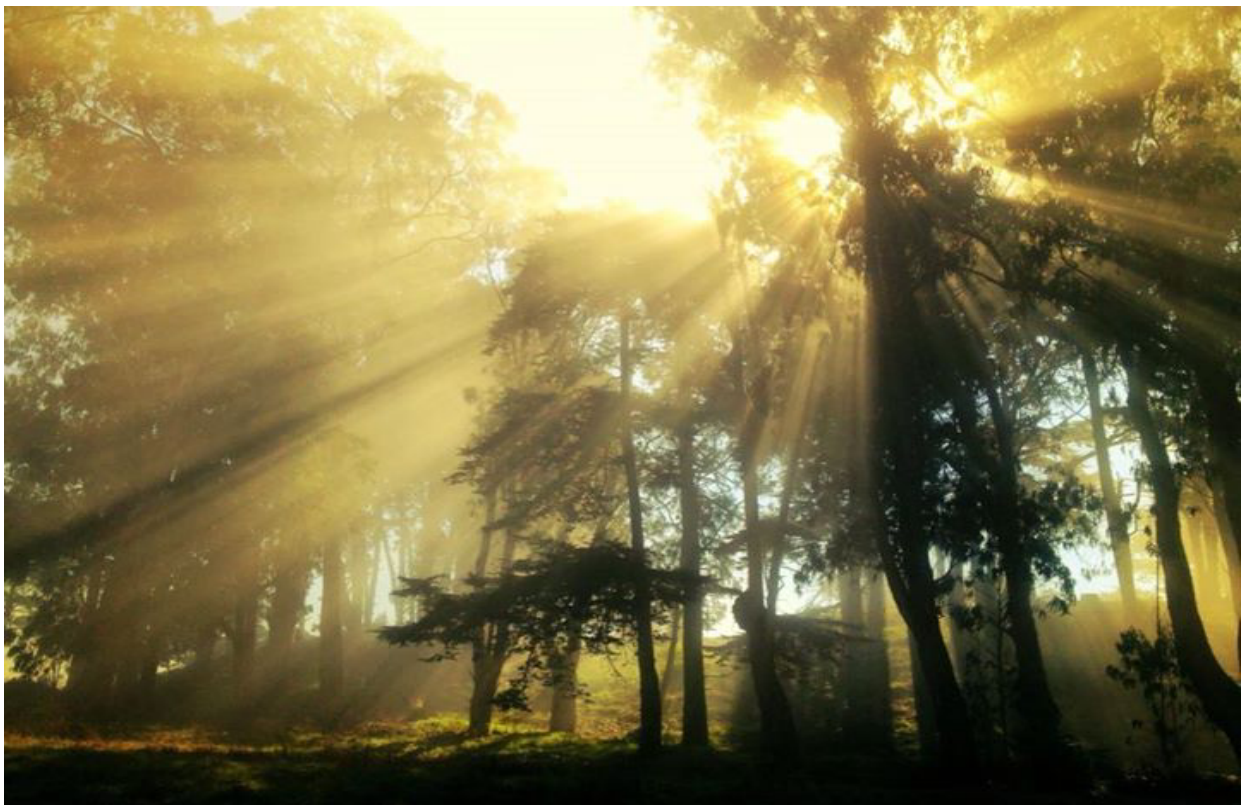


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**April 2017**



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## INDEX

| Sr. No | Topics covered  | Page No. |
|--------|---|----------|
| 1.     | <a href="#">Service Tax</a>                                 | 3        |
| 2.     | <a href="#">Income Tax</a>                                  | 3        |
| 3.     | <a href="#">Goods and Service Tax</a>                       | 4        |
| 4.     | <a href="#">Reserve Bank of India</a>                       | 4        |
| 5.     | <a href="#">Economics</a>                                   | 5        |
| 6.     | <a href="#">Summary of Judgments- Income Tax</a>            | 6        |
| 7.     | <a href="#">Discussion on Judgments – Income Tax</a>        | 8        |
| 8.     | <a href="#">Due date chart for the month of April, 2017</a> | 18       |

## **SERVICE TAX**

### **Amendment in exemption in the taxable services**

Services provided to or by an educational institution in respect of education is exempted from service tax, by way of,-

- (a) Auxiliary educational services; or
- (b) Renting of immovable property;

“Provided that nothing contained in clause (b) shall apply to an educational institution other than an institution providing services by way of pre-school education and education up to higher secondary school or equivalent.

This notification shall come into force on the 1st day of April, 2017.

*Notification no. 10/2017-Service Tax dated 08-03-2017*

[Index](#)

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## **INCOME TAX**

### **Procedure of TAN application through SPICe (Form No. INC 32) of MCA.**

An applicant may apply for allotment of tax deduction and collection account number through a common application form notified by the Central

Government.

A common application form of specified Performa Incorporating Company Electronically i.e. Form INC-32 has been notified by MCA.

The said form shall be applicable for Newly Incorporated Company.

Procedure:

- a) Application for allotment of tax deduction and collection account number (TAN) will be filed as a part of filing the SPICe INC-32 by using digital signature.
- b) After generation of Corporate Identity Number, MCA will forward data in Form 49B to prescribed Income Tax Authority through digital signature.

*Notification no. 03/2017-for March 2017*

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### **Clarification on Income Computation and Disclosure Standards (ICDS) issued by Ministry of Finance.**

Clarification on Income Computation and Disclosure Standards (ICDS) notified u/s 145(2) of the Income Tax Act, 1961. is issued by CBDT. The Central Government had notified 10 ICDS with effect from assessment year

2016-17.

The issues which require further clarification have been considered by Board and clarification is issued by way of 25 FAQs.

*Circular no 10/2017 dated 23rd March, 2017*

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### **Guidelines for waiver of interest charged u/s 201(1A) of the Income Tax Act, 1961 i.e. Interest on late payment of TDS.**

Chief Commissioner and Director General of Income Tax may consider in reduction or viewer of interest in following cases

- a) During the course of proceeding, the books and documents were seized u/s 132 of the Income Tax Act.
- b) Where any sum was not liable for deduction of TDS, but in consequences of retrospective amendment of law or the decision of the Supreme Court, the said sum was held to be deductible.
- c) Where the default relates to non-deduction or lower deduction

u/s 195 of the Act including Foreign Company subject to condition specified.

*Circular no 10/2017 dated 23rd March, 2017*

[Index](#)

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### **GOODS AND SERVICE TAX**

#### **Extension of date for provisional Id's**

As per earlier circular, last date for disabling provisional Login Id and Access Token of phase 1 and phase2 dealers was declared on 06/03/2017. However, as per the request from the trade, the date for disabling provisional Ids is now extended upto 15-03-2017.

*Trade circular No. 7 T of 2017 dated 08/03/2017*

[Index](#)

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### **RESERVE BANK OF INDIA (RBI)**

#### **Gold Monetization Scheme**

Agency banks may report the Gold Monetisation Scheme transactions, in order to have uniformity in reporting, reconciliation and accounting i.e., receipt, payment, penalty, interest,

commission for mobilization, handing charges, etc., directly through the government account maintained for the purpose at Central Accounts Section, Reserve Bank of India, Nagpur, on a daily basis as in the case of the transactions of Public Provident Fund (PPF) Scheme, 1968

*Notification* *RBI/2016-17/243*  
*DGBA.GAD.No.2294/15.04.001/2016-17*  
*dated 6th March 2017*

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## **Inclusion of “The Royal Bank of Scotland plc” in the Second Schedule to the Reserve Bank of India Act, 1934**

“The Royal Bank of Scotland plc” has been included in the Second Schedule to the Reserve Bank of India Act, 1934.

*Notification* *RBI/2016-17/244*  
*DBR.No.Ret.BC.54/12.07.150/2016-*  
*17 dated 9th March 2017*

[Index](#)

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## **ECONOMICS**

### **Implementation of GST will expand Indian economy by 1%**

According to Mr. Prashant Kumar, Additional Commissioner, Service Tax,

Mumbai-I informed GST holds the potential to make Indian products improve compliance, globally competitive and contribute to the expansion of the Indian Economy by at least 1% of GDP.

On March 20, 2017, the Union Cabinet approved 4 crucial GST bills, viz. CGST, IGST, UTGST and the Compensation Bill. These Bills are expected to be tabled in parliament shortly as Money Bills.

[www.indiaainfoline.com](http://www.indiaainfoline.com)

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### **Supreme Court to Government: Aadhaar Card can't be made necessary for welfare scheme**

The Aadhaar card can't be made mandatory by the government for extending the benefits of its welfare schemes to the people, the apex court said on Monday.

The Supreme Court, however, said that the government cannot be stopped from using Aadhaar in other schemes like the opening of bank accounts.

[www.businesstoday.in](http://www.businesstoday.in)

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## SUMMARY OF IMPORTANT TAX JUDGEMENTS:

Unless otherwise stated, the sections mentioned hereunder relate to the Income Tax Act, 1961.

| Sr. No | Tribunal/Court     | Section/Area  | Nature  | Case Law                                       |
|--------|--------------------|---|---|--|
| 1.     | Mumbai Tribunal    | Section 2(42A),<br>Section 2(47),<br>Section 45 and<br>Section 48 | While s. 2(42A) uses the term "held", the other provisions use the terms "acquired", "purchased" and "owner". Accordingly, for considering whether an asset is a "long-term capital asset", the period of holding must be computed on a de facto basis. The letter of allotment, even though not "ownership", must be taken as the date of holding the asset.   | Anita D.<br>Kanjani V<br>ACIT                  |
| 2.     | Supreme Court      | Section 9(1)(vii)<br>and Article 12                               | In order to constitute "technical services", services catering to the special needs of the person using them must be rendered. The provision of a common facility is not "technical services". Amount paid towards reimbursement of a common technical computer facility is not "fees for technical services". Amount received by way of reimbursement of expenses does not have the character of income. | DIT V A.P.<br>Moller<br>Maersk A S             |
| 3.     | Ahmedabad Tribunal | Section 143(3)  | The fact that the assessee sold goods at a concession does not mean that the difference between sale value and market value can be assessed as income. The onus is on the AO to make inquiries from the buyers and bring incriminating evidence on record to show that the assessee sold flats at a higher  | Nishant<br>Constructio<br>n Pvt. Ltd V<br>ACIT |

|    |                    |  |  |   |
|----|--------------------|--|--|---|
|    |                    |  | rate   |   |
| 4. | Hyderabad Tribunal | Section 195 and Section 206AA            | S. 206AA does not have an overriding effect over the other provisions of the Act. By virtue of s. 90(2), the provisions of the Treaty override s. 206AA to the extent they are beneficial to the assessee. Consequently, the payer cannot be held liable to deduct tax at higher of the rates prescribed in s. 206AA in case of payments made to non-resident persons in spite of their failure to furnish the PAN | Nagarjuna Fertilizers and Chemicals Limited V ACIT    |
| 5. | Delhi High Court   | Section 271(1)(c) read with Section 153A | When an assessee has filed revised return after search has been conducted, and such revised return has been accepted by Assessing Officer, then merely by virtue of fact that such return showed a higher income, penalty under section 271(1)(c) cannot be automatically imposed  | Principal Commissioner of Income-tax V. Neeraj Jindal |
| 6. | Mumbai Tribunal    | Section 271(1)(c) and Section 274        | Penalty cannot be levied if the omission to offer income, and the wrong claim of deduction, was by oversight and the auditors did not point it out. Also, the failure of the AO to specify the limb under which penalty u/s 271(1) (c) is imposed is a fatal error   | Wadhwa Estate & Developers India Pvt. Ltd V ACIT      |

[Index](#)

## Discussion on Judgments – Income Tax



**1. While s. 2(42A) uses the term "held", the other provisions use the terms "acquired", "purchased" and "owner". Accordingly, for considering whether an asset is a "long-term capital asset", the period of holding must be computed on a de facto basis. The letter of allotment, even though not "ownership", must be taken as the date of holding the asset.**

During assessment 2011-12 the assessee had sold her office premises. According to the assessee the asset was held for more than 36 months, therefore it was a "long term capital asset" and hence showed the resultant gains as the long term capital gains in return.

The AO was of the view that though allotment of the said office was done prior to 36 months from the date of sale, the agreement to sale was registered during the period of 36 months only and hence he computed the holding

period from the date of registration of the agreement and held that the asset was a short term capital asset and assessed the resultant gain as short term capital gain.

The CIT (Appeals) upheld the order of the Assessing officer.

**On second appeal to the Tribunal it held that:**

- A perusal of section 2(42A) shows that the legislature has used the expression 'held' while in various other similar or allied sections like 54 and 54F it has used the expression 'acquired' or 'purchased'. Thus the intention of the legislature is clear that for the purpose of determining the nature of capital gain it is concerned with the period of holding during which the asset was held by the assessee.
- It is further noted that the letter of allotment was issued to the assessee on 11.04.2005. Also a sum of Rupees 5,00,000 was paid by the assessee on 04.04.2005 as against the total consideration of Rupees 29,64,000/-.
- Based on case of CIT v. A. Suresh Rao, for the purpose of holding an asset it is not necessary that



the assessee should be the owner of the asset based upon a registration of conveyance conferring title on him.

Thus on the basis of various judgements of various High Courts wherein this very issue has been analysed in detail, holding period should be computed from the date of issue of allotment letter. If one does so, the holding period becomes more than 36 months and consequently, the property sold by the assessee would be long-term capital asset in the hands of the assessee and the gain on sale of the same would be taxable in the hands of the assessee as long-term capital gain.

Thus in view of above the Tribunal allowed the appeal of the assessee.

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**2. In order to constitute “technical services”, services catering to the special needs of the person using them must be rendered. The provision of a common facility is not “technical services”. Amount paid towards reimbursement of a common technical computer facility is not “fees for technical services”. Amount received by way of reimbursement of expenses does not have the character of income**

The assessee was a foreign company engaged in the shipping business and was a tax resident of Denmark. It had agents in India working for it. These agents booked cargo and acted as clearing agents for the assessee.

In order to help all its agents, across the globe, the assessee had set up and was maintaining a global telecommunication facility called Maersk Net System which was a vertically integrated communication system. The agents were paying for said system on pro rata basis. According to the assessee, it was merely a system of cost sharing and the payments received by the assessee from its agents were in the nature of reimbursement of expenses. The AO held that the amounts paid by the agents to the assessee was consideration or fees for technical services rendered by the assessee and held the same to be taxable under article 13(4) of the DTAA.

The Tribunal allowed assessee’s claim. It held that the utilisation of the Maersk Net Communication System was an automated software based communication system which did not require the assessee to render any technical services. It was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business.

On an appeal to the High Court, it also held that the income from the use of Global Telecommunication Facility called 'Maersk Net' could be classified as income arising out of "shipping business" and not as "fees for technical services".

**On an Appeal made by the department to the Supreme Court it held that:**

- The facts on record are that the assessee is engaged in the business of shipping, chartering and related business and has appointed agents in various countries for booking of cargo and servicing customers in those countries, preparing documentation etc. All the agents including those appointed in India used Maersk Net System.
- This system is a facility which enabled the agents to access information like tracking of cargo of a customer, transportation schedule, customer information, documentation system and several other informations.
- For the sake of convenience of these agents a centralized system is maintained to avoid unnecessary costs. The system comprises of booking and communication software,

hardware and a data communications network making it an integral part of international shipping business.

- Expenditure incurred on this system is shared by all the agents. Thus payments made by the agents cannot be treated as fees for technical service. It is in the nature of reimbursement of cost whereby the three agents paid their proportionate share of the expenses incurred on these said systems and for maintaining those systems.
- Also the revenue itself has given the benefit of Indo-Danish DTAA to the assessee by accepting that under article 9 thereof, freight income generated by the assessee in these assessment years is not chargeable to tax as it arises from the operation of ships in international waters. Maersk Net System being an integral part of the shipping business and the business cannot be conducted without the same, by no stretch of imagination it could be treated as any technical services provided to the agents.
- In such a situation, 'profit' from operation of ships under article

19 of DTAA would necessarily include expenses for earning that income and cannot be separated, more so, when it is found that the business cannot be run without these expenses.

Thus in view of above Supreme Court dismissed the appeal of the department stating that once the character of the payment is found to be in the nature of reimbursement of the expenses, it cannot be income chargeable to tax.

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**3. The fact that the assessee sold goods at a concession does not mean that the difference between sale value and market value can be assessed as income. The onus is on the AO to make inquiries from the buyers and bring incriminating evidence on record to show that the assessee sold flats at a higher rate**

The assessee was engaged in the business of real estate. The assessing officer had made an addition to income amounting to Rupees 32.56 Crores on the belief that no one makes a loss in real estate business and the market perceptions indicate that the prices of immovable properties are always on the upward trend.

**On an appeal made to the Tribunal with respect to such an addition it held that:**

- It appears that the lower authorities have been carried away with the notorious practice prevailing in the real estate circles that in all the property transactions there is non-disclosure of property transactions.
- The assessing authority has no power to disturb the sale price shown except in three cases. The first is u/s 145 of the Act. Where the sale of properties is a part of business of the assessee, the AO if he is of the opinion that the accounts are not correct and complete, may proceed to reject the books of accounts and thereafter make a best judgement assessment u/s 144 of the Act.
- The second is in the case where section 50C of the Act is invoked on the basis of the prices fixed by the Stamp Valuation Authorities and the third is the case of section 92BA in case of 'specified domestic transactions'. Except in these 3 cases the Act does not permit the enhancement of the

profits of the business shown by the assessee.

- Moreover the AO did not make any enquiry from buyers of flat in respect of actual prices paid by them. He also did not make any other inquiry in order to corroborate his conclusion. There is no incriminating evidence to show that the assessee has sold the flats at a higher rate.
- Several decades before the Madras High Court in the case of Shri Ramalinga Choodambikai Mills Ltd. vs. CIT: (1955) 28 ITR 952 held that “in the absence of any evidence to show either that the sales were sham transactions or that the market price were in fact paid by the purchasers, the mere fact that goods were sold at a concessional rate would not entitle the Income tax Department to assess the difference between the market price and the price paid by the purchaser as profit of the assessee.”

Thus in view of above and in light of the judicial decisions the Tribunal set aside the findings of CIT (A) and directed the AO to delete the addition of Rs. 32.56 crores.

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**4. S. 206AA does not have an overriding effect over the other provisions of the Act. By virtue of s. 90(2), the provisions of the Treaty override s. 206AA to the extent they are beneficial to the assessee. Consequently, the payer cannot be held liable to deduct tax at higher of the rates prescribed in s. 206AA in case of payments made to non-resident persons in spite of their failure to furnish the PAN**

The assessee made certain payments in the nature of fees for technical services to non-residents. It deducted TDS at lower rate as per DTAA even in case of payees, who did not furnish valid Permanent Account Numbers.

The assessee was held to be liable to deduct tax at source at higher rate of 20 per cent for want of Permanent Account Numbers of the concerned non-resident payees as per the provisions of section 206AA. Accordingly, the intimations under section 200A along with the demand notices under section 156 were issued by the Department treating the assessee as in default for the short-deduction of tax along with interest payable thereon.

The CIT (Appeals) also held that section 206AA starting with non

obstante clause would override all other sections including section 90(2).

**On an appeal to the Tribunal it held that:**

- The assessee deducted TDS from the corresponding amounts paid to the respective non-residents at the rates prescribed by the provisions of section 195 read with section 2(37A). Now the issue boils down to whether the assessee can still be held to be liable to deduct TDS at higher rate by virtue of section 206AA as a result of failure of said payees to furnish their PANs.
- Section 206AA contains a non-obstante clause and relying on the same, the stand taken by the authorities below is that the provisions of section 206AA have a overriding effect and since the said provisions override all other provisions of the Act, the same are required to be given effect to. On the other hand, one of the contentions raised on behalf of the assessee is that the non-residents at the relevant time were not required to obtain PAN as per the provisions of section 139A (8) read with rule 114C and hence they cannot be required to

furnish the same as envisaged in section 206AA and the said provisions, therefore, cannot be applied in the case of non-residents even by the overriding effect given to the said provisions, which is required to be read down.

- There is merit in the contention raised on behalf of the assessee that the provisions of section 206AA are required to be read down so as to make it inapplicable in the cases of concerned non-resident payees who were not under an obligation to obtain the PAN.
- Whenever there is a conflict between the provisions of the Treaty and the provisions of the Domestic Law, the provisions of Treaty will override even the charging provisions of the Domestic Law. There is no merit in the contention raised by the department that as per section 90(2) treaty does not override the Act but gets overridden.
- Since section 206AA falls in Chapter XVII-B dealing with tax deduction at source, it follows that the treaty provisions which override even the charging

provisions of the Domestic Law by virtue of section 90(2) would also override the machinery provisions of section 206AA irrespective of non obstante clause contained therein and the same is required to be restricted to that extent and read down to give effect to the relevant provisions of DTAA, which are overriding being beneficial to the assessee.

- It is rightly pointed out on behalf of the assessee that no such provision is made separately and specifically in section 90 to give overriding effect to section 206AA over section 90(2), which clearly shows that the intention of the legislature is not to give overriding effect to section 206AA over the provisions of the relevant DTAA which are beneficial to the assessee.
- Provisions of section 206AA will not have an overriding effect for all other provisions of the Act and the provisions of the Treaty to the extent they are beneficial to the assessee will override section 206AA by virtue of section 90(2).

Thus in view of above it was held that the assessee could not be held liable to

deduct tax at higher of the rates prescribed in section 206AA in case of payments made to non-resident persons having taxable income in India in spite of their failure to furnish the Permanent Account Numbers.

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**5. When an assessee has filed revised return after search has been conducted, and such revised return has been accepted by Assessing Officer, then merely by virtue of fact that such return showed a higher income, penalty under section 271(1)(c) cannot be automatically imposed**

A search and seizure operation under section 132(4) was carried out in the premises of the assessee's group companies and directors of the company. Notice under section 153A was issued, in response to which the assessee filed his return of income declaring additional income.

The AO completed the assessment u/s 153A read with section 143(3) after accepting the declared income and also initiated penalty proceedings u/s 271(1)(c). He imposed penalty being 100% of the amount of tax sought to be evaded on the concealed income.

The Commissioner (Appeals) held that for the purpose of imposition of

penalty, the original return of income filed under section 139 could not be considered. Penalty under section 271(1)(c) was imposable when there is variation in assessed and returned income and not otherwise. If there was no variation, there will be no concealment and, thus, the question of levy of penalty would not arise.

**On an appeal made to the High Court it held that:**

- The word 'conceal' in section 271(1)(c), would require the Assessing Officer to prove that specifically there was some conduct on part of the assessee which would show that the assessee consciously intended to hide his income.
- The AO in his order noted that the disclosure of higher income in the return filed by the assessee was a consequence of the search conducted and hence, such disclosure cannot be said to be 'voluntary'. Hence, in the AO's opinion, the assessee had 'concealed' his income. However, the mere fact that the assessee has filed revised returns disclosing higher income than in the original return, in the absence of any other incriminating

evidence, does not show that the assessee has 'concealed' his income for the relevant assessment years.

- When an assessee has filed revised return after search had been conducted, and such revised return has been accepted by the AO, then merely by virtue of the fact that such return showed a higher income, penalty under section 271(1)(c) cannot be automatically imposed.
- Also considering that the non obstante clause under section 153A excludes the application of, inter alia, section 139, it is clear that the revised return filed under section 153A takes the place of the original return under section 139, for the purposes of all other provisions of the Act. Hence for all purposes, including for the purpose of levying penalty under section 271(1)(c), the return that has to be looked at is the one filed under section 153A.

Thus in view of above, for the purpose of levying penalty under section 271(1)(c), what has to be seen is whether there is any concealment in the return filed by the assessee under section

153A, and not vis-à-vis the original return under section 139

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**6. Penalty cannot be levied if the omission to offer income, and the wrong claim of deduction, was by oversight and the auditors did not point it out. Also, the failure of the AO to specify the limb under which penalty u/s 271(1) (c) is imposed is a fatal error**

The assessee had failed to offer interest on fixed deposit amounting to Rupees 5,92,186/- and loss claimed on account of fixed asset written off amounting to Rupees 1,82,242/- . In course of proceedings the assessee accepted the taxability of these items and offered them to tax. The assessee has explained that non-disclosure of aforesaid two items of income is due to oversight and due to the fact that neither in the tax audit nor in the statutory audit such omission was pointed out.

**On an appeal to the Tribunal it held that:**

- On perusal of the Audit report, we have noted that the auditors have not pointed out the omission. Thus the assessee's explanation that non-disclosure of two items of income is on

account of omission due to oversight is believable since the auditors have also failed to detect such omission in the audit report.

- Therefore in our opinion the ratio laid down by the Hon'ble Supreme Court in PricewaterhouseCoopers Pvt. Ltd., clearly applies to the facts of the present case as, in our opinion, it is a bonafide mistake committed by the assessee.
- Also perusal of the assessment order clearly demonstrates that the AO has not recorded any satisfaction whether the facts of the case necessitate initiation of proceeding for imposition of penalty under section 271(1)(c) either for concealing particulars of income or for furnishing inaccurate particulars of income or for both.
- The AO has simply initiated the proceedings for penalty u/s 271(1)(c) without mentioning the offence committed by the assessee.
- Further on reference to the notice issued u/s 274 read with section 271 it was found that the AO has not specified the limb of the provision contained u/s 271(1)(c)



is attracted to the assessee. Also while issuing the notice the AO should delete the inappropriate words or paragraphs, otherwise, it may indicate that the AO himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or had furnished inaccurate particulars of income.

Thus in view of above the Tribunal was of the opinion that the AO having failed to record his satisfaction while initiating proceedings for imposition of penalty under section 271(1)(c) as to which limb of the provisions of section 271(1)(c) is attracted, the order imposing penalty is invalid and hence the imposition of penalty u/s 271(1)(c) is not justified.

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**NOTE: The Judgments should not be followed without studying the complete facts of the case law.**

[Index](#)

## DUE DATES CHART FOR THE MONTH OF APRIL 2017 (VARIOUS ACTS):

| <b>April 2017</b>                                      |   |     |     |     |   |                               |
|--|---|-----|-----|-----|---|-------------------------------|
| Sun  | Mon   | Tue | Wed | Thu | Fri   | Sat                           |
|  |   |     |     |     |   | 1                             |
| 2  | 3   | 4   | 5   | 6   | 7   | 8                             |
| 9  | 10<br>Monthly Excise Return (ER-1)/ ER-2 monthly return by 100% EOU, Quarterly Excise Return by EOU, SSI Units and paying 2% in Form ER-8 | 11  | 12  | 13  | 14  | 15<br>Provident fund payment, |
| 16   | 17  | 18  | 19  | 20  | 21<br>MVAT Payment, ESIC Payment, Payment and filing of quarterly/monthly MVAT Return | 22                            |
| 23   | 24  | 25  | 26  | 27  | 28  | 29                            |
| 30<br>Profession Tax Payment, Income Tax – TDS payment |   |     |     |     |   |                               |

*This communication is intended to provide general information, guidance on various professional subject matters and should not be regarded as a basis for taking decisions on specific matters. In such instances, separate advice should be taken.*

[Back](#)