

## **Common Disputes:-**

### ➤ **Payment of Export commission to Non-Resident Agent :-**

#### ▪ **Relevant Bare Act, Rules & Circulars:-**

#### **Other Sums**

**195.** [(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest<sup>84</sup>[(not being interest referred to in section [194LB](#) or section [194LC](#))]<sup>85</sup>[or [section 194LD](#)]<sup>86</sup>[\*\*\*] or any other sum chargeable under the provisions of this Act<sup>87</sup> (not being income chargeable under the head "Salaries"<sup>88</sup>[\*\*\*]) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.

#### **Income deemed to accrue or arise in India.**

**9.** <sup>5</sup>(1) The following incomes shall be deemed<sup>6</sup> to accrue or arise in India :—

<sup>7</sup>(i) all income accruing or arising, whether directly or indirectly<sup>8</sup>, through or from any business connection<sup>8</sup> in India, or through or from any property<sup>8</sup> in India, or through or from any asset or source of income in India, <sup>9</sup>[\* \* \*] or through the transfer of a capital asset situate in India.

<sup>10</sup>[*Explanation 1*].—For the purposes of this clause—

- (a) in the case of a business of which all the operations<sup>11</sup> are not carried out in India, the income of the business deemed under this clause to accrue or arise in India shall be only such part of the income as is reasonably attributable to the operations<sup>11</sup> carried out in India ;
- (b) in the case of a non-resident, no income shall be deemed to accrue or arise in India to him through or from operations which are confined to the purchase of goods in India for the purpose of export ;

#### **Abstract of clause (1) of Article 7 of DTAA with USA**

1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein

**Circular No. 786 is withdrawn by Circular No.7/2009.**

▪ **Relevant Case Laws:-**

1. Section 5(2), read with section 9 of the Income-tax Act, 1961 – Income – Accrual of – Assessment year 1962-63 – An Indian exporter sold tobacco abroad through non-resident sales agents (assesseees) – Sales agents were entitled to commission, as per agreement – Sale price received on sale abroad was remitted wholly to Indian exporter who debited commission account and credited amount of commission payable to non-resident agents (i.e. assesseees)–Amount of commission was later remitted to non-resident agents – Whether, since non-resident assesseees did not carry on any business operations in India, amounts earned for services rendered outside India could not be deemed to be incomes which had either accrued or arisen in India – Held, yes – Whether, moreover, assesseees could not be charged to tax on basis of receipt of income, actual or constructive, in taxable territories during relevant accounting period as they neither received nor could be deemed to have received sums in question when their accounts with Indian exporter were credited – Held, yes

**CIT Vs. Toshoku Ltd. [1980] 125 ITR 525 (SC)**

2. Section 9, read with sections 40(a)(ia) and 195, of the Income-tax Act, 1961 - Income - Deemed to accrue or arise in India [Business profits] - Assessment year 2008-09 - Assessee exporter claimed deduction on commission paid to agents abroad who were canvassing for assessee in overseas market - During relevant year, when assessee had effected payments to foreign agents, such payments were not income of non-residents exigible for tax in India - Whether neither subsequent circular allegedly withdrawing benefits given to assessee, nor addition of Explanation to section 9(2) through Finance Act, 2010 with retrospective effect from 1-6-1976 would have any effect on taxability of such income earned by non-resident agents outside India during relevant year in course of his business or profession carried out outside India - Held, yes [Para 7] [In favour of assessee]

**ACIT vs. Capricorn Food products India Ltd. [2013] 38 taxmann.com 158 (Chennai - Trib.)**

3. *Whether since assessee's US agent did not have any business operations in India and they were functioning and operating in USA, assessee's liability to deduct tax at source under section 195 would not arise - Held, yes [Paras 9 & 10]"*

**CIT vs. Himalaya International Ltd. [2014] 51 taxmann.com 213 (Delhi)**

4. Section 9, read with section 40(a)(i), and section 195 of the Income-tax Act, 1961, read with article 7 of OECD Model - Income - Deemed to accrue or arise in India (Business Profits/Commission) - Assessment years 2008-09 to 2010-11 - Whether where assessee had engaged services of non-resident agents outside India to propagate and co-ordinate its sales outside Indian territory, commission paid to said agents was not chargeable to tax in India and therefore, assessee was not liable to deduct tax at source under section 195 on said payments - Held, yes [Paras 4 and 6] [In favour of assessee]  
**Sri rajalakshmi Enterprise vs. ITO [2015] 53 taxmann.com 302**  
**(Chennai - Trib.)**

➤ **Prosecution u/s.276CC:-**

▪ **Relevant Bare Act:-**

**Failure to furnish returns of income.**

**276CC.** If a person wilfully fails to furnish in due time the return of fringe benefits which he is required to furnish under sub-section (1) of [section 115WD](#) or by notice given under sub-section (2) of the said section or [section 115WH](#) or the return of income which he is required to furnish under sub-section (1) of [section 139](#) or by notice given under clause (i) of sub-section (1) of [section 142](#) or [section 148](#) or [section 153A](#), he shall be punishable,—

(i) in a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds twenty-five hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with imprisonment for a term which shall not be less than three months but which may extend to two years and with fine:

**Provided** that a person shall not be proceeded against under this section for failure to furnish in due time the return of fringe benefits under sub-section (1) of [section 115WD](#) or return of income under sub-section (1) of [section 139](#)—

(i) for any assessment year commencing prior to the 1st day of April, 1975; or

(ii) for any assessment year commencing on or after the 1st day of April, 1975, if—

(a) the return is furnished by him before the expiry of the assessment year; or

(b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees.

**Punishment not to be imposed in certain cases.**

**278AA.** Notwithstanding anything contained in the provisions of [section 276A](#), [section 276AB](#), or [section 276B](#), no person shall be punishable for any failure referred to in the said provisions if he proves that there was reasonable cause for such failure.

**Presumption as to culpable mental state.**

**278E.** (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

*Explanation.*—In this sub-section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

**Prosecution to be at instance of <sup>13</sup>[Principal Chief Commissioner or] Chief Commissioner or <sup>13</sup>[Principal Commissioner or] Commissioner.**

**279.** (1) A person shall not be proceeded against for an offence under [section 275A](#), [section 275B](#), [section 276](#), [section 276A](#), [section 276B](#), [section 276BB](#), [section 276C](#), [section 276CC](#), [section 276D](#), [section 277](#), [section 277A](#) or [section 278](#) except with the previous sanction of the <sup>13</sup>[Principal Commissioner or] Commissioner or Commissioner (Appeals) or the appropriate authority:

**Provided** that the <sup>13</sup>[Principal Chief Commissioner or] Chief Commissioner or, as the case may be, <sup>13</sup>[Principal Director General or] Director General may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of proceedings under this sub-section.

*Explanation.*—For the purposes of this section, "appropriate authority" shall have the same meaning as in clause (c) of [section 269UA](#).

(1A) A person shall not be proceeded against for an offence 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 clause (iii) of sub-section (1) of [section 271](#) has been reduced or waived by an order under [section 273A](#).

(2) Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by the <sup>13</sup>[Principal Chief Commissioner or] Chief Commissioner or a <sup>13</sup>[Principal Director General or] Director General.

(3) Where any proceeding has been taken against any person under sub-section (1), any statement made or account or other document produced by such person before any of the income-tax authorities specified in clauses (a) to (g) of [section 116](#) shall not be inadmissible as evidence for the purpose of such proceedings merely on the ground that such statement was made or such account or other document was produced in the belief that the penalty imposable would be reduced or waived, under [section 273A](#) or that the

offence in respect of which such proceeding was taken would be compounded.

*Explanation.*—For the removal of doubts, it is hereby declared that the power of the Board to issue orders, instructions or directions under this Act shall include and shall be deemed always to have included the power to issue instructions or directions (including instructions or directions to obtain the previous approval of the Board) to other income-tax authorities for the proper composition of offences under this section.

▪ **Conclusion:-**

If return of income is filed after the end of the assessment year then department is initiating the prosecution u/s. 276CC subject to condition that self assessment tax was payable.

Though same won't be tenable, as willful failure to file the return of income is necessary. But onus to prove the fact that there was no willful failure shall lie on the assessee (sec.278E).

- **No penalty u/s.271(1)(c) if no clear cut finding is made whether penalty is for the concealment of Income or for the furnishing inaccurate particulars:-**

If no clear cut finding is made whether penalty is levied for concealment of Income or for furnishing inaccurate particulars, penalty under section 271(1)(c) should be deleted.

- i) ***Manu Engg. Works [1980] 122 ITR 306 (GUJ.)***  
The Division Bench in the case of *Manu Engg. Works [1980] 122 ITR 306 (GUJ.)* has observed and held as under;

"We find from the order of the Inspecting Assistant Commissioner, in the penalty proceedings, that is, the final conclusion as expressed in para. 4 of the order; 'I am of the opinion that it will have to be said that the assessee had concealed its income and/or that it had furnished inaccurate particulars of such income'. Now, the language of 'and/or' may be proper in issuing a notice as to penalty order or framing of charge in a criminal case or a quasi-criminal case, but it was incumbent upon the Inspecting Assistant Commissioner to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income had been furnished by the assessee. No such clear-cut finding was reached by the Inspecting Assistant Commissioner and, on that ground alone, the order of penalty passed by the Inspecting Assistant Commissioner was liable to be struck down."

- ii) ***New Sorathin Engg. Co. v. CIT [2006] 155 taxman 513 (Guj.)***.

Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income - Assessment year 1981-82 - Whether where penalty order and order of Commissioner (Appeals) showed that no clear-cut finding had been reached as to whether penalty under section 271(1)(c) was being levied for concealment of particulars of income by assessee or whether any inaccurate particulars of income had been furnished, order of penalty could not be sustained - Held, yes

- iii) ***CIT v. Whiteford India Ltd. [2013] 38 taxmann.com 15 (Guj.)***

In absence of clear finding of Assessing Officer whether assessee is guilty of concealment of income or furnishing incorrect particulars of income, penalty levied under section 271(1)(c) cannot be sustained.

Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income [Condition precedent] - Whether where no clear finding was recorded by Assessing Officer whether assessee was guilty of concealing income and/or furnishing inaccurate particulars of income, Tribunal was justified in deleting penalty under section 271(1)(c) levied by Assessing Officer - Held, yes [Para 4] [In favour of assessee]

iv) **CIT v. Jyoti Ltd. [2013] 34 taxmann.com 65 (Guj.)**

Where Assessing Officer in order of penalty did not come to a clear finding regarding penalty being imposed on concealment of income or on furnishing inaccurate particulars of income, Tribunal was justified in setting aside impugned penalty order.

Section 271(1)(c) of the Income-tax Act, 1961 - Penalty - For concealment of income [Satisfaction of Assessing Officer] - In course of assessments Assessing Officer disallowed assessee's claim of payment of commission - Such disallowance was made on ground that assessee could not even obtain confirmation from commission recipient - Assessing Officer also passed a penalty order under section 271(1)(c) - Tribunal set aside penalty order holding that, in order of penalty, Assessing Officer had not given a clear finding whether penalty was imposed on assessee for having concealed particulars of income or having furnished inaccurate particulars of income - Whether since Assessing Officer in order of penalty did not come to a clear finding regarding penalty being imposed on concealment of income or on furnishing inaccurate particulars of income, Tribunal was justified in setting aside impugned penalty order - Held, yes [Para 7] [In favour of assessee]

v) **Mitsu Industries Ltd. .v. DCIT(2014) 112 DTR 273(Guj.)(HC)**

S. 271(1)(c) : Penalty–Concealment–In the absence of a clear-cut finding by the AO as to whether it is a case of 'concealment' or 'furnishing inaccurate particulars', penalty cannot be levied.

It is incumbent upon the AO to come to a positive finding as to whether there was concealment of income by the assessee or whether any inaccurate particulars of such income have been furnished by the assessee. In the absence of a clear-cut finding reached by the AO, and, on that ground alone, the order of penalty passed by the AO is liable to be struck down ( T.A. No. 216 of 2004, dt. 16.10.2014.)(AY. 1992-93)



Similar judgments are pronounced by the Hon'ble Tribunal in following cases also: -

- i) Ganpatibhai M Mistry Furnishers P. Ltd. v. ACIT (ITA No.505/Ahd/2009)
- ii) Krishna Developers v. ITO (ITA No.4447, 4448 and 4449/Ahd/2007)