

Penalty for concealment of income

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If the *Assessing Officer* or the *Commissioner (Appeals)* or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has:

- (i) concealed the particulars of his income; or
- (ii) furnished inaccurate particulars of such income,

he may, in addition to the tax, *if any payable*, direct that such person *shall pay* by way of penalty a sum which shall not be less than, but which shall not exceed three times the *amount of tax sought to be evaded* by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

1. The penalty proceedings for concealment of income must be initiated by issuing a show cause notice by:
 - (a) the Assessing Officer *before the completion of the assessment*; or
 - (b) the first appellant authority *before passing an order under section 250*
 - (c) the Commissioner of Income Tax before passing the order under section 263.The mere fact that the penalty notice was issued some days after the assessment order was passed is immaterial if the assessment order itself contained a direction for issuing a penalty notice. [*Raja Rana Yogender Chandra v CIT* (1979) 117 ITR 473].
2. Penalty other than penalty imposable for concealed income under section 271(1)(c) can be levied by initiating penalty proceedings at any time. Thus, penalty proceedings under section 271B or 271F or under any other section can be initiated during the course of assessment proceedings or at any time. It can be initiated even if assessment is not required on the assessee. However, such penalty cannot be levied after the time limit specified under section 275.
3. To levy penalty, the order of penalty must be passed by the authority who is competent to levy such penalty.
4. Penalty for concealment of income can be levied only by the Assessing Officer or the Commissioner (Appeal) or by the Commissioner of Income Tax. It cannot be levied by ITAT even if the income is increased by ITAT. However, ITAT can reduce the penalty in an appropriate case.
5. Penalty will be levied under this section after completing the assessment or passing an order under section 250 and revision under section 263.
6. Where any addition is made on a question of law, no penalty shall be leviable.

Judicial decisions

(1) *Recording of satisfaction necessary for levy of penalty*: In the assessment order under section 143(3) of the Income-tax Act, 1961 there was no recording of the satisfaction for levy of penalty under section 271(1)(c) of the Act. At the end of the order, it was merely stated as under:

"Penalty proceedings under section 271(1)(c) are initiated separately."

The Delhi High Court held as under:

(A) The satisfaction as to the assessee having concealed the particulars of such income is to be arrived at by the Assessing Officer during the course of any proceedings under the Act which would mean the assessment proceedings, without which, the very jurisdiction to initiate the penalty proceedings is not conferred on the assessing authority by reference to section 271(1)(c) of the Act. Since, the assessment order did not record the satisfaction before initiating the penalty proceedings, the tribunal is justified in canceling the penalty. [*CIT v Ram Commercial Enterprises Ltd.* (2000) 246 ITR 569 (Del). **Also see** *Diwan Enterprise*

v *CIT* (2000) 246 ITR 571 (Del)].

(B) The Assessing Officer having simply given direction for penalty under section 271(1)(c) without recording any satisfaction for levy of penalty in the assessment order, it *ex facie* suffers from the vice of non-application of mind and, therefore, penalty was rightly set aside. [*CIT v Vikas Promoters Pvt. Ltd.* (2005) 277 ITR 337 (Del)].

(2) *Penalty should be worked out on the basis of law in force at the time of filing of return*: The quantum of penalty for concealment should be worked out on the basis of law in force at the *time of filing the return*, whether original and/or revised which contained the alleged concealment or misstatement. [*Sharma (B.N.) v CIT* (1997) 226 ITR 442 (SC)].

(3) *Penalty should be imposed by the Assessing Officer and first appellate authority/Commissioner on respective findings*: Penalty should be imposed by the Assessing Officer or the first appellate authority on *their respective findings only*. [*CIT v Shadiram Balmukund* (1972) 84 ITR 183 (All)]. The fact that during the original assessment proceedings the Assessing Officer did not initiate penalty proceeding is no bar to the exercise of such power by the first appellate authority. [*Kamlapat Motilal v CIT* (1962) 45 ITR 266 (SC)].

(4) *Involuntary surrender of income does not avoid penalty*: Merely because the assessee has surrendered an amount, which was seized from him after initial explanation, that it belonged to his brother and his brother-in-law, penalty cannot be avoided, since the initial explanation was *prima facie* unbelievable, so that the surrender of such income can only be treated as involuntary. In view of the *Explanation* deeming concealment, the assessee has a duty to offer an explanation. But where an explanation was offered and found to be unreliable, penalty becomes exigible. [*CIT v Mohd. Mohtram Farooqui* (2003) 259 ITR 132 (Raj)].

(5) *No penalty if the facts of the transaction are disclosed*: If the assessee has claimed any exemption after disclosing the relevant basic facts of the transaction of the income and under ignorance of the provisions of the Act of 1961 has not offered that amount for tax, in such cases, penalty should not be imposed. In such cases rather it is the duty of the Assessing Officer to ask for further details and tax the income if it is liable to tax. In the instant case, the assessee had shown "long-term capital gain" and claimed exemption, but the transaction had been disclosed in the return. There was no concealment of income and penalty could not be imposed. [*Chandrapal Bagga v Income-tax Appellate Tribunal* (2003) 261 ITR 67 (Raj)].

(6) *Revised return after detection of concealed income offers no immunity from penalty*: A revised return does not always spare penalty, where such revised return has been filed after concealment has been brought home. The assessee had admitted that 50 to 70% of his receipt are not recorded, but he claimed that he had admitted the same only during search in a spirit of co-operation in order to avoid penalty and prosecution. The first appellate authority deleted the penalty on the ground that the return was voluntary before proceedings were taken on the returns filed, while the Tribunal endorsed the decision on the ground that it was a matter of bargain between the assessee and the Department and that penalty is exonerated on revised return filed in pursuance of such bargain. The High Court held that the revised return could not be treated as purely voluntary especially, since the assessee had admitted concealment during search. [*CIT v Dr. A. Mohd. Abdul Khadir* (2003) 260 ITR 650 (Mad)].

(7) *No penalty for concealment if the claim of the assessee is debatable or arguable*:

If the claim of a deduction or an expenditure is either debatable or contraversial or even arguable, in such cases, it cannot be said that the assessee has concealed any income or furnished inaccurate particulars for evasion of tax and hence penalty cannot be levied under section 271(1)(c). [*CIT v Harshvardhan Chemicals & Minerals Ltd.* (2003) 259 ITR 212 (Raj)].

(8) *Penalty under section 271(1)(c) may be imposed in case of a surrender:* Even when the assessee was to make a surrender, it must adduce sufficient explanation for previous omission so as to protect itself against action under section 271(1)(c) of the Act. [*CIT v Kerala Transport Co.* (2004) 270 ITR 149 (Ker)].

(9) *No penalty unless there is a deliberate attempt:* Mere omission on part of assessee does not amount to concealment and if no supportive evidence are available to prove that it was a deliberate attempt on part of the assessee, it was held that no penalty under section 271(1)(c) of the Act is leviable. [*CIT v Ashim Kumar Agarwal* (2005) 275 ITR 48 (Jharkhand)].

(10) *Order of penalty must clearly state the nature of penalty:* It is incumbent upon the Assessing Officer to state whether penalty was being levied for concealment of particulars of income by the assessee or whether any inaccurate particulars of income have been furnished by the assessee. The order stating the penalty was for one of the offences is not valid. [*New Sorathia Engineering Co. v CIT* (2006) 282 ITR 642 (Guj)].

Illustration: Assessee filed a return of income declaring an income of Rs. 1,00,000. Assessing Officer added unexplained cash credits of Rs. 50,000 and assessed the income at Rs. 1,50,000. The assessee filed an appeal to CIT(A) who further enhanced the income by Rs. 30,000 to Rs. 1,80,000. The assessee decided not to go for further appeal. Assessing Officer wants to levy penalty under section 271(1)(c) on Rs. 80,000. Is the Assessing Officer justified?

Solution: The Supreme Court held in *CIT v Shadiram Balmukund* [(1972) 84 ITR 183 (All)] that the Assessing Officer can levy penalty on the additions made by him and not on the additions made by CIT(A). Similarly CIT(A) can levy penalty on the additions made by him and not on the additions made by the Assessing Officer. Therefore Assessing Officer can levy penalty on Rs. 50,000 and is not justified in levying penalty on Rs. 80,000.

In this case Assessing Officer had initiated the penalty proceedings before completing the assessment, but CIT(A) had not initiated the penalty proceedings before passing the order under section 250. Assessing Officer had levied penalty on Rs. 80,000. In view of the above judgement, the Assessing Officer will revise the penalty order and levy penalty on Rs. 50,000. CIT(A) cannot levy penalty since he has not initiated the penalty proceedings before passing the order under section 250.

'Concealment' vis-a-vis 'furnishing inaccurate particulars': 1. The first question that arises for determination is as to when the assessee can be said to have 'concealed' the particulars of his income. The dictionary meaning of 'conceal' is to 'keep secret, not allow to be seen or noticed'. The meaning of the word "concealment" as found in Shorter Oxford English Dictionary, third edition is — "In law, the intentional suppression of truth or fact known, to the injury or prejudice of another". Webster in his New International Dictionary equates its meaning "to hide or withdraw from observations; to cover up or keep from sight to prevent discovery of: to withhold knowledge of".

2. The Madras High Court, in *A.V. Thomas & Co. (India) Ltd v CIT* (1966) 59 ITR 499 (Mad) analysed the implications of word conceal thus:

The word "conceal" implies something more than mere failure to disclose and it pertains to an affirmative action likely to prevent or intended to prevent knowledge of a fact and refers to some advantage to the concealing party or disadvantage to some

interested party from whom the fact is withheld. Webster in his Dictionary gives the meaning for the word "conceal" as "to hide, withdraw from observation or to cover to keep from sight". Secrecy is an essential ingredient of the act of concealment. To constitute "concealment", it must appear that the statement or act of the person was calculated and designed to prevent discovery of the act with which he is charged. His act must be misleading, false or deceptive."

3. When particulars of income furnished in the return of income are not correct resulting in understatement of income, it may be a case of inaccurate particulars of income. Furnishing of inaccurate particulars may assume varied forms e.g. when the details of closing stock given are correct in quantity but the valuation given is incorrect, it may be a case of inaccurate particulars. Broadly speaking, when a particular item of income is not included in the return, it would be a case of concealment but not of furnishing inaccurate particulars of income. There could be cases where certain items of incomes may be concealed and inaccurate particulars may also be furnished in order to strengthen that concealment.

4. It has been judicially held that concealment and furnishing of inaccurate particulars are separate and distinct defaults and where penalty proceedings have been taken on the ground of concealment; penalty cannot be imposed on the ground of furnishing of inaccurate particulars. It has, however, been recognised that in some cases both the defaults may exist simultaneously and in such cases, the penalty proceedings have to be initiated for both the defaults. Where however the defaults overlap and inaccurate particulars have been furnished to strengthen the concealment, the distinction between the two would not be material.

5. The difference between 'concealment' and 'furnishing inaccurate particulars' has been analysed by the Orissa High Court in *CIT v Indian Metal and Ferro Alloys Ltd.* (1995) 211 ITR 35 (Ori) as under:—

"The expression "has been concealed the particulars of income" and "has furnished inaccurate particulars of income" have not been defined either in Section 271(1)(c) or elsewhere in the Act. One thing is certain that these two circumstances are not identical in detail although they may lead to the same effect, namely, keeping off a certain portion of income. The former is direct and the latter may be indirect in its execution. The word "conceal" is derived from the latin *concelare* which implies to hide. Webster in his New International Dictionary equates its meaning to "hide or withdraw from observation, to cover or to 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 portion thereof from the knowledge of income-tax authorities. In furnishing its return of income an assessee is required to furnish particulars and accounts on which the return income has been arrived at. These may be particulars as per its books of account, if he has maintained them, or any other basis upon which it had arrived at the returned figure of income. Any inaccuracy made in such books of account or otherwise which resulted in keeping off or hiding a portion of its income is punishable as furnishing inaccurate particulars of its income".

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| <ol style="list-style-type: none"> 1. The phrases "conceal the particulars of his income" would include false deduction or exemption claimed by the assessee in the return. 2. The word "conceal" involves a knowledge on the part of the assessee of the real income when giving the particulars. |
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Wider connotation of "concealed income" and "furnishing of inaccurate

particulars of income": The Act has widened the scope of provisions relating to levy of penalty by inserting seven explanations to section 271, *Explanations* 1, 2, 5 and 7 relate to extension of clause (c) of section 271(1) which provide for wider connotation of the concealed income or inaccurate particulars of income. *Explanation* 4 relates to quantification of penalty. *Explanation* 3 relates to extension of clause (c) of section 271(1) if return of income is not furnished within the specified time and certain conditions are satisfied. The sixth explanation, is however not relevant now as no adjustments can be made under section 143(1)(a) to the income declared in the return.

Explanation to section 271(1)(c) is an integral part of the main section: Where the Assessing Officer did not invoke the *Explanation* to section 271(1)(c) but levied penalty for concealment of income and the Commissioner upheld the penalty relying on the explanation, it was held that *Explanation* being an integral part of the main section and as such the penalty levied was correct in spite of not invoking the explanation. [*CIT v S.M.J. Builders* (2003) 262 ITR 60 (Bom)].

1. Facts material to the computation of total income are not explained or the explanation given is false or it is not substantiated, etc. [*Explanation 1* to section 271]: Where in respect of any facts material to the computation of total income of any person, if such person:

- (a) (i) *fails* to offer an explanation; or
- (ii) offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or the Commissioner to be false; or
- (b) (i) offers an explanation which he is not able to substantiate; *and*
- (ii) fails to prove that such explanation is *bona fide*; *and*
- (iii) fails to prove that all the facts relating to the same and material to the computation of income have been disclosed by him,

then, the amount added or disallowed in computing the total income of such person as a result thereof, shall be deemed to represent the income in respect of which particulars have been concealed.

This *Explanation* places the onus of proof on the assessee to establish that income has not been concealed by him as the assessee has to offer an explanation which he has to substantiate and prove that is *bona fide* and prove that he has disclosed all facts which are material to computation of total income.

Important Supreme Court decisions

***Dilip N. Shroff v Joint CIT* (2007) 291 ITR 519 (SC) and *T Ashok Pai v CIT* (2007) 161 Taxman 340 (SC)**

Mens rea was considered to be a necessary ingredient for levy of penalty as laid down by the Supreme Court in *CIT v Anwar Ali* (1970) 76 ITR 696. But after the introduction of *Explanation 1* to section 271(1)(c) deeming concealment wherever there is a difference between the reported and assessed income, the Supreme Court held that the requirement of proof of *mens rea* on the part of the Revenue, would no longer be necessary as held in *Addl. CIT v Jeevan Lal Sah* (1994) 205 ITR 244 (SC) and *B.A. Balasubramaniam and Bros. Co. v CIT* (1999) 236 ITR 977 (SC). The role of the *Explanation* it was pointed out, was only to place the burden of proof squarely on the taxpayer.

The *Explanation* was often overworked by the Assessing Officers, so as to justify penalty in each and every case of difference, even where an addition was merely on estimated basis or for *bona fide* omissions. Additions disputed on interpretation of law were also invariably subjected to penalty by relying on the *Explanation*. The High Courts

understood the effect of the *Explanation* differently often leading to conflicting decisions.

In this context two landmark judgments have been given by Apex Court in ***Dilip N. Shroff v Joint CIT (2007) 291 ITR 519 (SC)*** and ***T Ashok Pai v CIT (2007) 161 Taxman 340 (SC)*** this spells out the present law on the subject elaborately with reference to the law settled by the Supreme Court itself in various decisions. The Apex Court has announced the following rules for the purpose of penalty imposable:—

- (1) Both the expressions "concealment of income" and "furnishing of inaccurate particulars" indicate some deliberation on the part of the assessee, though the word "deliberately" and the word "willfully" are no longer part of the statute.
- (2) Mere omission or negligence would not constitute a deliberate act of *suppressio veri* or *suggestio falsi*.
- (3) Though there is no doubt, that the assessee is expected to take care to disclose his income fully, where income is based upon the opinion of a registered valuer, there is no scope for levy of penalty.
- (4) Primary burden of proof is on the revenue. The statute requires satisfaction on the part of the Assessing Officer. He is required to arrive at a satisfaction so as to show that there is primary evidence to establish that the assessee had concealed the amount or furnished inaccurate particulars and this onus is to be discharged by the department. And in this regard the Apex Court has made a reference to the twin decisions of the Delhi High Court in *CIT v Ram Commercial Enterprises Ltd.* (2000) 246 ITR 568 (Del) and *Diwan Enterprises v CIT* (2000) 246 ITR 571 (Del)].
- (5) The Assessing Officer while considering levy of penalty should consider whether the assessee has been able to discharge his part of the burden. He should not begin with the presumption that the assessee is guilty.
- (6) Though penalty proceedings under the income-tax law may not be criminal in nature, they are still quasi-criminal requiring the Department to establish that the assessee has concealed his income. For this purpose, the inference drawn in the assessment proceedings cannot automatically be adopted in penalty proceedings as decided in *Anantharam Veerasinghaiah and Co. v CIT* (1980) 123 ITR 437 (SC).
- (7) Where the assessee reports an income on the basis by valuation of market value as on 1-4-1981, as permitted by the statute, there can be no presumption of understatement with reference to such valuation, even if the market value may be found to be different having regard to the location of the property. Even where the registered valuer's report relied upon by the assessee is faulted by the Departmental Valuer on the basis of some information, it has to be understood that there can be genuine difference of opinion between the two experts. As long as the assessee has relied upon the expert opinion of a registered valuer appointed in terms of a statutory scheme there can be no inference of the assessee furnishing inaccurate particulars.
- (8) It has to be understood that the *Explanation* to section 271(1)(c) is an exception to the general rule raising a legal fiction by which the burden which is ordinarily with the Department is sought to be placed on the assessee. This burden on the assessee is subject to "conditions precedent", which are required to be satisfied before the *Explanation* could be applied.

2. Intangible additions [Explanation 2 to section 271]: The Assessing Officer in many cases makes additions to the returned income purely on account of certain technical reasons. For example, sometimes he calculates the total income of the assessee by

assuming a certain rate of gross profit or yield. Similarly the Assessing officer sometimes disallows a portion of certain expenses on estimated basis. These are commonly referred to as intangible additions. On *such intangible additions, normally penalty is not levied* as adequate material to establish that these additions represent the assessee's concealed income are not available. These intangible additions may be exploited by the assessee as a means of escape from tax and penalty in assessments pertaining to subsequent years when he is confronted with the need to explain the source of some of his funds, assets, etc. He may, in that case, take the plea that the said funds, etc. have come out of the income represented by intangible additions made in the earlier assessment. The Supreme Court in *Anantharam Veerasighaiah and Co. v CIT* (1980) 123 ITR 457 (SC) observed that the secret profits or undisclosed income of an assessee earned in an earlier assessment year, commonly described as intangible additions, are also the real income of the assessee. Therefore the assessee can explain the unexplained investment, etc. of the current year to have been met out of intangible additions made in the past.

To take care of such eventuality *Explanation 2* has been inserted to enable the Assessing Officer to initiate penalty proceedings in respect of intangible additions made in the past which are claimed by the assessee to be the source of any receipt, deposit or outgoing or investment. in any subsequent year. The penalty proceedings shall be initiated for the assessment year(s) in which such intangible additions were made and shall be leviable only on such intangible additions made in past year(s) which have been claimed to be a source of receipt, deposit or outgoing or investment of the subsequent year.

To enable the assessing officer to initiate penalty proceedings in respect of earlier year(s) in which intangible additions were made, section 271(1A) has been inserted. According to this section, where any penalty is imposable by virtue of *Explanation 2* to section 271(1), the proceedings for imposition of such penalty *may be initiated at any time, even if assessment proceedings in the course of which such penalty could have been initiated have been completed.*

Year(s) for which penalty proceedings will be initiated: Where the assessee claims that the unexplained investment, unexplained cash credit or unexplained expenditure, etc. of the current year is out of the intangible additions made in the past year(s), penalty proceedings will be first initiated by the Assessing Officer on the intangible additions made in the immediate preceding previous year and if such intangible additions of the immediate preceding previous year is not sufficient to cover the whole amount of receipt, deposit/outgoing or investment, penalty proceedings on the balance shall be initiated on the intangible additions made in the year immediately earlier to the said proceedings for year and so on.

Further penalty shall be levied as per the rates applicable to the respective assessment years. The penalty in this case can be initiated at any time even if the assessment has been completed.

Example: The unexplained investment for assessment year 2008-09 was found to be Rs. 6,00,000. The following intangible additions have been made in the past year(s)

<i>Assessment Year</i>	<i>Amount (Rs.)</i>
2007-2008	2,00,000
2006-2007	3,00,000
2005-2006	2,00,000
2004-2005	1,00,000

In the above case penalty proceedings will be initiated on the intangible additions as follows:

For assessment year

2007-2008	2,00,000
2006-2007	3,00,000
2005-2006	1,00,000

If the entire/part of the intangible additions have already been subject to penalty in the past then no such penalty proceedings shall be initiated on such intangible additions which have been claimed to be the source of unexplained investment etc. of the current year.

Example: Unexplained investment of Rs. 12,00,000 was found for assessment year 2008-09. The following addition has been made and penalty imposed in the past years:

<i>Assessment year</i>	<i>Total addition</i>	<i>Amount of addition on which penalty levied</i>
2007-2008	3,00,000	Penalty levied on intangible additions of Rs 1,00,000 only
2006-2007	5,00,000	Nil
2005-2006	4,00,000	Penalty levied on intangible addition of Rs. 2,00,000

In the above case penalty proceedings will be initiated for assessment year 2008-09 on the amount mentioned in column 4, calculated as under:

<i>Assessment year</i>	<i>Intangible Additions made starting from immediately preceding assessment years in which intangible addition is made</i>	<i>Penalty already levied</i>	<i>Balance amount on which penalty is leviable in respective assessment years</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>
2007-2008	3,00,000	1,00,000	2,00,000
2006-2007	5,00,000	—	5,00,000
2005-2006	4,00,000	2,00,000	2,00,000

3. Return not filed but the assessee had taxable income [Explanation 3 to section 271]: This *Explanation* regarding concealment of income is applicable if the following conditions are satisfied:

- The assessee, *whether or not assessed earlier*, fails *without reasonable cause*, to furnish the return of his income which he was required to furnish under section 139 within the period specified in section 153(1) (*i.e.* within 21 months from the end of the relevant assessment year).
- No notice has been issued to him either under section 142(1)(i) or 148 within the aforesaid period of 21 months.
- The Assessing Officer/Commissioner (Appeal) is satisfied that in respect of such assessment year, the person has taxable income.
- The taxable income of such assessment year shall be deemed to be the concealed income even if such person furnishes a return of his income at any time after the expiry of the aforesaid period in pursuance of a notice under section 148.

4. Determination of tax sought to be evaded [Explanation 4 to section 271]: As already discussed, penalty under section 271(1)(c) is minimum 100% of the *tax sought to be evaded* and maximum 300% of the *tax sought to be evaded*. *Explanation 4* has

explained how the amount of tax sought to be evaded is to be determined.

Situation 1

Where the loss declared in the return is reduced or is converted into income:

Where the amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished has the effect of reducing the loss declared in the return or converting that loss into income, the tax sought to be evaded shall be the tax that would have been chargeable on the *concealed income had such income been the total income*.

Example 1

	Rs.
Return of loss furnished by R for assessment year 2008-09	(-) 7,00,000
Concealed income under section 143(3)	3,00,000
Assessed loss	(-) 4,00,000

In the above case the loss declared in the return has been reduced by Rs. 3,00,000 due to concealed income.

Therefore although no tax is due on the assessed income but penalty will be levied on the tax sought to be evaded had the total income been Rs. 3,00,000.

	Rs.
Tax education cess and SHEC on Rs. 3,00,000	40,170
Therefore, minimum penalty	40,170
Maximum penalty	1,20,510

Example 2

Return of loss submitted by X Ltd. for assessment year 2008-09	(-) 1,50,000
Additions made on account of concealment by Assessing Officer u/s 143(3)	2,50,000
Total income assessed	1,00,000

In this case, loss declared in return has been converted into income due to concealment of income. Therefore, tax sought to be evaded shall be determined as under:

	Rs.
Additions treated as total income	2,50,000
Tax on Rs. 2,50,000 @ 30% + surcharge Nil + education cess @ 2% + SHEC @ 1%	77,250
Therefore, minimum penalty @ 100%	77,250
Maximum penalty @ 300%	2,31,750

In addition to the penalty he shall pay the tax of Rs. 30,900 on Rs. 1,00,000. Besides the tax, he will have to pay interest under sections 234A, 234B and 234C.

It may be observed that any addition or disallowance may be made on account of:

- (a) *Question of law:* In this case assessee does not conceal the particulars of his income or furnishes inaccurate particulars of such income. In this case, there is a difference of opinion in the interpretation of law. The Assessing Officer/CIT(A) may not agree with the assessee on a point of law and make additions to the returned income. In this case, although additions have been made but there is no concealment. Hence, no penalty is imposable under section 271(1)(c).
- (b) *Intangible additions:* As already discussed, these additions are made on account of certain presumptions and therefore normally no penalty is imposed as there is no evidence to establish concealment.
- (c) *Question of fact:* In this case if the assessee has concealed the particulars of income or furnished inaccurate particulars of such income. Penalty under section 271(1)(c) shall be leviable.

Example 3

		Rs.
Return of loss submitted by S for assessment year 2008-09		(-) 2,00,000
<i>Additions made by Assessing Officer:</i>		
(1) on account of question of law	1,20,000	
(2) on account of question of facts	1,40,000	
(3) intangible additions	<u>60,000</u>	<u>3,20,000</u>
Assessed income		<u>1,20,000</u>

He will have to pay tax on Rs. 1,20,000 *i.e.* Rs. 1,030 *plus* interest as applicable

Besides the tax he has to pay penalty u/s 271(1)(c).

In this case the loss due to mistake of fact has been reduced by Rs. 1,40,000 and therefore Rs. 1,40,000 will be treated as total income for imposing penalty.

	Rs.
Tax on Rs. 1,40,000 (including education cess @ 2% <i>plus</i> SHEC @ 1%)	3,090
Minimum penalty	3,090
Maximum penalty	9,270

Example 4

Return of loss submitted for assessment year 2008-09	(-) 1,20,000
Additions made under section 143(3) for concealed income	80,000
Loss assessed	(-) 40,000

(a) What will be the penalty imposable under section 271(1)(c) if the above return is submitted by (a) an individual resident in India (b) a company?

(b) What shall be your answer if the addition made under section 143(3) is Rs. 1,20,000 instead of Rs. 80,000.

Solution: (a) In the above case, the loss declared in the return has been reduced by Rs. 80,000 therefore the concealed income shall be treated as the total income. Since the deemed total income in this case is Rs. 80,000, tax sought to be evaded will be Nil, if it is a case of individual or Hindu undivided family as the maximum exemption limit in their case is Rs. 1,10,000. Therefore penalty imposable is Nil.

In case of a company, the tax sought to be evaded shall be 30.9% of Rs. 80,000 *i.e.* Rs. 24,270. Therefore minimum penalty shall be Rs. 24,270 and maximum Rs. 74,160.

(b) Loss declared in this case has been reduced by Rs. 1,20,000. Therefore, the concealed income shall be treated as the total income. Tax on Rs. 1,20,000 shall be Rs. 1,030 and the penalty imposable shall be minimum Rs. 1,030 and maximum Rs. 3,090. However, he shall not be liable to pay any income tax as his total income is nil.

In case of a company, the tax sought to be evaded shall be 30.9% of Rs. 1,20,000 *i.e.* Rs. 37,080. Therefore minimum penalty shall be Rs. 37,080 and maximum Rs. 1,11,240. No income tax is payable as the total income after addition will be nil.

Situation II

Where no return has been furnished by the assessee under section 139: This situation relates to *Explanation 3* discussed above.

In this case, the amount of tax sought to be evaded means the tax on the total income assessed as reduced by the amount of advance tax, TDS, TCS and self-assessment tax paid before the issue of notice under section 148.

Situation III

Any other case i.e. where total income assessed exceeds the concealed income: In

this case the tax sought to be evaded shall be computed as under:

Tax sought to be evaded = Tax on total income assessed – tax on (total income assessed - concealed income).

Illustration

		Rs.
Return of income submitted by S for assessment year 2008-09		1,20,000
<i>Additions made by Assessing Officer:</i>		
(1) on account of question of law	20,000	
(2) on account of question of facts	50,000	
(3) intangible additions	<u>40,000</u>	1,10,000
Assessed income		<u>2,30,000</u>

Compute the tax payable and penalty imposable under section 271(1)(c)

Solution

	Rs.
<i>Tax payable</i>	
Tax payable on assessed income (including education cess @ 2% + SHEC @ 1%)	20,600
Less: Tax paid on returned income	<u>1,030</u>
Balance tax payable	<u>19,570</u>
<i>Penalty payable</i>	
Tax sought to be evaded shall be determined as under:	
Tax on assessed income	20,600
Less: Tax on (assessed income as reduced by concealed income)	
<i>i.e.</i> Tax on Rs. 1,80,000 (Rs. 2,30,000 - 50,000)	<u>10,300</u>
Tax sought to be evaded	<u>10,300</u>
Minimum penalty @ 100%	10,300
Maximum penalty @ 300%	30,900

Note.—1. Intangible additions are normally not treated as concealed income and therefore are not subject to any penalty. Similarly, additions due to question of law are not concealment of income.

2. In addition to tax, he will have to pay interest as applicable.

5. In case of search, penalty leviable even though income representing assets found is declared in the return filed subsequently [Explanation 5 to section 271]:

Where in the course of a search initiated under section 132 before 1-6-2007, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (hereafter referred to as assets) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income:

- (a) for any previous year *which has ended* before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or
- (b) for any previous year *which is to end* on or after the date of the search,

then, even if 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 section 271(1)(c), be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

Exceptions: The above *Explanation* will not apply where:

- (1) such income is, or the transactions resulting in such income, are recorded:
 - (i) in a case falling under clause (a), before the date of search; and

- (ii) in a case falling under clause (b), on or before such date, in the books of account, if any, maintained by him for any source of income or such income is otherwise disclosed to the Chief Commissioner or Commissioner before the said date; or
- (2) he, in the course of the search, makes a statement under section 132(4) that any money, bullion, jewellery or other valuable article of thing found in his possession or under his control, has been acquired out of his income which has not been disclosed so far in his return of income to be furnished before the expiry of time specified in sub-section (1) of section 139, and also specifies in the statement the manner in which such income has been derived and pays the tax, together with interest, if any, in respect of such income.

The immunity referred to in Explanation 5 to section 271(1)(c) will also be available in respect of preceding years: Where the assessee had not disclosed his income in the returns already filed or not filed in the previous years which have ended prior to the date of the search and in the statement given under section 132(4), the assessee admits the receipt of undisclosed income for those years and also specifies the manner in which such income had been derived, and thereafter pays the tax on that undisclosed income with interest, such undisclosed income would get immunized from the levy of penalty as per *Explanation 5 to section 271(1)(c)*. [*CIT v S.D.V. Chandru* (2004) 266 ITR 175 (Mad)].

The exception provided in clause (2) of *Explanation 5* appears to be to provide an opportunity to the assessee to make a clear and fair confession and to surrender his income and also to deposit the tax and interest thereon which may result in an agreed assessment. The paramount intention appears to be that in the case of fair and clear confession and surrender of his income during the course of search, further litigation may be avoided and the Revenue may get the tax and interest, etc., at the earliest and the assessee may be saved from further litigation.

In the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on. The object of the provision is achieved by making the statement admitting the non-disclosure of money, bullion, jewellery, etc. Thus, much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in the absence of anything to the contrary. Therefore, mere non-statement of the manner in which such income was derived would not make *Explanation 5(2)* inapplicable. [*CIT v Radha Kishan Goel* (2005) 278 ITR 454 (All)].

Where concealed income is admitted during search itself and the admitted income was enhanced by adopting a higher valuation in respect of gold admitted as acquired out of concealed income, it was held that the difference being one of valuation and non-concealment of the asset itself, penalty was not justified, since the immunity offered in *Explanation 5* should be available even for enhanced value. [*CIT v E.V. Balashanmugham* (2006) 286 ITR 626 (Mad)].

Explanation 5A and section 271AAA to be applicable instead of Explanation 5, where a search is initiated on or after 1-6-2007

As per the Finance Act, 2007, *Explanation 5* to section 271(1) is now applicable for search initiated before 1-6-2007. Where a search is initiated on or after 1-6-2007, the assessee shall be levied the following two penalties:

- (a) penalty under section 271(1)(c) read with explanation 5A to section 271(1).

(b) penalty under section 271AAA.

(A) Undisclosed income found in search initiated on or after 1-6-2007 but the assessee did not file the return of that previous year although due date of filing had expired [Explanation 5A to section 271]

Where in the course of a search initiated under section 132 on or after 1-6-2007, 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 he 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 section 271(1)(c) of this section, be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

(B) Penalty under section 271AAA

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 10% of the undisclosed income of the specified previous year.

Penalty under section 271AAA shall not be levied in the following case [Section 271AAA(2)]

Where the assessee,—

- (i) in the course of the search, in a statement under section 132(4), 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.

the penalty under section 271AAA shall not be levied.

Penalty under section 271(1)(c) shall not be levied in this case [Section 271AAA(3)]

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

1. The provisions of sections 274 and 275 shall, so far as may be, apply in relation to the penalty referred to in this section (*i.e.* section 271AAA).
2. "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;
3.	"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.]

6. The explanation is not applicable on or after 1-6-1999 [Explanation 6]

7. Amount added or disallowed due to income added or expenses disallowed on the basis of arm's length price [Explanation 7].—Where in the case of an assessee who has entered into an international transaction defined in section 92B, any amount is added or disallowed in computing the total income under section 92C(4), then, the amount so added or disallowed shall, for the purposes of section 271(1)(c), be deemed to represent the income in respect of which particulars have been concealed or inaccurate particulars have been furnished, unless the assessee provides to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner that the price charged or paid in such transaction was computed in accordance with the provisions contained in section 92C and in the manner prescribed under that section, in good faith and with due diligence.

Illustration: Return of loss submitted for assessment year 2008-09	(-) 3,00,000
Additions made under section 143(3)	
On question of fact	1,50,000
On question of law	1,00,000
	<u>2,50,000</u>
Total loss assessed	<u>(-) 50,000</u>

Compute the tax payable and penalty payable under section 271(1)(c) for assessment year 2008-09.

Solution

	Rs.
Tax on total income	Nil
Deemed total income for computing tax sought to be evaded	1,50,000
Tax on Rs. 1,50,000	4,120
Minimum penalty @ 100%	4,120
Maximum penalty @ 300%	12,360
Tax payable	Nil

Illustration

	Rs.
Return of income submitted for assessment year 2008-09	1,00,000
Additions made under section 143(3)	
On question of fact	1,50,000
On question of law	50,000
	<u>2,00,000</u>
Total income assessed	<u>3,00,000</u>

Compute the tax payable, penalty payable under section 271(1)(c) for assessment year 2008-09.

Solution: The above case shall fall under situation III.

	Rs.
Tax on total assessed income of Rs. 3,00,000	40,170
Less: Tax paid on returned income	Nil
Balance tax payable	<u>40,170</u>

Penalty under section 271(1)(c)

Tax sought to be evaded	
Tax on assessed income of Rs. 3,00,000	40,170
Tax on assessed income as reduced by concealed income (3,00,000 - 1,50,000)	<u>4,120</u>
Tax sought to be evaded	<u>36,050</u>

Penalty u/s 271(1)(c) Rs. 36,050 to Rs. 1,08,150

Besides the tax of Rs. 40,800, interest as applicable shall be payable as per section 234A, 234B and 234C.

Illustration

	Rs.
Return of income submitted for assessment year 2008-09	1,40,000
Additions made under section 143(3)	
On question of fact	60,000
On question of law	30,000
Intangible additions	<u>20,000</u>
Total income assessed	<u>2,50,000</u>

Compute the tax payable, additional income-tax payable and penalty payable under section 271(1)(c) for assessment year 2008-09.

Solution

	Rs.
Tax on total assessed income of Rs. 2,50,000	24,720
Less: Tax paid on returned income	<u>3,090</u>
Balance tax payable	<u>21,670</u>
<i>Penalty under section 271(1)(c)</i>	
Tax sought to be evaded	
Tax on Rs. 2,50,000	24,720
Less: Tax on (2,50,000 - 60,000) i.e. tax on Rs. 1,90,000	<u>12,360</u>
Tax sought to be evaded	<u>12,360</u>
Minimum penalty @ 100% of tax sought to be evaded	12,360
Maximum penalty @ 300% of tax sought to be evaded	37,080

Hence in this case

Tax payable under section 143(3) Rs. 21,630

Penalty under section 271(1)(c) Rs. 12,360 to Rs. 37,080

Power to reduce or waive penalty, etc., in certain cases [Section 273A]

(A) Power to reduce or waive penalty imposed or imposable for default under section 271(1)(c) [Section 273A(1)]

Commissioner may reduce/waive penalty: Notwithstanding anything contained in the Income-tax Act, the Commissioner may, in his discretion, reduce or waive the amount of penalty *imposed* or *imposable* on a person under section 271(1)(iii) for concealment of income, etc. as per section 271(1)(c) if certain conditions are satisfied.

Waiver may be suo moto or otherwise: Such power to reduce or waive the penalty

can be exercised by the Commissioner on his own motion or on an application made by the assessee.

Conditions to be satisfied for waiver/reduction: Such power *shall* be exercised by the Commissioner if he is satisfied that the assessee has:

- (a) prior to the detection by the Assessing Officer, of the concealment of particulars of income or of the inaccuracy of particulars furnished in respect of such income, voluntarily and in good faith, made full and true disclosure of such particulars; and
- (b) co-operated in any enquiry relating to the assessment of his income; and
- (c) has either paid or made satisfactory arrangements for the payment of any tax or interest payable in consequence of an order passed under the Income-tax Act in respect of the relevant assessment year. *i.e.* the assessment year(s) for which application is made under section 273A.

If the assessee satisfies all the above 3 conditions, then the Commissioner shall (*i.e.* he is duty bound) waive the penalty and in that case there is no discretion.

Deemed case of true disclosure [Explanation to section 273A(1)]: For the purpose of section 273A(1), a person shall be deemed to have made full and true disclosure of his income or of the particulars relating thereto in any case where the excess of income assessed over the income returned is of such a nature as not to attract the provisions of section 271(1)(c).

Prior approval of Chief Commissioner/Director General necessary where aggregate concealed income exceeds Rs. 5,00,000 [Section 273A(2)]: According to section 273A(2), no order under section 273A(1) for reducing or waiving the penalty shall be made by the Commissioner except with the prior approval of the Chief Commissioner/Director General, as the case may be, in a case falling under section 271(1)(c) where the *amount of income* in respect of which the penalty is imposed or impossible for the relevant assessment year, or, where such disclosure relates to more than one assessment year, the *aggregate amount of such income* for those years, exceeds a sum of Rs. 5,00,000.

Relief available only once in life time [Section 273A(3)]: According to section 273A(3) Where an order has been made under section 273A(1) *in favour of any person*, whether such order relates to one or more assessment years, he shall not be entitled to any relief under this section in relation to any other assessment year at any time after the making of such order.

(B) Power to reduce or waive any penalty [Section 273A(4)]

Commissioner can waive any penalty including levied under section 271(1)(iii): Without prejudice to the powers conferred on him by *any other provision* of this Act [including section 273(1)], the Commissioner may, after recording his reasons for so doing, *reduce or waive* the amount of *any penalty* payable by the assessee under the Income-tax Act, or *stay*; or *compound* any proceeding for the recovery of any such amount provided certain conditions are satisfied.

Waiver only when application is made by the assessee: The waiver or reduction of penalty under section 273A(4) is possible only when an application for the same is made by the assessee. It cannot be done *suo moto* by the Commissioner.

Conditions to be satisfied for waiver or reduction: Such power shall be exercised by the Commissioner if he is satisfied that:

- (i) to do otherwise would cause genuine hardship to the assessee, having regard to the circumstances of the case; and
- (ii) the assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him.

Prior approval of Chief Commissioner or Director General necessary where penalty or aggregate amount of such penalties exceeds Rs. 1,00,000: No order reducing or waiving the amount or compounding any proceeding for its recovery under this sub-section shall be made by the Commissioner except with the previous approval of the Chief Commissioner or Director General, as the case may be where the amount of any penalty payable under the Income-tax Act or, where such application relates to more than one penalty, the aggregate amount of such penalties exceeds Rs. 1,00,000.

It has been clarified that the genuine hardship referred to in the provisions of section 273A(4) should exist at the time at which the application under section 273A(4) is made by the assessee before the commissioner and should so exist even at the time of passing of order under section 273A(4) by the Commissioner. [Circular No. 784, dated 22-11-1999].

1. Every order made under this section shall be final and shall not be called into question by any court or any other authority. However, the assessee can file a writ with the High Court under Article 226 of the Constitution and thereafter a special leave petition to the Supreme Court.
2. Orders passed under this section are quasi-judicial in nature and should therefore be supported by reasons with reference to the facts of the case, [Instruction No. 1417, dated 29-9-1981].
3. A disclosure following a search in which unaccounted cash or other incriminating documents were discovered cannot be considered to be a voluntary one. [Instruction No. 1142, dated 25-1-1978].
4. There can be no waiver or reduction of penalty where part of the concealed income was detected prior to the detection. [Advice of the Ministry of Law, dated 7-8-1981].
5. A person shall not be proceeded against for prosecution under section 276C or section 277 in relation to the assessment for an assessment year in respect of which the penalty imposed or imposable on him under section 271(1)(iii) has been reduced or waived by an order under section 273A.
6. There is no time limit for making an application under section 273A as well as for passing the order under this section.
7. Power under section 273A can be exercised by the Commissioner even if the assessee has challenged the penalty order in any appellate proceedings or before any court.
8. The assessee can either claim relief under section 273(A)(i) which is allowed once in life time or under section 273A(4) where it is possible for even more than once.
9. Interest under section 234A, 234B and 234C cannot be waived or reduced by the Commissioner under section 273A.

Judicial decisions

(1) The whole concept under section 273A is that the assessee admits his liability to the penalty but relies upon certain mitigating circumstances specified in the section for the purpose of getting the interest or penalty waived or reduced. Under section 273A the Commissioner is given the discretion, when the requisite conditions envisaged by section 273A are satisfied, that he may waive or reduce the penalty or interest imposable under the various sections of the Act. However, such discretion must be exercised judiciously by taking into consideration all the relevant facts and not arbitrarily or capriciously. [K.S.N. Murthy v Chairman, CBDT (2001) 252 ITR 269 (AP)].

(2) *The commissioner must give his reasons while passing an order on waiver of*

penalty under section 273A: The power under section 273A is a quasi-judicial power and, therefore, it is desirable for the Commissioner to reason his decision in every case. In this case the Commissioner while reducing the penalty by 50% did not give any reason for his action. The order was therefore quashed. [*Shri Ganesh Trading Co. v CIT* (2004) 134 Taxman 441 (P&H)].

Reduction or waiver of penalty u/s 273A(1) as compared to section 273A(4): Besides the conditions to be satisfied, which are different under sections 273A(1) and 273A(4), the following are other differences between section 273A(1) and section 274—

- (a) *Which penalty can be reduced or waived.*—Under section 273A(1) the Commissioner can reduce or waive the *penalty imposed u/s 271(1)(c)* for concealment of income whereas u/s 273A(4) he can reduce or waive *any penalty*.
- (b) *How many times reduction or waiver is possible.*—Once in a lifetime in case of section 273A(1) and any number of times in case of 273A(4).
- (c) *Is suo motu reduction or waiver possible.*—In case of section 273A(1) the Commissioner can reduce or waive the penalty either *suo motu* or *on an application made* by the assessee. In case of 273A(4), it can be done only on an application made by the assessee and *suo motu* is not permissible.
- (d) *Is prior approval of Chief Commissioner/Director General required for reduction or waive of penalty.*—Yes, u/s 273A(1) if the concealed income exceeds Rs. 5,00,000. In case of section 273A(4) it is required if any penalty exceeds Rs. 1,00,000.
- (e) *Can CIT stay or compound the proceedings for recovery.*—There is no power under section 273A(1) to stay or compound the proceeding for recovery, whereas it is possible under section 273A(4).

Individual or HUF covered u/s 194C(1), w.e.f. 1-6-2007: Section 194C(1) is applicable where the contract is **between individual/HUF and a contractor** provided the total sales, gross receipts or turnover from the business or profession carried on by such individual/HUF exceed Rs. 40,00,000/10,00,000, as the case may be, during the *financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor*. It may be noted that no tax is to be deducted by such individual/HUF under this section if the amount is credited or paid before 1-6-2007. However, for computing the limit of Rs. 50,000 for a financial year, the amount paid or credited before 1-6-2007 shall also be considered.

Individual/HUF not to deduct tax if the payment is for personal use: No individual or a Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.