"Legal aspects – Reassessment proceedings, Responding to notices u/s. 131, 131(1A),133(6), penalties, prosecution & compounding of offences under the Income -tax Act, 1961- Constitutional remedies"

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1. Introduction.

1.1. The Constitution of India is the supreme law of the land in our country. One of the most important provisions of the Constitution of India is Article. 265, which provides that **"No tax shall be levied or collected except by authority of law".** The collection of tax has to be also within the frame work of law. The **Circular No. 14 (XL-35), dt. 11/04/1955**, also states that a duty is cast upon the Assessing Officer to assist and aid the assessee in the matter of taxation. Assessing Officers are supposed to advise the assessee and guide them and not take advantage of any error or mistake committed by the assessee or of their ignorance. The function of the Assessing officer is to administer the statute with solicitude for public exchequer with an inbuilt idea of fairness to taxpayers. 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)

Raghavan Nair v. ACIT (2018) 402 ITR 400(Ker.)(HC)

Capital gains wrongly shown in the return as taxable. Duty of Assessing Officer to refrain from assessing such income. No tax shall be levied or collected except by authority of law.

Dr. Jyoti Vajpayee v. CIT (2017) 392 ITR 518 (All) (HC) (53)

"Under Article 265 of the Constitution of India "no tax shall be levied or collected except by the authority of law". Thus, unless and until the income of an assessee is liable to be taxed, it cannot be so taxed under the Act. The taxing authority cannot collect or retain tax, that is not authorised. Any retention of tax collected, which is not otherwise payable, would be illegal and unconstitutional".

Balmukund Acharya v. Dy. CIT (2009) 310 ITR 310 (Bom.)(HC) (318)

"If any assessee, under a mistake, misconceptions or on not being properly instructed is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected".

S.R. Koshti v. CIT (2005) 276 ITR 165 (Guj.)(HC) (175)

"A word of caution. The authorities under the Act are under an obligation to act in accordance with law. Tax can be collected only as provided under the Act, that. If an assessee, under a mistake, misconception or on not being properly instructed, is over-assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected"

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

"There cannot be any estoppel against the statute, Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied

or collected without authority of law". [Also refer, CIT v. V.MR.P. Firm, Muar (1965) 56 ITR 67 (74)]

CIT v. Shelly Products (2003) 261 ITR 367 (SC) (382)

"If the assessee has by mistake or inadvertence or on account of ignorance, included in his income any amount which is exempted from payment of Income-tax or is not income within the contemplation of law, he may like wise bring this to the notice of the assessing authority, which if satisfied, may grant him relief and refund the tax paid in excess if any".

1.2. Concession of law is not binding.

CIT v. Mahalaxmi Sugar Mills Co. Ltd. (1986) 160 ITR 920 (928)

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

1.3. For today's discussion, we have divided the subjects into 10 parts

1. Reassessment proceedings-important legal issues.
2. Power regarding discovery, production of evidence, etc. S.131.
3. Issue of notice when reason to suspect that any income has been concealed or is likely to be concealed, by any person or class of persons. [S. 131(1A)].
4. Power to call information. S.133(6).
5. Replies to penalty notices.
6. Replies to prosecution notices.
7. Compounding of offences.

8. Prosecutions–Important legal issues.
9. Check list-Practical guide-Representation before the Assessing Officer, Commissioner (Appeals) and Appellate Tribunal.
10. Questions and answers.

2. Reassessment proceedings–Important legal issues.

2.1. Relevant Sections.

S.147. Income escaping assessment - Power of Reassessment
S.148. Issue of notice where income has escaped assessment.
S.149. Time Limit for notice.
S.150. Provision for cases where assessment in pursuance of an order on appeal, etc.
S.151. Sanction for issue of notice.
S.152. Other provisions.
S.153. Time limit for completion of assessment, reassessment and re computation.
S.143(2). Assessment- Issue of notice.
S.282. Service of notice generally.
S.292B. Return of income, etc, not to be invalid on certain grounds.
S. 292BB-Notice deemed to be valid in certain circumstances.

2.2. Pre conditions. S.147 & 148.

2.2.1. Recording of reasons is mandatory before issue of notice u/s 148 to file the return.
2.2.2. Necessary sanction is required u/s 151 of the Act in certain circumstances.

2.3. Proper procedure to be adopted by Assessing Officer on issue of notice and duty of Assessee on receipt of notice u/s. 148 of the Act.

GKN Driveshafts (India) Ltd v. DCIT (2003) 259 ITR 19 (SC)

- to file the return of income ,
- if Assessee so desires, to seek reasons for issuing the notices,
- the assessing officer is bound to furnish reasons within a reasonable time,
- on receipt of reasons, the assessee is entitled to file objections to issuance of notice, and
- the assessing officer is bound to dispose of the same by passing a speaking order

Asian Paint Ltd. v. Dy. CIT (2008) 296 ITR 90 (Bom.)(HC)

If the Assessing Officer does not accept the objections, filed by the assessee, he shall not proceed further in the matter with in period of four weeks from the date of service of said order on objections.

Allana cold storage Ltd v. ITO (2006) 287 ITR 1 (Bom.) (HC)

Assessing Officer is bound to follow the law laid down by Supreme Court in GKN Driveshafts (India) Ltd v. DCIT (2003) 259 ITR 19 (SC) and bound to dispose the objections of the assessee by passing speaking order.

CIT v. Trend Electronics (2015) 379 ITR 456 (Bom.)(HC).

The Assessee had asked the reasons only once hence not supplied cannot be the reasons to justify for non furnishing of reasons. Recording of reasons and furnishing of the reasons to be strictly complied with.

CIT v. Videshi Samchar Nigam Ltd. (2012) 340 ITR 66 (Bom.)(HC)

Failure to furnish the recorded reasons for issue of reopening notices to the assessee before completion of assessment proceedings would make the reassessment is bad in law. (Followed, CIT v. Fomento Resorts & Hotels Ltd., ITA No. 71 of 2006, dt. 27-11-2006 (Bom.)(HC) (SLP was dismissed on 16 -07 -2007)

Home Finders Housing Ltd. v. ITO. (2018) 404 ITR 611 (Mad.)(HC)

(SLP of assessee is dismissed,Home Finders Housing Ltd. v. ITO (2018) 256 Taxman 59 (SC))

The Court held that, non-compliance of direction of Supreme Court in GKN Driveshafts (India) Ltd. v. ITO that on receipt of objection given by assessee to notice under S. 148, Assessing Officer is bound to dispose of objections by passing a speaking order, would not make reassessment order void ab initio. However the Assessing Officer in Maharashtra is bound by the decision of Jurisdictional High Court.

Sahakari Khand Udyog Mandal Ltd. v. ACIT (2015) 370 ITR 107 (Guj.)(HC)

- Assessee shall file return within time prescribed in notice.
- AO shall supply reasons within 30 days of filing Return without waiting for demand of reasons from the assessee.
- Assessee should raise his objections within 60 days of receipt of the reasons.
- AO shall dispose off objections within 4 months of receipt of the objections.
- The above time limits shall apply to AO where the assessee also adheres to the same.
- The procedure provided in GKN Drive Shafts shall apply notwithstanding whether the above time limit is followed or not.
- The Chief Commissioner of Income -tax and Cadre Controlling Authority of the Gujarat State, shall issue a circular to all the Assessing Officers for scrupulously carrying out the directions contained in this judgment.

Muller & Philpps (India) Ltd v. ITO (2016) 47 ITR 69 (Mum.)(Trib.)

Reasons must be recorded and recorded reasons must be furnished to the assessee, when sought for, so as to enable the assessee to object to the same, during the course of assessment proceeding. Thus, in the absence of reasons provided by the Assessing Officer to the assessee, the reassessment order shall be bad in law.

Bayer Material Science Pvt. Ltd. v. DCIT (2016) 382 ITR 333 (Bom.) (HC)

Non disposal of objections and providing the assessee with the recorded reasons towards the end of limitation period and passing a reassessment order without dealing with the objections results in gross harassment to the assessee which the PCIT should note and take remedial action / proceedings.

2.4 Suggestions :

1. Filing of return.

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-practitioners or Chartered accountants file the letter with 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), ITO v. R.K.Gupta (2008) 115 ITD 384 (Delhi)(Trib),** held that letter stating that the earlier return filed may be treated as return filed in pursuance of notice u/s. 148 which is a sufficient compliance and the date of filing of such return would be the date on which assessee wrote the letter to Assessing Officer requesting him to treat original return as return filed under S.148. However some times the department is contesting that mere letter is not sufficient and it has to be proper return filed by

the assessee. Therefore it is advisable that the return of income be filed by the assessee who is also authorised to sign the return.

2. **Copy of recorded reasons.**

Request for copy of recorded reasons and the same must be in writing.

3. **Certified copy of order sheet and inspection of records.**

If the assessee is not sure about the details filed in the course of assessment proceedings. Request for certified copies of order sheet and also inspection of records. The Assessing Officer is bound to supply the copy of order sheet and also bound to provide the inspection of records. In the case of in the case of **Shankarlal Khaitan v ACIT (2017) 393 ITR 484(Orissa) (HC). www.itatonlin.org.** It has been held that it is the right of the every assessee to seek certified copies of the entire order sheet of any assessment proceedings on payment of charges. The certified copies have to be handed over forthwith on payment.

4. **Objections to recorded reasons**

On receipt of recorded reasons, it is advisable to file a detailed reply on facts and law, with supporting evidence. If the AO has relied upon some statement, the assessee should ask for copy of statement received. When the Assessing Officer disposes the objections, he has to deal with all the objections. If the issue is that the Assessing Officer desires to reopen the assessment which is subject matter of appeal and the appeal is pending before Tribunal, it is advisable to file the order copy of CIT(A) and grounds of appeal filed before the Appellate Tribunal. Also request for copy of letter of sanction for issue of reassessment notice.

5. **On receipt of order disposing the objections**.

The assessee is given four weeks time to decide whether to approach the High Court under Article 226 of the Constitution of India to quash the issue of notice or pursue the normal remedy by filing an appeal after receipt of the order. If the assessee desires to approach the High Court, it is advisable to do so at the earliest. If no ad interim stay is obtained from High Court, the Assessing Officer may pass the order. Once the order is passed, the High Court may not entertain the writ petition. In **Cenveo Publisher services India Ltd. v. UOI (Bom)(HC), www.itatonline.org,** the court held that, if the assessee delays in filing objections to the reasons and leaves the AO with little time to dispose of the objections and pass the assessment order before it gets time barred, it destroys the formula provided in **Asian Paints Ltd. v. Dy.CIT (2008) 296 ITR 90 (Bom.)(HC)** that the AO should not pass the assessment order for 4 weeks. A writ petition to challenge the reopening is not entertained in such a case.

6. Writ petition is not entertained when statutory remedy of appeal is available.

Neeraj Mandoli v. ACIT (2017) 399 ITR 287 (MP) (HC)

When the assessment order is passed, there was right to statutory appeal which was available and therefore writ was not an appropriate remedy. The Court cannot go in to various aspects of matters already dealt with in assessment order, for which remedy of appeal was available. (Also refer **CIT v. Chhabil Dass Agarwal (2103) 357 ITR 357 (SC), CIT v. Vijaybhai N. Chandrani (2013) 357 ITR 713 (SC).**

2.5.1 Notice issued on dead person or company which is not in existence.

Rupa Shyamsundar Dhumatkar v. ACIT (Bom.)(HC), www.itatonline.org (WP No. 404 of 2019, dt. 05.04.2019)

The fact that the AO was not informed of the death before issue of notice is irrelevant. Consequently, S. 148 notice is set aside and order of assessment stands annulled. Followed Alamelu Veerappan v. ITO (2018) 257 Taxman 72 (Mad) (HC) followed).

Sumit Balkrishna Gupta. v. ACIT (2019) 262 Taxman 61 (Bom.) (HC)

For acquiring jurisdiction to reopen an assessment, notice should be issued in name of living person, i.e., legal heir of deceased assessee. S.292B or 292BB could not be invoked to correct a fundamental/substantial error.

Chandreshbhai Jayantibhai Patel v. ITO (2019) 261 Taxman 137 (Guj.)(HC)

Merely because in response to notice issued against Jayantilal Harilal Patel petitioner had informed Assessing Officer about death of assessee and asked him to drop proceedings. It could not, by any stretch of imagination, be construed as petitioner having participated in proceedings and, therefore, provisions of S. 292B would not be attracted.

Jaydeepkumar Dhirajlal Thakkar v. ITO (2018) 401 ITR 302 (Guj.)(HC)

Notice issued in name of deceased assessee. Objection raised by legal heir of deceased assessee before completion of reassessment. Notice was held to be null and void.

2.5.2. Suggestions.

It is advisable that on death of the assesse, a letter may be filed to the jurisdictional Assessing officer informing about the death of the asseeee and requesting for cancellation of PAN No. This procedure may be

followed even in cases of merger and Amalgamation and also firm or company converted in to LLP or dissolution of firm.

2.6.1. New reasons cannot be allowed to be introduced or supplied.

Hindustan Lever Ltd. v. R. B. Wadkar (2004) 268 ITR 332 (Bom.) (HC)

Validity of an order must be judged by the reasons so mentioned therein. Reasons recorded cannot be supplemented by filing affidavit or making oral submission.

2.7.1. Assessing Officer issuing the notice and the Assessing Officer recording the reasons must be the same person.

Hyoup Food and Oil Industries Ltd. v. ACIT (2008) 307 ITR 115 (Guj.)(HC)

Assessing Officer recording reasons under S. 148(2) and Assessing Officer issuing notice under S. 148(1) has to be same person; successor Assessing Officer cannot issue notice under S. 148 on basis of satisfaction recorded by predecessor Assessing Officer, because reason to believe that income liable to tax for assessment year has escaped assessment within meaning of S. 147 has to be of Assessing Officer concerned, viz., Assessing Officer issuing notice under S. 148 of the Act.

2.8. S. 149:Issue of notice.

2.8.1 Kanubhai M. Patel (HUF) v. Hiren Bhatt (2011) 334 ITR 25 (Guj.)(HC)

Expression "to issue" Meaning send out. Notice signed on 31-3-2010 sent to speed post on 7-4-2010-Notice issued after six years for the relevant AY.2003-04. Date of issue would be date on which same was handed over for service to proper office. Reassessment is held to be bad in law.

2.8.2. CIT v. Sudev Industries Ltd. (2018) 405 ITR 325(Delhi)(HC), www.itatonline.org (SLP of assessee is dismissed, Sudev Industries Ltd v. CIT (2018) 259 Taxman 221 (SC))

S. 282 : Service of notice -Service of notice at the factory premises of the assessee on the security guard was held to be valid, though "service" of notice u/s.148 is not a mere procedural requirement, but a condition precedent for initiation of proceedings, the service upon a person who was not authorized to receive notice does not render the proceedings null and void if the assessee complied and entered appearance.

2.9. Assessment u/s 143(1):

2.9.1. PCIT v. Shodiman Investments Pvt. Ltd. (2018) 93 taxmann.com 153 / 167 DTR 290 (Bom.)(HC), www.itatonline.org

S.143(1).Intimation-The Assessing Officer cannot reopen on the basis of info received from DIT (Inv) that a particular entity has entered into suspicious transactions without linking it to the assessee having indulged in activity which could give rise to reason to believe that income has escaped assessment. Such reopening amounts to a fishing inquiry. The Assessing Officer has to apply his mind to the information received by him from the DDIT (Inv.) and cannot act on borrowed satisfaction.

Ankita A. Choksey v. ITO (2019) 411 ITR 207 (Bom.)(HC), www.itatonline.org

The basic condition precedent of 'reason to believe' applies even to S. 143(1) intimations. If the assessee claims the facts recorded in the reasons are not correct, the order on objection must deal with them. Otherwise an adverse inference can be drawn against the revenue.

2. 10.Change of opinion - Reopening within four years.

2.10.1.ITO v. Techspan India (P) Ltd (2018) 404 ITR 10(SC), www.itatonline.org

Deduction was allowed in the original assessment, on the same facts to hold that the excess deduction was allowed will be change of opinion therefore, reassessment was held to be bad in law. Followed CIT. v. Kelvinator of India Ltd (2010) 320 ITR 561 (SC)

2. 10.2.CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1 (Del.) (FB) Approved by Supreme Court in (2010) 320 ITR 561 (SC)

If it is change of opinion the reassessment is not permissible.

2.10.3. Asst. CIT v. Rolta India Ltd. (2011)132 ITD 98 (TM) (Mum.)(Trib.)

Once an assessment has been completed under S. 143(3) after raising a query on a particular issue and accepting assessee's reply to the query. Assessing Officer has no jurisdiction to reopen the assessment merely because the issue in question is not specifically adverted in the assessment order.

2.10.4 Idea Cellular Ltd v. Dy.CIT (2008)301 ITR 407 (Bom.)(HC)

Once all material was before Assessing Officer and he chose not to deal with several contentions raised by assessee in his final assessment order, it could not be said that he had not applied his mind; and in such a case reopening of assessment after four years could not be said to be justified. (Also refer CIT v. Fine Jewellery (India) Ltd (2015) 372 ITR 303 (Bom.)(HC).CIT v. Reliance Communication Ltd (2017) 396 ITR 217 (Bom.)(HC)

2.11. Reassessment - Issue of notice after expiry of four years from the end of the relevant assessment year -Bad in law when all material facts are disclosed fully and truly.

2.11.1. Precilion Holding Limited v. DCIT (Bom)(HC), www.itatonline.org

If the Assessing Officer is of the opinion that the issue requires verification, it tantamounts to fishing or roving inquiry. He is not permitted to reopen merely because in the later year, he took a different view on the basis of similar material. Even if the question of taxing interest income under the DTAA was not in the mind of the AO when he passed the assessment, he cannot reopen if there is no failure to disclose truly and fully all material facts.

2.11.2. Saurabh Suryakant Mehta v. ITO (Bom.)(HC), www.itatonline.org

If the AO disallowed 2.5% of alleged bogus purchases during the regular assessment. Reassessment to disallow entire amount is said to be bad in law- There is difference between revisional powers and reassessment.

2.11.3. Zuari Foods and farms Pvt. Ltd. v. ACIT (2018) 408 ITR 279 (Bom.)(HC), www.itatonline.org

Income from Mushroom cultivation as agricultural income. The ground that the petitioner had failed to disclose all the relevant material was not incorporated in the reasons supplied to the petitioner. Court directed the Counsel to furnish the compilation of judgments on reassessment proceedings to the Commissioner to study the same. Even for reopening the assessment with in four years there are certain jurisdictional requirements that must exist before the power of reassessment is exercised. Strictures passed against the Assessing Officer for making comments which are highly objectionable and bordering on contempt and for being oblivious to law.

2.11.4. Cedric De Souza Faria v. DCIT (2018) 400 ITR 30 (Bom.)(HC)

There was no failure to disclose all material facts. Reassessment was held to be not valid. Alternative remedy is no bar to file writ petition if the action of the authority is beyond their jurisdiction.

2.13. Re-assessment-audit objection.

2.13.1.Indian & Eastern News paper Society v. CIT (1979) 119 ITR 996 (SC)

Asian Cerc Information Services (P) Ltd v. ITO (2007) 293 ITR 271 (Bom.) (HC)

2.13.2. Objection by the Assessing Officer in respect of audit objection.

Shree Ram Builders v. ACIT (OSD) (2015) 377 ITR 631 (Guj.)(HC)

When the Assessing Officer tries to justify the assessment order and requested the audit party to drop the proceedings but still reopens to comply with the audit objection, it means he has not applied his mind independently and the reopening is void.

2.14. Ignorance of Board Circular.

Dr. H. Hbicht v. Makhija (1985) 154 ITR 552 (Bom.)(HC)

Mere fact that the Assessing Officer was not aware of the circular of the Board is not sufficient to reopen the assessment.

2.15. Nirmala Agarwal v. ACIT (2018) 64 ITR 658 (Jaipur)(Trib.)

Merely on the basis of statement recorded by investigation wing and cross examination was not provided. Reopening assessment on borrowed satisfaction rather than his own satisfaction. Reassessment is held to be invalid.

2.16. Deepraj Hospital (P) Ltd. v. ITO (2018) 65 ITR 663 (Agra) (Trib.), www.itatonline.org

If the reopening is based on information received from the investigation dept, the reasons must show that the Assessing Officer independently applied his mind to the information and formed his own opinion. If the reopening is done mechanically, it is void. Also, if the reasons refer to any document, a copy should be provided to the assessee. Failure to do so results in breach of natural justice and renders the reopening void.

2.17. Notice u/s. 143(2) is mandatory.

2.17.1 CWT v. HUF of H. H. Late Shri. J.M. Scindia (2008) 300 ITR 193 (Bom.)(HC).

The failure to issue notice u/s 16(2) (143(2) of the Act renders the reassessment void.

2.17.2 ACIT v Geno Pharmaceuticals (2013)214 Taxman 83 (Bom.) (HC)

Notice under S. 143(2) is mandatory, and in absence of such service, Assessing Officer cannot proceed to make an inquiry on return filed in compliance with notice issued under S. 148 of the Act.

2.17.3 CIT v. Staunch Marketing Pvt. Ltd. (2018) 404 ITR 299 (Delhi)(HC)

One return is filed pursuant to notice issued u/s 148, issue of notice u/s 143(2) is mandatory.

2.18. Sudhir Menon v. ACIT (2018) 67 ITR 86 (SN) (Mum.)(Trib.), www.itatonline.org

Halcrow Groups Ltd. v. ADIT (2018) 194 TTJ 704 (Delhi)(Trib.), www.itatonline.org

Additional ground was raised before the Appellate Tribunal as regards non issue of notice u/s 143(2). Additional ground was Admitted. Tribunal held that a notice u/s 143(2) issued by the AO before the assessee files a return of income has no meaning. If no fresh notice is issued after the assessee files a return, the AO has no jurisdiction to pass the reassessment order and the same has to be quashed. S. 292BB does not save the assessment.

2.19. PCIT v. Oberoi Hotels Pvt. Ltd. (2018) 409 ITR 132 (Cal) (HC)

S. 292BB does not dispense with the issuance of any notice that is mandated to be issued under the Act, but merely cures the defect of service of such notice if an objection in such regard is not taken before the completion of the assessment or reassessment. Entire proceedings including any order is liable to be quashed though the assessee had participated in the course of the reassessment.

2.20. CIT v. Central Warehousing Corporation (2015) 371 ITR 81 (Delhi) (HC)

Vodafone South Ltd v. UOI (2014) 363 ITR 338 (Delhi) (HC)

Second reassessment notice was based upon re-appreciation of original record, said notice was not valid.

A. Sridevi (Smt) v. ITO (2018) 409 ITR 502 (Mad.) (HC)

Second reassessment. New tangible material was found. Reassessment is valid.

2.21. CIT v. Jandu Construction Co. (2018) 61 ITR 235 (Chand) (Trib.)

Reopening on same issues as considered in rectification proceedings earlier was held to be not valid.

2.22. Ardent Steel Ltd. v. ACIT (2018) 405 ITR 422 (Chhattisgarh) (HC)

S.148 : Issue of notice at old address after expiry of period of limitation, in spite of change in the official record by updating PAN data base. Reassessment is held to be bad in law.

2.23. Finding or direction. S.150.

2. 23.1.K. M. Sharma v. ITO (2002) 254 ITR 772 (SC)

S. 150(1) of the Act provides that the power to issue notice under S. 148 of the Act in consequence of or giving effect to any finding or direction of the appellate/revisional authority or the court is subject to the provision contained in S. 150(2) of the Act. S. 150(2) provides that directions under S. 150(1) of the Act cannot be given by the appellate/revisional authority or the court if on the date on which the order impugned in the appeal was passed, the reassessment proceedings had become time-barred.

2.24. CIT v. Green World Corporation 314 ITR 81 (SC)

The Tribunal do not have power to give any finding or direction in respect of another year / period which is not before the authority.

2.25. Shri Anil Suri v. ITO (ITA No. 1640/M/2010 dt 16 -04 2015.

Finding or direction in respect of any other year or period .Beyond six years- Held not valid.

2.26. Eskaykn IT (India) Ltd. v. Dy.CIT (2015) 229 Taxman 204 (Bom.)(HC)

Finding given by Tribunal could not enable Assessing Officer to extend period of limitation-Order barred by limitation.

2.27. Sunil Katyal v. ITO (2017) 190 TTJ 889 (2018) 161 DTR 275 (Delhi)(Trib.)

S.149: Direction of CIT(A) to issue notice after the expiry of period of period of limitation is held to be not valid .

2.28. Sanction. S.151.

2.28.1. Ghanshyam K. Khabrani v. ACIT (2012) 346 ITR 443 (Bom.)(HC)

S 151(2) mandates satisfaction of Joint Commissioner for issuance of notice under S. 148 in certain cases, reopening of assessment with approval of Commissioner is unsustainable.

2.28.2. German Remedies Ltd. v. Dy.CIT (2006) 287 ITR 494 (Bom.)(HC)

Central India Electric Supply Co. Ltd. v. ITO (2011) 51 DTR 51 (Delhi.)(HC)

Merely affixing a 'yes' stamp and signing underneath suggested that the decision was taken by the Board in a mechanical manner as such, the same was not a sufficient compliance under S. 151 of the Act. The approval is a safeguard and has to be meaningful and not merely ritualistic or formal.

2.28.3.ITO v. Virat Credit & Holdings Pvt. Ltd. (Delhi)(Trib.), www.itatonline.org

The grant of approval by the CIT with the words "Yes. I am satisfied" proves that the sanction is merely mechanical and he has not applied independent mind while according sanction as there is not an iota of material on record as to what documents he had perused and what were the reasons for his being satisfied to accord the sanction to initiate the reopening of assessment u/s. 148 of the Act.

2.28.4. CIT v. Aquatic Remedies Pvt. Ltd. (2018) 406 ITR 545 (Bom.)(HC) www.itatonline.org

If the Assessing Officer reopens the assessment by obtaining the sanction of the Commissioner of Income-tax instead of the Additional Commissioner of Income-tax, there is a breach of S. 151 which renders the reopening void.

2.28.5 CIT v. Gee Kay Finance and Leasing Co. Ltd. (2018) 401 ITR 472 (Delhi) (HC)

After the expiry of four years-Sanction of the Chief Commissioner was a pre-condition. Order is bad in law.

2.28.6. CIT v. Suman Waman Chaudhary (2010) 321 ITR 495 (Bom) (HC).

ITO v. Ashok Jain (Surat)(Trib.), www.itatonline.org

If the Assessing Officer issues the notice for reopening the assessment before obtaining the sanction of the CIT, the reopening is void ab initio. The fact that the sanction was given just one day after the issue of notice makes no difference.

2.29. Supreme Court decision cannot be the basis for reopening.

DY. CIT v. Simplex concrete Piles (India) Ltd. & Ors (2013) 358 ITR 129 (SC)

CIT v. ITW India Ltd. (2015) 377 ITR 195 (P & H)(HC)

Austin Engineering Co Ltd v JCIT (2009) 312 ITR 70 (Guj.) (HC)

SESA Goa Ltd. v. Jt CIT (2007) 294 ITR 101 (Bom.) (HC)

The Assessing Officer cannot seek to reopen an assessment under S. 147 on the basis of the Supreme Court decision in a case where assessee had disclosed all material facts. Subsequent decision of a Court is no ground of reopening of an assessment under S. 147 after the expiry of a period of four years.

2.30. Subject matter of appeal.

ICICI Bank Ltd. v. Dy. CIT (2012) 246 CTR 292/ 204 Taxman 65 (Mag.) (Bom.)(HC)

Appeal was pending before ITAT and the matter was subject matter of appeal before CIT(A). No Reassessment. Once an issue is subject matter of appeal before Tribunal, issuance of notice of reassessment on said ground has to be considered bad in law. (Also refer CIT v. Fortaleza Developers (2015) 374 ITR 510 (Bom) (HC), CIT v. Shashi Theatre Pvt Ltd (2001) 248 ITR 126 (Guj.) (HC), Sonal Garments v .JCIT (2005) 95 ITD 363 (Mum.) (Trib.)

2.31. Limitation.S.153.

2.31.1 EskayK'n' IT (India) Ltd. v. Dy. CIT (2015) 229 Taxman 204 (Bom.)(HC)

Finding given by Tribunal could not enable Assessing Officer to extend period of limitation as provided under S. 150 for purpose of issuing notice.

2.31.2 Emgeeyar Pictures (P.) Ltd. v. DCIT (2016) 159 ITD 1 (TM) (Chennai)(Trib.)

In respect of any assessment year wherein further proceedings are barred by limitation, assessment cannot be reopened merely by virtue of an opinion expressed by any higher forum at a later date, i.e., subsequent to date of limitation period.

2.32. Jurisdiction–Reassessment.

2.32.1 **Investment Corpn. Ltd v. CIT (1992) 194 ITR 548 (Bom.)(HC) (556)**

N. Nagaganath Iyer v. CIT (1996) 60 ITR 647 (Bom.)(HC) (655)

Hemal Knitting Industries v. ACIT (2010) 127 ITD 160 (TM) (Chennai) (Trib.)

Jurisdictional issue can be challenged in second appeal.

2.33. Dy.CIT v. Torquoise Investment & Finance Ltd. (2008) 299 ITR 143 (MP)(HC)

An assessee can raise the question of law which was not raised before lower authorities, first time before the Tribunal in the appeal filed by the revenue.

2.34. Indo Java & Co v. IAC (1989) 30 ITD 161 (Delhi)(SB)

Point which can be agitated in appeal before The Tribunal by an appeal also include points impinge on computation of income as shown by the assessee himself by mistake or otherwise and even not agitated before the ITO or ACC.

[Referred in Oricon Enterprises Ltd v ACIT (2018) 171 ITD 231 (Mum.)(Trib)]

2.35. Jehangir H.C. Jehangir v. ITO (2015) 229 Taxman 392 (Bom.) (HC)

Issue was raised before the Assessing Officer, however was not raised before the CIT(A) can be raised before the Appellate Tribunal.

2.36. Nath Developers v. ACIT (2013) 157 TTJ 224 (Pune)(Trib.)

Assessee is entitle to raise fresh ground of reassessment in appeal at the Tribunal stage as the relevant facts were already on records.

2.37. CIT v. Indian Bank (2015) 230 Taxman 635 (Mad) (HC)

Grounds not raised before the CIT(A) can also be raised before the Tribunal.

2.38. CIT v. Silver Line (2016) 383 ITR 455 (Delhi) (HC)

Jurisdiction issue of reassessment can be raised in cross objection though not raised before lower authorities. There is no difference between appeal and cross objection.

2.39. ACIT v Sterling Infotech Ltd (2012) 138 ITD 323 (Chennai) (Trib.)

ACIT v. DHL Operations BV (2007) 108 TTJ 152 (SB) (Mum.)(Trib.)

Tribunal has power to admit additional ground raised before it so long as they arise from the subject matter of the proceedings, though they may not arise from the order of AAC, as long as these grounds are in respect of subject matter the entire tax proceedings.

2.40. Ahmedabad Electricity Co. Ltd. v. CIT (1993) 199 ITR 351 (FB) (Bom.) (HC)

Additional ground can be filed at the time of hearing -R.11

CIT v. Nelliappan (1967) 66 ITR 722 (SC)

New India Life Asss. Co. Ltd. v. CIT (1957) 31 ITR 844 (Bom.)(HC) (846)

2.41. Additional grounds can be raised orally – Rule 11 of the Appellate Tribunal Rules.

Amines Plasticizers Ltd. v. CIT (1997) 223 ITR 173 (Guwahati) (HC)

Assam Carbon Products Ltd. v. CIT (1997) 224 ITR 57 (Guwahti) (HC)

Baby Samuel v. ACIT (2003) 262 ITR 385 (Bom.) (HC)

Shilpa Associates v. ITO (2003) 263 ITR 317 (Raj.) (HC)

Additional grounds can be raised orally at the time of hearing of appeal.

2.42. Appellant can agitate the issue not pressed before CIT (A).

Vijay Kumar Jain v. CIT (1975) 99 ITR 349 (P& H) (HC)

J.K. Oil Mills Co Ltd. v. CIT (1976) 105 ITR 53 (All.) (HC)

Issue not pressed before the CIT(A) can be raised, if the assessee is able to give proper reasoning.

2.43. Reassessment jurisdiction is available for benefit of revenue only.

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

Since the proceedings under S 147/148 are for the benefit of the revenue and are aimed at gathering the escaped income of the revenue the same cannot be allowed to be converted as revisional or review proceedings at the instance of the assessee, thereby making the machinery workable.

3. Power regarding discovery, production of evidence, etc.-S.131

3.1 Various income tax authorities are referred in the Section 131, who have powers u/s 131 which are vested in a Court under the Civil Procedure Code, 1908, when trying a suit in respect of the following matters namely;

(a) discovery and inspection;

(b) enforcing the attendance of any person,

(c) compelling the production of books of account and other documents, and also impounding books of account and documents;

(d) Issuing Commissions.

3.2. S.131 : Duty of the Assessing Officer to comply with the request of the assessee to produce a witness- Civil Procedure Code, 1908, O.XVI, R.10

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

The authority empowered under S. 131 should excise all his powers to collect all evidence and collate all material before coming to proper conclusion. It would be failure to exercise the jurisdiction particularly when a party to the proceedings requests for summoning evidence from a particular person.

CIT v. Kamadenu Vyapar Co. Ltd. (2003) 263 ITR 692 (MP) (HC)
When the assessee requests the Assessing Officer for issue of summons under S. 131 to the subscribers of capital in the course of investigation in to source for share capital, the Assessing Officer must issue summons.

Nathu Ram Premchand v CIT (1963) 49 ITR 561 (All.)(HC)
E.M.C Works P Ltd (1971) 79 ITD 540 (All.)(HC)
Niranjanlal Ramballabh v CIT (1956) 29 ITR 459 (Nag.)(HC)

If the Assessing Officer does not exercise his powers to call the witness and examine him, he cannot treat the deposits in the name of witness as assessee's suppressed income.

Ram Kumar Jain v CIT (1976) 105 ITR 331 (Bom.)(HC)
Summons addressed to the creditor was returned with postal remark "not known" Prayer for the issue of second summons was refused. High Court held that the fresh summons should have been issued as the first summon was erroneous.

ACIT v. Shyam Indus Power Solutions (P) Ltd. (2018) 62 ITR 512 512 (Delhi)(Trib.)
Assessee, furnished names and addresses of concerned parties, their PAN and confirmation with bank account and their Income tax returns, and Assessing Officer had not carried out any investigation by issuing summons u/s 131 of the Act to show that those companies did not exist but were paper companies. Addition cannot be made.

Umbrella Project Pvt. Ltd. v. ITO (Delhi)(Trib.), www.itatonline.org (ITA No. 5955/Del/2014, dt. 23. 02. 2018)
The fact that the shareholders did not respond to S. 133(6) summons is not sufficient to draw an adverse inference. There must be material to

implicate the assessee in a collusive arrangement with person who are accommodation entry providers.

Prinku landfin (P.) Ltd. v. ITO (2018) 170 ITD 139 (Delhi) (Trib.)

Investors have complied with details u/s 133(6) and the summons was not issued to the investors though request was made by the assessee, addition was held to be not justified.

Kesha Appliances Pvt. Ltd. v. ITO (2018) 63 ITR 294 (Delhi) (Trib.)

Merely on the ground that six companies failed to reply to notices issued to them, addition was held to be not justified, when the assesse had furnished all the necessary details of six companies along with the permanent account numbers.

Prabhatam Investment Pvt. Ltd. v. ACIT (2018) 61 ITR 352 (Delhi) (Trib.)

The Assessing Officer doubted the genuineness of the transaction because notice under S. 133(6) could not be served upon the investors but the assessee had provided correct and updated address of the entity in terms of the MCA web site. The Assessing Officer instead of issuing fresh notice under S. 133(6) at the correct address of the investors, merely relied upon the fact that the earlier letter had been returned unserved. Since the Assessing Officer did not issue fresh notice at the correct address provided by the assessee and no coercive action had been taken for the production of investors, no adverse inference could be drawn against the assessee. The orders of the authorities were to be set aside and the addition was to be deleted.

CIT v. Sunita Dhadda (2018) 406 ITR 220 (Raj) (HC) SLP rejected, CIT v. Sunita Dhadda (2018) 403 ITR 309 (St.) (SC)

Tribunal deleted the addition of 'on-money' said to have been received in respect of the land of the assessee holding that unless it was established by the department, that as a matter of fact, the consideration passed to the seller from the purchaser, the Department had no right to make any additions, especially since none of the witnesses were examined by issuing summons u/s 131 and the assessee was not provided an opportunity to cross-examine them.

G.M. Breweries Ltd v. UOI (2000) 241 ITR 446 (Bom.)(HC) (450)

Summons not containing required particulars or the inapplicable portion scored out such summons are not valid summons. There was no pending proceedings, High Court on writ quashed the summons issued u/s 131 of the Act.

3.2.2.Oaths Act, 1969.

When summons is issued u/s 131 and or statement is recorded u/s 132(4), the oath has to be administered. As per S.4 of the Oaths Act, 1969, a statement should be recorded in the language which the person from whom the deposition is taken understands. If it is not possible to do so, it should be explained to him in the language known to him.

3.3.Commission for examination of witness, etc.

Jaganatha Sastry v. Surathambal Ammal (1923) 44 MLJ 202 (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.

3.4.Dy.CIT v. Deloitte Touche Tohmatsu India (P) Ltd. (2018) 193 TTJ 65 (UO) (Mum.) Trib.)

DCIT v. KPMG Advisory Services (P.) Ltd. (2018) 168 ITD 34 (Mum.) (Trib.)

Merely on the basis of AIR information and ITS data addition cannot be made. AO could have done was to issue notices u/s 133(6) or 131 to concerned parties whose identities were available before AO, to ascertain correct fact. Followed CIT v. S. Ganesh ITA No 1930 /2011 dt 1-03 2014, 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)

3.5.PCIT v. Chawla Interbild Construction Co. Pvt. Ltd (2019) 412 ITR 152 (Bom.) (HC)

Disallowances cannot be made merely on the ground that parties to whom payments were made not appeared before the AO in response to summons, when the assessee has furnished PAN numbers, TDS was deducted and details of the bank was furnished.

3.6.Survey – Statement u/s 131(1).

Maruti Mills (P) Ltd v. UOI(2001) 250 ITR 348 (Raj) (HC)

Where neither petitioner-assessee nor any of its employees, legal representative or director had either refused or evaded to furnish an information, resort to provisions of S. 131(1) in the course of survey would be unwarranted and uncalled for.

3.7.Jurisdiction to issue summons.

Amway India Enterprises v. UOI (2003) 362 ITR 428 (Ker.)(HC)

A summon can be issued to a witness who resides outside the territorial jurisdiction, either for production of any document or for examination him as the case may be as empowered u/s 131(1A) of the Act.

S.133A(6), provides that when an assessee does not afford facility to the income -tax authority to inspect the books of account, the authority can exercise the power vested u/s. 131(1) and 132(2).

3.8.DCIT (Inv.) v. Prakash V. Sanghavi (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.

3.9. CIT v. Subha & Prabha Builders Ltd. (2012) 342 ITR 14 (Karn.)(HC)

Survey action was conducted at the premises of the Assessee. Books produced in pursuance to notice issued during survey. Assessing Officer retained the books for unreasonable period. A long period of five years had lapsed and the Revenue did not complete the assessment and still wants to continue to retain the books which is nothing but amounts to the abuse of powers available under S. 131(3)(b). Therefore, it is a fit case for entertaining the Writ and issuing direction to return the book of accounts and to award cost of Rs. 25,000/-.

3.10. ACIT v. Overseas Trading and Shipping Co. (P.) Ltd. (2018) 173 ITD 446 (Rajkot)(Trib.)

When the assessee has filed all relevant details, addresses of all parties were available in relevant bills filed by the assessee. As the Assessing Officer failed to verify the genuineness of expenses by calling information u/s 133(6) and 131 of the Act, deletion of addition by CIT(A) is held to be justified.

3.11. CIT v. Kamadhenue Vyapar Co. Ltd. (2003) 263 ITR 692 (Cal.)(HC)

In order to secure attendance of subscriber, request is made by assessee to Assessing Officer for issuing of summons under S. 131, it is incumbent on Assessing Officer to issue such summons in order to enable assessee to avail of opportunity provided by statute, otherwise Assessing Officer would be denying opportunity in-built in section 68 and proceedings under section 68 would be vitiated.

3.12. Whether an advocate or authorized representative has right to be present during examination of the assessee u/s 131 of the Act.

V. Datchinamurthy v. ADIT (1984) 149 ITR 341 (Mad.)(HC)

There is no provision under the law which authorized witness to be represented by counsel when any statement is recorded as 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.

3.13. Penalty- S. 272A(1): Non compliance of summons u/s 131 of the Act is liable to penalty .

Young Indian v. ADIT (2018) 169 DTR 382 (Delhi)(Trib.), www.itatonline.org

Tribunal held that not submitting the details as called for by the ADIT (Inv.) is concerned was a deliberate defiance on the part of the assessee for non-submission of the same under the pretext that some of the details are available in the records of the Income Tax Department or some of the details are available in the Website of the Ministry of Corporate Affairs. Tribunal held that no prejudice would have been caused to the assessee by submitting the details as called for by the ADIT (Inv.), as per the summons u/s 131(1A) if those details are already available in the records of the I.T. Department or in the website of the Ministry of Corporate Affairs. The conduct of the assessee in the instant case, is not at all bona-fide therefore ley of penalty is held to be justified.

4. Issue of notice when reason to suspect that any income has been concealed or is likely to be concealed, by any person or class of persons. [S.131(1A)].

4.1: Power u/s 131(1A) is only an enabling power regarding discovery, production of evidence etc, before entering in to actual exercises of Search and seizure under S. 132. Such a power under S. 131(1A) cannot be exercised for the purpose of reopening of the assessment under S. 147 of the Act. Arjun Singh v. ADIT (2000) 246 ITR 363 (MP) (HC) (398), Sumermal Jain v. Dy.CIT (2014) 360 ITR 553 (Cal.)(HC)

4.2. Emaar Alloys (P) Ltd. v. DGIT (Inv) & Ors. (2015) 235 Taxman 569 (Jharkhand)(HC)

Summons can be issued u/s. 131(1A) even after the search proceedings are initiated.

4.3. Sky View Consultants (P) Ltd. v. ITO (2017) 397 ITR 673 (Delhi) (HC) (SLP of revenue is dismissed, ITO v. Sky view consultants. (2018) 257 Taxman 250 (SC))

Where Income-tax Officer had not been authorized to exercise his powers under S. 131(1A), reports submitted by him could not have formed valid basis for re-opening assessment.

5. Power to call information. S.133(6) – Fishing enquiry is not permitted,

5.1.Kathiroor Service Co-op Bank Ltd. v. CIT (CIB) (2014) 360 ITR 243 (SC)

Power to call for information can be exercised in course of enquiry even where no proceedings are pending. Therefore, notice to banks calling for information as regards persons having cash transactions of over Rs. 1 lakh or having time deposits was held to be valid.

Kulathupuzha Service Co-op Bank Ltd. v. ITO (Int) (2014) 361 ITR 200 (Ker.)(HC)

Notice to bank calling for information as regards persons having deposits is held to be valid.

Kodur Service Co-op. Bank Ltd. v. DIT(2014) 367 ITR 22 (Ker.)(HC)

Notice to credit co-operative society to furnish information relating to depositors with cash deposits exceeding five lakhs of rupees is held to be valid.

Gyarsi Lal Gupta & Sons v. ITO (2005) 94 ITD 329 (Jaipur)(Trib.)

Action on part of Assessing Officer under S. 133(6) can be challenged only through writ; Tribunal cannot adjudicate upon validity of action of Assessing Officer under S. 133(6). Even if information is called for in contravention of legal provisions, material obtained thereby can still be used by department against persons concerned.

S. Savithri (Mrs.) v. ITO (2018) 400 ITR 513 (Karn) (HC)

Legal representatives cannot refuse to furnish details of bank accounts of deceased.

Kapoor Bros v. UOI (2001) 247 ITR 324 (Pat.) (HC)

The reopening of assessment based on enquiries conducted under S.133(6) was held to be valid.

5.2. S. 136 : Proceedings before income-tax authorities to be judicial proceedings.

S.136 provides that any proceedings under the Act shall be deemed to be a judicial proceeding within the meaning of S.193 and 228 and for the purpose of S.196 of the Indian Penal Code.

5.3 Right of cross examination.

5.3.1. Whenever the statement of third party is confronted to the assessee, it is desired that the right of cross examination may be requested.

5.3.2. Kishanchand Chellaram v CIT (1980) 125 ITR 713 (SC)

The authorities cannot use the statement as evidence without giving an opportunity of hearing or cross -examination.

Andaman Timber Industries v CCE (2015) 127 DTR 241/ 281 CTR 241 (SC)

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

6. Replies to penalty notices.

6.1. Fundamental principle.

Penalty proceedings are quasi -criminal in nature. They are distinct, separate and independent from the assessment proceedings. Onus is on the assessee to prove bonafides on the basis of facts and circumstances of the case. There are more than 31 sections which deals with penalties leviable under the income -tax Act, 1961 depending upon the nature of default. S.273B refers to various sections and states that no penalty shall be imposable on the person or the assessee, as the case may be for failure referred to in the said provisions, if he proves that there was reasonable cause for the said failure. In this article, we have discussed the general principles which are relevant to all penalty provisions under the income -tax Act, 1961.

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 (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 S. 271(1)(c) is not attracted. If the contention of the revenue is accepted, the assessee would be liable to penalty under S. 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.

6.2. 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 that "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.

6.3. 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.

6.4. Specifying charge- Concealment penalty.

CIT v. SSA's Emerald Meadows (2016) 242 Taxman 180 (SC) www.itatonline.orgOrder 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.

Jeetmal Choraria v. ACIT (2018) 91 taxmann.com 311(Kol.)(Trib.) www.itatonline.org

When show cause notice does not strike out the inappropriate words, levy of penalty was held to be not justified.

6.5. Quantum confirmed–Levy of penalty is not justified.

Rama Natha Gadhavi v. ITO (2017) 393 ITR 59 (Guj.)(HC). SLP of revenue was dismissed CIT v. Rama Natha Gadhavi (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 DTR 251 (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.

6.6. Penalty proceedings.-Jurisdiction of reassessment.

Tide Water Marine International Inc v. Dy.CIT (2005) 96 ITD 406 (Delhi) (Trib.)

R. Dalwali v ITO (1990) 34 ITD 183 (Ahd.)(Trib.)

Penalty proceedings jurisdiction of reassessment proceedings can be challenged, though not challenged in the quantum proceedings. Penalty order was quashed. Jurisdiction cannot be conferred by consent and there would be no question of waiver.

6.7.Salora International Ltd. v. CIT (2018) 402 ITR 211 (Delhi) (HC)

Time to be reckoned from date of service of order of Commissioner (Appeals) on Assessee-Penalty proceedings was barred by limitation.

J. Srinivasan v. ACIT (2018) 404 ITR 51 (Mad.) (HC)

Notices issued after period of limitation as per first limb of S. 275(1)(a) hence barred by limitation.

Lakshadweep Development Corporation Ltd. v. ACIT (TDS) (2019) 411 ITR 213 (FB) (Ker) (HC)

S. 271C : Penalty - Failure to deduct at source – Delay in paying whole or part of tax deducted at source. Reasonable cause. Penalty can be waived or reduced.

6.8. Heddle Knowledge (P.) Ltd. v. IOT (2018) 169 ITD 304 / 169 DTR 396 / 195 TTJ 536 (Mum.)(Trib.)

S.140A : Self-assessment tax – Assessee's failure to pay self-assessment tax within stipulated period, in view of act that amended section 140A(3) with effect from 1/4/1989 levy of penalty was held to be not justified. Legislature has prescribed mandatory charging of interest u/s. 234B of the Act, for default in payment of self-assessment tax.

6.9. Replies should be in facts stating why penalty should not be levied. Evidences which were not filed in the quantum proceedings, one may try to file in the course of penalty proceedings.

7. Offences and Prosecutions under Income-tax Act, 1961.

7.1 The sections dealing with offences and prosecution proceedings are included in Chapter XXII of the Income -tax Act, 1961i.e. S.275A to S.280D of the Act (herein after referred as "said Act"). However, the provisions contained in said Chapter XXII of the Act do not inter se deal with the procedures regulating the prosecution itself, which is governed by the provisions of the Criminal procedure Code 1973. The provisions of the said code are to be followed relating to all offenses under the Income-tax Act, unless the contrary is specially provided for by the Act. An appropriate example would be S.292A of the Act that prescribes that S.360 of the Code of Criminal Procedure, 1973(Order to release on probation of good conduct or after admonition) and the Probation of Offenders Act, 1958, would not apply to a person convicted of an offence under the Income–tax Act, unless the accused is under eighteen of age. The Finance Act, 2012, w.e.f. 1-7-2012 has inserted S. 280A to 280D, wherein the Central Government has been given the power to constitute Special Courts in consultation with the Chief Justices of the respective jurisdictional High Courts. Normally, the Magistrate Court in whose territorial jurisdiction an offence is committed tries the offense. For direct tax cases, the offence is said to committed at the place where a false return of income is submitted, even though it is completely possible that the return has been prepared elsewhere or that accounts have been fabricated at some other place. In J.K. Synthetics Ltd. v. ITO (1987) 168 ITR 467 (Delhi) (HC), the Court held that the offence u/s. 277 of the Act can be tried only at the place where false statement is delivered (SLP was rejected (1988) 173 ITR 98 (st). also refer Babita Lila v UOI(2016) 387 ITR 305 (SC). A First class Magistrate or a Metropolitan Magistrate, should try the prosecution case under the direct taxes. If a Special Economic

Offences Court with specified jurisdiction is notified, the complaint is to be filed before the respective court. For ready reference and for easy understanding summery of prosecutions provisions under Income–tax Act has been reproduced in a chart as per annexure "A".

7.2. S. 278E : Presumption as to culpable mental state.

The concept of mens rea is integral to criminal jurisprudence. An offense cannot be committed unintentionally. Generally a guilty mind is a sine qua non for an offense to be committed. The rule in general criminal jurisprudence established over the years has evolved into the concept of 'Innocent until proven guilty' which effectively places the burden of proving the guilt of the accused beyond reasonable doubt squarely on the prosecution. However, The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, inserted S. 278E with effect from 10th September, 1986 which carved out an exception to this rule. The said Section places the burden of proving the absence of mens rea upon the accused and also provides that such absence needs to be proved not only to the basic threshold of 'preponderance of probability' but 'beyond reasonable doubt'. The scope and effect of this provision has been explained by the Board Circular No 469 dt. 23-9-1986 (1986) 162 ITR 21(St) (39)

S. 278E of the Act, is analogous to S. 138A of the Customs, Act, 1962,S.92C of the Central Excise and Salt Act, 1944,S.98B of the Gold (Control) Act, 1968 and S.59 of the Foreign Exchange Regulation Act, 1973.Similar provision was introduced under Wealth-tax Act, 1957, i.e. S. 35-O and Gift–tax Act, S.35D.Constitutional validity of the said provision was upheld in Selvi J. Jayalalitha v. UOI and Ors. (2007) 288 ITR 225 (Mad) (HC), Selvi J. Jayalalithav. ACIT (2007) 290 ITR 55 (Mad.) (HC) which was affirmed by Apex court in Sasi Enterprises v. ACIT (2014) 361 ITR 163(SC).The Apex court in the afore mentioned decision observed that where ever specifically provided, in every prosecution case, the Court shall always presume culpable mental state and it is for the accused to prove the contrary beyond reasonable doubt. This is a drastic provision

which makes far reaching changes in the concept of mens rea in as much as it shifts the burden of proof to show the absence of the necessary ingredients of the intent to commit the crime upon the accused and is a radical departure from the concept of traditional criminal jurisprudence. According to this section, wherever mensrea is a necessary ingredient in an offence under the Act, the Court shall presume its existence. No doubt, this presumption is a rebuttable one. The explanation to the section provides for an inclusive definition of culpable mental state which is broad enough in its field so as to include intention, motive, knowledge of a fact and belief in or a reason to believe a fact. The presumption arising under sub section (1) may be rebutted by the accused, but the burden that is cast upon the accused to displace the presumption is very heavy. The accused has to prove absence of culpable mental state not by mere preponderance of probability. In Prakash Nath Khanna v CIT (2004) 266 ITR 1(SC) (12), the Court observed that the Court has to presume the existence of culpable mental state, and the absence of such mental state can be pleaded by an accused as a defense in respect of the Act charged as an offence in the prosecution. It is therefore open to the appellants to plead absence of a culpable mental state when the matter is taken up for trail. In J. Tewari v. UOI(1997) 225 ITR 858 (Cal) (HC) (861) the court observed that the rule of evidence regarding presumptions of culpability on the part of the accused does not differentiate between a natural person and a juristic person and the court will presume the existence of culpable state of mind unless the accused proves contrary. In ACIT v. Nilofar Currimbhoy (2013) 219 Taxman 102(Mag.) (Delhi) (HC), prosecution was launched u/s 276CC for a failure to file the return of income, the court held that the onus was on the assessee to prove that delay was not wilful and not on the department (SLP of assessee is admitted in the case of Nilofar Currimbhoy v ACIT (2015) 228 Taxman 57 (SC).

S. 278E, being penal in nature is not applicable for those offences that have been committed on or before 9-9-1986 even if the prosecution proceedings are launched after the said date.

Before the amendment to S. 276A, 276B, 276C, 276D and 276E, the onus was on the prosecution to prove beyond a reasonable doubt that the accused had no reasonable cause or excuse to commit any of the offences as envisaged by the aforesaid sections. However, in the light of the amendment by the Taxation Laws (Amendment and Misc Provisions) Act, 1986 to the aforesaid, sections wherein the word "without reasonable cause or excuse" have been deleted and with the insertion of S. 278AA, the onus of proving the existence of reasonable cause has shifted on to the accused.

7.3. Procedure governing prosecution proceedings:

The procedure governing prosecution proceedings under the Act can be divided into two parts i.e.

I. Procedure to be followed by the Department while launching prosecution proceedings, and

II. The procedure to be followed before the Court.

I. Procedure followed by the department while launching the prosecution:

Though there is no specific procedure provided under the Act or Rules, the Department has framed their own guidelines and instructions for initiating prosecution proceedings. The said instructions are referred in the following cases while quashing the prosecutions under S. 271C(1) read with S. 277 and 276CC of the Act. Madan Lal v. ITO (1998) 98 Taxman 395 (Raj) (HC), Patna Guinea House v. CIT (2000) 243 ITR 274(Pat) (HC), Satya Narain Dalmia v. State of Bihar (2000) 110 Taxman 28 (Pat) (HC), K. Inba Sagaran v. ACIT (2000) 247 ITR 528 (Mad.) (HC).

The Income-tax department's manual deals with various guidelines to be followed before launching prosecution proceedings and the broad parameters laid down are as follows:

1. The Assessing Officer on the basis of the records of the assessee sends the proposal to the respective Commissioner.
2. The Commissioner issues the show cause notice to the assessee.
3. If Commissioner is satisfied with the reply of the assesse, he may not grant sanction to the Assessing Officer to file complaint before the Court.

II. Procedure before Court;

On the basis of complaint filed before a Court, the court sends summons to the accused along with the copy of complaint, to attend before the Court on a particular date. The complaint being criminal complaint, the accused must be present before the court, unless the court gives a specific exemption.

If the accused is not present on such particular date, the court can issue a warrant against the accused. If the warrant is issued, unless the accused secures bail, he may be arrested and produced before the court.

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.

Before the trial itself is underway and regular hearings start in a matter, the court has to frame charges against the accused. Framing of the charge means that on the basis of the complaint and on seeing the

primary evidence after hearing the accused, the court charges the accused of the offences purported to be committed by him. If on hearing the accused, the court feels that there is no apparent case against the said accused the court will dismiss the complaint. However, if the court feels that there is substance in the complaint the charges will be framed and the proceedings shall continue as per the Criminal Procedure Code. Many of the Assessing Officer may not be aware that the Assessing Officer who has filed the complaint may have to be examined before the final decision is taken. Given the current pendency in courts, it is completely possible that prosecution that is launched in the year 2019 may very well come up for hearing after 15 or 20 years, and even though the officer who has launched the prosecution might have retired, he may still have to attend the proceedings. Therefore, it is very essential that before launching the prosecution the officer concerned may have to examine the consequences, especially the possibility of the matter being tried several years after the prosecution has been initiated.

If the trial results in a conviction, then an appeal to the court of session will lie under S.374(3) of the criminal procedure code. The said appeal will be heard under S.381 of the CRPC, either by the a Session judge or by an Additional Sessions Judge. The petition of appeal is to be presented in the form prescribed filed by the appellant or by his pleader accompanied by a copy of the Judgment appealed against within a period of 30 days from the date of order, as per the Limitation Act.

7.4. Certain aspects to be kept in mind relating to launching of prosecution proceedings are:-

7.4.1. Sanction for launching of prosecutions:-

Under S.279, the competent authority to grant sanction for prosecution is Commissioner, Commissioner (Appeals), Chief Commissioner or the Director General. Prosecution, without a requisite sanction shall make the entire proceedings void ab initio. The sanction must be in respect of each

of the offences in respect of which the accused is to be prosecuted. Where the Commissioner has held that an assessee had made a return containing false entries and gave sanction for prosecution for an offence under S. 277, and the accused was found guilty of an offence under S.276CC, and not under S.277, it was held in revision that an offence under S.276CC was of a different nature from that under S.277, and as there was no sanction for prosecution for an offence under S.276CC, the conviction was illegal (Champalal Girdharlal v. Emperior (1933) 1 ITR 384 (Nag) (HC))

7.4.2. Opportunity of being heard.

When an Assessing Officer takes a decision to initiate proceedings or a commissioner grants sanction for such proceedings. He has to apply his mind and on the basis of the circumstances and the facts on record, he has to come to the conclusion whether prosecution is necessary and advisable in a particular case or not. The said Act does not provide that the Commissioner has to necessarily afford the assessee an opportunity to be heard before deciding to initiate proceedings. The absence of an opportunity to be heard will not make the order of sanction void or illegal as held in CIT v. Velliappa Textiles Ltd. (2003) 263 ITR 550 (SC) (567 to 569). **UOI v Banwari Lal Agarwal (1998) 101 Taxman 508 (SC)**

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 sets as a 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.

However, it is being observed that the commissioners are issuing a show cause notice before giving the Sanction for prosecution based on the internal manual.

7.4.3. Circumstances under which the Commissioner cannot initiate proceedings.

S. 279(1A) has provided for the exception to the Power of Commissioner to initiate proceedings. Therefore, if a particular case falls and is established u/s.276C or 277 of the said Act and if an order u/s.273A has been passed by the Commissioner, by using the phrase "has been reduced or waived by an order under S.273A" in S.279(1A),the legislature has made it clear that the order referred to in S.279(1A) is the order of the Commissioner waiving or reducing the penalty u/s.273A and not the order of non imposition of penalty by the ITO or the order of cancellation of penalty for lack of ingredients as required by S.271 by appellate authorities. This is relevant because in the cases where the penalty is waived partly u/s.273A, the Commissioner is precluded from granting sanction u/s.279 of the Act.

Therefore, the non-existence of the circumstances enumerated in S.273A is a precondition for the initiation of proceedings for prosecution u/s.276C or 277. Accordingly, the CIT should ascertain by himself that the circumstances prescribed in section 273A do not exist. A complaint filed for prosecution u/s.276C or 277 would be illegal and invalid if the circumstances as provided in S.273A exist. It may be noted that, as per

the instruction No. 5051 of 1991 dt. 7/2/1991 issued by the Board states as under:

"Prosecution need not normally be initiated against a persons who have attained the age of 70 years at the time of commission of the offence".

In Pradip Burma v. ITO (2016) 382 ITR 418 (Delhi) (HC), the court held that, at the time of commission of offence the petitioner has not reached the age of 70years, hence the circular was held to be not applicable.

7.5. Whether prosecution Proceedings can be initiated before completion of assessment or when the matter is pending in appeal.

The assessment proceedings and prosecution proceedings are independent proceedings. The assessment proceedings are conducted by the Income tax Authorities and are civil in nature, whereas prosecution for offenses committed are tried before a competent Court. The provisions of the Law of evidence that do not bind assessment proceedings, are to be strictly followed in criminal proceedings. In P. Jayappan v. ITO (1984) 149 ITR 696 (SC), the Court held that the two types of proceedings could run simultaneously and that one need not wait for the other. In Kalluri Krishan Pushkar v Dy.CIT(2016) 236 Taxman 27 (AP& T) (HC), the Court held that, existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings. In that particular case the prosecution was initiated u/s. 276C, for non-payment of admitted tax and interest.

In Sayarmull Surana v. ITO (2019) 260 Taxman 397/ 173 DTR 338/ 306 CTR 354 (Mad.)(HC) www.itatonline.org, the Court held that when quantum proceeding appeal are pending, launching of prosecution is held to be not justified. Prosecution was quashed and the assessee was

discharged from being prosecuted. In Deepak Fertilizer and Petrochemicals Corporation Ltd v. ACIT (Bom)(HC), www.itatonline.org. it was held that once appeal is admitted on substantial questions of law, there is no justification for the Dy. CIT to threaten the appellant/applicant with any prosecution. Even if such prosecution is launched, the same shall not proceed till the pendency of this Appeal. [Also refer Suresh Company Pvt. Ltd. v. PCIT (ITA No 738 of 2016, Notice of motion 84 of 2019 dt 25-1-2019) (Bom.) (HC)] **However in Bhupen Champak Dalal v. Sandeep Kapor & 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 (Patna)(HC)

Ramchandran Ananthan Pothi v. UOI (Bom.)(HC) (www.itatonline.org)

Prosecution proceedings were stayed as the appeal was pending before the CIT(A).

7.6. S.276B . Failure to pay tax to the credit of Central Government under Chapter XII -D or XVII-B.

7.6.1.ITO v. Firoz Abdul Gafar Nadiadwala C.No. 95.SW/ 2014 dt 25-04 2019 www.itatonline.org.

For failure to deposit the tax deducted at source of Rs. 8,56,102 with in specified time though the accused had deposited the tax with interest and penalty after expiry of 12 months. The accused was held guilty and held the accused shall under go rigors imprisonment for a period of 3 moths and fine of Rs. 5,000. The Court relied upon the judgement in Madhumilan Systex Ltd v. UOI AIR 2007 SC 148 para 37 " Once a statute requires to pay tax and stipulates period within which such payment is to be made, the payment must be made within that period. If

the payment is not made with in that period, there is default and an appropriate action be taken under the Act "

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

Non-Executive Chairman is not involved in day-to-day affairs of company and the managing director admitting liability and entering into negotiations with revenue. Prosecution of non-executive chairman is held to be not valid for TDS default committed by the company.

7.6.3. Ramprakash Biswanath Shroff v. CIT (TDS) (2018) 259 Taxman 385(Bom.) (HC) www.itatonline.org

S. 200 : Deduction at source-Duty of person deducting tax-Employer. Failure to issue Form no 16 after deducting tax at source from salary. Commissioner (TDS) is directed to file a comprehensive affidavit and Department of Revenue was also to be directed to penalise such defaulters and take other strict measures as contemplated by law against them by launching prosecution as per S. 405 of the Indian Penal code (Criminal breach of trust).

7.6.4. Durgeshwari Hi-Rise & Farms (P.) Ltd v. CCIT (2018) 172 DTR 343/(2019) 103 taxmannn.com 292 (Bom.) (HC).

Application for compounding of offence for delay in depositing tax deducted at source was dismissed only on ground that nobody attended proceedings when said application was taken up for hearing. Prosecution was launched. High Court set aside the order and the matter was remanded back to Commissioner for disposal on merits.

7.7.S. 276C : Wilful attempt to evade tax, etc.

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

Failure to pay self assessment tax. Issue of show cause was held to be justified. Petition to quash complaint was dismissed.

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

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 confirming the fine was up held by the High Court.

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

Pending tax due was not paid. 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. Launching of proceedings was held to be valid.

7.8.S. 276CC . Failure to file return of income.

7.8.1 Karan Luthra v. ITO (2018) 259 Taxman 209 (Delhi)(HC)

Failure to furnish return in response to notice under S. 142(1). Mere fact that subsequently furnished return of income and no amount of tax was due, would not exempt from liability to be prosecuted. Disobedience of each of said provisions of law itself constitute a distinct offence.

7.8.2. R. Inbavalli v. ITO (2010) 327 ITR 226 (Mad.)(HC)

Assessee is not exonerated from prosecution under S. 276CC for not filing the returns within statutory due date as per S. 139(1) though the returns are filed in response to notice under S. 148, further, as there is a statutory presumption prescribed under S. 278E, the burden is on the assessee to show that there was no willful default.

7.8.3. Y. Rajendra, Dy. CIT v. Khoday Eshwarsa & Sons (2005) 272 ITR 448 (Karn.)(HC)

Where notice under S. 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 S. 158BC was not served on it. Matter was remanded to trial Court.

7.8.4. ACIT v. Nilofar Currimbhoy (2013) 219 Taxman 102 (Mag.) (Delhi) (HC) (SLP is granted to the assessee SLA(CRL) No. 3714 of 2013 dated 22-8-2014, Nelofar Currimbhoy v. ACIT (2015) 228 Taxman 57 (SC))

High Court held that since the assessee had not filed return of income timely, it could be prosecuted under S. 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.

7.9.S. 277 . False statement in verification, etc. Findings of the Appellate Tribunal.

7.9.1. The Appellate Tribunal is the final fact finding authority under the Act. Hence, the findings and the orders of the Appellate Tribunal are binding on the Commissioner of Income tax. On the aforesaid proposition, the two important questions that may arise are:-

(1) If there is a finding of the Appellate Tribunal that there is no concealment and no false statement, etc., then whether or not the Commissioner of Income tax would be stopped from initiating proceedings under S. 277? and

(2) How far are the findings of the Appellate Tribunal in the assessment proceedings binding upon the trail court in respect of the proceedings for prosecution u/s.277?

The Supreme Court, in **Uttam Chand v. ITO (1982) 133 ITR 909 (SC)**, while dealing with prosecution proceedings u/s.277, held that the finding given by the Appellate Tribunal is binding on the criminal courts.

Therefore, when there is a finding of the Appellate Tribunal leading to the conclusion that there is no prima facie case against the assessee for concealment, then that finding would be binding on the Court and the Court will have to acquit or discharge the assessee.

If the penalty for concealment is quashed on technical grounds due to limitation or due to violation of the due process of law, as the penalty is not quashed on merits, it cannot be said that there should not be any prosecution. Similarly, when the Appellate Tribunal holds that the assessee is liable for penalty, the conviction is not automatic. The concerned 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.

7.9.2. Penalty and Prosecution–S.271(1)(c) and S.277

In **S.P. Sales Corporation v. S.R. Sikdar (1993) 113 Taxation 203 (SC)** and **G.L. Didwania v. ITO (1995) 224 ITR 687 (SC)**, the Hon'ble Apex Court laid down the principle that "The Criminal Court no doubt has to give due regard to the result of any proceedings under the Act having bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act." In **K.C. Builder v. ACIT (2004) 265 ITR 562 (SC)**, the Court held that when the penalty is cancelled, the prosecution for an offence u/s 276C for wilful evasion of tax cannot be proceeded with thereafter. Following this principle the Courts have quashed prosecution proceedings on the basis of the cancellation of penalty by the appellate authority (**Shashichand Jain & Ors. v UOI (1995) 213 ITR 184 (Bom) (HC)**. When Tribunal decides against the assessee in quantum proceedings and if there is possibility of department launching prosecution proceedings, it may be desirable for the Assessee to file an appeal before the High Court. Various courts have held that, when the substantial question of law is admitted by a High Court, it is not a fit case for the levy of penalty for concealment of

Income (**CIT v. Nayan Builders and Developers (2014) 368 ITR 722 (Bom) (HC)**, **CIT vs. Advaita Estate Development Pvt. Ltd. (ITA No. 1498 of 2014 dt. 17/2/2017) (Bom.)(HC), (www.itatonline.org)**, **CIT v. Dr. Harsha N. Biliangady (2015) 379 ITR 529 (Karn.)(HC).** From a harmonious reading of the various ratios, it can be concluded that if penalty cannot be levied upon the admission of a substantial question of law by the Jurisdictional High Court, it cannot be a fit case for prosecution.

In **V. Gopal v. ACIT (2005) 279 ITR 510 (SC)**, the Court held that when the penalty order was set-aside, the Magistrate should decide the matter accordingly and quash the prosecution.

In **ITO v. Nandlal and Co. (2012) 341 ITR 646 (Bom)(HC)**, the Court held that, when the order for levy of penalty is set-aside, prosecution for wilful attempt to evade tax does not survive.

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

Order of penalty was set aside on ground there was no concealment of income. Prosecution was liable to be quashed.

Non-initiation of penalty proceedings does not lead to a presumption that the prosecution cannot be initiated as held in **Universal Supply Corporation v. State of Rajasthan (1994) 206 ITR 222(Raj) (HC) (235)**, **A.Y. Prabhakar (Kartha) HUF v. ACIT (2003) 262 ITR 287 (Mad.)(HC) (288).** However, if penalty proceedings are initiated and after considering the reply, the proceedings are dropped, it will not be a case for initiating prosecution proceedings. CBDT guidelines had instructed that where quantum additions or penalty have been deleted by the departmental appellate authorities, then steps must be taken to withdraw prosecution. However when penalty is cancelled on technical grounds, such as limitation, no application of mind etc. prosecution can

be initiated. **(Guidelines F.No. 285/16/90-IT (Inv) 43 dated 14-05-1996)**

7.9.3. Sujatha Venkateshwaran (Mrs) v. ACIT (2018) 257 Taxman 195 (Mad.)(HC)

Bogus claim of brokerage. Accused 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.

7.9.4. Ramchandran Ananthan Pothi v UOI (Bom.) (HC), www. itatonline.org.

Pendency of appeal before CIT(A). Alleged bogus purchases. During pendency of stay the criminal prosecution should not be launched and, if it has been already launched, the same shall not proceeded.

7.10. S.277A. Falsification of books of account or documents etc.

7.10.1. T.D. Gandhi, ITO v. Sudesh Sharma (2015) 230 Taxman 572 (P&H)(HC)

Tax practioner, filed a return on behalf of assessee claiming refund, in view of fact that respondent had no role in preparing TDS certificates, complainant-. ITO could not initiate criminal proceedings against him on ground that refund was wrongly claimed on basis of ingenuine TDS certificates. Proceedings initiated under sections 418,465 and 481 of the IPC was also quashed.

7.11. S. 278 : Abetment of false return, etc.

7.11.1 S.278 of the said Act deals with the offense of abetment in the matter of delivering any accounts or a statement or a declaration relating

to income chargeable to tax. Though abetment has not been defined in the Income-tax Act the provisions relating to abetment of an offence are dealt with in Chapter V of the Indian Penal Code. In particular S.107, 108, 108A and 110 of IPC are important. On the perusal of S.107, it is seen that the offence of abetment is committed in three ways, namely –

(a) by instigation;

(b) by conspiracy; or

(c) by intentional aid.

In order to constitute abetment, the abettor must be shown to have intentionally aided in the commission of a crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough to fulfil the ingredients of the offense as envisaged byS.107. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional adding and active complicity is the gist of the offence of abetment. (Shri Ram v. State of Uttar Pradesh 1975 (SC) (Cr. 87), 1975 AIR 175, 1975 SCC (3) 495). For an offence of abetment, it is not necessary that the offence should have been committed. A man may be guilty as an abettor, whether the offence is committed or not. (Faunga Kanata Nath v. State of Uttar Pradesh, AIR 1959 SC 673). Further, a person can be convicted of abetting an offence, even when the person alleged to have committed that offence in consequence of abetment, has been acquitted. (Jamuna Singh vs. State of Bihar, AIR 1967 SC 553, 1967 SCR (1) 469). In Smt. Sheela Gupta v. IAC (2002) 253 ITR 551 (Delhi) (HC) (552), the Court held that, when the Tribunal has set-aside the order of the Assessing Officer, the complaint filed for abetment does not survive hence the complaint was quashed.

7.11. 2. Liability of an advocate or a chartered accountant for abetment.

S.278 of the said Act, imposes a criminal liability on the abettor for abetment of false return etc. Circular No. 179 dt. 30/1975 (1975) 102 ITR

9 (St.)(25) explain the provision. Under this section, if a person abets or induces in any manner, another person to make or deliver an account, statement, declaration which is false and which he either knows to be false or does not believe to be true, he shall be punishable with rigorous imprisonment of not less than three months.

The section casts an onerous duty on the advocates, Chartered Accountants and Income Tax Practitioners to be cautious and careful. The legal profession is a noble one and legal practitioners owe not only a duty towards his client but also towards the court. It would be highly unprofessional if a legal practitioner is to encourage dishonesty or to file such returns knowing or having reason to believe that the returns or declarations so made are false.

7.11. 3.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.

7.11.4 Binod Kumar Agarwal v. CIT (2019) 411 ITR 493 (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.

7.12. S.278B: Offences by companies, etc.

S.278B makes certain provisions with regard to offence committed by companies, firms, association of person and bodies of individuals, whether

incorporated or not. Where an offence has been committed by a company, a firm, association of persons, or body of individuals, the person, who was in charge of and was responsible for the conduct of its business at the time when the offence was committed will be deemed to be guilty of the offence, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of the offence. Further, if in the case of a company it is proved that the offence had been committed with the consent or connivance of or is attributable to any neglect on the part of the company, such director, manager, secretary or others will be deemed to be guilty of the offence and will be liable to be prosecuted and punished accordingly. This provision will also apply in relation to mutatis mutandis committed by a firm, association of persons or body of individuals.

In Dhrupadi Devi (Smt) v. State of Rajasthan (2001) 106 Comp. Ca 90 (Raj) (HC)(93), the Court held that criminal liability of partner cannot be thrust upon his legal heirs. In ITO v Kamra Trading Co. (2004) 267 ITR 170 (P&H) (HC) the Court held that launching of prosecution against sleeping partner was held to be bad in law for failure to pay the tax.

7.13. S.278C : Offences by Hindu undivided families.

S.278C provides for criminal liability of the Karta, or members of a HUF in respect of offences committed by the Hindu undivided family. Under this provision, when an offence has been committed by HUF, the karta thereof will be deemed to be liable to be prosecuted and punished accordingly, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the offence. If the offence was committed with the consent or connivance of or is attributable to any neglect on the part of any other member of the family, such other member shall be deemed to be guilty of the offence and shall be liable to be prosecuted and punished accordingly. In RoshanLal v.

Special Chief Magistrate (2010) 322 ITR 353 (All.) (HC), the Court held that a member of HUF cannot be held liable for delay in filing of return of HUF though he has participated in the assessment proceedings.

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

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. Order of Judicial magistrate quashing the prosecution was set aside.

7.14. S.279(2): Compounding of offences.

7.14.1 S.279(2) empowers the Chief Commissioner or Director General to compound an offence under the Act, either before or after the initiation of proceedings. The Department has issued new set of guidelines for compounding of offences under direct taxes vide notification F.NO 185/35/2013 IT (Inv.V)/108 dated December 23, 2014 (2015) 371 ITR 7 (St) (www.itatonline.org).

These guidelines replace the existing guidelines issued vide **F.No 285/90/2008, dated May 10 2008**, with effect from January 1, 2015. However, cases that have been filed before this date shall continue to be governed by earlier guidelines. Under S.279(2), an offence can be compounded at any stage and not only when the offence is proved to have been committed. Once compounding is effected, the assessee cannot claim a refund of the composition amount paid on the ground that he had not committed any of said offences (Shamrao Bhagwantrao Deshmukh v. The Dominion of India (1995)27 ITR 30 (SC)). The requirement under S.279(2) is that the person applying for a composition must have allegedly committed an offence. The compounding charges might be paid even before a formal show cause notice has been issued. On the other hand, even if the accused is convicted of an offence and an

appeal has been preferred against the same, there seems to be no particular bar to give effect to a compounding during the pendency of such appeal and the accused shall not have to undergo the sentence awarded if he pays the money to be paid for compounding. Prosecution initiated under Indian Penal Code, if any, cannot be compounded under the provisions of the Income -tax Act. However, S.321 of the Criminal Procedure Code, 1973, provides for withdrawal of such complaints filed. Clause 8 of the Circular prescribing Guidelines for compounding of offences under Direct tax laws , 2014 refers the offences generally not to be compounded. Clause 8.vii. Reads as under " Offences committed by a person for which complaint was filed with the competent court 12 months prior to receipt of the application for compounding". Many a times though the prosecution is launched before the Magistrate Court , the accused the receives the information only after a year in such situation though the accused may agree for compounding the revenue may reject the application only on technical ground . It is desired that clause 8 .(vii) may be amended stating that 12 months from the date of receipt of complaint from the Magistrate Court .

Notwithstanding anything contained in the guidelines, the Finance Minister may relax restrictions for compounding of an offence in a deserving case on consideration of a report from the Board on the petition of an appellant.

7. 14.2. Procedure for compounding.

The accused has to approach the Commissioner with a proposal for compounding. A hearing has to be given to the assessee by the Commissioner on the proposal for compounding made by him and thereafter the compounding fees are finally determined. The ultimate decision as to the acceptance or refusal of the compounding proposal lies with the Commissioner. If the Commissioner accepts the proposal for compounding, the same would have to be recommended by him to the

Central Board of Direct Taxes. It may be noted that offences under Indian penal code cannot be compounded by the competent authority under the Income -tax Act. However, generally when the alleged offences under direct tax laws are compounded, the prosecution launched for the corresponding alleged offences under IPC are also withdrawn. In V.A. Haseeb and Co. (Firm) v CCIT (2017) 152 DTR 306 (Mad) (HC), the court held that, application for compounding cannot be rejected merely because of the conviction of assesse in the criminal court. In Punjab Rice Mills v CBDT (2011) 337 ITR 251 (P& H) (HC), it was held that the Court will not compel the Commissioner to compound the offence or interfere unless the exercise of discretionary statutory power was held to be perverse or against the due process of law.

Supernova System Private Limited v. CCIT (2018) 171 DTR 65 / 305 CTR 326 /(2019) 260 Taxman 345 (Guj)(HC), www.itatonline.org

The expression "amount sought to be evaded" in CBDT's compounding guidelines dated 23.12.2014 means the amount of "tax sought to be evaded" and not the amount of "income sought to be evaded"-Directed the department to refund the excess amount paid by the assessee latest by 31.10.2018.

Vikram Singh v. UOI (2017) 394 ITR 746 (Delhi) (HC)

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.

Vikram Singh v. UOI (2018) 401 ITR 307 (Delhi)(HC)

Guidelines on compounding of offenses dated 23. 12. 2014 prescribing eligibility conditions and the formula for calculating the compounding fee are valid or unreasonable

B. Gopi v. G. Thiyagarajan, ITO (2015) 370 ITR 353 (Mad.)(HC)

S.276C :False verification in return – Conviction and sentence confirmed – Liberty to Department to consider application for compounding offence.

Government of India, Ministry of Finance, Department of Revenue (CBDT) v. R. Inbavalli (2017) 249 Taxman 476 (Mad.) (HC)

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.

7.15. Power of the settlement commission to grant immunity. S. 245H

S. 245H(1), empowers the Settlement Commission under the specified circumstances to grant immunity to the assessee from prosecution for an offence, subject to such conditions as it may think fit to impose. However, sub section (2) of S.245H also empowers the settlement commission to withdraw the immunity so granted if it is satisfied that such person has not complied with the conditions subject to which immunity was granted or that such person had, in the course of the settlement proceedings, concealed any particular relevant material or had led false evidence. In Nirmal and Navin P. Ltd. And Others vs. D. Ravindran (2002) 255 ITR 514 (SC), the court held that when immunity is granted by settlement commission, it, was not open to criminal court to go behind order passed by settlement commission. As per the proviso to S. 245H(1), the Settlement Commission is precluded from granting immunity from prosecution in cases where prosecution has been instituted on the date of receipt of application for settlement; under section 245C. In Anil Kumar Sinha v UOI (2013) 352 ITR 170 (Pat.) (HC), the Court held that, if

prosecution is already launched and thereafter the assessee moves Settlement Commission, the Settlement Commission was justified in not granting immunity in respect of prosecution which was already launched u/s.276CC of the Act.

7.16. The Benami Transactions (Prohibition) Amendment Act, 2016.

The definition "benami transaction" is as per S.2(9) of the said Act which is very wide, hence if an action is taken against the assessee under the said Act, which is affirmed by the competent Court, the assessee may also be tried under the Income-tax Act for false verification in return etc.

7.17. Limitation for initiation of proceedings: Economic offences - No limitation is provided for initiation of proceedings.

Chapter XXXVI of the Code of Criminal procedure 1973 lays down the period of limitation beyond which no court can take cognizance of an offence which is punishable with fine only or with imprisonment not exceeding three years. But, for Economic offences (In respect of applicability of Limitation Act, 1974) it is provided that nothing in the aforesaid chapter XXXVI of the Code of Criminal Procedure, 1973, shall apply to any offence punishable under any of the enactment specified in the Schedule. The Schedule referred to includes Income tax, Wealth tax, etc. In Friends Oil Mills & Ors. v. ITO (1977) 106 ITR 571 (Ker.) (HC), dealing with S.277 of the Act, the Hon'ble Kerela High Court held that the bar of limitation specified in section 468 of the Code of Criminal Procedure, 1973 would not apply to a prosecution, under the Income-tax Act (also refer Nirmal Kapur v. CIT (1980) 122 ITR 473 (P&H) (HC).In view of this, as there is no fixed period of limitation for initiation of proceedings under the Act, the sword of prosecution can be said to be perpetually hanging on the head of the assessee for the offences said to have been committed by him. It may be noted that this may result in injustice to the assessee because a person who is in a better position to

explain the issue or things in the initial stage, may not be able to do so later, if he is confronted with the act of commission of an offence under a lapse of time. In Gajanand v State (1986) 159 ITR 101 (Pat) (HC)),the Hon'ble High Court held that where the Criminal Proceedings had proceeded for 12 years and the Income tax department failed to produce the evidence, the prosecution was to be quashed. In State of Maharashtra v Natwarlal Damodardas Soni AIR 1980 SC 593, 1980 SCR (2) 340, the Court held that a long delay along with other circumstances be taken in to consideration in the mitigation of the sentence. Reference can also be made to the decision of Bombay High Court, in the case of VishnooKamatv. First ITO (1994) 207 ITR 1040 (Bom.) (HC).
of "culpable mental state " on the part of the accused for any offences for the purposes of prosecution.

7.18. Court's power to reduce punishment.

S.275A to 278A provide for punishment in terms of imprisonment but section 276D provides for fine as an alternative for imprisonment. Since the legislature has used the phrase "shall be punishable" in each of the sections, the question that arises whether the court can interpret the phrase "shall be punishable" to mean "may be punishable" and whether the court will have discretion to award the imprisonment or not, or to award only fine and not imprisonment. The Supreme Court in State of Maharashtra vs. Jaymanderalal, AIR 1966 SC 940, while interpreting section 3(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956, held that by using the expression shall be punishable, the legislature has made it clear that the offender shall not escape the penal consequences". The in Modi Industries Ltd v. B.C. Goel, (1983) 144 ITR 496(All) (HC), has taken the view that courts have no power to reduce the punishment prescribed by the statute.

7.19. Power of Central Government to grant immunity. S.291

S.291(1) of the said Act, confers on the Central Government a power, under specified circumstances, to grant immunity to the assessee, from prosecution for any offence under the Direct taxes, IPC or any other Central Act to a person, with a view to obtain evidence. This is subject to condition of him making a full and true disclosure of the whole circumstances relating to the concealment of income or evasion of payment of tax on income. However, sub section (3) of this section, empowers the Central Government to withdraw the immunity so granted, if such person has not complied with the condition on which such immunity was granted or is willfully concealing anything or is giving false evidence.

7.20. Offences committed under The Income-tax Act, prosecution can also be launched under Indian penal code.

As per the provisions of S.26 of the General Clauses Act, 1897, where an act or omission constitutes an offence under two or more enactments, the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence and the punishment shall run concurrently. To strengthen the case of the revenue, generally the revenue also launches prosecution under the various provisions of the Indian Penal Code. *In* **Dipesh Chandak v. UOI (2004) 270 ITR 85(SC),** 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.

A chart indicating briefly therein the various acts or omissions under the Direct Tax laws which tantamount to commission of an offence under the Indian Penal Code is given in Annexure " B".

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

State of Gujarat v. Mohanlal Jitamalji 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"

8.16. Conclusion

Tax consultants may have to guide assesses to better comply with the provisions of the Act and adopt better tax management practices to maintain the peace of mind. It may not be advisable to venture into highly adventurous tax avoidance schemes just to avoid paying the government the taxes due. One should appreciate that the tax administration, with the help of technology and reporting system, is well equipped to identity tax evaders. It is desired that all citizens must follow Article 51A of the Constitution of India being fundamental duties read with Article 265 of the Constitution of India i.e. pay the taxes which are

rightfully due to Government, neither less nor more. I hope the CBDT will also try to implement the suggestions of the Comptroller and Auditor General of India for better administration of prosecution proceedings.

9. **Check list.**

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 an 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 a chartered accountant or a 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 are 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 partie’s 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 the deponent 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 objections, if the assessee desires to approach the 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. It 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 assesse, if the department, thereafter, contest in appeal before the Tribunal, it may be desirable to file cross objection within 30 days of the intimation received from the Appellate Tribunal. However if cross objection is not filed, the asseeee 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 asssessee 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 the assessee has 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 assesee 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. ie. 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 assesse, 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, 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 a 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 wherein the assessee has agreed for percentage of addition in respect of alleged bogus purchases, the revenue has lunched prosecution proceedings.

41. In an appropriate case, if 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 assesse 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 grant, immunities from prosecution and also allow the capitalization of the additional amount disclosed.

Thank you

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

Thank You

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