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BY CA Vimal Punmiya

ORGANISED BY : WIRC of ICAI

SUBJECT : Important Decisions on Penny Stock

DATE : 04.01.2018 (Thursday)

TIME : 05.00 P.M. .

**VENUE : ICAI Tower, Plot No.C-40, 'G' Block, Near Standard Chartered Bank,
Bandra Kurla Complex, Bandra (E), Mumbai – 400 051**

1. What is penny Stock?

Penny stocks are those that trade at a **very low price**, have very low market capitalisation, are mostly illiquid, and are usually listed on a smaller exchange. Penny stocks in the Indian stock market can have prices below Rs 10. These stocks are **very speculative** in nature and are considered **highly risky** because of lack of liquidity, smaller number of shareholders, large bid-ask spreads and limited disclosure of information.

2. Why the Penny Stock came in eyes of Income Tax Department?

Penny stock is one type of equity shares and regularly traded in stock market and Department got some information that some people are engaged in providing in accommodation entries and they are dealing in providing bogus capital gain entries and they are taking advantages of bogus capital gain and they are involved in artificial involved in price manipulation .Hence They are evading tax.

3. What did after the information received about penny stock?

Department conducted various search at many places and doubted person was under raid of department. Many Alleged person recorded on oath and various report from investigation department generated and forwarded to concern Income Tax office.

4. What is section 10(38) of the Income Tax Act?

any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund where—

(a) the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No. 2) Act, 2004 comes into force³; and

(b) such transaction is chargeable to securities transaction tax under that Chapter :

4[Provided that the income by way of long-term capital gain of a company shall be taken into account in computing the book profit and income-tax payable under section 115JB.]

Explanation.—For the purposes of this clause, "equity oriented fund" means a fund—

(i) where the investible funds are invested by way of equity shares in domestic companies to the extent of more than 5[sixty-five] per cent of the total proceeds of such fund; and

(ii) which has been set up under a scheme of a Mutual Fund specified under clause (23D)

Provided that the percentage of equity shareholding of the fund shall be computed with reference to the annual average of the monthly averages of the opening and closing figures;]

5. Is the dealing in penny stock is illegal or contrary to Income Tax Act, 1961?

Penny stock is not illegal. We can see from daily trade in stock market that some shares are have low value and there are unexpected variation from both side higher and lower. It is under regulation of SEBI. The Income Tax Act is not said anything that penny stock is illegal and if the anything fit in criteria of any exemption that it cannot be said that it is illegal and benefit is not granted. All trading and profit and loss are part of business and its depends and Risk and luck of person because whole share market runs of sentiments. In Practical we already seen when Congress lead BJP in initial stage and Share market was unexpected lower side and within one hour it is reach at top side again. Hence we can say that share market itself in speculation nature.

6. What happened after all investigation report from investigation wing and various entry provider recorder on Oath?

The alleged person who took the entries or did transaction from said concern has been open under normal scrutiny and many reopening done in various cases.

7. How you will deal with penny Stock cases?

We will deal in penny stock cases in two part . One is technical part and other is merit part.

The appellant/ Respond can take many arguments depending on the facts of the cases and succeed in cases.

You can succeed in cases on following technical point –It is decided in various judicial case Laws.

1. The Notices issued under section 147/143 is time barred.

Time Limit for Notice u/s. 148

→ Section 149 – Notice can be issued up to 4 years from the end of relevant assessment year. However, if the income > 1.00 lac, then notice u/s. 148 can be issued up to six years.

→ Notice has to be issued within the— prescribed time limit not necessarily served within it. (R. K. Upadhyaya v. Shanabhai Patel 166 ITR 163 (SC))

2. Escapement of Income – Reasons lacks validity

“The result of this exercise would be that even if the expenditure of the so called bogus purchases is disallowed, the only effect it could have is to increase the profit of the assessee which in any case is exempt under section 10AA of the Act. Section 147 of the Act would be applicable where the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. When this fundamental requirement fails, power of reopening cannot be exercised – 241 taxman 383 (Guj).”

→ Borrowed Satisfaction – Can AO borrow satisfaction while recording reasons:

→ Where Assessing Authority had tangible material in form of specific information received by Investigation Wing that assessee had been beneficiary of bogus transactions, it was thoroughly justified in

issuing notice for reassessment - 76 taxmann.com 106 (Guj)

- ➔ Reopening for roving and/or fishing inquiries: "For a mere verification of the claim, the power of reopening of assessment could not be exercised. Assessing Officer under the guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims, as if it were a scrutiny assessment - 77 taxmann.com 293 (Guj)
- ➔ Cause and Effect relationship between reasons and income escaping assessment Reasons: "It is seen that the assessee has transferred 5,30,410 shares during year under consideration whose market value on the date of transfer was Rs.7,63,09,5550/- without consideration to M/s Nerka Chemicals Pvt Ltd by way of transfer deed dated 26.02.2010. In view of the above facts, I have reason to believe that and I am satisfied that the income chargeable to tax of more than Rs.1,00,000/- has escaped assessment within the provisions of section 147 of the Income Tax Act." Where Assessing Officer merely mentioned about transaction in notice for reassessment and nothing more and, thus, he had not stated how he had come to reason to believe that income had escaped assessment, such notice lacked validity - 238 Taxman 185 (Guj).
- ➔ The Assessing Officer himself must have Reason to Believe. Reopening on the basis of Audit objection is not valid. 170 Taxman 229 (Del), 240 ITR 24 (Guj);
- ➔ Escapement of Income. Reason must speak for itself so as to indicate/imply that some income has escaped assessment. 299 ITR 383 (Del);

3. The notice issued on non exiting entity.

- ➔ Where during pendency of assessment proceedings, assessee company was amalgamated with another company and thereby lost its existence, assessment order passed subsequently in name of said non-existing entity would be without jurisdiction and deserved to be set aside

[2017] 85 taxmann.com 330 (Delhi) Principal Commissioner of Income-tax-6, New Delhi V/s. Maruti Suzuki India Ltd.*

4. The assessment u/s 143(3) completed and reopening u/s 147 on same information i.e. Change of opinion

- ➔ CIT v. Kelvinator of India Ltd. 320 ITR 561 (SC), held that the Assessing Officer does not have power to review his own order u/s. 147. Change of opinion tantamount to review of order and reassessment for change of opinion u/s. 147 cannot be made.
- ➔ "Tangible Material" must be present to reopen.
- ➔ Some useful references:

Friends of WWB India vs DCIT 249 taxman 458 (Guj)

- Manan Exports Pvt Ltd vs ITO 78 taxmann.com 225 (Guj)
- Aryan Arcade Ltd vs DCIT 390 ITR 67 (Guj)
- Hynoup Food & Oil Industries Ltd vs ACIT 307 ITR 115 (Guj)
- Garden Silk Mills Ltd. V. DCIT 222 ITR 68 (GUJ)
- Indian and Eastern News Paper Society v. CIT [1979] 119 ITR 996, 1004 (SC)
- Siemens Information System Ltd. vs. ACIT 295 ITR 333 (Bom).

5. Reopening beyond Four Years

- ➔ Proviso to S. 147 of the Act
Failure to disclosure truly and fully all the material facts: 224 ITR 459 (Guj); 251 ITR 270 (Guj)θ 225 ITR 853 (Guj); 240 ITR 628 (Guj)θ 240 ITR 77 (Guj); 242 ITR 612 (Guj);θ
- ➔ "Primary Facts"

Duty of the assessee is to disclose only the 'primary' facts. Based on the primary facts, legal as well as factual inferences have to be drawn by the assessing officer. Primary facts means all the primary documents, which were statutorily required to be filed along with the return of income as also the documents called for in the course of the assessment proceedings for the year under consideration. – 41 ITR 191 (SC) – 79 ITR 582 (SC) @ 587-88

→ Full and True Disclosure

Test of failure to disclose fully and truly all the material facts lies in the reasons recorded. If on the basis of the very same material, Assessing Officer can reach to belief so as to reopen, there can hardly, said to be any failure to disclose fully and truly all material facts on the part of the assessee.

→ Effect of later decisions / Retrospective amendment 238 ITR 1022 (Guj); 242 ITR 173 (Guj) 271 ITR 340 (GUJ)

→ Reason must speak for itself

- Failure of the assessee to disclose fully and truly all material facts must be disclosed in the reasons recorded. In other words, reopening has to be justified on the basis of the reasons recorded which must allege such failure. No new ground or arguments can be taken into consideration beyond what is stated in the reasons recorded. – 225 ITR 853 (Guj) @ 856 – 324 ITR 154 (Bom) – 216 ITR 811 (Bom)

6. Can reassessment be framed without adding/disallowing items giving rise to reopening ?

- (2013) 30 Taxmann.com 1 (Guj)
- 306 ITR 343 (Raj) – 305 ITR 170 (Ker)
- 180 ITR 319 (Har)
- 82 ITR 831 (SC)

7. The assessment is not completed within time limit.

- Where scrutiny assessment was not completed within time limit and intimation under section 143(1) was issued, reassessment proceedings under section 147 could be initiated [2013] 34 taxmann.com 161 (Allahabad) HIGH COURT OF ALLAHABAD Commissioner of Income-tax, Kanpur V/s. J.S. Bindra*

8. If AO forgets to issue notice u/s 143(2) in time, can he issue notice u/s 148 ?

When assessment proceeding was initiated by issue of notice under section 142(1) and before concluding assessment proceedings, Assessing Officer issued notice under section 148 for reassessment, same was invalid

[2017] 85 taxmann.com 51 (Visakhapatnam - Trib.) Medapati Venkayamma V/s. Income-tax Officer, Ward-2, Amalapuram*

- METRO AUTO CORPORATION v. ITO & Oths. (2006) 286 ITR 618 (Bom)
- CIT v. VED & CO. (2007) 209 CTR 455 (Del)
- Trustees of H.E.H. the Nizam's Supplemental Family Trust vs. CIT (2000) 242 ITR 381 (SC)

9. Assessee requested for Cross Examination and the opportunity for cross examination is not provided.

Where assessee had taken loan from one 'N' and Assessing Officer added loan amount in income of assessee under section 68 on basis that no confirmation letter had been obtained from 'N', since loan was advanced and repaid vide account payee cheques, Assessing Officer should have provided assessee material used against him apart from providing him an opportunity to cross examine deponents whose statements were relied upon

[2016] 72 taxmann.com 110 (Bombay) H.R. Mehta V/s. Assistant Commissioner of Income-tax, Mumbai*

10. Issues discussed by AO

• Issues gone into and processed by the assessing officer may not get reflected in the body of the assessment order. Nonetheless such issues are considered as issues decided by the assessing officer.

- 309 ITR 67 (Guj)
- 221 ITR 155 (Guj)
- 343 ITR 329 (Del)
- 341 ITR 537 (Del)
- 333 ITR 547 (Del)
- 308 ITR 195 (Bom)

11. Assessee requested for material used for assessment like statement recorded has not been provided by A.O.

[2016] 72 taxmann.com 110 (Bombay) H.R. Mehta V/s. Assistant Commissioner of Income-tax, Mumbai*

12. Approval for reopening of the case is not taken from proper authority.

→ Where notice under section 148 was issued after obtaining sanction from Commissioner instead of Joint Commissioner who is competent authority to approve issuance of notice, assessment framed consequent thereto was not valid and same was void ab initio

[2015] 61 taxmann.com 320 (Lucknow - Trib.) Sardar Balbir Singh V/s. Income-tax Officer*

→ IT : Notice issued under section 148 after obtaining approval of Commissioner would be of no consequence as said approval is contrary to provisions of section 151

[2014] 41 taxmann.com 151 (Bombay) DSJ Communication Ltd. V/s. Deputy Commissioner of Income-tax, Circle -2(1)*

13. Objection filed by Assessee is not disposed off.

It is obligatory on part of Assessing Officer to dispose of assessee's objections before invoking re-assessment proceedings

[2017] 80 taxmann.com 77 (Karnataka) Deepak Extrusions (P.) Ltd. V/s. Deputy Commissioner of Income-tax, Central Circle 1(4), Bangalore*

14. Assessee did not receive any amount in said assessment year.

15. Addition made merely basis of AIR information without any supporting documents.

Just because AIR of BSE indicated PAN of assessee, the onus did not shift completely to assessee and it was responsibility of Assessing Officer to examine complete details before asking for reconciliation

[2012] 27 taxmann.com 321 (Mumbai - Trib.) IN THE ITAT MUMBAI BENCH 'L' Threadneedle Investment Fund ICVC Asia Fund V/s. Assistant Director of Income-tax (International Taxation) - 2(2)*

16. Assessment order passed on wrong entity.

17. A.O. only reopens in the basis of audit objection without applying his mind.

18. Implication of said section was not attracted in those years.

19. Others Points

On The Merits of The case

1. Payment made from accounts payee cheque.
2. Said investment duly recorded in books of accounts of assessee.
3. Said investment is accepted by A.O. in previous years.
4. Said investment is duly supported with Contract Notes.
5. Said transaction covered in DEMAT Account.
6. Said Investment sold by sold by DEMAT and duly supported with contract notes.

7. Payment received from proper banking channels.
8. It is under various regulations like SEBI, Service Tax and etc.
9. Without purchases sales cannot taken Place.
10. STT paid statement
11. Some of the cases situation may arise to treat as short term in demat account purchases and sales of shares within one year.

8. Where A.O. will make addition?

Addition made in section 68/69 and section 68 reproduced as under.

Cash credits.

68. Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :

Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

- (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
- (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of [section 10](#).

9. The Act can not itself explain everything and the situation and decision is depends on facts of the case Laws , Hence We reproduced some case Laws as under for annlysis and to increase confidence in our case.

Ser . No.	Citation and Name of Case Laws	Decision
1.	[2015] 54 taxmann.com 108 (Bombay) HIGH COURT OF BOMBAY Commissioner of Income-tax-13 <i>v.</i> Shyam R. Pawar* DECEMBER 10, 2014	Section 68 of the Income-tax Act, 1961 - Cash credit (Share dealings) - Assessment years 2003-04 to 2006-07 - Assessee declared capital gain on sale of shares of two companies - Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices, held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68 - On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus - Whether on facts, transactions in shares were rightly held to be genuine and addition made by Assessing Officer was rightly deleted - Held, yes [Para 7] [In favour of assessee]
2.	[2014] 41 taxmann.com 118 (Hyderabad - Trib.) IN THE ITAT HYDERABAD BENCH 'A' Income-tax Officer, Ward 2, Nizamabad <i>v.</i>	Section 10(38) of the Income-tax Act, 1961 - Capital gains - Exemption of, on transfer of securities [Genuineness of transactions] - Assessment year 2006-07 - Assessee filed its return declaring long term capital gains on shares traded in Calcutta Stock Exchange - Since sale transactions took place through

	<p>Smt. Aarti Mittal* NOVEMBER 6, 2013</p>	<p>authorized stock exchange and securities transaction tax was paid, assessee claimed entire sale proceeds arising out of transaction as long term capital gain exempt from tax under section 10(38) - Assessing Officer did not believe transactions in question as genuine and treated entire sale proceeds as 'Income from Other Sources' - Commissioner (Appeals) opined that in absence of any positive evidence, merely on basis of suspicion, transactions could not be held to be not genuine - Commissioner (Appeals) thus set aside addition made by Assessing Officer - It was noted that even though enquiry with Chennai Stock Exchange (CSE) revealed that no purchase had taken place through it, since transactions were in physical form and done through off market, question of same being routed through floor of a recognized stock exchange did not arise - It was also apparent that assessee having purchased shares in question, converted them in D-mat form and thereupon sale of those shares was carried out through CSE after paying Securities Transaction Tax - Whether on facts, transactions of purchase and sale of shares were to be regarded as genuine in nature and, therefore, assessee's claim was rightly allowed - Held, yes [Para 23] [In favour of assessee]</p>
3.	<p>[2017] 77 taxmann.com 260 (Ahmedabad - Trib.) IN THE ITAT AHMEDABAD BENCH 'B' Pratik Suryakant Shah <i>v.</i> Income-tax Officer, Ward- 10 (3), Ahmedabad* OCTOBER 21, 2016</p>	<p>Section 10(38), read with section 147, of the Income-tax Act, 1961 - Capital gains - Income arising from transfer of long-term securities (Bogus transactions) - Assessment year 2006-07 - Assessee purchased 3000 shares of company 'T' through a stock broker - These shares were transferred to assessee's demat account - However, said stock broker submitted before authorities that he was providing accomodation entries for taking profit or loss by showing purchase or sales of shares and securities commission from beneficiary parties and that assessee was one of beneficiary of such accomodation entries - Assessing authorities reopened assessment of assessee - Whether since shares of said company was listed in BSE/NSE and these were also transferred to demat account of assessee, assessee's claim of exemptions of long-term capital gain on sale of shares could not be denied on basis of submission of said broker - Held, yes [Paras 17 and 18] [In favour of assessee]</p>
4.	<p>[2016] 69 taxmann.com 65 (Mumbai - Trib.) IN THE ITAT MUMBAI BENCH 'E' Income-tax Officer, 19(3)(4), Mumbai <i>v.</i> Shamim M. Bharwani* MARCH 27, 2015</p>	<p>Section 68 of the Income-tax Act, 1961 - Cash credit (Share dealings) - Where assessee claimed income earned from sale of shares as exempt under section 10(38), in view of fact that purchase transaction of said shares was not recorded in stock exchange and, moreover, selling rates were artificially hiked later on with no real buyers, Assessing Officer rightly rejected assessee's claim and added amount in question to his taxable income under section 68 [Assessment year 2006-07] [In favour of revenue]</p>
5.	<p>ACIT vs. Vineet Sureshchandra Agarwal (ITAT Ahmedabad) ITA No. 1442/Ahd/2013 & CO No. 209/Ahd/2013 Assessment Year : 2005-06</p>	<p>Bogus capital gains from penny stocks: The fact that the Stock Exchanges disclaimed the transaction is irrelevant because purchase and sale of shares outside the floor of Stock Exchange is not an unlawful activity. Off-market transactions are not illegal. It is always possible for the parties to enter into transactions even without the help of brokers. Therefore, it is not possible to hold that the transactions reported by the assessee were sham or bogus</p>
6.	<p>Surya Prakash Toshniwal HUF vs. ITO (ITAT Kolkata)</p>	<p>Bogus capital gains from penny stocks: Long-term capital gains claimed exempt u/s 10(38) cannot be</p>

	ITA No.1213/Kol/2016 Assessment Year :2005-06	treated as bogus unexplained income if the paper work is in order. The fact that the Company whose shares were sold has violated SEBI norms and is not traceable does not mean that the assessee is at fault
7.	CIT vs. Mukesh Ratilal Marolia (Bombay High Court) INCOME TAX APPEAL NO. 456 OF 2007 7th September 2011	S. 10(38)/ 69: Fact that a small amount invested in "penny" stocks gave rise to huge capital gains in a short period does not mean that the transaction is "bogus" if the documentation and evidences cannot be faulted
8.	Farrah Marker vs. ITO (ITAT Mumbai) ITA No. 3801/Mum/2011 (Assessment Year: 2005-06)	S. 10(38)/ 68: Long-term capital gains on sale of "penny" stocks cannot be treated as bogus & unexplained cash credit if the documentation is in order & there is no allegation of manipulation by SEBI or the BSE. Denial of right of cross-examination is a fatal flaw which renders the assessment order a nullity
9.	Shri Sanjay Bimalchand Jain, V/s The Income-tax Officer, Ward-4(2), Nagpur I.T.A. No. 61/Nag/2013. Assessment Year : 2006-07. Date of Pronouncement : 18th July, 2016 confirmed by Bombay High Court in INCOME TAX APPEAL NO. 18/2017 (Against the assessee)	In the present case the assessee's explanation that the said receipt is on account of investment in shares whereby share of Rs.5/- of unknown company has jumped to Rs.485/- in no time has been totally rejected by the authorities below. The assessee has not at all been able to adduce cogent evidences in this regard. There is no economic or financial justification for the sale price of these shares. The so called purchaser of these shares has not been identified despite efforts of the AO. The broker company through which shares were sold did not respond to queries in this regard. Hence the fantastic sale price realisation is not at all humanly probably, as there is no economic or financial basis, that a share of little known company would jump from Rs. 5/- to 485/-, In these circumstances
10.	Smt. Sunita Jain, V/s. Income Tax Officer, Ward10 (3), Ahmedabad ITA. Nos: 501 & 502/AHD/2016 Assessment Year: 2008-09)	The claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the direct evidences on record relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account
11.	ITO-24(3)(1) V/s M/s Arvind Kumar Jain HUF ITA No. 4862/MUM/2014 Assessment Year: 2005-06	where assessee's broker share transaction was bone fide in all respect, merely because share broker was tainted violating SEBI regulations, would not make assessee's share transactions bogus.
12.	Kamla Devi S. Doshi V/s. The Income Tax Officer Ward 16(3)(1), I.T.A. No.1957/Mum/2015 Assessment Year: 2006-07)	Bogus penny stocks capital gain: The s. 131 statement implicating the assessee is not sufficient to draw an adverse inference against the assessee when the documentary evidence in the form of contract notes, bank statements, STT payments etc prove genuine purchase and sale of the penny stock. Failure to provide cross-examination is a fatal error
13.	Shri Sunil Prakash V/s. ACIT -15(2) I.T.A./6494/Mum/2014, Assessment Year: 2005-06	S. 68 bogus gains from penny stocks: If the AO relies upon the statement of a third party to make the addition, he is duty bound to provide a copy of the statement to the assessee and afford the opportunity of cross-examination. Failure to do so vitiates the assessment proceedings. A transaction evidenced by payment/receipt of share transaction value through banking channels, transfer of shares in and from the D-mat account, etc cannot be treated as a bogus transaction so as to attract s. 68

Other Issue on penalty on penny stock cases

Section 271(1)©

On Technical part

1. Where income disclosed by assessee in return and income assessed was nil, no penalty was leviable under section 271(1)(c)
[2017] 80 taxmann.com 220 (SC) SUPREME COURT OF INDIA Classic Industries Ltd.
2. Where the satisfaction recorded for initiating penalty proceedings under section 271(1)(c) was not congruent with order levying penalty, penalty was not sustainable
[2017] 79 taxmann.com 213 (Pune - Trib.) Rohini Ranjeet Mulay V/s. Deputy Commissioner of Income-tax, Central Circle, Aurangabad
3. Where quantum disallowance relating to 'Head Office Expenditure' was deleted by Tribunal, very foundation of penalty imposed under section 271(1)(c) in respect of same ceased to hold good in law and, therefore, Commissioner (Appeals) was justified in setting aside impugned penalty order
[2017] 82 taxmann.com 386 (Ahmedabad - Trib.) Assistant Director of Income-tax, International Taxation-II, Ahmedabad V/s. Dalma Energy LLC*
4. Where addition on basis of which penalty was imposed has become doubtful/debatable, penalty imposed under section 271(1)(c) cannot survive
[2015] 58 taxmann.com 311 (Mumbai - Trib.) IN THE ITAT MUMBAI BENCH 'E' Schrader Duncan Ltd. V/s. Additional Commissioner of Income-tax*
5. T: Before levying penalty under section 271(1)(c), it is incumbent upon Assessing Officer to state whether penalty was being levied for concealment of income or for furnishing of inaccurate particulars of income
[2015] 64 taxmann.com 155 (Kolkata - Trib.) Chandra Prakash Bubna V/s. Income-tax Officer, Ward- 27(3), Kolkata*

Common Judgment on Penalty

SN	Observation:	Judgments:
1.	Mere addition to income does not mean there is concealment of income	CIT V. IndenBislers 240 ITR 943, 158CTR 323, 118 Taxmann 766
2.	Unless the filing of return is accompanied by a guilty mind, penalty u/s 271(1)(c) cannot be levied. Cement Marketing Co. of India Ltd. v. Asst. CST(1980) 124 ITR 15 (SC) CIT v. Ahmed Tea Co.(P) Ltd.(1978) 113 ITR 74 (Gau) Addl. CIT v. Sawan Motor Stores 109 ITR 660 (AP)	
3.	Concealment is attributable to an intention on part of the assessee to hide or conceal the income to avoid imposition of tax/ Case of conscious concealment was not visible.	K.C. Builders Vs. ACIT 265 ITR 562 India Cine Agencies Vs DCIT 275 ITR 430 CIT v. Sureshchandra Gupta 226 ITR 613 (MP) CIT v. GurbaxLal& Co. 176 CTR 82 (P & H)

4.	Where assessee has furnished all particulars of income, imposition of penalty is not automatic in nature.	Dilip N. Shroff V/S. Jt. CIT 291 ITR PG. 519 Twin Star Jupiter Co-op Hsg Ltd. V. ITO 31 SOT 474 ACIT Vs. Enpakc Motors Pvt. Ltd ITA NO. 914/MUM/2008.
5.	Where assessee had disclosed complete facts before A.O and it had adopted a particular computation of the capital gain which did not need approval of A.O that would not mean that assessee had furnished inadequate particulars.	Veejay Service Station V. Asst. CIT 112 TTJ 824 (DELHI)
6.	Where the assessee makes a bonafide claim and no malafide can be attributed, then penalty cannot be levied./ Certain amounts claimed by assessee and disallowed does not mean that the assessee is guilty of fraud or willful neglect. <ul style="list-style-type: none"> • CIT V. Aretic Investment (P) Ltd. (2010) 190 TAXMAN 157 • Yogesh R. Desai V. Asst. CIT (2010) 2 ITR 267 • CIT V/S. Phi Seeds India Ltd. 301 ITR 13 Delhi • CWT v. HasmukhlalGandalal (2003) 264 ITR 42 (Guj) • CIT V. IndenBislers(1999) 240 ITR 943(Mad) • Karan Raghav exports (P) Ltd. V. CIT (2012) 21 Taxman 8 (Del.) • CIT Vs. Zoom Communication P. Ltd. : [2010] 327 ITR 510 (Del) • CIT VS. Shri Pawan Kumar Dalmia 168 ITR 379 	
7.	It is well settled law that findings in the assessment proceedings are relevant but not conclusive in penalty proceedings because the considerations that arise in penalty proceedings are different from those that arise in the assessment proceedings. [Assessee disclosed all material facts-although expenditure was disallowed- penalty u/s 271(1)(c) cannot be initiated. <ul style="list-style-type: none"> • Ashok GrihUdyog Kendra (P) Ltd. Vs. ACIT [(2009) 120 ITD 151] 	

1) A legal claim unsustainable in law cannot be a basis for levying penalty

As held in the case of **CIT V. Reliance Petro products (P) Ltd. 189 TAXMAN 322/230 CTR 320/322 ITR 158 (SC) :**

'A mere making of the claim, which is not sustainable in the law, by itself will not amount to furnishing inaccurate particulars of income of the assessee. Mere erroneous claim, in the absence of concealment or inaccurate particulars of income cannot be a ground for levying penalty.'

Reliance is also placed on Kanbay Software India Pvt. Ltd. 122 TTJ 721 (Pune) (supra).

The assessee's case is squarely covered by the above judgment. The assessee made a wrong claim by computing tax @ 15% instead of the rate of 30% which though unsustainable in law cannot be a basis for levying penalty.

2) Applying wrong rate of tax was an inadvertent mistake which was voluntarily accepted by the assessee

The application of wrong rate of tax was due to an inadvertent error caused by the erroneous understanding of facts by the Chartered Accountant and consequently the error of the clerk of the C.A. while filling the details in the wrong field in the return. It also needs to be mentioned that the field was not entirely visible and hence the error was committed. However, the transactions on which STT was not paid was voluntarily disclosed by the assessee and thereby agreed that tax should have been computed at a higher rate of 30%. Therefore, this is a case of genuine error in the case of the assessee. It has been held by various judicial pronouncements that where an assessee has made an inadvertent mistake or a clerical error, it is not a fit case to levy penalty.

In **Sidhartha Enterprises, 322 ITR 80(P&H)**, Their Lordships while distinguishing the decision in **Union of India vs. Dharamendra Textile Processors (2008) 306 ITR 277(SC)** have held:

“Held, dismissing the appeal, that penalty order under section 271(1)(c) of the Income tax Act, 1961, was imposed only when there was some element of deliberate default and not a mere mistake. The finding had been recorded on the facts that the furnishing of inaccurate particulars was simply a mistake and not a deliberate attempt to evade tax. The view taken by the Tribunal could not be held to be perverse.”

Thus, there was no deliberate attempt by the assessee to conceal any information.

Further reliance is placed on the following judicial pronouncements:

SN	Observation:	Judgments:
1.	Price Waterhouse Coopers (P.) Ltd. vs Commissioner of Income-tax, Kolkata-I[2012] 25 taxmann.com 400 (SC)	Section 271(1)(c), read with section 37(1), of the Income-tax Act, 1961 - Penalty - For concealment of income - Bona fide mistake - Assessment year 2000-01 - Assessee firm filed its return of income along with tax audit report - In its tax audit report it was indicated that provision towards payment of gratuity was not allowable but it failed to add provision for gratuity to its total income - Whether it was a bona fide and inadvertent error - Held, yes - Whether assessee was not guilty of either furnishing inaccurate particulars or attempting to conceal its income - Held, yes - Whether imposition of penalty was unjustified - Held, yes [Para 20] [In favour of assessee]
2.	Director of Income-tax (IT)-1, Mumbai vs Asia Attractive Dividend Stock Fund[2013] 35 taxmann.com 265 (Bombay)	Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income [Bona fide clerical error] - Assessment year 2008-09 - Assessee filed original return claiming certain refund on basis of computing its tax payable on short-term capital gain at rate of 10 per cent under section 111A - Subsequently, assessee, on its own, realized its mistake in claiming refund and filed revised computation on basis of tax being payable at rate of 30 per cent - Assessing Officer completed assessment without granting claim for refund and also levied penalty under section 271(1)(c) upon assessee - Whether it was a case of bona fide clerical error while computing tax liability in process of filing its return of income which was rectified by assessee on its own and, therefore, penalty was not justified - Held, yes [Paras 3 and 4][In favour of assessee]
3.	Walter Saldhana vs DCIT [2011] 44 SOT 26 (Mum.)	Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 2006-07 - Whether a mere making of a claim, which is not sustainable in law, by itself, will not amount to furnishing inaccurate particulars regarding income of assessee and, therefore, penalty under section 271(1)(c) is not sustainable in such a case - Held, yes -

		In course of assessment proceedings, Assessing Officer made addition to assessee's income under head 'Short-term capital gain' on account of violation of provisions of section 94(7) by not ignoring losses - He also levied penalty under section 271(1)(c) - Commissioner (Appeals) confirmed penalty order - On instant appeal, it was noted that Assessing Officer had made addition to income only on basis of material and informations furnished by assessee - It was also noticed that assessee had furnished full detail and had not concealed any particulars of income or had furnished any inaccurate particulars of income - Whether, on facts, claim raised by assessee was a bona fide claim and, mere rejection of same would not empower authorities below to pass a penalty order under section 271(1)(c) - Held, yes
4.	Udayan Mukherjee vs. CIT 291 ITR 318 (Cal)	Provisions contained in section 271(1)(c) are penal in nature. It visits the assessee with civil consequences. Therefore it has to be interpreted strictly. There is a distinction between furnishing of wrong particulars and making a wrong calculation on the basis of the particulars furnished. If the particulars are furnished then there cannot be any question of concealment. A mistaken calculation is distinct from concealment. A mistaken indexation would not amount to furnishing of wrong particulars nor concealment within the scope of section 271(1)(c). Thus, wrong calculation of capital gains on the basis of a mistaken indexation does not come within the purview of section 271(1)(c).
5.	CIT vs. Arisudana Spinning Mills Ltd. (2010) 326 ITR 429 (P&H)	<i>"Held, dismissing the appeal, that when the returns of income were filed, the issue with regard to entitlement of deduction under section 80-IA on the profits derived from trading turnover, i.e. trading in raw wool and knitted cloth was debatable and this issue was later settled by the judgment of this court in Liberty India vs. CIT (2007) 293 ITR 520 (P&H) upheld by the Supreme Court in Liberty India vs. CIT (2009) 317 ITR 218. Therefore, the Tribunal has rightly come to the conclusion that the assessee did not deliberately or consciously conceal the true particulars of income nor furnished inaccurate particulars of income. The deletion of penalty was justified."</i>
6.	Lotus Learning Pvt. Ltd. vs. DCIT 7 SOT 540 (Mum)	Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 1992-93 - Assessee claimed deduction of sum of Rs. 3.56 lakhs paid towards Family Pension Scheme (FPS) - Assessee thereafter on being called by Assessing Officer for details submitted that by inadvertent mistake claim had been made twice and actual claim was only Rs. 1,73,126 to which it accepted addition - Assessing Officer, therefore, added said amount to income of assessee and also initiated penalty proceedings under section 271(1)(c) - Commissioner (Appeals) confirmed penalty - Assessee's case was that Assessing Officer had not recorded his satisfaction about initiation of penalty in assessment order and, therefore order was bad in law - Whether since in assessment order Assessing Officer had mentioned factum of initiation of penalty proceedings after addition in question that he had applied his mind and he was satisfied about concealment of income and only thereafter penalty proceedings were initiated, objection raised by assessee was liable to be rejected - Held, yes - Whether, however, since assessee itself offered sum of Rs. 1,73,126 for taxation when mistake was discovered by it, penalty for concealment was liable to be cancelled - Held, yes

7.	<p>Further reliance is placed on:</p> <ul style="list-style-type: none">i) Niton Valve Industries (P) Ltd. vs. ACIT 30 SOT 236 (Mum)ii) Maya Ram JiyaLal vs. CIT 152 ITR 608 (P&H)iii) CIT vs. PHI Seeds India Lte 301 ITR 13 (Del)iv) CIT vs. International Audio Visual 288 ITR 570 (Del)v) CIT vs. Sumerpur Truck Operators Union 203 ITR 204 (Raj)vi) PMS ParappaNadar& Sons vs. 3rd ITO 10 TTJ 203 (Mad)vii) Colour House vs. ACIT 53 TTJ (Coch) 255viii) ix) CIT vs. S. Dhanabal 309 ITR 268 (Del)ix) CIT vs. Sri Saradha Textile Processors (P) Ltd. 286 ITR 499 (Mad)x) CIT vs. Sumerpur Truck Operations Union 203 CTR (Raj) 205xi) CIT vs. Freementle India Televiso 295 ITR 88 (Del)xii) CIT vs. Manihbai & Bros 295 ITR 501 (Guj)xiii) CIT vs. Khoday Eshwara& Sons 83 ITR 369 (SC)
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***** Thanking You*****