BOMBAY CHARTERED ACCOUNTANTS' SOCIETY

CONCEALMENT PENALTY
271(1)(c), 158BFA & 271AAA

On

2nd January, 2008

A HAPPY AND PROSPEROUS NEW YEAR

CONCEALMENT PENALTY

Meaning ***"concealed"***

The word 'concealed' is derived from the Latin Word "concelare" which implies to hide.

Law Lexicon, the word "conceal" means:

"to hide or keep secret. The word 'conceal' is con+celare which implies to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent the discovery of; to withhold knowledge of. The offence of concealment is, thus, a direct attempt to hide an item of income or a portion thereof from the knowledge of the income tax authorities."

Webster's Dictionary, "inaccurate" has been defined as:

"not accurate, not exact or correct; not according to truth; erroneous; as an inaccurate statement, copy or transcript."

Land Mark Judgements of Apex Court

- CIT vs. Anwar Ali (1970) 76 ITR 696 (SC)
- Jain Brothers vs. UOI (1970) 77 ITR 107 (SC)
- Hindustan Steel Ltd vs. CIT (1972) 83 ITR 26 (SC)
- CIT vs. Khoday Eswaras and sons (1972) 83 ITR 369 (SC)
- Anantram Veerasinghaiah & Co vs. CIT(1980) 123 ITR 457 (SC)

CONCEALMENT PENALTY

FIVE BASIC PRINCIPLES

(1) Finding given in assessment proceedings for determining or computation of tax is not conclusive.

(2) Penalty proceedings are not essentially a continuation of the proceedings relating to assessment where a return has been filed. Proceedings for imposition of penalty though emanating from proceedings of assessment are independent and separate aspects of the proceedings.

(3) Penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct.

(4) Penalty proceedings being penal in character, the department must establish that the receipt of the amount in dispute constitutes income of the assessee.

(5) Merely because explanation given by the assessee is found to be false it does not attract penalty.

CONCEALMENT PENALTY

Dilip N. Shroff vs. JCIT (2007) 291 ITR 519 (SC) (AY 1998-99)

- The word inaccurate signifies a `deliberate' act of omission on the part of the assessee.
- Such deliberate act must be for the purpose of concealment of income or furnishing inaccurate particulars.
- The primary burden of proof is on the revenue.
- Explanation appended to S 271(1)(c) is an exception to the general rule.
- Levy of the penalty is not automatic.
- Levy of penalty not only is discretionary in nature but such discretion should be exercised keeping in view the relevant factors and the principles of natural justice.
- The order imposing the penalty is quasi criminal in nature.
- The burden of proof in penalty proceedings varies from that in the assessment proceedings.
- Penalty order which was confirmed by the Bombay High Court was deleted.

CONCEALMENT PENALTY

REFERENCE TO THE LARGER BENCH

- ***Union of India and Ors. vs. Dharamendra Textile Processors & others (2007) 295 ITR 244 (SC)***

BINDING

- ***CIT vs. Desai Bros. Ltd. (1990) 189 ITR 89 (Bom.)***

  Special leave petition from judgement of High Court pending before Supreme Court. Not a ground for not following the judgement. Untill finally decided, court bound to follow the earlier decision.

CONCEALMENT PENALTY

SATISFACTION AND RECORDING OF SATISFACTION

- ***CIT vs. S.V. Angidi Chettiar (1962) 44 ITR 739, (745) (SC)***

BOMBAY HIGH COURT'S VIEW

- ***CIT vs. Dajibhai Kanjibhai (1991) 189 ITR 41 (Bom)***

CONCEALMENT PENALTY

Narita Invt. (P) Ltd vs. CIT (2007) 17 SOT 428 (Mum) (Asst. Year 1998-99)

- Recording of satisfaction should be properly worded in assessment order.
- The Assessing Officer had simply added a footnote in the assessment order with a direction to issue penalty notice u/s. 271(1)(c).
- Narration did not mean to be a satisfaction of the Assessing Officer about existence of any of the conditions which attracted penalty under section 271(1)(c).
- Penalty in the instant case, could not be levied either for want of satisfaction or on account of explanation 1 to section 271(1)(c).
- The majority of the High Courts have taken the view that there should be recording of satisfaction in the assessment order.

When there is jurisdictional high court though there may be contrary judgments,

the view of jurisdictional high court has to be followed.

- ***CIT vs. Universal Ferro and Allied Chemicals Ltd. (1994) 207 ITR 849 (Bom)***
- ***K. Subramanian, ITO and Anr. vs. Siemens India Ltd. & Anr. (1985) 156 ITR 11 (Bom)***

CONCEALMENT PENALTY

SUCCEEDING OFFICER TO GIVE FRESH HEARING IF SOUGHT BY THE ASSESSEE

- It has been held permissible for the successor A.O. to pass the order of penalty after giving the assessee a further opportunity to explain his case, when such an opportunity is specifically sought by the assessee.

  Murlidhar Tejpal vs. CIT (1961) 42 ITR 129 (Pat). (135)

- Penalty levied, without issuing notice by succeeding officer, held to be invalid

  CIT vs. Shankar D. Dhanwatey (1995) 212 ITR 150 (Bom) (153)

CONCEALMENT PENALTY

UNSIGNED NOTICE

- An unsigned notice is no notice at all in the eye of law. It cannot therefore be said that the absence on the notice of the signature of the officer issuing it simply constituted a mistake or omission within the meaning of sec. 292B of the Act. The notice to show cause why penalty should not be imposed should be signed by the A O and the omission to do so has been held to invalidate the notice as also the proceedings taken thereunder.

Umashankar Mishra vs. CIT (1982) 136 ITR 330 (MP)

CONCEALMENT PENALTY

PENALTY CANNOT BE INITIATED / DIRECTED TO BE INITIATED U/S. 263:

- ***CIT vs. Dr. Suresh G. Shah (2007) 289 ITR 110 (Guj.)***
- **CIT vs. Parmanand M. Patel (2005) 278 ITR 3 (Guj.)**

CONCEALMENT PENALTY

NO PENALTY ON PROTECTIVE BASIS

- A Penalty cannot be imposed on a protective basis. Under the law, a protective order of assessment can be passed but not a protective order of penalty

  CIT vs. Behari lal (1983), 141 ITR 32 (Punj.)

QUANTUM – TWO VIEWS

- Quantum proceedings, not binding in penalty proceedings, when two views are possible and when no clear and definition inference can be drawn, in a penalty proceedings penalty can not be imposed.

  Durga Kamal Rice Mills vs. CIT (2004) 265 ITR 25 (Bom)

CONCEALMENT PENALTY

AGREED ASSESSMENT AND PENALTY

- ***Sir Shadilal Sugar and General Mills Ltd vs. CIT (1987) 168 ITR 705 (SC)***
- ***CIT vs. Suresh Chandra Mittal (2001) 251 ITR 9 (SC)***

  Even after proviso to explanation 1, voluntary surrender to buy peace penalty u/ s 271 (1) (c) can not be levied.

- ***Ramnath Jaganath vs. State of Maharashtra(1984) 57 STC 46,51 (Bom),***

  Where an assessee is making surrender of certain amount to be assessed as his income on the condition that there should not be levied a penalty on that count, that amount can be treated as assessee's income only subject to that condition and not otherwise.

  Penalty levied was cancelled.

CONCEALMENT PENALTY

EXPLANATION 1 - A COMPLETE CODE HAVING FOLLOWING FEATURES:

1. Every difference between reported and assessed income needs an explanation.
2. If no explanation is offered, penalty may justify penalty.
3. If explanation is offered, but is found to be false, penalty will be exigible.
4. If explanation is offered and it is not found to be false, penalty may not be leviable –
   a. such explanation is bona fide
   b. the assessee had made available to the A.O. all the facts and materials necessary in computation of income.

CONCEALMENT PENALTY

WHERE PENALTY IS NOT LEVIABLE NOTWITHSTANDING EXPLANATION 1

- Where there is only an addition solely on estimate.

  CIT vs. Dhillon Rice Mills (2002) 256 ITR 447 (P & H)

- Failure to disprove addition does not warrant penalty

  CIT vs. Kerala Spinners Ltd (2001) 247 ITR 541 (Ker)

- Where full particulars are given.

  India Cine Agencies vs. DCIT (2005) 275 ITR 430 (Mad)

- Stock difference by itself does not justify penalty.

  CIT vs. Abdul Majid (1998) 232 ITR 250 (Ker)

- Bona Fide Belief / Inadvertent error / mistaken belief of law:

  CIT vs. Sudhitkumal Chottubhai (2001) 250 ITR 528 (Bom)

CONCEALMENT PENALTY

ADDITION / DISALLOWANCES MADE ON AD HOC ESTIMATE BASIS WOULD NOT JUSTIFY LEVY OF PENALTY

Harigopal Singh vs. CIT (2002) 258 ITR 85 (P & H)

CIT vs. Smt. K. Meenakshi Kutty (2002) 258 ITR 494 (Mad)

CIT vs. Rahamat Khan Birbal Khan Badruddin & Party (1999) 240 ITR 778 (Raj)

Rejection of books of accounts resulting in estimated addition / disallowance does not justify levy of penalty.

CIT vs. M.M. Rice Mills (2002) 253 ITR 17 (P & H)

Addition made due to rejection of accounts because of non maintenance of stock / production register would not justify levy of penalty.

CIT vs. B.D. Ramchandra (1984) 150 ITR 242 (Bom)

CONCEALMENT PENALTY

<u>FURNISHING INACCURATE PARTICULARS VIS-À-VIS DEDUCTION</u>

- ***Atul J. Doshi vs. ITO (2005) 4 SOT 515 (Mum)***

<u>FURNISHING INACCURATE PARTICULARS VIS-À-VIS LOSS</u>

- ***CIT vs. S.P.K. Steels (P) Ltd. (2004) 270 ITR 156 (MP)***

<u>FURNISHING INACCURATE PARTICULARS VIS-À-VIS EXPENDITURE</u>

- ***CIT vs. Textiles & General Tdg. Co. (2000) 244 ITR 876 (Del)***

<u>EXEMPTION</u>

- ***Chandrapal Bagga vs. ITAT (2003) 261 ITR 67 (Raj)***

<u>RETROSPECTIVE AMENDMENT</u>

- ***CIT vs. Premier protein Ltd. (2005) 278 ITR 252 (MP)***

CONCEALMENT PENALTY

ILLUSTRATIONS, WHERE PENALTY WAS FOUND EXIGIBLE WITH REFERENCE TO EXPLANATION 1

Where no explanation is offered

- ***Balwant Rai & Co. vs. CIT (2005) 274 ITR 629 (All)***

Where explanation was found to be false

Non production of records.

- ***Vidya Shankar Dixit vs. CIT (2005) 277 ITR 285 (All)***

Mere assertion that claim is genuine does not avoid penalty.

- ***CIT vs. Mangaram (2005) 276 ITR 362 (P&H)***

Improbable or unsatisfactory explanation

- ***CIT vs. Coromandal P. Ltd. (2004) 265 ITR 611 (Mum)***

CONCEALMENT PENALTY

EXPLANATION 2 ; EARLIER "INTANGIBLE ADDITIONS" NOW CAPITALIZED, IS SUBJECT TO PENALTY

- ***ACIT vs. Avtar Singh (2004) 1 SOT 534 (Chd) (SMC)***

  There is nothing in explanation to revive case of levy of penalty after it is dropped on merit.

CONCEALMENT PENALTY

EXPLANATION 3 - PENALTY IN RESPECT OF VOLUNTARY RETURNS

Explanation 3.—Where any person [***] fails, without reasonable cause, to furnish within the period specified in sub-section (1) of section 153 a return of his income which he is required to furnish under section 139 in respect of any assessment year commencing on or after the 1st day of April, 1989, and until the expiry of the period aforesaid, no notice has been issued to him under clause (*i*) of sub-section (1) of section 142 or section 148 and the Assessing Officer or the [***] Commissioner (Appeals) is satisfied that in respect of such assessment year such person has taxable income, then, such person shall, for the purposes of clause (*c*) of this sub-section, be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148

[***] – “who has not previously been assessed under this Act”, omitted by the Finance Act, 2002 w.e.f. 1-4-2003.

Before 1-4-2003, this explanation was applicable in the case of a new assessee who has not been previously assessed to Income tax.

- ***S.P. Hinduja (Bigger HUF) vs. ITO (2005) 279 ITR (AT) 178 (Mum)***

CONCEALMENT PENALTY

ASSESSEES W.E.F. 1-4-2003

- ***Salvi Divakar Shankar vs. ACIT (1999) 72 ITD 552 (Pune)***

  When tax is deducted at source, though no return was filed salary income cannot be treated as undisclosed source.

- ***Shri Terry J. Mendonca vs. DCIT, ITA No. 779/Mum/2003, Bench 'A' dated 27-3-07.***

  Advance tax paid, return not filled – to the extend of advance tax cannot be treated as undisclosed income.

- ***P. R. Patel vs. Dy. CIT (2001) 78 ITD 51 (Mum.)***

PENALTY VIS-À-VIS SUBMISSION OF RETURN

- **ITO vs. Bombaywala Readymade Stores (Ahd.-ITAT) (2004) 271 ITR 577 AY (TM) 1985-86**

  From the plain language of the section and from the scheme of the Act, it is clear that no penalty u/s. 271(1)(c) can be levied unless the assessee submits a return of income u/s. 139 or 147.

CONCEALMENT PENALTY

EXPLANATION 4 – AMOUNT OF TAX SOUGHT TO BE EVADED - CONCEALMENT VIS-À-VIS ASSESSED LOSS

- ***CIT vs. Pritipal Singh and Co. (2001) 249 ITR 670 (SC)***
- ***Virtual Soft Systems Ltd. vs. CIT (2007) 289 ITR 83(SC)***

Rule in Prithipal Singh & Co's case should apply for years prior to the assessment year 2003-2004, where there is no positive income.

The amendment by Finance Act, 2004 is not retrospective.

CONCEALMENT PENALTY

SEARCH VIS-À-VIS EXPLANATION 5 – SEARCH INITIATED U/S. 132 BEFORE THE FIRST DAY OF JUNE 2007

- ***CIT vs. Mishrimal Soni (2007) 289 ITR 77 (Raj)***

  Explanation 5 applies to tangible and intangible asset.

  Promissory notes found during search – penalty cannot be levied.

- ***CIT vs. Chhabra Emporium (2003) 264 ITR 249 (Del)***

  Surrender made on the date of search. Revised return filed. Penalty cannot be levied.

- ***Gulabrai V. Gandhi vs. ACIT (2003) 84 ITD 370 (Mum)***

  Not specifying the manner. Penalty cannot be levied.

- ***CIT vs. S.D.V. Chandru (Mad) (2004) 266 ITR 175 (Mad)***

  Disclosed earlier year u/s. 132 (4) – Pays tax and interest. Penalty cannot be levied

CONCEALMENT PENALTY

PENALTY U/S. 158BFA

The levy of penalty is discretionary and not mandatory as is apparent from the use of the term `may' in the said section.

Levy of penalty u/s. 158BFA is not automatic

- ***DCIT vs. Koatex Infrastructure Ltd (2006) 100 ITD 510 (Mum)***
- ***Nemichand vs. ACIT (2005) 93 TTJ 564 (Bang)***
- ***Habibullah Khanyari vs. CIT (2007) 108 ITD 321 (Mum)***

CONCEALMENT PENALTY

<u>EXPLANATION 5A – SEARCH INITIATED U/S. 132 ON OR AFTER FIRST DAY OF JUNE 2007</u>

Explanation *5A.—Where in the course of a search initiated under* *section 132* *on or after the 1st day of June, 2007, the assessee is found to be the owner of,—*

(i) any money, bullion, jewellery or other valuable article or thing (hereinafter in this Explanation *referred to as assets) and the assessee claims that such assets have been acquired by him by utilizing (wholly or in part) his income for any previous year; or*

*(ii) any income based on any entry in any books of account or other documents or transactions and claims that such entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year, which has ended before the date of the search and the due date for filing the return of income for such year has expired and the assessee has not filed the return, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under clause (*c*) of sub-section (1) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.*

P. R. Metrani vs. CIT (2006) 287 ITR 209 (SC)

-**Presumption u/s. 132(4A), cannot be extended to regular assessment**

-**Section 292C – Presumption as to assets, books of accounts, etc.**

Inserted by the Finance Act, 2007 w.e.f. 1-10-1975

CONCEALMENT PENALTY

271AAA - PENALTY WHERE SEARCH HAS BEEN INITIATED

Inserted by the Finance Act, 2007 w.e.f. 1-4-2007

(1) The Assessing Officer may, notwithstanding anything contained in any other provisions of this Act, direct that, in a case where search has been initiated under section 132 on or after the 1st day of June, 2007, the assessee shall pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of ten per cent of the undisclosed income of the specified previous year.

(2) Nothing contained in sub-section (1) shall apply if the assessee,—

(i) in the course of the search, in a statement under sub-section (4) of section 132, admits the undisclosed income and specifies the manner in which such income has been derived;

(ii) substantiates the manner in which the undisclosed income was derived; and

(iii) pays the tax, together with interest, if any, in respect of the undisclosed income.

(3) No penalty under the provisions of clause (c) of sub-section (1) of section 271 shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1).

(4) The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section.

CONCEALMENT PENALTY

Explanation.—For the purposes of this section,—

(a) "undisclosed income" means—

(i) any income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—

(A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) otherwise not been disclosed to the Chief Commissioner or Commissioner before the date of the search; or

(ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted;

(b) "specified previous year" means the previous year—

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or

(ii) in which search was conducted.

CONCEALMENT PENALTY

REVISED RETURN VIS-À-VIS CONCEALMENT

PENALTY

- ***T. Ashok Pai vs. CIT (2007) 292 ITR 11 (SC)***
- ***CIT vs. Suresh Chandra Mittal (2001) 251 ITR 9 (SC)***

CONCEALMENT PENALTY

REVISED RETURN VIS-À-VIS SURVEY

- ***CIT vs. V. Narashima Prasad (2001) 250 ITR 852 (Kar)***
- ***Mr. Bhagwandas H. Thakkar vs. ITO - ITA No. 8145/M/03 Bench I' A.Y. 99-00, dated 31/8/2004 (unreported)***
- ***Amirchand vs. ITO (1994) 49 ITD 606 (Delhi)***

  Explanation 5 to section 271(1)(c) cannot be applied to survey proceedings.

CONCEALMENT PENALTY

GENERAL

JURISDICTION

- *Sanabhai R. Dalwadi vs. ITO (1990) 34 ITD 183 (Ahd)*

EFFECT OF SETTING ASIDE OF APPEAL

- *The Gujarat High Court Ranchhodbhai Haribhai jadhav vs. ACIT (1999) 238 ITR 949 (Guj)*

ENHANCEMENT BY CIT(A)

- *CIT vs. Dwarka Prasad Subhash Chandra, (1974) 94 ITR 154 (All)*

CONCEALMENT PENALTY

<u>GENERAL</u>

<u>PENALTY VIS-À-VIS WRONG PROFESSIONAL ADVICE</u>

- ***Concord of India Insurance Co. Ltd. vs. Nirmala Devi (1979) 118 ITR 507 (SC)***
- ***Shyam Gopal Charitable Trust vs. Director of Income tax (Exemptions) (2007) 290 ITR 99 (Del)***
- ***T. Ashok Pai vs. CIT (2007) 292 ITR 119 (SC)***
- ***CIT vs. Rice Mills (S.D.) (2005) 275 ITR 206 (P & H)***

<u>Substantial question of law</u>

- ***Rupam Mercantile Ltd. vs. Dy CIT (2004) 91 ITD 237(AHD)™ . para 35 (296).***

<u>Penalty vis-à-vis statement recorded in different proceedings</u>

- ***Akshay Bhandar vs. CIT (Gau) 1996) 220 ITR 325***

BAR OF LIMITATION – S. 275

- ***Shri Tariochan Singh and sons (HUF Bhatinda vs. ITO (2007) 34 IT Rep 452 (ITAT) (Asr.)***

PROSECUTION

- *ITO vs. Taran Steel Sales (2002) 255 ITR 583 (P&H)*
- *K.C. Builders vs. ACIT (2004) 265 ITR 562 (SC)*
- *Mahadeva Naidu and Sons vs. CIT (2002) 255 ITR 208 (Mad)*

CONCEALMENT PENALTY

TRANSFER PRICING - EXPLANATION 7

Penalties comparisons with other countries

USA	20/40% of additional tax resulting from adjustments exceeding thresholds
UK	Ordinary provisions apply – 0 – 100% of tax unpaid.
Singapore	No specific TP penalties – Normal penalties ranging from 100 – 400% of underpaid tax.
Sweden	No specific TP penalties – Ordinary penalty of 40% of the additional tax.
Australia	Penalty of 50% of additional tax payable (dominant tax avoidance) or 10-25% in all other cases. However, reducible on reasonable grounds.
Canada	TP penalty of 10% of the transfer pricing adjustment if it exceeds threshold.
Germany	Documentation not submitted 5 – 10% of income adjustment with minimum of EUR 5,000 late submission – minimum fine EUR 100 per day, max MUR 1 million.
Japan	No specific TP penalties – ordinary penalty is 10 – 15% of additional tax (35% for concealment of facts)
OECD	Depends on local law. However, guidelines recognize that promoting compliance should be the primary objective of civil tax penalties.

Concealment and fringe benefits

CONCEALMENT PENALTY

SUGGESTIONS

1. Reply should be on facts and not on law or technicalities.
2. Evidence, which we are not able to produce in the course of assessment proceedings, file the same in the penalty proceedings.
3. Natural justice, opportunity of cross examination – should be asked though not asked in the course of original proceedings.

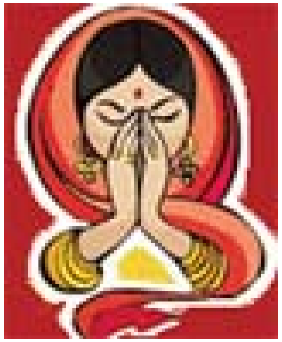
SUGGESTIONS

4. You may not file an appeal on quantum, there may be number of reasons, e.g. Possibility of enhancement, cost of litigation etc, however when penalty under concealment is levied, it is desirable to file an appeal because there could be possibility of prosecution.

5. When ever cash credits or commission payments are involved, we should request the assessing officer to issue summons.

6. When quantum of addition is substantial, it may be desirable to file an appeal to High court. If the appeal is admitted it may be possible to argue that penalty can not be levied, as the issue involved of substantial question of law.

WISH YOU AGAIN A HAPPY & PROSPEROUS NEW YEAR 2008



THANK YOU.

Dr. K. Shivaram, B. Com., LL. M., PH.D (Law)

RESEARCH TEAM

Mr. Rahul Hakani, Mr. Ajay Singh and Mr. Paras Savla
Advocates, KSA Legal

ksalegal@gmail.com