaining to cash expenditures can be said to unsustainable claim(s). It is well settled that no penalty can be levied for making claims which are unsustainable. - '**Saurabh Bansal**' 41 SOT 157 (Ahd.)'.

20) Amount offered by the assessee suo motu.- '**Hindustan Coca-Cola MKtg. Co 2013-TIOL-1242-ITAT-Del.** Dt.13th Dec'13- calculation mistake-conveyance exps not included in FBT

21) No penalty for ad-hoc disallowance- '**Kamal Sahadev ITA/6126/2012** ITAT Delhi dt. 20th Dec'13.

22) Claim of sec.80IA- claim of insurance, empty gunny bags, drums- Simplex Engg & Foundry Works P. Ltd. ITA/6108/Mum./2010.

23) **Wrong Head**- The treatment of a particular receipt as taxable under a particular head is a matter of opinion/view and merely because the assessee is of the view that a particular receipt is taxable under a particular head and to which the Revenue does not agree, it cannot constitute 'concealment' and/or furnishing of inaccurate particulars. ***CIT V/s. Awaita Properties P. Ltd. Income Tax Appeal no.731 of 2009 (Bombay High Court)*** ; ***CIT V/s. Tridhara Investments Pvt. Ltd. Income Tax Appeal no. 4045 of 2010. (Bombay High Court)***.

24) STCG treated as business income- ***CIT V/s. Lilly Exporters 2013-TIOL-798-HC-KOL-IT***.

25) where addition is agreed upon by the assessee to buy peace & avoid litigation, no penalty can be levied. {See: ***Marathon Nextgen Realty & Textiles Ltd. {2012} 67 DTR (Mum.) (Trib.) 249***}.

26) Merely because there is an addition by invoking section 50C, the same cannot *ipso facto* lead to presumption of concealment-***Renu Hingorani ITA/2210/Mum/2010. 2011-ITRV-ITAT-Mum-094; C. Basker V/s. ACIT, Trichy 2013-TIOL-39-ITAT-Mad. Dtd.12-10-12.; Japfa Comfeed (I) Pvt. Ltd. 2011-TIOL-703-ITAT-Del. & Khoodsurat Resorts 256 CTR (Del.) 371.***

27) Merely because disallowance was made u/s. 40(a)(ia), it does NOT follow that the assessee has concealed particulars and/or furnished inaccurate particulars - **'Tanushree Basu ITA/2922/M/2012** dated 22nd May 2013.

28) AO while giving effect to CIT(A)'s order cannot levy penalty- Satisfaction should have been recorded by the CIT(A)- **Padmini Mishra 2013- TIOL-956-ITAT-Del.**

Penalty u/s. 221- Penalty when tax in default.

- a) Default caused by financial inability is good & sufficient ground for not imposing penalty. -**CIT V/s. Bhikaji Ramchandra 183 ITR 478 (Bom.)**.
- b) Liquidity crunch due to heavy investment, held to be a reasonable cause.-
Brahma Bazaz Inns 79 TTJ (Pune) 342

Reasonable Cause u/s. 273B.

Sec. 273B of the IT Act, 1961 inter alia clearly lays down that in case assessee can demonstrate a reasonable cause for his lapse, the penalties mentioned in that section is/are not to be imposed. The AO is obliged to see whether the explanation offered by the assessee constitutes a 'reasonable cause' or not. As to what is "a reasonable cause" is essentially a question of fact, which needs to be determined after taking into account facts and circumstances of the case and the preponderance of probabilities. The facts and circumstances are best known by the person concerned and, therefore, it is his responsibility to give the explanation to the officer who is to adjudicate on whether or not the penalty is to be levied. When an explanation is

offered by the assessee, it is duty of the officer to objectively consider the same and determine whether on the facts of a particular case, such an explanation could possibly explain the default. The officer is not to elaborate upon as to what should have happened in the ideal circumstances but he has to only ascertain whether there are any real inconsistencies or factual errors in the explanation and whether, in a real life situation, assessee's explanation may hold good. It is also not the law that the assessee has to prove the explanation to the hilt, nor that the AO has to accept any explanation no matter how unrealistic it is.

Some Instances of reasonable cause.

- a) Section 271C- NO loss to Revenue- Short deduction of Tax (at source) while paying interest to group concerns, since assessee was under a bonafide belief that the income of payees would be less. However the payees had paid the tax, in most cases the payees were entitled to refunds & hence it was held that there was no loss to the Revenue. So no penalty u/s. 271C- ***CIT V/s. Muthoot Financiers 103 ITD 108 (Coch.)***.
- b) Section 271B- Delay in filing tax audit report- Change of management in the middle of the year is a reasonable cause.- ***Aleli & Co. {2006} 7 SOT 639 (Mum.)*** .
- c) Section 271B- The assessee had misplaced the tax challan. Therefore the return could not be filed in time and the tax audit report was also not filed in time, even though the tax audit report was ready before the due date. An affidavit was also filed by the assessee stating that the advance tax challan had been misplaced by the accountant of the concern who was trying to locate the same. .- ***CIT V/s. Lakshmanaswamy 296 ITR 591 (Mad.)***.

PROSECUTION.

1) **Section 278E. Presumption as to culpable mental state.**

(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation : In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.]

2) **Section 276C.**

Wilful attempt to evade tax, etc.

(1) If a person wilfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable,—

(i) in a case where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

(2) If a person wilfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

Explanation : For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person,—

(i) has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or

(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or

(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or

(iv) causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.]

3) **section 277**- **False statement in verification, etc.**

If a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable,—

(i) in a case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

4) **Section 276CC**-

Failure to furnish returns of income.

If a person wilfully fails to furnish in due time the return of fringe benefits which he is required to furnish under sub-section (1) of section 115WD or by notice given under sub-section (2) of the said section or section 115WH or] the return of income which he is required to furnish under sub-section (1) of section 139 or by notice given under clause (i) of sub-section (1) of section 142] or section 148 or section 153A], he shall be punishable,—

(i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds one hundred thousand rupees], with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with imprisonment for a term which shall not be less than three months but which may extend to three years and with fine:

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of fringe benefits under sub-section (1) of section 115WD or return of income under sub-section (1) of section 139]—

(i) for any assessment year commencing prior to the 1st day of April, 1975; or

(ii) for any assessment year commencing on or after the 1st day of April, 1975, if—

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid and any tax deducted at source, does not exceed three thousand rupees.]

5) **Section 278B**- Offences by companies.

(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly :

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer, of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(3) Where an offence under this Act has been committed by a person, being a company, and the punishment for such offence is imprisonment and fine, then, without prejudice to the provisions contained in sub-section (1) or sub-section (2), such company shall be punished with fine and every person, referred to in sub-section (1), or the director, manager, secretary or other officer of the company referred to in sub-section (2), shall be liable to be proceeded against and punished in accordance with the provisions of this Act.]

Explanation: For the purposes of this section—

(a) "company" means a body corporate, and includes—

(i) a firm; and

(ii) an association of persons or a body of individuals whether incorporated or not; and

(b) "director", in relation to—

(i) a firm, means a partner in the firm;

(ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.