



Treatise On The Rule Of Evidence As Applicable To Direct Tax Laws

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RULE OF EVIDENCE:
[\(VIDEO – 1\)](#)

The Chamber of tax consultants Mumbai had arranged a lecture meeting at IMC on 4-10-2018 on the Subject of **“Rule of Evidence in assessment, penalty and prosecution proceedings“(with special reference to alleged suspicious transactions in shares - Penny Stocks) applicable to direct taxes“**, lecture given by Dr.K.Shivaram, Senior Advocate. Entire lecture is summarized by Mr.Sashank Dundu, Advocate, for the benefit of readers and is published on itatonline.org. We acknowledge and thank to the Chamber of tax Consultants for their consent for publishing the speech for the benefit of the tax professionals and taxpayers.

[**Note on recent developments** : Few important case laws on the subjects involved which are delivered after the date of the lecture are also added for reference in appropriate places.]

1. Introduction.

1.1. We have more than 1,000 Central Acts. The Central Govt. is proposing to host all the Acts on one portal i.e. “indiacode.nic.in”. Some of the Acts are already hosted on the website, Eg. The Indian Evidence Act, 1872. This is a welcome move which will benefit all the Citizens. You may be aware that the Income-tax Act 1961 is the only Central legislation which refers to around 133 Central Acts, various State Legislations, and double taxation agreements with more than 92 countries, circulars, notifications, and amendments in every year. More than 3000 case-lawson direct taxes are reported every year. I always tell my colleagues that, once you practice on income-tax law, you will be able to practice any branch of law. Development of Hindu law, Partnership Act etc. is based on the interpretation of taxation law.

Therefore, knowledge of general law, especially Evidence Act, plays a very important role to make better representation before the tax authorities.

As on date total pendency of appeals before the Appellate Tribunal are 98,000 of which 16,000 are in Mumbai. (as on 1-4-2019 total pendency is 92,205 and in Mumbai it is 14,714) (AFTPJ-April P.55). 90% of matters which are argued before the Appellate Tribunal are based on facts i.e. evidences. Appeal can be filed before the High Court u/s 260A of the Act only on substantial question of law. Only 20% matters are taken up before the High Court. Even in the 20% matters, 80% of the matters are dismissed by the High Court on the basis that the decision of Appellate Tribunal is based on appreciation of facts.

Therefore, the subject selected for discussion i.e. **“Rule of Evidence in assessment, penalty and prosecution proceedings“(with special reference to alleged suspicious transactions in shares) (Penny stocks) Applicable to direct taxes“** by the organizers, deserves special appreciation for selecting the subject which is very important to all tax practitioners in their day to day practice.

1.2. Before we discuss the subject in detail, we must know four important judgments of Supreme Court which are relevant for the discussion on general principles. i.e.

- 1) Dhakeshwari Cotton Mills Ltd v. CIT (1954) 26 ITR 775 (SC)
- 2) CIT v. Durga Prasad More (1971) 82 ITR 540 (SC)
- 3) Chuharmal v. CIT (1988) 172 ITR 250 (SC)
- 4) Sumati Dayal v CIT (1995) 214 ITR 801 (SC)

Many of you might have read the judgements earlier, I suggest that everyone should read the same again and again. If one has not read it earlier, must read to understand the principles of law.

1.2.1. Natural Justice:

Dhakeshwari Cotton Mills Ltd. v. CIT (1954) 26 ITR 775 (SC) (782)-Ratio.

- The evidence brought on record without the knowledge of the assessee and used against him without giving him an opportunity to rebut it, offends the principle of natural justice. In making assessment under S.143(3), the Assessing Officer is not entitled to make a pure guess and make an assessment without reference to any evidence or any material at all. There must be something more than bare suspicion to support the assessment.

1.2.2.Evidence, how to be judged-Human probabilities.

CIT v. Durga Prasad More (1971) 82 ITR 540 (SC) (546, 547)

Ratio.

“Science has not yet invented any instrument to test the reliability of the evidence placed before a court or a Tribunal. Therefore, the Courts and Tribunals have to judge the evidence before them by applying the test of human probabilities. Human minds may differ as to reliability of a piece of evidence. But in that sphere the decision of the final fact finding authority is made conclusive by law“

“It is true that neither the principle of res judicata nor the rule of estoppel is applicable to assessment proceedings. But the fact that the assessee included the income of the premises in his returns for several years, and after obtaining to the inclusion of that income in his total income in the assessment year 1942 -43, in the absence of any satisfactory explanation, is undoubtedly a circumstance which the taxing authorities were entitled to take in to consideration“

1.2.3.Evidence Act- Income -tax Act, 1961 .

Chuharmal v. CIT (1988) 172 ITR 250 SC)

Ratio.

What was meant by saying that the Evidence Act did not apply to proceedings under the Income -tax Act, 1961, was that the rigour of the rules of evidence contained in the Evidence Act was not applicable; but that did not mean that when the taxing authorities were desirous of invoking the principles of the Evidence Act in proceedings before them, they were prevented from doing so.

That all that Section 110 of the Evidence Act, 1872, did was to embody a salutary principle of common law jurisprudence, viz., where a person was found in possession of anything, the onus of proving that he was not its owner was on that person. This principle could be attracted to a set of circumstances that satisfy its conditions and was applicable to taxing proceedings.

1.2. 4 .Surrounding circumstances and applying test of human probabilities .

Sumati Dayal v CIT (1995) 214 ITR 801 (SC)

Ratio.

Though an apparent must be considered real until it was shown that there were reasons to believe that the apparent was not real, in a case where a party relied on self-serving recitals in documents, it was for that party to establish the truth of those recitals. The taxing authorities were entitled to look in to the surrounding circumstances to find out the reality of recitals.

The majority opinion of the Settlement Commission after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about her winning being from races was not genuine. It could not be said that the explanation offered by the appellant in respect of the said amount had been rejected unreasonably and that finding that the said amounts were income of the appellant from other sources was not based on evidence. In the circumstances, no case was made out for interference of the order passed by the Settlement commission.

2. Provisions in the Income-tax Act, 1961, where a specific reference is made of the Indian Evidence Act, 1872.

- (i) S. 131, Power regarding discovery, production of evidence, etc:

- (ii) S. 132: Search and seizure
- (iii) S. 132(4A): Presumption—Books of account, documents etc-
- (iv) S. 132A: Power to requisition books of account, etc
- (v) S. 132B: Application of seized or requisitioned assets.
- (vi) S. 133A: Power of survey.
- (vii) S. 136. Proceedings before income-tax authorities to be judicial proceedings.
- (viii) S. 142. Enquiry before assessment.
- (viii) S. 143(3): Assessment
- (ix) S. 250(4): CIT(A)- Rule 46A- Additional evidence.
- (x) S. 254(1): Appellate Tribunal- ITAT, R, 18, 29.
- (xi) S. 278E: Presumption as to culpable mental state.
- (xii) S. 292C : Presumption as to assets, books of account, etc.

3. Provisions of the Indian Evidence Act, 1872- Relevance to Income-tax proceedings .

S.3: Interpretation clause:

“Document”

“Evidence”

“Electronic records”

S.4: “May presume”, “Shall presume” and “Conclusive proof”

S.5: Evidence may be given of facts in issue and relevant facts.

S.17: Admission defined.

S.21. Proof of admission against persons making them, and by or on their behalf.

S. 24: Confession caused by inducement, threat or promise, when irrelevant in criminal proceedings.

S.34: Entries in books of accounts, including those maintained in electronic form when relevant.

S.35: Relevancy of entry in public record or an electronic record made in performance of duty.

S.45: Opinions of experts.

S. 45-A: Opinion of Examiner of Electronic Evidence.

S.61: Proof of contents of documents.

S.62: Primary evidence.

S.63: Secondary evidence.

S.65-A: Special provisions as to evidence relating to electronic record.

S.65-B: Admissibility of electronic records.

S.74: Public documents.

S.75: Private documents.

S.76: Certified copies of public documents.

S.91: Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.

S.92: Exclusion of evidence of oral agreement.

S.94: Exclusion of evidence against application of document to existing facts.

S.101: Burden of proof.

S.106: Burden of proving fact especially within knowledge.

S.114: Court may presume existence of certain facts.

S.126: Professional communications.

S.129: Confidential communications with legal advisers.

S.131: Production of documents or electronic records which another person, having possession, could refuse to produce.

S.132: Witness not excused from answering on ground that answer will criminate.

S. 147: When witness to be compelled to answer.

ASSESSMENT PROCEEDINGS

(VIDEO – 2)

4. For the discussion, we have divided the subjects into six parts; ie.

1. Assessment-Specific issues ;
2. Suspicious transactions in shares ;
3. Concealment penalty;
4. Offences and Prosecutions;
5. Checklist; and
6. Questions and answers.

4.1. Assessment-Specific issues

4.1.1 .Evidentiary value of an “admission” in the return of income.

An admission in the return, if occurred or occasioned consequent upon a *bona fide* mistake, it can be corrected either by submitting the revised return, or explaining the mistake before the authorities. Assessee’s ignorance cannot be taken advantage of by the Assessing Officer, as emphasised by the Central Board of Direct Taxes in its Circular No. 14(XL – 35) 1955 dated 11th April 1955..The scope of the above circular is explained in CIT v. Ahmedabad Keiser-E.Hin Mills Co .Ltd (1981 128 ITR 486 (Guj.) (HC) (492), Parekh Bros v.CIT (1984) 150 ITR 105 (Ker) (HC) (118) Dattatraya Gopal Sathe v.CIT (1984) 150 ITR 464 (Bom.)(HC) (463-464)

Apex Court in the case of CIT v. Mahalakshmi Sugar Mill Co. (1986) 160 ITR 920 (SC)(928)

“There is a duty cast on the Income-tax Officer to apply relevant provisions of the Income -tax Act for the purpose of determining the true figure of the assessee’s taxable income and consequential tax liability. Merely because the assessee fails to claim the benefit of set-off, it cannot relieve the Income-tax Officer of his duty to apply section 24 in an appropriate case“

Danny Denzongpa v. CIT (2012) 344 ITR 166 (Bom.)(HC)

In matters giving benefit to assessee, Department must avoid pedantic approach. Amendment made retrospectively exempting the interest and dividend income of Sikkimese, the Court held Commissioner should have condoned the delay in filing the application under S. 264 and ought to have granted the relief.

Asian Paints Ltd v. Dy CIT (2017) 184 TTJ 275 (Mum) (Trib) Error! Hyperlink reference not valid.)

If appeal is filed for some other issues and at the time of hearing of the appeal the assessee realised that it has wrongly shown the receipt as taxable income. If the details are on the record, Eg. Balance sheet, return etc. Additional ground can be raised before the Tribunal even in second round of appeal. On facts, the assessee, by mistake showed the Royalty received from overseas subsidiary from Egypt. In second round of appeal the assessee raised the issue stating that the Royalty received from overseas subsidiary from Egypt as per Article 13 of the DTA between India and Egypt received from is not taxable in India in view of specific provision of DTA, which the assessee was not aware. Details were available in the profit and loss account as well as in the Balance sheet. Tribunal allowed the additional ground of the assessee and directed the AO to decide in accordance with law.

4.1.2 .No estoppel in law against a party in a taxation matters.

CIT v. V. MR.P. Firm, Muar, (1965) 56 ITR 67 (SC) (74)

Nirmala L. Mehta v. CIT (2004) 269 ITR 1 (Bom) (HC) (11)

If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other doctrine -No estoppel in law against a party in a taxation matter.

4.1.3. Nature of assessment proceedings is quasi-judicial in nature.

M. Chockalingam & M. Meyyappan v. CIT (1963) 48 ITR 34 (SC) (40)

The authorities acting under the income-tax Act have to act judicially and one of the requirements of judicial action to give fair hearing to a person before deciding against him.

4.1.4 .Opportunity given must be reasonable.

Tin Box Co v. CIT (2001) 249 ITR 216 (SC) (218)

Once the Tribunal found that the Officer had not given a proper opportunity of hearing to the assessee, the Tribunal must set aside the assessment order and remand the same to the officer for fresh assessment after giving to the assessee a proper opportunity of being heard. That the assessee could have placed the evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts. That order must be made after the assessee has been given a reasonable opportunity of setting out his case.

4.1.5.No obligation to make maximum profits – Sale of goods below market price .

CIT v. A.Raman & Co (1968) 67 ITR 11 (SC) (17)

CIT v. Calcutta Discount Co.Ltd (1973) 91 ITR 8 (SC)

The law does not oblige a trader to make the maximum profits that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands income which he could have, but has not earned is not taxable as accrued to him. In the absence of evidence to show that the sales made below the market price were sham transactions or that the market price were paid by the purchasers, the mere fact the goods were sold at a concessional rate would not entitle the income-tax department to assess the difference between the market price and the price paid by the purchaser as profits of the assessee.

4.1.6 .Commercial expediency -Businessman's point of view .

Shahzad Nand & Sons v CIT (1977) 108 ITR 358 (SC) (366)

CIT v Sales Magnesite (P) Ltd (1995) 214 ITR 1 (Bom) (HC) (6)

While considering the allowability of business expenditure, commercial expediency must be tested in the context of current social-economic thinking and to be decided from businessman's point of view

4.1.7.Evidentiary value of affidavit in assessment proceedings.

Affidavit - Meaning.

Concise Oxford Dictionary

“Written statement confirmed by oath or affirmation, for use of evidence in court“

Black's law Dictionary

“A voluntary declaration of facts written down and sworn to by the declarant before an officer authorised to administer oaths “

Sudha Devi v.M.P. Narayanan AIR 1988 SC 1381/ 1988 3SCC 366

Affidavits are not included in the definition of evidence in section 3 of the Evidence Act and can be used in evidence only if the Court permits it to be so used for sufficient reasons.

Mehta Parikh & Co v. CIT (1956) 30 ITR 181 (SC) (187).

The rejection of an affidavit by an assessee is not justified unless the deponent has either been discredited in cross examination or has failed to produce other supporting evidence when called upon to do so.

CIT v. Silver Streak Trading Pvt. Ltd. (2010) 326 ITR 418(Delhi.) (HC) (419)

When an affidavit is filed stating that notice u/s 143(2) was not received. Onus is on revenue to prove that notice was served in time. Dismissing the appeal of the revenue for filing frivolous appeals, the revenue was awarded cost of Rs 10000/.

A.K.K. Nambiar v. UOI AIR 1970 SC, 652 (654)/(1969) 3 SCC 864

State of Rajasthan v. Sindhi film Exchange. AIR 1974 (Raj) 31.

If an affidavit is not properly verified, it cannot be admitted in evidence as it is no affidavit in the eye of law.

Income -tax (Appellate Tribunal) Rules, 1963, R. 10. Filing of an affidavit.

Where a fact which cannot be borne out by, or is contrary to the records alleged, it shall be stated clearly and concisely and supported by a duly sworn affidavit.

Income -tax Settlement Commission (Procedure) Rules, 1976 .R.8. Filing of an affidavit .

Where a fact which cannot be borne out by, or is contrary to the record relating to the case is alleged in the statement of facts furnished under rule 7, it shall be stated clearly and concisely and supported by a duly sworn affidavit.

Kunal Surana v. ITO (2013) 144 ITD 195 / (2014) 161 TTJ 92 (Mum.) (Trib.)/(www.itatonline.org)

Condonation of delay was rejected on the ground that the Affidavit was not in accordance with law. Verification clause was not proper. Tribunal discussed in detail entire provision of law on affidavit.

Effect of false affidavit.

Filing of false affidavit is an offence under section 192 of the Indian penal code.-Perjury

Supreme Court in Mohan Singh v. Late Amer Singh dt. 1-09-88, observed that, "filing of false affidavit, in a court of law has the tendency of causing obstruction in the due course of justice. It undermines and obstructs free flow of unsoiled stream of justice and aims at striking blow at the rule of law. The stream of justice has to be kept clear and pure and no one can be permitted to take liberties with it by soiling its purity. Since we are prima facie satisfied that the tenant has filed false affidavits and tampered with judicial record, with a view to eradicate the evil of perjury. Since we are prima facie satisfied that the tenant has filed false affidavits and tampered with judicial record, with a view to eradicate the evil perjury, we consider it appropriate to direct the Registrar of this Court to file a complaint before the appropriate Court and set the criminal law in motion against the tenant, the appellant in this case namely Mohan Singh".

Abdul Rashid v. Calcutta Municipal Corporation, AIR 1900 Cal 37.

Court held that "This affidavit cannot be relied upon as the said Kedar Prasad has signed in Hindi and it does not appear from the body of the affidavit that the test of this document in English was explained to him by anybody"

As per the Maharashtra Stamp Act (Bom. Act LX of 1958) affidavit has to be on Rs. 100 stamp paper (Schedule 1 S. No. 4)

4.1.8. Entries in books of account -S. 34 of the Indian Evidence, Act, 1872

Central Bureau of Investigation v. V.C. Shukla (1998) 3 SCC 410 (433 - 434)/AIR 1998 SC 1406

In order to charge any person with liability, it is not enough merely to prove that books have been regularly kept in the course of business and the entries therein are correct. It is further incumbent upon relying upon those entries to prove that they were in accordance with facts. In other words, even correct and authentic entries in books of account cannot, without independent evidence of their trustworthiness, fix a liability upon a person.

Common Cause (A registered society) v. UOI (2017) 394 ITR 220 (SC) / (2017) 11 SCC 731/ AIR 2017 SC 540

Entries in books of account, including those maintained in electronic form. Investigation could not have been directed in case of high public functionaries on basis of legally inadmissible evidence in form of loose papers, more so with respect to third parties.

4.1.9. Noting in diary, loose paper, dumb paper.

S.P Goyal v. Dy. CIT (2002) 82 ITD 85 (TM) (Mum) (Trib).

The tribunal held that, mere entry on loose sheet of paper not supported by actual cash cannot be considered to be sufficient evidence to treat the same as cash credits under s.68. Followed the ratio in CBI v. V.C.Shukla 1998 3 SCC 410

4.1.10. Right to cross examination.

State of Kerala v. K.T. Shaduli Yusuf (1977) 39 STC 478 (SC) / 1977 2 SCC 777/ AIR 1977 SC 1627

The Court held that not only it is the duty of the Department to provide copies of statements or reports, but the assessee is entitled to seek right of cross examination.

Kishan Chand Chellaram v. CIT (1980) 125 ITR 713 (SC) (720) the Court held that evidence which is used against the assessee must be provided to the assessee and also an opportunity to confront the same should be given permitting cross examination.

Capricorn Shopping Complex v. ITO (1996) 218 ITR 721 (Ker) (HC) (723)

“That if some document is relied on against the assessee to assess him to a high rate of tax, the documents shall be disclosed to him. It cannot be withheld “

Kanwar Natwar Singh v. Director of Enforcement (2010) 13 SCC 255 / (2010) 160 Comp Cas 30 (SC) (www.itatonline.org)

One cannot ask all the documents. The documents relied on can be asked for. The appellants insisted for supply of all documents in possession of the Authority and such demand is based on vague, indefinite and irrelevant grounds. The Court observed that the appellants are not sure as to whether they are asking for the copies of the documents in possession of the Adjudicating Authority or in possession of authorized officer who lodged the complaint.

Andaman Timber Industries v CCE (2015) 127 DTR 241/ 281 CTR 241/ (2015) 52 GST 355/ (2015) (324) ELT 641 (SC) (SC)

Failure to give the assessee the right of cross-examine witness whose statements are relied up on results in breach of principles of natural justice. It is a serious flaw which renders the order a nullity.

H. R. Mehta v. ACIT (2016) 138 DTR 217 (Bom.) (HC); www.itatonline.org

The assessee is bound to be provided with the material used against him apart from being permitted to cross examine the deponents. The denial of such opportunity goes to root of the matter and strikes at the very foundation of the assessment order and renders it vulnerable.

4.1.11.S.131 : Duty of AO to enforce of witness- Civil Procedure Code, 1908, O. XVI, R. 10.

Food Corporation of India v. Provident Fund Commissioner (1990) 1 SCC 68 (SC) (71)

In a proper case, the Assessing Officer should exercise all his powers to collect evidence collate all material before coming to proper conclusion. This is the legal duty of the Officer concerned who is vested under section 131 with certain powers in respect of certain matters. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

Nathu Ram Premchand v. CIT (1963) 49 ITR 561 (All) (HC) (564)

It is the duty of the Income -tax officer to enforce attendance of the witness if his evidence is material, in exercise of his powers under section 131 (37(1) of the 1922Act) of the income -tax Act, read with order XVI ,rule 10 of the Civil Procedure Code

MunnalalMurlldhar v. CIT (1971) 79 ITR 540 (All) (HC) (543)

Duty of the Assessing Officer to assist the assessee by exercising his powers under section 131 (37(1) of the 1922 Act) to enable the assessee to produce the evidence in support of his return.

4.1.12.Commission for examination of witness, etc.

Jaganatha Sastry v. SurathambalAmmal (1923) 44 MLJ202 (Mad) (HC) /AIR 1923 Mad 321

Rule 19 of Order XVI of the Civil Procedure Code- Summons can be issued only where witness resides within 500 Kms.(Beyond 200 miles) When the witness resides beyond prescribed limits, only commission can be issued. When application is made the Court has to issue the commission.

V. Datochinamurthy and another v. Asst. DIT (IT) (1984) 149 ITR 341 (Mad) (HC)(372)

4.1.13.Witness does not have right to be represented by counsel when his statement is recorded.

That there is no provision under the law which authorises witness to be represented by counsel when any statement is recorded and a witness does not have any right under the law to take his counsel along with him at the time when the statement is recorded.

4.1.14. S. 131 : Income-tax authorities – Powers – Discovery – Summons,

Anis Ahmad & Sons v. CIT (2008) 297 ITR 441 (SC)(446)

The question before the Assessing Officer was whether the assessee is a trader or a commission agent. The Assessing Officer summoned five parties who were in the state, but could not summon other 5 who were outside the State. The five parties within the State came and gave the evidence that the assessee is a commission agent. On the basis of the fact that the other five did not give any evidence the Assessing Officer took the view that the assessee is a trader. The Supreme Court held that the fact that other five parties did not give any evidence would not allow the Assessing Officer to draw the inference that the assessee is a trader and that the assessee could not be held responsible for the non-appearance of the other 5 traders.

CST v. Sunil HaribhauPote (Bom.)(HC)(MANU/MH 1230/2017 :www.itatonline.org

4.1.15 .S. 282:Service of notice .

When a notice is sent by RPAD and its return by the postal authorities with the remark "addressee refused to accept" amounts to a valid service .

Milan Poddar v. CIT (2013) 357 ITR 619 (Jharkhand)(HC)

Speed Post is included in generic word 'Post' or 'Registered Post' - When notice sent by "Speed-post" does not return as undelivered, finding that it is deemed to have been delivered to assessee, presumption is justified.

Kross Television India Pvt. Ltd. v. Vikhyat Chitra Production (MANU /MH /1228 /2017 (Bom.)(HC) :www.itatonline.org

Service of notice by WhatsApp - E-Mail & WhatsApp are not formally approved but if service is shown to be effected and is acknowledged it cannot be said that the Defendants had 'no notice'. Defendants who avoid and evade service by regular modes cannot be permitted to take advantage of that evasion.

4.1.16.S.69 of the Income -tax Act and S. 110 of the Indian Evidence Act, 1872.

CIT v. K.T.M.S. Mohamood (1997) 228 ITR 113 (Mad.)(HC),

Currency notes were recovered from the premises of the assessee belongs to the assessee. Relying on the S.110 of the Evidence Act the Court held that the onus is on the person who is in possession of money to show that he is not the owner of the same.

Chuharmal v. CIT (1988) 172 ITR 250 (SC) (255)

Watches were seized from the bed room of the assessee. The assessee was held to be the owner. Applying the provision of S.110 of the Evidence Act to S.69 of the Income -tax Act, the Court come to the conclusion that the onus to prove is on the assessee based on the criteria laid down in Evidence Act.

4.1.17.S.69: Unexplained investment -AIR information .

S. Ganesh v. ACIT (ITA No. 527/ Mum/2010 dt -8-2-2010)(Mum) (Trib.) www.itatonline.org. Affirmed by Bombay High Court CIT v. S. Ganesh (ITA No. 1930 of 2011 dt. 18-03 2014) www.itatonline.org

Addition on account of unexplained investment cannot be made in the hands of the assessee on the basis of AIR information, when the assessee was only the second owner of the units of mutual funds and the identity of the first owner was established and they are assessed to tax.

ITO v. Amit Vijay Kulkarni ITA No. 1597 /PN/ dt. 25-03- 2015, www.itatonline.org.

Tribunal held that addition cannot be made in the assessment of partner only on the basis of AIR information. As per S.14 of the Indian Partnership Act, partner can hold the property on behalf of the firm. Also refer A.F.Ferguson & Co v. JCIT ITA no 5037 /Mum/ 2012 dt 17-10-2014 Shreeballabh R. Lohiya v, ITO ITA no 412 /Mum/ 2011 dt. 8-8-2018 ,Dy.CIT v. Deloitte Touche Tohmatsu India (P) Ltd. (2018) 193 TTJ 65 (UO) (Mum) Trib)

4.1.18.Presumption- S.292C-Favour .

ACIT v. Katrina Rosemary Turcotte (Katrina Kaif) (2017) 160 DTR 113 /190 TTJ 681 (Mum) (Trib.)

Addition on the basis of seized document print out from Blackberry mobile digital was held to be not justified.

D.N. Karnani (HUF) v. Dy.CIT (2000) 241 ITR 85 (TM)(Patna) (Trib.)

Presumption however strong cannot take place to substitute rule of evidence. On money in respect of one flat .Addition cannot be made on presumption in respect of all the flats sold during the year.

4.1.19: Presumption – S.292C- Against .

Harish Textile Engineers Ltd. v. DCIT (2015) 379 ITR 160 (Bom.)(HC)

The presumption that documents found during search correctly reflect the facts is a discretionary presumption & not a compulsory presumption. The presumption does not apply if the documents are inchoate . Primary requirement of satisfaction of section 37(1) is not met by assessee. No evidence of suppliers of scrap and their address . Addition was held to be justified.

CIT v. Sonal Constructions (2013) 359 ITR 532 (Delhi) (HC) (543)

Presumption as to seized documents is available for the purpose of block assessment.

4.1.20. Tape -recorded conversation.

Mahavir Prasad Sharma v. Dr. Surinder Kaur, AIR 1982 SC 1097 /(1982) SCR (3) 607 /1982 2SCC 258

A tape-recorded conversation between the husband and the land -lady and the tenant on which the Rent Controller had relied could only be a corroborative evidence of the conversation deposed to by any of the parties . In the absence of any such evidence the tape -recorded conversation cannot be proper evidence and cannot be relied upon.

**REASSESSMENT – SURVEY, SEARCH & SEIZURE
([VIDEO – 3](#))**

4.1.21: Re-assessment- Procedure to be followed when the notice u/s 148 is received.

When the notice for reassessment is received, it is always desirable to file the return signed by the assessee who is authorised to sign the return u/s 140 of the Income -tax Act , 1961 . Many a times it has been observed that the tax-practitioner or Chartered accountant file the letter in their letter head stating that, the return filed by the assessee, earlier may be treated as return in pursuance of notice u/s 148. in *Tiwari Kanyhaiya Lal v.CIT (1985) 154 ITR 109 (Raj) (HC) (115)* held that letter stating that the earlier return filed may be treated as return filed in pursuance of notice u/ 148 which is a sufficient compliance . However now a days the department is contesting that mere letter is not sufficient it has to be return filed by the assessee. Therefore it is advisable that the return be filed by the assessee who is authorised to sign the return.

Follow the procedure prescribed in *GKN Driveshafts (India) Ltd v. DCIT (2003) 259 ITR 19 (SC)* ,*Asian Paint Ltd. v.Dy.CIT (2008) 296 ITR 90 (Bom) (HC)*, *Allana cold storage Ltd v. ITO (2006) 287 ITR 1 (Bom) (HC)*

**Reference -For detailed discussion on reassessment, refer to the article of Mr. Ajay Singh, [www.itatonline.org](http://itatonline.org) (2018) AIFTPJ – September - P.14, by clicking the link below :
http://itatonline.org/articles_new/a-comprehensive-guide-to-the-law-of-reopening-of-assessments-under-sections-147-to-153-of-the-income-tax-act-1961/**

4.1.22.Search and seizure .

Pooran Mal v. Director of Investigation (1974) 93 ITR 505 (SC)

It was held that even when search and seizure was held to be illegal, yet documents and other papers seized would carry “ evidentiary” value though the search and seizure may be illegal the evidence collected can be used against the assessee.

Dr.Pratap Singh v Director of enforcement (1985) 155 ITR 166 (SC)

Court held that the illegality in the method, manner or initiation of search does not vitiate evidence collected during search.

CBDT Instruction No. F. No. 286/2/2003 - IT(Inv) dt. 10-3-2003 (April 2003 AIFTP Journal P. 25). Click on the link below to download the copy of the Instruction:

[\[http://itatonline.org/info/no-confessional-statement-in-the-course-of-search-seizure-and-survey/\]](http://itatonline.org/info/no-confessional-statement-in-the-course-of-search-seizure-and-survey/)

CBDT Letter F.No.286/98/2013-IT (INV.II), dt. 18-12-2014.Click on the link below to see the entire text of the CBDT notification:

[\[http://itatonline.org/info/wp-content/uploads/2014/12/CBDT_Instruction_Coercion_Disclosure.pdf\]](http://itatonline.org/info/wp-content/uploads/2014/12/CBDT_Instruction_Coercion_Disclosure.pdf)

CBDT clarified that the survey or search party should not take the statement under pressure. Assessing Officers should rely upon the evidence/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders.

Chetnaben J. Shah v. ITO (2016) 140 DTR 235 / 288 CTR 79 (Guj.)(HC)

Mere voluntary disclosure of undisclosed income by assessee cannot form basis of addition if no evidence is detected in search. Fact that retraction of statement is late is irrelevant. CBDT Circular No. F.No.286/2/2003-IT (In) dated 10.03.2003 bars addition on the basis of confession.

Kailashben Manharilal Chokshi v. CIT (2010) 328 ITR 411 (Guj.)(HC)

Statement made at odd hours cannot be considered as voluntary statement. Addition made on the basis of statement was deleted. Assessee retracted the statement by giving proper explanation.

Digipro Import & Export Pvt. Ltd. v. UOI (Delhi) (HC),www.itatonline.org(W.P. (C) 3070/2017 & CM No. 13393/2017, dt. 15.05.2017)

Severe strictures were passed to condemn the illegal practice of the Dept of collecting undated cheques from taxpayers after search/survey without even quantifying the extent of duty evasion. Attempt of the unscrupulous officers is to 'negotiate' the evaded duty by threats and coercion. It is not rule of law but anarchy unleashed by holders of public office. It is an abuse of law which has to be stopped-Central Vigilance Commissioner (CVC)is directed to issue the guide lines.

CIT v. Rakesh Ramani (2018) 256 Taxman 299 (Bom.) (HC)

There is no requirement in law that evidence in support of it cannot be produced by the assessee only at the time of seizure has been made and not during the assessment proceedings.

DCIT (Inv.) v. Prakash V. Sanghvi (2016) 236 Taxman 176 (Karn.)(HC)

The Assessing Officer is empowered to visit the house of the assessee for the purpose of examining him on oath, by camping at the residence of the assessee.

4.1.22 .Survey –Addition cannot be made only on the basis of statement.

Supreme Court in **CIT v. S. Khadar Khan & Sons(2013) 352 ITR 480 (SC)** has held that S. 133A does not empower any ITO to examine any person on oath; so statement recorded under section 133A has no evidentiary value and any admission made during such statement cannot be made the basis of addition.

Section 133A enables the Income Tax Authority to record the statement of any person which may be useful. It does not authorise to take any sworn statement, as held by the Kerala High Court in the case of Paul Mathews Sons v. CIT (2003) 263 ITR 101 (Ker.)(HC) which also stated that the statement recorded without oath has no evidentiary value. Unsworn statement is an admission and can be used, though its weightage shall not be as that of a sworn statement particularly because it is permitted specifically by section 133A(6).

PCIT v. Texraj Realty P. Ltd (2018)98 taxmann.com 102 (Guj)(HC), www.itatonline.org

The court held that addition of undisclosed income cannot be made on the basis of (a) entries in diary found during survey & (b) admission of director in S. 133A survey if assessee has filed a retraction and alleged that the entries/ statement were recorded under pressure. Statement u/s 133A is merely information simplicitor and not evidence per se. Addition cannot be sustained if the Dept has not investigated the matter and found material to support the addition.

CIT v. IibsInfonet Pvt. Ltd. (2017) 394 ITR 538 (Delhi) (HC)

Merely on the basis of statement during course of survey without supporting evidence, additions cannot be made. Decision in CIT v. Ravindra Jain (2009) 33 SOT 251 (Delhi) (Trib.), approved and MAK Data Pvt Ltd v. CIT (2013) 358 ITR 593 (SC) is explained.

4.1.23.133A. Survey- Addition based on the statement is held to be justified.

Dr. Dinesh Jain v. ITO (2014) 363 ITR 210 (Bom.)(HC)

Amounts of investments not fully disclosed in books of account. Statement does not lose its evidentiary value. Retraction in the form of affidavit was rejected on the ground that, it was after thought and without any evidence. Accordingly the addition was held to be justified.

PCIT v. Avinash Kumar Setia (2017) 395 ITR 235 (Delhi) (HC)

Voluntary declaration of unaccounted money Allowing the appeal of the Revenue, the Court held that retraction made after two years was held to be not bona fide and there was no satisfactory explanation filed hence addition was confirmed in respect of voluntary disclosure which was made after two months of survey. (referred , Circular No. 286/2/2003-IT (INV.) (I), dated 10-3-2003)

PENNY STOCK

(VIDEO – 4)

2. Suspicious transactions in shares (Penny Stocks).

4. 2. 1. Bhandari Construction Company v Narayan Gopal Upadhye (2007) 3 SCC 163 /AIR 2007 SC 1441

A mere suspicion that builders in the country are prone to take a part of the sale amount in cash, is no ground to accept the story of payment of Rs. 4,00,000/- especially when such a payment had not even been set up in the complaint before the District Forum.

One may refer letter issued by CBDT dt 16-03 -2016 for reopening of assessment to tax bogus capital gains / loss in penny stocks . Scam by tax payers. www.itatonline.org

4.2.2. Broad principles- Addition as cash credits is deleted .

CIT v. Mukesh Ratilal Morolia (SC), CIT v. Mukesh Ratilal Morolia (Bom.)(HC) Mukesh Ratilal Morolia v. CIT (2006) 6 SOT 247 (Mum)(Trib.)

Capital gains cannot be treated as fictitious and additions cannot be made as cash credits, unexplained investment, income from undisclosed sources etc. Appellate Tribunal deleted the addition. Order of Tribunal was confirmed by High Court. SLP of revenue was dismissed. (Civil) No(s).20146/2012 dt. 27-1-2014 (ITA 456 of 2007 dt. 07/09/2011)

CIT v. Shyam R. Pawar (2015) 229 Taxman 256 (Bom.) (HC)

DEMAT account and contract note showed credit / details of share transactions, and the revenue had stopped inquiry at a particular point and did not carry forward it to discharge basic onus. Transaction held to be genuine. Purchase and sale of shares reflected in the books of account and Balance sheet, payment by account payee cheque, receipt by account payee cheque

PCIT v. Prem Pal Gandhi (2018) 401 ITR 253 (P & H) (HC)

Mere appreciation in value does not justify the transactions being treated as fictitious when (a) the shares are traded on the Stock Exchange, (b) the payments and receipts are routed through the bank, (c) there is no evidence to indicate that it is a closely held company and (d) the trading on the Stock Exchange was manipulated in any manner. Assessment has to be completed on the basis of records and not on the basis of personal knowledge and excitement events.

ITO v. Arvind Kumar Jain HUF (ITA No. 4862/mum/2014, dt.18.09.2017)(Mum.) (Trib.), www.itatonline.org

If the DEMAT account and contract note show details of the share transactions and the AO has not proved the transactions to be bogus, the capital gains earned on the said transactions cannot be treated

as unaccounted income. The fact that the broker was tainted and violated SEBI regulations would not make assessee's transactions bogus.

Kamla Devi S. Doshiv. ITO (2017) 57 ITR 1 / 88 taxmann.com 773 (Mum.) (Trib.)

Failure to give opportunity of cross examination is a fatal error.

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.

Sunil Prakash v. ACIT (ITA No. 6494/Mum/2014, dt. 02.01.2017) (Mum.) (Trib.); www.itatonline.org

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 DEMAT account, etc cannot be treated as a bogus transaction.

Pramod Kumar Lodha v. ITO (2018) 195 TTJ 20/ (2019) 174 ITD 186 (Jaipur)(Trib.)www.itatonline.org

The enquiry conducted by the Investigation Indore is not conclusive, merely supplying of statement to the assessee at the fag end of the assessment proceedings is not sufficient to meet the requirement of giving an opportunity to cross examine. Suspicion without any material evidence to controvert or disprove the evidence produced. **Prior to sale, shares were held for certain period and sale transactions were not disputed, long term capital gains couldn't be held to be a mean to introduce unaccounted money.**

Navneet Agarwal v. ITO (2018) 97 taxmann.com 76n(Kol.)(Trib.), www.itatonline.org

Revenue has to show that there is a scam and that the assessee is part of the scam. The chain of events and the live link of the assessee's action giving her involvement in the scam should be established. The Dept cannot rely on alleged modus operandi and human behaviour and disregard the evidence produced by the assessee. Addition was made to income of assessee on basis of information of DIT (Inv.) that assessee was part of list of several beneficiaries of bogus accommodation entries, since there was no specific finding against assessee in investigation wing report, impugned addition was unjustified.

Prakash Chand Bhutoria v. ITO (ITA No. 2394/Kol/2017, dt.27.06.2018)(Kol.)(Trib.), www.itatonline.org

31000% increase in value of shares over 2 years is highly suspicious but cannot take the place of evidence. The addition cannot be made based on generalizations. Evidence collected from third parties cannot be used against the assessee without giving him a copy and an opportunity to rebut the same.

ACIT v. Vineet Sureshchandra Agarwal (ITA No. 1442/Ahd/2013 & Co. No. 209/Ahd/2013., dt.06.01.2017)(Ahd.)(Trib.); www.itatonline.org

It is always possible for the parties to enter into transactions even without the help of brokers. The fact that the Stock Exchange 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 not possible to hold that the transactions reported by the assessee were sham or bogus.

Sunita Jain (Smt.) v. ITO (ITA No. 501 & 502/Ahd/2016, dt.09.03.2017)(Ahd.) (Trib.) :www.itatonline.org

Failure to provide a copy of the statement and an opportunity to cross examination, the addition is bad in law - Direct evidences relating to sale / purchase, broker note cannot be disregarded.

Dolarri Hemani v. ITO (2017) 183 TTJ 433 (Kol.) (Trib.); www.itatonline.org

The fact that the stock is thinly traded and there is unusually high gain is not sufficient to treat the long-term capital gains as bogus when all the paper work is in order. The revenue has to bring material on record to support its finding that there has been collusion/connivance between the broker and the assessee for the introduction of its unaccounted money. Confirmation from broker and stock exchange is sufficient to prove genuineness of transaction.

PCIT v. Ramniwas Ramjivan Kasat (2017) 248 Taxman 484 / (2019) 410 ITR 540 (Guj.) (HC)

When purchase of shares were accepted as genuine in the year, sale consideration cannot be assessed as cash credits.

CIT v. Sadhana Jain (Smt.) (2014) 97 DTR 1 / 224 Taxman 28 (Mag.) (All.) (HC)

Burden is discharged by showing circumstantial evidences, though the persons who have sold the shares have not responded to the summons.

CIT v. Udit Narain Agrawal (2013) 81 DTR 63 / 213 Taxman 178 (Mag.) / 255 CTR 102 (All.) (HC)

Transaction was considered genuine when shares were held in a DEMAT account and sale consideration of the same was also received through bank draft

CIT v. Jamnadevi Agrawal (Smt.) (2010) 328 ITR 656 (Bom.) (HC)

Purchase and sale price of shares in conformity with market rates prevailing on the respective dates, though the statement of broker that the transaction was bogus was not relevant when transaction being off market and produced relevant documents.

CIT v. Anupam Kapoor (2008) 299 ITR 179 (P&H) (HC)

When shares were listed and transaction took place through a registered broker of stock exchange. Burden is on revenue to prove that transaction was simpliciter a device to camouflage activities, to defraud revenue.

Meenu Goel v. ITO (2018) 94 taxmann.com 158 (Delhi) (Trib.)

Merely on basis of report of investigation wing, addition cannot be made as cash credits without proving that the assessee was directly involved in bogus transaction. Long term capital gains is held to be exempt u/s 10 (38) of the Act.

ITO v. Aarti Mittal (Smt.) (2014) 149 ITD 728 (Hyd) (Trib.)

Purchase of shares in physical form, converted them in DEMAT form and sale through recognized stock exchange after paying securities transaction tax. Claim for exemption cannot be denied.

Pratik Suryakant Shah v. ITO (2017) 77 taxmann.com 260 (Ahd) (Trib.)

Merely on basis of statement of stock broker that the transaction is not genuine, addition cannot be made when the purchase of shares is through stock exchange and same was transferred to DEMAT account and later on sold from said DEMAT account. Long term exemption cannot be denied.

Smita P. Patil (Smt.) v. ACIT (2014) 159 TTJ 182 (Pune) (Trib.)

Merely because there was a delay in converting physical shares into electronic form, i.e. DEMAT account, transaction cannot be disbelieved when the share transactions are recorded in the regular books of account prior to date of search.

ITO v. Indravadan Jain (HUF) (ITA No. 4861/Mum./2014 dt. 27-5-2016) (Mum) (Trib.) www.itatonline.org

Merely because SEBI has initiated an inquiry with regard to the Company & the broker if the shares are purchased from the exchange, payment is by cheque and delivery of shares is taken and given, genuineness cannot be doubted .

CIT v. Jamna Dev Agarwal (Smt.) (2010) 328 ITR 656 (Bom.) (HC)

Assessee in group had purchased and sold shares of similar companies through same broker, could not be a ground to hold that transactions were sham and bogus.

CIT v. Vivek Mehta (2012) 204 Taxman 177 (P&H)(HC)

Transactions of purchase and sale of shares which were carried out through recognized stock brokers at rates prevalent in stock exchange at relevant time. Addition cannot be made.

CIT v. Mahesh Chandra G. Vakil(2014) 220 Taxman 166 (Guj.)(HC)

Contract notes for sale and purchase, bank statement of broker, DEMAT account showing transfer in and out of shares, as also abstract of transactions furnished by stock exchange. Addition cannot be made.

CIT v. Sumitra Devi (Smt.) (2015) 229 Taxman 67 (Raj) (HC)

Transaction of purchase and sale of shares were supported with broker's note, contract note, copies of share certificates and DEMAT statement, transaction of shares. Additions cannot be made as cash credits.

CIT v. Himani M. Vakil (2014) 221 Taxman 140 (Guj.) (HC)

Contract notes for sale and purchase, bank statement of broker and DEMAT account showing transfer in and out of shares. Addition is held to be not justified

Baijnath Agarwal v. ACIT (2010) 133 TTJ 129 (Agra) (Trib.)

Purchase of shares in earlier years was accepted by revenue. Shares were sold through stock broker who was registered with Stock Exchange, at prices quoted at stock exchange at relevant time. Addition not justified .

Farrah Marker (Ms) v. ITO (ITA No. 3801/Mum/2011 dt.27-04-2016 (Mum)(Trib.) (www.itatonline.org)

If the documentation is in order and there is no allegation of manipulation by SEBI or the BSE. Addition is held to be not justified .

Arvind Mehta v. ITO (ITA No. 2799/Mum/2015 dt. 29-2-2016)(Mum) (Trib.) (www.itatonline.org)

Sales through DEMAT account. Statement of Shri.Mukeshchokshi was not provided. Onus is on the Assessing officer to establish that purchase and sale of shares are bogus.

DCIT v. Anil Kaniya (ITA No. 4077/Mum/2013)(Mum) (Trib.) (www.itatonline.org)

Purchases of earlier years were not doubted. DEMAT was done by the assessee. Burden is on revenue. Addition cannot be made .

Sudhanshu Suresh Pandhare v. ITO (ITA. No. 5185/Mum/2012 dt.5-10-2016)(Mum)(Trib.) (Error! Hyperlink reference not valid.)

Sale of shares had taken place through Ahmedabad Stock Exchange. The statement of Shri.MukeshChoksi has been relied upon without confronting the same to the assessee. Addition was deleted.

Surya Prakash Toshniwal HUF v. ITO (ITA No.1213/Kol/2016) (Kol.) (Trib.) (www.itatonline.org)

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. No addition can be made.

CIT v. Bhagwati Prasad Agarwal (ITA No 22 of 2009 dt. 29-04 2009) (Cal) (HC)
(www.itatonline.org)

Chain of transactions have been proved by evidence such as contract notes, DEMAT account, and payments through banking channel- Deletion of addition was upheld.

Late Roshan Raja Through Legal v ITO (ITA No. 3803/Mum/2011 dt. 27-04 2016) (Mum)
(Trib.) (www.itatonline.org)

Copies of the physical share certificates DEMAT account statement confirmation of the transactions of buying and selling of the said shares by the respective stock brokers, receipt of sale proceeds through banking channels, etc.

Pavillion Commercial Pvt Limited v. ITO (ITA No. 935/Kol/2012 dt. 12/08/2016) (Kol) (Trib.)
(www.itatonline.org)

No defect in the papers in support of the transactions, the suspension of the broker by SEBI will not hold the transaction invalid.

DCIT v Sunita Khema (ITA Nos 714 to 718/ kol/2011 dt (Kol) (Trib.) (www.itatonline.org)

Only on the basis of suspicion or surmise without any evidence, a transaction of purchase and sale of shares, supported by Contract Notes and DEMAT statements and Account Payee Cheques cannot be treated as bogus.

Rajkumar Agarwal v. ITO (ITA 1330/Kol/2007 dt.10/08/07) (Kol) (Trib.)

Transactions cannot be treated as bogus, when purchase and sale of shares were supported by proper Contract Notes, deliveries of shares were received through DEMAT accounts maintained with various agencies, the shares were purchased and sold through recognized broker and the sale considerations were received by Account Payee Cheques.

Amita Bansal (Ms.) v. CIT (2018) 400 ITR 324 (All.) (HC)

Evidence of contract notes and payment through Banks. Addition cannot be made solely on the basis that late recording in DEMAT Pass book. Order of Tribunal is set aside.

PCIT v. Rungta Properties (P) Ltd. (2018) 403 ITR 234 (Cal.) (HC) (244)

Loss on penny stock cannot be disallowed only on the ground that broker was suspended for some time unless the AO had not brought on record any material to show that assessee's transactions in shares of company X were false or fictitious.

CIT v. Carbo Industrial Holdings Ltd. (2000) 244 ITR 422 (Cal) (HC)

Loss on shares cannot be denied, merely because a broker failed to appear even after issue of summons or on a mere suspicion about genuineness of transaction.

4. 2. 3 .Addition as Cash credits is held to be justified.

Sanjay Bimalchand Jain v. P CIT (ITA No. 18/2017, dt. 10.04.2017)(2018) 89 taxmann.com 196
(Bom.) (HC); www.itatonline.org.

The assessee has not tendered cogent evidence to explain how the shares in an unknown company worth Rs.5 had jumped to Rs.485 in no time. The fantastic sale price was not at all possible as there was no economic or financial basis to justify the price rise. The assessee had indulged in a dubious share transaction meant to account for the undisclosed income in the garb of long term capital gain. Finding do not rise any substantial question of law.

ITO v. Shamim M. Bharwani (2015) 170 TTJ 238 (Mum.) (Trib.)

Despite documentary evidence and broker's confirmation, genuineness of penny stock transactions has to be determined on the basis of 'preponderance of human probabilities'. If assessee is unable to

explain 'intriguing' facts and circumstances, genuineness of transaction cannot be accepted. Ratio in the case of *Haresh Win Chaddha v. DDIT* (ITA Nos. 3088 to 3098 & 3107/Delhi/2005 dt. 31/12/2010)(Delhi)(Trib.)www.itatonline.org is applied, wherein the Tribunal has expressed the view that there is no presumption in law that the AO is supposed to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion beyond doubt as in criminal proceedings.

Usha Chandresh Shah v. ITO (Mum.)(Trib.); www.itatonline.org

The tax authorities have rightly applied the test of human probabilities to examine the claim of purchase and sale of shares made by the assessee. Appeal of assessee is admitted. *Usha C. Shah v. ITO (Bom) (HC) (ITA NO 13 of 2016 dt. 18-06-2018)* "Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in not following the orders of the co-ordinate Benches, on identical fact situation that the co-ordinate Benches did not apply the correct test of human probabilities " ?

4. 2. 4 .Shell companies –Failure to produce lenders - Addition is held to be justified.

Pavankumar M. Sanghvi v. ITO (2017) 165 ITD 260 (SMC) (Ahd.) (Trib.)

Assessee received loan from two companies, in view of fact that on date assessee was given loan there were credit entries of almost similar amounts and balance after these transactions was a small amount and moreover assessee failed to produce these lenders for verification addition as cash credit is held to be justified. (Note Affirmed by High Court, *Pavankumar M. Sanghvi v. ITO* (2018) 301 CTR 265 /90 taxmann.com 386 / 404 ITR 601 (Guj) (HC) SLP of the assessee is rejected (2018) 258 Taxman 160 (SC) (10250 /2018 dt. 1-05 -2018))

ITO v. Rajiv Aggarwala (2004)89 TTJ 1095 (Delhi) (Trib.) (Referred in Baijnath Agarwal v. ACIT (2010) 40 SOT 475 (Agra)) (Trib.)

The assessee did not furnish the address of the said company; the fact that the assessee could not adduce evidence in support of his claim of purchase of shares; the assessee failed to adduce any evidence regarding transfer of shares in his name; and that the assessee has failed to even furnish the name and address of the person to whom the shares were sold. Addition was upheld .

Ratnakar M. Pujari v. ITO (ITA. No.995/Mum/2012 dt 2-08-2016) (Mum) (Trib.)www.itatonline.org

The assessee is indulged in non-genuine and bogus capital gains from transaction of sale and purchase of shares of M/s Shiv Om Investment and Consultancy Limited which was penny stock company and pre-dated contract notes were issued by the Brokers to manipulate and introduce long term capital gains in favour of the assessee which are exempt from tax u/s 10(38) of the Act leading to escapement of income from taxation.

The said shares were purchased in off market transactions for which payments were made in cash. The said purchases have been treated as bogus and sham transactions by the Revenue as it is alleged that certain brokers have manipulated and issued pre-dated contract notes which even did not have details such as time of contract, trade number, transaction details etc and payments were also made in cash by the assessee against such sham and bogus purchase with the objective of introducing by manipulating tax free exempt long term capital gains u/s 10(38) of the Act leading to escapement of income from taxation.

4.2.5: Ratio of judgement to be applied .

CIT v. Sun Engineering works P. Ltd (1992) 198 ITR 297 (SC) (320)

Ratio of judgement must be ascertained by the Court /Tribunal before applying the same.

"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of this court, divorced from the context of the question under consideration and treat it to be the complete "law" declared by this court . The judgement must be read as a whole and the observations from the

judgment have to be considered in the light of the questions which were before this court. A decision of this court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, the Courts must carefully try to ascertain the true principle laid down by the decision of this court and not to pick out words or sentences from the judgement, divorced from the context of the questions under consideration by this court, to support their reasonings.”

Amar Singh Yadav v. Santi Devi AIR (1987) Pat 191

CIT v. Madukant M. Mehta (1981) 132 ITR 159 (Guj) (HC)

Two judgements of Jurisdictional High Court which are contrary to each other and latter judgement is delivered without referring earlier judgment. Tribunal can prefer either of the two judgements, which is better in point of law than in point of time.

CIT v. Vegetable Products Ltd (1973) 88 ITR 192(SC)

If there are contrary decisions of different Benches of the Tribunal, decision which is favourable to the assessee may be followed

ACIT v. TVS Motors Co. Ltd. (2011) 128 ITD 47 (Chennai) (Trib.)

Scheme of Merger approved by the court - Department cannot contend that amalgamation is with an intention to avoid tax.

Vodafone Essar Gujarat Ltd. vs. Department of Income Tax (2013) 353 ITR 222 (Guj.)(HC) affirmed Department of Income Tax vs. Vodafone Essar Gujarat Ltd. (2015) 373 ITR 525 (SC)

When scheme is approved by High Court department cannot contend that the scheme was to avoid tax payment .

4. 2.6 .Share capital -Addition is deleted as cash credits.

CIT v. Lovely Exports Pvt. Ltd. (2008) 319 ITR 5(St),216 CTR 195 / 6 DTR 308 (SC)

-If the assessee has given the name of the shareholders from whom they have received the share application money, then the department is free to proceed to reopen their individual assessments in accordance with law, but it cannot be regarded as the undisclosed income of the company.

Earth metal Electricals (P) Ltd. v. ITO (2005) 4 SOT 484 (Mum.)(Trib.)High Court dismissed the appeal ITA No. 590 of 2005 dt 15-10-2008 Supreme Court allowed the appeal of the assessee. SLA (Civil) No. 21073/2009, civil Appeal No. 618 of 2010 dt 30-7-2010. Hence, the order of the Tribunal is no more good law.

Where assessee-company claimed that it had taken certain share capital money and unsecured loan from family members of directors but assessee failed to produce confirmations from creditors and also failed to discharge primary onus put upon it, share capital money and unsecured loan were rightly treated as unexplained cash credits.

CIT v. Stellar Investment Ltd (1991) 192 ITR 287 (Delhi) (HC) affirmed,CIT v. Stellar Investments Ltd (2001) 251 ITR 263(SC)

Device used by assessee for converting black money by issuing shares -ITO failed to conduct detailed investigation- revision was quashed.

V. R. Global Energy Pvt. Ltd. v. ITO (Mad.)(HC), www.itatonline.org

If no cash is involved in the transaction of allotment of shares and it is a case of book adjustment, provisions of s. 68 treating it as unexplained cash credit are not attracted. Even if it were to be assumed that the subscribers to the increased share capital are not genuine, the amount of share capital would in no circumstances be regarded as undisclosed income of the company.

CIT v. Jalan Hard Coke Ltd. (2018) 95 taxmann.com 330 (Raj) (HC)

SLP of revenue is dismissed; CIT v. Jalan Hard Coke Ltd. (2018) 257 Taxman 91 (SC)

Inability to produce share applicants - Addition cannot be made.

CIT v Russian Technology Centre Pvt. Ltd. (2018) 300 CTR 501 (Delhi)(HC)

When the assessee has filed balance sheet confirmation etc, addition cannot be made merely on suspicion. If AO has any doubt he should make enquiry with lender's bank etc.

CIT v. Oriental International Co. P. Ltd. (2018) 401 ITR 83 (Delhi) (HC)

Merely on the basis of statement given by Directors of investing companies additions cannot be made when the assessee has provided all necessary evidences – Burden is on revenue to prove otherwise.

Lalitha Jewellery Mart P. Ltd v. Dy. CIT (2017) 399 ITR 425 (Mad) (HC)

Amounts received through banks and identity of applicants established – Addition was held to be not valid.

Associated Transrail Structure Ltd v. ACIT (2017) 397 ITR 573 (Guj) (HC)

Allowing the appeal of the assessee, the Court held that; the share application money was received by account payee cheque and the confirmation was filed, hence the addition was held to be not justified.

PCIT v. Apeak Infotech (2017) 397 ITR 148 (Bom.) (HC)

Amount received on issue of share capital including premium were on capital account and could not be considered to be income. Amendment is effective from 1-4-2013 hence amount received as share premium cannot be taxed as cash credits for the AY. 2012-13.

CIT v. Orchid Industries P. Ltd. (2017) 397 ITR 136 (Bom.) (HC)

Merely because, parties failed to appear before the AO, additions cannot be made, when the assessee had produced other documentary evidence to prove the genuineness of the transaction.

CIT v. Green Infra Ltd. (2017) 392 ITR 7 (Bom.) (HC)

Subscriptions of share premium done through banks and recorded in books of account- Genuineness identity and capacity of subscribers proved. Addition was held to be not justified.

CIT v. ARL Infratech Ltd. (2017) 394 ITR 383 (Raj.) (HC)

Permanent application number provided – Mode of payment explained -No direct or indirect relation between company and share applicants -Deletion of addition was held to be justified.

PCIT v. Laxman Industrial Resources Pvt. Ltd (2017) 397 ITR 106 (Delhi) (HC)

Merely on the basis of report of investigating wing additions cannot be made.

CIT v. N.C. Cables Ltd (2017) 391 ITR 11 (Delhi) (HC)

Failure by Assessing Officer to conduct adequate and proper inquiry into materials, no addition can be made.

CIT v. Gagandeep Infrastructure Pvt. Ltd (2017) 394 ITR 680 (Bom.) (HC)

Share premium-The proviso to s. 68 (which creates an obligation on the issuing Co to explain the source of share capital & premium) has been introduced by the Finance Act 2012 with effect from 01.04.2013 and does not have retrospective effect. If the AO regards the share premium as bogus, he has to assess the shareholders but cannot assess the same as the issuing company's unexplained cash credit.

CIT v. Likproof India P. Ltd. (2017) 390 ITR 377 (Bom.)(HC)

Entries made in pay – in – slips cannot prevail over entry in books of account, addition cannot be made as income from undisclosed sources.

PCIT v. Jatin Investment Pvt. Ltd. (Delhi)(HC); www.itatonline.org

A transaction cannot be treated as fraudulent if the assessee has furnished documentary proof and proved the identity of the purchasers and no discrepancy is found-The AO has to exercise his powers u/s. 131 & 133 (6) to verify the genuineness of the claim and cannot proceed on surmises.

CIT v. Softline Creations P. Ltd. (2016) 387 ITR 636 (Delhi)(HC)

-Permanent account numbers, bank details of share applicants and affidavits of directors of share applicant company was furnished, share application money cannot be considered as unexplained cash credits.

CIT v. SVP Builders (India) Ltd. (2016) 238 Taxman 653 (Delhi)(HC)

Initial burden which lay upon Assessee to establish source of share capital received shall be duly discharged by the Assessee – Without any material to contrary – No addition can be made.

CIT v. K. C. Pipes P. Ltd. (2016) 386 ITR 532 (P&H)(HC)

Assessee company cannot be held liable if shareholders have acquired money illegally.

CIT v. Al AnamAgro Foods (P.) Ltd. (2013) 219 Taxman 125(Mag.) (All.)(HC)

Identity was proved .Addition cannot be made in the assessment of company as cash credits .

CIT v. Kamna Medical Centre (P) Ltd. (2013) 217 Taxman 16 (Mag.) (All.)(HC)

Assessee-company received from shareholders certain amount on account of share application money, it was required to prove only identity of shareholder and not genuineness of transactions and creditworthiness of shareholders.Deletion of addition was held to be valid.

CIT v. Bhaval Synthetics (2013) 217 Taxman 23 (Raj.)(HC)

Money received through banking channels. Existence of the applicants proved . Addition cannot be made as unexplained cash credits

CIT v. Peoples General Hospital Ltd. (2013) 216 Taxman 320 (MP)(HC)

Creditworthiness, identity established .Addition is held to be not valid

CIT v. LDK Shares & Securities (P) Ltd. (2012) 71 DTR 371 (All.)(HC)

When Identity of share applicant is established-Addition cannot be made ascash credits.

CIT v. Jay Dee Securities and Finance Ltd. (2013) 350 ITR 220 (All.)(HC)

Assessee produced tax returns and confirmation of shareholders . Burden of proving source of share application money discharged addition was deleted.

CIT v. STL Extrusion (P) Ltd. (2011) 333 ITR 269 (MP)(HC)

Provided the name, age, address, date of filing the share application and number of shares applied by each shareholder, addition under section 68 of the Act cannot be made.

Hindustan Inks & Resins Ltd. v. Dy. CIT (2011) 60 DTR 18 (Guj.)(HC)

Identity of shareholder established .Department was free to proceed against shareholders in accordance with law.

4.2.7.Share capital – Addition is confirmed as Cash credits:

Konark Structural Engineering (P.) Ltd. v. Dy. CIT (2018) 254 Taxman 184 (Bom.)(HC)

Assessee failed to prove identity and creditworthiness of shareholders . Summonsserved were returned back with remark that theaddressees were not available . Addition was held to be justified.

Seema Jain v. ACIT(2018) 406 ITR 411 (Delhi) (HC)

Authorities entitled to look into surrounding circumstances to find out reality. The assessee was unable to state exact purpose for which loan of Rs. 1 Crore was taken and stating her husband looked after all finances .No personal or business relationship of assessee with the lender . Transaction squared in next financial year would not establish genuineness of transaction . Addition is held to be justified(**Relied, CIT v.Durga Prasad More (1971) 82 ITR 540 (SC) / SumatiDayalv.CIT (1995) 214 ITR 801 (SC)**)

J. J. Development Pvt. Ltd. v. CIT (Cal)(HC), www.itatonline.org

If the alleged share applicants do not appear before the AO pursuant to the S. 131 summons and the documentation is inadequate, it is bogus claim . The assessee cannot argue that the AO should have made inquiries from the AO of the share applicants as to their credit-worthiness

Rick Lunsford Trade and Investment Ltd. v. CIT (2016) 385 ITR 399 (Cal.)(HC)SLP of assessee is rejected Rick Lunsford Trade & Investment Ltd. v. CIT (2017) 245 Taxman 43 (SC)

Investors denying the subscription of shares . Notices were returned unserved. Addition was held to be justified.

CIT v. N.R. Portfolio (P.) Ltd. (2013) 214 Taxman 408 (Delhi)(HC)

Share applicants did not attend investigation proceedings despite summons under section 131, addition was justified - If on verification, the Assessing Officer cannot contact the share applicants, or the information becomes unverifiable, the onus shifts back to the assessee. At that stage, if it falters, the consequence may well be an addition under section 68.

CIT v. Neelkanth Ispat Udyog (P) Ltd. (2013) 81 DTR 214 (Delhi)(HC)

Where most of the share applicants had deposited money a few days before the issue of shares and also not responded to the summons – Addition under section 68 held to be justified

CIT v. Nipun Builders and Developers Pvt. Ltd. (2013) 350 ITR 407 (Delhi)(HC)

Burden is on assessee to prove the genuineness of the Transaction . All the notices were returned. It was contended that the registered offices of the company could be found in the website www.mca.gov.in and the Assessing Officer may visit the site for further verification. There is no onus on the Assessing Officer to visit website for address of share application for verification, onus on assessee to prove genuineness. Mere furnishing of bank statements of share applications is not sufficient to prove the creditworthiness. Failure to furnish report of investigation wing does not affect validity of addition. On facts and on reassessment the appeal of revenue was allowed and the addition made by the assessing Officer was confirmed.

Bhola Shankar Cold Storage Pvt. Ltd. v. Jt. CIT (2004) 270 ITR 487 (Cal.)(HC)

Small farmers from same area. Creditworthiness and genuineness of transaction being not established, addition of cash credits was justified.

4. 2.8: Recent developments .

PCIT v. NRA Iron & Steel Pvt. Ltd. (2019) 103 taxmann.com 48 (SC), www.itatonline.org

The Apex court dealing with issue of bogus share capital/ premium the court held that the assessee is under legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee. Mere mention of income tax file number of an investor is not sufficient to discharge the onus. On the facts of the case the AO has made proper investigation such as creditworthiness, source, genuineness of transaction etc, by examining the parties who have made investment in shares. Based on the facts the Apex Court affirmed the order of the AO.

PCIT v. Aditya Birla Telecom Ltd. (Bom.)(HC), www.itatonline.org Referring to the judgement in PCIT v. NRA Iron & Steel Pvt. Ltd. (2019) 103 taxmann.com 48 (SC) court held that merely because the investment was considerably large and several corporate structures were either created or came into play in routing the investment in the assessee through a Mauritius entity, would not be sufficient to brand the transaction as colourable device. The assessee cannot be asked to prove the source of source

Baba Bhootnath Trade & Commerce Ltd. v. ITO (Kol.) (Trib.), www.itatonline.org, the Appellate Tribunal, explained the ratio in PCIT v. NRA Iron & Steel Pvt. Ltd. (Supra) and held that the assessee has discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants by producing the PAN details, bank account statements, audited financial statements and Income Tax acknowledgments and the investors have shown the source of source & personally appeared before the AO in response to s. 131 summons. The judgement in PCIT v. NRA Iron & Steel (2019) 103 taxmann.com 48 (SC) is distinguished on facts stating that in the said decision the AO had made extensive enquiries and from that he had found that some of the investor companies were non-existent which is not the case of the assessee.

PCIT v. NDR Promoters Pvt. Ltd. (2019) 410 ITR 379/ 175 DTR 30 /261 Taxman 270 (Delhi)(HC), www.itatonline.org, addition was confirmed as cash credits in respect of share capital and share premium as bogus share capital in form of accommodation entries. On the facts of the case it was found that the directors were working as peons, receptionists etc, who have admitted that they have signed the documents as per direction of Mr Tarun Goyal. Though the details were filed, however they have not been produced before the AO for examination.

If one analyses the all three judgements referred above, all are decided on facts of the case. When any sum is credited in the books of the assessee, burden is on the assessee to prove the creditworthiness and genuineness of transactions. Apex Court in CIT v. Sun Engineering (P) Ltd (1992) 198 ITR 297(320) (SC), observed that “It is neither desirable nor permissible to pick out a word or sentence from the judgement of this Court divorced from the context of the question under consideration and treat it to be complete law declared by this court”

Therefore as regards applicability of S.68 is concerned each cash credit has to be tested on its own facts. i.e. Initial burden is on the assessee to file confirmation, explain the source and produce the parties if the AO issues the summons. When the lender or investor confirms, the burden is on the revenue to prove how the transactions are not genuine. The appellate authorities have to decide the issue by appreciating the facts.

4.2.9. Share capital -Reassessment -Favour

PCIT v. Light Carts P. Ltd (2018) 404 ITR 574 (All) (HC)

Reassessment-After the expiry of four years- Information from investigation wing -No averment of failure on part of the assessee to disclose fully and truly all material facts necessary for assessment – Reassessment is held to be not valid.

Sabh Infrastructure Ltd. v. ACIT (2017) 398 ITR 198 (Delhi) (HC)

Reassessment – After the expiry of four years-Share application money-Notice was quashed and guidelines were laid down and the Revenue is directed to adhere to them.

PCIT v. Paradise Inland Shipping Pvt. Ltd. (2018) 400 ITR 439 (Bom) (HC) SLP of revenue is dismissed PCIT v. Paradise Inland Shipping Pvt. Ltd. (2018) 255 Taxman 160 (SC)

Reassessment -Share capital - Reliance on statements of third parties who have not been subjected to cross examination is not permissible. Voluminous documents produced by the assessee cannot be discarded merely on the basis of statements of individuals contrary to such public documents - Reassessment was held to be not valid.

4.2.10.Share capital- Reassessment – Against

Sairam Commercial Pvt. Ltd. v. UOI (2018) 406 ITR 281 (All) (HC)

Reassessment-After the expiry of four years-Shell companies-Search of third person revealing that transaction disclosed by Assessee during original assessment was bogus. The notice of reassessment was valid.

Aradhna Estate Pvt. Ltd. v. DCIT (2018) 404 ITR 105 (Guj.) (HC)

Reassessment - After the expiry of four years - Cash credits – Share application money - Shell companiesBogus accommodation entries - Report from investigation wing having live link with formation of belief – Proviso added by the Finance Act, 2012 with effect from April 1, 2013 did not change the position - Reassessment was held to be valid.

Ankit Agrochem (P.) Ltd. v. JCIT(2018) 253 Taxman 141 (Raj.)(HC)

Share capital - Bogus accommodation entries – Reassessment was held to be valid

Etiamamedia Ltd. v. ITO (2019) 261 Taxman 88/ 176 DTR 155 (MP)(HC),www.itatonline.org

Specific information was available with the authorities .Allegation that assessee is a dummy concern, used to route unaccounted money by way of bogus share application money is sufficient to reopen assessment .

4. 2. 11.For further information on Penny Stock, refer to the article of Mr. Paras Savla, Advocate Penny stock & 115BBE (2018) AIFTPJ -April -P 23 on www.itatonline.org. Click on the link below for the article:

[http://itatonline.org/articles_new/penny-stocks-modus-perandi -for-generating-bogus-capital-gains-law-practice/](http://itatonline.org/articles_new/penny-stocks-modus-perandi-for-generating-bogus-capital-gains-law-practice/)

PENALTY ([VIDEO - 5](#))

4.3.1 .Concealment Penalty- S.271(1)(C)

The fundamental principle of the levy of penalty is that the penalty proceedings are quasi -criminal in nature. They are distinct, separate and independent of the assessment proceedings. Onus is on the assessee to prove bonafides on the basis of facts and circumstances of the case.

CIT v. Vegetable Products Ltd (1973) 88 ITR 192 (SC) (195)

Provisions dealing with penalty must be strictly construed. If the court finds that language of a taxing provision is ambiguous or capable of more meanings than 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

Anantharam Veerasinghaiah & Co. v. CIT (1980) 123 ITR 457 (SC) (462)

Finding in assessment proceedings are relevant but not conclusive in penalty proceedings.

CIT v. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 / 189 Taxman 322 / 230 CTR 320/ 36 DTR 449 (SC)

Mere making of a claim not maintainable in law, will not amount to furnishing of inaccurate particulars. Merely because the assessee claimed deduction of interest expenditure has not been accepted by the Revenue, penalty under section 271(1)(c) is not attracted. If the contention of the revenue is accepted, the assessee would be liable to penalty under section 271(1)(c) in every case

where the claim made by the assessee is not accepted by the Assessing Officer for any reason. The court held that this cannot be the intention of the legislature.(AY. 2001-02)

Price Waterhouse Coopers Pvt. Ltd. v. CIT (2012) 348 ITR 306 (SC)

Filing inaccurate particulars of income - Inadvertent - Human error - Bonafide mistake - Levy of penalty held to be not leviable

4.3.2 .Surrender of income- Concealment penalty.

Voluntary surrender of income in the course of survey, can the Assessing Officer levy the penalty relying on the ratio in Mak Data (P) Ltd v CIT (2013) 358 ITR593 (SC).

In **Mak Data (P) Ltd. v. CIT (2013) 358 ITR 593 (SC)** the Apex Court held that voluntary surrender of income does not absolve the assessee from penalty due to concealment. The Apex Court further held that the Assessing Officer has to satisfy in the course of assessment proceedings as to whether the penalty proceedings can be initiated or not, however the Assessing Officer is not required to record his satisfaction in any particular style. One may have to refer observation of the Apex Court in para 10, wherein the Apex Court observed as under “Surrender of income in this case is not voluntary “The court observed that survey was conducted in the case of sister concern of the assessee before 10 months of filing of return by the assessee, which proved that the assessee had no intention to make full and true disclosure. Hence based on the peculiar facts of the case, the levy of penalty was upheld. In CIT v. Sun Engineering (P) Ltd (1992) 198 ITR 297(320) (SC), it was observed that “ It is neither desirable nor permissible to pick out a word or sentence from the judgement of this Court divorced from the context of the question under consideration and treat it to be complete law declared by this court”

Therefore the decision in Mak Data (P) Ltd (supra) is not universally applicable and penalty on income surrendered cannot be automatic. In **CIT v. Hiralal Doshi (2016) 383 ITR 19 (Bom.)(HC)** wherein after considering supreme court decision in Mak Data (P) Ltd(supra) it was held that the said decision is not universally applicable and penalty on income surrendered during survey was deleted. Mumbai Tribunal in **Uttam Value Steels Ltd v ACIT (ITA No.3622/Mum/ 2016 dt 22-05-2017 “ F”(AY. 2010-11)**after considering Mak Data (P) Ltd(supra), deleted the penalty on surrender of income after explaining the ratio in the case of Mak Data (P) Ltd.

CIT v. Hiralal Doshi (2016) 383 ITR 19 (Bom.)(HC)

Survey – Capital gains on sale of shares – Penalty is not leviable on income declared during survey and offered in return – A mere change of head of income from capital gains to business income does not attract penalty.

CIT v. Man Industries Ltd (2018) 164 DTR 165 (Bom.) (HC)

Withdrawal of claim on alleged bogus donation and filing the revised return disclosing the alleged bogus donation. Deletion of penalty was held to be valid.

4.3.3. Revised return- Levy of penalty is held to be justified .

PCIT v. Dr. Vandana Gupta (2018) 163 DTR 361/ 301 CTR 460 (Delhi)(HC)

Held that voluntary surrender of income after survey by filing a revised income does not save the assessee from levy of penalty for concealment of income in the original return if there is no explanation as to the nature of income or its source. However according to me it depends on facts of each case.

Khandelwal Steel & Tube Traders. v. ITO (2018) 256 Taxman 305 (Mad) (HC)

Survey-Agreed addition- Revised return- Burden is on the assessee to show that there was an omission or wrong statement in original return which was due to bona fide inadvertence or bona fide mistake on part of assessee and even if assessee agreed to addition with a condition that penalty could not be imposed, department is not precluded from initiating penalty proceedings- levy of penalty is held to be valid

PCIT v. Dr. Vandana Gupta (2018) 301 CTR 460 (Delhi)(HC)

Voluntary surrender of income after survey by filing a revised income does not save the assessee from levy of penalty for concealment of income in the original return if there is no explanation as to the nature of income or its source.

Girraj Mehta v. CIT (2016) 382 ITR 385 (Raj.)(HC)

Bogus Liability – On confrontation of facts – Assessee Surrendered the liability subject to non-initiation of penalty – AO could not have given such assurance – Levy of penalty is held to be justified.

CIT v. Sangameshwara Associates (2012) 345 ITR 396 (Karn.)(HC)

Revised return - Penalty for concealment is leviable though the income was offered in pursuance of notice under section 148.

4.3.4. Specifying charge- Concealment penalty

CIT v. SSA's Emerald Meadows (2016) 242 Taxman 180 (SC) www.itatonline.org Order in CIT v. SSA's Emerald Meadows ITA No 380 of 2015 dt 23-11-2015 (Karn) (HC) is affirmed.

Omission by the AO to explicitly specify in the penalty notice as to whether penalty proceedings are being initiated for furnishing of inaccurate particulars or for concealment of income makes the penalty order liable for cancellation.

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

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

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

CIT v. Samson Perinchery (2017) 392 ITR 4 (Bom.) (HC)

Assessing Officer initiating penalty proceedings for furnishing of inaccurate particulars of income and imposing penalty for concealment of income—Levy of penalty was held to be not valid.

Muninaga Reddy v. ACIT (2017) 396 ITR 398 (Karn.) (HC)

Notice should state specific grounds for levy of penalty—Printed form is not sufficient—Levy of penalty is held to be not valid.

PCIT v. Baisetty Revathi (Smt.) (2017) 398 ITR 88 (AP) (HC)

The AO must specify whether the charge is of concealment of particulars of income or furnishing of inaccurate particulars thereof and which one of the two is sought to be pressed into service. He is not permitted to club both by interjecting an 'or' between the two - Levy of penalty was held to be not valid

PCIT v. Kulwant Singh Bhatia (2018) 168 DTR 327 / 304 CTR 103 / 102 CCH 303 (MP.)(HC)

Not mentioning the specific charge -Ground mentioned in show cause notice would not satisfy requirement of law for levying penalty as charges levied in the notice were not specific- Deletion of penalty is held to be valid .

4.3.4 Quantum confirmed – Levy of penalty is not justified .

Rama NathaGadhavi v. ITO (2017) 393 ITR 59 (Guj) (HC).SLP of revenue was dismissed CIT v. Rama NathaGadhavi(2017) 392 ITR 44 (St.)

Addition is confirmed in quantum proceedings. Levy of penalty is improper.

CIT v. Dalmia Dyechem Industries Ltd (2015) 377 ITR 133 (Bom) (HC) .www.itatonline.org
The Court held that rigors of penalty provisions cannot be diluted only because a small number of cases are picked up for scrutiny . No penalty can be levied unless if assessee's conduct is dishonest malafide and amounting concealment of facts . The AO must render the conclusive finding that there was active concealment or deliberate furnishing of inaccurate particulars . (CIT v. Zoom Communication P.Ltd (2010) 327 ITR 510 (Delhi) (HC) is distinguished .)

CIT .v. Petals Engineers (P) Ltd (2014) 223 Taxman 15(Mag.)/264 CTR 577/97 DTR251(Bom.)(HC)

Quantum was confirmed by Tribunal. Levy of penalty was not justified.

CIT v. Nalin P. Shah (HUF) (2013) 40 taxmann.com 86(Bom.) (HC) www.itatonline.org
Penalty cannot be levied even for unsustainable/ non-debatable claims if there is disclosure in the return .

CIT v. S.M. Construction (2015) 233 Taxman 263 (Bom.)(HC)
Mere fact that explanation of assessee was not accepted in quantum proceedings would not *ipso facto* become a reason to levy penalty for concealment on assessee .(CIT v. Zoom Communication (P) Ltd. (2010) 327 ITR 510 (Delhi)(HC) is distinguished.)

CIT v. S.M. Construction (2015) 233 Taxman 263 (Bom.)(HC)
Amount was disclosed as capital receipt .Assessed as income . Just because explanation was not accepted in quantum proceedings, levy of penalty was held to be not valid. .(CIT v. Zoom Communication (P) Ltd. (2010) 327 ITR 510 (Delhi)(HC) is distinguished.)

CIT v. Bennett Coleman & Co. Ltd (2013) 259 CTR 383 / 215 Taxman 93 (Mag.)/ 87 DTR 368 (Bom.)(HC)
Penalty cannot be levied if income not offered to tax due to inadvertent mistake. On the facts of the case offering income under the wrong head capital gains instead of other sources does not attract penalty.

CIT v. Hans Christian Gass (Bom.)(HC) www.itatonline.org
Ignorance of law caused by complicated provisions amounts to “bona fide belief”, deletion of penalty held to be justified.

CIT v. Nayan Builders and Developers (2014) 368 ITR 722 (Bom) (HC)
CIT v. Advaita Estate Development Pvt. Ltd. (Bom.) (HC); www.itatonline.org

If the quantum appeal is admitted by the High Court, it means that the issue is debatable and penalty cannot be levied.(Refer Advaita Estate Development Pvt. Ltd. v ITO (2014) 147 ITD 693 (Mum) (Trib)) Also refer PCIT v. Dhariwal Industries Ltd (2018) 170 DTR 1/ 304 CTR 870 (Bom) (HC) www.itatonline.org after referring PCIT v .Gopal Housing and Planation Corporation (2018) 167 DTR 236 (Bom) (HC) .In PCIT v. Rasiklal M. Parikh (Bom) (HC),www.itatonline.org,the Court held that deletion of penalty on the sole ground that the High Court has admitted the Appeal and framed substantial questions of law, it cannot be said that the entire issue is debatable one and under no circumstances, penalty could be imposed.

4.4.Offences and prosecutions.

([VIDEO - 6](#))

S. 275A to 280 deal with Offences and prosecutions under the Income -tax Act .

4.4.1 :Criminal procedure Code, 1973

Chapter XXII of the Income -tax Act 1961 do not inter-se deal with the procedures regulating the provision. In other words, the provisions of Criminal Procedure Code, are to be followed in respect of all the offences under the Income- tax Act.

4.4.2 .Economic offences – No limitation is provided for initiation of proceedings

There is no specific limitation period prescribed against economic offences under Criminal Procedure Code. The issue of limitation is jurisdictional issue and before weighing the case on merits, it has to be decided in a technical manner. The Kerala High Court in the case of **Friends Oil Mills & Others v. ITO (1977) 171 ITR 106(Ker) (HC)** held that the bar of limitation specified in section 468 of Criminal Procedure Code 1973, would not apply to prosecution under the Income -tax Act 1961. In terms of this decision, primarily it could be opined that for initiation of proceedings under the Income -tax Act there is no fixed period of limitation. Further proceedings against the tax payer could be initiated for an offence committed in the past, without any regard to the efflux of time. However, the Apex Court held in the decision of **State of Maharashtra v. Natwarlal Damodardas Soni, AIR 1980 SC 593/(1980) 2 SCR 340./ 1980 4SCC 669**, held that a long delay along with other circumstances in favour of an assessee must be taken into consideration in the mitigation of the sentence and Also reference can be made to the decision of Patna High Court in the case of **Gajanand v. State (1986) 159 ITR 101(P& H) (HC)** wherein the court held that prosecution was to be quashed, when the department failed to produce the evidence in spite of the fact that the proceedings were there for 12 years. Reference can also be made to the decision of Bombay High Court, in the case of **Vishnoo Kamatv.. First ITO (1994) 207 ITR 1040 (Bom) (HC)**.

S.278E of the Income -tax Act, 1961, contains a presumption of existence of “culpable mental state “ on the part of the accused for any offences for the purposes of prosecution.

Circular No 469 dt. 23-09-1986 (1986) 162 ITR 21 (St)

Sasi Enterprises v.ACIT (2014) 361 ITR 163 (SC)

Constitutional validity is up held.

Selvi J. Jayalalitha v. UOI (2007) 288 ITR 225 (Mad) (HC) and Selvi J. Jayalalitha v ACIT (2007) 290 ITR 55 (Mad) (HC)

The constitutional validity of section 278E was challenged. The case for the launching of prosecution was non filing of the return. The court upheld the constitutional validity of section 278E after referring to various decided cases. The following observations of the court are of relevance :-

- (i) Section 278E has shifted the onus of proof, and it has an element of mens rea in it. Section 278E requires the court to presume the culpable mental state on the part of the accused in the prosecution of an offence under the Act.
- (ii) The section provides that once the evasion of tax is proved, the intention to evade need not be proved by the revenue.
- (iii) Without the element of culpable mental state there is no offence for prosecution under the Income -tax Act 1961. The accused should prove the existence of circumstance which negate mens rea.
- (iv) It is not the case that the court accepts the culpable mental state as an irrebuttable fact. The law requires that the person should prove that there were circumstances which prevented him from discharging his statutory duty.

The various fundamental principles enunciated in the decided cases referred by the Madras High Court in the decision mentioned above explain that an assessee once charged with an offence under the respective section of the Income Tax Act,

should with utmost care and caution, put forth his defence from the stage of answering the show cause notice before the sanction is issued for launching the prosecution.

Prakash Nath Khanna v CIT (2004) 266 ITR 1 (SC) (para 12)

Presumption can be rebutted but burden is heavy on the accused

4.4.3 .Approach of Courts to Economic Offences Dealing with S. 135 and 111 of the Customs Act.

State of Gujarat v. Mohanlal Jitmalji Porwal & Ors (1987) 2 SCC 364/ AIR 1987 SC 1321

“The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest”

Ram Narain Popli v. CBI (2003) 3 SCC 641

“ ... Unfortunately the last few years, the Country has seen an alarming rise in white -collar crimes which has affected the fibre of the Country’s economic structure. These cases are nothing but private gain at the cost of public, and lead to economic disaster”

4.4.5 .Procedure followed by the department while launching the prosecution.

UIO v Banwari Lal Agarwal (1998) 101 Taxman 508 (SC)

CIT v. Vellippa Textile Ltd (2003) 263 ITR 550 (SC) (567, 569)

Opportunity of being heard before giving sanction u/s 279 of the Act.

Act does not provide that the Commissioner has to necessarily afford of an opportunity hearing before deciding to initiate proceedings

Mansukhlal Vithaldas Chauhan v. State of Gujarat (1977) 7 SCC 622 /AIR 1997 SC 3400

Sanction for launching of prosecution

- (1) Sanction is a weapon to ensure discouragement of frivolous and vexatious prosecutions and is safe guard for the innocent but not a shield for guilty.
- (2) The order of sanction must ex facie disclose that the sanction authority had considered the evidence and material placed before it.
- (3) The sanctioning authority has to apply its own independent mind.
- (4) Discretion should be shown to have not been affected by any extraneous consideration.

If the above test is not satisfied sanction may be held to be bad in law . the ratio of the decision referred above is equally applicable when sanction is given u/ S.279 of the Income -tax Act.

Pradip Burma v. ITO (2006) 382 ITR 418 (Delhi) (HC)

Instruction No 5051 of 1991 dt 7-2-1991 (Guidelines).

If the accused is 70 years of age when the offence was committed then prosecution will not be launched based on the circular of the Board.

Click on the link below to see the complete guidelines in this respect:

<https://drive.google.com/open?id=1-3gzflecdFXs2UkR8eyX2IWB3TKKg2VK>

4.4.6 Can prosecution be initiated during the pendency and before the completion of assessment or during the pendency of Appeal before the appellate authority?

The answer to this question is noticeable from the decision of Apex Court in the case of **P. Jayappan v. CIT (1984) 149 ITR 696 (SC)**. The Apex Court held that the assessment proceedings and criminal proceedings are independent proceedings. They can simultaneously take place and one proceeding need not wait for the other proceeding. This is because the income tax assessment proceedings are civil proceedings in nature and conducted by Income Tax Authority. For the offences committed, once the proceedings are initiated, they are tried before a competent court. Strict rules of evidence as per the Evidence Act need not be followed by the income tax authorities. The Evidence Act has strictly to be implemented in the criminal proceedings.

In a case relating to the mode of recovery of tax demand where the prosecution was initiated under Section 276C of Income-tax Act 1961, for non-payment of admitted tax and interest thereon, the A.P. & T. High Court in the decision of **Kalluri Krishna Pushkar v. Dy. CIT (2016) 236 Taxman 277 (AP & T) (HC)** held that the existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings.

Prosecution was launched for wilful attempt to evade the tax, when the appeal was pending before Appellate Authorities. Magistrate decided to proceed with the matter for recording the evidence to frame the charge. Accused moved to High Court to stay the proceedings. High Court passed interim order staying proceedings in criminal cases when the appeal was pending.

**However in Bhupen Champak Dalal v. Sandeep Kapur & Anr (2001) 248 ITR 827 (Bom) (HC) SLP dismissed with speaking order considering the Judgement of Apex court in P. Jayappan v. CIT (1984) 149 ITR 696 (SC).
CIT v. Bhupen Champak Dalal (2001) 248 ITR 830 (SC)**

Naresh Prasad v. UOI (2005) 276 ITR 633 / 143 Taxman 291 (Patna) (HC)

Ramchandran Ananthan Pothen vs. UOI (Bom.) (HC) (www.itatonline.org)
prosecution proceedings were stayed as the appeal was pending before the CIT(A).

4.4.7. Finding of the Appellate Tribunal

How far the findings of the Income-tax Appellate Tribunal in the assessment proceedings are binding upon the trial court, in respect of the proceedings initiated under section 277.

The answer to this question can be found in the decision of Apex Court in the case of **Uttam Chand v. ITO (1992) 133 ITR 909 (SC)**. The court held that while dealing with the prosecution proceedings under section 277, the findings given by the Income-tax Appellate Tribunal are binding on the criminal courts. This is because, the Income-tax Appellate Tribunal is the final fact finding authority under the Income-tax Act 1961. The findings of Income Tax Appellate Tribunal are binding on the Principal Commissioner of Income-tax or The Commissioner of Income-tax as the case may be. Once it is brought to the notice of the trial court that the Income Tax Appellate Tribunal held, that there is no prima facie case against the assessee for concealment of income, the finding has to be respected by the trial court and the trial court has to discharge or acquit the accused. There can be a situation where on technical grounds i.e., imposition of penalty barred by limitation or due to violation of due process of law, the tribunal may quash the penalty imposed for concealment of income. In such cases, since the penalty for concealment is not quashed on merits it cannot be said that there should not be any prosecution. There can also be a situation, where the tribunal holds that the assessee is liable for penalty. In such cases it cannot be said that the conviction is automatic. The trial court has to examine the witnesses and has to come to an independent

finding as to whether the accused is guilty of the offences by following the due process of law.

Finding of the Appellate Tribunal.

Penalty is deleted on merits even though the quantum is upheld, Prosecution is liable to be quashed

K.C. Builders v. ACIT (2004) 265 ITR 562 (SC)

V. Gopal v. ACIT (2005) 279 ITR 510 (SC)

ITO v. Nandlal and Co (2012) 341 ITR 646 (Bom) (HC)

Sashichand Jain & Others v. UOI (1995) 213 ITR 184 (Bom) (HC)

S.P. Sales Corporation v. S.R. Sikdar (1993) 113 Taxation 203 (SC)

G.L. Didwan v. ITO (1995) 224 ITR 687 (SC)

Malti Mishra (Smt.) v. State Of Uttar Pradesh. (2018) 401 ITR 327 (All) (HC)

4.4.8. Guidelines F.No.285 /160/90 -IT (Inv) dt. 14-05 1996

When penalty is cancelled on technical grounds, such as limitation, no application of mind etc- Prosecution can be initiated

4.4.9 :Penalty & Prosecution

a) **Universal Supply Corporation v. State of Rajasthan (1994) 206 ITR 222 (Raj) (HC)**

A.Y. Prbakar (Karta) v. ACIT (2003) 262 ITR 287 (Mad) (HC) (288)

Non initiation of penalty does not lead to a presumption that prosecution cannot be initiated

b) In case where the Penalty proceedings are initiated and later on dropped after considering the reply on merits, the Prosecution proceedings may have to be quashed.

c) **CIT v. Nayan Builders and Developers (2014) 368 ITR 722 (Bom) (HC)**

CIT v. Advaita Estate Development Pvt. Ltd. (Bom.) (HC); www.itatonline.org

When quantum appeal is admitted by the High Court, it means that the issue is debatable and penalty cannot be levied.- it cannot be a fit case for initiation of prosecution.

d) **Neo Corp International Ltd v. PCIT (2017) 147 DTR 48 (MP) (HC)**

S. 276C : Offences and prosecutions - Wilful attempt to evade tax - Search and seizure - Failure to pay self assessment tax - Issue of show cause was held to be justified - Petition to quash complaint was dismissed..

e) **Ambience Hospitality Pvt Ltd v. Dy. CIT (2018) 161 DTR 36 (Delhi) (HC)**

S. 276C : Offences and prosecutions - Wilful attempt to evade tax - Depreciation on land - A claim in the return which is scrutinised by the auditors and the directors cannot be considered as a mere accounting mistake, hence order of the learned Magistrate is upheld.

f) **Kalluri Krishan Pushkar v. Dy. CIT (2016) 236 Taxman 27 (AP & T) (HC)**

S. 276C : Offences and prosecutions - Wilful attempt to evade tax - Notice under section 156 for recovering the tax need not be issued before launching prosecution. Existence of other modes of recovery cannot act as a bar to the initiation of prosecution proceedings.

g) **Kalanithi Maran v. UOI (2018) 405 ITR 356 (Mad) (HC)**

S. 276B : Offences and prosecutions - Failure to pay to the credit tax deducted at source - Non-Executive Chairman is not involved in Day-To-Day affairs of company - Managing

Director admitting Liability and entering into negotiations with revenue — Prosecution of Non-Executive Chairmans held to be not valid.

- h) **B. Gopi. v. G. Thiyagarajan, ITO (2015) 370 ITR 353 (Mad.)(HC)**
S.276C : Offences and prosecutions – False verification in return – Conviction and sentence confirmed – Liberty to Department to consider application for compounding offence.
- i) **R. Inbavalli v. ITO (2010) 327 ITR 226 (Mad.)(HC)**
S. 276CC : Offences and prosecutions – Failure to furnish return of Income – Filing of return in response to notice under section 148
Assessee is not exonerated from prosecution under section 276CC for not filing the returns within statutory due date as per section 139(1) though the returns are filed in response to notice under section 148, further, as there is a statutory presumption prescribed under section 278E, the burden is on the assessee to show that there was no willful default.
- j) **Y. Rajendra, Dy. CIT v. KhodayEshwarsa& Sons (2005) 272 ITR 448 (Karn.)(HC)**
S. 276CCC : : Offences and prosecutions – Search cases – Failure to furnish return –Where notice under section 158BC was served on assessee's CA and assessee admittedly had its knowledge but did not file return in response thereto and, hence, criminal proceedings were started against it, Trial Court was not justified in discharging assessee accused on ground that notice under section 158BC was not served on it.
- k) **ACIT v. NilofarCurrimbhoy (2013) 219 Taxman 102 (Mag.) (Delhi) (HC)**
(SLP is granted to the assessee SLA(CRL) No. 3714 of 2013 dated 22-8-2014, NelofarCurrimbhoy v. ACIT (2015) 228 Taxman 57 (SC))
-S.276CC : Offence and prosecutions – Culpable mental state – Failure to furnish return of income –High Court held that since the assessee had not filed return of income timely, it could be prosecuted under section 276CC on presumption that there existed a culpable mental state as onus to prove that delay was not wilful was on assessee and not on department.
- l) **Sujatha Venkateshwaran (Mrs) v. ACIT (2018) 257 Taxman 195 (Mad)(HC)**
S. 277: Offences and prosecutions - False statement – Verification – Principal Assessing Officer-Bogus claim of brokerage- Subscribed her signature in profit and loss account and balance sheet of company for relevant assessment year which were filed along with returns- Assessing Officer was justified in naming her as Principal Officer and accordingly she could not be exonerated for offence under S. 277 of the Act.
- m) **T.D. Gandhi, ITO v. Sudesh Sharma (2015) 230 Taxman 572 (P&H)(HC)**
S.277A : Offences and prosecutions – Falsification of books – False TDS certificate –Tax practitioner – Refund on the basis of TDS certificates – Respondent had no role in preparing TDS certificates – ITO could not initiate criminal proceedings for commission of offences punishable under IPC.
- n) **Vikram Singh v. UOI (2018) 401 ITR 307(Delhi) (HC)**
S. 279 :Compounding Of Offences — Guidelines fixing compounding fees was held to be valid.Application For Compounding twenty years after assessment order and after framing of criminal charges — Determination of compounding fees was held to be valid.Assessee was directed to pay cost of Rs 50,000/-.
- o) **Vikram Singh v. UOI (2017) 394 ITR 746 (Delhi) (HC)**
S. 279 : Compounding of an offence – No time limit is prescribed-The CBDT has no jurisdiction to demand that the assessee pay a 'pre-deposit' as a pre-condition to considering the compounding application.

p) **Government of India, Ministry of Finance, Department of Revenue (CBDT) v. R. Inbavalli (2017) 249 Taxman 476/159 DTR 15 /(2018) 400 ITR 352/301 CTR 225 (Mad.) (HC)**

S. 279: When High Court has given direction to consider the application for compounding, pendency of appeal against conviction could no longer be a reason for refusing consideration for compounding of offence.

q) **ITO v. Balaji Chit Fund (No. 1) (2003) 264 ITR 428 (Mad.)(HC)**

S. 276C : Offences and prosecutions – Willful attempt to evade tax – Successor can continue the proceedings

Where initially the authorization was given to one officer who filed a complaint and, subsequently, he relinquished the office or was transferred, his successor could proceed with the same complaint as a complainant.

r) **Roshan Lal v. Special Chief Magistrate (2010) 322 ITR 353 (All.)(HC)**

S. 276CC : Offences and prosecutions – Failure to furnish return of income – Karta liable for tax offence of the HUF. Member of HUF cannot be held liable for delay in filing of the return of HUF, though he has participated in the assessment proceedings.

s) **Bhaskar Industries Ltd v. Bhiwani Denim and Apparels Ltd, AIR 2001 SC 3625 (3629)/(2001) 7 SCC 401**

Power of Magistrate to dispense with personal appearance of an accused. When an accused makes application to a Magistrate through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with, the Magistrate can consider all aspects and pass appropriate order thereon before proceeding further.

4.4.10.S.273A.Waiver of penalties. S.279 .

If penalty is waived even partly, no prosecution can be launched

Dipesh Chandak v. UOI (2004) 270 ITR 85(SC)

S. 276C : Offences and prosecutions – Willful attempt to evade tax – Benefit of Pardon -If accused makes a full and complete disclosure to get benefit of pardon under section 306 of the Code of Criminal Procedure, 1973, the prosecution under section 276C / 277 should not be allowed to proceed.

4. 4.11 Abatement – Liability of chartered Accountant.

Navrathna & Co v. State (1987) 168 ITR 788 (Mad) (HC) (790)

Merely preparing returns and statement on the basis of the accounts placed before the Chartered Accountant, the question of abatement or conspiracy does not arise

Binod Kumar Agarwal v. CIT (2018) 257 Taxman 58 (Cal) (HC) www.itatonline.org. strictures against CA for certifying bogus accounts with a view to mislead bankers. The matter is typical how business is conducted in this country and why loans obtained from Banks remain unpaid. The ITAT may only be faulted for not reporting the CA to ICAI for having apparently abetted in the commission of a colossal act of misrepresentation. ICAI was directed to look in to the matter and take necessary action.

For further information on Prosecution, refer to the article of Dr. K. Shivaram, Senior Advocate on www.itatonline.org. Click on the link below for the article :

http://itatonline.org/articles_new/guide-to-offenses-and-prosecutions-under-the-income-tax-act-1961-with-video/

The Chambers special issue, started with prosecution under Income- tax Act in the year 1987. Very recently in April -May, 2018, under editorship of Mr K.Gopal Advocate, Special issue is published on the subject of Prosecution.

4.4.12 .Settlement Commission.

In an appropriate case, it may be desirable to approach for settlement commission. Assessee will get the capitalization, waiver of penalties immunity from persecution and finality of the entire case within two years. As per S. 245I of the Income -tax Act order of Settlement Commission is conclusive. If you approach under normal procedure, assuming you succeed before Tribunal the department will take the matter further up to Supreme Court.

4.5. Check list- Practical guide – Representation before the Assessing Officer ,Commissioner (Appeals) and Appellate Tribunal. Tax professionals and assesses.

1. As far as possible the assessee should not agree for addition with the intention of buy peace or prolonged litigation. Assessing Officer has to make the assessment as per law there cannot be agreed assessment.

2. Chartered accountant or tax consultant should not agree for addition on behalf of his client

3. When a statement on oath is taken in the course of assessment or survey or search proceedings it is not advisable for chartered accountant or Tax consultant to sign as witness.

4. As soon as the statement is recorded the assessee must make an application to the authority concerned to furnish the copy of the statement recorded.

5. In case creditors reluctant to appear before the Assessing Officer on the request of the assessee, the Assessing Officer may be requested in writing to issue summons u/s 131 of the Act.

6. If third party statement is relied on by the Assessing Officer, an application may be made to furnish the copy of the statement and also an opportunity of cross examination.

7. Application may be made at the earliest to provide for copies of documents, impounded, seized, papers, books of account as well as electronic data.

8. If the assessee is not provided sufficient time to furnish the required details an application may be made in writing to provide a reasonable time to furnish the details.

9. If the assessee is not well conversant with English language the assessee may request the authority concerned to take the statement in the language which he understands or ask the authority concerned to explain in the language which he understands before signing the statement on oath.

10. Service of the notice is a condition precedent for making of an assessment. In case the service of notice is not done the objection must be raised at the earliest in the course of assessment proceedings it self .

11. In case of reopening of assessment on furnishing the return in response to notice u/s 148, it is desirable to file the return signed by the assessee, instead mere letter by the tax consultant treat the return filed earlier may be treated as return in pursuance of notice u/s 148.

12. Once return is filed in pursuance of notice u/s 148 the assessee should ask the copy of recorded reasons .

13. While filing reply to recorded reasons, detailed reply must be filed, dealing with all the issues , including the legal objections if any .

14. After receipt of the order disposing the objection is received , if the assessee is desire to approach High Court by filing writ petition ,the petition should be filed at the earliest .

15. Retraction of statement must be done within reasonable time

16. If the natural justice is violated a specific ground regarding the violation of natural justice must be taken before the first appellate authority.

17. It is not advisable to act on the oral assurance of the Assessing Officer that he will not levy penalty or he will drop the reassessment proceedings.

18. While giving the reply don't mention technical objections to the notice, eg. wrong application of section. You may write stating that the notice is not in accordance with law .

19. When there is change of address or change in name ,or merger of companies the same by be informed in writing to the AO . If the appeal is filed revised form may be filed with the new address or with new name .
20. After filing of return if the assessee is no more the intimation may be sent in writing to bring legal heirs on record .
21. If the assessee in respect of whom appeal is to be preferred is dead , the assessee's legal heirs should be brought on record . The death certificate along with an affidavit should be filed with the Registry by the legal heirs.
- 22.If there is delay in filing of an appeal , the application for condonation of delay must be filed supported by an affidavit .
23. While arguing before the CIT(A) don't agree for not pressing the ground on legal issues, on the assurance that he/she will decide the quantum of appeal in favour of assessee on merit.
24. While filing an appeal before CIT(A) , file detailed statement of facts , which will help to make better representation before the Appellate Tribunal and High Court .
25. When ever additional evidence is filed before the CIT(A) or Appellate Tribunal , the same should be with proper application, explaining the reasons why the same could not be filed before the lower authorities . In certain circumstances , it can be supported by an affidavit . The additional evidence may be preferably in paper book No 2 and the same should be continuously numbered from the paper book No 1 which was filed .
- 26 . If you have succeeded before CIT(A) on merit and the CIT(A) has not decided on legal ground ,file an appeal or cross objection in respect of legal grounds urged before the CIT(A).
27. If certain observation made by the AO, CIT(A) which are contrary to facts, file rectification letter and also specific ground before the appropriate authority.If required in the form of an affidavit.
28. As per Rule 18 of the Appellate Tribunal Rules , the appellant shall file paper book in triplicate at least 7 days before the date of hearing of the appeal. The paper book shall contain documents or statements of witness and other papers referred to or submitted before the Assessing Officer or CIT (A) , on which the appellant would like to rely . Each paper should be certified as a true copy by the party filing the same ;i.e by the assessee or his authorized representative. If the paper book contains any documents which are in vernacular language , the assessee must file the translated copy of the said documents in English which is duly certified by the competent authority . eg .Advocate , Chartered Accountant or Notary public .
29. While signing the certificate to the paper book, the professional must be very careful. If wrong certificate is given there could be prosecution for giving wrong certificate .
30. If the CIT(A) has decided the appeal on quantum in favour of the assessee and on reassessment against the assessee. If the department contest in appeal before the Tribunal, it may be desirable to file cross objection with in 30 days of the intimation received from the Appellate Tribunal . However if cross objection is not filed , the assessee may file application under 27 of the Appellate Tribunal Rules . There is no time limit for filing the Rule 27 application , however it is desirable to file Rule 27 application at least seven days before the date of hearing, so that the other side will have an opportunity to meet the contention of the assessee.
- 31 . When there is an appeal by an assessee and the department or cross objection for the same assessment year , both must be clubbed together. It is the duty of the assessee to intimate the Registrar of the ITAT to fix the appeal and cross objection together . Refer GST v Vijay .Int .Udyog (1985) 152 ITR 111 (SC)
32. While arguing before the Tribunal if you have taken four grounds, make submission in respect of all grounds.
33. Questions not argued before the Appellate Tribunal cannot be contested in appeal before the High Court, therefore if the question is argued before the Tribunal and Tribunal has not recorded the correct facts, it may be desirable to file miscellaneous application and get it rectified .
34. If the assessee desires to file an appeal against the order of the Appellate Tribunal the time limit starts from the date of service of the order. However the Court has the power to condone the delay .

35. When the assessee partly succeeds in appeal before the Appellate Tribunal, and if the revenue files an appeal. The assessee can file cross objection against the appeal of the revenue, within 30 days of the notice to the respondent i.e. Within 30 days of the receipt of the appeal memo filed by the revenue.

36. Before representing before the Appellate Tribunal or CIT(A), verify with the assessee whether any representative has appeared or filed vakalatnama / Power of attorney in the said matter. If yes, then a 'no objection' may be required to be obtained before appearing in the matter.

37. If possible, it may be desirable to ask the assessee to bring the original record or file in respect of the issues to be argued. At some occasion, a member may desire to see the original records.

38. It may be desirable not to make the ladies who are not well conversant with the business of the firm as signatories to the return.

39. If certain wrong facts are referred in the order, the assessee should be advised to file rectification application before the Assessing Officer /CIT(A) or Tribunal.

40. When the matter is contested before the Tribunal don't agree for the addition confirmed by the CIT (A) or the AO. There are instances where in the assessee has agreed for percentage of addition in respect of alleged bogus purchases, the revenue has launched the prosecutions.

41. In an appropriate case if the concealment penalty is levied or leviable u/s 271(1)(iii) of the Act, and there is possibility of launching of prosecution, it may be desirable to approach the Commissioner for waiver of penalty u/s 273A of the Act. Once the penalty is waived either partly or fully the Commissioner cannot give sanction u/s 279 to launch prosecution for offences committed u/s 276C or Section 277 of the Act.

42. If the prosecution is launched against the assessee who is lady or senior citizens for failure to deduct at source or concealment of penalty, if the quantum of compounding fees is not very high it may be desirable to file the compounding application to avoid the harassment and prolonged litigation and mental torture.

43. Whenever survey or search is conducted on assessee, unaccounted cash or incriminating documents are found it may be advisable to consider approaching settlement commission. Settlement Commission has the power to waive penalties, immunities from prosecution and also allow the capitalization of the additional amount disclosed.

Considering the tax litigation and time involved, it is desirable to have better tax management and tax compliance without having any adventurous tax planning.

QUESTION & ANSWER SESSION

[\(VIDEO - 7\)](#)

Questions and answers

1.Q. Service of notice- Kolkata investigation wing has sent the information which was received by Mumbai Income tax Officer on Saturday. Notice was issued by the Income tax Officer on last date of limitation, is such notice valid?

A. Section 149 refers to time limit for notice i.e. issue of notice and not service of notice. Where as S.148 refers to service of notice. (Mayawati v.CIT (2010) 321 ITR 349 (Delhi) (HC) If the notice is issued within limitation period the said notice is valid. One may find out by making an application under Right to Information Act, whether the notice was handed over to the postal authority or before Limitation period. Burden is on assessee to prove that the notice was not handed over to the postal authority on or before last date of limitation.

2.Q. Department takes up the matter on the last date of limitation and does not grant sufficient opportunity to produce evidence. how far the order is valid?

A. Order cannot be said to be invalid just because the matter was taken up on the last date of limitation . One may have to take specific ground of natural justice before CIT (A) and explain the reasons. CIT (A) is bound to consider the additional evidence and decide in accordance with law.

3.Q. Appeal in respect of Penny stock matter is pending before CIT(A), whether we can succeed before CIT (A) or Tribunal ?

A. Depends on the facts. If one is able to show on facts that the case is genuine, he /she may succeed before CIT(A) . Appellate Tribunal being authority on finding of facts which is functioning under Ministry of law and Justice and not Ministry of Finance they decide the issue on facts and law . If the transaction is genuine the chances of success is better before the Appellate Tribunal. One may refer to the various case laws on the subject.

4.Q. Appeal is pending before CIT(A) , can department launch prosecution?

A. Department cannot launch the prosecution when an appeal is pending before the CIT(A) ,which has the bearing on the alleged offences by the revenue. One may approach High Court to stay the prosecution proceedings . One may refer to the judgement of Bombay High Court in Ramchandran Ananthan Pothi v UOI (Bom)(HC),www.itatonline.org. where in stay was granted by the High Court.

5.Q. What is the procedure for getting the return accepted or obtaining refund from the tax department ?

A. Govt Office cannot refuse to accept the return or letters. If Officer is not accepting the return or letters one may approach Higher authorities. Make representation. If you are not able to succeed, file Writ petition before High Court.

6.Q. Whether service of notice via WHATS APP is valid?

A. Notice has to be sent as per prescribed mode. In High Court there is no procedure of sending notice of hearing to the assessee. It is the duty of the Advocate on record to inform the parties In Kross Television India Pvt. Ltd. v. Vikhyat Chitra Production (MANU /MH /1228 /2017 (Bom) (HC);www.itatonline.org,the intimation was sent through WHATSAPP to the other side Advocate to be present on the appointed day and time, High Court opined that intimation by WHATSAPP is sufficient compliance .

7.Q. We are not getting the refund immediately though the intimation is received, what is the remedy ?

A. Make representation, if no response file writ before High Court.

8.Q. Can addition be made on the basis of statement made on oath during search proceedings?

A. Statement given on oath is binding on the assessee. Burden is on the assessee to discharge that the statement is not voluntary .However if any statement is given with respect to legal aspects , the said statement is not binding as there is no estoppel against law.

9.Q. Notice is hosted on portal and also information is sent by email, whether valid ?

A. If the intimation is hosted online and also sent by email the notice is valid. Each case has to be tested on facts and one cannot generalize.

10.Q. Whether filing of return is mandatory in response to notice u/s 148 of the Act before asking the recorded reasons?

A. In response to notice the assessee must file the return and thereafter ask for recorded reasons. One has to follow the procedure laid down by Apex Court in GKN Driveshafts (India) Ltd v. DCIT (2003) 259 ITR 19 (SC) and Bombay High Courts in Asian Paint Ltd. v. Dy. CIT (2008) 296 ITR 90 (Bom)(HC), Allana cold storage Ltd v. ITO (2006) 287 ITR 1 (Bom)(HC)

11.Q. Can the penny stock be assessed as cash credits based on the statement of Broker or management?

A. Depends on facts. In PCIT v. Prem Pal Gandhi (2018) 401 ITR 253 (P & H) (HC) held that, merely because there is appreciation in value the capital gains the same cannot be assessed as income from undisclosed sources. Punjab and Haryana High Court held that merely because broker has denied transactions the same cannot be held to be non genuine. In the case of Kolkotta Tribunal in Prakash Chand Bhutoria v. ITO (Kol)(Trib), www.itatonline.org there was 31000% increase in value of shares over 2 years is highly suspicious but cannot take the place of evidence. The addition cannot be made based on generalizations.

Thank you

[Research on the subject is contributed by the, Team KSA Legal Chambers. Advocates, Rahul Hakani, Neelam Jadhav and Sashank Dundu Advocates]

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