369.4-2 *JUDICIAL RULINGS* - One should note the following—

■ *Mistake left untouched* - Where mistake in original assessment is left untouched in subsequent reassessment, period of limitation should be counted from the date of original assessment and not from the date of reassessment— *Mettur Chemical & Industrial Corpn. Ltd.* v. *CIT*[1977] 110 ITR 822 (Mad.).

■ *Partial revision under section 264* - Where the Assessing Officer's order was only partially revised under section 264 and the assessee sought rectification of an item which was not the subject-matter of revision, the period of limitation for rectification would be counted from the date of Assessing Officer's original order and not from date of revision— *Saran Engg. Co. Ltd.* v. *CIT*[1983] 143 ITR 765 (All.).

Therefore so long as the original order remains unaffected and does not merge with the appellate order, the limitation will run from the date of the original order and not from the date when Assessing Officer has given effect to the order of the appellate authority— *CIT* v. *Shaw Wallace & Co. Ltd.* [1993] 199 ITR 105 (Cal.).

■ *Issue of demand notice* - Limitation period is applicable only to making of order and not to issue of demand notice— *S.T. Velu* v. *CIT*[1958] 33 ITR 463 (Mad.).

■ *Condonation of delay* - Question whether there was sufficient cause for condonation of delay in rectification application or not, is a matter within discretion of the Board and no oral hearing in such a case is necessary— *A.P. Sivaraman* v. *ITO*[1994] 209 ITR 36 (Ker.).

369.5 ***Technical formalities*** - The following points should be noted—

■ The order of rectification should be in writing.

■ Where the rectification has the effect of enhancing tax liability or reducing refund then the concerned income-tax authority should follow the following steps—

1. Before rectifying the mistake a notice should be given to the assessee a reasonable opportunity of being heard should be given.

2. After passing the rectification order the Assessing Officer shall serve on the assessee a notice of demand.

■ Where the rectification has the effect of reducing the assessment, the Assessing Officer shall make any refund which may be due to the assessee.

369.6 ***Frequently asked questions*** - The following are some of the frequently asked questions—

369.6-1 *IS IT POSSIBLE TO TAKE ACTION UNDER SECTIONS 143(2) AND 154 SIMULTANEOUSLY* - A notice under section 143(2) is normally issued to ensure that the assessee has not understated the income or has not computed excessive loss or underpaid the tax. It is only on consideration of the matter and on being satisfied that it is necessary or expedient to do so that the Assessing Officer issues the notice under section 143(2). Once that has been done, the Assessing Officer has to proceed under sub-section (3) of section 143 and make an assessment of the total income or loss of the assessee. It is no doubt correct that an error apparent on the record can be corrected under section 154. However, if parallel proceedings are permitted it would only result in waste of time. It would serve no purpose. Thus, the Assessing Officer cannot invoke his jurisdiction under section 154 after notice under section 143(2) has been given to the assessee—*CIT* v. *Arihant Industrial Ltd.* [2002] 255 ITR 458 (Punj. & Har.).

However, the proceedings which are initiated under section 154 or 155 cannot be made a ground of defence for invalidating notice issued under section 147/148—*Dev Son (P.) Ltd.* v. *Union of India* [1991] 56 Taxman 122 (J&K).

369.6-2 *SECTION 147 OR SECTION 154 - WHICH ACTION IS APPROPRIATE* - If in a case requirements of both section 147 and section 154 are satisfied, the Assessing Officer can have recourse to either—*Bihar State Road Transport Corpn.* v. *CIT*[1976] 103 ITR 736 (Pat.), *Salem Provident Fund Society Ltd.* v. *CIT*[1961] 42 ITR 547 (Mad.).

369.6-3 *WHAT IS "MISTAKE APPARENT FROM RECORD"* - Under the provisions of section 154, there has to be a mistake apparent from the record. In other words, a look at the record must show that there has been an error and that error may be rectified. Reference to documents outside the record and the law is impermissible when applying the provisions of section 154—*CIT* v. *Keshri Metal (P.) Ltd.* [1999] 237 ITR 165 (SC). A mistake apparent from record must be an obvious and patent mistake, it must not involve a debatable point of law— *T.S. Balram, ITO* v. *Volkart Bros.* [1971] 82 ITR 50 (SC). For instance, where controversy can be resolved only by way of a complicated process of investigation, recourse cannot be taken to section 154— *CIT* v. *Delhi Cement Stockists* [1971] 81 ITR 515 (Delhi). If, on a question of construction on a point of law, two views are possible, then the view which is in favour of the assessee has to be taken and, therefore no rectification can be done by invoking section 154— *CIT* v. *Indian Steel & Wire Products Ltd.* [1991] 192 ITR 252 (Cal.).

If there is a divergence of opinion among High Courts on a particular controversy, rectification cannot be resorted to by merely applying or following decision of jurisdictional High Court [if debate was settled subsequently by the Supreme Court, rectification is permissible]— *CIT* v. *Orient Paper Industries Ltd.* [1994] 208 ITR 158 (Cal.), *V.R. Soni* v. *CIT* [1979] 117 ITR 838 (Cal.), *Veena Theatres* v. *Union of India* [1977] 109 ITR 748 (Pat.), *Raja Hari Chand Raj Singh* v. *CIT* [1978] 114 ITR 727 (All.). However, a contrary opinion has been expressed by Allahabad High Court in *Omega Sports & Radio Works* v. *CIT* [1982] 134 ITR 28, where it was held that an issue concluded by decision of a High Court is no longer debatable in that State, similar views were expressed in *CIT* v. *Premier Polymers (P.) Ltd.* [1992] 107 CTR (Cal.) 310 and *CIT* v. *Ramlal Babulal* [1998] 148 CTR (Punj. & Har.) 643.

- One should also keep in view the following -

1. Rectification under section 154 is not obligatory on the part of the Assessing Officer if clear data is not available— *Anchor Pressings (P.) Ltd.* v. *CIT* [1986] 161 ITR 159 (SC).

2. Rectification is not confined to clerical or arithmetical error only— *N.V.N. Nagappa Chettiar* v. *ITO* [1958] 34 ITR 583 (Mad.).

3. Whatever cannot be done under section 143(1)(*a*), it can also not be done under section 154 read with section 143(1)(*a*)—***CIT*** v. ***Siemens AG*** [2004] 90 ITD 117 (Mum.).

4. Rectification to treat certain amount, shown by assessee as trade discount, as "commission" for purpose of TDS, is not justified—***Shree Baidyanath Ayurved Bhawan Ltd.*** v. ***CIT*** [2004] 3 SOT 489 (Kol.).

5. If interest under section 234A/234B/234C is chargeable, failure to charge it will be a mistake apparent from record—***Plasser India (P.) Ltd.*** v. ***CIT*** [2004] 84 TTJ (Delhi) 1024. However, interest under section 234A cannot be charged by invoking section 154 after completing reassessments where original regular assessment under section 143(3)/144/143(1)(*a*) has already been made but no such interest was charged at that time—***Kangra Bajri Co.*** v. ***CIT*** [2004] 90 ITD 124 (Chd.).

6. Where Assessing Officer, while framing assessment under section 143(3), considered explanation of the assessee and after applying his mind, allowed his claim for the higher depreciation, successor Assessing Officer cannot invoke section 154 to reduce depreciation—***Varindra Construction*** v. ***ITO*** [2004] 1 SOT 152 (Asr.)

7. Whenever loss or *nil* income returned by an assessee is converted into positive income by way of rectification, the assessee assumes right to make claims in course of rectification proceedings regarding deductions available to it only against positive income—***Associated Hotels Ltd.*** v. ***CIT*** [2005] 2 SOT 93 (Mum.).

8. The Kerala High Court in ***R. Lakshmi, S.T. Reddiar & Sons*** v. ***CIT*** [2006] 156 Taxman 297 held that every change in opening written down value shall be a cause for action under section 154 at the instance of the Assessing Officer to give consequential effect in the allowance of depreciation from year to year, no matter even if the assessee has not made such claim in the return furnished.

9. Assessing Officer cannot, in exercise of his powers under section 154, amend an intimation issued under section 143(1) with regard to a matter which he cannot do or process under section 143(1) itself—***Packers (India)*** v. ***ITO*** [2006] 99 ITD 383 (Ahd.). However, he is well-competent to rectify any mistake in the intimation under section 143(1) which is brought to his notice by the assessee—***CIT*** v. ***Justice Dilip Kumar Seth*** [2006] 98 ITD 241/101 TTJ 90 (Kol.).

Where order passed is not in conformity with law declared by Supreme Court, it has to be treated as suffering from a mistake apparent from record—***Dinosaur Steels Ltd.*** v. ***CIT*** [2007] 288 ITR 476 (Mad.).

369.6-4 *WHETHER RETROSPECTIVE AMENDMENT OF LAW BY PARLIAMENT OR SUBSEQUENT RULING OF SUPREME COURT AMOUNTS TO MISTAKE APPARENT FROM RECORD* - If assessment order is plainly and obviously inconsistent with the specific and clear provision amended retrospectively, indisputably there is a mistake apparent from record—*CIT* v. *E. Sefton & Co. (P.) Ltd.* [1989] 179 ITR 435 (Cal.).

If the Supreme Court has subsequently reversed or modified the existing interpretation of law in another case, it does not render earlier judgment open to review nor does it constitute a mistake or error apparent on face of record envisaged under section 154. The *Explanation* added to rule 1 of Order 47 of Code of Civil Procedure, in order to define a mistake or error apparent on face of record, is equally applicable to section 154—***Geo Miller & Co. Ltd.*** v. ***CIT*** [2004] 134 Taxman 552 (Cal.), ***Smriti Properties Pvt. Ltd.*** v. ***Settlement Commission*** [2005] 149 Taxman 386 (Cal.).

Likewise a later judgment of jurisdictional High Court cannot give rise to a mistake apparent from record in order passed by Tribunal earlier—***Trilok Ship Breakers (P.) Ltd.*** v. ***CIT*** [2003] 84 ITD 48 (Mum.).

369.6-5 *WHAT IS MEANING OF "RECORD"* - Record does not mean only the order of assessment but it comprises of all proceedings on which assessment order is based— *Maharana Mills (P.) Ltd.* v. *ITO* [1959] 36 ITR 350 (SC). Tribunal's finding is a part of record of appeal so as to empower the Commissioner to rectify his earlier order—*Mahendra Mills Ltd.* v. *P.B. Desai, AAC* [1975] 99 ITR 135 (SC). Record of assessment of other assessment years can also be looked into— *Indra Singh & Sons (P.) Ltd.* v. *Union of India* [1967] 64 ITR 501 (Cal.), *Upasana Hospital & Nursing Home* v. *CIT* [2002] 120 Taxman 545 (Ker.). Assessment records of firm and partners are part of the same record— *Devendra Prakash* v. *ITO* [1963] 47 ITR 501 (All.). But mistake apparent from record of firm is not a mistake apparent from record of its partners— *Swaran Yash* v. *CIT* [1982] 138 ITR 734 (Delhi).

369.6-6 *WHETHER ISSUE OF NOTICE IS MUST* - The action under section 154 may be taken in favour of the taxpayer without any notice to him but if the action has the effect of enhancing an assessment or reducing the refund, the Assessing Officer must send a notice to the assessee and give him a reasonable opportunity of being heard—*M. Chockalingam & M. Meyyappan* v. *CIT* [1963] 48 ITR 34 (SC). The notice to the assessee may be express or constructive. It is not always necessary to serve the assessee with a notice if he is aware of the rectification proceedings—*Mulchand* v. *CIT* [1977] 107 ITR 932 (MP).

369.6-7 *WRIT PETITION - WHETHER POSSIBLE* - Remedies available under Income-tax Act against issuance of notice under section 154 are effective remedies and writ petition to quash a notice under section 154 without exhausting such remedies, is not maintainable— *V.K. Construction Works Ltd.* v. *CIT* [1995] 215 ITR 26 (Punj. & Har.).

Time limit for completion of assessments/reassessments [Sec. 153]*

370. Section 153 prescribes time limit for completion of assessment/reassessment under section 143, 144 or 147 as follows :

*Similar rules are applicable for assessment/reassessment of fringe benefits.

370.1 ***Assessment under section 143 or 144 [Sec. 153(1)]*** - An assessment under section 143 or 144 or 115WE or 115WF shall be completed within 21 months* from the end of the relevant assessment year (regardless of the fact whether it is a case of concealment).

For instance, assessment under section 143 or 144 or 115W or 115WF for the assessment year 2008-09 should be completed up to December 31, 2010.

■ With effect from June 1, 2007, the time-limit specified under section 153 in cases where reference is made to Transfer Pricing Officer (TPO) shall be extended by 12 months. However, the extended time-limit is applicable only in the following cases—

Case 1 - The case pertains to the assessment year 2005-06 or any of the subsequent assessment years. Reference to TPO under section 92CA(1) is made before June 1, 2007 but order under section 92CA(3) has not been made by the TPO before June 1, 2007.

Case 2 - The case pertains to the assessment year 2005-06 or any of the subsequent assessment years. Reference to TPO under section 92CA(1) is made on or after June 1, 2007.

Provisions illustrated - For the assessment year 2007-08, the Assessing Officer makes a reference to TPO under section 92CA on June 1, 2008. TPO can pass order any time before November 1, 2010. The Assessing Officer should complete the assessment at any time on or before December 31, 2010 in conformity with the arm's length price as so determined by the TPO.

370.2 ***Assessment or reassessment under section 147 [Sec. 153(2)]*** - An assessment or reassessment under section 147 must be completed within 9 months** from the end of the financial year in which notice under section 148 was served.

For instance, for the assessment year 2004-05 assessment was completed under section 143(3) on January 30, 2005. Notice under section 148 was issued on March 26, 2007 to include an unassessed income of Rs. 1.20 lakh. The notice was served on the assessee on April 4, 2007. In this case reassessment under section 147 must be completed by December 31, 2008 (*i.e.*, within 9 months from the end of the financial year 2007-08 in which notice is served). It is not 9 months from the end of the financial year 2006-07 in which notice was issued—***Prakash Electric Co.*** v. ***ITO*** [2008] 22 SOT 382 (Bang.).

■ With effect from June 1, 2007, the time-limit specified under section 153 in cases where reference is made to Transfer Pricing Officer (TPO) shall be extended by 12 months. However, the extended time-limit is applicable only in the following cases—

Case 1 - Notice under section 148 is served on or after April 1, 2006. In the reassessment proceedings, a reference is made to TPO under section 92CA(1) before June 1, 2007 but order under section 92CA(3) has not been made by the TPO before June 1, 2007.

Case 2 - Notice under section 148 is served on or after April 1, 2006. In the reassessment proceedings, a reference is made to TPO under section 92CA(1) on or after June 1, 2007.

Provisions illustrated - Notice under section 148 is issued on March 29, 2007 for a case pertaining to the assessment year 2004-05. The notice is served on the assessee on April 1, 2007. In reassessment proceeding, a reference is made to TPO on June 15, 2008. The extended time-limit is available. TPO can pass the order at any time before November 1, 2009. The reassessment should be completed by the Assessing Officer on or before December 31, 2009 in conformity with the arm's length price as determined by the TPO.

370.3 ***Fresh assessment [Sec. 153(2A)]*** - Section 153(2A) is applicable if fresh assessment is made in pursuance of an order under section 250, 254, 263 or 264 setting aside or cancelling an assessment.† In such cases fresh assessment can be made within the time-limit given below :

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*If the assessment year is 2003-04 (or any of the earlier years), assessment should be completed in 24 months from the end of the assessment year.

**If the notice is served before April 1, 2005, the time-limit is 12 months.

†Section 153(2A) is not applicable if an order is not set aside or cancelled.

Situations	Time-limit
■ If assessment is set aside or cancelled by virtue of an order of Commissioner (Appeals) under section 250 or the order of Tribunal under section 254	Fresh assessment shall be completed within 9 months‡ from the end of the financial year in which order under section 250 or 254 is received by the Chief Commissioner or Commissioner
■ If assessment is set aside or cancelled by virtue of an order of Commissioner under section 263 or 264	Fresh assessment shall be made within 9 months† from the end of the financial year in which order under section 263 or 264 is passed by the Chief Commissioner or Commissioner.

■ With effect from June 1, 2007, the time-limit specified under section 153 in cases where reference is made to Transfer Pricing Officer (TPO) shall be extended by 12 months. However, the extended time-limit is applicable only in the following cases—

Case 1 - The order under section 254 is received by the Commissioner or the order under section 263 or 264 is passed by the Commissioner on or after April 1, 2006 for setting aside or cancelling the assessment. During the proceeding for fresh assessment a reference is made to TPO under section 92CA(1) before June 1, 2007 but order under section 92CA(3) has not been made by the TPO before June 1, 2007.

Case 2 - The order under section 254 is received by the Commissioner or the order under section 263 or 264 is passed by the Commissioner on or after April 1, 2006 and during the proceeding for fresh assessment a reference is made to TPO under section 92CA(1) on or after June 1, 2007.

Provisions illustrated - Under section 263, Commissioner cancels the assessment pertaining to the year 2006-07. The order is passed by the Commissioner on April 10, 2007 directing the Assessing Officer to make fresh assessment. In the proceedings for fresh assessment, a reference is made to TPO on June 1, 2008. The TPO should pass his order before November 1, 2009. The extended time-limit is available. Consequently, the assessment should be completed by the Assessing Officer on or before December 31, 2009 in conformity with the arm's length price as determined by the TPO.

370.4 ***Assessment/reassessment to give effect to a direction [Sec. 153(3)]*** - The table given below highlights the scope of sub-sections (2A) and (3) of section 153 :

Section in which order is given	Nature of order	Time-limit given by section 153(2A) for fresh assessment	No time-limit under section 153(3) for reassessment
250, 254, 263, 264	Setting aside or cancelling an assessment	9 month time-limit for fresh assessment *see* para 370.3	—
250, 254, 260, 262, 263 or 264 or an order of any Court otherwise than by way of appeal/reference under the Act	Giving a direction for assessment, reassessment or recomputation	—	No time-limit for assessment/reassessment, or recomputation in the case of assessee or any other person—*see* para 370.4-1
147	Reassessing firm which requires revision of partner's assessment		No time-limit

370.4-1 *NO TIME-LIMIT IN CASE OF A FINDING OR DIRECTION* - In the following cases, assessment, reassessment and recomputations can be completed at any time [subject to provisions of section 153(2A)] :

a. where a fresh assessment is made under section 146 ;

b. where the assessment, reassessment or recomputation is made on the assessee or any person [*see* para 370.4-1a] in consequence of or to give effect to any finding or direction [*see* para 370.4-1b] contained in an order of appeal or revision under section 250, 254, 260, 262, 263 or 264 or in an order of any Court in a proceeding otherwise than by way of appeal or reference under the Act ;

†If order is received by the Commissioner or passed by the Commissioner before April 1, 2005, time-limit is 12 months.

c. where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147.

In aforesaid three cases, no time limitation applies. The only exception is where an assessment is set aside or cancelled in appeal/revision [in such case fresh assessment can be made only within the time prescribed by section 153(2A)—*see* para 370.3].

370.4-1a "ANY PERSON" - MEANING OF - Modification or setting aside of assessment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the HUF or the individual, as the case may be. In such cases though the latter are not *eo nomine* parties to the appeal, their assessment depend upon the assessments on the former. These instances are only illustrative. Therefore, the expression "any person" in the setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal — *ITO* v. *Murlidhar Bhagwan Das* [1964] 52 ITR 335 (SC).

In other words, a direction or finding given against "any other person" will be operative (*i.e.*, an assessment/reassessment can be made on the "any other person" on the basis of such finding or direction without any time limit) only if :

a. such person is intimately connected with the assessment as observed in *ITO* v. *Murlidhar Bhagwan Das* (*supra*) ; and

b. finding/direction is necessary for disposal of appeal/reference, etc.

In the case of a person other than the assessee who is not intimately connected with the assessment, a valid finding or direction cannot be given against them—*see CIT* v. *S. Raghubir Singh Trust* [1980] 123 ITR 438 (SC), *N.K. Patni* v. *ITO* [1983] 139 ITR 972 (All.).

370.4-1b EXPLANATIONS 2 AND 3 TO SECTION 153 - *Explanations 2* and *3* to section 153 are applicable in the following situations :

Explanation 2	*Explanation 3*
1. A finding or direction is given in an order under sections 250, 254, 260, 262, 263, 264 or any order of any Court	*1.* A finding or direction is given in an order under sections 250, 254, 260, 262, 263, 264 or any order of any Court
2. Under such order an income is excluded from the total income of the assessee for an assessment year	*2.* Under such order any income is excluded from total income of one person and *held to be income of another person*
3. An assessment of such income for another assessment year may be made at any time (even notice under section 148 can be issued at any time) to give effect to any finding/direction contained in such order.	*3.* An assessment of such income on such other person may be made at any time (even notice under section 148 may be issued at any time) to give effect to such finding/direction
	4. Such other person should be given an opportunity of being heard before passing on such other person.

370.5 ***Computation of period of limitation [Expln. 1 to Sec. 153]*** - In computing the period of limitation, the following time shall be excluded :

a. the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be re-heard under the proviso to section 129 ; or

b. the period during which the assessment proceeding (*i.e*, the process of assessment starting from the state of filing of return till making order of assessment) is stayed by an order or injunction of any Court ; or

c. the time taken in getting withdrawal of approval under section 10(*21*), (*22B*), (*23A*), (*23B*), (*23C*)(*iv*)/(*v*)/(*vi*)/(*via*) [*see* para 365.2, point 3]; or

d. the period commencing from the date on which the Assessing Officer directs the assessee to get his accounts audited under section 142(2A) and ending with the date on which the assessee is required to furnish audit report ; or

e. the period (not exceeding 60 days) commencing from the date on which the Assessing Officer received the declaration under section 158A(1) and ending with the date on which the order under section 158A(3) is made by him ; or

f. in a case where an application made before the Settlement Commission under section 245C is rejected by it or is not allowed to be proceeded with by it, the period commencing from the date on which such application is made and ending with the date on which the order under section 245D(1) is received by the Commissioner under section 245D(2); or

g. the period commencing from the date on which an application is made before the Authority for Advance Rulings and ending with the date on which the order rejecting the application or, as the case may be, the date on which the advance ruling pronounced by it is received by the Commissioner.

■ The proviso in *Explanation 1* provides that where immediately after the exclusion of the time or period mentioned in the *Explanation*, the period of limitation referred to in sub-sections (1), (2) and (2A) of section 153 available to the Assessing Officer for making orders under those sub-sections is less than 60 days, the remaining period shall be extended to 60 days and the aforesaid period of limitation shall be deemed to be extended accordingly.

■ One should also keep in view the following—

1. Extension of time granted by the Assessing Officer for the filing audit report at the request of the auditors cannot be excluded in computing period of limitation, as any request for the extension of period to file audit report need to be made by the assessee and period extended on the request of the assessee alone can be excluded in computing period of limitation—***CIT*** v. ***Popular Automobiles*** [2004] 90 ITD 333 (Cochin).

2. Once it is held that direction for getting the special audit under section 142(2A) is legally sustainable and is rightly issued, then the period spent in special audit has to be excluded for making an assessment—***CIT*** v. ***Vijay Kumar Rajendra Kumar & Co.*** [2005] 142 Taxman 21 (MP).

3. Under section 153, *Explanation* 1(*ii*), only such period is to be excluded during which the assessment proceedings are stayed. There is no provision in the Act for excluding the period taken for obtaining a copy of Court's order—***Dilip S. Dahanukar*** v. ***CIT*** [2004] 90 ITD 525 (Mum.).

370.6 *Other judicial rulings* - One should also keep in view the following judicial rulings—

■ GENERAL

❑ *Communication* - Time-limit is only for making assessment order, it may be communicated later—*Esthuri Aswathiah* v. *CIT* [1963] 50 ITR 764 (Mys.).

❑ *Assessment includes determination of tax* - Assessment to be completed also includes determination of tax before limitation period—*Mohendra J. Thacker & Co.* v. *CIT* [1983] 139 ITR 793 (Cal.), *CIT* v. *Purshottamdas T. Patel* [1994] 209 ITR 52 (Guj.).

■ SUB-SECTION (3) OF SECTION 153

❑ *Any Court* - 'An order of any Court' means an order of any and every Court in the country. If there is an order of a Court, whatever be its status, then the bar of limitation is automatically lifted—*T.M. Kousali* v. *Sixth ITO* [1985] 155 ITR 739 (Kar.).

❑ *'In consequence of'* - Words 'in consequence of or to give effect to' have to be collated with, and cannot enlarge the scope of the findings or direction—*ITO* v. *Murlidhar Bhagwan Dass* [1964] 52 ITR 335 (SC).

❑ *'Finding' or 'direction'* - 'Finding' which can lift bar of limitation is limited to matters which appellate authority is called upon to decide—*Pt. Hazari Lal* v. *ITO* [1960] 39 ITR 265 (All.). 'Finding' must be necessary for disposal of appeal—*Rajinder Nath* v. *CIT* [1979] 120 ITR 14 (SC). For instance, an order dropping proceedings under section 263 is not an order containing 'direction' or 'finding' within the meaning of section 150—*Raj Kishore Prasad* v. *ITO* [1992] 195 ITR 438 (All.).

■ *EXPLANATION 3* OF SECTION 153

❑ *Opportunity of being heard* - *Explanation 3* embraces within its scope persons other than the assessee as well but it lays down conditions that such third party should be given an opportunity of

being heard before order depriving him of right of pleading his limitation is passed—*Gupta Traders* v. *CIT* [1982] 135 ITR 504 (All.).

❑ *Director of company* - Examination of director of company cannot be equated with opportunity being given to company of being heard—*C.A. Gulanikar, ITO* v. *Ramnarain Sons (P.) Ltd.* [1979] 119 ITR 83 (Bom.).

Provisions of section 155

371. Provisions regarding time-limit under section 155 are summarised in the table given below :

155(1)/(2)	Amending assessment order of partner of firm or member of AOP/BOI for inclusion of correct share from firm/ AOP/BOI	Within 4 years from end of financial year in which final order is passed in case of firm/ AOP/BOI
155(4)	Recomputing total income for succeeding year(s) in respect of loss or depreciation recomputed under section 147	Within 4 years from end of financial year in which order under section 147 is passed
155(4A)	Withdrawing investment allowance allowed under section 32A, if —	
	(*a*) asset is sold within 8 years	Within 4 years from end of previous year in which sale took place
	(*b*) investment allowance reserve is not utilised for acquiring new asset within 10 years	Within 4 years from end of said 10 years
	(*c*) reserve is misutilised before expiry of 10 years	Within 4 years from end of previous year in which amount is so misutilised
155(5)	Withdrawing development rebate under section 33 if asset is sold within 8 years or reserve is misutilised	Within 4 years from end of previous year in which sale took place or reserve is so misutilised
155(5A)	Withdrawing development allowance under section 33A if land is sold within 8 years or reserve is misutilised	Within 4 years from end of previous year in which sale took place or reserve is so misutilised.
155(5B)	Recomputing total income where weighted deduction in respect of expenditure on scientific research under section 35(2B) is deemed to have been wrongly allowed (applicable up to March 31, 1992)	Within 4 years from end of previous year in which period allowed for completion of scientific research programme has expired
155(7)	Recomputing distributable income and additional tax liability under section 104	Within 4 years from end of financial year in which final order was passed
155(7B)	Recomputing deemed capital gains under section 47A	Within 4 years from end of previous year in which capital asset is converted into stock-in-trade or in which parent company/holding company ceases to have 100 per cent shareholding in subsidiary company
155(10A)	Amending order of assessment so as to exclude unadjusted amount of capital gain on long-term capital asset not chargeable under section 54E(1)	Within 4 years from end of financial year in which original assessment is made
155(11)	Amending order of assessment so as to exclude unadjusted amount of capital gain not chargeable by virtue of section 54H	Within 4 years from the end of the previous year in which compensation was received by the assessee
155(12)	Amending order of assessment so as to exclude income not chargeable to tax under section 80-O	Within 4 years from the end of the previous year in which income is received in, or brought into, India (however, the period from April 1, 1988 to September 30, 1991 shall be excluded)
155(13)/ (11A)	Amending order of assessment so as to allow deduction under section 10A or 10B or 10BA or 80HHB or 80HHC or 80HHD or 80HHE or 80-O or 80R or 80RR or 80RRA in respect of late remittance of foreign exchange after the approval of RBI	Within 4 years from the end of previous year in which such income is so received in, or brought into India
155(14)	Amending order of the assessment so as to give tax credit in respect of tax deducted at source or (with effect from April 1, 2007) collected at source	Within 4 years from the end of the financial year in which the order sought to be amended was passed
155(15)	Amending the order of assessment so as to compute capital gains by taking full value of consideration to be the value as revised in appeal, revision, etc., as per provisions of section 50C	Within 4 years from the end of the previous year in which the order revising the value was passed in the appeal or revision or reference

155(16)	Amending order of assessment so as to compute capital gain by taking into consideration compensation as ordered by the Court, Tribunal on authority.	Within 4 years from the end of the previous year in which the order reducing the compensation is passed by the Court, Tribunal or any other authority
155(17)	Amending order of assessment so as to recalculate amount deductible under section 80RRB in case the name of the assessee has been excluded from patents register.	Within 4 years from the end of the previous year in which the order of the Controller or High Court is passed

Problems on return of income and assessment

372-P1 *P Co. Ltd. is due to submit its return under section 139(1) by September 30, 2008. According to the draft return prepared by it the gross amount of tax payable works out at Rs. 10 lakh while it had paid Rs. 6 lakh by way of advance tax and Rs. 80,000 by way of deduction of tax at source. It wants to take time for 6 months for submission of the return. P Co. Ltd. expects to earn income @ 30 per cent per annum on money employed by it in the business against which of course it will have to pay interest @ 15 per cent to the bank and so it feels that it is worthwhile for it to delay the submission of the return by six months. Advise.*

SOLUTION : In this case the company wants to postpone payment of self-assessment tax of Rs. 3,20,000 (i.e., Rs. 10,00,000—Rs. 6,00,000 — Rs. 80,000) for 6 months. From the given information it appears that the company has to borrow Rs. 3,20,000 @ 15% per annum from a bank for the payment of tax. In case payment of tax is postponed for 6 months, the same money can be utilised for business purposes which will yield pre-tax return of 30% per annum. To take the decision whether to postpone tax payment, the assessee should make the following calculations :

	If return is filed on	
	September 30, 2008 Rs.	March 31, 2009 Rs.
Interest payment to bank (i.e., 15% of Rs. 3,20,000 × 1/2)	(-)24,000	(-)24,000
Deduction under section 37(1), tax saving on (Rs. 24,000 @ 33.99%)	-	(+)8,158
Business income on Rs. 3,20,000 (i.e., 30% of Rs. 3,20,000 × 1/2)	-	(+)48,000
Extra tax on Rs. 48,000 @ 33.99%	-	(-)16,315
Interest on Rs. 3,20,000 for late filing of return under section 234A @ 1% per month		(-)19,200
Extra interest on Rs. 3,20,000 for short payment of advance tax under section 234B		(-)19,200
Net result	(-)24,000	(-)22,557

The difference between the two calculations is Rs. 1,443. Moreover, if the company does not have any deduction under sections 10A, 10B, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID and 80-IE, it can submit the return on March 31, 2009 to get an extra income of Rs. 1,443.

372-P2 *The Assessing Officer issued a notice on December 3, 2008 calling upon an assessee to file the return for the assessment year 2008-09. In response to the notice the assessee furnished a return of loss claiming the carry forward of :*

a. business loss ; and

b. depreciation.

State whether the assessee would be entitled to the benefit of carry forward as claimed in the return.

SOLUTION : The assessee has been issued a notice and he has furnished the return in response to the said notice. It is, therefore, clear that the assessee has not filed the return of loss voluntarily within the time allowed under section 139(1) read with section 139(3). Section 80 provides that no loss will be allowed to be carried forward and set off under section 72(1) unless such loss is determined in pursuance of a return filed in accordance with the provision of section 139(3). Therefore, the assessee will not be in a position to carry forward the business loss by virtue of the specific provisions of section 80. However, the assessee will be in a position to carry forward the unabsorbed depreciation. The benefits of carry forward of depreciation is governed by section 32(2). Unlike section 80, section 32(2) does not stipulate that the return should be filed within a particular time-limit in order that the assessee may get the benefit of carry forward.

372-P3 *What is the time limit in the cases given below :*

1. *Completion of assessment under section 143(3) for the assessment year 2006-07.*

2. *Suppose in* (1) supra *the Assessing Officer directs the assessee to get his accounts audited on November 11, 2008. The assessee is required to furnish audit report by December 8, 2008.*

3. *Completion of reassessment for the assessment year 2004-05 under section 147, notice under section 148 is issued on March 17, 2007 and served on the assessee on April 2, 2007.*

4. *Suppose in* (3) supra *reassessment proceedings have been stayed by the Rajasthan High Court from June 6, 2007 to November 10, 2008.*

5. *Suppose in* (3) supra *reassessment proceedings had been stayed by the Delhi High Court on November 20, 2008. The stay was, however, vacated by the Supreme Court on November 23, 2008.*

6. *Completion of fresh assessment for the assessment year 2005-06 (original order was passed under section 144 on March 22, 2007 ; the order was cancelled by the Commissioner under section 264 on March 20, 2008, directing the Assessing Officer to make fresh assessment ; Commissioner's order is received by the assessee on April 10, 2008).*

7. *Suppose in* (6) supra, *the proceeding of the fresh assessment has been stayed from October 10, 2008 to October 25, 2008.*

8. *Suppose in* (6) supra, *the proceeding of the fresh assessment has been stayed from November 10, 2008 to November 25, 2008 by the Supreme Court.*

9. *Suppose in* (6) supra, *the proceeding of the fresh assessment has been stayed from December 10, 2008 to March 3, 2009.*

10. *Reassessment of X Ltd. for the assessment year 1984-85 [on a reference for the assessment year 1992-93 by the Commissioner, the Calcutta High Court has given a finding that a receipt of Rs. 40,000 was taxable for the assessment year 1984-85 and not for 1992-93. This finding was given by the High Court on January 10, 2005].*

11. *Recomputation of income of X for the assessment year 1983-84 [on an appeal by X (HUF), the Supreme Court has directed that a business income of Rs. 76,000 pertains to X for the assessment year 1983-84 and not of X (HUF) ; the Court's judgment is given on December 10, 2008].*

SOLUTION :

1. The assessment for the assessment year 2006-07 shall be completed by December 31, 2008 (*i.e.*, within 21 months from end of the assessment year).

2. As stated in (1) *supra*, generally assessment for the assessment year 2006-07 shall be completed within 21 months. However, by virtue of *Explanation 1 (iii)* to section 153 the period commencing on November 11, 2008 and ending December 8, 2008 shall be excluded (*i.e.*, 27 days). The extended time-limit ends on January 27, 2009. If immediately after the exclusion of time (*i.e.*, on December 8, 2008), the remaining period of limitation (*i.e.*, from December 8, 2008 to January 27, 2009) for completion of assessment is less than 60 days, such remaining period shall be 60 days [proviso to section 153]. To put it differently, the Assessing Officer is given a minimum time of 60 days after submission of audit report. The assessment in this case can be completed by February 6, 2009 (*i.e.*, within at least 60 days after December 8, 2008).

3. Reassessment under section 147 shall be completed within 9 months from the end of the financial year in which notice under section 148 is served. Notice is served during the financial year 2007-08 and, consequently, the reassessment shall be completed by December 31, 2008.

4. By virtue of *Explanation 1 (ii)* to section 153, the period from June 6, 2007 to November 10, 2008 (523 days) shall be excluded. Consequently, the time-limit which expires on December 31, 2008 shall be extended by 523 days. Hence, the reassessment shall be completed by June 7, 2010.

5. The period of 3 days, when the proceeding was stayed by an order of the Court, shall be excluded and, consequently, the reassessment shall be completed by January 3, 2009. However, after vacation of the stay (*i.e.*, November 23, 2008), the Assessing Officer is given a minimum time of 60 days (proviso to section 153). Consequently, the reassessment in this case shall be completed by January 22, 2009.

6. By virtue of section 153(2A), fresh assessment in this case shall be completed by December 31, 2008, *i.e.*, within 9 months from the end of the financial year in which order under section 264 is passed (such order is passed on March 20, 2008).

7. The period from October 10, 2008 and October 25, 2008 (*i.e.*, 15 days) shall be excluded. Consequently, the fresh assessment shall be completed on or before January 15, 2009.

8. The period from November 10, 2008 to November 25, 2008 (*i.e.*, 15 days) shall be excluded. Consequently, the time-limit which expires on December 31, 2008 shall be extended to January 24, 2009 as follows :

a. January 15, 2009 (*i.e.*, an extension of 15 days from December 31, 2008); or

b. January 24, 2009 (*i.e.*, a minimum period of 60 days from November 25, 2008),

whichever is later.

9. The period from December 10, 2008 to March 3, 2009 (*i.e.*, 83 days) shall be excluded. Consequently, the time-limit which expires on December 31, 2008 shall be extended to May 2, 2009 as follows :

a. March 24, 2009 (*i.e.*, an extension of 83 days from December 31, 2008) ; or

b. May 2, 2009 (*i.e.*, a minimum period of 60 days from March 3, 2009),

whichever is later.

10. By virtue of *Explanation 2* to section 153 read with sections 153(3) and 150, a notice for reassessment under section 148 can be issued at any time and reassessment may be completed at any time.

11. By virtue of *Explanation 3* to section 153 read with sections 153(3) and 150, a notice for reassessment under section 148 can be issued at any time and reassessment may be completed at any time.

372-P4 *Discuss whether the following persons are required to submit return of income for the assessment year 2009-10 [indicate form number and due date] —*

Assessee	Net income Rs.	Amount of deduction under sections 10A, 10B, 10BA, 80C to 80U	Sources of income Rs.	Turnover/gross receipt Rs.
X Ltd.	*51,000*	*Nil*	*Business*	*40,80,000*
Y (70 years)	*1,30,000*	*95,010*	*Salary and property*	-
Mrs. Z	*1,80,000*	*7,000*	*Rent*	-
A Ltd.	*(-)30,000*	*Nil*	*Business*	*50,00,000*
B	*(-)20,000*	*Nil*	*Profession*	*45,00,000*
C	*(-)32,000*	*Nil*	*Capital gain*	-
D	*23,000*	*2,40,000*	*Pension*	-
E	*2,60,000*	*10,000*	*Business*	*38,00,000*
F	*75,000*	*25,000*	*Business*	*45,00,000*
G (64 years)	*75,000*	*76,000*	*Business*	*39,00,000*
H (30 years)	*90,000*	*61,000*	*Salary*	—
I (Firm)	*10,000*	*4,000*	*Business*	*41,00,000*
F (Firm)	*60,000*	*Nil*	*Business*	*34,00,000*

SOLUTION :

Assessee	Is it necessary to submit return under section 139(1) [see para 353]		Due date
	Yes or No	Form No.	
X Ltd.	Yes	ITR-6	September 30, 2009
Y	Yes	ITR-2	July 31, 2009
Mrs. Z	Yes	ITR-2	July 31, 2009
A Ltd.	Yes[2]	ITR-6	September 30, 2009
B	No[2]	ITR-4	September 30, 2009
C	No[2]	ITR-2	July 31, 2009
D	Yes	ITR-1	July 31, 2009
E	Yes	ITR-4	July 31, 2009
F	No	ITR-4	—
G	Yes	ITR-4	July 31, 2009
H	Yes	ITR-1	July 31, 2009
I (Firm)	Yes	ITR-5	September 30, 2009
F (Firm)	Yes	ITR-5	July 31, 2009

CHAPTER TWENTY

Penalties and prosecutions

Penalties for defaults in brief

373. An assessee has been made liable to penalty for the different defaults committed by him under the different provisions of the Act.

Section	*Nature of default*	*Minimum penalty*	*Maximum penalty*
1	*2*	*3*	*4*
140A(3)	Failure to pay whole or any part of income-tax and/or interest in accordance with the provisions of section 140A(1)	Such amount as the Assessing Officer may impose [Sec. 221(1)]	Tax in arrears
221(1)	Default in making payment of tax within prescribed time	Such amount as the Assessing Officer may impose	Tax in arrears
271(1)(*b*)	Failure to comply with a notice under section 142(1) or 143(2) or with a direction issued under section 142(2A)	Rs. 10,000 for each failure	Rs. 10,000 for each failure
271(1)(*c*)/(*d*)	Concealment of the particulars of income or furnishing inaccurate particulars of income or concealment of particulars of fringe benefits	100% of tax sought to be evaded	300% of tax sought to be evaded
271A	Failure to keep or maintain books of account, documents, etc., as required under section 44AA	Rs. 25,000	Rs. 25,000
271AA	Failure to keep and maintain information and documents in respect of international transaction	2% of value of each international transaction	—
271AAA	Undisclosed income in the case of search (applicable if search is initiated on or after June 1, 2007)	10 per cent of undisclosed income of specified previous year	—
271B	Failure to get accounts audited under section 44AB or furnish such report as is required under section 44AB	½% of the total sales, turnover, or gross receipts	Rs. 1,00,000
271BA	Failure to submit report under section 92E	Rs. 1,00,000	—
271C	Failure to deduct the whole or any part of tax as required under sections 192 to 195 or failure to pay the whole or any part of tax as required under section 115-O(2) or second proviso to section 194B	Amount of tax such person has failed to deduct or pay	—
271CA	Failure to collect tax at source	100% of tax which a person has failed to collect	—
271D	Taking or accepting any loan or deposit in contravention of the provisions of section 269SS	Amount of loan/deposit so taken or accepted‡	—
271E	Repaying any deposit or loan referred to in section 269T otherwise than in accordance with the provisions of section 269T	Amount of deposit so repaid	—
271F	Failure to furnish return of income as required by section 139(1) before the end of relevant assessment year	Rs. 5,000	—

‡In excess of Rs. 20,000—***CIT*** v. ***Ajanta Dyeing & Printing Mills*** [2003] 130 Taxman 442 (Raj.).

1	2	3	4
271F	Failure to furnish return of income as required by proviso to section 139(1) on or before the end of the assessment year	Rs. 5,000	—
271FA	Failure to furnish annual information return within the prescribed time under section 285BA(1)	Rs. 100 for every day during the failure continues†	—
271FB	Failure to furnish return of fringe benefits	Rs. 100 per day during which the failure continues	—
271G‡	Failure to furnish information or documents under section 92D	2% of value of the international transaction for each failure	—
272A(1)(*a*)	Failure to answer any question put to a person (who is legally bound to state the truth of any matter touching the subject to his assessment) by an income-tax authority	Rs. 10,000 for each default	Rs. 10,000 for each default
272A(1)(*b*)	Failure to sign any statement made by a person in course of income-tax proceeding	Rs. 10,000 for each default	Rs. 10,000 for each default
272A(1)(*c*)	Failure to comply with summons issued under section 131(1) to attend office to give evidence and produce books of account or other documents	Rs. 10,000 for each default	Rs. 10,000 for each default
272A(2)	Failure to comply with a notice issued under section 94 ; to give notice of discontinuance of business/ profession under section 176(3); to furnish returns/ statement mentioned in section 133, 206, 206C or 285B ; to allow inspection of register referred in section 134 (or of any entry in such register or to allow copies of such register to be taken) ; to furnish return of income under section 139(4A) or 139(4C) or to deliver in due time a declaration mentioned in section 197A or 206C(1A) ; to furnish a certificate as required in section 203 or 206C ; to deduct and pay tax under section 226; to furnish a statement as required by section 192(2C) ; to deliver a copy of quarterly statement of TDS/TCS under section 200(3)/206C(3); to deliver quarterly return under section 206A	Rs. 100 for every day during which default continues	Rs. 100 for every day during which default continues (the amount of penalty in relation to declaration under section 197A, certificate in Form No. 16/16A/16AA as required under section 203 and the amount of penalty for default under sections 200(3), 206 and 206C shall not exceed the amount of tax deductible or collectible)
272AA	Failure to comply with the provision of section 133B	Any amount up to Rs. 1,000	Rs. 1,000
272B	Failure to comply with the provisions of section 139A	Rs. 10,000	—
272BB(1)	Failure to comply with the provisions of section 203A	Up to Rs. 10,000	Rs. 10,000
272BB(1A)	Failure to quote tax deduction or collection number (from June 1, 2006)	Rs. 10,000	—
272BBB	Failure to comply with the provisions of section 206CA (applicable from June 1, 2002 but before October 1, 2004)	Rs. 10,000	—

373.1 ***Penalty cannot be imposed if there was a reasonable cause*** - By virtue of section 273B, penalty is not leviable under section 271(1)(*b*), 271A, 271AA, 271B, 271BA, 271BB, 271C, 271CA, 271D, 271E, 271F, 271FA, 271FB, 271G, 272A(1)(*c*)/(*d*), 272A(2), 272AA(1), 272B, 272BB(1), 272BB(1A) or 272BBB(1) or 273(1), (2)(*b*)/(*c*), if the assessee proves that there was reasonable cause for failure—*Kalakrithi* v. *ITO* [2002] 125 Taxman 97 (Mad.).

†No penalty if AIR for the financial year 2004-05 is submitted by November 30, 2005.

‡Provisions of section 271G are quite different from provisions of section 271(1) and, therefore, no satisfaction need be recorded before initiating proceedings under section 271G—***Cargill India (P.) Ltd.*** v. ***CIT*** [2008] 167 Taxman 114 (Delhi).

Before levying penalty, the concerned officer is required to find out that even if there is any failure referred to in the concerned provision, the same is without a reasonable cause. The initial burden is on the assessee to show that there existed reasonable cause which is the reason for the failure referred to in the concerned provision. Thereafter the officer dealing with the matter has to consider whether the explanation offered by the assessee as regards the reason for failure, is on account of reasonable cause. Reasonable cause means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances which (assuming them to be true), would reasonably lead any ordinary prudent and cautious man (placed in the position of the person concerned), to come to the conclusion that the same was the right thing to do. The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation, the aforesaid penalty can be imposed—*Woodward Governors India (P.) Ltd.* v. *CIT* [2001] 118 Taxman 433, 745 (Delhi).

373.2 ***Penalty under section 271(1)(c)*** - *See* para 374.

373.3 ***Penalty under section 271B for failure to get books of account audited*** - Penalty proceedings under section 271B are independent of assessment proceedings and it is not necessary that these proceedings should be initiated at the time of completion of assessment—*CIT* v. *Madan Roller Flour Mills* [1999] 71 ITD 274 (Asr.) or before completion of assessment proceedings—***Assam State Warehousing Corpn.*** v. ***CIT*** [2007] 288 ITR 25 (Gauhati).

One should keep in view the following points—

- Section 44AA imposes a duty on the assessee to maintain books of account and on failure to do so, the assessee shall be liable to be penalised under section 271A. Even after maintenance of books of account, the obligation of the assessee does not come to an end. He is required to do something more, *i.e.*, getting books of account audited by an accountant. But when a person commits the offence of not maintaining the books of account as contemplated by section 44AA, the offence is complete. After that, there can be no possibility of any offence as contemplated by section 44AB and, therefore, penalty cannot be imposed under section 271B—*Ram Prakash C. Puri* v. *CIT* [2001] 117 Taxman 154 (Pune)(Mag.).

- Delay on part of the statutory auditors in completing audit of the assessee co-operative society would not justify levy of penalty on the assessee—*Ahmedabad Co-operative Dept. Stores (Apna Bazar)* v. *ITO* [2001] 73 TTJ (Ahd.) 784.

- Where the assessee entertains a *bona fide* belief that the turnover of dealings in shares made on behalf of various buyers and sellers of shares through the assessee in their capacity as sub-broker is not includible for determining the applicability of section 44AB, there is no justification for levy of penalty under section 271B—*R. Wadiwala & Co.* v. *CIT* [2002] 120 Taxman 125 (Ahd.) (Mag.).

- Where delay in filing the audit report was due to fact that the auditors suddenly discontinued work and the assessee enquired from the statutory auditors reasons for not continuing audit and, on knowing reasons, gave proper clarification and also accepted demand for increased fees, there being a reasonable cause for delay, no penalty could be imposed on assessee—*Kripa Industries (I) Ltd.* v. *CIT* [2002] 76 TTJ (Pune) 502.

- Where the accountant left service without finalising accounts, another accountant was engaged and that resulted in delay in finalising accounts as well as getting accounts audited and assessment year under consideration was the first assessment year for compliance of section 44AB, instant case was not a fit case for levying penalty under section 271B—***S.H. Sopariwala*** v. ***CIT*** [2003] 128 Taxman 23 (Ahd.)(Mag.).

- Where the assessee contended that as its books of account were seized by Customs Department, which had been later taken over by the Income-tax Department, audit was completed late, the assessee had a reasonable and sufficient cause for not getting accounts audited in time as provided in Act—***CIT*** v. ***Tribhovandas Tejpal & Sons*** [2003] 126 Taxman 28 (Rajkot) (Mag.).

- Where the delay in filing the audit report was only of nine days and the authorised representative of the assessee had specifically accepted the mistake on his part in not furnishing the same to the office of the Assessing Officer, since the delay was quite marginal, imposition of penalty under section 271B was not justified—*Deepak Jyoti* v. *ITO* [2001] 72 TTJ (Jodh.) 1030.

■ Where there was no difference between the returned income and finally assessed income and there was no loss of revenue, keeping in view the fact that in case of technical or venial breach of provisions of law discretion should not be exercised in favour of punishing a minor default, the Assessing Officer should not have imposed penalty under section 271B—*ITO* v. *Bindra Ban Bansi Lal* [2001] 78 ITD 228 (Asr.).

■ There is no specific requirement in section 271B of mentioning of initiation of penalty proceedings in the assessment proceedings or mentioning of satisfaction of default regarding penalty in assessment order—***Vinod Kumar*** v. ***ITO*** [2003] SOT 4 (Jodh.) (SMC).

■ Penalty is impossible in case of failure of assessee-builder to get accounts audited on ground that it has only received advances from customers and as such there is no receipt, sales or turnover as required under section 44AB—***CIT*** v. ***Gopal Krishan Builders*** [2004] 91 ITD 124 (Lucknow) (SMC)

■ Where year in question is first year of business of assessee and quantum of turnover is just above Rs. 40 lakh and assessee is not aware of provisions of section 44AB, his failure to get accounts audited in time can be said to be due to reasonable cause—***Madan Lal Gupta*** v. ***ITO*** [2004] 3 SOT 144 (Delhi) (Mag.).

■ The two proceedings, one relating to the levy of penalty under section 271B and the other to assessment, are two different things, which do not have any bearing on each other. If an assessee fails to obtain the requisite audit report, he has committed a default and the penalty is exigible, even if no assessment order is passed—***Pawan Cotton Mills*** v. ***ITO*** [2005] 1 SOT 389 (Jodh.).

■ Where total sales by the assessee does not exceed Rs. 40 lakh but by including interest receipt, his total receipts exceed Rs. 40 lakh, and the assessee is under *bona fide* belief that it is, in view of above position, not required to get its accounts audited, imposition of penalty on the assessee is not justified—***Patel Ambalal Somnath Sarkar*** v. ***ITO*** [2006] 100 TTJ (Ahd.) 735.

373.4 ***Penalty for failure to deduct tax at source under section 271C*** - Penalty under section 271C is not an automatic consequence of non-deduction or short-deduction of tax at source. Where tax is not deducted at source for a reasonable cause, like the reason for short-deduction of tax at a programming error, no penalty can be said to be leviable on the assessee—*ITO* v. *Dishergarh Power Supply Co. Ltd.* [2001] 71 TTJ (Cal.) 725.

Likewise, a reasonable belief that one is not obliged to deduct tax or surcharge at source, can be treated as good and sufficient cause for not deducting tax/surcharge at source—*Punjab State Electricity Board* v. *ITO* [2002] 121 Taxman 367 (Chd.) (Mag.).

One should also keep in view—

■ Where the assessee was making payments to party right from 1980 and was under belief that no deduction of tax at source was required as per agreement and no default in this regard was pointed out by the department, failure to deduct tax at source in the assessment years 1990-91 and 1991-92 could not be said to be without reasonable cause—*Senior Accounts Officer, Thermal Power Project* v. *CIT* [1999] 107 Taxman 40 (All.) (Mag.).

■ After insertion of section 271C, failure to deduct tax and pay it, is not prosecutable but liable to penalty—*Mitsui & Co. Ltd.* v. *Dy. CIT* [1999] 107 Taxman 46 (Delhi) (Mag.).

■ *Bona fide* belief leading to short deduction of tax coupled with voluntary compliance in terms of depositing the same immediately on coming to know of the same, would constitute reasonable cause—***CIT*** v. ***SMS India Ltd.*** [2006] 7 SOT 424 (Mum.).

■ To the extent, a default is covered by the specific provisions of section 271C, such a default cannot be a subject-matter of penalty under section 221(1) considering the view that penalty under section 221(1) cannot be imposed for the cases of non-deduction and short-deduction of taxes at source, which are undisputedly covered by the specific provisions of section 271C, so far as period after April 1, 1989, is concerned—*ITO* v. *Titagarh Steels Ltd.* [2001] 79 ITD 532 (Cal.), ***IDBI*** v. ***ITO*** [2006] 10 SOT 497 (Mum.).

■ Penalties under section 271C can be attracted in a case where there is material on record to show a complete connivance and nexus between Indian company and foreign company whereby there

emerges a deliberate attempt to mislead the tax authorities in India by making nominal payments in India and paying substantial amounts abroad (maybe to the families of the expatriate employees)— ***Asahi Glass Co. Ltd.*** v. ***CIT*** [2003] 129 Taxman 76 (Delhi) (Mag.).

- Plea that crediting of interest is reversed in later year cannot be accepted as an explanation for not deducting tax at time of credit of interest—***Marg Constructions Ltd.*** v. ***CIT*** [2003] 81 TTJ (Chennai) 440.

- There is no merit in plea that where the Department has not treated the assessee-in-default under section 201(1) for good and sufficient reasons, the same test should also hold good as being a reasonable cause *vis-a-vis* levy of penalty under section 271C—***Wipro Finance Ltd.*** v. ***ITO*** [2003] 81 TTJ (Bang.) 887.

- Nowhere it has been stated or clarified either in Act or by CBDT that once short deducted tax has been paid by the deductor-assessee, no penalty under section 271C can be levied—***Hindustan Coca-Cola Beverages (P.) Ltd.*** v. ***CIT*** [2004] 90 ITD 720 (Delhi).

- Where taxes were paid voluntarily before any detection by the department, that would constitute reasonable cause—***Indo Nissin Foods Ltd.*** v. ***CIT*** [2004] 3 SOT 495 (Bang.).

- Not passing order under section 201(1) before initiation of proceedings under section 271C, would make imposition of penalty invalid—***Indo Nissin Foods Ltd.*** v. ***CIT*** [2004] 3 SOT 495 (Bang.).

- In ***CIT*** v. ***Mitsui & Co. Ltd.*** [2004] 140 Taxman 430 (Delhi) the assessee escaped from penalty for the failure to deduct tax on payments to non-resident employees. Before the Tribunal the assessee pleads that it did not deduct tax on the basis of an opinion received from its international legal cell. The Tribunal held that the opinion with the assessee constitute a reasonable cause for such failure hence, it deletes the penalty. The Delhi High Court affirmed the order of the Tribunal.

- The Delhi High Court in ***CIT*** v. ***Dex Travel (P.) Ltd.*** [2008] 172 Taxman 142 held that the issue whether an assessee is required to deduct tax on the discount/special commission paid to agents is debatable and, thus, no penalty is exigible on any such failure. In this case, the assessee carried with him opinion from a former Chairman of CBDT, a senior advocate; and a chartered accountant. In ***ITO*** v. ***ABN Amro Bank*** [2008] 23 SOT 52 (Delhi), the Tribunal held that penalty under section 271C cannot be levied in doubtful cases where the assessee had acted in a *bona fide* manner on basis of opinion of its counsel.

- If an employer has made a fair and honest estimate of the taxable salary and deducted and paid tax thereon, he cannot be treated as an assessee in default under section 201(1) even if the Assessing Officer ultimately assessed the salary at a higher figure—***Savani Financials Ltd.*** v. ***ITO*** [2005] 1 SOT 112 (Mum.), ***Lintas India Ltd.*** v. ***CIT*** [2006] 5 SOT 311 (Mum.).

- Tax is not deductible at source under section 195 in respect of transactions relating to commission and retainer fees payable to non-resident having no office or business operation in India, on export earnings—***Ind Telesoft (P.) Ltd., In re*** [2004] 140 Taxman 463 (AAR - New Delhi).

- The Delhi High Court in ***CIT*** v. ***HCL Info System Ltd.*** [2005] 146 Taxman 227 held that the exemption provided by the employer in regard to conveyance allowance and LTA amounts on the basis of employees declarations is not to be adversely looked upon as far as short deduction of tax is concerned. It was held that the employer only makes a *bona fide* estimation of income and it is for the Assessing Officer to demand the evidence of actual expenses incurred by each employee.

- Where tax has already been paid by the payee, no penalty can be levied on the assessee-payer for the failure to deduct tax at source—***Wipro GE Medical Systems Ltd.*** v. ***ITO*** [2005] 3 SOT 627 (Bang.)

373.5 ***Penalty for violation of provisions of sections 269SS and 269T read with sections 271D and 271E*** - Section 269SS provides that if the amount of loan/deposit or the aggregate amount of such loan/deposit is Rs. 20,000 or more, then the same shall not be taken/accepted otherwise than by an account payee cheque/draft. The scheme of legislation is quite clear that no penalty is attracted with reference to amount of loan/deposit below of Rs. 20,000 and that penalty would only be exigible with

reference to further loan/deposit in excess of Rs. 20,000—*Ravi Iron & Scrap Co.* v. *CIT* [2001] 118 Taxman 111 (Chd.) (SMC) (Mag.).

One should also keep on view the following points—

- The expression 'reasonable cause' has to be considered pragmatically and where transaction is an open transaction done to meet exigencies of business, it can be said to have constituted 'reasonable cause' and penalty under section 271D cannot be imposed—*Dillu Cine Enterprises (P.) Ltd.* v. *CIT* [2002] 80 ITD 484 (Hyd.). Under section 269SS, even for genuine loans or deposits, the assessee has to explain why it had obtained the same in cash and if he is able to explain a reasonable cause, then there will be no penalty leviable under section 271D—***Thenamal Chhajjer*** v. ***CIT*** [2005] 96 ITD 210 (Chennai). However, it is not sufficient to say simply that the transaction was genuine, so section 269SS is not applicable. One has to examine circumstances under which cash was accepted. In ***ITO*** v. ***Sunil M. Kasliwal*** [2005] 94 ITR 281 (Pune), the assessee took cash loan from two ladies for purchasing machinery. Since urgent requirement of machine was not known and machine was not purchased soon after taking loan from 'ladies', the Tribunal held that the assessee could have complied with requirement of section 269SS without much difficulty and, as such, penalty in respect of loan was justified.

- Ignorance of law is no excuse for violation of provisions of sections 269SS and 269TT—***Udaichand Santosh Kumar Jain*** v. ***ITO*** [2003] 131 Taxman 184 (Indore) (Mag.).

- Where the assessee obtained certain loan from his wife in cash for construction of house which was naturally a joint venture for prosperity of family and the transaction did not involve any interest element and there was no promise to return amount with or without interest, it could be said that there was a reasonable cause for not complying with section 269SS—*Dr. B.G. Panda* v. *CIT* [2000] 111 Taxman 86 (Cal.) (Mag.).

- Where the assessee had accepted deposits in cash from agriculturists who had no bank accounts, default was merely technical and venial in nature and penalty was not attracted—***ITO*** v. ***Ganesh Wooden Industries*** [2003] SOT 44 (Ahd.) (SMC).

- Where the assessee had allegedly received a loan of Rs. 70,000 in cash from his wife for investment in acquisition of immovable properties, and the assessee was under *bona fide* belief that the amount was not to be returned, no penalty was leviable—***ITO*** v. ***Tarlochan Singh*** [2003] 128 Taxman 20 (Asr.) (SMC) (Mag.).

- Where credit entries made in books of account of assessee are by way of transfer entries, there being no deposit as per mode of section 269SS, violation of said section cannot be said to have taken place—***CIT*** v. ***Lala Murari Lal & Sons*** [2004] 2 SOT 543 (Lucknow).

- Repayment in cash out of capital remaining with assessee-firm, is not covered by section 269T—***ITO*** v. ***Shree Mahaveer Industries*** [2004] 82 TTJ (Jodh.) 549.

- No penalty could be levied where the loan had been received by the assessee in cash exceeding the prescribed limit from the family members on Sunday, to be kept in safe custody and used in business—***CIT*** v. ***T.R. Rengarajan*** [2005] 279 ITR 587 (Mad.).

- No penalty can be imposed on assessee-firm in respect of transactions *inter se* between assessee and its partners even if there is violation of sections 269SS and 269TT - ***CIT*** v. ***Lokhpat Film Exchange (Cinema)*** [2007] 212 CTR (Raj.) 371

- Where Commissioner (Appeals) and Appellate Tribunal found that (*i*) there was business exigency forcing assessee to take cash loans for purpose of honouring commitment, *viz.*, issuance of cheque on a particular date; (*ii*) creditors were genuine persons and transactions were never doubted by authorities below; and (*iii*) there was no revenue loss to State Exchequer, imposition of penalty on assessee for making borrowings in cash exceeding prescribed limits was not justified—***CIT*** v. ***Balaji Traders*** 2007 Tax L.R. 261 (Mad.).

- Where Tribunal was of view that there was a reasonable cause to accept deposit otherwise than through bank draft or through cheque because the assessee *bona fide* believed that cash transac-

tions below Rs. 20,000 were permissible and, in fact, none of transaction had exceeded Rs. 20,000, deletion of penalty by Tribunal was justified—***CIT*** v. ***Raj Kumar Sharma*** [2007] 294 ITR 131 (Raj.).

373.6 ***Penalty for failure to answer questions, submit TDS returns under section 272A*** - One should keep in view the following judicial rulings—

- Non-deduction of TDS or delay in depositing TDS to Government account can certainly not be taken as reasonable cause for not filing return—*ITO* v. *Shri Gajanan Auto Engg. (P.) Ltd.* [2002] 75 TTJ (Pune) (SMC) 75.

- Where the assessee was in very first year of its new line of activity and its explanation for delay in filing Form No. 26C was that it was not aware of provisions of section 194C and that it was difficult for it to convince labour contractors regarding TDS, default not being deliberate, should not have been visited with penalty—*Bharat Kumar Manilal* v. *CIT* [2002] 121 Taxman 361 (Rajkot) (SMC) (Mag.).

- Where the assessee-club did not deduct tax at source under section 194-I within the financial year from rent paid but immediately thereafter deducted and deposited the same along with interest leviable under section 201(1A), the assessee had a reasonable cause and as such penalty under section 272A(2)(*c*) was not leviable—***Saturday Club Ltd.*** v. ***CIT*** [2003] 85 ITD 224 (Kol.).

- Where the appellant had been deducting and depositing tax in time regularly and there was no default either in deducting the tax or in paying the same and the only default was in furnishing statement of TDS Form No. 26 which was only a technical default, no penalty could be imposed on the assessee—*Rajasthan Tribal Area Dev. Coop. Fedn. Ltd.* v. *ITO* [1998] 60 TTJ (Jp.) 427.

- Where the reasons for late filing of annual TDS return was the late payment of TDS into Government account as the assessee entertained *bona fide* belief that the annual returns could not be filed without making the said payment, it could be said that the assessee had a reasonable cause for delay in filing return—*Dube Motel India (P.) Ltd.* v. *CIT* [2001] 119 Taxman 165 (Mum.) (SMC) (Mag.).

- A reading of provisions of section 197A together with section 272A(2)(*f*) makes it clear that penalty is to be levied with reference to default or delay in submitting copy of each declaration separately and not with reference to one aggregate default—*Escorts Employees Ancillaries Ltd.* v. *CIT* [2000] 74 ITD 1 (Delhi) (TM).

- Where the assessee had not deducted tax on interest paid/credited in respect of certain persons who filed declarations under section 197A(1) in Form No. 15H and these declarations were submitted to department belatedly, since delay was only for 21 days and the assessee had also furnished declarations voluntarily without issue of any reminder or notice by the department, it would be unjustified to hold that the assessee had consciously disregarded statutory obligations of furnishing these declarations; hence no penalty was to be levied on the assessee under section 272A(2)(*f*)—*Manager, Indian Overseas Bank* v. *ITO* [2001] 119 Taxman 75 (Chd.) (Mag.), ***CIT*** v. ***State Bank of Patiala*** [2005] 277 ITR 315 (Punj. & Har.)

- Default committed by an assessee in not filing Form No. 15H received by it from various depositors within stipulated period, is only of technical nature for which no penalty under section 272A(2)(*f*) is leviable—***CIT*** v. ***Manager, State Bank of Patiala*** [2004] 191 CTR (Punj. & Har.) 256.

- Merely because TDS certificates are undated would not make assessee liable to penalty for default under section 272A(2)(*g*) for late issue of TDS certificate—***Salwan Furnishing Co.*** v. ***CIT*** [2005] 1 SOT 485 (Del.).

- Penalty under section 272A(2)(*c*) cannot be levied in a routine manner—***CIT*** v. ***Superintending Engineer*** [2003] 131 Taxman 596 (Raj.).

- Where the assessee had deducted tax at source and deposited the same with Government within the stipulated time, failure in sending certificate to the person concerned would be a technical default not attracting penalty—*CIT* v. *Harsiddh Construction (P.) Ltd.* [2001] 118 Taxman 760 (Guj.), ***CIT*** v. ***ARK Corporation*** [2008] 172 Taxman 339 (Delhi).

■ Where there was no default in deducting tax or in depositing same or in filing annual return and there was no revenue loss nor any *mala fide* or deliberate intention on part of the assessee by delaying issue of certificates, in Form No. 16/16A there was no justification to levy penalty—***ITO*** v. ***Mayfair Industries*** [2003] SOT 232 (Delhi), ***HMT Ltd.*** v. ***CIT*** [2004] 140 Taxman 606 (Punj. & Har.), ***CIT*** v. ***Gabrial India Ltd.*** [2005] 146 Taxman 740 (MP).

■ Penalty cannot exceed TDS amount—***Bhawani Dass Ashok Kumar*** v. ***CIT*** [2003] SOT 247 (Delhi) (SMC).

■ Penalty is not exigible where there is no loss of revenue and there are *bona fide* reasons for delay - ***Bhawani Dass Ashok Kumar*** v. ***CIT*** [2003] SOT 247 (Delhi) (SMC).

■ Once a person prescribed or concerned or the assessee has been subjected to a penalty under section 271C, for not deducting the tax at source, there would not arise any occasion for levying a penalty under section 272A(2)(*a*) and 272A(2)(*g*) for non-compliance of the provisions of section 203 and 206. In other words, in case tax has not been deducted at source, the question of issuing the certificate of tax under section 203 or that of filing of return under section 206 would not arise at all. That being so, the question of imposing penalty for violation of the aforesaid provisions, would also not arise—***CIT, Lucknow*** v. ***Sri Ram Memorial Education Promotion Society*** [2006] 150 Taxman 59 (All.)

Penalty under section 271(1)(c)

374. Section 271(1)(*c*) is applicable if the following conditions are satisfied—

a. the penalty can be imposed by the Assessing Officer, Commissioner (Appeals) or Commissioner;

b. it can be imposed in the course of proceedings under the Act; and

c. the taxpayer has concealed particulars of his income or furnished inaccurate particulars of such income.

If the aforesaid conditions are satisfied, then the Assessing Officer, Commissioner (Appeals) or Commissioner may direct that such person shall pay penalty which shall not be less than the amount of tax sought to be evaded, but which shall not exceed three times the amount of tax sought to be evaded. The penalty is in addition to the tax payable by the assessee.

The expression "has concealed" and "has furnished inaccurate particulars" have not been defined either in the section or elsewhere in the Act. However, notwithstanding differences in the two circumstances, they lead to the same effect, *viz.*, keeping off a certain portion of the income. The former is direct while the latter may be indirect in its execution. It is settled law that before levying penalty under section 271(1)(*c*), it has to be held that the assessee has either concealed the particulars of income or has furnished inaccurate particulars of income.

374.1 ***Explanations to section 271(1)*** - Section 271(1) has the following *Explanations :*

374.1-1 EXPLANATION 1 - Where in respect of any facts material to the computation of total income of any person, additions are made because of the following two reasons, the amount so added shall be deemed to be the income in respect of which particulars have been concealed :

a. such person fails to offer an explanation or offers an explanation which is found by the Assessing Officer or the Commissioner (Appeals) or Commissioner to be false ; or

b. such person offers an explanation which he is not able to substantiate and fails to prove that such explanation is *bona fide* and that all the facts relating to the same and material to the computation of his total income have been disclosed by him.

Explanation 1 to section 271(1) can be invoked any time. Even if it is not invoked at any stage at the time of assessment proceedings, the same can be initiated at the time of penalty by the Assessing Officer—***CIT*** v. ***Roadmaster Industries of India Ltd.*** [2005] 94 TTJ (Chd.) 859/148 Taxman 18 (Mag.).

374.1-1a WHAT IS *MENS REA* - "*Mens rea*" is evil intention or knowledge of the wrongfulness of the act that a person commits. It is said to be present if a person does something incorrectly deliberately knowing that his action is against law. In other words, the person has a guilty mind in committing the relevant act. Only when such mental attitude is present in an act, the person who commits it is said to have acted deliberately in defiance of law or is guilty of dishonest conduct.

■ *Is it necessary in penalty proceedings* - The Taxation Laws (Amendment & Miscellaneous Provisions) Act, 1986, has inserted section 273B and at the same time words "without reasonable cause" have been omitted from different sections regulating imposition of penalty. The net effect of these amendments was to shift the initial burden of proof that "unlawful act has been done without reasonable cause" from Income-tax Department to the assessee. To put it differently, the effect of *Explanation 1* read with section 273B may be explained as follows:

1. Explanation 1 makes it clear that the assessment proceedings and penalty proceedings are wholly distinct and independent of each other.

2. Explanation 1 is a rule of evidence. It raises an initial presumption that the additions represent concealed income of the assessee. The presumption is, however, rebuttable.

3. The initial burden of discharging the onus to rebut the above presumption is on the assessee. In other words, the assessee has to explain that the explanation offered by him about a particular income/expenditure is *bona fide* and all material to the computation of his income has been disclosed.

4. The burden placed upon the assessee is not discharged by any fantastic explanation. *Explanation* of the assessee for the purpose of avoidance of penalty must be an acceptable explanation.

5. Mere failure to substantiate the explanation is not enough to warrant penalty. Revenue has to establish that the explanation offered was not substantiated.

6. The *Explanations* appended to section 272(1)(*c*) entirely indicate the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing the return. The object behind the enactment of section 271(1)(*c*) read with the *Explanations* indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as is the case in the matter of prosecution under section 276C—***Union of India*** v. ***Dharmendra Textiles Processors*** [2008] 306 ITR 277 (SC).

7. Mere rejection of a legal claim of the assessee for taxability of income under a particular head of income is not by itself sufficient to warrant imposition of penalty. Cases involving genuine difference of opinion on matters of law between the assessee and the Assessing Officer are clearly outside the scope of *Explanation* 1 to section 271(1) provided the assessee has made full disclosure of all the relevant facts and also acted *bona fide*—***ITO*** v. ***Roborant Investments (P.) Ltd.*** [2006] 7 SOT 181 (Mum.).

8. Where addition has been made by rejecting explanation of the assessee, it does not amount to concealment of income within meaning of *Explanation* to section 271; where additions in question were deleted by the Commissioner (Appeals) and later restored by the Tribunal, in such a case of difference of opinion between two appellate authorities, penalty cannot be imposed on basis of those additions—***Devki Nandan*** v. ***Assessing Officer*** [2006] 150 Taxman 44 (Asr.) (SMC) (Mag.).

374.1-2 ***EXPLANATION 2*** - Additions are sometimes made by the Assessing Officer for purely technical reasons, *e.g.*, application of a presumptive rate of gross profit or of yield, or on account of estimated disallowance of certain expenses, shortfalls, wastage, etc., but no penalty for concealment is levied in respect of these additions for want of adequate evidence to establish that these additions represent the assessee's concealed income.

In later assessments, when called upon to explain certain deposits, etc., the assessee urges at times that such deposits, etc., have come out of the income represented by the aforesaid additions made earlier. Despite this virtual confession of concealment on the part of the assessee, no penalty was leviable in such cases as the time-limit for initiating concealment penalty proceedings in respect of

the earlier year in which the addition was made would have expired. The penalty could also not be imposed in respect of the year in which the deposit was made as there was no concealment in that year, the deposit having been explained as out of an earlier year's income.

Explanation 2 to section 271 provides that in such cases, the assessee would become liable to penalty for concealment in respect of additions made in the earlier year in which the additions were made.

Explanation 2 is applicable where the following conditions are satisfied :

1. The source of any receipt, deposit, outgoing or investment in any assessment year (*i.e.*, current year) is claimed by any person to be amount which had been added in computing the income or deducted in computing the loss in the assessment of such person for any earlier assessment year (*i.e.*, earlier year).

2. In respect of such earlier year no penalty had been levied on account of such addition, etc., under section 271(1)(*c*).

3. That part of the amount so added or deducted in such earlier assessment year which is sufficient to cover the amount represented by such receipt, deposit or outgoing or value of such investment shall be treated as the income of the assessee, particulars of which had been concealed or inaccurate particulars of which had been furnished for the earlier year.

The following points should also be kept in view :

- Where the amount so added in the earlier year is not sufficient to cover the entire amount of receipt, deposit, outgoing or investment of the current year, then that part of the amount so added in the year immediately preceding the earlier year which is sufficient to cover the receipt, deposit, outgoing or investment not so covered shall be treated as the income of the assessee for which particulars have been concealed for the year immediately preceding the earlier year and so on until the entire amount is covered [*see* problem 374.1-2P1].
- Where any penalty is imposable by virtue of *Explanation 2*, proceedings for the imposition of such penalty may be initiated (notwithstanding that any proceedings under the Act) in the course of which such penalty proceedings could have been initiated under section 271(1) have been completed.

374.1-2P1 *For the previous year 2008-09 (assessment year 2009-10), the Assessing Officer makes the following observations :*

The assessee has purchased on June 3, 2008 gold for Rs. 2 lakh for which he is unable to offer any explanation. On his daughter's marriage, the assessee spends Rs. 12 lakh on May 15, 2008 and the assessee fails to explain the source of expenditure.

1. Can the Assessing Officer levy penalty under section 271(1)(c) ?

2. Is it possible for the assessee to argue in the penalty proceedings that the aforesaid investment/expenditure have been made out of following additions made by the Department in earlier years —

Assessment years	Additions made Rs.	Whether penalty was levied under section 271(1)(c)
2003-04	*20,00,000*	*Yes only on Rs. 1,20,000*
2004-05	*3,00,000*	*Yes only on Rs. 80,000*
2005-06	*Nil*	—
2006-07	*7,00,000*	*No*
2007-08	*50,000*	*No*

SOLUTION :

1. The Assessing Officer can levy penalty under section 271(1)(c) on unexplained investment/expenditure of Rs. 14,00,000.

2. The assessee can explain that the investment/expenditure is made out of additions made during earlier years— *Anantharam Veerasinghaiah & Co.* v. *CIT* [1980] 123 ITR 457 (SC). However, by adopting such plea, application of *Explanation 2* to section 271(1) cannot be avoided. Rs. 14 lakh will be treated as concealed income of the earlier years as follows (however, penalty will be imposed on the amount given in column (*4*) of the table)—

Assessment years	Additions made	Out of (2) penalty already levied	Amount treated as concealed income of the different assessment years on which section 271(1)(c) penalty shall be levied by virtue of Explanation 2
(1)	(2) Rs.	(3) Rs.	(4) Rs.
2007-08	50,000	—	50,000
2006-07	7,00,000	—	7,00,000
2004-05	3,00,000	80,000	2,20,000
2003-04	3,50,000*	1,20,000	2,30,000

*Rs. 14 lakh — Rs. 50,000 — Rs. 7 lakh — Rs. 3 lakh.

374.1-3 ***EXPLANATION 3*** - If a person does not file a return of income (without reasonable cause) for an assessment year voluntarily within 21 months† from the end of the assessment year in which income was first assessable and no notice under sections 142(1) and 148 is issued to him till the expiry of the said period, he is treated to have concealed his income and penalty is leviable on him accordingly, if he is later found to have had taxable income in that year. This provision is applicable even if such person furnishes a return of income at any time after the expiry of 21 months† from the end of the relevant assessment year in pursuance of a notice under section 148.

374.1-4 ***EXPLANATION 4*** - *Explanation 4* to section 271 defines "the amount of tax sought to be evaded". According to the definition, this expression ordinarily means the following :

1. Where the amount of income in respect of which the 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 amount of tax sought to be evaded shall be the tax that would have been chargeable on the amount of such income as if it were the total income.

2. In case of which *Explanation 3* applies (*i.e.*, non-submission of return of income), the expression "tax sought to be evaded" means the tax chargeable on the total income assessed, as reduced by advance tax, tax deducted/collected at source and self assessment tax paid before the issue of notice under section 148.

3. In any other case, such expression means the difference between the tax on the total income assessed and the tax that would have been chargeable had such total income been reduced by the amount of income in respect of which particulars have been concealed.

374.1-4P1 *Find out the minimum and maximum penalty which can be imposed under section 271(1)(c) in the cases given below for the assessment year 2009-10 :*

(Rs. in thousand)

Name of assessee	Income returned	Additions made				Income as per assessment order under section 143(3) or 144
		Reason (a)	Reason (b)	Reason (c)	Reason (d)	
X Ltd.	*(-) 80*	*4*	*50*	*5*	*20*	*(-) 1*
Y (30 years)	*(-) 80*	*4*	*50*	*5*	*20*	*(-) 1*
Mrs. Z (28 years)	*(-) 130*	*10*	*30*	*5*	*75*	*(-) 10*
A (26 years)	*(-) 110*	*40*	*200*	*15*	*900**	*1045*
B (24 years)	*Not submitted*	-	-	-	-	*996.7****
C (22 years)	*755*	*70*	*90*	*5*	*310***	*1230*
D Ltd.	*45*	*8*	*10*	-	*30*	*93*
E (HUF)	*(-) 170*	*4*	*90*	*5*	*71*	*Nil*
F (Firm)	*(-) 170*	*4*	*90*	*5*	*71*	*Nil*

†24 months for the assessment year 2003-04 or earlier years.

*Out of Rs. 9,00,000, Rs. 1,45,000 is long-term capital gain.

**Out of Rs. 3,10,000, Rs. 20,000 is long-term capital gain.

***Advance tax paid by B is Rs. 5,100. Tax deducted/collected at source is Rs. 4,000.

Reasons for additions are as follows—

a. *wrong application of law unknowingly by the assessee (the taxpayer gives an explanation which is not found to be false by the Assessing Officer);*

b. *deliberate attempt to conceal income by applying a provision of law incorrectly (against the advise of a tax consultant, the taxpayer applies the provision of law wrongly; no explanation is offered to the Assessing Officer);*

c. *addition by the Assessing Officer on estimate basis (like disallowance of telephone expenses/car expenses for personal use of the assessee); and*

d. *concealment of income by not disclosing it in return of income or debiting bogus expenses to profit and loss account (the taxpayer fails to offer an explanation).*

SOLUTION : In the given problem, additions (a) and (b) are because of wrong application of law, whereas additions (c) and (d) are on question of facts. There is no hard and fast rule that addition on account of question of law cannot result in concealment of income or addition on question of facts always represents concealed income of the assessee. The chart given below highlight the nature of additions—

Additions	*Is it concealment*	*Remark*
(a)	No	Wrong application of law unknowingly and the explanation offered is not found as false by the Assessing Officer
(b)	Yes	Deliberate attempt to conceal income by applying law incorrectly, even no explanation is offered
(c)	No	Addition on estimate basis does not represent concealed income
(d)	Yes	Non-disclosure of income/bogus expenditure, no explanation is offered

Penalty under section 271(1)(c) will be determined as under—

Name of assessee	*Concealed income [i.e., (b) + (d)]*	*Tax sought to be evaded (i.e., tax on concealed income where concealed income is more than assessed income)*	*Tax sought to be evaded (i.e., tax on assessed income if return is not submitted) minus advance tax and tax deducted/collected at source*	*In any other case*		
				Tax on assessed income	*Tax on (assessed income minus concealed income)*	*Tax sought to be evaded [(5) - (6)]*
(1)	*(2)* Rs.	*(3)* Rs.	*(4)* Rs.	*(5)* Rs.	*(6)* Rs.	*(7)* Rs.
X Ltd.	70,000	21,630	-	-	-	-
Y	70,000	Zero	-	-	-	-
Z	1,05,000	Zero	-	-	-	-
A	11,00,000	2,49,827	-	-	-	-
B	1,96,700	-	2,01,030	-	-	-
C	4,00,000	-	-	3,08,176	1,58,620	1,49,556
D Ltd.	40,000	-	-	28,737	16,377	12,360
E (HUF)	1,11,000	1,133	-	-	-	-
F (Firm)	1,11,000	49,749	-	-	-	-

Minimum penalty : 100% of tax sought to be evaded.

Maximum penalty : 300% of tax sought to be evaded.

374.1-5 ***EXPLANATIONS 5 AND 5A*** - *Explanations* 5 and 5A to section 271(1) and section 271AAA regulate penalty of concealment of income in search cases. These provisions are discussed in para 374.2.

374.1-6 *EXPLANATION 6* - Penalty for concealment of income shall not be imposed on so much of the income on which additional tax has been charged under section 143(1A).

374.1-7 *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 be deemed to represent income in respect of which particulars have been concealed or inaccurate particulars have been furnished. However, the provisions of this *Explanation* shall not apply where the assessee proves to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or Commissioner that the price charged (or paid) in such transaction has been determined in accordance with section 92C in good faith and with due diligence.

374.2 ***Concealment penalty in search cases [Sec. 271(1),*** **Explanations** ***5 and 5A, Sec. 271AAA]*** - These provisions are given below—

374.2-1 *PENALTY PROVISIONS BEFORE THE AMENDMENT MADE BY THE FINANCE ACT, 2007 (i.e., WHERE SEARCH IS INITIATED BEFORE JUNE 1, 2007)* - *Explanation* 5 to section 271(1) is applicable if search is initiated before June 1, 2007. These provisions are given below—

374.2-1a OLD RULE GIVEN BY *EXPLANATION 5* - Where, in the course of a search under section 132, the assessee is found to be the owner of any money, bullion, jewellery or other article or thing, and he claims that such assets have been acquired by him by utilising (wholly or in part) his income of—

a. any previous year which has ended before the date of search but the return for that year has not been furnished or, such income has not been declared in any return furnished before the said date ; or

b. any previous year which ends on or after the date of the search,

then, notwithstanding the fact that such income is declared by him in any return of income furnished on or after the date of the search he will be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income for the purposes of imposition of penalty under section 271.

374.2-1b EXCEPTIONS TO THE AFORESAID RULE - In any of the following two cases, however, the above provision of *Explanation 5* is not applicable :

▪ *Exception one - Action before search* - The above rule of *Explanation 5* is not applicable if such income is (or the transactions resulting such income are) recorded (before such search) in the books of account, if any, or such income is otherwise disclosed before such search to the Commissioner.

In other words, there should be recording of income in books of account or disclosure to the Chief Commissioner but this has to be done before the date of search—*Sevantilal Manilal* v. *CIT* [2000] 74 ITD 155 (Mum.) (SMC). Moreover, the books of account referred to above are those books of account which are maintained for the purposes of the Act and not the diaries which are maintained merely as man's private record, prepared by him as may be in accordance with his pleasure or convenience to secretly record secret, unaccounted clandestine transactions not meant for the purposes of the Act, but with specific intention or desire on the part of the assessee to hide or conceal income so as to avoid imposition of tax thereon—*Sheraton Apparels* v. *CIT* [2002] 123 Taxman 238 (Bom.).

Only books of account maintained in the regular course can make the assessee eligible for grant of immunity from penalty and not just any of such books, which have not been maintained in regular course of business—***Brij Lal Goyal*** v. ***CIT*** [2004] 88 ITD 413 (Delhi).

▪ *Exception two - Disclosure in the course of search* - If the following conditions are satisfied, *Explanation 5* is not applicable—

1. The assessee must have made a statement under section 132(4) that such assets found in his possession have been acquired out of income which has not been disclosed so far in the return of income to be furnished before the expiry of time specified in section 139(1).

2. The assessee specifies in a statement under section 132(4), the manner in which such income has been derived.

3. The assessee pays the tax together with interest, if any, in respect of such income.

These conditions have to be fulfilled in the course of search itself when the statement under section 132(4) is recorded. Condition 3 (noted above) does not require that the tax along with interest should be deposited before the filing of the return. Consequently, merely because the tax and interest has not been deposited before the filing of the return, it would not make the *Exception two* inapplicable—***CIT*** v. ***Nem Kumar Jain*** [2006] 151 Taxman 188 (All.).

374.2-1c OTHER POINTS - The following points should be noted—

- *Denial of immunity* - If the assessee has fulfilled exquisite conditions for availing the benefit of immunity under *Explanation 5* to section 271(1)(*c*), the same cannot be denied on flimsy grounds that in his statement, under section 132(4) recorded, he had stated that amount of declaration belonged to his family members but in return, entire declaration is made in the hands of the assessee.

- *Where no query was raised* - If the authorised officer has not raised any query to ascertain the manner in which the income was derived, to put blame on the assessee later on for not specifying the manner in which income had been derived would be totally unjustified. Therefore, the benefit of immunity from penalty cannot be denied to the assessee on the ground of not specifying the manner in which the income was derived by him—***Gulabrai V. Gandhi*** v. ***Asstt. CIT*** [2003] 84 ITD 370 (Mum.). Under section 132(4) unless the authorized officer puts a specific question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in that regard and in case in the statement the manner in which income has been derived has not been stated but has been stated subsequently, that amounts to satisfaction of conditions of *Exception two*—***CIT*** v. ***Radha Kishan Goel*** [2006] 152 Taxman 291 (All.).

- *Not necessarily voluntary-disclosure* - Disclosure as envisaged under *Explanation 5* to section 271(1)(*c*) does not speak of "voluntary disclosure". The requirement of disclosure under these provisions is that the disclosure should have been during the course of search; whether it is 'voluntary or otherwise' does not come into the picture—*Shyam Biri Works (P.) Ltd.* v. *CIT* [2001] 70 TTJ (All.) 880.

- Explanation 5 *not applicable in cases other than that of search* - Search under section 132 on the assessee's premises is the basic statutory requirement for invoking the deeming fiction contained under *Explanation 5* to section 271(1)(*c*) and where no search warrant is issued in name of assessee, *Explanation 5* cannot be invoked—*ITO* v. *Lajwanti Devi* [1998] 66 ITD 95 (Chd.) (TM).

- *Other valuable articles* - 'Other valuable article or thing' as referred to in *Explanation 5* have necessarily to be movable articles which are capable of having a value; it cannot include immovable property—***CIT*** v. ***Mahadik Bros.*** [2003] 84 ITD 1 (Pune).

- *Exception two applicable for any year* - Exception two in *Explanation 5* to section 271(1)(*c*) is applicable to the year of search as well as for earlier years—***CIT*** v. ***S.D.V. Chandru*** [2004] 136 Taxman 537 (Mad.).

- *Furnishing of late return* - Even if the return of income is submitted late, the benefit of immunity given by *Explanation 5* cannot be denied—***CIT*** v. ***Lad Devi Kothari*** [2005] 97 TTJ (Jp.) 421.

374.2-2 *PENALTY PROVISIONS AFTER THE AMENDMENT MADE BY THE FINANCE ACT, 2007 (i.e., WHERE SEARCH IS INITIATED ON OR AFTER JUNE 1, 2007)* - Under the provisions before amendment given in *Explanation 5* to section 271(1) one can avoid penalty in search cases by making a disclosure/statement referred

to in section 132(4). In such a case, if the taxpayer specifies in the statement the manner in which undisclosed income has been derived and pays tax/interest, no penalty could be levied even in the cases given below—

1. The taxpayer had filed a return not disclosing the quantum of income.

2. The taxpayer had omitted filing income-tax return although the due date of submission of income had expired.

Moreover, one could also avoid concealment penalty under section 271(1)(*c*) in search cases if one proved that the undisclosed income was recorded in the books of account before the date of search (if undisclosed income related to a preceding year) or on or before the date of search (if undisclosed income related to the year of search).

The aforesaid provisions of *Explanation* 5 will not be applicable in cases where search is initiated on or after June 1, 2007. *Explanation* 5A to section 271(1) has been inserted. Along with the *Explanation* 5A, section 271AAA has been inserted. *Explanation* 5A to section 271(1) and section 271AAA will be applicable in cases where search is initiated on or after June 1, 2007. The table given below pinpoints the applicability of these provisions in respect of undisclosed income pertaining to different years in search cases—

	Undisclosed income of the year in which search is conducted	*Undisclosed income of the previous year (a) which has ended before the date of search, (b) the due date under section 139(1) has not expired before the date of search, and (c) return of income has not been submitted*	*Undisclosed income of the previous year (a) which has ended before the date of search, (b) the due date under section 139(1) has expired before the date of search, and (c) return of income has not been submitted*	*Any other case. It will include a case where undisclosed income pertains to a previous year (a) which has ended before the date of search, (b) the due date under section 139(1) has expired or not expired before the date of search, but (c) return of income has been submitted before the date of search without disclosing the income*
■ Section 271AAA [in this section concealment penalty is 10 per cent of undisclosed income, besides if a few conditions are satisfied, even this penalty can be avoided]	Applicable	Applicable	Not applicable	Not applicable
■ *Explanation 5A* to section 271(1) [under this provision concealment penalty can be between 100 per cent to 300 per cent of the tax sought to be evaded]	Not applicable	Not applicable	Applicable. *Explanation 5A* assumes that the taxpayer has undisclosed income even if return of income is submitted on or after the date of search and undisclosed income is declared in that return	Not applicable
■ Normal provisions of section 271(1)(*c*) [under this provision concealment penalty can be between 100 per cent to 300 per cent of the tax sought to be evaded]	Not applicable	Not applicable	*See* next column	Applicable. Since return is submitted without disclosing undisclosed income, normal provisions of section 271(1)(*c*) will govern imposition of concealment penalty and in this situation there is no need of deeming provisions of *Explanation 5A*

374.2-2a SECTION 271AAA - Section 271AAA is applicable if—

a. a search is initiated under section 132 on or after June 1, 2007;

b. there is some "undisclosed income"; and

c. undisclosed income pertains to a "specified previous year".

▪ *What is the quantum of concealment penalty* - If the above conditions are satisfied, 10 per cent of "undisclosed income" of the "specified previous year" is concealment penalty which can be imposed by the Assessing Officer in addition to tax. If section 271AAA is applicable, penalty under section 271(1)(*c*) cannot be imposed.

▪ *Is it possible to avoid the aforesaid penalty [Sec. 271AAA(2)]* - The aforesaid penalty of 10 per cent of "undisclosed income" of the "specified previous year" can be avoided if the following conditions are satisfied—

1. If the assessee in a statement under section 132(4) in the course of the search, admits the undisclosed income.

2. Further, he specifies the manner in which such income has been derived.

3. He substantiates the manner in which the undisclosed income was derived.

4. He pays the tax, together with interest, if any, in respect of the undisclosed income.

If the above 4 conditions are satisfied penalty under section 271AAA (*i.e.*, 10 per cent of "undisclosed income" of the "specified previous year") can be avoided.

▪ *What is "specified previous year"* - The aforesaid provisions of imposition of 10 per cent concealment penalty and the manner of avoiding it are applicable only when "undisclosed income" pertains to a "specified previous year". For this purpose "specified previous year" is any one or both of the following—

"Specified previous year" one	It is a previous year which satisfies all the following conditions— *a.* it ends before the date of search; *b.* the due date of filing return of income under section 139(1) has not expired before the date of search; *c.* before the date of search, the assessee has not submitted return of income for the above previous year
"Specified previous year" two	It is the previous year in which search is conducted.

It may be noted that in the cases given below, section 271AAA is not applicable as the previous year does not fall in any of the above stated "specified previous year". Consequently, in the cases given below, the normal provisions of section 271(1)(*c*) will be applicable—

Case 1 - Undisclosed income pertains to a previous year which has ended before the date of search and on the date of search the due date of filing return of income has expired. For instance, search is conducted on October 1, 2008 and undisclosed income pertains to the previous year 2007-08.

Case 2 - Undisclosed income pertains to a previous year which has ended before the date of search, on the date of search return of income has been submitted without disclosing undisclosed income, though due date of filing of return of income has not expired on the date of search. For instance, search is conducted on June 25, 2008. Undisclosed income pertains to previous year 2007-08. Return of income for the previous year 2007-08 has been submitted without disclosing undisclosed income on June 24, 2008.

▪ *What is undisclosed income* - For the purposes of section 271AAA, "undisclosed income" has been defined so as to mean—

1. Any income of the "specified previous years" 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 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 which has otherwise not been disclosed to the Commissioner before the date of the search.

2. Any income of the "specified previous years" 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.

374.2-2b EXPLANATION 5A TO SECTION 271 - If the following conditions are satisfied it will be assumed that the taxpayer has concealed the particulars of his income or furnished inaccurate particulars of income. In other words, if these conditions are satisfied normal concealment penalty (*i.e.*, 100 per cent - 300 per cent of tax sought to be evaded) can be imposed—

1. Search is conducted on or after June 1, 2007.

2. In the course of search the assessee is found to be the owner of (*a*) any money, bullion, jewellery or other valuable article or thing (referred to as "assets" in the *Explanation* 5A); or (*b*) any income based on any entry in any books of account or other documents or transactions and he claims that such assets or entry in the books of account or other documents or transactions represents his income (wholly or in part) for a previous year given below.

3. The above "assets" or income pertains to a previous year which has ended before the date of the search, the due date for filing the return of income for such year has expired and the assessee has not filed the return.

If the above conditions are satisfied *Explanation 5A* will assume that the taxpayer has concealed the particulars of his income or furnished inaccurate particulars of his income and concealment penalty (100 per cent - 300 per cent of tax sought to be evaded) can be imposed under section 271(1)(*c*) even if such income is declared by the taxpayer in any return of income which is furnished on or after the date of search.

374.2-2c PROVISIONS ILLUSTRATED - Consider the following examples—

Date of initiation of search	*"Undisclosed income" pertains to the previous year given below*	*Due date of submission of return of income for the previous year given in Column 2*	*Date of submission of return of income*	*Penalty*
June 10, 2008	2006-07	October 31, 2007	No return	*Explanation 5A* will be applicable
June 5, 2008	2006-07	July 31, 2007	July 31, 2007, "undisclosed income" not disclosed	Normal provisions of section 271(1)(*c*), will apply. There is no need to have deeming provisions similar to *Explanation 5A* as return is submitted without disclosing "undisclosed income"
June 5, 2008	2006-07	July 31, 2007	December 1, 2007, "undisclosed income" not disclosed	Normal provisions of section 271(1)(*c*), will apply. There is no need to have deeming provisions similar to *Explanation 5A* as return is submitted without disclosing "undisclosed income"
June 5, 2008	2006-07	July 31, 2007	April 10, 2008, "undisclosed income" not disclosed	Normal provisions of section 271(1)(*c*), will apply. There is no need to have deeming provisions similar to *Explanation 5A* as return is submitted without disclosing "undisclosed income"
June 5, 2008	2006-07	October 31, 2007	April 10, 2008, "undisclosed income" not disclosed	Normal provisions of section 271(1)(*c*), will apply. There is no need to have deeming provisions similar to *Explanation 5A* as return is submitted without disclosing "undisclosed income"
November 3, 2008	2007-08	September 30, 2008	No return	*Explanation 5A* will be applicable

Date of initiation of search	*"Undisclosed income" pertains to the previous year given below*	*Due date of submission of return of income for the previous year given in Column 2*	*Date of submission of return of income*	*Penalty*
November 3, 2008 (11:30 AM)	2007-08	September 30, 2008	Return submitted on November 3, 2008 at 10:30 AM disclosing the quantum of income	*Explanation 5A* will be applicable even if return is submitted on the date of search disclosing the quantum of income
November 3, 2008	2007-08	September 30, 2008	Return submitted on November 4, 2008 disclosing the quantum of income	*Explanation 5A* will be applicable even if return is submitted on or after the date of search disclosing the quantum of income
September 3, 2008	2007-08	September 30, 2008	September 10, 2008 disclosing the "undisclosed income"	Section 271AAA will be applicable. Penalty can be avoided if conditions given in section 271AAA(2) are satisfied [*see* para 374.2-2a]
October 8, 2008	2007-08	September 30, 2008	October 7, 2008 without disclosing "undisclosed income"	Normal provisions of section 271(1)(*c*) will apply

374.3 ***Broad propositions for imposing penalty*** - The following broad propositions taken from judicial pronouncement should be noted—

374.3-1 *BASIC CONCEPTS* - The following are basic concepts for imposing penalty—

1. Penalty proceedings are initiated before laying the penalty. Generally, these proceedings are initiated by issuing a show-cause notice.

2. If the Assessing Officer wants to levy penalty for concealment of income, then the Assessing Officer before completion of assessment must initiate proceedings for penalty.

3. If Commissioner (Appeals) wants to levy penalty for concealment of income, then such proceedings must be initiated before passing the order under section 250.

4. If the Commissioner wants to impose penalty in the case of increasing taxable income under section 263, then he must initiate penalty proceeding before passing the order under section 263.

374.3-2 *PENALTY UNDER SECTION 271(1)(c) - IS IT DISCRETIONARY* - The Assessing Officer has discretion under section 271(1)(*c*) whether or not to initiate penalty proceedings. The word used in the section is "may". The Supreme Court in the case of *Hindustan Steel Ltd.* v. *State of Orissa* [1972] 83 ITR 26, has laid down that the penalty will not be imposed merely because it is lawful to do so where a discretion is given to the authority—***CIT*** v. ***V.S.K. Adi Chetty Suravel Chetty*** [2003] 127 Taxman 543 (Mad.).

374.3-3 *CAN PENALTY PROCEEDING BE INITIATED AFTER DROPPING PENALTY PROCEEDING EARLIER* - There is no bar on fresh initiation of proceedings and merely because proceedings had been dropped earlier, that is no reason to hold that subsequently penalty proceedings cannot be initiated; proceedings under section 271(1)(*c*) can be initiated at any stage—*CIT* v. *Jain Brothers* [2002] 120 Taxman 307 (Delhi)

374.3-4 *SATISFACTION FOR INITIATION OF PENALTY UNDER SECTION 271(1)* - Section 271(1) empowers the Assessing Officer to levy penalty for certain offences listed in that sub-section. It is a requirement that the Assessing Officer is required to be satisfied before such a penalty is levied.

374.3-4a JUDICIAL INTERPRETATION - There is a considerable variance in the judicial opinion on the issue as to whether the Assessing Officer is required to record his satisfaction before issuance of penalty notice under this sub-section. Some judicial authorities have held that such a satisfaction need not

be recorded. However, the Delhi High Court in the case of ***CIT*** v. ***Ram Commercial Enterprises Ltd.*** [2000] 246 ITR 568 and the Apex Court in the case of ***Dilip N. Shroff*** v. ***CIT*** [2007] 291 ITR 519 have held that such a satisfaction must be recorded by the Assessing Officer.

374.3-4b MODIFICATION MADE BY THE FINANCE ACT, 2008 - Sub-section (1B) has been inserted in section 271 with retrospective effect from April 1, 1989. It is applicable if the following conditions are satisfied—

- Any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment.
- The above order contains a direction for initiation of penalty proceedings under section 271(1)(*c*).

If the above two conditions are satisfied, such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under section 271(1)(*c*).

374.3-5 *AGREED ADDITIONS/SURRENDER BY ASSESSEE - DOES IT AMOUNT TO CONCEALMENT* - It cannot be laid down as a principle of universal application that wherever an assessment has been completed by accepting the offer of an assessee, no penalty can be imposed. It is for the department to consider the explanation offered by the assessee in respect of an amount, which was offered to be taxed. It is not automatic that whatever amount has been offered by the assessee, penalty is to be imposed. Generally, concealment provision cannot be invoked in case of surrendered addition if surrender is made specifically on condition that no penalty will be levied or if surrender is made with a view to buy peace or avoid harassment or litigation—*ITO* v. *Manjit Singh Baldev Singh Commission Agents* [1999] 69 ITD 197 (Asr.), ***Brij Bala Chaudhary*** v. ***ITO*** [2003] 87 ITD 173 (Lucknow), ***CIT*** v. ***Rajesh Nath Aggarwal*** [2008] 172 Taxman 26 (Punj. & Har.).

374.3-6 *ADDITION BECAUSE OF WRONG CLAIM - DOES IT AMOUNT TO CONCEALMENT* - Disallowance of an expense *per se* cannot mean that the assessee has furnished incorrect particulars of its income. Concealment involves penal action. It has to be proved as a conscious act. In order to justify levy of penalty, circumstances must show that assessee is having an intention to conceal income and to evade payment of tax—***Balaji Vegetable Products (P.) Ltd.*** v. ***CIT*** [2007] 290 ITR 172 (Kar.). It is true that direct evidence may not be available in every case. Yet, it must be proved as a necessary corollary from the facts and circumstances established on the record—*CIT* v. *Ajaib Singh & Co.* [2001] 119 Taxman 825 (Punj. & Har.). In other words, the mere fact that certain amounts claimed by the assessee have been disallowed and treated as income does not necessarily lead to the conclusion that the assessee is guilty of fraud or wilful neglect. The fact that the *Explanation* to section 271(1)(*c*) required the assessee to show that there was no fraud or wilful negligence does not in any way enable the revenue to contend that there is a presumption of fraud or negligence without adducing any evidence whatever to substantiate such assertion—*CIT* v. *Inden Bislers* [2001] 118 Taxman 766 (Mad.).

On the basis of the decided cases, the following broad propositions can be drawn—

1. Where the claim of deduction by the assessee which is debatable is disallowed, no penalty can be imposed on the assessee—***CIT*** v. ***Harshvardhan Chemicals & Minerals Ltd.*** [2003] 259 ITR 212 (Raj.). ***CIT*** v. ***H.M.A. Udyog (P.) Ltd.*** [2007] 159 Taxman 394 (Delhi), ***CIT*** v. ***Caplin Point Labs Ltd.*** [2008] 172 Taxman 279 (Mad.). Interestingly, the Delhi High Court in ***CIT*** v. ***Virgo Marketing (P.) Ltd.*** [2008] 172 Taxman 83 held that if the Assessing Officer takes a view contrary to that expressed by the assessee, it does not *per se* mean that the assessee has adopted an illegal device for reducing its tax liability. In holding so, the High Court made following noticeable observations:

> "Even though the law has been settled by this Court in a very large number of cases, apart from *Ram Commercial Enterprises'* case (*supra*) such as *Diwan Enterprises* v. *CIT* [2000] 246 ITR 571 (Delhi) and *CIT* v. *B.R. Sharma* [2005] 275 ITR 303/146 Taxman 1 (Delhi), the revenue is

still filing these sort of appeals for no apparent reason. By this casual attitude of the revenue, the Registry (apart from this Court) has been put under severe pressure in dealing with a large influx of appeals, which *prima facie* do not have any merit. By this flood of litigation, the revenue is ensuring that more important cases, where stakes are much higher and where perhaps the revenue has a better case, get receded into the background and their turn cannot come up in the near future. We have been repeatedly observing this but to no effect."

2. Where the assessee's claim for depreciation (and investment allowance) was *bona fide* and was based on a decision of High Court, the fact that the assessee subsequently withdrew the claim would not show that there had been deliberate furnishing of inaccurate particulars by the assessee when it filed the original return—***CIT*** v. ***Sivananda Steels Ltd.*** [2003] 128 Taxman 771 (Mad.).

3. No penalty is leviable where the assessee has disclosed capital gains and claimed exemption incorrectly because of ignorance of law even if the claim is disallowed by Assessing Officer—***Chandra Pal Bagga*** v. ***ITAT*** [2003] 128 Taxman 632 (Raj.).

4. Where the assessee is under the mistaken belief that income of minor son can be assessed as income of minor and not of the assessee, penalty cannot be imposed on the assessee for non-inclusion of such income in the assessee's return—*Pandit Govind Prasad Mishra* v. *CIT* [1999] 238 ITR 338 (All.).

5. Where excessive claim of depreciation was made because of mistake of accountant and the assessee agreed to disallowance, it was to be treated as case of *bona fide* mistake so as to justify deletion of penalty—*Deena Kak* v. *ITO* [2001] 70 TTJ (Jodh.) 375. Likewise, if somebody has wrongly claimed some deduction under some *bona fide* mistake, disallowance of such claim cannot be a ground for penalty under section 271(1)(*c*)—***CIT*** v. ***Manibhai & Bros.*** [2007] 294 ITR 501 (Guj.).

6. Where the assessee has correctly filed particulars regarding deduction under section 80HHC and also certificate of chartered accountant as required under section 80HHC(4), addition on account of recalculation of claim by the Assessing Officer could not be treated as concealment of income by the assessee—*Kasinka Tradings* v. *CIT* [1999] 63 TTJ (Asr.) 348. Similarly, where an assessee had a *bona fide* belief that by selling dubbing rights to a foreign company, it was selling goods or merchandise within meaning of section 80HHC, the mere disallowance of its claim for deduction under section 80HHC would not warrant imposition of penalty—***CIT*** v. ***International Audio Visual Co.*** [2007] 288 ITR 570 (Delhi).

7. A duty may be enjoined on an assessee to make a correct disclosure of income but if such disclosure is based on opinion of an expert, who is otherwise also a registered valuer having been appointed in terms of a statutory scheme, only because his opinion is not accepted or some other expert gives another opinion, same by itself may not be sufficient for arriving penalty under section 271(1)(*c*)—***Dilip N. Shroff*** v. ***CIT*** [2007] 161 Taxman 218 (SC).

374.3-7 *ESTIMATED ADDITION - WHETHER AMOUNTS TO CONCEALMENT* - Where addition was made on the basis of estimate and not on any concrete evidence of concealment or furnishing of inaccurate particulars, levy of penalty is not justified. Likewise, the addition made on account of difference of opinion about estimated rates of income and expenditure, will not justify levy of penalty—*CIT* v. *Ravail Singh & Co.* [2002] 122 Taxman 831 (Punj. & Har.), ***CIT*** v. ***Sangrur Vanaspati Mills Ltd.*** [2008] 171 Taxman 320 (Punj. & Har.).

Where, however, concealment of income is apparent from record, penalty for concealment can be imposed even on basis of estimate of income—***ITO*** v. ***R.K. Bros.*** [2003] 87 ITD 649 (All.).

374.3-8 *HIGHER INCOME DECLARED IN REVISED RETURN - DOES IT AMOUNT TO CONCEALMENT* - Liability to penalty under section 271(1)(*c*) and filing of revised return under section 139(5) are mutually exclusive. If a case falls within the scope of section 139(5), there would be no chance for levy of penalty under section 271(1)(*c*) on the basis of original return. If, on the other hand, the case does not fall within the scope of section 139(5), the fact that the assessee purported to file a revised return

will not absolve him from liability to penalty under section 271(1)(*c*) provided, he had concealed particulars of income or deliberately furnished inaccurate particulars of income in the original return already filed by him—*CIT* v. *J.K.A. Subramania Chettiar* [1977] 110 ITR 602 (Mad.). In a nutshell, the return filed so as to include the concealed income cannot be treated as a revised return because the omission to file the correct income in the original return cannot be said in such circumstances to be due to any *bona fide* mistake or omission. The onus is, therefore, on the assessee to show that the omission or wrong statement was discovered subsequent to the filing of the original return. This onus can be discharged with reference to material aspects to be brought on record by the assessee—*CIT* v. *A. Sreenivasa Pai* [2000] 109 Taxman 267 (Ker.).

The following points should also be kept in view—

1. Where the assessee had filed revised return independently to purchase peace, disclosing amount not entered in books on relevant dates due to negligence of its accountant, and the Assessing Officer had not recorded any independent finding either at assessment stage or during the course of penalty proceedings to establish concealment of income or filing of inaccurate particulars thereof, penalty under section 271(1)(*c*) was not exigible—*CIT* v. *Guru Ram Dass Fruit & Vegetable Agency* [1998] 67 ITD 1 (Chd.)(TM).

2. The fact that the assessee purported to file a 'revised return' after its coming to know that the revenue authorities had information in possession regarding concealed income of the assessee which had not been shown in the original return, would not absolve the assessee from culpability under section 271(1)(*c*)—***CIT*** v. ***Glamour Restaurant*** [2003] 80 TTJ (Mum.) 763, ***Man Mohan Gupta*** v. ***CIT*** [2004] 189 CTR (Raj.) 331.

3. Concealment of income in original return would attract penalty even if the assessee submits a revised return before the assessment is completed or penalty proceedings are started, where disclosure was made in revised return only after search and after a query was raised by the Assessing Officer—***CIT*** v. ***Lad Devi Kothari*** [2005] 97 TTJ (Jp.) 421, ***Joyti Laxman Konkar*** v. ***CIT*** [2007] 292 ITR 163 (Bom.), ***M. Sahil Hameed Batcha*** v. ***ITO*** [2007] 292 ITR 585 (Mad.).

374.3-9 *ADDITION MADE IN EX PARTE ASSESSMENT* - Penalty proceedings are distinct from assessment proceedings and one is independent of other and, therefore, any addition made in *ex parte* assessment proceedings may not by itself justify imposition of penalty, merely because addition was not disputed in appeal—*CIT* v. *Abril Pharmaceuticals (P.) Ltd.* [1999] 70 ITD 206 (Indore).

374.3-10 *OTHER POINTS* - One should also keep in view the following points—

▪ *Law on which date is applicable - On the date of filing original return or revised return* - Levy of a penalty is as per law which existed on date on which original return was filed—*Nem Kumar Tholia* v. *Addl. CIT* [1992] 194 ITR 371 (Raj.) (FB) and not that in force when duplicate return with identical concealment is filed—*Khub Chand Kundanmal* v. *Union of India* [1991] 56 Taxman 278 (Cal.).

In both types of cases, *viz.*, (*i*) where the assessee after filing an original return files a revised return under section 139(5), and (*ii*) where the assessee files a return pursuant to a reassessment notice under section 148 after an original assessment on his original return, the substantive provisions of law relating to penalty for concealment of income applicable would be those in force on the date of the original return from which income has been concealed and the filing of a subsequent return either under section 139(5) or 148 will not alter the position—*CIT* v. *Onkar Saran & Sons* [1992] 195 ITR 1 (SC), *CIT* v. *Kanhaiyalal Ghatiwala* [1989] 180 ITR 338 (Raj.), *CIT* v. *Joginder Singh* [1985] 151 ITR 93 (Delhi).

▪ *Not filing appeal against additions* - The mere fact that the assessee had not filed appeal against the cash credits addition would not lead to the conclusion that the assessee had concealed the particulars of income—*CIT* v. *Sharp Springs & Staples Co. (P.) Ltd.* [1999] 105 Taxman 241 (Rajkot) (Mag.).

▪ *No specific notice of intention of invoke Explanations is necessary* - The statutory provision in question comes into operation by its own force once conditions mentioned *Explanation 1* come into existence. No specific notice of intention to invoke *Explanation* is necessary—*Raghuvir Soni* v. *Asstt. CIT* [2002] 123 Taxman 205 (Raj.), ***CIT*** v. ***T.J. Mathai*** [2004] 140 Taxman 259 (Ker.).

▪ *Non-disclosure of amount unutilised under section 54F* - Penalty cannot be imposed because unutilised amount under section 54F was not kept in specified account with bank but under some other account—***ITO*** v. ***Preet Pal Singh*** [2003] 133 Taxman 203 (Chd.) (Mag.).

▪ *Rejection of method of accounting* - Where the income had been estimated by rejecting 'project-completion method' followed by the assessee, penalty was not leviable—***Amruta Enterprises*** v. ***CIT*** [2003] 84 ITD 172 (Mum.).

▪ *Application of higher rate of profit* - Levy of penalty for concealment under section 271(1)(*c*) in respect of the addition based on application of higher gross profit rate is not tenable in law—***ITO*** v. ***Madan Lal*** [2003] 130 Taxman 88 (SMC) (Mag.).

▪ *No deposit of sales tax* - If the assessee has collected sales tax but the same has not been deposited till the due date of submission of return of income, nor it has been included in taxable income, it amounts to "concealment" of income—***CIT*** v. ***Bassein Metals (P.) Ltd.*** [2004] 139 Taxman 48 (Bom.).

▪ *Effect of petition under section 273A* - Pendency of application under section 273A is no bar to imposition of penalty—*Jaswant Rai* v. *CBDT* [1982] 133 ITR 19 (Delhi).

▪ *Totalling mistake* - Totalling mistake in accounts which is not deliberate will not be ground for imposition of penalty—***CIT*** v. ***Pitambardas Dulichand*** [2004] 191 CTR (MP) 43.

▪ *Entries on loose paper* - Entries found on loose papers cannot have any authenticity or evidentiary value in itself—***Nem Chand Daga*** v. ***CIT*** [2005] 1 SOT 515 (Delhi).

▪ *Mistake of indexation* - Wrong calculation of capital gains on basis of mistaken indexation, cannot be treated to be an indirect concealment or a wrong furnishing of particulars—***Udayan Mukherjee*** v. ***CIT*** [2007] 291 ITR 318 (Cal.).

▪ *Minimum penalty* - When penalty under section 271(1)(*c*) is attracted, no discretion lies with Assessing Officer to reduce same below minimum leviable—***BPL Sanyo Finance Ltd.*** v. ***CIT*** [2007] 290 ITR (AT) 80 (Bang.).

374.3-11 CONCLUSIONS - The Supreme Court in ***Dilip N Shroff*** v. ***CIT*** [2007] 161 Taxman 218 and ***T. Ashok Pai*** v. ***CIT*** [2007] 161 Taxman 340, announced the following rules for the purpose of imposition of concealment penalty—

1. A finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted for the purpose of section 271(1)(*c*).

2. If a certain disclosure is based on opinion of an expert, only because his opinion is not accepted or some other expert gives another opinion, the same by itself may not be sufficient for arriving at conclusion that the assessee has furnished inaccurate particulars attracting penalty under section 271(1)(*c*).

3. Penalty proceedings are not to be initiated only to harass the assessee. The Assessing Officer while initiating penalty proceedings must be fair and objective.

4. The expression 'conceal' is of great importance. It signifies a deliberate act or omission on the part of the assessee. Such deliberate act must be either for the purpose of concealment of income or furnishing of inaccurate particulars. However, in a later judgment, the Supreme Court held that wilful concealment is not an essential ingredient as is the case in the matter of prosecution under section 276C—***Union of India*** v. ***Dharamendra Textile Processors*** [2007] 166 Taxman 65 (SC).

5. Primary burden of proof is one the Department. 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.

6. Since burden of proof in penalty proceedings varies from that in an assessment proceeding, a finding in an assessment proceeding that a particular receipt is income cannot automatically be adopted, though a finding in the assessment proceeding constitutes good evidence in the penalty proceedings. In the penalty proceedings, thus, the authorities must consider the matter afresh as the question has to be considered from a different angle.

7. It is now a well-settled principle of law that more stringent the law, more strict construction thereof would be necessary. Even when the burden is required to be discharged by an assessee, it would not be as heavy as in the prosecution cases.

Who can levy penalty

375. Penalty under different sections can be levied by the following :

375.1 ***Under sections 271 and 271A*** - Under section 271, penalty can be imposed by the Assessing Officer, Commissioner (Appeals) or Commissioner. Under section 271A, penalty can be imposed by the Assessing Officer or Commissioner (Appeals).

375.1-P1 *X filed a return of income for assessment year 2008-09 disclosing therein business income of Rs. 20,000. On scrutiny of accounts the Assessing Officer found cash credits of Rs. 80,000 in names of different parties. The Assessing Officer accepted the assessee's explanation in regard to the nature and source of cash credits amounting to Rs. 50,000 and rejected his explanation in regard to the balance amount of Rs. 30,000. The Assessing Officer thus treated the said sum of Rs. 30,000 as income of X from undisclosed sources and brought to tax the same. The Assessing Officer also initiated the penalty proceedings under section 271(1)(c) for the purpose of imposing penalty for concealment of particulars of income. In the meanwhile, X filed an appeal before the Commissioner (Appeals), who enhanced the addition in regard to cash credits by Rs. 50,000 after giving opportunity to X. X accepted the decision of the Commissioner (Appeals). The Assessing Officer proposes to levy penalty on the total amount of Rs. 80,000 for concealing the particulars of income. X seeks your advice in connection with the above proposal of the Assessing Officer to levy penalty.*

SOLUTION : The penalty proceedings were initiated by the Assessing Officer on completion of the assessment for the purpose of imposing penalty on a sum of Rs. 30,000 which was treated as concealed income in course of assessment proceedings. His jurisdiction is restricted to the imposition of penalty in respect of the said sum of Rs. 30,000. In other words, the Assessing Officer is not competent to impose penalty on the further sum of Rs. 50,000 which represented the addition in respect of cash credits as made by the Commissioner (Appeals) in course of appeal proceedings, by way of enhancement of assessment. The jurisdiction to levy penalty on the said sum of Rs. 50,000 is with the Commissioner (Appeals) who is competent to levy penalty under section 271(1)(c)—*CIT* v. *Shadiram Balmukund* [1972] 84 ITR 183 (All.).

375.2 ***Under sections 271B and 272BB*** - Under sections 271B and 272BB, penalty can be imposed by the Assessing Officer [*see* also para 377.2].

375.3 ***Under sections 271BB, 271C, 271CA, 271D and 271E*** - Penalty under sections 271BB, 271C, 271CA, 271D and 271E can be imposed by the Joint Commissioner.

375.4 ***Under section 272A*** - Under section 272A penalty shall be imposed by the following :

a. in a case where the contravention, failure or default in respect of which such penalty is imposable under section 272A occurs in the course of any proceeding before an income-tax authority not lower in rank than a Joint Director or a Joint Commissioner, by such income-tax authority ;

b. in a case of failure to deliver in due time a copy of the declaration mentioned under section 197A, by the Chief Commissioner or Commissioner ; and

c. in any other case, by the Joint Director or the Joint Commissioner.

375.5 ***Under section 272AA*** - Under section 272AA penalty may be imposed by the Joint Commissioner, Assistant Director, Deputy Director or the Assessing Officer [*see* also para 377.2].

Power of Commissioner to reduce or waive penalty [Secs. 273A and 273AA]

376. Penalty may be reduced or waived by the Commissioner in the following cases—

Case 1 - Power to reduce or waive penalty under section 271(1)(*c*)	*See* paras 376.1, 376.2 and 376.4
Case 2 - Power to reduce or waive any penalty under the Income-tax Act (except covered by *Case 3*)	*See* paras 376.3 and 376.4
Case 3 - Power to grant immunity from penalty if proceedings for settlement have abated under section 245HA	*See* para 376.5

376.1 ***Power to reduce or waive penalty under section 271(1)(c) [Sec. 273A(1)]*** - The Commissioner has been empowered to reduce or waive the penalty imposed or imposable under section 271(1)(*c*) for concealment of income if the conditions given in para 376.1-1 are satisfied.

376.1-1 CONDITIONS - The following conditions must be satisfied—

376.1-1a FULL AND TRUE DISCLOSURE BEFORE DETECTION - The Commissioner can exercise this power only in the cases where he is satisfied that the assessee has (prior to the detection by the Assessing Officer of the concealment of particulars of income), voluntarily and in good faith, made full and true disclosure of such particulars. However, such disclosure will be treated as full and true disclosure only if the additions made to the returned income are of such a nature so as not to attract penalty for concealment under section 271(1)(*c*).

376.1-1b CO-OPERATION BY THE ASSESSEE - The Commissioner should be satisfied that the assessee has co-operated in tax proceedings with the department. The expression "co-operation" in any enquiry relating to the assessment in section 273A should be held to mean that the assessee did not resort to litigation, obstruction or evasive tactics in concluding the assessment and no more—*Mahalakshmi Rice Mills* v. *CIT* [1981] 129 ITR 53 (Kar.).

376.1-1c PAYMENT OF TAX/INTEREST - The assessee has either paid or made satisfactory arrangements for the payment of any tax or interest payable in consequence of an order passed under the Act in respect of the relevant assessment year.

376.1-1d RELIEF CAN BE GIVEN ONLY ONCE [SEC. 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 section 273A [under sub-section (1) or (4)] in relation to any other assessment year at any time after the making of such order. To put it differently, the power under section 273A shall be exercised only once in the case of a given person (whether it relates to one assessment year or more than one assessment year) and not more than once.

376.1-1e PREVIOUS APPROVAL OF CHIEF COMMISSIONER OR DIRECTOR-GENERAL IN SOME CASES - If the amount of income in respect of which penalty is imposed (or imposable) for the relevant assessment year, or where such disclosure relates to more than one assessment year, the aggregate amount of income for those years exceeds Rs. 5,00,000, the Commissioner can reduce or waive penalty only with the previous approval of the Chief Commissioner or Director-General.

376.1-1f FINAL ORDER - Every order under section 273A is final and cannot be called into question by a Court or authority.

376.2 ***Judicial pronouncements*** - The following are the broad judicial pronouncements given by the Courts regarding section 273A(1) :

376.2-1 GENERAL - The following basic rulings should be kept in view—

■ *Appeals to Commissioner or Tribunal* - Section 273A(1) comes into play irrespective of the assessee pursuing the remedies of appeal to the Commissioner (Appeals) or the Tribunal or to High Court challenging the validity or correctness of the levy of penalty under section 271(1)(*c*)—*Seetha Mahalakshmi Rice & Groundnut Oil Mill Contractors Co.* v. *CIT* [1981] 127 ITR 579 (AP).

■ *No time limit* - No limitation of time is prescribed for making an application—*Indra & Co.* v. *CIT* [1980] 122 ITR 510 (Raj.).

■ *Penalty imposed or imposable* - Commissioner can exercise his powers to waive or reduce penalty even where penalty is liable to be imposed though it has not been imposed—*Jakhodia Bros.* v. *CIT* [1978] 115 ITR 61 (All.).

376.2-2 *GOOD FAITH - MEANING OF* - If the element of honesty is present, the requirement of "good faith" is satisfied. "Good faith" is an orientation of honest intention and would also include an act done with a *bona fide* belief, even if such belief is a mistaken belief—*Public Carriers Truck Owners' Association* v. *CIT* [1994] 76 Taxman 1/210 ITR 36 (Raj.). Therefore, for the exercise of the discretion under section 273A(1)(*ii*), the Commissioner has to be satisfied that the petitioner voluntarily and honestly, *i.e.*, fairly, frankly, and without falsehood, made full and true disclosure of the particulars of income which were concealed or earlier inaccurately furnished—*K. Ramulu & Bros.* v. *CIT* [1990] 51 Taxman 57 (AP).

376.2-3 *VOLUNTARY - MEANING OF* - The word "voluntary" has been defined in the *Shorter Oxford Dictionary,* as performed or done of one's own free will, impulse or choice not constrained, prompted or suggested by another, proceeding from the free unprompted or unconstrained will of a person. A return filed under the constraint of exposure to adverse action by the department, will not be voluntary within the meaning of section 273A—*Hakam Singh* v. *CIT* [1980] 124 ITR 228 (All.).

376.2-3a VOLUNTARY DISCLOSURE - The following basic rulings should be kept in mind :

■ *Past disclosure* - The fact that in past the assessee did not make a full disclosure of his income and concealed the same, is immaterial—*Ramjanki Devi* v. *CIT* [1991] 58 Taxman 3 (Raj.).

■ *In revised return or by way of petition* - Disclosure can be made by way of petition—*Dhan Raj* v. *CIT* [1983] 140 ITR 652 (All.), or can be made in revised return, and it cannot be said that assessee has not co-operated in enquiry relating to the assessment—*City Dry-fish Co.* v. *CIT* [1990] Tax LR 586 (AP).

■ *After period of limitation for making assessment* - Disclosure in return filed after expiry of period of limitation for making assessment would amount to disclosure for section 273A. It can also be made either by an application or a letter which may be beyond the period prescribed for making assessment—*Cheldas Khushaldas Patel* v. *CIT* [1992] 196 ITR 200 (Guj.).

■ *Fear of adverse action* - Return filed under fear of adverse action by department is not a voluntary disclosure—*Hakam Singh* v. *CIT* [1980] 124 ITR 228 (All.). A disclosure which is made under the compulsion of a possible penalty or other proceedings cannot be termed honest or one made in good faith—*K.L. Swamy* v. *CIT* [1999] 102 Taxman 491/239 ITR 386 (Kar.).

376.2-4 *FULL AND TRUE DISCLOSURE* - Mere variation between returned and assessed income would not amount to non-disclosure of full income for the purpose of section 273A—*Navnitlal K. Zaveri* v. *CIT* [1980] 125 ITR 385 (Guj.).

376.2-5 *CO-OPERATION BY THE ASSESSEE* - The Commissioner should be satisfied that the assessee has co-operated in tax proceedings with the department. The expression "co-operation" in any enquiry relating to the assessment in section 273A should be held to mean that the assessee did not resort to litigation, obstruction or evasive tactics in concluding the assessment and no more—*Mahalakshmi Rice Mills* v. *CIT* [1981] 129 ITR 53 (Kar.). Similarly, co-operation required under section 273A must precede assessment order—*Guru Nanak Estates* v. *CIT* [1994] 208 ITR 118 (Cal.).

376.2-6 *PAYMENT OF TAX/INTEREST* - The assessee has either paid or made satisfactory arrangements for the payment of any tax or interest payable in consequence of an order passed under the Act in respect of the relevant assessment year.

■ *Extending time of payment of tax* - An order of the Assessing Officer under section 220(3) extending the time for the payment of tax on an application by assessee or the Assessing Officer's failure to make such an order despite the assessee's request, cannot be claimed as a "satisfactory arrange-

ment" for payment of tax for the purpose of claiming reduction/waiver under section 273A—*P.A. Mohammed Abdul Khader & Co.* v. *CIT*[1978] 112 ITR 552 (Ker.).

■ *Arrangement* - Section 273A does not entitle the Commissioner to reject an application for waiver or reduction merely on the ground that the assessee has not made the payment of tax or interest. If an assessee makes arrangements for payment to tax or interest, that would be a sufficient ground for consideration of the application on merits—*Ramesh Chand Gubrele* v. *CIT*[1987] 167 ITR 723 (All.).

376.3 ***Power to reduce or waive any penalty [Sec. 273A(4)]*** - Power to reduce or waive penalty is available under section 273A(4) without prejudice to the powers conferred on the Commissioner by any other provision [including section 273A(1)] of the Act. Relief under section 283A(4) is given by the Commissioner on an application made by the assessee. If the conditions mentioned in para 376.3-1 are satisfied, the Commissioner (after recording his reasons in writing for doing so) can —

a. reduce or waive the amount of penalty payable under the Act ; or

b. stay or compound any proceedings for the recovery of such amount.

376.3-1 CONDITIONS - The following conditions must be satisfied :

1. Genuine hardship - The Commissioner can give relief under section 273A(4) if he is satisfied that to do otherwise would cause genuine hardship to the assessee, having regard to the circumstances of the case. Rejection of the petitioner's application on ground that it has already paid amount of penalty and, therefore, there is no genuine hardship caused to the assessee, cannot be said to be a valid reason for rejection of application under section 273A(4)—*Garden Silk Weaving Factory* v. *CIT* [1994] 76 Taxman 408 (Guj.).

2. Co-operation - The assessee has co-operated in any inquiry relating to the assessment or any proceeding for the recovery of any amount due from him [*see* para 376.2-5].

3. Previous approval of Chief Commissioner or Director-General - Where the amount of any penalty payable under the Act (or where such application relates to more than one penalty, the aggregate amount of such penalties) exceeds Rs. 1,00,000, no order reducing or waiving the amount of compounding any proceeding for its recovery under section 273A(4) shall be made by the Commissioner except with the previous approval of the Chief Commissioner or Director-General, as the case may be.

4. No relief if the assessee has availed the benefit under section 273A(1) - *See* para 376.1-1d.

5. No time limit - No limitation of time is prescribed for making an application—*Indra & Co.* v. *CIT* [1980] 122 ITR 510 (Raj.).

6. Final order - Every order made under section 273A is final and cannot be called into question by any Court or authority.

376.4 ***Common judicial pronouncements*** - The following are some of the broad common judicial pronouncements regarding section 273A(1) and 273A(4):

■ *Principal of natural justice* - Power under section 273A is a quasi-judicial power which in very nature is required to be exercised fairly, judiciously and objectively and subject to rules of natural justice including the obligation to grant a hearing and to record reasons for conclusions ultimately arrived at in writing—*Tilakraj Bhaktavarmal* v. *CIT*[1995] 128 CTR (Kar.) 341. But the order of the Commissioner need not be in any prescribed form—*Fairdeal Motors/Smt. Shama Mir* v. *CIT*[1975] 101 ITR 687 (J&K).

Where the order rejecting the assessee's application contained the reasons in a cyclostyled proforma which is inserted between the first and last pages of the order, it shows non-application of mind by the Commissioner—*Mrs. Sharada Pullela* v. *CIT*[2000] 241 ITR 473 (MP).

■ *Finality of order* - Section 273A does not exclude power of the Commissioner under section 154 to rectify an order passed by his predecessor under section 273A—*Dr. (Mrs.) Beena Rahul Mishra* v. *V.K. Shrivastava, CIT*[1990] 185 ITR 361 (Bom.).

■ *Writ jurisdiction* - The order of Commissioner under this section is open to scrutiny by the judiciary. Order could be struck down if it is not in writing or does not give the reasons for arriving at the conclusion. Moreover, being a quasi-judicial order, its within the ambit of Court by way of writ petition if the Commissioner is grossly subjective in quashing the application—*see Madhya Pradesh Agricultural Corporation* v. *CIT*[1988] 171 ITR 576 (MP). However, a writ is not maintainable if two views are possible and the Commissioner has taken one view—*P.D. Varghese & E.J. Davis* v. *CIT* [1989] 180 ITR 187 (Ker.).

■ *Duty bound to grant relief* - If conditions mentioned in para 376.1-1 for the purpose of section 273A(1) or conditions mentioned in para 376.3-1 for the purpose of section 273A(4) are satisfied, the Commissioner is duty bound to grant relief under the respective sub-sections—*Laxman* v. *CIT*[1988] 174 ITR 485 (Bom.). In other words, if the conditions laid down for the exercise of discretion are satisfied, the authority has no discretion to refuse to exercise the discretion. The authority is under a statutory duty to exercise the discretion—*K.S.N. Murthy* v. *Chairman, CBDT*[2001] 119 Taxman 310 (AP).

376.5 ***Power of Commissioner to grant immunity from penalty [Sec. 273AA]*** - There are various issues that may arise in the event of abatement of proceedings before the Settlement Commission. Section 273AA, which has been inserted by the Finance Act, 2008 with effect from April 1, 2008, amends the power of the Commissioner to grant immunity from penalty in cases which abate.

The salient features of the scheme for granting immunity from penalty are as under—

376.5-1 *WHO CAN MAKE AN APPLICATION FOR GRANT OF IMMUNITY FROM PENALTY* - A person may make an application to the Commissioner for granting immunity from penalty, if the following two conditions are satisfied—

a. he has made an application for settlement under section 245C and the proceedings for settlement have abated; and

b. penalty proceeding have been initiated under this Act.

376.5-2 *WHEN THE APPLICATION SHOULD BE MADE* - If penalty was levied before or during the pendency of settlement proceedings, then the assessee can approach the Commissioner for immunity at any time. If no penalty was levied till the time of abatement of proceedings before the Settlement Commission, then the assessee must make an application for immunity before the imposition of penalty by the income-tax authority. However, the application for grant of immunity from penalty shall not be made after the imposition of penalty after abatement.

376.5-3 *GRANT OF IMMUNITY BY THE COMMISSIONER* - The Commissioner may, subject to such conditions as he may think fit to impose, grant to the person immunity from the imposition of any penalty under the Act, if he is satisfied that the person has, after abatement, co-operated with the income-tax authority in the proceedings before it and has made a full and true disclosure of his income and the manner in which such income has been derived.

376.5-4 *WITHDRAWAL OF IMMUNITY* - The immunity granted to a person shall stand withdrawn, if such person fails to comply with any condition subject to which the immunity was granted and thereupon the provisions of the Act shall apply as if such immunity had not been granted.

Further, the immunity granted to a person may, at any time, be withdrawn by the Commissioner, if he is satisfied that such person had, in the course of any proceeding, after abatement, concealed any particulars, material to the assessment, from the income-tax authority or had given false evidence, and thereupon such person shall become liable to the imposition of any penalty under the Act to which such person would have been liable, had such immunity not been granted.

Procedure for imposition of penalty [Sec. 274]

377. Section 274 provides the following procedure :

377.1 ***Opportunity of being heard [Sec. 274(1)]*** - No order imposing a penalty shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.

377.2 ***Previous approval of Joint Commissioner*** - In the following cases penalty can be imposed only with the prior approval of the Joint Commissioner :

1. Penalty by the Income-tax Officer where the penalty exceeds Rs. 10,000.

2. Penalty by the Assistant Commissioner or Deputy Commissioner where the penalty exceeds Rs. 20,000.

377.3 ***Order to the Assessing Officer [Sec. 274(3)]*** - An income-tax authority on making an order imposing a penalty shall send a copy of such order to the Assessing Officer.

Time-limit for completion of penalty proceedings [Sec. 275]

378. Time-limit for making an order imposing a penalty is given below -

	Time-limit One *From the end of the financial year in which proceedings, in the course of which action for the imposition of penalty has been initiated, are completed*	***Time-limit Two*** *From the end of month/ financial year in which the appellate order is received by the Commissioner or revision order is passed by the Commissioner or action for imposition of penalty has been initiated*	*Effective time-limit*
Situation 1 - The relevant assessment order is subject-matter of an appeal before Commissioner (Appeals) [appellate order is passed before June 1, 2003] or Tribunal [Sec. 275(1)(*a*)]	Before the expiry of financial year given above	Before the expiry of 6 months from the end of the month in which the above order is received or passed by the Commissioner	Time-limit One, or Time-limit Two, whichever expires later
Situation 2 - The relevant assessment order is subject-matter of an appeal before Commissioner (Appeals) [appellate order is passed on or after June 1, 2003] [proviso to sec. 275(1)(*a*)]	Before the expiry of financial year given above	Before the expiry of 1 year from the end of the financial year in which the above order is received or passed by the Commissioner	Time-limit One, or Time-limit Two, whichever expires later
Situation 3 - The relevant assessment order is subject-matter of revision under section 263 or 264 [Sec. 275(1)(*b*)]	NA	Before the expiry of 6 months from the end of the month in which the above order is passed by the Commissioner	Time-limit two
Situation 4 - Case given in section 275(1A) [*see* para 378.1]		Before the expiry of 6 months from the end of the month in which appellate order of Commissioner (Appeals)/ Tribunal/High Court/Supreme Court is received by the Commissioner/Chief Commissioner or the order of revision is passed by the Commissioner.	Time-limit two
Situation 5 - Any other case [Sec. 275(1)(*c*)]	Before the expiry of financial year given above	Within 6 months from the end of month in which action for imposition of penalty is initiated	Time-limit One, or Time-limit Two, whichever expires later

Notes

1. In *Situation 5*, a six-month period of limitation is with reference to initiation of proceedings and not with reference to date of completion of assessment. Where initiation of penalty proceedings is done on June 8, 2005 (when penalty notice was issued) and the penalty is levied on December 15, 2005, it is within six months from the date of initiation of penalty proceedings and the date of completion of assessment, *i.e.*, March 25, 2004 is not relevant—***CIT*** v. ***Tam Tam Pedda Guruva Reddy*** [2006] 287 ITR 72 (Kar.). In other words, in those cases where penalty proceedings are not related to assessment proceedings but are independent of it, *Time-limit One* does not depend upon date of completion of assessment—***CIT*** v. ***Hissaria Bros.*** [2008] 169 Taxman 276 (Raj.).

Take another case, the Authority to impose penalty under provisions of sections 271D and 271E is Joint Commissioner; having regard to provisions of sections 271D and 271E, period of limitation for the purpose of section 275 is to be reckoned from date when penalty proceedings are initiated by Joint Commissioner and not from date on which assessment proceedings are completed — ***Dewan Chand Amrit Lal*** v. ***CIT*** [2006] 98 ITD 200/[2005] 98 TTJ 947 (Chd.)(SB).

2. If the Assessing Officer has not been able to impose penalty within period of limitation due to certain practical difficulties, the period of limitation cannot be extended. If penalty is not levied within time prescribed under section 275, it is barred by limitation and existence of reasonable cause for failure of the Assessing Officer to levy penalty is immaterial—***Paharpur Cooling Towers Ltd.*** v. ***CIT*** [2007] 109 ITD 69 (Kol.).

378.1 ***Time-limit for passing penalty order under sec. 275(1A)*** - The provisions are given below -

1. An assessment/order is subject-matter of an appeal to the Commissioner (Appeals), Appellate Tribunal, High Court, Supreme Court or revision before Commissioner.

2. An order of imposing/enhancing/reducing/dropping penalty has been passed before the authorities given above pass the appellate order/revision order.

3. After passing the appellate/revision order by the aforesaid authorities, penalty can be imposed/enhanced/reduced/dropped on the basis of assessment as revised by giving effect to said appellate/revision order.

4. Such order cannot be passed without giving the assessee a reasonable opportunity of being heard.

5. Such order cannot be passed after the expiry of six months from the end of the month in which appellate order of Commissioner (Appeals)/Tribunal/High Court/Supreme Court is received by the Commissioner/Chief Commissioner or the order of revision is passed by the Commissioner.

6. Provisions of section 274(2) shall be applicable.

7. The aforesaid provisions are applicable with effect from July 13, 2006.

378.2 ***Exclusion of certain period*** - In computing the period of limitation as given above, the following shall be excluded—

a. the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129[if there is an application or a request is made by the assessee to provide him an opportunity for re-hearing and if such re-hearing is given by the authorities, then the time taken in giving rehearing opportunity to the assessee can be computed for the purpose of limitation. In other words, this provision cannot be invoked by the department unilaterally to compute the period of limitation on its own without there being any request for re-hearing by the assessee—***B.N. Amarnath*** v. ***CIT*** [2003] 126 Taxman 201 (Kar.)];

b. any period during which the immunity granted under section 245H remained in force ; and

c. any period during which a proceeding for the levy of penalty is stayed by an order or injunction of any Court.

378.1-P1 *Find out the time-limit for imposition of penalty in the following cases :*

1. On February 10, 2008, the Assessing Officer completes the assessment for the assessment year 2006-07 under section 143(3). For imposing concealment penalty under section 271(1)(c), the Assessing Officer initiates penalty proceedings on February 10, 2008.

2. In the aforesaid case suppose the assessee files an appeal to the Commissioner (Appeals). The Commissioner (Appeals) passes the order on April 17, 2009 and which is received by the assessee and the Commissioner on April 28, 2009 and May 2, 2009, respectively.

3. Suppose in (1) supra, the Commissioner revises the assessment under section 263 by his order dated August 16, 2008 which is received by the assessee on September 3, 2008.

4. Suppose in (1) supra penalty proceedings have been stayed by the Bombay High Court on August 29, 2008. The Supreme Court, however, vacates the stay order on November 6, 2008.

5. Suppose in (2) supra, the Bombay High Court has stayed penalty proceeding from August 18, 2009 to September 20, 2009.

SOLUTION : The time-limit for completion of penalty proceeding is as follows :

	Case 1	Case 2	Case 3	Case 4	Case 5
1. Last day of the financial year in which penalty proceeding was initiated	March 31, 2008	March 31, 2008	March 31, 2008	March 31, 2008	March 31, 2008
2. Six months† from the end of the month—					
2.1 in which penalty proceeding was initiated	August 31, 2008	—	—	August 31, 2008	—
2.2 in which order of the Commissioner (Appeals) is received by the Commissioner	—	March 31, 2011	—	—	March 31, 2011
2.3 in which order under section 263 is passed by the Commissioner	—	—	February 28, 2009	—	—
3. Date by which order of penalty order shall be passed [(1) or (2), whichever is later]	August 31, 2008	March 31, 2011	February 28, 2009	August 31, 2008	March 31, 2011
4. Date by which penalty order shall be passed after excluding the time during which proceedings were stayed by the Court in the case of stay order :					
4.1 in case 4 from August 29, 2008 to November 6, 2008 [i.e., 69 days]	—	—	—	November 8, 2008	—
4.2 in case 5 from August 18, 2009 to September 20, 2009 (i.e., 33 days)	—	—	—	—	May 3, 2011

Offences and prosecutions

379. Besides penalties imposable for different defaults, the Income-tax Department is empowered to start prosecution proceedings for offences committed by taxpayers. The Table given below highlights different offences which invite prosecution under different provisions of the Act :

Section	*Nature of offence*	*Rigorous imprisonment*	
		Minimum period	*Maximum period*
(1)	*(2)*	*(3)*	*(4)*
275A	Dealing with seized assets in contravention of the order made by the officer conducting search	Any period up to 2 years (and fine)	2 years (and fine)
275B	Failure to comply with the provisions of section 132(1)(*iib*) (applicable from June 1, 2002)	Any period up to 2 years (and fine)	2 years (and fine)
276	Removal, concealment, transfer or delivery of property to thwart tax recovery		

†One year from the end of the financial year in which the order of Commissioner (Appeals) is received by the Commissioner in Case No. 2.

(1)	(2)	(3)	(4)
276A	Failure to comply with the provisions of section 178(1), (3) by liquidator of a company	Any period up to 2 years (and fine)	2 years (and fine)
276B	Failure to pay tax to the Government's treasury or failure to pay to the Government tax payable by him as required by section 115-O(2) or second proviso to section 194B	3 months (and fine)	7 years (and fine)
276BB	Failure to pay to the credit of Central Government tax collected under section 206C	3 months (and fine)	7 years (and fine)
276C(1)	Wilful attempt to evade tax, penalty or interest imposable under the Act	If tax evaded exceeds Rs. 1,00,000: 6 months; otherwise : 3 months (and fine)	If tax evaded exceeds Rs. 1,00,000 : 7 years ; otherwise : 3 years (and fine)
276C(2)	Wilful attempt to evade the payment of any tax, penalty or interest	3 months (and fine)	3 years (and fine)
276CC	Wilful failure to file return of income in time under section 139(1) or section 148 or section 153A or wilful failure to file in time return of fringe benefit under section 115WD(1) or in response to notice under section 115WH(2)	If tax evaded exceeds Rs. 1,00,000 : 6 months; otherwise : 3 months (and fine)	If tax evaded exceeds Rs. 1,00,000 : 7 years ; otherwise : 3 years (and fine)
276D	Wilful failure to produce books of account and documents or wilful failure to comply with a direction to get the accounts audited	Any period up to one year (and fine of Rs. 4 to Rs. 10 for every day of default)	1 year (and fine of Rs. 4 to Rs. 10 for every day of default)
277	Making a false statement in verification or delivering a false account or statement	If tax evaded exceeds Rs. 1,00,000 : 6 months; otherwise : 3 months (and fine)	If tax evaded exceeds Rs. 1,00,000 : 7 years ; otherwise : 3 years (and fine)
277A	Falsification of books of account or documents, etc.	3 months (and with fine)	3 years (and with fine)
278	Abetment to make a false statement or declaration	If tax evaded exceeds Rs. 1,00,000 : 6 months; otherwise : 3 months (and fine)	If tax evaded exceeds Rs. 1,00,000 : 7 years ; otherwise : 3 years (and fine)
278A	Punishment for second and subsequent offences under section 276B, 276C(1), 276CC, 277 or 278	6 months for every offence	7 years for every offence
278B and 278C	Offences committed by companies/firms/HUFs —criminal liability of managing director, managing partner, karta or any such officer, who wilfully committed the offence for the company/firm or HUF	Same as in the case of the company/firm/HUF Up to 6 months (and fine)	Same as in the case of the company/firm/HUF 6 months (and fine)
280(1)	Disclosure by public servants in contravention of section 138(2) [maybe prosecuted with previous sanction of Central Government]		

379.1 ***Other points*** - The following points should also be kept in view :

■ *Issue of instructions* - Proceeding against the aforesaid offences can be started only at the instance of the Commissioner, Commissioner (Appeals) or the appropriate authority. The Chief Commissioner or Director-General may issue such instructions to the aforesaid authorities as he may deem fit for institution of proceedings.

For filing a criminal complaint, an opportunity of hearing is not required to be afforded to the assessee before the grant of sanction by the Commissioner—***CIT*** v. ***Velliappa Textiles Ltd.*** [2003] 132 Taxman 165 (SC).

■ *Trial by Court* - The aforesaid offences can be tried by a Court of law. By virtue of section 292, no Court inferior to that of a Presidency Magistrate of the first class can try any offence under the Act.

■ *Bar on subsequent prosecution* - In view of section 279(1A), if the Commissioner has reduced or waived penalty for concealment of income under section 273A, no prosecution proceedings can be initiated for the same assessment year in respect of the following offences :

a. wilful attempt to evade tax [sec. 276C(1)] ;

b. wilful attempt to evade the payment of tax [sec. 276C(2)] ; or

c. making false statement in verification or delivering a false account or statement [sec. 277].

■ *Offence committed by companies* - In respect of the some of the offences, it is provided that the person found guilty shall be punishable with rigorous imprisonment and with fine. A company being a juristic person cannot be punished with imprisonment, it can be punished with fine only—***CIT*** v. ***Velliappa Textiles Ltd.*** [2003] 263 ITR 550 (SC).

Consequently, sub-section (3) has been inserted in section 278B with effect from October 1, 2004. It provides that if an offence under the Act has been committed by a person being a company, it shall be punished with fine and any other person who was in charge of and was responsible for the conduct of business of the company, or any director, manager, secretary or other officer of the company shall be liable for punishment of imprisonment and fine, whatever so provided.

■ *Compounding an offence* - Under section 279(2), the Chief Commissioner or a Director-General may either before or after the institution of proceedings compound any such offence. Generally, the following points [*vide* Letter FN4/7/69-IT (Inv.), dated March 21, 1969] are considered before deciding to compound an offence—

- Compounding of an offence may be considered only in those cases in which the assessee comes forward with a written request for compounding offence.
- Cases in which the prospects of a successful prosecution are good are not ordinarily compounded.
- Bearing in mind the deterrent effect of a prosecution, it is considered whether the purpose will be more effectively served by making the assessee pay a deterrent composition fee or by obtaining a conviction.
- In cases where subsequent to the launching of prosecution fresh evidence becomes available which may show that the case of the prosecution is weak and the assessee is agreeable to have the offence compounded, the practice is to compound the offence.

The Central Board of Direct Taxes has liberalised its guidelines for compounding of offences under the Direct Tax Laws. The guidelines have liberalised the conditions for compounding of technical offences such as delay in depositing the tax deducted at source or the tax collected at source. The Chief Commissioners of Income-tax are now empowered to compound the first technical offence in any case if the compounding charges do not exceed Rs. 10 lakh. Taxpayers whose cases were rejected earlier may also seek reconsideration of their applications under the new guidelines. However, cases in which the compounding orders have already been passed shall not be reviewed.

The revised guidelines have been issued with the objective of ensuring fairness and objectivity in compounding of offences, reducing the pendency of prosecutions before the Courts and removal of unintended hardship to the taxpayers. It is expected that the liberalised guidelines will attract a large number of assessees to come forward with requests for compounding of offences for which they have been charged—PIB Press Release, dated October 11, 1994.

■ *Prosecution proceedings* - Imposition of penalty is neither a prosecution nor a punishment for any offence and, hence, proceedings can continue simultaneously with the criminal complaints and thereby the petitioner is not exposed to any double jeopardy as contemplated in article 20 of the Constitution of India—*Gulab Chand Sharma* v. *H.P. Sharma, CIT* [1974] 95 ITR 117 (Delhi). If penalty proceedings are set aside or cancelled by a competent authority, on the same allegations, prosecution cannot be continued—***K.C. Builders*** v. ***CIT*** [2004] 135 Taxman 461 (SC). Where,

however, the department's appeal against the order of the Commissioner (Appeals) cancelling penalty is pending before the Tribunal, till the disposal of the department's appeal, the prosecution against the assessee can be stayed rather than quashed—*M.A. Quddus* v. *ITO* [2001] 114 Taxman 187 (AP).

Where an appeal is pending against the assessment order, the Assessing Officer can launch criminal proceedings under section 277 on the basis of the said order—*Associated Industries* v. *First ITO* [1983] 139 ITR 269 (Mad.). Pendency of appeal is not a bar to the launching of prosecution proceedings—*Shankar & Co.* v. *Third ITO* [1991] 97 CTR (Kar.) 92.

■ *Section 277* - Though offences under section 277 of the Income-tax Act and section 193 of the Indian Penal Code are somewhat similar, they are not identical and there is no legal bar to the prosecution of the petitioner for both the offences—*Gulab Chand Sharma* v. *H.P. Sharma, CIT* (*supra*).

■ *Participation* - A partner not taking part in the conduct of the affairs of the firm cannot be prosecuted—*Manian Transports* v. *S. Krishna Moorthy, ITO* [1991] 191 ITR 1 (Mad.).

■ *Lesser than minimum penalty* - The court has no power to award a lesser than minimum sentence once the offence is made out—*ITO* v. *D. Manoharlal Kothari* [1999] 104 Taxman 139 (Mad.).

■ *Protective assessment* - It is doubtful whether prosecution can be launched against the assessee on the basis of protective assessment—*P. Soundarya* v. *ITO* [2000] 113 Taxman 534 (Mad.).

■ *Conditional surrender* - Where a settlement was arrived at between the Commissioner and petitioner in accordance with which the petitioner surrendered Rs. 60,000 on understanding that no penal action or prosecution would be initiated against it, initiation of criminal proceedings against the petitioner would be bad in law—*Krishna Pipe & Tubes* v. *Union of India* [1998] 99 Taxman 568 (All.).

■ *Order of Settlement Commission* - Where the Settlement Commission, while imposing penalty on the petitioner, granted him immunity from criminal prosecution, complaint filed against him earlier for offences under sections 276C and 277 cannot be sustained—*Kishore Kumar More* v. *CIT* [1998] 100 Taxman 161 (Pat.).

379.2 *Power of Commissioner to grant immunity from prosecution [Sec. 278AB]* - The salient features of the scheme of section 278AB, which has been inserted by the Finance Act, 2008 with effect from April 1, 2008, are given below -

379.2-1 *WHO CAN MAKE AN APPLICATION FOR GRANT OF IMMUNITY FROM PROSECUTION* - A person may make an application to the Commissioner for granting immunity from prosecution, if he has made an application for settlement under section 245C and the proceedings for settlement have abated.

379.2-2 *WHEN THE APPLICATION SHOULD BE MADE* - The application for the immunity must be made by the assessee to the Commissioner before institution of the prosecution proceedings after abatement.

If prosecution proceedings were instituted before or during the pendency of settlement proceedings, then the assessee can approach the Commissioner for immunity at any time. However if the assessee has received any notice, etc., from the income-tax authority for institution of prosecution, then he must apply to the Commissioner for immunity, before actual institution of prosecution.

379.2-3 *GRANT OF IMMUNITY BY THE COMMISSIONER* - The Commissioner may grant to such person, subject to such conditions as he may think fit to impose, immunity from prosecution for any offence under the Income-tax Act, if he is satisfied that the person has, after abatement, co-operated with the income-tax authority in the proceedings before him and has made a full and true disclosure of his income and the manner in which such income has been derived:

Where, however, the application for settlement under section 245C is made before June 1, 2007, the Commissioner may grant immunity from prosecution for any offence under the Income-tax Act or under the Indian Penal Code or under any Central Act for the time being in force.

379.2-4 *WITHDRAWAL OF IMMUNITY* - The immunity granted to a person shall stand withdrawn, if such person fails to comply with any condition subject to which the immunity was granted and thereupon the provisions of the Act shall apply as if such immunity had not been granted.

Further, the immunity granted to a person may, at any time, be withdrawn by the Commissioner, if he is satisfied that such person had, in the course of any proceeding, after abatement, concealed any particulars material to the assessment, from the income-tax authority or had given false evidence, and thereupon such person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the proceedings.

Onus of proof [Secs. 273B, 278AA and 278E]

380. With the insertion of sections 273B, 278AA and 278E, the onus of proof has been shifted from department to the assessee.

380.1 ***Sections 273B and 278AA*** - An assessee will have to prove that the omission or commission is with "reasonable cause" or it is without the existence of culpable mental state. The Department had so far been unsuccessful in levying penalty and of prosecuting the defaulters due to onus of proof being casted upon the department. By deleting the words "without reasonable cause" from penalty provisions, it has been provided that the default of an assessee by itself would attract penalty. On the same line it has been provided in sections 273B and 278AA that notwithstanding anything contained in penalty provision [*i.e.*, sections 271(1), 271A, 271B, 271BB, 271C, 271D, 271E, 271F, 272A(1)(*c*)/(*d*), 272A(2), 272AA(1), 272BB, 273] and provision of prosecution (*i.e.*, sections 276A, 276AB, 276B) respectively, no penalty or prosecution shall be imposed or launched on the assessee for any failure referred to in the said sections if he proves that there was a reasonable cause for the said failure. Thus, aforesaid amendments have overruled the decision of the Supreme Court in *CIT* v. *Anwar Ali* [1970] 76 ITR 696. In context of penalty provisions, words 'reasonable cause' would mean a cause which is beyond control of the assessee—***OMEC Engineers*** v. ***CIT*** [2008] 169 Taxman 158 (Jharkhand).

380.2 ***Section 278E***† - Section 278E provides that in any prosecution proceedings under the Act requiring a culpable mental state on the part of the accused, the Court shall presume the existence of such mental state. However, 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 against him. 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 mere preponderance of probability.

380.2-1 *SECTION 278E FAILS TEST OF REASONABLENESS* - In England, Parliament is sovereign and an Act of Parliament is immune from being challenged. Conversely, in India every statute of Parliament or a State Legislature is subject to the test of fundamental rights provided in the Constitution. A statute cannot violate any of the fundamental rights guaranteed under the Constitution. Article 21 of the Constitution states : "No person shall be deprived of his life or personal liberty except by the procedure established by law". In *Maneka Gandhi* v. *Union of India* AIR 1998 SC 597, it was laid down that the procedure prescribed by law must be reasonable, fair and just and that it can never be arbitrary. This approach has been reiterated in a number of cases and it is now well-settled in the constitutional law that every law that deprives a person of his life and personal liberty must be fair, reasonable and just.

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†Section 278E is constitutionally valid—***Selvi J. Jayalalitha*** v. ***UOI*** [2007] 288 ITR 225 (Mad.).

By virtue of section 278E in a criminal trial for an offence under the Act, mental culpability required by the offence is presumed. The onus is put on the accused to prove the absence of such mental culpability and that too beyond reasonable doubt. Usually, when in a criminal proceeding, onus is on the accused to prove a particular defence, the standard of proof is never 'beyond reasonable doubt'. Section 278E, however, imposes much greater burden on the accused. It requires the accused to establish 'beyond reasonable doubt' the absence of the culpable mental state required by the offences under the Act. Even if the accused creates a reasonable doubt as to his mental guilt, he will have to face conviction, if he does not disprove the existence of culpable mental state beyond reasonable doubt. It cannot be said with certainty that those who fail to disprove the culpable mental state beyond reasonable doubt did actually possess such mental state. It is extremely unfair to punish a person by raising a presumption as to his guilt, when actually there is a reasonable probability of his being innocent.

Advance payment of tax

Income liable for advance tax

381. Under the scheme of advance payment of tax, every income (including capital gains, winnings from lotteries, crossword puzzles, etc.) is liable for payment of advance tax.

381.1 ***Liability to advance tax - When arises*** - It is obligatory to pay advance tax in every case where the advance tax payable is Rs. 5,000 or more.

381.2 ***Due dates of payment of advance tax*** - Advance tax is payable as follows :

	In the case of a corporate assessee	*In the case of a non-corporate assessee*
On or before June 15 of the previous year	Up to 15 per cent of advance tax payable	—
On or before September 15 of the previous year	Up to 45 per cent of advance tax payable	Up to 30 per cent of advance tax payable
On or before December 15 of the previous year	Up to 75 per cent of advance tax payable	Up to 60 per cent of advance tax payable
On or before March 15 of the previous year.	Up to 100 per cent of advance tax payable.	Up to 100 per cent of advance tax payable.

■ Any payment of advance tax made before March 31 shall also be treated as advance tax paid during the financial year.

■ If the last day for payment of any instalment of advance tax is a day on which the receiving bank is closed, the assessee can make the payment on the next immediately following working day, and in such cases, the mandatory interest leviable under sections 234B and 234C would not be charged.

■ After March 31, 2008, all corporate assessees and other assessees (who are subject to compulsory audit under section 44AB) will have to make electronic payment of tax through internet banking facility offered by authorized banks. Alternatively, these taxpayers can make electronic payment of tax through internet by way of credit or debit cards. It is not necessary for the assessee to make payment of taxes from his own account in an authorized bank. An assessee can make electronic payment of taxes also from the account of any other person. However, the challan for making such payment must clearly indicate the Permanent Account Number (PAN) of the assessee on whose behalf the payment is made—**Circular No. 5/2008,** dated July 17, 2008.

Advance tax liability - Under different situations

382. Advance tax liability can be computed as follows :

382.1 ***Payment of advance tax by the assessee of his own account [Sec. 210]*** - An assessee who is liable to pay advance tax is required to estimate his current income and pay advance tax thereon without having to submit any estimate or statement of income to the assessing authorities.

Revision of second and subsequent instalment - After making payment of first/second instalment of advance tax, an assessee can revise the remaining instalment(s) of advance tax in accordance with his revised estimate of current income and pay tax accordingly, without any requirement of filing the revised estimate of advance tax.

382.1-1 *COMPUTATION OF TAX* - Tax can be computed on the current income (estimated by the taxpayer) at the rates in force during the financial year. From the tax so computed, tax deductible

or collectible at source will be deducted. Calculation can be made on similar lines in the case of upward/downward revision of current income.

Tax deductible at source has to be excluded from tax payable while computing advance tax liability even if tax had not actually been deducted—***CIT*** v. ***Pride Foramer SAS*** [2008] 24 SOT 59 (Delhi).

382.2 ***Payment of advance tax in pursuance of order of Assessing Officer [Sec. 210]*** -

■ *Order by the Assessing Officer* - The provisions are given below—

1. The taxpayer is one who had earlier been assessed to income-tax.

2. Inspite of the legal obligation, he has not paid advance tax.

3. The Assessing Officer may pass an order under section 210(3) requiring him to pay advance tax on his current year's income.

4. The order must specify the different instalments in which the advance tax should be paid.

5. Such order may be passed during the previous year but not later than last day of February.

■ *Lower estimate by assessee* - On receipt of the notice from the Assessing Officer to pay advance tax the assessee can submit his own estimate of lower current income/advance tax and pay tax accordingly. In such a case he has to send an intimation in Form No. 28A to the Assessing Officer.

An estimate furnished by assessee in Form No. 28A cannot be rejected by departmental authorities—***Punjab Tractors Ltd.*** v. ***CIT*** [2004] 137 Taxman 211 (Punj. & Har.). However, care must be exercised by assessees in every such case to file such estimate in Form No. 28A (by the due date of making payment of advance tax) for any failure in this regard will prompt the Assessing Officer to make legally permissible coercive recovery under the law.

■ *Higher estimate by the assessee* - Alternatively, if the advance tax on current income as per own estimate of the assessee is likely to be higher than the amount estimated by the Assessing Officer, the assessee shall pay higher tax in accordance with his own calculation. In such case, no intimation to the Assessing Officer is required.

382.2-1 *COMPUTATION OF TAX BY ASSESSING OFFICER* - The provisions are given below—

■ First of all the Assessing Officer will have to find out income of the current year. Current year's income would be calculated on the following basis—

a. total income of the latest previous year in respect of which the assessee has been assessed by way of regular assessment; or

b. the total income returned by the assessee for any subsequent year,

whichever is higher.

■ Tax liability on the income of the current year would be calculated according to the rate applicable. Tax deducted/collected at source will be deducted.

■ Calculation can be made on the similar lines when the assessee wants to make upward/downward revision of current income.

382.3 ***Payment of advance tax in pursuance of revised order of Assessing Officer*** - The provisions are given below:

1. The order passed by the Assessing Officer under section 210(3) can be revised by him under section 210(4).

2. Such revision is possible if subsequent to passing an order under section 210(3) but before March 1 of the relevant financial year, the assessee had furnished a return of income for a later year or any assessment for a later year has been completed at a higher figure.

3. On receipt of revised order, the assessee will have to pay advance tax accordingly.

■ *Lower estimate by the assessee* - The assessee can submit his own estimate of lower current income/advance tax and pay tax accordingly. In such a case he has to send an intimation in Form No. 28A to the Assessing Officer.

■ *Higher estimate by the assessee* - If alternatively, the advance tax on current income as per own estimate is likely to be higher than the amount re-estimated by the Assessing Officer, the assessee shall pay higher tax in accordance with his own calculation. In such a case intimation to the Assessing Officer is not required.

382.3-1 *COMPUTATION OF TAX* - The total income declared in the return furnished by the assessee for the later previous year or total income in respect of which the regular assessment is made after passing an order by the Assessing Officer but before March 1, shall be taken and income-tax thereon shall be calculated at the rates in force in the financial year. From the tax so determined, tax deducted or collected at source will be deducted.

Interest payable by the assessee or Government

383. *See* paras 385 and 386.

Problems illustrating advance tax provisions

384-P1 *The following are the particulars submitted by different taxpayers for the assessment year 2009-10 :*

	X (an individual) Rs.	Y (a Hindu undivided family) Rs.	Z (a firm) Rs.	A Ltd. (a company) Rs.
1	2	3	4	5
Salaries	2,80,000	—	—	—
Income from house property	3,000	37,000	36,000	(-) 14,000
Profits and gains of business or profession	—	(-) 13,000	2,98,840	5,50,000
Capital gains (short-term)	16,000	—	24,000	67,000
Income from other sources	13,000	2,68,000	43,000	38,000
Gross total income	3,12,000	2,92,000	4,01,840	6,41,000
Less : *Deductions under sections 80C to 80U*				
Under section 80C	26,000	4,500	—	—
Under section 80G	2,000	3,000	2,000	3,000
Net income	3,84,000	2,84,500	3,99,840	6,38,000
Tax liability	31,800	13,450	1,19,952	1,91,400
Add : *Surcharge*	Nil*	Nil*	Nil	Nil
Tax and surcharge	31,800	13,450	1,19,952	1,91,400
Add : *Education Cess*	636	269	2,399	3,828
Add : *Secondary and higher education cess [1% of tax and surcharge]*	318	135	1,200	1,914
Total	32,754	13,854	1,23,551	1,97,142
Less : *Tax deducted or collected at source*	27,755	5,274	27,853	51,192
Balance (a)	4,999	8,580	95,697	1,45,950

Determine the amount of advance tax payable during the financial year 2008-09.

*Not applicable in case of an individual and Hindu undivided family for the assessment year 2009-10 in case net income does not exceed Rs. 10 lakh.

SOLUTION : Advance tax payable for the financial year 2008-09 will be as under :

	X Rs.	Y Rs.	Z Rs.	A Ltd. Rs.
Advance tax payable on or before June 15, 2008	—	—	—	21,893
Advance tax payable on or before September 15, 2008 (in the case of A Ltd. after June 15, 2008 but on or before September 15, 2008)	—*	2,574	28,709	43,785
Advance tax payable after September 15, 2008 but on or before December 15, 2008	—*	2,574	28,709	43,785
Advance tax payable after December 15, 2008 but on or before March 15, 2009	—*	3,432	38,279	36,487

*Since in the case of X, amount of tax as shown at (a) is less than Rs. 5,000, it is not necessary to pay advance tax.

384-P2 *X Ltd. is a company in which the public are not substantially interested. It was assessed for the first time in 1977. It does not pay any advance tax during April 1, 2008 and September 15, 2008. The concerned Assessing Officer (vide order dated September 20, 2008 in Form No. 28) requires the company to pay tax of Rs. 22,170 on current income of Rs. 71,740 as advance tax (Rs. 16,630 on or before December 15, 2008 and Rs. 5,540 on or before March 2009). What are the different alternatives before the company?*

SOLUTION : On receipt of the demand notice the company has the following three alternatives :

Alternative 1 - It can pay advance tax as demanded by the Assessing Officer.

Alternative 2 - If it thinks that current income is lower than the income estimated by the Assessing Officer, it can intimate it to the concerned officer in Form No. 28A and pay tax accordingly. Suppose, as per the expectation of the company, the current income is Rs. 40,000, it can pay advance tax of Rs. 12,360 (*i.e.*, Rs. 9,270 on or before December 15, 2008 and Rs. 3,090 on or before March 15, 2009).

The company can revise advance tax liability even after payment of instalment on December 15, 2008. Suppose, the company pays Rs. 16,630, as per order of the Assessing Officer on December 15, 2008, and later on (say during January 2009) it suffers a loss of Rs. 10,000 (loss is unexpected and was not considered by the Assessing Officer), it can revise the advance tax payable on March 15, 2009 (after sending intimation in Form No. 28A to the Assessing Officer) as follows :

	Rs.
Current income (*i.e.*, Rs. 71,740—loss of Rs. 10,000)	61,740
Tax	19,078
Less : Advance tax paid on December 15, 2008	16,630
Advance tax payable on March 15, 2009	2,450

Alternative 3 : Under the third alternative, the company can make upward revision of the tax liability estimated by the Assessing Officer (if as per calculation of the company, tax on current income is higher) and pay tax accordingly. No intimation is required to be given to the Assessing Officer. Suppose, the company pays Rs. 16,630 on December 15, 2008 (as per order of the Assessing Officer). It gets unexpected profit of Rs. 45,000 due to a strike in the factory of a competitor. It can revise the tax payable on March 15, 2009 as follows :

	Rs.
Current income (Rs. 71,740 + Rs. 45,000)	1,16,740
Tax	36,073
Less : Tax paid on December 15, 2008	16,630
Tax payable on March 15, 2009	19,440

Interest

Interest payable by the assessee

385. Interest is payable by the assessee under the Income-tax Act in the circumstances enumerated below :

385.1 ***For defaults in furnishing return of income [Sec. 234A]*** - If a return of income is furnished after the due date or is not furnished, the assessee is liable to pay interest under section 234A.

385.1-1 *HOW TO CALCULATE INTEREST* - Interest is calculated as under :

1. Rate of interest	1 per cent per month or part of month (simple interest).
2. Period for which interest is payable.	Commencing on the date immediately following the due date for filing the return of income and ending on— *a.* the date of furnishing the return (where return has been filed after the due date) ; or *b.* the date of completion of assessment under section 144 (where no return has been furnished).
3. Amount on which interest is payable	It is calculated as under : *1.* Find out the tax on total income as determined under section 143(1) or on assessment under section 143(3) or section 147 or 153A (if the assessment is made for the first time under section 147 or 153A)† *2.* From the tax so determined advance tax paid, tax deducted or collected at source, relief under section 90/90A/91 and MAT credit under section 115JAA (but not tax paid under section 140A) shall be deducted.

385.1-2 *OTHER POINTS* - The following points shall also be kept in view :

385.1-2a SELF-ASSESSMENT TAX PAID BEFORE THE DUE DATE AND RETURN SUBMITTED AFTER DUE DATE - Interest would not be payable in a case where tax has been deposited prior to due date of filing of income-tax return even if the return of income is filed after the due date of furnishing such return (provided the return could not be filed for reasons beyond the assessee's control)—*Dr. Prannoy Roy* v. *CIT* [2002] 121 Taxman 314 (Delhi). In ***Milan Enterprise*** v. ***CIT*** [2005] 95 ITD 18, the Mumbai Bench of the Tribunal held that it is not open to the Assessing Officer to charge interest under section 234A in a situation where the assessee has paid due taxes and merely filing of income-tax return is delayed.

385.1-2b WHEN ASSESSMENT IS MADE FOR THE FIRST TIME UNDER SECTION 147 - A belated return cannot be submitted after the expiry of one year from the end of the assessment year. If an assessment is made for the first time under section 147, then the assessee cannot be made liable to pay interest for the period during which it was not possible on the part of the assessee to file return (*i.e.*, after one year from the end of the assessment year) till issuance of notice under section 148—***Priti Pithawala*** v. ***ITO*** [2003] 129 Taxman 79 (Bom.) (Mag.).

† If one has to calculate interest under section 234A for the purpose of self-assessment under section 140A, tax on returned income shall be taken [*see* problem 392-P4].

385.1-2c INTEREST IN THE CASE OF REASSESSMENT - Section 234A(3) is applicable if return of income is not submitted or submitted belatedly in the course of reassessment proceedings. Interest in such a case is payable by the assessee at the rate of 1 per cent per month (for part thereof) for the period of default. The period of default commences on the date immediately following the expiry of time given by notice under section 148 or 153A and ends on the date of furnishing of return (or on the date of completion of reassessment under section 147 or 153A where no return has been furnished). Interest is payable on the amount by which the tax on the total income as reassessed exceeds the tax on the total income determined on the basis of the earlier assessment.

385.1-2d INCREASE/REDUCTION IN INTEREST - If as a result of an order under section 154, 155, 250, 254, 260, 262, 263, 264 or 245D(4), the tax payable is increased or reduced, as the case may be, the interest shall be increased/reduced accordingly.

385.1-2e REDUCTION OF INTEREST - There is no provision for reduction or waiver of interest [*see*, however, paras 388 to 390].

385.1-2f DELAY DUE TO STRIKE - Interest should not be charged where delay in filing return is due to strike of personnel of Income-tax Department—*Income-tax Bar Association* v. *Chief CIT* [1990] 182 ITR 43 (Guj.).

385.1-2g NO OPPORTUNITY OF HEARING - The liability to pay interest under sections 234A, 234B and 234C is automatic and the question of granting opportunity of being heard does not arise—*CIT* v. *R. Ramalingair* [2000] 108 Taxman 1 (Ker.).

385.1-2h INTEREST MUST BE CHARGED IN THE ASSESSMENT ORDER - While charging interest under section 234A, 234B or 234C, the Assessing Officer is required to pass a specific order to this effect in its assessment order. When the assessment order is silent, as to whether any interest is leviable, the notice of demand under section 156 cannot be beyond the assessment order and the assessee cannot be served with any such notice demanding the interest. Interest cannot be charged by mere observation like charge interest as per law. It has to be by means of a speaking order—*CIT* v. *Inchcape India (P.) Ltd.* [2002] 124 Taxman 744 (Delhi), *CIT* v. *Ranchi Club Ltd.* [2001] 247 ITR 209/114 Taxman 414 (SC), *Tej Kumari* v. *CIT* [2001] 247 ITR 210/114 Taxman 404 (Pat.).

385.1-2i BOOKS OF ACCOUNT IN CUSTODY OF INCOME-TAX AUTHORITY - During the period when the books of account are in the custody of the concerned income-tax authorities, it is not possible for the taxpayer, to submit the return of income. Consequently, he cannot be saddled with liability to pay penal interest under section 234A for that period—***Paras Bansilal Patel*** v. ***B.M. Jindel*** [2004] 135 Taxman 125 (Guj.).

385.1-2j ISSUE OF NOTICE UNDER SECTION 142(1) - Issue of notice under section 142(1)(*ii*) and 142(1)(*iii*) does not give the Assessing Officer jurisdiction to levy interest under section 234A—*CIT* v. *Ranchi Club Ltd.* [2001] 114 Taxman 414 (SC).

385.1-2k CONCESSIONS AVAILABLE TO THE MIGRANTS AND RESIDENTS OF KASHMIR VALLEY - *Vide* Notification No. 275/12/2007-IT(B), dated April 26, 2007, interest chargeable under section 234A and section 234B for assessment year 2007-08 shall be waived for the period up the date of filing of the return of income or up to March 31, 2009, whichever is earlier, in respect of the migrant assessees of Kashmir Valley and assessees who reside in, or have their principal place of business in, the Kashmir Valley. The Board gave a similar concession for the earlier assessment years.

385.1-P1 *Determine the amount of interest under section 234A in the following cases :*

	X (22 years)	Y (35 years)	X (P.) Ltd.	X(HUF)
Due date of filing return for the assessment year 2009-10	*July 31, 2009*	*July 31, 2009*	*September 30, 2009*	*September 30, 2009*
Date of filing return	*Not filed*	*September 4, 2009*	*January 10, 2010*	*November 17, 2009*
Date of completion of assessment	*January 7, 2010*	*September 4, 2009*	*April 15, 2010*	*December 17, 2010*
	Rs.	Rs.	Rs.	Rs.
Income declared	—	*2,80,070*	*3,50,100*	*9,87,170*

	Rs.	Rs.	Rs.	Rs.
Income assessed	*3,47,540*	*2,82,600*	*3,61,560*	*11,87,170*
Advance tax paid during 2008-09	*16,400*	*6,500*	*95,000*	*1,000*
Tax deducted or collected at source	*220*	*300*	*1,100*	*500*
Tax paid under section 140A on the date of filing return of income	—	*3,050*	*15,460*	*12,000*
SOLUTION : *Interest will be determined as under* :				
Period of default (a part of month is taken as full month)	6 months	2 months	4 months	2 months
	Rs.	*Rs.*	*Rs.*	*Rs.*
Income assessed	3,47,540	2,82,600	3,61,560	11,87,170
Tax	24,508	13,260	1,08,468	2,61,151
Add : Surcharge	*Nil**	*Nil**	*Nil***	26,115
Tax and surcharge	24,508	13,260	1,08,468	2,87,266
Add : Education cess	490	265	2,169	5,745
Add : Secondary and higher education cess	245	133	1,085	2,873
Tax payable on assessed income	25,243	13,658	1,11,722	2,95,884
Less : Advance tax paid and tax deducted or collected at source	16,620	6,800	96,100	1,500
Shortfall (tax paid under section 140A is not considered)	8,623	6,858	15,622	2,94,384
Shortfall (rounded off) [see para 387] (c)	8,600	6,800	15,600	2,94,300
Interest on (c) at the rate of 1% per month	516	136	624	5,886

385.2 ***For failure to deduct or collect and pay tax at source [Sec. 201(1A) or 206C(7)]*** - The provisions are given below—

■ *Default* - Interest is payable in respect of any of the following defaults—

1. If the person responsible for deducting/collecting tax at source does not deduct/collect tax at source, wholly or partly, under sections 192 to 196C and 206C.

2. After deducting/collecting tax, he fails to pay the same as required by the Act.

■ *Interest* - In the above two cases, the person responsible for deducting/collecting tax is liable to pay interest. Interest is calculated at the rate of 1 per cent per month (or part thereof). Interest is payable on short payment or non-payment. It is payable from the date on which such tax was deductible/collectible to the date on which the tax is actually paid.

One should keep in view the following points —

385.2-1 *TIME LIMIT* - No time-limit is fixed for passing orders under section 201(1A)—*U.P. State Industrial Development Corpn. Ltd.* v. *ITO* [2002] 81 ITD 173 (Lucknow), ***Thai Airways International Public Co. Ltd.*** v. ***CIT*** [2005] 2 SOT 389 (Delhi). However, Courts have held that action under section 201 would be possible by a competent authority under the Act within period of four years—***CIT*** v. ***NHK Japan Broadcasting Corpn.*** [2008] 172 Taxman 230 (Delhi). Where the Assessing Officer did not know such default or the assessee delayed the proceedings, there can be some extension to the said limit of four years. The Assessing Officer is required to pass a speaking order for charging interest under section 201(1A)—***Mittal Bhai Investment (P.) Ltd.*** v. ***ITO*** [2005] 92 TTJ (Jp.) 286.

385.2-2 *WHEN RECIPIENT HAS PAID TAX* - In the case of *CIT* v. *Rishikesh Apartments Co-op. Housing Society Ltd.* [2001] 119 Taxman 239 (Guj.), the assessee failed to deduct tax under section 194C. However, it was found that the contractor on the other hand had paid the advance tax and self-

*Surcharge is not applicable in case of an individual and Hindu undivided family if the net income does not exceed Rs. 10 lakh.

**10% of tax in case of a domestic company only if net income exceeds Rs. 1 crore.

assessment tax over and above the tax payable, thereby not causing any loss to the revenue. The High Court held that if the revenue is permitted to levy interest under section 201(1A) even in a case where the person liable to tax has paid tax on due date, the revenue would derive undue benefit by getting interest on the amount of tax which had already been paid on the due date.

There is, therefore, no justification for the revenue to seek to levy interest for any period after the date on which the tax is actually paid. The same is clear from a plain reading of section 201(1A). The period for which interest can be claimed under section 201(1A) is 'from the date on which such tax was deductible to the date on which such tax is actually paid'. Consequently, no interest beyond the date of actual payment of tax can be claimed by the department. This section does not state that the tax should have been paid by the assessee (deductor) alone. The tax may actually be paid by the assessee or the deductee. What is of relevance is the actual payment of the tax - ***CIT*** v. ***Adidas India (P.) Ltd.*** [2006] 157 Taxman 521 Delhi.

385.2-3 *WHEN TAX IS NOT DEDUCTED UNDER SECTION 192 ON A UNIFORM BASIS FOR EACH MONTH* - If there is no overall short deduction of tax under section 192 but a few months tax deducted is lower as compared to other months, interest on the basis of monthly shortage cannot be charged under section 201. There is an express provision under section 192(3) authorising the person responsible for deducting tax to increase or reduce the amount to be deducted under section 192 for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct during the financial year—*Hero Honda Motors Ltd.* v. *ITO* [2000] 112 Taxman 154 (Delhi) (Mag.), ***Vinsons*** v. ***Third ITO*** [2004] 89 ITD 267 (Mum.).

If performance incentive can be qualified in the month of March of the financial year and tax is deducted from April to February on the basis of average rate of tax (which is calculated without considering the amount of performance incentive which was not qualified), interest under section 201(1A) for short deduction cannot be imposed—***CIT*** v. ***Marubeni India (P.) Ltd.*** [2007] 165 Taxman 467 (Delhi).

385.2-4 *BONA FIDE ESTIMATION OF INCOME* - Section 192 is very categorical to state that tax has to be deducted from income under the head 'Salaries' computed on the estimated income of the assessee under this head. What has to be seen is whether the employer company has acted *bona fide* or not while computing the tax liability of its employees for the purpose of deducting tax at source—*Associated Cement Co. Ltd.* v. *ITO* [2000] 74 ITD 369/111 Taxman 251 (Mag.). In a step further the Gujarat High Court in a similar fashion in *CIT* v. *Oil & Natural Gas Corpn. Ltd.* [2002] 125 Taxman 698 held that any addition or disallowance in the hands of the employee does not reflect in any manner on the estimate of the employer. Once two opinions are possible over taxability of an item and the employer has chosen one in favour of his employee, no fault can be found with him—*Nishith M. Desai* v. *ITO* [2006] 9 SOT 42 (Mum.). Valuation of perquisite by an employer by relying upon a well known book can be said to be *bona fide* and, therefore, the assessee cannot be deemed to be an assessee-in-default under section 201(1) and, consequently, interest under section 201(1A) cannot be levied—***ITO*** v. ***G.D. Goenka Public School*** [2008] 23 SOT 77 (Delhi).

385.2-5 *MANDATORY* - Interest under section 201(1A) is mandatory and there is no question of considering a reasonable cause for non-payment of tax deducted at source in time—***CIT*** v. ***Excel Industries Ltd.*** [2006] 5 SOT 236 (Mum.). Interest payable under section 201(1A) is mandatory and can neither be waived nor the rate can be reduced—***West Bengal State Electricity Board*** v. ***CIT*** [2005] 147 Taxman 234/278 ITR 218 (Cal.).

385.2-6 *QUARTERLY RETURN CANNOT BE SUBMITTED BEFORE PAYMENT OF INTEREST* - With effect from June 1, 2006, quarterly return of TDS/TCS cannot be submitted before payment of interest for late deposit of tax deducted or collected at source.

385.3 ***For default in payment of advance tax [Sec. 234B]**** - Under section 234B(1), interest is payable as follows :

*See paras 388 to 390 for reduction/waiver of interest.

When interest is payable	*Amount on which interest is payable*	*Rate of interest*	*Period for which interest is payable*
An assessee who is liable to pay advance tax, has failed to pay such tax	Interest is payable on assessed tax	Simple interest @ 1 per cent for every month or part of month	From April 1 of the assessment year to the date of determination of income under section 143(1) and where a regular assessment is made to the date of such regular assessment†
An assessee who had paid advance tax but the amount of advance tax paid by him is less than 90 per cent of assessed tax*	Assessed tax *minus* advance tax	Simple interest @ 1 per cent for every month or part of month	From April 1 of the assessment year to the date of determination of income under section 143(1) and where a regular assessment is made to the date of such regular assessment†

385.3-1 *ASSESSED TAX - MEANING OF* - "Assessed tax" means the tax on total income determined under section 143(1) or on regular assessment as reduced by tax deducted or collected at source on any income which is subject to such deduction or collection and which is taken into account in computing such total income.

From the assessment year 2007-08, relief under section 90/90A/91 and MAT credit under section 115JAA shall be deducted.

■ The following points should be noted—

1. Even tax deductible (but not actually deducted) by the payer will be deducted—*Mitsui Engg. & Shipbuilding Co. Ltd.* v. *CIT* [2001] 79 ITD 481 (Delhi).

2. For the purpose of computing interest payable under section 140A, "assessed tax" means tax on total income as declared in return as reduced by tax deducted or collected at source or relief under section 90/90A/91 on MAT credit.

3. If tax deductible at source is not deducted by the payer, the assessee non-resident payee cannot be burdened with interest under sections 234B and 234C—***Sumitomo Corporation*** v. ***CIT*** [2007] 17 SOT 197 (Delhi).

385.3-2 *ADJUSTMENT WHEN TAX IS PAID BEFORE REGULAR ASSESSMENT UNDER SECTION 140A* - If before the date of completion of a regular assessment tax is paid on the basis of self-assessment under section 140A, the interest shall be calculated as under :

a. up to the date of payment of tax under section 140A, interest will be calculated as mentioned in the table above ; and

b. from the date of payment of tax under section 140A, interest will be calculated on the amount by which advance tax and tax paid under section 140A falls short of assessed tax.

From the amount of interest computed above, amount paid under section 140A towards interest chargeable under section 234B shall be deducted [*see* problem 392-P4].

385.3-3 *ADJUSTMENT IN THE CASE OF REASSESSMENT/RECOMPUTATION UNDER SECTION 147 OR 153A [SEC. 234B(3)]* - If as a result of reassessment/recomputation [under section 147 or 153A], the amount on which interest was initially payable is increased, the taxpayer will be liable to pay additional interest at the rate of 1 per cent per month (or part of month) for the period starting from the date of regular assessment and ending on the date of reassessment/recomputation. This additional interest is to be paid on the excess of tax determined on the basis of reassessment/recomputation over tax payable on the basis of regular assessment.

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*The interest is chargeable as a result of the order of settlement even where the advance tax paid was more than 90 per cent of the tax on the total income shown in the return of income or that determined under sub-section (1) of section 143 or on regular assessment and it became less than 90 per cent of the tax found due on the basis of the Settlement Commission's order—*Sahitya Mudranalaya (P.) Ltd., In re* [1995] 79 Taxman 463 (ITSC-Bom.) (SB).

†Where an assessment is made for the first time under section 147 or 153A, the assessment so made is regarded as regular assessment. In case a regular assessment has been made, interest under section 234B has to be levied up to date of regular assessment and not up to date of determination of total income under section 143(1)—***Shadi Ram & Sons*** v. ***CIT*** [2005] 142 Taxman 30 (Luc.), ***Hindustan Sanitary Engineer*** v. ***ITO*** [2005] 95 ITD 226 (Asr.)

385.3-4 *ADJUSTMENT IN THE CASE OF RECTIFICATION/REVISION/MODIFICATION UNDER SECTION 154, 155, 250, 254, 260, 262, 263, 264 OR 245D(4)* - If as a result of an order of rectification/revision/modification under the aforesaid sections, the amount on which interest was payable under section 234B has been increased/reduced, the interest shall be increased/reduced, accordingly. In the case of increase in interest liability, the Assessing Officer will serve on the assessee a notice of demand specifying the sum payable. In the case where interest is reduced, the excess interest shall be refunded.

Further after decision of the Tribunal, the Assessing Officer is duty bound to charge interest under section 234B up to date of original order of assessment passed by him and not upto date of reassessment order passed by him in pursuance of order of Tribunal—***Freightship Consultants (P.) Ltd.*** v. ***ITO*** [2007] 15 SOT 617 (Delhi).

385.3-5 *INTEREST UNDER SECTION 234B OR 234C IN CASE OF MAT* - All companies are liable for payment of advance tax having regard to the provisions contained under section 115JB. Consequently, interest under sections 234B and 234C will be calculated after taking into consideration section 115JB—Circular No. 13/2001, dated November 9, 2001. However, interest under sections 234B and 234C can be levied only on that deficiency in the payment of advance tax which arises after giving the credit to set-off of brought forward tax credit under section 115JAA.

385.3-6 *SHIPPING BUSINESS OF NON-RESIDENTS* - Under the provisions of section 172(7), the non-resident owner or charterer is allowed an option to be assessed on his total income of the previous year in accordance with other provisions of the Act. When such option is exercised and an assessment is made accurately, the tax already paid under the provisions of section 172(4) by the non-resident owner or charterer would be treated as tax paid in advance for that assessment year before determining the amount of tax finally due.

The Board has clarified that in case of a regular assessment under section 172(7), the non-resident assessee is liable to pay interest under sections 234B and 234C and also entitled to receive interest under section 244A as the case may be—Circular No. 9/2001, dated July 9, 2001.

385.3-7 *PAYMENT BY CHEQUE* - If tax is paid by cheque, it shall be deemed that payment has been made on the date when cheque is handed over to the Government's bankers (if the cheque is not dishonoured later)—*K. Saraswatty* v. *P.S.S. Somasundram Chettiar* [1989] 4 SCC 527 (SC), *CIT* v. *Kumudam Publications (P.) Ltd.* [1981] 128 ITR 617 (Mad.), *Sahara Airlines Ltd.* v. *Commissioner of Customs* [2000] 110 Taxman 378 (Govt. of India).

385.3-8 *SPECIFIC ORDER* - In the absence of any specific order of the assessing authority, interest under sections 234A and 234B cannot be charged—*Tej Kumari* v. *CIT* [2001] 114 Taxman 404 (Pat.), *CIT* v. *Ranchi Club Ltd.* [2001] 114 Taxman 414 (SC). Where there is no direction to charge interest at all in assessment order, levy of interest under sections 234B and 234C would be illegal. Where, however, there is a direction to charge interest in assessment order but specific section has not been mentioned, department can be justified in charging interest under applicable sections—***Shadi Ram & Sons*** v. ***CIT*** [2005] 142 Taxman 30 (Luc.).

385.3-9 *IF RETURNED INCOME AND ASSESSED INCOME OF LATEST YEAR IS* NIL - Where the returned income and assessed income of the latest previous year is *nil*, and the Assessing Officer has not made his order under section 210(3), there is no obligation on the assessee to pay advance tax and no liability to pay interest—*Buland Motor & Land Finance (P.) Ltd.* v. *CIT* [2001] 117 Taxman 116 (All.).

385.3-10 *CHARGE OF INTEREST MANDATORY* - Sections 234A, 234B and 234C in clear terms impose a mandate to collect interest at the rates stipulated therein. The expression 'shall' used in the said section cannot by any stretch of imagination be construed as 'may'. There are sufficient indications in the scheme of the Act to show that the expression 'shall' used in sections 234A, 234B, and 234C is used by the Legislature deliberately and it has not left any scope for interpreting the said expression as 'may'—*CIT* v. *Anjum M.H. Ghaswala* [2001] 119 Taxman 352 (SC).

Since the provisions of section 234B are mandatory, while framing assessment, the Assessing Officer has no jurisdiction to consider as to whether there is reasonable cause for non-payment of advance

tax or not but to levy interest—***CIT*** v. ***Haryana Warehousing Corpn.*** [2005] 1 SOT 258 (Chd.). Once a default within the meaning of sections 234B and 234C takes place, levy of penal interest is automatic and there is no scope for applying the principles of equity or rules of natural justice or finding out reasonable cause of non payment of advance tax. No hearing is required to be given to the assessee seeking any justification for not making the payment of advance tax—***CIT*** v. ***Upper India Steel Mfg. Engg. Co. Ltd.*** [2004] 141 Taxman 693 (Punj. & Har.)—***CIT*** v. ***Prime Securities Ltd.*** [2005] 95 ITD 249 (Mum.).

385.3-11 *CASH SEIZED DURING SEARCH* - Cash seized during search should be treated as advance tax for the purpose of computation of interest under section 220(2) and sections 234A, 234B and 234C—*Vipul D. Doshi* v. *CIT* [2001] 118 Taxman 30 (Mum.) (Mag.).

385.3-12 *SHORTFALL BECAUSE OF INTERPRETATION OF LAW* - If short payment of advance tax is mainly because of a *bona fide* dispute regarding the interpretation of law, interest under section 234B is not applicable—***CIT*** v. ***Sedco Forex International Drilling Co. Ltd.*** [2004] 134 Taxman 109 (Uttaranchal).

385.3-13 *WHEN ADVANCE TAX LIABILITY ARISES BECAUSE OF A SUBSEQUENT COURT RULING* - If short payment is because of retrospective amendment in law, or because of subsequent court ruling, interest under sections 234B and 234C cannot be imposed—*Priyanka Overseas Ltd.* v. *CIT* [2001] 79 ITD 353 (Delhi), *Haryana Warehousing Corpn.* v. *CIT* [2002] 75 ITD 155 (Delhi).

■ In ***Balkrishna Breeding Farms (P.) Ltd.*** v. ***CIT*** [2005] 147 Taxman 148 (Kar.), the assessee-company engaged in business of hatchery claimed deduction under sections 80HHA and 80-I on basis of decision of the High Court in *CIT* v. *Rahebar Farms Ltd.* [I.T. Reference Case No. 25 of 1991] and had not paid any advance tax on amounts claimed as deduction under sections 80HHA and 80-I. The Assessing Officer allowed claim and completed assessment. Subsequently, above decision was reversed by Supreme Court in *CIT* v. *Venkateswara Hatcheries (P.) Ltd.* [1999] 237 ITR 174/103 Taxman 503, wherein it was held that units engaged in poultry farming or hatcheries do not manufacture any article or thing and as such they are not entitled to special deduction under section 80HHA or 80-IA. Accordingly, the Assessing Officer, in view of the Supreme Court's order, issued notice under section 148. The assessee filed revised returns and deposited all tax payable. The Assessing Officer levied interest under section 234B on ground that assessee had defaulted in payment of advance tax in regard to amount which had now become taxable in view of pronouncement of the Supreme Court. The Chief Commissioner took view that since decision of the High Court had been reversed by the Supreme Court on March 24, 1999, and having regard to reasonable time which had to be allowed to the assessee for filling its revised return which according to him was up to April 30, 1999, the assessee was liable to pay interest for period subsequent to April 30, 1999 and interest payable up to April 30, 1999 was waived.

There is no provision in Act requiring the assessee to file a revised return of income in regard to relevant assessment years after the Supreme Court has reversed judgment of High Court. Since the assessee filed its revised return within time allowed by notice issued under section 148 and tax that became due in terms of revised return had also been paid within time, no delay could be attributed to the assessee.

385.3-14 *CONCESSIONS AVAILABLE TO THE MIGRANTS AND RESIDENTS OF KASHMIR VALLEY* - *See* para 385.1-2k.

385.4 ***For deferment of advance tax [Sec. 234C]***† - Interest is payable under section 234C if an assessee has not paid advance tax or underestimated instalments of advance tax. Interest is to be computed on the following basis :

385.4-1 *IN THE CASE OF A NON-CORPORATE ASSESSEE [SEC. 234C(1)(b)]* - In the case of a non-corporate-assessee, interest under section 234C is payable as follows :

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†*See* paras 388 to 390 for reduction/waiver of interest. *See* also para 385.3-6.

When interest is payable under section 234C	*Rate of interest*	*Period of interest**	*Amount on which interest is payable*
(1)	*(2)*	*(3)*	*(4)*
If advance tax paid on or before September 15 is less than 30% (*a*—*b*)	Simple interest @ 1 per cent per month	3 months	30% (*a*—*b*)—*c*
If advance tax paid on or before December 15 is less than 60% (*a*—*b*)	Simple interest @ 1 per cent per month	3 months	60% (*a*—*b*)—*d*
If advance tax paid on or before March 15 is less than 100% (*a*—*b*)	Simple interest @ 1 per cent	—	100% (*a*—*b*)—*e*

Notes :

a. Tax on the total income declared in the return filed by the assessee.

b. Tax deducted or collected at source and relief under section 90/90A/91.

c. Amount of advance tax paid on or before September 15 of the financial year immediately preceding the relevant assessment year.

d. Amount of advance tax paid on or before December 15 of the financial year immediately preceding the relevant assessment year.

e. Amount of advance tax paid on or before March 15 of the financial year immediately preceding the relevant assessment year.

385.4-2 *IN THE CASE OF A CORPORATE-ASSESSEE [SEC. 234C(1)(a)]* - A corporate-assessee will be liable for interest under section 234C as under :

When interest is payable under section 234C by a company	*Rate of interest*	*Period of interest**	*Amount on which interest is payable*
(1)	*(2)*	*(3)*	*(4)*
If advance tax paid on or before June 15 is less than 12% (*a*—*b*)	Simple interest @ 1 per cent per month	3 months	15% (*a*—*b*)—*c*
If advance tax paid on or before September 15 is less than 36% (*a*—*b*)	Simple interest @ 1 per cent per month	3 months	45% (*a*—*b*)—*d*
If advance tax paid on or before December 15 is less than 75% (*a*—*b*)	Simple interest @ 1 per cent per month	3 months	75% (*a*—*b*)—*e*
If advance tax paid on or before March 15 is less than 100% (*a*—*b*)	Simple interest @ 1 per cent	—	100% (*a*—*b*)—*f*

Notes :

a. Tax on the total income declared in the return filed by the assessee.

b. Tax deducted or collected at source, relief under section 90/91A/91 and MAT credit under section 115JAA.

c. Amount of advance tax paid on or before June 15 of the financial year immediately preceding the relevant assessment year.

d. Amount of advance tax paid on or before September 15 of the financial year immediately preceding the relevant assessment year.

e. Amount of advance tax paid on or before December 15 of the financial year immediately preceding the relevant assessment year.

f. Amount of advance tax paid on or before March 15 of the financial year immediately preceding the relevant assessment year.

385.4-3 *SHORT PAYMENT OF ADVANCE TAX IN CASE OF CAPITAL GAINS/CASUAL INCOME [FIRST PROVISO TO SEC. 234C(1)]* - No interest will be levied in respect of any shortfall in the payment of advance tax due on the returned income if—

a. the shortfall is on account of underestimate or failure to estimate the amount of capital gains (short-term or long-term) or income of the nature referred to in section 2(*24*)(*ix*) (*i.e.*, lottery income, gambling income, etc.) ; and

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*If assessee has delayed payment of advance tax, interest under section 234C is to be charged for period of default, subject to maximum period of three months and not compulsorily for period of three months, irrespective of period of default—***Panther Investrade Ltd.*** v. ***CIT*** [2007] 160 Taxman 203 (Mum.).

b. the assessee has paid the whole of the amount of tax payable in respect of such income, as part of the remaining instalments of advance tax which are immediately due or if no instalment is due, then such tax is paid before the end of the financial year [*see* problem 392-P2].

385.4-4 *WHAT IS RETURNED INCOME* - Income shown by assessee in the revised computation of income filed before the Assessing Officer after time-limit prescribed in section 139(5), cannot be treated as 'returned income' of the assessee for purpose of levy of interest under section 234C—***South Eastern Coalfields Ltd.*** v. ***Jt. CIT*** [2003] 85 ITD 608 (Nag.).

385.5 ***Interest on excess refund [Sec. 234D]*** - In a case where an assessee claims refund of a substantial portion of advance tax or TDS or TCS treated as paid by him on the basis of the total income as declared in his return of income furnished under section 139, such refund has to be granted to him at the time of processing of the return under section 143(1). Subsequently, if regular assessment is made on a total income much higher than the returned income, the refund earlier granted to the assessee or a substantial portion of it is treated as tax payable. But while the assessee pays interest for shortfall in payment of advance tax with effect from the first day of the assessment year, nothing is charged from the assessee for having utilized the refund amount, till the date of regular assessment.

Section 234D was inserted (with effect from June 1, 2003) to charge interest on excess refund granted at the time of summary assessment.

■ *Interest under section 234D(1)* - In any of the following two cases interest is attracted under section 234D(1)—

Case one - If any refund is granted under section 143(1) but no refund is due on regular assessment.

Case two - If any refund is granted to the assessee under section 143(1) and the refund so granted exceeds the amount refundable on regular assessment.

For the aforesaid purpose, regular assessment means assessment under section 143(3) or 144. If an assessment is made for the first time under section 147 or section 153A, the assessment so made shall be regarded as a regular assessment.

Computation of interest - In any of the above two cases interest is payable under section 234D(1) as follows—

Rate of interest	½ per cent per month or part of a month
Period for which interest is payable	The period commencing from the date of grant of refund under section 143(1) to date of regular assessment
Amount on which interest is payable	In *Case One* on whole of the amount refunded; in *Case Two* on the excess of amount refunded under section 143(1) over the amount refundable on regular assessment.

■ *Adjustment under section 234D(2)* - Where, as a result of an order under section 154 or 155 or 250 or 254 or 260 or 262 or 263 or 264 or an order of the Settlement Commission under section 245D(4) the amount of refund granted under section 143(1) is held to be correctly allowed, either in whole or in part, as the case may be, then the interest chargeable under section 234D(1), shall be reduced accordingly.

385.5-P1 *For the assessment year 2009-10, X files return of income on September 30, 2009 (income declared in the return Rs. 3,70,000, advance tax : Rs. 50,000). The Assessing Officer refunds under section 143(1) the excess tax paid by X on July 20, 2010 as follows—*

	Rs.
Tax on Rs. 3,70,000	*29,000*
Add : *Education cess*	*580*
Add : *Secondary and higher education cess*	*290*
Tax	*29,870*
Add : *Interest under sections 234A, 234B and 234C*	*3,500*

	Rs.
Total	*33,370*
Less : *Prepaid tax*	*50,000*
Refund	*16,630*
Add : *Interest under section 244A*	*1,330*
Amount refunded (rounded off)	*17,960*

The Assessing Officer issues notice under section 143(2) on August 16, 2010. The assessment is completed under section 143(3) on March 26, 2011. Income assessed is (a) Rs. 3,70,000, (b) Rs. 3,75,000; or (c) Rs. 4,45,000. Assume that interest under section 234A etc., is (a) Rs. 3,500, (b) Rs. 3,630 or (c) Rs. 6,550, respectively in the three cases, find out interest under section 234D.

SOLUTION :

	If assessed income is		
	Rs. 3.70 lakh Rs.	Rs. 3.75 lakh Rs.	Rs. 4.45 lakh Rs.
Income-tax on assessed income	29,000	30,000	44,000
Add : Surcharge*	—	—	—
Tax and surcharge	29,000	30,000	44,000
Add : Education cess†	580	600	880
Add : Secondary and higher education cess [1% of tax and surcharge]	290	300	440
Tax payable	29,870	30,900	45,320
Add : Interest under section 234A, 234B or 234C	3,500	3,630	6,550
Total	33,370	34,530	51,870
Less : Prepaid tax	50,000	50,000	50,000
Tax refund due	16,630	15,470	-
Add : Interest under section 244A	1,330	1,232	-
Refund	17,960	16,702	-
Amount refunded under section 143(1) on July 20, 2010 (a)	17,960	17,960	17,960
Amount of tax or refund as per assessment order under section 143(3) dated March 26, 2011 (b)	17,960	16,702	-
Excess refund given earlier [a - b]	-	1,258	17,960
Rounded off	-	1,200	17,900
Period from July 20, 2010 to March 26, 2011	-	9 months	9 months
Interest @ 0.5 per cent per month under section 234D	-	54	806

385.6 ***For making late payment of income-tax [Sec. 220(2)]*** - If any assessee fails to pay any tax (other than advance tax) specified in a demand notice within 30 days of the service of notice of demand, he is liable to pay interest at the rate of 1 per cent‡ for every month or part of month from the expiry of 30 days of the service of demand notice.

The following points should also be kept in view :

385.6-1 ***REDUCTION OR WAIVER OF INTEREST [SECTION 220(2A)]*** - The Chief Commissioner or Commissioner may reduce or waive the amount of interest payable by an assessee under section 220(2), if he is satisfied that—

*Surcharge is not applicable in case net income does not exceed Rs. 10 lakh.

†Education cess is 2% of tax and surcharge.

‡1.25 per cent up to September 7, 2003.

a. payment of such interest would cause genuine hardship to the assessee ;

b. the default in the payment of the amount on which interest was payable was due to circumstances beyond the control of the assessee; and

c. the assessee has co-operated in any inquiry relating to the assessment or in any proceeding for the recovery of any amount due from him.

One should also keep in view the following—

1. The above conditions for waiver must be satisfied cumulatively—*Metallurgical & Engg. Consultants (India) Ltd.* v. *CIT* [1999] 103 Taxman 542 (Pat.).

2. If at the time the relief is sought, the assessee had no hardship, relief cannot be granted by holding that at some time in the past the assessee had hardship—*H.A.G. Dastagir Sherif* v. *CIT* [2001] 248 ITR 626 (Mad.).

3. Mere fact that the assessee is a wealth-tax assessee is not a relevant consideration at all for proving that payment of interest would not cause any genuine hardship to assessee—*J. Jayalalitha* v. *CIT* [1999] 107 Taxman 476 (Mad.).

4. Power must be exercised judicially and reasonably based on relevant facts—*Auro Food Ltd.* v. *CIT* [1999] 239 ITR 548 (Mad.).

5. Application of assessee under section 220(2A) should be decided by a speaking order—*J. Jayalalitha* v. *CIT* [1999] 107 Taxman 476 (Mad.), ***Auro Food Ltd.*** v. ***CIT*** [2005] 276 ITR 658 (Mad.).

6. Order signed by the Assessing Officer on behalf of the Commissioner and which does not state reasons for rejection would be liable to be quashed—*P. Ramasamy* v. *CIT* [1999] 102 Taxman 413 (Mad.).

385.6-2 ***WHEN ASSESSMENT REFRAMED*** - Where an assessment order is cancelled/set aside by an appellate/revisional authority and the cancellation/setting aside becomes final (*i.e.*, it is not varied as a result of further appeals/revisions), no interest under section 220(2) can be charged pursuant to the original demand notice. The necessary corollary of this point will be that even when the assessment is reframed, interest can be charged only after the expiry of 30 days from the date of service of demand notice pursuant to such fresh assessment order—Circular No. 334, dated April 3, 1982.

■ Where the assessment made originally by the Assessing Officer is either varied or even set aside by one appellate authority but on further appeal, the original order of the Assessing Officer is restored (either in part or wholly), the interest payable under section 220(2) will be computed with reference to the due date reckoned from the original demand notice and with reference to the tax finally determined. The fact that during an intervening period, there was no tax payable by the assessee under any operative order would make no difference to this position—Circular No. 334, dated April 3, 1982.

The observation given in Circular No. 334 does not find support in the judicial pronouncement given by the Apex Court in *Vikrant Tyres Ltd.* v. *First ITO* [2001] 115 Taxman 202. In this case the assessee deposits the demand made by the Assessing Officer and goes in appeal. The appellate authority decides the issue in favour of the assessee and the tax collected is refunded. In further appeal by the revenue before the High Court, the assessee looses the case. Fresh demand notices are issued to the assessee demanding interest under section 220(2) for the period commencing from the refund of tax consequent upon the first appellate order. The assessee disputes the charge of interest.

The Supreme Court held that for invoking section 220 one of the conditions is that if there is a default in payment of amount demanded under a notice by the revenue within the time stipulated therein and if such a demand is not satisfied, interest is leviable under section 220(2). The Court held that the section cannot be invoked to revive a demand notice, which has already been fully satisfied. The landmark ruling of the Supreme Court is a clear pointer to taxpayers to pay tax demands in full (and not in part) as and when they arise to save the burden of interest in the ultimate.

385.6-3 ***STAY BY TRIBUNAL*** - Appellate Tribunal has power to grant stay of recovery of interest demanded under section 220(2)—*Bhoja Reddy* v. *CIT* [1998] 231 ITR 47/100 Taxman 44 (AP).

385.6-4 *OTHER POINTS* - One should also keep in view the following points—

- Separate notice for determination of interest is not necessary—*Rajam Pictures Circuit* v. *CIT* [2000] 108 Taxman 26 (Mad.).
- Company court has powers to waive recovery of interest levied under section 220(2)—***Catholic Centre*** v. ***Pilot Pen Co. (India) (P.) Ltd.*** [2003] 131 Taxman 437 (Mad.).
- Before levy of interest opportunity need not be given to assessee—*J. Jayalalitha* v. *CIT* [1999] 107 Taxman 476 (Mad.).
- Where the assessee has not paid interest under section 234B which is included in the demand notice issued under section 156, the assessee is liable to pay interest under section 220(2) even on interest levied under section 234B—***Shriram Chits & Investments (P.) Ltd.*** v. ***CIT*** [2005] 2 SOT 838 (Chennai).

Interest payable to assessee [Sec. 244A]

386. Interest is payable where any refund arises due to any excess payment of tax. There is no need for making claim for refund.

386.1 ***How to compute interest*** - Interest is payable by the Government as follows—

	Refund of advance income-tax, tax deducted/ collected at source or advance fringe benefit tax	*Refund in any other case*
(1)	*(2)*	*(3)*
Whether any application for obtaining refund is required	No	No
Rate of interest	0.5 per cent per month (or part of month)	0.5 per cent per month (or part of month)
Period	From the first day of the assessment year to the date of grant of refund (*i.e.*, the date of signing of the refund order)	From the date of the notice of demand (or assessment order) to the date of grant of refund (*i.e.*, the date of signing of the refund order)

386.2 ***Other points*** - One should also keep in view the following points—

- *No interest on excess payment advance tax/TDS/TCS/advance fringe benefit tax in some cases* - In the case of refund of advance tax income-tax or advance fringe benefit tax or tax deduction/ collection at source [*i.e.*, the case of refund covered by *column (2)* of the table (*supra*)], no interest is, payable if the excess payment is less than 10 per cent of tax determined under section 143(1) or on regular assessment.
- *Refund of self assessment tax* - Refund of self assessment tax is governed by column (*3*) of the table *supra*. Consequently, assessee would be entitled to interest from the date of the assessment order till the date of actual refund and not from the date of payment of self-assessment tax—*Dhanvi Trading & Investment (P.) Ltd.* v. *Assessing Officer* [2000] 72 ITD 245 (Ahd.), ***Sutlej Inds Ltd.*** v. ***CIT*** [2003] 86 ITD 335 (Delhi).
- *When assessee is responsible for delay in refund* - If the proceedings (resulting in the refund) are delayed for reasons attributable to the assessee (whether wholly or in part) the period of the delay so attributable to him shall be excluded from the period for which interest is payable. If any question arises as to the period to be excluded, it shall be decided by the Chief Commissioner whose decision thereon shall be final. Where, however, the assessee has inadvertently paid advance tax by wrong Challan which is meant for payment of TDS, the Department is not justified in rejecting assessee's claim for interest on refund on the ground that repayment of refund to the assessee has been delayed due to fault of the assessee who used a wrong challan and so he is not entitled to interest under section 244A—*Flint Pharma (P.) Ltd.* v. *CIT* [2002] 82 ITD 342 (Ahd.) (SMC). Likewise, merely because there is a delay in furnishing original TDS certificates, such delay cannot be treated as a

delay in respect of proceedings resulting in refund—***Eternit Everest Ltd.*** v. ***CIT*** [2007] 12 SOT 40 (Mum.).

▪ *When assessment is reframed* - If as a result of an order under section 115W(1), 143(1), 143(3), 147, 154, 155, 250, 254, 260, 262, 263, 264 or 245D(4), the amount on which interest was payable has been increased/reduced, the interest shall be increased/reduced accordingly. If interest is reduced, the Assessing Officer will send a notice of demand in the prescribed form specifying the amount of the excess interest paid and requiring him to pay such amount.

▪ *Money detained by department as security* - If money is retained in the hands of the revenue only by way of deposit as security for meeting tax liability, section 244A is not applicable—*Kurumber Betta Estate* v. *ITO* [2002] 124 Taxman 161 (Kar.).

▪ *Prompt action by the Department* - The mere fact that the application filed by the petitioner is decided expeditiously cannot be made a ground for declining its prayer for award of interest—*National Horticulture Board* v. *Union of India* [2002] 125 Taxman 922 (Punj. & Har.).

▪ *Interest on interest* - The concept of 'compound interest' or 'interest on interest' is not applicable under section 244A. However, the assessee is entitled to interest under section 244A(1) in respect of "refund" of amount paid as interest under section 220(2)—***Nuchem Ltd.*** v. ***Asstt. CIT*** [2003] 128 Taxman 64 (Delhi) (Mag.), ***Sandvik Asia Ltd.*** v. ***CIT*** [2004] 137 Taxman 167 (Bom.). In other words, if "refund" comprises element of tax and also interest due on that particular amount of tax which has been delayed by Department; the assessee is entitled to interest on interest due included in amount of refund, where there is a delay in refunding the same or to the assessee—***Eternit Everest Ltd.*** v. ***CIT*** [2007] 12 SOT 40 (Mum.).

▪ *Opportunity of hearing in case of refusal* - Denial of interest under section 244A cannot be made without giving an opportunity of hearing—***Artist Tree (P.) Ltd.*** v. ***ITO*** [2004] 3 SOT 4 (Mum.).

▪ *Interest with refund is a must* - *Vide* Instruction No. 2/2007, dated March 28, 2007, the Board has reminded all Assessing Officers that while granting refund to the assessees, care should be taken to ensure that any interest payable under section 244A on the amount of refund due should be granted simultaneously with the grant of refund and there should, in no case, be any omission or delay in the grant of such interest. Failure to do so will be viewed adversely and the officer concerned will be held personally accountable, inviting appropriate action.

Procedure to be followed in calculation of interest [Rule 119A]

387. In calculating interest payable by the assessee or interest payable by the Central Government to the assessee, the amount of tax, penalty or other sum in respect of which interest is to be calculated will be rounded off to the nearest multiple of Rs. 100 ignoring any fraction of Rs. 100.

▪ Where interest is to be calculated on annual basis, the period for which such interest is to be calculated shall be rounded off to a whole month/months and for this purpose any fraction of a month shall be ignored. Where, however, the interest is to be calculated for every month or part of a month comprised in a period, any fraction of a month shall be deemed to be a full month.

Waiver or reduction of interest under sections 234A, 234B and 234C

388. In exercise of the powers conferred under section 119(2)(*a*), the Central Board of Direct Taxes have directed (*vide* order dated June 2, 1994) that in cases where any income accrues or arises for any previous year due to the operation of any order of a Court, statutory authority or of the Government (other than an order of assessment, appeal, reference or revision passed under the provisions of the Income-tax Act) passed after the close of the said previous year (such income and the order hereinafter referred to as the "relevant income" and the "relevant order" respectively) interest under sections 234A, 234B and 234C shall be reduced or waived by the Chief Commissioner/Director-General subject to certain conditions.

388.1 ***Conditions*** - The following conditions shall be satisfied—

Condition 1	The relevant income is disclosed in a return of income furnished for the said previous year or is otherwise disclosed to the Assessing Officer
Condition 2	The tax attributable to such income has been paid.

388.2 ***Period*** - Reduction/waiver of interest is given in respect of the following period—

Section	*Period in respect of which reduction or waiver is allowed*
Section 234A	From the date immediately following the due date for furnishing the return of income for the relevant assessment year till the end of the month in which the relevant order giving rise to the relevant income is passed.
Section 234B	From the first day of April of the relevant assessment year till the end of the month in which the relevant order giving rise to the relevant income is passed.
Section 234C	For the period mentioned in that section.

388.3 ***Extent of interest to be reduced or waived*** - The quantum of interest to be reduced or waived shall be the difference between :

a. the interest computed for the period mentioned in para 388.2 above with reference to the tax on the total income inclusive of the relevant income ; and

b. the interest computed for the same period with reference to the tax on the total income as reduced by the relevant income.

388.4 ***Discretion should be exercised in judicial manner*** - It is true that the waiver of interest is at the discretion of the concerned official. But the discretion must be exercised in a judicial manner and cannot be *ipse dixit* of the officer and the result of any whim—*J.D. Properties Ltd.* v. *Chief CIT* [2001] 118 Taxman 592 (Delhi). Application for waiver of interest under sections 234A, 234B and 234C cannot be rejected in laconic and mechanical manner—***Tushaar Mehta*** v. ***CIT*** [2004] 189 CTR (Mad.) 550.

Chief Commissioner/Director General (Investigation) to reduce penal interest in certain cases

389. The Central Board of Direct Taxes has decided to authorise Chief Commissioners and Directors General (Investigation) to reduce or waive penal interest under sections 234A, 234B and 234C. However, no reduction or waiver of such interest shall be ordered unless the assessee has filed the return of income for the relevant assessment year and paid the entire income-tax (principal component of demand) due on the income as assessed. The Chief Commissioner of Income-tax or Director-General of Income-tax may also impose any other conditions as deemed fit for the said reduction or waiver of interest. Penal interest charged under the aforesaid sections may be reduced or waived in the following circumstances, namely :

1. Where, in the course of search and seizure operation, books of account have been taken over by the Department and were not available to the taxpayer to prepare his return of income.†

2. Any income other than capital gains which was received or accrued after the date of first or subsequent instalment of advance tax, which was neither anticipated nor contemplated by the taxpayer and on which advance tax was paid by taxpayer after the receipt of such income.

3. Where, as a result of any retrospective amendment of law or the decisions of the Supreme Court, certain receipts which were hitherto treated as exempt, become taxable. Since no advance tax would normally be paid in respect of such receipts during the relevant financial year, penal interest is levied for the default in payment of advance tax.

4. Where a return of income is filed voluntarily without detection by the Income-tax Department and due to circumstances beyond the control of the taxpayer such return of income was not filed within the stipulated time-limit or advance tax was not paid at the relevant time.†

†In these cases only interest under section 234A can be waived.

389.1 ***Other points*** - The following points should be noted—

- Where return is filed after search proceedings, the petition for waiver of interest under sections 234A, 234B and 234C should be rejected—***K.G. Prasad*** v. ***CIT*** [2004] 134 Taxman 51 (Kar.).
- Instances given above may be taken as illustrative and not exhaustive—*Dr. Mahesh D. Singhvi, In re* [1998] 97 Taxman 58 (ITSC).
- The above guidelines were issued for waiver of interest under sections 234A, 234B and 234C and it will not govern interest leviable under section 158BFA—*New Punjab Skin Co.* v. *Union of India* [2000] 242 ITR 401/110 Taxman 431 (Punj. & Har.).

Power of CBDT and Settlement Commission to reduce/waive interest

390. CBDT has power to make relaxation in cases covered by sections 234A, 234B and 234C and where assessee makes an application for waiver of interest under said sections, the Board cannot decline assessee's request by a cryptic order that it was unable to interfere in matter—*Sant Lal* v. *UOI* [1996] 89 Taxman 272/222 ITR 375 (Punj. & Har.).

- *Settlement Commission* - The Settlement Commission in exercise of its power under section 245(4) and (6) does not have the power to reduce or waive interest statutorily payable under sections 234A, 234B and 234C except to the extent of granting relief under the Circulars issued by the Board under section 119—*CIT* v. *Anjum M.H. Ghaswala* [2001] 119 Taxman 352 (SC), ***CIT*** v. ***Hindustan Bulk Cemera*** [2003] 259 ITR 449 (SC).

Writ petition

391. Since no appeal is provided by statute against levy of interest under sections 234A, 234B and 234C, writ petition is maintainable against such levy—*Uday Mistanna Bhandar & Complex* v. *Tej Kumari Devi* [1996] 222 ITR 44 (Pat.).

Problems illustrating computation of interest

392-P1 *During the financial year 2008-09, X (32 years) pays the following instalments of advance tax :*

	Rs.
On September 15, 2008	*4,800*
On December 15, 2008	*11,000*
On March 15, 2009	*28,000*
On March 16, 2009	*52,000*

X files return of Rs. 7,01,000. Assessment is also completed on the basis of income returned by X after making addition of Rs. 25,000 (date of assessment order : January 20, 2010). X is entitled to tax credit of Rs. 12,510 on account of tax deducted at source. Compute interest under sections 234B and 234C.

SOLUTION : *Interest liability under section 234B*

	Rs.
Income	7,26,000
Tax on Rs. 7,26,000	1,26,484
Less : Tax deducted at source	12,510
Assessed tax	1,13,974
90% of assessed tax	1,02,577
Advance tax paid during 2008-09 (*i.e.*, Rs. 4,800 + Rs. 11,000 + Rs. 28,000 + Rs. 52,000)	95,800

Since advance tax during the financial year 2008-09 is less than 90% of assessed tax, X is liable to pay interest under section 234B, *i.e.*, on the shortfall of Rs. 18,100 (being Rs. 1,13,974— Rs. 95,800, rounded off) for 10 months (Rs. 18,100 × 1/100 × 10) which comes to Rs. 1,810.

Interest liability under section 234C :

	Rs.
Income as per return of income	7,01,000
Tax on Rs. 7,01,000 (a)	1,18,760

	Rs.
Less : Tax deducted at source (*b*)	12,510
Assessed tax (*a*—*b*)	1,06,249
30% of assessed tax [30% of (*a*—*b*)]	31,875
Tax paid on or before September 15, 2008 (*c*)	4,800
60% of assessed tax [60% of (*a*—*b*)]	63,749
Tax paid on or before December 15, 2008 (*i.e.*, Rs. 4,800 + Rs. 11,000) (*d*)	15,800
100% of assessed tax (*a*—*b*)	1,06,249
Tax paid on or before March 15, 2009 (*e*)	43,800

	On first instalment of September 15, 2008 Rs.	*On second instalment of December 15, 2008* Rs.	*On third instalment of March 15, 2009* Rs.
Shortfall			
❑ 30% of (*a*—*b*)—*c*	27,075	—	—
❑ 60% of (*a*—*b*)—*d*	—	47,949	—
❑ 100% of (*a*—*b*)—*e*	—	—	62,449
Rounded off amount as per rule 119A	27,000	47,900	62,400
Rate of interest	1 per cent per month	1 per cent per month	1 per cent
Period of default	3 months	3 months	—
Amount of interest	810	1,437	624

Total interest payable under section 234C will be Rs. 2,871.

392-P2 *X Ltd., an Indian company, submits the following information for the previous year 2008-09.*

	Rs.
Business income	*1,90,000*
Long-term capital gain on sale of debentures on September 20, 2008	*1,00,000*
Winning from lottery on December 20, 2008 (out of which tax deducted is Rs. 15,450)	*50,000*

Ascertain the minimum amount of advance tax payable by way of different instalments to ensure that interest liability under section 234C is not attracted.

SOLUTION : *First instalment on June 15, 2008 and second instalment on September 15, 2008 :*

	Rs.
Business income	1,90,000
Tax @ 30%	57,000
Add : Surcharge	*Nil*
Tax and surcharge	57,000
Add : Education cess	1,140
Add : Secondary and higher education cess	570
Tax payable	58,710

At least 12% of Rs. 58,710 (*i.e.*, Rs. 7,050) should be paid on before June 15, 2008 to avoid interest under section 234C. Assume the company pays Rs. 7,050 as advance tax on June 15, 2008, then the second instalment shall be determined as follows —

	Rs.
Tax	58,710
36% of tax	21,136
Less : First instalment	7,050
Second instalment (which is paid on September 15, 2008) (rounded off)	14,090

Third instalment on December 15, 2008

	Rs.
Business income	1,90,000
Long-term capital gain	1,00,000
Net income	2,90,000
Tax (*i.e.*, 30% of Rs. 1,90,000 + 20% of Rs. 1,00,000)	77,000
Add : Surcharge	*Nil*
Tax and surcharge	77,000
Add : Education cess	1,540
Add : Secondary and higher education cess	770
Tax payable	79,310
Minimum amount of advance tax payment to avoid tax under section 234C [*i.e.*, 75% of Rs. 79,310—Rs. 7,050, being the tax paid on June 15, 2008—Rs. 14,090 (being tax paid on September 15, 2008)]	38,340

Assume that the company pays Rs. 38,340 as advance tax on December 15, 2008, then the fourth instalment shall be determined as under —

Fourth instalment on March 15, 2009	Rs.
Business income	1,90,000
Long-term capital gain	1,00,000
Lottery winning	50,000
Net income	3,40,000
Tax [*i.e.*, 30% of Rs.1,90,000 + 20% of Rs. 1,00,000 + 30% of Rs. 50,000]	92,000
Add : Surcharge	*Nil*
Tax and surcharge	92,000
Add : Education cess	1,840
Add : Secondly and higher education cess	920
Tax payable	94,760
Less: Tax deducted at source	15,450
Balance	79,310
Fourth instalment on March 15, 2009 [*i.e.*, Rs. 79,310—Rs. 7,050—Rs. 14,090—Rs. 38,340)	19,830

392-P3 *X Ltd., an Indian company, files return of income on December 10, 2009, though the due date is September 30, 2009 for the assessment year 2009-10. On the same day, it deposits Rs. 36,620 (being self-assessment tax) under section 140A computed as follows —*

	Rs.
Tax on income of Rs. 2,00,000 declared in the return	*61,800*
Less : Advance tax paid during 2008-09	*20,000*
Tax deducted at source	*10,000*
Balance	*31,800*
Add : Interest	
Under section 234A for late submission of return [@ 1% per month on Rs. 31,800 for 3 months]	*954*
Under section 234B for short deposit of advance tax [on Rs. 31,800 from April 1, 2009 to December 10, 2009 @ 1% per month for 9 months]	*2,862*
Under section 234C [Rs. 1,000 is correctly computed under section 234C]	*1,000*
Total (rounded off)	*36,620*

Assessment is completed under section 143(3) on April 20, 2010 on income of Rs. 2,20,000. Find out the amount of tax payable.

SOLUTION : *Interest liability under section 234A*

Date of filing of return	December 10, 2009
Due date of return	September 30, 2009
Period of default (a part of month is taken as full month)	3 months
	Rs.
Income	2,20,000
Tax on income	67,980
Less: Advance payment of tax	20,000
Tax deducted at source	10,000
Assessed tax	37,980
Interest on assessed tax @ 1% per month for 3 months	1,137
Interest liability under section 234B	
Assessed tax (*i.e., tax minus* tax deducted at source, as computed above)	57,980
90% of assessed tax	52,182
Advance tax paid during 2008-09	20,000
It is liable to pay interest under section 234B as advance tax paid is shorter than Rs. 52,182	
Shortfall from April 1, 2009 to December 10, 2009	37,980
Period of default (April 1, 2009 to December 10, 2009)	9 months
Interest @ 1% per month for 9 months on shortfall	3,411
Shortfall from December 10, 2009 to April 20, 2010 [*i.e.*, Rs. 37,980 – Rs. 31,800 being self-assessment tax under section 140A paid on December 10, 2009 – *see* Note 1]	6,180
Period of default January 1, 2010 to April 20, 2010 (in the shortfall of 9 months period up to December 31, 2009 is included)	4 months
Interest on Rs. 6,100 for 4 months @ 1% per month	244
Interest under section 234B	3,655

Notes :

1. In this example, X Ltd. has paid Rs. 36,620 on December 10, 2009 under section 140A. As per calculation given in the problem, Rs. 4,816 is adjusted towards payment of interest and the balance Rs. 31,800 is adjusted towards tax payable. If tax paid under section 140A (*i.e.*, self-assessment tax) is less than Rs. 36,620, then the amount paid under section 140A, shall be first adjusted towards interest payable and the balance if any, shall be adjusted towards tax payable.

2. Net tax and interest payable is to be computed as under :	*Rs.*
Tax on Rs. 2,20,000	67,980
Add : Interest	
Under section 234A	1,137
Under section 234B	3,655
Under section 234C	1,000
Total	73,772
Less: Prepaid tax	
Tax deduction at source	10,000
Advance tax	20,000
Self-assessment tax under section 140A	36,620
Balance payable (rounded off)	7,150

392-P4 *X (28 years) (a businessman whose turnover is Rs. 30 lakh) pays Rs. 10,000 as advance tax on March 15, 2009 (no instalment of advance tax is paid on September 15, 2008 and December 15, 2008). He further paid advance tax of Rs. 12,000 on March 31, 2009. He files his return of income on November 10, 2009 (income declared : Rs. 5,42,500). On November 10, 2009, he pays Rs. 50,600 (Rs. 48,600 by way of tax and Rs. 2,000 by way of interest for not paying advance tax in time and for late filing of return of income). His assessment for the*

year 2009-10 is completed on March 14, 2010 (income assessed : Rs. 5,57,500). He is also entitled for tax credit of Rs. 5,230 on account of tax deducted at source. Is he liable for interest under sections 234A, 234B and 234C ?

SOLUTION : *Interest liability under section 234A*

	As per return of income	As per assessment order
Due date of return	July 31, 2009	July 31, 2009
Date of filing of return	November 10, 2009	November 10, 2009
Period of default (a part of month is taken as full month)	4 months	4 months
	Rs.	*Rs.*
Income	5,42,500	5,57,500
Tax on income	67,750	72,250
Add : Surcharge (not applicable in case net income does not exceed Rs. 10 lakh)	—	—
Tax and surcharge	67,750	72,250
Add : Education cess	1,355	1,445
Add : Secondary and higher education cess [1% of tax and surcharge]	678	723
Tax payable	69,783	74,418
Less : Advance payment of tax	22,000	22,000
Tax deducted at source	5,230	5,230
Assessed tax	42,553	47,188
Assessed tax (rounded off)	42,500	47,100
Interest on assessed tax @ 1% per month for 4 months	1,700	1,884
Interest liability under section 234B		
Assessed tax (as computed above)	64,553	69,188
90% of assessed tax	—	62,269
Advance tax paid during 2008-09	22,000	22,000
Shortfall from April 1, 2009 to November 10, 2009	42,553	47,188
Shortfall (rounded off)	42,500	47,100
Period of default (April 1, 2009 to November 10, 2009)	8 months	8 months
Interest @ 1% per month for 8 months on shortfall	3,400	3,768
Shortfall from November 10, 2009 to March 14, 2010 [*i.e.*, Rs. 69,188—Rs. 22,000 (advance tax) — Rs. 43,215, self-assessment tax under section 140A paid on November 10, 2009—see Note 1]	—	3,973
Shortfall (rounded off)	—	3,900
Period of default (December 1, 2009 to March 14, 2010, in the shortfall of 8 months period up to November 30, 2009 is included)	—	4 months
Interest on Rs. 2,700 for 4 months @ 1% per month	—	156
Interest under section 234B	—	3,924
Interest liability under section 234C		
Income as per return		5,42,500
Tax on Rs. 5,42,500 (*a*)		69,783
Less : Tax deducted at source (*b*)		5,230
Assessed tax (*a*—*b*)		64,553
Advance tax paid on or before September 15, 2008 (*c*)		*Nil*
Advance tax paid on or before December 15, 2008 (*d*)		*Nil*

	As per return of income	As per assessment order
Advance tax paid on or before March 15, 2009 (e)		10,000
Interest on 30% (*a*—*b*)—(c) [*i.e.*, Rs. 19,366 @ 1% per month for 3 months (Rs. 19,300 × 3 × 1/100)]		579
Interest on 60% (*a*—*b*)—(*d*) [*i.e.* Rs. 38,732 @ 1% per month for 3 months (Rs. 38,700 × 3 × 1/100)]		1,161
Interest on (*a*—*b*—e) (*i.e.*, Rs. 54,553) @ 1% (Rs. 54,500 × 1/100)		545
Total		2,285

Notes :

1. In this example, X has paid Rs. 50,600 on November 10, 2009 under section 140A. Out of Rs. 50,600, Rs. 2,000 is paid towards interest under sections 234A, 234B and 234C. As per calculation given below, interest liability comes to Rs. 7,385. Hence, as per *Explanation* to section 140A(1), Rs. 7,385 shall be adjusted towards payment of interest and the balance Rs. 43,215 (*i.e.*, Rs. 50,600 — Rs. 7,385) is to be adjusted towards the tax payable.

	Rs.
Interest under section 234A as per return of income up to November 10, 2009	1,700
Interest under section 234B as per return of income up to November 10, 2009	3,400
Interest under section 234C	2,285
Total interest as per return of income	7,385

2. Net tax and interest payable is to be computed as under :

Tax on Rs. 5,57,500	74,418
Add : Interest	
❑ Under section 234A	1,884
❑ Under section 234B	3,924
❑ Under section 234C	2,285
Total	82,511
Less : Prepaid tax	
❑ Tax deduction at source	5,230
❑ Advance tax	22,000
❑ Self-assessment tax under section 140A	50,600
Balance payable (rounded off)	4,680

Tax deduction or collection at source

Deduction of tax from salaries [Sec. 192]

405. Any person responsible for paying any income chargeable under the head "Salaries" is required to deduct tax at source on the amount payable. Tax is to be calculated at the rates prescribed for the financial year in which the payment to employees is made. The person responsible for paying the salary may, at the time of deducting tax at source, increase or decrease the amount to be deducted for the purpose of adjusting any previous deficiency or excess deduction.

405.1 ***How to compute salary and tax thereon*** - For computing taxable salary, refer to Chapter 4 and Chapter 11. At the time of deducting tax at source, the person responsible for paying salary during the financial year 2008-09 should keep the following points in mind :

405.1-1 *EXEMPTION LIMIT* - No tax is required to be deducted at source unless the estimated salary exceeds the maximum amount not chargeable to tax‡ for the financial year 2008-09.

405.1-2 *HOUSE RENT ALLOWANCE* - House rent allowance qualifies for exemption, subject to the specified limits [*see* para 50.2].

Incurring actual expenditure on payment of rent is a pre-requisite for claiming deduction under section 10(*13A*). The employee should submit a written statement to the employer pinpointing rent paid by him, name of the landlord and address of the property taken on rent along with rent receipt given by the landlord. However, the Board has decided (as an administrative measure) that if house rent allowance is Rs. 3,000 per month (or less than that), the employer will give exemption on the basis of a declaration given by the employee (no need to submit rent receipt). This concession is only for the purpose of tax deduction at source and, in the regular assessment of the employee, the Assessing Officer will be free to make such enquiry, as he deems fit, for the purpose of satisfying himself that the employee has incurred actual expenditure on payment of rent.

405.1-3 *OTHER ALLOWANCES AND PERQUISITES* - Exemption available under section 10 in respect of other allowances, will be provided by the employer. The value of the perquisites by way of free residential accommodation and other perquisites will be determined under rule 3 [*see* para 52] and should be taken into account for computing taxable salary.

405.1-4 *DONATIONS BY EMPLOYEE DEDUCTIBLE UNDER SECTION 80G* - The employer should not give any deduction in respect of donation given by an employee to a notified public charitable institute. The tax relief admissible under section 80G in respect of such donations will have to be claimed by the employee at the time of finalization of his assessment.

However, where donations/contributions are made to other funds (*e.g.*, the Jawaharlal Nehru Memorial Fund, the Prime Minister's Drought Relief Fund, the National Children's Fund, etc.) deduction should be allowed by the employer while calculating tax deductible from salary income.

405.1-5 *OTHER DEDUCTIONS* - The employer should also take into consideration amount deductible under sections 80C, 80CCC, 80CCD, 80D, 80DD, 80E, 80GG and 80U.

405.1-6 *TAX DEDUCTIBLE* - The total salary should be rounded off to the nearest multiple of Rs. 10 by ignoring the fraction of less than five rupees and increasing the fraction of five rupees or more. On

‡Exemption limit for the financial year 2008-09 is as follows: Rs. 1,80,000 in the case of resident woman (below 65 years), Rs. 2,25,000 in the case of resident senior citizen (65 years or more), Rs. 1,50,000 in the case of any other individual or every HUF.

the estimated taxable salary, tax during the financial year 2008-09 is to be calculated at the rates mentioned in Appendix 1.

405.2 *Other points* - The following points should be noted—

405.2-1 ***TAX ON PERQUISITE PAID BY EMPLOYER*** - Section 192(1A) provides that the person responsible for paying any income in the nature of a perquisite (not provided for by way of monetary payment) referred to in section 17(2) may pay at his option, tax on the whole (or part of such income) without making any deduction therefrom at the time when such tax was otherwise deductible under the provisions of section 192(1).

For this purpose tax shall be determined at the average of income-tax computed on the basis of the rates in force for the financial year, on the income chargeable under the head "Salaries" and the tax so payable shall be construed as if it were, a tax deductible at source from the income under the head "Salaries". *See* also problem 63-P6 and para 143.8.

405.2-2 ***MORE THAN ONE EMPLOYER*** - Where an employee has more than one employer, he is required by section 192(2) to furnish in Form No. 12B to one of the employers (as selected by the employee having regard to the circumstances of the case) the details of salary due/received by him from other employers. Only after submission of information in Form No. 12B, it becomes the obligation of the employer (to whom Form No. 12B is submitted) to deduct tax at source after considering the information submitted by the employee. If information is submitted in the month of October, only from October onwards, tax shall be deducted at the average rate determined after considering the details submitted in Form No. 12B—***CIT*** v. ***Marubeni India (P.) Ltd.*** [2007] 165 Taxman 467 (Delhi).

Provisions illustrated - The following illustrations are given to have better understanding —

1. During the previous year 2008-09, X is employed simultaneously by A Ltd. (salary: Rs. 30,000) and B Ltd. (salary: Rs. 42,000) on part-time basis. X may select any of the two companies for deducting tax at source on aggregate salary. Suppose, X selects B Ltd., then tax will be deducted as follows:

	Tax deduction by A Ltd. on salary paid by it Rs.
Taxable salary by A Ltd. (Rs. 30,000 × 12)	3,60,000
Tax on taxable salary to be deducted at source by A Ltd.	27,810

The above information pertaining to A Ltd. will be submitted by X to B Ltd. in Form No. 12B. B Ltd. will deduct tax on the aggregate salary as follows:

	Tax deduction by B Ltd. Rs.
Taxable salary (Rs. 30,000 × 12 + Rs. 42,000 × 12)	8,64,000
Tax on taxable salary	1,69,126
Less: Tax deducted by A Ltd.	27,810
Tax to be deducted by B Ltd.	1,41,316

2. Y is employed by C Ltd. up to June 30, 2008 (salary being Rs. 80,000 per month). On July 1, 2008, he joins D Ltd. (salary being Rs. 95,000 per month). Tax will be deducted at source as follows:

	Tax deduction by C Ltd. on salary paid by it Rs.
Taxable salary by C Ltd. (Rs. 80,000 × 3)	2,40,000
Tax on taxable salary deducted at source by C Ltd.	9,270

The above information pertaining to C Ltd. will be submitted by Y to D Ltd. in Form No. 12B. D Ltd. will deduct tax on the aggregate salary as follows (Y should not select the old employer for deducting tax in respect of aggregate salary):

	Tax deduction by B Ltd. Rs.
Taxable salary (Rs. 80,000 × 3 + Rs. 95,000 × 9)	10,95,000
Tax on taxable salary	2,64,556
Less: Tax deducted by C Ltd.	9,270
Tax to be deducted by B Ltd.	2,55,286

405.2-3 ***RELIEF UNDER SECTION 89*** - Section 192(2A) provides that in respect of salary payments of employees of Government or public sector undertakings, company, co-operative society, local authority, university, institution, association or body, deduction of tax at source is to be made after allowing relief under section 89. To avail this benefit, the concerned employee should furnish information in Form No. 10E to the employer.

405.2-4 ***CAN THE EMPLOYER DEDUCT TAX IN RESPECT OF OTHER INCOMES OF EMPLOYEE*** - The provisions are given below—

1. The employee may (or may not) declare his other incomes to the employer.

2. If the employee wants to declare his other incomes to the employer, then such information should be given plain paper[1] to the employer.

3. The employee may declare details of his other incomes (including loss under the head "Income from house property" but not any other loss) and tax deducted thereon by others. If the aforesaid information is not submitted by the employee to the employer, then employer cannot take into consideration other incomes of the employee (even if the quantum of other incomes is otherwise known to the employer).

4. After receipt of such information, the employer should deduct (out of salary payment) tax due on total income as follows—

Computation one [on the basis of (a) salary and (b) other incomes declared by the employee]*	*Computation two [on the basis of salary and ignoring the other incomes* declared by the employee]*
a. Find out salary income	*j.* Find out salary income
b. *Add*: Other incomes declared by the employee (in case of loss, only house property loss would be considered; no other loss would be taken into consideration)	*k.* *Less*: Loss under the head "Income from house property" as declared by the employee
c. Find out aggregate of (*a*) and (*b*)	*l.* Find out (*j*) - (*k*)
d. *Less* : Deduction under sections 80C to 80U	*m.* *Less* : Deduction under sections 80C to 80U
e. Find out (*c*) - (*d*)	*n.* Find out (*l*) - (*m*)
f. Find out tax on (*e*)	*o.* Find out tax on (*n*)
g. *Add*: Surcharge†, education cess‡ and secondary and higher education cess£	*p.* *Add*: Surcharge† and education cess‡ and secondary and higher education cess£
h. *Less*: Tax deducted by others as per information given by the employee	*q.* *Less*: Tax deducted from rent by others (if there is loss of house property) as per information given by the employee
i. Find out tax liability [(*f*) + (*g*) - (*h*)]	*r.* Find out tax liability [(*o*) + (*p*) - (*q*)]

*Only house property loss declared the assessee would be considered.

†Surcharge is not applicable in case net income does not exceed Rs. 10 lakh for the assessment year 2009-10.

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1. A verification shall be annexed to the statement of other income given on plain paper as follows—
"I.....(name of employee) do declare that what is stated above is true to the best of my information and belief."

‡Education cess is 2 per cent of tax and surcharge.

£Secondary and higher education cess is 1 per cent of income-tax and surcharge.

The tax deductible at source from salary payment is amount determined at (*i*) or (*r*), whichever is higher.

405.2-5 ***PARTICULARS OF PERQUISITES/PROFITS IN LIEU OF SALARY*** - With effect from June 1, 2001, sub-section (2C) has been inserted in section 192. It provides that any person responsible for paying salary shall furnish to the person who receives the salary a statement giving particulars of perquisites or profits in lieu of salary provided to him in Form 12BA.

Form No. 12BA stating the nature and value of perquisite is to be provided by the employer to employee if salary exceeds Rs. 1,50,000. In other cases, the information shall be provided in Form No. 16. The chart given below highlights the same :

	Form No. 24 to the Government	*Form No. 16 to employees*	*Form No. 12BA to the employees*
■ If salary exceeds Rs. 1,50,000	Yes	Yes	Yes
■ If salary is up to Rs. 1,50,000 and tax is deducted under section 192	Yes	Yes	No
■ If salary is up to Rs. 1,50,000 and tax is not deducted at source from the salary of any employee	No	No	No

405.3 ***When tax is deductible at lower rate*** - *See* para 426.2.

405-P1 *X is in employment of A Ltd., drawing salary of Rs. 5,50,670, during the financial year 2008-09. He contributes Rs. 40,000 towards public provident fund. The following information is submitted by X in respect of other income to his employer.*

	Rs.
Income from consultancy	*70,000*
Tax deducted by the payer under section 194J	*7,210*
Expenses on earning the above income	*68,250*
Short-term capital loss	*(-) 6,000*
Loss from self occupied house property	*(-) 40,000*
Loss from let out house property	*(-) 61,000*
Tax deducted by the payer of rent	*6,240*

SOLUTION : On receipt of the above information, A Ltd. will make the following two computations—

Computation 1 - Under this computation, all other income declared by the employee will be considered.

Computation 2 - Only salary income will be considered.

It may be noted that in the two computations, house property loss (from let out as well as self-occupied property) will be considered. However, no other loss will be considered.

	Computation 1 Rs.	*Computation 2* Rs.
Salary	5,50,670	5,50,670
House property loss	(-) 1,01,000	(-) 1,01,000
Short-term capital loss	—	—
Consultancy income [Rs. 70,000 (-) Rs. 68,250]	1,750	NA
Gross total income	4,51,420	4,49,670

	Computation 1 Rs.	Computation 2 Rs.
Less : Deduction under section 80C	40,000	40,000
Net income	4,11,420	4,09,670
Tax	38,403	38,042
Less : Tax deducted by others		
By tenant under section 194-I	6,240	6,240
By payer of consultancy fees under section 194J	7,210	—
Balance	24,953	31,802

Tax to be deducted by the employer is Rs. 31,802.

Deduction of tax at source from interest on securities [Sec. 193]

406. Any person responsible for paying any interest on securities to a resident is required to deduct income-tax at source at the rates in force.

406.1 ***Time of tax deduction*** - Tax has to be deducted at source at the time of payment or at the time of credit to the account of payee or transfer to interest payable account or suspense account, whichever comes earlier. However, tax cannot be deducted until identity of the person in whose hands it is includible as income can be ascertained—***Industrial Development Bank of India*** v. ***ITO*** [2006] 10 SOT 497/104 TTJ 230 (Mum.).

406.2 ***Securities interest on which is not subject to tax deduction*** - Tax is not deductible in respect of interest payable on the following† :

a. debentures issued by any institution or authority or any public sector company or co-operative society (including a co-operative land mortgage bank or a co-operative land development bank) notified by the Central Government ;

b. any security of the Central/State Government [However, from June 1, 2007, interest exceeding Rs. 10,000 payable during a financial year on 8 per cent Savings (Taxable) Bonds, 2003 (popularly known as Relief Bonds) will be subject to tax deduction at source irrespective of date of investment];

c. securities beneficially owned by the Life Insurance Corporation of India or the General Insurance Corporation of India or to any of the four companies formed by virtue of the schemes framed under section 16(1) of the General Insurance Business (Nationalisation) Act, 1972 or any other insurer; and

d. (with effect from June 1, 2008) any listed Demat security.

■ *Tax rates* - Tax is deductible at the rate of 10 per cent (+SC+EC+SHEC)* in the case of listed debentures and 8 per cent Relief Bonds and at the rate of 20 per cent (+SC+EC+SHEC)* in the case of non-listed debentures if the recipient is a resident non-corporate assessee. Tax is deductible at the rate of 20 per cent (+ SC + EC + SHEC)* if the recipient is a domestic company.

†Only securities which are currently in force are pointed in the book.

*Surcharge, education cess and secondary and higher education cess is applicable as follows:

	Financial year 2008-09 (assessment year 2009-10)
■ *Surcharge (as a percentage of income-tax)*—	
1. If the recipient is an individual/HUF/AOP/BOI and payment or credit subject to tax deduction does not exceed Rs. 10 lakh	*Nil*

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406.3 ***Cases when tax is not deducted or deducted at lower rate*** - In the following cases tax is not deductible or deducted at lower rates :

406.3-1 *APPLICATION IN FORM NO. 13* - *See* para 426.2.

406.3-2 *DECLARATION TO THE PAYER IN FORM NO. 15G* - *See* para 426.1.

406.3-3 *INTEREST ON DEBENTURES IN SOME CASES* - It will not be necessary to deduct tax at source on interest on debentures paid to a resident individual, if the following conditions are fulfilled, namely :

a. the debentures have been issued by a company in which the public are substantially interested ;

b. the debentures are listed in a recognised stock exchange in India ;

c. the interest is paid by the company by an account payee cheque ; and

d. the aggregate amount of interest paid or likely to be paid by the company to the holder of the debentures during the financial year does not exceed Rs. 2,500.

406.3-4 *AMOUNT PAYABLE TO FUNDS ESTABLISHED FOR THE BENEFIT OF ARMED FORCES* - Since the income of these organisations is exempt under section 10(*23AA*), no tax should be deducted at source under section 193 from the income of such funds—Circular No. 735, dated January 30, 1996.

406.3-5 *INTEREST TO PROVIDENT FUNDS* - The Board has decided that in the case of a provident fund whose income is exempt under section 10(*25*)(*ii*) the income by way of interest on securities of Central and State Governments may be paid to such provident funds without deduction of income-tax at source— Circular No. 741, dated April 18, 1996.

406.3-6 *DEEP DISCOUNT BONDS* - Tax is deductible at the time of redemption [*see* **Circular No. 4/2004** dated May 13, 2004]. If the recipient has paid tax on interest on accrual basis, he can take relief under section 197 [*see* para 426.2] or 197A [*see* para 426.1].

406.3-7 *TDS ON 8 PER CENT SAVINGS (TAXABLE) BONDS, 2003* - The following clarifications have been given in respect of application of TDS on 8 per cent Savings (Taxable) Bonds, 2003—

■ Tax deduction at source on 8 per cent Savings (Taxable) Bonds, 2003 is effective from June 1, 2007. Any interest credited or paid on 8 per cent Savings (Taxable) Bonds, 2003 on or after June 1, 2007 will attract TDS if the amount of interest exceeds Rs. 10,000 for the financial year. Therefore, the date of investment is not a relevant factor. TDS would, thus, apply to existing bond holders also.

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	Financial year 2008-09 (assessment years 2009-10)
2. If the recipient is an individual/HUF/AOP/BOI and payment or credit subject to tax deduction exceeds Rs. 10 lakh	10%
3. If the recipient is an artificial juridical person	10%
4. If the recipient is a firm or a domestic company and payment or credit subject to tax deduction does not exceed Rs. 1 crore	*Nil*
5. If the recipient is a firm or a domestic company and payment or credit subject to tax deduction exceeds Rs. 1 crore	10%
6. If the recipient is a non-domestic company and payment or credit subject to tax deduction does not exceed Rs. 1 crore	*Nil*
7. If the recipient is a non-domestic company and payment or credit subject to tax deduction exceeds Rs. 1 crore	2.5%
8. If the recipient is a co-operative society or local authority	*Nil*
■ *Education cess (as a percentage of income-tax and surcharge)*	2%
■ *Secondary and higher education cess (as a percentage of income-tax and surcharge)*	1%

■ The rate of TDS is 20 per cent if the recipient is a company and 10 per cent if the recipient is a person other than a company. These rates will be increased by surcharge, education cess and secondary and higher education cess.

■ The recipient can submit Form No. 15G or 15H to get interest without TDS [for the relevant conditions *see* para 426.1].

■ On 'cumulative' type of investments, if the interest is credited every year, tax deduction has to be made if the interest credited during the financial year exceeds the threshold limit of Rs. 10,000. Thus, in the case of 'cumulative' type of investments, though the interest is payable on the date of maturity, tax deduction is still to be made whenever the interest credited or paid exceeds the threshold limit during the financial year.

■ A certificate issued by the Assessing Officer under section 197 [*see* para 426.2] for deduction of tax at a lower rate or *Nil* rate is required in the case of charitable institutions and trusts. No special dispensation is allowed to charitable institutions and trusts as far as TDS discipline is concerned.

Deduction of tax at source from dividends [Sec. 194]

407. The principal officer of an Indian company or a company which has made the prescribed arrangements for the declaration and payment of deemed dividend under section 2(*22*)(*e*) within India to a shareholder who is resident in India, is required, before making any payment, to deduct tax at source from the amount of dividend at the prescribed rate [*see* Appendix 1]. For the financial year 2007-08 rate for tax deduction is 20 per cent (+SC+EC+SHEC)*.

407.1 ***Cases when tax is not deducted or deducted at lower rates*** - In the following cases tax is not deducted or deducted at lower rates :

407.1-1 *DIVIDENDS COVERED BY SECTION 115-O* - No tax is deductible from June 1, 1997 to March 31, 2002 and from April 1, 2003 in the case of dividend referred to in section 115-O [*see* para 337].

407.1-2 *APPLICATION IN FORM NO. 13* - *See* para 426.2.

407.1-3 *DECLARATION TO THE PAYER IN FORM NO. 15G* - *See* para 426.1.

Deduction of tax at source from interest other than interest on securities [Sec. 194A]

408. Any person, (not being an individual£ or a Hindu undivided family£), who is responsible for paying to a resident any income by way of interest other than income chargeable as interest on securities, is required to deduct income-tax thereon at the rates in force [*see* Appendix 1] at the time of credit of such income to the account of payee or "interest payable account" or "suspense account" or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier [*see* also para 406.1].

Deduction of tax is to be made from gross interest and not net interest payable after mutual set off between parties—*CIT* v. *S.K. Sundararamier & Sons* [1999] 240 ITR 740 (Mad.).

■ *Tax rates* - Generally, tax is deducted at the rate of 10 per cent (+SC+EC+SHEC)* if the recipient is a resident non-corporate assessee and 20 per cent (+SC+EC+SHEC)* if the recipient is a domestic company.

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*For surcharge, etc., *see* footnote of para 406.

£The provisions of sections 194A, 194C, 194H, 194-I and 194J have been amended from June 1, 2002 to provide that an individual or a Hindu undivided family, whose total sales, turnover or gross receipts from the business or profession carried on by him exceed the monetary limits specified under section 44AB (*i.e.*, Rs. 40 lakh in the case of business and Rs. 10 lakh in the case of a profession) during the financial year immediately preceding the financial year in which the income is to be credited or paid, shall be liable to deduct income-tax under the relevant provisions of the aforementioned sections.

408.1 ***Adjustment in the case of short deduction*** - The person responsible for making the payment at the time of making any deduction, increase or reduce the amount to be deducted under section 194A for the purpose of adjusting any excess or deficiency arising out of any previous deduction or failure to deduct during the financial year.

408.2 ***When section 194A is not applicable*** - By virtue of sections 194A(3) and 197(1C), tax is not deductible in the following cases :

a. where the aggregate amount of interest credited or paid (or likely to be credited or paid) during the financial year does not exceed a specified amount *see* para 408.2-1];

b. where interest is credited or paid to any banking company, co-operative bank, public financial institutions, the Life Insurance Corporation, the Unit Trust of India, an insurance company or a co-operative society carrying on the business of insurance, or notified institutions [*see Taxmann's Direct Taxes Circulars*, Vol. 2, 2006 edition];

c. where interest is credited or paid by the firm to its partner(s);

d. where interest is credited or paid by a co-operative society to its members [*i.e.*, interest on time deposits/other deposits to members holding one share—Circular No. 9/2002, dated September 11, 2002[£]] or to any other co-operative society;

e. where interest is credited or paid in respect of deposits under the schemes of Post Office (Time Deposits), Post Office (Recurring Deposits), Post Office Monthly Income Account, Kisan Vikas Patra, National Savings Certificates VIII Issue and Indira Vikas Patra ;

f. where interest is credited or paid in respect of deposits (other than time deposits made on or after July 1, 1995) with a banking company or interest to non-members on deposits with a co-operative bank [*see* also para 408.2-1] ;

g. where interest is credited or paid in respect of deposits (by non-members) with a primary agricultural credit society or primary credit society or co-operative land mortgage bank or co-operative land development bank ;

h. where interest is credited or paid by the Central Government under different provisions of the direct taxes;

i. where the interest is paid or credited on compensation awarded by the Motor Accidents Claims Tribunal if the amount of payment or the aggregate amount of such payment does not exceed Rs. 50,000 ;

j. income paid/payable by an infrastructure capital company/fund or public sector company in relation to zero coupon bonds on or after June 1, 2005; and

k. interest paid or payable by an Offshore Banking Unit on deposits (or borrowing) made on or after April 1, 2005 by a person who is resident but not ordinarily resident in India.

408.2-1 *NO TAX DEDUCTION IF INTEREST DOES NOT EXCEED A SPECIFIED AMOUNT* - Tax under section 194A is not deductible where the aggregate amount of interest credited or paid (or likely to be credited or paid) during a financial year does not exceed the amount given below—

	From June 1, 2007 Rs.	*Up to May 31, 2007* Rs.
Where the payer is a banking company and interest is paid or payable on time deposit	10,000	5,000
Where the payer is a co-operative society engaged in carrying on the banking business and interest is paid or payable on time deposit	10,000	5,000

[£]The CBDT was overstepped the authority available to it and, consequently, Circular No. 9/2002 does not give correct interpretation of law—***Jalgaon District Central Co-operative Bank Ltd.*** v. ***Union of India*** [2004] 134 Taxman 1 (Bom.).

	From June 1, 2007 Rs.	Up to May 31, 2007 Rs.
Where the payer is post office and interest is paid or payable on notified deposit scheme with post office, *i.e.*, Senior Citizen Savings Scheme, 2004	10,000	5,000
Where the payer is any other person	5,000	5,000

The aforesaid limits shall be computed with reference to the income credited or paid by a branch of the banking company or the co-operative society, as the case may be. The interest on time deposits made with a primary agricultural credit society or a primary credit society or a co-operative land mortgage bank or a co-operative land development bank, will not be subject to the requirement of deduction of income-tax at source. The expression "time deposits" has been defined to mean deposits, excluding recurring deposits, repayable on the expiry of fixed period.

408.3 ***Cases where tax is deducted at lower rate or when no tax is deducted*** - In the following cases tax is not deducted or deducted at lower rates :

408.3-1 APPLICATION TO THE ASSESSING OFFICER IN FORM NO. 13 - *See* para 426.2.

408.3-2 DECLARATION TO THE PAYER IN FORM NO. 15G - *See* para 426.1.

408.4 ***Deposit in joint names*** - If there is a deposit of Rs. 7,000 in a joint account of XY (the payer does not give any information about share of X and Y) and there are deposits of Rs. 45,000 in the name of X and Rs. 3,000 in the name of Y with the same person, the rate of interest being 10 per cent per annum, the payer may aggregate the interest in the joint account amounting to Rs. 700 with the interest Rs. 4,500 on the deposit of X (who has higher interest income) and since the aggregate interest during a financial year exceeds Rs. 5,000, he may deduct tax at source. The fact that the joint account may be styled as YX instead of XY will not make any difference. On the other hand, if the payer has definite information about the separate share of X and Y in the joint deposit (say both have equal shares), then their respective interest (50 per cent in each case) on joint deposit will be added to separate interest income of each of them. Since, in this particular case amounts to be arrived at do not exceed Rs. 5,000 (Rs. 4,850 and Rs. 650 in the case of X and Y, respectively) the payer is not liable to deduct tax at source—Circular No. 256, dated May 29, 1979.

408.5 ***Interest payment under Land Acquisition Act*** - *Vide* Circular No. 526, dated December 5, 1988, interest payment made under the Land Acquisition Act are covered by the provisions of section 194A.The Supreme Court has stated in *Bikram Singh* v. *Land Acquisition Collector* [1996] 89 Taxman 119 that section 194A is not applicable in the case of interest payable on delayed compensation for compulsory acquisition.

408.6 ***Interest payable on hundi by buyer to supplier in the case of outstation sale of goods - Whether tax to be deducted by the buyer*** - In the case of out-station sale of goods, the supplier draws a *hundi* on the buyer and routes it through his banker along with transport documents with instructions to deliver the documents on retirement of the *hundi* and to charge interest on the amount of hundi from the date of acceptance thereof to the date of actual payment.

A problem arises whether, in such circumstances, tax is to be deducted at source by the party retiring the *hundi* on the amount of interest at the time of making payment to the bank. In the aforesaid case, interest paid by the buyer to the supplier is not to the bank as such but only routed through the bank.

The exemption under section 194A(3)(*iii*)(*a*) is available when interest is paid to a bank. As the interest from the buyer is not for the bank as such, but only routed through bank to the supplier (who is the recipient), the buyer has to deduct tax at source under section 194A from the interest paid and routing of the interest through bank will not make any difference—Circular No. 48, dated November 7, 1970.

408.7 ***Interest payable by consignors to their commission agent*** - Tax is to be deducted at source in accordance with section 194A from the interest paid by the consignors to their commission agent even where such interest is paid under an arrangement whereby the commission agent retains for himself the interest due to him at the time of paying to the consignor the moneys due to him on account of the consignment—Circular letter F. No. 12/12/68-IT(A-II), dated September 23, 1968.

408.8 ***Finance service company*** - Payment made by the assessee, which is a company engaged in retail finance services, corporate advisory services, securities trading and assets securitisation, to the persons who has invested in a scheme floated by the assessee under which the investor is guaranteed a minimum return of 1.5 per cent a month, is 'interest' as defined in section 2(*28A*) and as such assessee is liable to deduct tax at source under section 194A from payment of interest made to investors under the above scheme—*Viswapriya Financial Services & Securities Ltd.* v. *CIT*[2002]258 ITR 496 (Mad.).

Likewise, where assessee has borrowed money from financiers for making payment to its suppliers and had paid 'financial charges' to the financiers and debited the same under the head 'Discounting charges', said discounting charges are in nature of interest and liable for tax deduction at source under section 194A—***Kanha Vanaspati Ltd.*** v. ***CIT*** [2007] 17 SOT 160 (Delhi).

408.9 ***Who is an individual*** - Section 194A is not applicable in some cases if the payer of income is an individual or a Hindu undivided family. Even an artificial juridical person can be treated as an individual under section 194A. Status fixed for the purpose of assessment cannot get altered for the purpose of section 194A. Once a trust has been assessed as an individual under section 161, section 194A will not be applicable to it— *ITO* v. *Arihant Trust* [1995] 214 ITR 306 (Mad.).

408.10 ***Payment under a hire purchase agreement*** - When a part of purchase instalment is paid by a hirer to the owner under a hire purchase contract, the provisions of section 194A are not attracted—Instruction No. 1425, dated November 16, 1981.

408.11 ***Cheque discounting charges*** - Cheque discounting charges are different from interest payments and the provisions of section 194A are not attracted—***ITO*** v. ***A.S. Babu Sah*** [2003] 86 ITD 283 (Mad.).

408.12 ***Interest on delayed payment of insurance compensation*** - Tax at source is to be deducted by insurance company in case of interest on delayed payment of compensation awarded by Motor Accident Claims Tribunal and trial court cannot direct insurance company to make payment without deduction of tax at source—***New India Assurance Co. Ltd.*** v. ***Mani*** [2004] 270 ITR 394 (Mad.).

408.13 ***Personal loan of directors routed through company*** - Where director's personal loans were routed through the company's books by back-to-back transactions/cheques, the Supreme Court, in ***CIT*** v. ***Century Building Industries (P.) Ltd.*** [2007] 163 Taxman 188, held that the company has an obligation to deduct tax on interest payment. It does not matter that it has only acted as a medium for collecting and disbursement purpose. The Supreme Court held that the tax should have been deducted at the time of credit notwithstanding the arrangement between the company, directors and the agency giving loan.

Deduction of tax at source from winnings from lotteries or crossword puzzles [Sec. 194B]

409. A person responsible for paying to any person any income by way of winnings from lotteries or crossword puzzles or card game or any other game of any sort exceeding Rs. 5,000 is required, at the time of such payment, to deduct income-tax thereon at the rate in force. The rate of tax deduction at source for the financial year 2008-09 is 30 per cent (+SC+EC+SHEC)*. Tax is deductible from the amount payable to the winner. Unclaimed and/or undisbursed prize money is

*For surcharge, *see* footnote of para 406.

not a winning from lottery and, as such the provisions of section 194B for deduction of income-tax at source are not applicable in respect thereof— *Director of State Lotteries* v. *CIT* [1999] 238 ITR 1 (Gauhati).

For instance, X wins a lottery prize of Rs. 2,00,000 on March 11, 2009 out of which Rs. 20,000 is payable to the agent. Out of Rs. 1,80,000 payable to the winner, Rs. 55,620 (being 30.9 per cent of Rs. 1,80,000) shall be tax deduction at source under section 194B.

■ *Prizes on the basis of gift coupon may not be "lottery"* - State Government's District Level Gift-Linked Savings Mobilisation Scheme cannot be treated as lottery merely because prizes were distributed on basis of gift coupons issued—*Director of Small Savings* v. *ITO* [2000] 75 ITD 152 (Mad.).

409.1 ***Prize given partly in cash and partly in kind*** - Where the prize is given partly in cash and partly in kind, tax will be deductible from cash prize with reference to the aggregate amount of the cash prize and the value of the prize in kind. Where the winnings are wholly in kind or where they are partly in cash and partly in kind but the part in cash is not sufficient to meet the liability for tax deduction in respect of the whole of the winnings, the person responsible for paying shall, before releasing the winnings either in cash or in kind, ensure that tax has been paid in respect of the winnings.

For instance, X wins a Maruti-Zen (value of Rs. 3.70 lakh) in a draw of lot organised by Maruti Udyog on January 31, 2009. Tax liability on the prize in kind comes to Rs. 1,14,330 (*i.e.*, 30.9 per cent of Rs. 3.70 lakh) which may be recovered by the Maruti Udyog from X and the same can be deposited with the Government on account of tax deduction.

Deduction of tax at source from winnings from horse races [Sec. 194BB]

410. Tax is deductible at source from any income by way of winnings from the horse races at prescribed rates. The rate of tax deduction at source for the financial year 2008-09 is 30 per cent (+SC+EC+SHEC). Deduction of tax at source can be made only in cases where income by way of winnings from horse races to be paid to a person exceeds Rs. 2,500. The obligation to deduct tax at source applies only where such winnings are paid by a bookmaker or a person to whom a licence has been granted by the Government under any law for the time being in force for horse racing in any race course or for arranging for wagering or betting in any race course.

Deduction of tax at source from payments to contractors or sub-contractors [Sec. 194C]

411. Provisions of section 194C are given below —

411.1 ***Who is responsible for tax deduction*** - In the following two cases tax is deductible under section 194C—

411.1-1 *CASE I - WHEN PAYMENT IS MADE BY A SPECIFIED PERSON TO A RESIDENT CONTRACTOR [SEC. 194C(1)]* - Any person responsible for paying any sum to any resident contractor for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between a *specified person* and the resident contractor is required to deduct tax at source. For this purpose, payer himself is treated as person responsible for paying any sum to contractor. If, however, payer is a company, the company itself including the principal officer thereof, is the person responsible for paying to resident contractor.

■ *Specified person - Meaning of* - Tax is deductible under section 194C(1) only if payment is made in pursuance of a contract between a specified person and a resident contractor. The following are "specified persons" for this purpose :

a. the Central Government or any State Government ; or

b. any local authority ; or

c. any corporation established by or under a Central, State or Provincial Act; or

d. any company ; or

e. any co-operative society ; or

f. any authority constituted in India by or under any law, engaged either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both ; or

g. any society registered under the Societies Registration Act, 1860 or under any law corresponding to that Act in force in any part of India ; or

h. any trust ; or

i. any University established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a University under section 3 of the University Grants Commission Act, 1956 ;

j. any firm; or

k. any individual or HUF whose books of account are required to be audited under section 44AB(*a*)/(*b*) during the immediately preceding financial year and sum credited/paid is not exclusively for personal purposes; or

l. (with effect from June 1, 2008) AOP/BOI whose books of account are required to be audited under section 44AB(*a*)/(*b*) during the immediately preceding financial year.

411.1-2 *CASE II - WHEN PAYMENT IS MADE BY A RESIDENT CONTRACTOR TO A RESIDENT SUB-CONTRACTOR [SEC. 194C(2)]* - Tax is also deductible—

a. in case payment is made by a resident contractor (not being an individual or a Hindu undivided family whose books of account are not required to be audited under section 44AB in the immediately preceding financial year);

b. to a resident sub-contractor;

c. for carrying out (or for the supply of labour for carrying out) the whole (or any part) of the work undertaken by the contractor, or for supplying, whether wholly or partly, any labour which the contractor has undertaken to supply.

411.2 ***When tax has to be deducted at source*** - Tax is to be deducted either at the time of credit of such sum to the account of the payee, or at the time of payment thereof in cash or by issue of cheque or by any other mode, whichever is earlier.

For this purpose, any sum credited to any account, whether called "Suspense account" or by any other name, in the books of account of the payer, is treated as credit of such income to the account of the payee. *See* also para 406.1.

411.3 ***Consideration/sum exceeding a particular sum is subject to tax deduction at source*** - The provisions are given below :

■ To avoid tax deduction in petty cases, tax is required to be deducted at source where the amount credited or paid to a contractor or sub-contractor exceeds Rs. 20,000 in a single payment or credit or Rs. 50,000 in the aggregate during a financial year. In other words, tax is not be deductible under section 194C if the following two conditions are satisfied—

a. the amount of any (single) sum credited or paid (or likely to be credited or paid) to the contractor or sub-contractor does not exceed Rs. 20,000; and

b. the aggregate of the amounts of such sums credited or paid (or likely to be credited or paid) during the financial year does not exceed Rs. 50,000.

■ Further, tax is not deductible under section 194C if the following conditions are satisfied—

1. Consideration for work contract is paid or payable by a resident contractor to a resident sub-contractor.

2. The resident sub-contractor is an individual.

3. The aforesaid amount is paid or payable to the sub-contractor during the course of business of plying, hiring or leasing goods carriages.

4. The resident sub-contractor does not own more than two goods carriages at any time during the previous year.

5. The resident sub-contractor submits a declaration to the payer in Form No. 15-I.

If the above conditions are satisfied, the payer (*i.e.*, resident contractor) will not deduct tax at source under section 194C. The payer shall furnish the details of above payment to the prescribed income-tax authority in Form No. 15J on or before June 30 after the expiry of the financial year.

Provisions illustrated - X is a resident individual. He owns two trucks. Besides, he has income taxable under sections 22, 45 and 56. He has taken a sub-contract from A Ltd. (resident contractor) to transport goods on behalf of A Ltd. from Delhi to Trivendram. The total consideration payable during the financial year 2008-09 is Rs. 3,60,000. He submits a declaration in Form No. 15-I to A Ltd.

In such a case, tax will not be deducted at source under section 194C by A Ltd.

411.4 ***Who is a contractor/sub-contractor*** - A "contractor" is one who makes an agreement with another to do a piece of work, retaining in himself control of the means, methods and the manner of producing the result to be accomplished, neither party having the right to terminate the contract at will. Sub-contractor is one who takes portion of contract from principal contractor or another sub-contractor.

The expression "contractor" shall also include a contractor who is carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor, and the Government of a foreign State; or a foreign enterprise; or any association or body established outside India.

411.5 ***Meaning of work contract*** - Provisions of section 194C relating to tax deduction from payment to contractors/sub-contractors are applicable only where contract is either a "work contract" or a "contract for supply of labour for works contract". These provisions are, therefore, not applicable for payments made under contract for sale of goods.

■ *"Work" as defined in section 194C* - The expression "work" shall also include (*a*) advertising, (*b*) broadcasting and telecasting including production of programmes for such broadcasting or telecasting, (*c*) carriage of goods and passengers by any mode of transport other than by railways, and (*d*) catering.

411.5-1 *SUPPLY OF GOODS AS PER SPECIFICATION OF BUYER - IS IT WORKS CONTRACT* - The provisions of section 194C would apply in respect of a contract for supply of any article or thing as per prescribed specifications only if it is a contract for work and not a contract for sale—**Circular No. 13/2006,** dated December 13, 2006.

If equipments are manufactured as per design, engineering, etc., specified by a customer, it would not result in a works contract, especially when all materials belong to the supplier, even though it produced a tailor-made product—***Power Grid Corpn. of India Ltd.*** v. ***CIT***[2007] 13 SOT 347 (Hyd.), ***Bangalore District Co-operative Milk Producers Societies Union Ltd.*** v. ***ITO*** [2007] 11 SOT 539 (Bang.). When a manufacturer purchases raw material on his own and produces the goods as per the specifications of the buyer, it is a case of sale of goods and not job work—***Whirlpool of India Ltd.*** v. ***CIT***[2007] 16 SOT 436 (Delhi). If the ownership in material passes to the payer only at the time of delivery of goods and prior to that ownership vests with the manufacturer, it will be transaction of sale and not subject to TDS under section 194C—***CIT*** v. ***Seagram Manufacturing (P) Ltd.*** [2008] 19 SOT 139 (Delhi). Where the assessee purchases printed packing material from a manufacturer for the purpose of packing of its finished products and no raw material is supplied by it to the manufacturer for manufacturing such packing material, transaction is a 'contract of sale' and not a 'works contract' and, therefore, it is outside the purview of section 194C—***CIT*** v. ***CAO, Markfed Khanna Branch*** [2008] 173 Taxman 149 (Punj. & Har.).

411.6 *Rate of tax deduction* - The person responsible for making payments to contractors/sub-contractors is required to deduct tax at source at the following rates during the financial year 2008-09. These rates are, however, not applicable in cases covered by para 411.8.

	Advertising contracts	*Other contracts*
	Income-tax	*Income-tax*
Payments to contractor	1% (+SC+EC+SHEC)*	2% (+SC+EC+SHEC)*
Payments to sub-contractor	1% (+SC+EC+SHEC)*	1% (+SC+EC+SHEC)*

411.6-1 *PAYMENT, NOT INCOME COMPRISED THEREIN, IS SUBJECT TO DEDUCTION* - The deduction at the aforesaid rate is with reference to the amount of payment itself and not "income comprised in the payment". The person responsible for payment is not, therefore, required to estimate the income comprised in the payment at all. The Supreme Court in *Associated Cement Co. Ltd.* v. *CIT* [1993] 201 ITR 435 has also given the same verdict.

411.6-2 *WHEN PURCHASE ORDER IS TO ACQUIRE MACHINERY AND ITS ERECTION* - One has to find out the primary object of the contract. If the primary object is to purchase plant and the civil work, erection and commissioning are only incidental to purchase of plant, tax is deductible under section 194C only in respect of consideration payable for civil work, erection and commissioning. This is because of the fact that the contract for supply of plant and the contract for civil work/erection are two separate contracts, though there may be a common purchase order—***Haryana Power Generation Corporation Ltd.*** v. ***ITO*** [2007] 164 Taxman 64(Delhi) (Mag.).

411.7 *Clarifications from the Board* - The Board has issued the following clarifications on section 194C :

411.7-1 *ADVERTISING CONTRACT* - When a client makes payment to an advertising agency (and not when advertising agency makes payment to the *media*, which includes both print and electronic *media*), the deduction is required to be made at the rate of 1 per cent*. When an advertising agency makes payments to their models, artists, photographers, etc., the tax shall be deducted at the rate of 5 per cent* as applicable to fees for professional and technical services under section 194J—Circular No. 715, dated August 8, 1995.

■ *Consolidated bill* - If an advertising agency gives a consolidated bill (including charges for art work and other related jobs as well as payment to *media*), the deduction will have to be made under section 194C at the rate of 1 per cent*. The advertising agencies shall have to deduct tax at source at the rate of 5 per cent* under section 194J while making payments to artists, actors, models, etc. If payments are made for production of programmes for the purpose of broadcasting and telecasting, these payments will be subjected to tax deduction @ 2 per cent*—Circular No. 715, dated August 8, 1995.

■ *Payment directly to print media/Doordarshan for release of advertisements* - The payments made directly to print and electronic *media* would be covered under section 194C as these are in the nature of payments for purposes of advertising. Deduction will have to be made at the rate of 1 per cent*. It may, however, be noted that the payments made directly to Doordarshan may not be subjected to tax deduction as Doordarshan, being a Government agency, is not liable to income-tax—Circular No. 715, dated August 8, 1995.

■ *Payment by an advertising agency to print media/electronic media* - It is not subject to tax deduction under section 194C—Circular No. 717, dated August 14, 1995.

■ *One per cent of gross amount of advertising bill* - In the case of advertising contract tax has to be deducted at the rate of 1 per cent* of gross amount of advertising bill (*i.e.*, commission to the person

*Surcharge, education cess and secondary and higher education cess shall be added [*see* para 406, footnote]. These rates are applicable on consideration for any work contract (including service tax thereon). In other words, tax is also deductible on service tax component (if any).

who arranges release of advertisement including bill of media)—Circular No. 715, dated August 8, 1995.

■ *Sponsorship of debates is advertisements* - The agreement of sponsorship of debates, seminars and other functions in schools/colleges/associations is in essence an agreement for carrying out a work of advertisement. Therefore, provisions of section 194C shall apply—Circular No. 715, dated August 8, 1995.

■ *Advertisement in souvenirs* - Tax has to be deducted on payments for cost of advertisements issued in the souvenirs brought out by various organisations—Circular No. 715, dated August 8, 1995.

■ *Payment of putting up a hoarding* - The contract for putting up a hoarding is in the nature of advertising contract and provisions of section 194C would be applicable. If, however, a person has taken a particular space on rent and thereafter sub-lets the same fully or in part for putting up a hoarding, he would be liable to tax deduction under section 194-I and not under section 194C—Circular No. 715, dated August 8, 1995.

411.7-2 *BROADCASTING/TELECASTING CONTRACT* - Advertising may be in print or electronic media, *i.e.*, in newspapers, periodicals, radio, television, etc. In such cases the tax will be deducted at the rate of 1 per cent* of the payments made for advertising including production of programmes for such broadcasting and telecasting to be used in such advertising. In all other cases of work of broadcasting and telecasting including production of programmes for such broadcasting and telecasting, where advertising is not involved, tax will be deducted at the rate of 2 per cent* of the sum—Circular No. 714, dated August 3, 1995.

■ Even if the production of such programmes is for the purpose of preparing advertisement material, not for immediate advertising, the payment will be subject to the tax deduction at the rate of 2 per cent* —Circular No. 715, dated August 8, 1995.

■ Once there is a specific provision introduced by way of an *Explanation* to section 194C, to bring within its ambit contractual work concerning 'broadcasting and telecasting', the revenue cannot resort to section 194J, which is in more general terms for purpose of tax deduction at source from income from such contractual work—***CIT*** v. ***Prasar Bharati (Broadcasting Corpn. of India)*** [2007] 158 Taxman 470/292 ITR 580 (Delhi).

■ Payment made by a cable operator to get license of TV channels is payment for a work contract pertaining telecasting rights and covered by section 194C—***Kurukshetra Darpans (P.) Ltd.*** v. ***CIT*** [2008] 169 Taxman 344 (Punj. & Har.).

411.7-3 *PAYMENT MADE TO TRAVEL AGENT/OR AN AIRLINE* - The payment made to a travel agent or an airline for purchase of a ticket for travel would not be subject to tax deduction at source as the privity of the contract is between the individual passenger and the airline/travel agent, notwithstanding the fact that the payment is made by an entity mentioned in section 194C(1). The provision of section 194C shall, however, apply when a plane or a bus or any other mode of transport is chartered by one of the entities mentioned in section 194C—Circular No. 715, dated August 8, 1995.

The above provision shall apply *mutatis mutandis* to the tickets for travel of individuals by any other mode of transport also—Circular No. 713, dated August 2, 1995.

411.7-3a PAYMENT TO CLEARING/FORWARDING AGENTS VIS-A-VIS PAYMENT TO TRAVEL AGENTS - Payments to clearing and forwarding agents for carriage of goods is subject to tax deduction at source under section 194C. The travel agent, issuing tickets on behalf of the airlines for travel of individual passengers, would not be required to deduct tax at source as he acts on behalf of the airlines. The position of clearing and forwarding agents is different. They act as independent contractors. Any payment made to them would, hence, be liable for deduction of tax at source. They would also be liable to deduct tax at source while making payments to a carrier of goods—Circular No. 715, dated August 8, 1995.

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*For surcharge, etc., *see* footnote of para 406.

■ *Tax deductible under section 194C, not under section 194-I*- There is no dispute about the fact that payments to clearing and forwarding agents are liable to deduction of tax at source. Payments to clearing and forwarding agents can be subjected to deduction of tax at source only under section 194C and not under any other provision.

411.7-3b PAYMENT MADE FOR CARRIAGE OF DOCUMENTS - The carriage of documents, letters, etc., is in the nature of carriage of goods and, therefore, provisions of section 194C would be attracted in respect of payments made to the couriers—Circular No. 715, dated August 8, 1995.

411.7-3c WHETHER EACH GR IS A SEPARATE CONTRACT - Normally, each GR can be said to be a separate contract, if the goods are transported at one time. But if the goods are transported continuously in pursuance of a contract for a specific period or quantity, each GR will not be a separate contract and all GRs relating to that period or quantity will be aggregated for the purpose of the tax deduction—Circular No. 715, dated August 8, 1995.

411.7-3d PAYMENT TO NON-RESIDENT SHIPPING COMPANIES OR THEIR INDIAN AGENTS - *See* para 421.5-1.

411.7-3e GOODS RECEIVED ON "FREIGHT TO PAY BASIS" - Payment of freight would be subject to tax deduction even when goods are received on "freight to pay basis"—Circular No. 715, dated August 8, 1995.

411.7-4 *DOES CATERING INCLUDE SERVING FOODS IN RESTAURANT* - Tax deduction at source is not required to be made when payment is made for serving food in a restaurant in the normal course of running of the restaurant/cafe—Circular No. 715, dated August 8, 1995.

411.7-5 *PAYMENT OF HIRE CHARGES* - The provisions of section 194C would not apply in the case of contract of sale of goods and in relation to payments made for hiring or renting of equipments, etc.—Circular No. 781, dated March 8, 1994.

411.7-6 *PAYMENT TO AN ELECTRICIAN* - The payments made to an electrician or to a contractor who provides the service of an electrician will be in the nature of payment made in pursuance of a contract for carrying out any work. Accordingly, provisions of section 194C will apply in such cases— Circular No. 715, dated August 8, 1995.

411.7-7 *MAINTENANCE CONTRACTS* - Routine, normal maintenance contracts which include supply of spares will be covered under section 194C. However, where technical services are rendered, the provisions of section 194J will apply in regard to tax deduction at source—Circular No. 715, dated August 8, 1995.

411.7-8 *FIXED DEPOSIT COMMISSION* - FD commission/brokerage cannot be covered by section 194C— Circular No. 715, dated August 8, 1995.

411.7-9 *PROCUREMENT OF ORDERS* - Rendering services for procurement of order is not covered by section 194C (but by section 194J)—Circular No. 715, dated August 8, 1995.

411.7-10 *REIMBURSEMENT* - Section 194C refers to any sum paid. Reimbursements cannot be deducted out of the bill amount for the purpose of tax deduction at source—Circular No. 715, dated August 8, 1995 [*see*, however, para 419.9].

411.7-11 *BIDI MANUFACTURING* - In the case of *bidi* manufacturing industry payments made to *munshis* (who give the work to the workers who work at home) are subject to tax deduction at source under section 194C—Circular No. 433, dated September 25, 1985. No tax is, however, deductible under section 194C if the workers (employed through the medium of agency such as *munshis*) bring *bidi* to the factory for quality check and for getting payments—Circular No. 487, dated June 8, 1987.

411.7-12 *COOLING CHARGES* - Section 194C will be applicable to the amounts paid as cooling charges by the customers of the cold storage—**Circular No. 1/2008,** dated January 10, 2008.

411.8 ***When tax is not deducted or deducted at lower rate*** - *See* para 426.2.

Deduction of tax at source from insurance commission [Sec. 194D]

412. Person responsible for paying to a resident any income by way of remuneration or reward, whether by way of commission or otherwise, for soliciting or procuring insurance business including business relating to the continuance, renewal or revival of policies of insurance is required, to deduct income-tax thereon at the rates in force [*see* Annex 1].

■ *Tax rates* - Generally tax is deductible at the rate of 10 per cent (+SC+EC+SHEC)* if the recipient is a resident non-corporate assessee and 20 per cent (+SC+EC+SHEC)* if the recipient is a domestic company.

412.1 ***Time of tax deduction*** - Tax shall be deducted at the time of credit of such income to the account of the payee or the payment thereof (by whatever mode), whichever is earlier.

412.2 ***Adjustment not possible*** - At the time of deducting tax from the insurance commission credited to an agent's account, adjustment for any debits made in this account in respect of excess commission credited or paid to him earlier is not permissible and income-tax must be deducted from the full amount of commission credited to this account—Circular No. 277, dated July 21, 1980.

412.3 ***When tax is not deductible or deductible at lower rate*** - In the cases given below, tax is not deductible or deductible at lower rate—

1. When the amount does not exceed Rs. 5,000 - No deduction shall be made in a case where the insurance commission or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed Rs. 5,000.

2. Application in Form No. 13 - *See* para 426.2.

Payment to non-resident sportsman or sports association [Sec. 194E]

413. A person responsible for paying the following income to the following persons shall deduct tax at source at the rate of 10 per cent (+SC+EC+SHEC)*.

Payee	*Nature of income*
1. Non-resident foreign citizen sportsman (including an athlete)	Income is by way of *a.* participation in India in any game (other than card game or gambling, etc.); or *b.* advertisement; or *c.* contribution of articles relating to any game or sport in India in newspapers, magazines or journals
2. Non-resident sports association or institution	Any amount guaranteed to be paid or payable in relation of any game (but other than card game, etc.) or sport played in India

413.1 ***When tax shall be deducted at source*** - Tax is to be deducted 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 issue of cheque or draft or by other mode, whichever is earlier. *See* also para 406.1.

Deduction of tax from payments in respect of National Savings Scheme [Sec. 194EE]

414. The person responsible for paying any amount (*i.e.*, principal and interest) out of National Savings Scheme, 1987 should deduct tax at source at the rate of 20 per cent (+SC+EC+SHEC)*. Tax is deductible at the time of payment. It may be noted that the payment out of National Savings

*For surcharge, etc., *see* footnote of para 406.

Scheme, 1992 (which was eligible for the benefit of sections 80L and 88) is not subject to tax deduction at source.

414.1 ***When tax is not deductible*** - No tax deduction shall be made in the following cases —

414.1-1 *PAYMENT UP TO RS. 2,500* - Where the amount of payment or the aggregate amount of payments in a financial year is less than Rs. 2,500, tax is not deductible under section 194EE.

414.1-2 *PAYMENT TO LEGAL HEIRS* - Where the payment is made to the heirs of the deceased assessee (depositor), no tax shall be deducted at source.

414.1-3 *DECLARATION TO THE PAYER IN FORM NO. 15G* - *See* para 426.1.

Deduction of tax at source on payments on account of repurchase of units by Mutual Funds or UTI [Sec. 194F]

415. The person responsible for paying to any person any amount referred to in section 80CCB shall, at the time of payment thereof, deduct income-tax thereon at the rate of 20 per cent (+SC+EC+SHEC)*. It may be noted that section 80CCB is applicable if investment was made during the previous years 1990-91 and 1991-92 in the notified units of Equity Linked Saving Scheme of UTI or a mutual fund.

Deduction of tax from commission, etc., on sale of lottery tickets [Sec. 194G]

416. Any person responsible for paying any income by way of commission, remuneration or prize (by whatever name called) on lottery tickets in an amount exceeding Rs. 1,000 shall deduct income-tax thereon at the rate of 10 per cent (+SC+EC+SHEC)*.

If an authorised lottery ticket agent purchases lottery tickets in bulk at a discount from the State Government and sells the same at the price of his choice, section 194G is not applicable— *M.S. Hameed* v. *Director of State of Lotteries* [2001] 114 Taxman 394 (Ker.).

416.1 ***Time of tax deduction*** - Tax shall be deducted at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or issue of cheque or draft, or by any other mode, whichever is earlier.

416.2 ***When tax is not deducted or deducted at lower rates*** - *See* para 426.2.

Deduction of tax at source from commission or brokerage [Sec. 194H]

417. Section 194H has been inserted from June 1, 2001. It provides as under—

417.1 ***Who is responsible for tax deduction*** - Any person (other than an individual[£] or Hindu undivided family[£]) who is responsible for paying commission or brokerage (not being insurance commission) to a resident shall deduct tax at source.

417.2 ***When tax has to be deducted*** - Tax shall be deducted at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier. Where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee. *See* also para 406.1.

417.2-1 *PAYMENT IN EXCESS OF RS. 2,500 IS SUBJECT TO TAX DEDUCTION* - No tax is deductible if the amount paid/credited during the financial year does not exceed Rs. 2,500.

417.2-2 *COMMISSION OR BROKERAGE AS DEFINED IN SECTION 194H* - "Commission or brokerage" for the purpose of section 194H includes any payment which satisfies the following conditions —

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*For surcharge, etc.; *see* footnote of para 406.

[£]In some cases, tax is deductible even if the payer is an individual/HUF. *See* para 408.

Condition 1	Payment is received or receivable by a person acting on behalf of the payer
Condition 2	The aforesaid payment is received for services rendered (not being professional services) or for any service in the course of buying/selling of goods or in relation to any transaction relating to any asset, valuable article or thing not being securities.
Condition 3	The above payment may be received or receivable directly or indirectly.
Condition 4	The above payment is not insurance commission covered by section 194D.

417.2-3 *PROFESSIONAL SERVICES* - The expression "professional services" means services rendered by a person in the course of carrying on a legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or such other profession as is notified by the Board for the purposes of section 44AA (*i.e.*, authorised representative, film artist, company secretary and information technology).

417.2-4 *"INDIRECT PAYMENT" - WHEN COMMISSION IS RETAINED BY AGENT* - A question may arise whether there would be deduction of tax at source under section 194H where commission or brokerage is retained by the consignee/agent and not remitted to the consignor/principal while remitting the sale consideration. Since the retention of commission by the consignee/agent amounts to constructive payment of the same to him by the consignor/principal, deduction of tax at source is required to be made from the amount of commission. Therefore, the consignor/principal will have to deposit the tax deductible on the amount of commission income to the credit of the Central Government, within the prescribed time—Circular No. 619, dated December 4, 1991.

417.2-5 *ELEMENT OF AGENCY IS A MUST* - To fall within the provisions of section 194H the payment received or receivable, directly or indirectly, is by a person acting on behalf of another person (*i*) for services rendered (not being professional services), or (*ii*) for any services in the course of buying or selling of goods, or (*iii*) in relation to any transaction relating to any asset, valuable article or thing. The element of agency is to be there in case of all services or transactions contemplated by section 194H.

A service in the course of buying or selling of goods has to be something more than the act of buying or selling of goods. When the licensed stamp vendors take delivery of stamp papers on payment of full price less discount and they sell such stamp papers to retail customers, neither of the two activities (buying from the Government and selling to the customers) can be termed as the service in the course of buying or selling of goods—*Ahmedabad Stamp Vendors Association* v. *Union of India* [2002] 124 Taxman 628 (Guj.), ***Kerala Stamp Vendors Association*** v. ***Office of the Accountant General*** [2006] 150 Taxman 30 (Ker.).

417.2-6 *TURNOVER COMMISSION BY RBI* - The work of receipt of tax payments and issue of refunds is conducted by the Bank authorised for such purposes by the Reserve Bank of India (RBI). As a compensation for the work so conducted, the Central Government pays to the Banks, through RBI, commission termed as "Turnover Commission".

Tax would not be required to be deducted by RBI on the amount of Turnover Commission paid or credited by it—**Circular No. 6/2003**, dated September 3, 2003.

417.2-7 *TRADE DISCOUNT IS DIFFERENT* - Where transaction between assessee-publishing newspaper and it sales agents is on principal to principal basis, assessee is justified in not effecting any TDS from discount given to newspaper agents and charges/commission retained by advertising agents under section 194H, as commission paid to circulation agents is in nature of trade discount—*CIT* v. *Samaj* [2001] 77 ITD 358 (Cuttack).

417.3 ***Rate of tax deduction*** - Tax shall be deducted at the rate of 5 per cent (+SC+EC+SHEC)* [from June 1, 2007, 10 per cent (SC+EC+SHEC)*].

417.4 ***When tax is deducted at lower rate*** - *See* para 426.2.

*For surcharge, etc., *see* footnote of para 406.

Deduction of tax at source from income by way of rent [Sec. 194-I]

418. Section 194-I has been inserted with effect from June 1, 1994.

418.1 ***Who is responsible for tax deduction*** - Any person (not being an individual[£] or a Hindu undivided family[£]) responsible for paying rent to a resident is required to deduct tax at source under the provisions of section 194-I.

418.2 ***When tax has to be deducted*** - The person responsible for paying rent should deduct tax at source. Tax is to be deducted at source either :

a. at the time of credit of such income to the account of payee ; or

b. at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier.

Where any income by way of rent is credited to any account (whether called "Suspense account" or by any other name) in the books of account of the person liable to pay such rent, such crediting shall be deemed to be credit of such income to the account of the payee. *See* also para 406.1.

418.2-1 *NO TAX IS DEDUCTIBLE IF PAYMENT DURING A FINANCIAL YEAR DOES NOT EXCEED RS. 1,20,000* - No tax is deductible if the amount of rent credited/paid during the financial year does not exceed Rs. 1,20,000.

418.2-2 *RENT AS DEFINED IN SECTION 194-I* - The salient features of "rent" are as follows :—

1. Payment is made under any lease, sub-lease, tenancy or any other agreement or arrangement.

2. Payment is made either for the use of only land or building (including factory building) or for land appurtenant to a building (including factory building), machinery, or plant or equipment or furniture or fittings.

3. It is immaterial whether or not the assets are owned by the person to whom rent is paid.

418.2-2b BROAD INFERENCES - On the basis of the aforesaid definition, clarifications given by the Board and judicial rulings the following broad inferences one can draw :

■ *When building is let out alongwith furniture/fittings* - If a building is let out alongwith furniture/fittings but rent is payable under two separate agreements (one for building and another for furniture/fittings) the composite rent is subject to tax deduction under section 194-I.

■ *Rent of 'any' building is covered* - Rent of any building is covered by section 194-I.

■ *The payee may not be owner of the building* - Section 194-I is applicable even if the person to whom rent is paid is not the owner of the building. In other words, tax is deductible even in the case of sub-lease of a building.

■ *Non-refundable deposit* - In cases where the tenant makes a non-refundable deposit, tax would have to be deducted at source as such deposit represents the consideration for the use of the land or the building, etc., and, therefore, partakes the nature of rent as defined in section194-I. If, however, the deposit is refundable, no tax is deductible at source. If the deposit carries interest, the tax to be deducted on the amount of interest will be governed by section 194A—Circular No. 718, dated August 22, 1995.

■ *Advance rent* - Advance payment of rent is also required to be taken into consideration for the purpose of section 194-I. However, refundable deposits do not attract the provisions of section 194-I — *Enterprise International Ltd.* v. *ITO* [2001] 77 ITD 189 (Cal.). Adjustment of interest-free security deposit refundable at the fag end of the lease or to be adjusted against the rent payable if the lease is not renewed against the rent amount, would tantamount to refund of security deposit only so that the assessee is not liable to deduct tax thereon — ***P.S. Cars (P.) Ltd.*** v. ***ITO*** [2005] 4 SOT 143 (Delhi.). On the other hand, where the security deposit is adjustable every six months, the deposit is, in fact, rent and the assessee is required to deduct tax at source from the amount of security deposit — ***CIT*** v. ***Reebok India Co.*** [2007] 163 Taxman 61 (Delhi).

£In some cases, tax is deductible even if the payer is an individual/HUF. *See* para 408.

■ *Warehousing charges* - The term "rent" as defined in section 194-I means any payment by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any building or land. Therefore, the warehousing charges will be subject to deduction of tax under section 194-I—Circular No. 718, dated August 22, 1995.

Payment to C&F agent do not bear the character of the nature of rent but rather bears the character of payment for carrying out work under section 194C—***National Panasonic India (P.) Ltd.*** v. ***CIT (TDS)*** [2005] 3 SOT 16 (Delhi).

■ *Rent inclusive of municipal tax, ground rent* - The basis of tax deduction at source under section 194-I is "income by way of rent". Rent has been defined, to mean any payment under any lease, tenancy, agreement, etc., for the use of any land or building. Thus, if the municipal taxes, ground rent, etc., are borne by the tenant, no tax will be deducted on such sum—Circular No. 718, dated August 22, 1995.

■ *Rent of a part of building* - Even if a part or portion of building is given on rent, section 194-I is applicable—Circular No. 718, dated August 22, 1995.

■ *Amount payable to funds established for the benefit of armed forces* - Since the income of regimental fund or non-public fund established by Armed force is exempt under section 10(*23AA*), no tax may be deducted at source under sections 193 and 194-I from the income of such funds—Circular No. 735, dated January 30, 1996.

■ *Payment by an individual to a hotel and later reimbursed by company* - Section 194-I do not normally cover any payment for rent made by an individual or HUF except in cases where the total sales, gross receipts or turnover from business and profession carried on by the individual or HUF exceed the monetary limits specified under clause (*a*) or clause (*b*) of section 44AB. Where an employee or an individual representing a company (like a consultant, auditor, etc.) makes a payment for hotel accommodation directly to the hotel as and when he stays there, the question of tax deduction at source would not normally arise (except where he is covered under section 44AB as mentioned above) since it is the employee or such individual who makes the payment and the company merely reimburses the expenditure—Circular No. 5/2002, dated July 30, 2002.

■ *Cinema house* - In the case of sharing of the proceeds of film exhibition between film distributor and a film exhibitor owning a cinema theatre, the Board are of the view that the provisions of section 194-I are not attracted to such payment because:

a. the exhibitor does not let out the cinema hall to the distributor ;

b. generally, the share of the exhibitor is on account of composite services ; and

c. the distributor does not take cinema building on lease or sub-lease or tenancy or under any agreement of similar nature— Circular No. 736, dated February 13, 1996.

■ *Payment to hotel* - Payments made for hotel accommodation taken on *regular basis* will be in the nature of rent subject to tax deduction under section 194-I if such payment exceeds Rs. 1,20,000 in a financial year. Section 194-I is not applicable in the case of rate-contract agreement.

■ *Rate-contract agreement* - A rate-contract, therefore, may be said to be a contract for providing specified types of hotel rooms at pre-determined rates during an agreed period. Where an agreement is merely in the nature of a rate contract, it cannot be said to be accommodation 'taken on regular basis', as there is no obligation on the part of the hotel to provide a room or specified set of rooms. The occupancy in such cases would be occasional or casual. In such case section 194-I is not applicable—Circular No. 5/2002, dated July 30, 2002.

■ *When payees are different* - Under section 194-I, the tax is deductible from payment by way of rent, if such payment to the payee during the year is likely to be Rs. 1,20,000 or more. If there are a number of payees, each having definite and ascertainable share in the property, the limit of Rs. 1,20,000 will apply to each of the payee/co-owner separately. The payers and payees are, however, advised not to enter into sham agreements to avoid tax deduction provisions.

■ *Tax deduction does not depend upon nomenclature* - The tax is to be deducted from rent paid, by whatever name called, for hire of a property (for instance payments made by a company taking

premises on rent but styling the agreement as a business centre agreement would attract the provisions of section 194-I). The incidence of deduction of tax at source does not depend upon the nomenclature, but on the contents of the agreement as mentioned in clause (*i*) of *Explanation* to section 194-I—Circular No. 715, dated August 8, 1995.

■ *When composite agreement is in essence the tenancy agreement* - If the composite agreement is in essence the agreement for taking premises on rent, the tax will be deducted under section 194-I from payments thereof. For instance, in a case of composite arrangement for user of premises and provisions of manpower for which consideration is paid as a specified percentage of turnover, section 194-I would be attracted if the agreement is in essence the agreement for taking premises on rent at source—Circular No. 715, dated August 8, 1995.

■ *Storage tanks* - Storage tanks may be regarded as 'plant' but they would not qualify as land or building within meaning of section 194-I and as such no tax is deductible from hire charges paid for hiring storage tanks—*Gulf Oil India Ltd.* v. *ITO* [2000] 75 ITD 172 (Mum.).

■ *Commission for running restaurant* - Where assessee-company, engaged in the business of hoteliering and catering, enters into agreement with two companies, to run and conduct the business in the restaurants/food outlets owned/and set up in the amusement parks set up by them and in consideration thereof the assessee is to pay a commission or royalty of 15 per cent, section 194-I is not applicable—*Kamat Hotels (I) Ltd.* v. *ITO* [2001] 78 ITD 241 (Mum.).

■ *Hoarding site* - Section 194C (and not section 194-I) is applicable when an advertising agent makes payment to owners of hoarding site - ***ITO*** v. ***Roshan Publicity (P.) Ltd.*** [2005] 4 SOT 105 (Mum.).

■ *Land fee/parking fee* - Landing of aircraft or parking aircraft amounts to user of land of airport and, hence, landing fee and parking fee amounts to rent within meaning of to section 194-I—***United Airlines*** v. ***CIT*** [2006] 152 Taxman 516 (Delhi).

418.3 *TDS rates* - Rates for tax deduction at source under section 194-I are given below—

	Rate of tax deduction
Rent of machinery or plant or equipment	10%*
Rent of any land or building or furniture or fitting—	
- Where the recipient is an individual or a Hindu undivided family	15%*
- Where the recipient is any other person	20%*

*Surcharge, education cess and secondary and higher education cess shall be added [*see* para 406, footnote]. These rates are applicable on rent of building, machinery, etc. (excluding service tax thereon). In other words, tax is not deductible on service tax component (if any)—**Circular No. 4/2008**, dated April 28, 2008*.

418.3-1 *PAYMENT TO INDIVIDUAL/HUF* - If the ultimate payee is an individual or HUF, who are co-owners of the property and whose shares are definite and ascertainable, the appropriate rate of deduction of tax at source is 15 per cent and not 20 per cent under section 194-I. This rule is applicable even if property is owned by an AOP and co-owners are members of AOP—***Vijaya Enterprises*** v. ***ITI*** [2006] 7 SOT 886 (Bang.).

418.4 *No tax deduction if payee is Government/local authorities* - There is no requirement to deduct income-tax at source on income by way of 'rent' if the payee is the Government. In the case of the local authorities and the statutory authorities referred to in section 10(*20A*)/10(*20*), there will be no requirement to deduct income-tax at source from income by way of rent if the person responsible for paying it is satisfied about their tax-exempt status under clause (*20*) or (*20A*) of section 10 on the basis of a certificate to this effect given by the said authorities—Circular No. 699, dated January 30, 1995.

418.5 *When tax is not deducted or deducted at lower rate* - *See* para 426.2.

*The benefit of this Circular cannot be extended to section 194J—**Board Letter : F.No. 275/73/2007 - IT(B)**, dated June 30, 2008, addressed to Bombay Chamber of Commerce and Industry.

418.6 ***Tax credit when rent is paid in advance*** - The recipient of rent can claim tax credit in respect of tax deducted at source. *Vide* Circular No. 5/2001, dated March 2, 2001, tax credit in respect of tax deducted on advance rent will be available as under—

Tax deduction under different situations	*Tax credit*
Tax is deducted at source under the provisions of section 194-I on advance rent pertaining to more than one financial year to be adjusted against future rent	Where advance rent is spread over more than one financial year and tax is deducted thereon, credit shall be allowed in the same proportion in which such income is offered for taxation for different assessment year based on the single certificate furnished for tax so deducted on the entire advance rent
Subsequent to the deduction of tax at source on advance rent pertaining to one or more financial year : *i.* rent agreement gets terminated/cancelled resulting into refund of balance amount of advance rent to the tenant, *ii.* rented property is transferred by way of sale, lease, gift, etc., with tenant in occupation or otherwise resulting into refund of balance amount of advance rent to the transferee or the tenant, as the case may be	Credit for the entire balance of tax deducted at source, which has not been given credit so far, shall be allowed in the assessment year relevant to the financial year during which the rent agreement gets terminated/ cancelled or rented property is transferred and balance of advance rent is refunded to the transferee or the tenant, as the case may be

Tax deduction at source on fees for professional or technical services or royalty [Sec. 194J]

419. Section 194J has been inserted with effect from July 1, 1995.

419.1 ***Who is liable to deduct tax at source under section 194J*** - Any person, not being an individual£ or a Hindu undivided family£, who is responsible for paying to a resident any sum by way of fees for professional services, or fees for technical services or royalty** shall deduct tax at source.

419.2 ***Time of tax deduction*** - Tax shall be deducted at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier.

Where any such sum is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such sum, such crediting shall be deemed to be credit of such sum to the account of the payee.

419.3 ***Rate of tax deduction*** - Tax shall be deducted at the rate of 10 per cent (+SC+EC+SHEC)*. The above rate is applicable on total payment (reimbursement cannot be deducted out of bill amount)—Circular No. 715, dated August 8, 1995. This rate is applicable on payment of technical/ professional fees, royalty, etc. (including service tax thereon). In other words, tax is also deducible on service tax component (if any)—**Board Letter: F.No. 275/73/2007-IT(B),** dated June 30, 2008, addressed to Bombay Chamber of Commerce and Industry.

419.4 ***When tax is not deductible*** - Where the amount of such sum or, as the case may be, the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed Rs. 20,000 in case of fees for professional services or Rs. 20,000 in the case of fees for technical service, or Rs. 20,000 in the case of royalty or Rs. 20,000 in the case of any sum referred to in section 28(*va*).

419.5 ***When tax is deductible at lower rate*** - *See* para 426.2.

£ In some cases, tax is deductible even if the payer is an individual/HUF. *See* para 408. However, from June 1, 2003 if the payer is an individual or HUF and payment is made for personal purposes, tax will not be deducted at source.

**"Royalty" is subject to tax deduction with effect from July 13, 2006.

**See* footnote of para 406 for surcharge and education cess.

419.6 ***Meaning of professional/technical services/royalty*** - The expression "professional services" has been defined to mean services rendered by a person in the course of carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising (*i.e.,* models, artists, photographers providing services to an advertising agency) or such other profession as is notified by the Board for the purposes of section 44AA (*i.e.,* authorised representative, film artist or company secretary or information technology) or of this section.† The expressions "fees for technical services" and royalty have been given the same meanings as in section 9.

419.7 ***Fees paid by non-residents*** - Any fees paid through regular banking channels to any chartered accountant, lawyer, advocate or solicitor who is resident in India by the non-residents who do not have any agent or business connection or permanent establishment in India may not be subject to the provisions of tax deduction at source under section 194J.

419.8 ***Payment to a director*** - A director is also a manager under the provisions of the Companies Act, 1956. He is, therefore, a technical personnel. Any payment made to such director (be it a sitting fee or any other sum) shall be required to be taken into consideration for the purposes of deduction of tax at source under section 194J.

419.9 ***Reimbursement of expenses*** - The Delhi Bench of the Income Tax Appellate Tribunal in ***ITO*** v. ***Dr. Willmar Schwabe India (P.) Ltd.*** [2005] 3 SOT 71 examined the scope of Circular No. 715, dated August 8, 1995 on the subject of deduction of tax at source on expenses reimbursement and upon perusal of the same, it held that reimbursement of expenses for which bill is separately raised did not attract the provisions of section 194J.

In their answer to the relevant question No. 30, the Board explained underneath as under :

Q. No. 30. Whether the deduction of tax at source under sections 194C and 194J has to be made out of the gross amount of the bill including reimbursements or excluding reimbursement for actual expenses?

Ans. Sections 194C and 194J refer to any sum paid obviously, reimbursements cannot be deducted out of the bill amount for the purpose for tax deduction at source.

In other words, if a consolidated bill is given by a professional/consultant for his fees as will as out of pocket expenditure, then the entire amount is subject to TDS. If a separate bill is given for reimbursement of out of pocket expenditure, then reimbursement of expenditure is not subject to tax deduction.

419.10 ***Fees for human resources development*** - Where assessee paid certain amount to its holding company for rendering advice or service in respect of human resources development, maintenance of accounts and finance, service rendered would definitely amount to providing service in managerial/technical field as defined in *Explanation (2)* to section 9(1)(*vii*) and, therefore assessee is liable to deduct tax at source under section 194J on payments made to holding company—***Tecumseh Products (I) Ltd.*** v. ***CIT*** [2007] 13 SOT 489 (Hyd.).

419.11 ***Lease rent, roaming charges*** - Assessee-company made payment, *inter alia,* to BSNL on account of lease line rental charges, port charges (inter connectivity charges), and access charges, without deduction of tax at source. Since services provided by BSNL to assessee were based on technology and assessee without technical services by BSNL would not be able to continue its business to transmit call/voice and signal to recipients, payment made by the assessee to BSNL with regard to port charges (Inter connectivity charges) and access charges is in nature of technical services subject to TDS under section 194J. However, payment made to BSNL on account of lease rental charges is neither in nature of work, nor in nature of agreement and, therefore, same could not be considered under section 194J—***Hutchison Telecom East Ltd.*** v. ***CIT*** [2007] 16 SOT 404 (Kol.).

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†For the purpose of section 194J, the Board has notified the following professions - (*a*) sports persons, (*b*) umpires and referees, (*c*) coaches and trainers, (*d*) team physicians and physiotherapists, (*e*) event managers, (*f*) commentators, (*g*) anchors and (*h*) sports columnists.

Providing cellular/fixed telephone service is not a technical service for this purpose—*Skycell Communication Ltd.* v. *CIT* [2001] 119 Taxman 496 (Mad.).

Tax deduction from payment of compensation in certain cases [Sec. 194LA]

420. The provisions of section 194LA are given below—

420.1 ***Who is responsible for tax deduction*** - Any person responsible for paying to a resident any compensation or enhanced compensation or consideration or enhanced consideration on account of compulsory acquisition of any immovable property (but other than agricultural land) is responsible for deduction of tax at source.

420.2 ***Time of tax deduction*** - Tax is deductible at the time of payment of aforesaid sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier.

420.3 ***Rate of tax deduction*** - Tax is deductible at the rate of 10 per cent (+SC+EC+SHEC)*. However, tax is not deductible if the aforesaid sum or the aggregate amount during a financial year does not exceed Rs. 1,00,000.

420.4 ***Is it possible to get payment without tax deduction or with lower tax deduction*** - *See* para 426.2.

Deduction of tax at source from other sums [Sec. 195]

421. A person responsible for making payment to a non-corporate non-resident assessee or to a company other than a domestic company, of any interest or any other sum (not being salary) is required, at the time of payment or at the time of credit to the account of payee, interest payable account, or suspense account, or at the time of payment, whichever is earlier, to deduct income-tax thereon at the rates prescribed by the relevant Finance Act [*see* Annex 1 for rates of tax deduction at source for the financial year 2008-09]. TDS liability under section 195 arises only when income is credited to account of payee or on actual payment of same, whichever is earlier and mere accrual of income in hands of foreign company would not be sufficient proximate reason for tax-deductor's liability under section 195—*C.J. International Hotels Ltd.* v. *ITO* (TDS) [2001] 79 ITD 506 (Delhi). No tax is deductible under section 195 in respect of dividends referred to in section 115-O from June 1, 1997 to March 31, 2002 and from April 1, 2003 onwards.

■ Payment to non-resident/foreign company is covered by section 195, whether payment is made within India or the payment is made outside India. The situs of the payment or the source of the payment is not a relevant consideration while applying the provisions of section 195—***Satellite Television Asian Region Ltd.*** v. ***CIT*** [2006] 99 ITD 91/99 TTJ 1025 (Mum.).

421.1 ***When tax is deducted at lower rate or when no tax is deducted*** - Tax at source should not be deducted or should be deducted at lower rate, as the case may be, where the recipient has made an application [Form Nos. 13, 15C and 15D] to the Assessing Officer and obtained a certificate to that effect. *See* para 426.2.

■ Moreover, tax is not deductible by an Offshore Banking Unit from interest paid on deposits made after March 31, 2005 by a non-resident or interest on borrowing taken from a non-resident on or after March 31, 2005.

421.2 ***Income of recipient taxable in India is subject to tax deduction, not the entire payment*** - Under section 195, income of non-resident which is taxable in India is subject to tax deduction. Where the payer of income (other than salary) considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application under section 195(2) to the Assessing Officer to determine by general or special order the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under section 195 only on that proportion of the sum which is so chargeable.

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*For surcharge, etc., *see* footnote of para 406.

The main consideration would be whether payment of sum to a non-resident is chargeable to tax under the provisions of the Act or not. That sum may be income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum; what would be the income is to be computed on the basis of various provisions of the Act including provisions for computation of the business income if the payment is a trade receipt. However, what is to be deducted is income-tax payable thereon at the rates in force—*Transmission Corpn. of A.P. Ltd.* v. *CIT* [1999] 105 Taxman 742/239 ITR 587 (SC).

In this context held, the following aspects are also to be kept in view:—

- It has been held by the Delhi High Court in the case of *CIT* v. *Jay Engg. Works Ltd.* [1984] 149 ITR 425/19 Taxman 525 that as no form is prescribed for application under section 195(2). It cannot be said that the application must contain in it all the requirements of section 195(2) to enable the Assessing Officer to exercise his jurisdiction. An assessee can approach the Assessing Officer by merely stating that an order under section 195(2) may be made.
- In case no application for obtaining the certificate under section 195(2) is filed before the Assessing Officer, then the payer is duty bound to deduct tax as per the prescribed rates in force at the relevant time—***Van Oord ACZ India (P.) Ltd.*** v. ***CIT*** [2008] 112 ITD 79 (Delhi).
- The orders passed under section 195(2) are not conclusive. They do not pre-empt the department from passing appropriate orders of assessment—*CIT* v. *Tata Engg. & Locomotive Co. Ltd.* [2000] 245 ITR 823 (Bom.). The findings given under section 195(2) will not preclude the department from taking a contrary view in the assessment proceedings—*CIT* v. *Elbee Services (P.) Ltd.* [2001] 115 Taxman 618 (Bom.).
- While acting under section 195(2), the Assessing Officer is duty bound to make requisite enquiries, evaluate facts in the context of provisions of the law and then pass a reasoned order—***Board of Control for Cricket in India*** v. ***Director of Income-tax (Exemption)*** [2005] 96 ITD 263 (Mum.).

421.3 ***Furnishing of information regarding deduction of tax at source under section 195*** - Tax is deductible at source under section 195 in respect of payment/credit of any sum (other than salary) to a person who is a non-resident. The person making the remittance is required to furnish an undertaking (in duplicate) addressed to the Assessing Officer accompanied by a certificate from a chartered accountant in a specified format. This undertaking and certificate is submitted to the Reserve Bank of India or its authorized dealers who, in turn, are required to forward a copy to the Assessing Officer.

The purpose of the undertaking and the certificate is to effectively collect taxes (by way of TDS under section 195) at the stage when the remittance is made, as it may not be possible to recover the tax at a later stage from the non-residents. There has been substantial increase in foreign remittances, making the manual handling and tracking of certificates difficult.

To monitor and track transactions in a timely manner, section 195 has been amended with effect from April 1, 2008. A scheme will be formulated to introduce e-filing of the information in the certificate and undertaking. In other words, the person responsible for deduction of income-tax shall furnish the information relating to payment of any sum to the non-resident or to a foreign company in a form and manner which will be prescribed by the Board. Although the amendment has been made from April 1, 2008, yet it will be effectively implemented only after the notification of the aforesaid scheme by the Central Board of Direct Taxes.

421.4 ***Procedure for refund of tax deducted at source under section 195 to the person deducting tax at source*** - The Board have revised (*vide* Circular No. 7/2007, dated October 23, 2007) the procedure for refund of tax deducted at source under section 195 to the deductor -

- Cases covered - In the following cases tax deducted at source under section 195 can be refunded to the deductor -

1. The contract is cancelled and no remittance is made to the non-resident.

2. The remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount has been returned to the person responsible for deducting tax at source.

3. The contract is cancelled after partial execution and no remittance is made to the non-resident for the non-executed part.

4. The contract is cancelled after partial execution and remittance related to non-executed part is made to the non-resident. In such cases, the remitted amount has been returned to the person responsible for deducting the tax at source or no remittance is made but tax was deducted and deposited when the amount was credited to the account of the non-resident.

5. There occurs exemption of the remitted amount from tax either by amendment in law or by notification under the provisions of Act.

6. An order is passed under section 154 or 248 or 264 reducing the tax deduction liability of a deductor under section 195.

7. There occurs deduction of tax twice from the same income by mistake.

8. There occurs payment of tax on account of grossing up which was not required under the provisions of the Act.

9. There occurs payment of tax at a higher rate under the domestic law while a lower rate is prescribed in the relevant double taxation avoidance treaty entered into by India.

In the cases given above, where no income has accrued to the non-resident due to cancellation of contract or where income has accrued but no tax is due on that income or tax is due at a lesser rate, the amount deposited to the credit of Government to that extent under section 195, can be refunded, with prior approval of the Chief Commissioner or the Director General concerned, to the person who deducted it from the payment to the non-resident.

■ The following should also be noted -

No interest under section 244A is admissible on refunds to be granted in accordance with this circular or on the refunds already granted in accordance with Circular No. 769 or Circular No. 790.

In case of refund being made to the person who made the payment under section 195, the Assessing Officer may, after giving intimation to the deductor, adjust it against any existing tax liability of the deductor under the Income-tax Act, Wealth-tax Act, or any other direct tax law. The balance amount, if any, should be refunded to the person who made such payment under section 195.

A refund should be granted only after obtaining an undertaking that no certificate under section 203 has been issued to the non-resident. In cases where such a certificate has been issued, the person making the claim of refund either obtain it or should indemnify the Income-tax Department from any possible loss on account of any separate claim of refund for the same amount by the non-resident.

A refund should be granted only if the deductee has not filed return of income and the time for filing of return of income has expired.

The limitation for making a claim of refund under this circular shall be two years from the end of the financial year in which tax is deducted at source (*supra*).

421.5 *Other points* - The following points should be noted—

421.5-1 *PAYMENT TO NON-RESIDENT SHIPPING COMPANIES AND/OR THEIR INDIAN AGENTS* - In the case of non-resident engaged in shipping, section 172 is applicable. It is a self-contained code for the levy and recovery of the tax, ship-wise, and journey-wise, and requires the filing of the return within a maximum time of thirty days from the date of departure of the ship.

The provisions of section 172 are to apply, notwithstanding anything contained in other provisions of the Act. Therefore, in such cases, the provisions of sections 194C and 195 relating to tax deduction at source are not applicable. The recovery of tax is to be regulated, for a voyage undertaken from any port in India by a ship under the provisions of section 172—Circular No. 723, dated September 19, 1995. Consequently tax is not required to be deducted at source.

■ *Payment to Indian agents of non-resident shipping companies* - There would be cases where payments are made to shipping agents of non-resident ship-owners or charterers for carriage of

passengers, etc., shipped at a port in India. Since, the agent acts on behalf of the non-resident ship-owner or charterer, he steps into the shoes of the principal. Accordingly, provisions of section 172 shall apply and those of sections 194C and 195 will not apply— Circular No. 723, dated September 19, 1995.

To put it differently, even if an agent is to be treated as a resident, by virtue of his acting on behalf of non-resident shippers or charters, he receives payments primarily on behalf of his principals, *i.e.*, non-resident ship owners or ship charters shipped at a port in India. Section 172 is applicable and tax is not deductible under section 194C or 195. Moreover, even if payment to an agent is of small element of the amount that ultimately may be going into the pocket of resident agent or any other resident on account of demurrage or handling charge or any amount of similar nature, it would be covered by section 172(8) inasmuch as Circular No. 723 (*supra*) does not draw any distinction between a dry port and a sea port. Thus, the inland haulage charges are also covered under this provision of law and, hence, no deduction of tax is required under section 194C—***ITO*** v. ***Freight Systems (India) (P.) Ltd.*** [2006] 6 SOT 474 (Delhi), ***CIT*** v. ***Continental Carriers (P.) Ltd.*** [2007] 163 Taxman 479 (Delhi).

421.5-2 *AGENTS OPERATING OUTSIDE INDIA* - Where the non-resident agent operates outside the country, no part of his income arises in India. Since the payment is usually remitted directly abroad it cannot be held to have been received by or on behalf of the agent in India. Such payments are, therefore, not taxable in India. No tax is, therefore, deductible under section 195 and, consequently, the expenditure on export commission and other related charges payable to a non-resident for services rendered outside India becomes allowable expenditure—Circular No. 786, dated February 7, 2000.

421.5-3 *TELECOM FACILITY* - In the case of ***Wipro Ltd.*** v. ***ITO*** [2003] 133 Taxman 149 (Bang.) (Mag.), the assessee running software development centre utilized telecom services provided by a British Company for transmitting the data to the overseas customers. The Bangalore Bench of ITAT held that the amounts paid to non-residents were not their income accruing in India under section 9(1)(*vii*) or 9(1)(*vi*) or DTAA. As the assessee had paid the amounts to non-residents outside India for services rendered outside India, the liability for TDS under section 195 did not arise in the hands of the payer. Similar views are taken by the Bangalore Tribunal in ***Software Technology Parks of India*** v. ***ITO*** [2005] 3 SOT 529.

421.5-4 *SALARY TO TECHNICIANS* - Where assessee reimburses actual amount of salaries incurred by its foreign collaborator in deputing foreign technicians to India with the assessee, tax is deductible at source under section 192 and not section 195—*HCL Infosystems Ltd.* v. *CIT* [2002] 76 TTJ (Delhi) 505.

421.5-5 *INCOME EXEMPT UNDER DTAA* - When an income is not exigible to tax in India, by virtue of the provisions of the applicable DTAA, the deduction of tax under section 195 does not come into play at all. It leads to the conclusion that the expression 'chargeable under the provisions of this Act' cannot include an income, which in terms of the specific provisions of the applicable DTAA, is not exigible to tax in India—***Maharashtra State Electricity Board*** v. ***CIT*** [2004] 90 ITD 793 (Mum.).

421.5-6 *LEAD MANAGER OF GDR* - Services rendered by the lead managers in connection with GDR issue fall within the definition of 'technical services' under section 9(1)(*vii*), read with *Explanation 2* and, therefore, management commission and selling commission are income of the lead managers, deemed to accrue or arise in India and as such, the liable to deduct tax under section 195(1). However, underwriting commission would not fall under section 9(1)(*vii*) and, therefore, no tax is deductible therefrom under section 195—***Gujarat Ambuja Cements Ltd.*** v. ***CIT*** [2005] 2 SOT 784 (Mum.).

421.5-7 *DATABASE* - Payment made by an Indian company to a U.S. company for providing access to information available in the database maintained by it is not subject deduction of tax at source under section 195 —***Wipro Ltd.*** v. ***ITO*** [2005] 94 ITD 9 (Bang.).

421.5-8 *USE OF TRANSPONDER AND UPLINKING FACILITY* - Payment of service fee to a non-resident for use of transponder and uplinking facility in the satellite is royalty within the provisions of section 9(1)(*vi*) and subject to TDS under section 195—***CIT*** v. ***Sanskar Info. T.V.P. Ltd.*** [2008] 24 SOT 97 (Mum.).

Tax deduction from any income payable to non-resident unit-holders of Mutual Fund [Sec. 196A]

422. Tax is not deductible under section 196A from April 1, 2003.

Deduction of tax at source in respect of units referred to in section 115AB [Sec. 196B]

423. Where any income in respect of units referred to in section 115AB or by way of long-term capital gain arising from the transfer of such units, is payable to an Offshore Fund, the person responsible for making the payment shall deduct tax at the rate of 10 per cent (+SC+EC+SHEC)*.

423.1 ***Time of tax deduction*** - Tax is deductible 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. *See* also para 406.1.

Deduction of tax from income or long-term capital gain from foreign currency bonds/Global Depository Receipts [Sec. 196C]

424. Any person responsible for paying any income in respect of bonds or Global Depository Receipts* referred to in section 115AC to a non-resident or by way of long-term capital gain arising from the transfer of such bonds/Global Depository Receipts* shall deduct tax at the rate of 10 per cent of such income (+SC+EC+SHEC)*.

424.1 ***Time of tax deduction*** - Tax is deductible at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or at the time of issue of a cheque or draft or by any other mode, whichever is earlier. However, no tax is deductible from dividends referred to in section 115-O with effect from April 1, 2003. *See* also para 406.1.

Deduction of tax at source from income of Foreign Institutional Investors from securities [Sec. 196D]

425. Any person responsible for paying any income in respect of securities referred to in section 115AD(1)(*a*) to a Foreign Institutional Investor shall deduct tax thereon at the rate of 20 per cent (+SC+EC+SHEC)*. With effect from April 1, 2003, no tax is deductible from dividend referred to in section 115-O.

425.1 ***Time of tax deduction*** - Tax is deductible at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or at the time of issue of a cheque or draft or by any other mode, whichever is earlier. *See* also para 406.1.

425.2 ***When tax is not deductible*** - No deduction of tax is to be made from any income by way of capital gains arising from the transfer of such securities.

Payment without tax deduction or with deduction at lower rate

426. The provisions of sections 197A and 197 are given below—

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*For the rate of surcharge education cess, etc., *see* footnote of para 406.

426.1 ***Provisions of section 197A*** - If a declaration is submitted under section 197A by the recipient to the payer, then no tax is deductible in a few cases. The provisions of section 197A as amended by the Finance Act, 2002 and the Finance Act, 2003 and impact of Circular No. 4/2002, dated July 16, 2002 are given in the table (*infra*)—

	Interest on securities [Sec. 193]	*Dividend [Sec. 194]*	*Interest other than interest on securities [Sec. 194A]*	*National Saving Scheme [Sec. 194EE]*
Condition 1 - Who is recipient	Other than a company or firm	Resident individual	Other than a company or firm	Resident individual
Condition 2 - What is tax on total income of the previous year	*Nil*	*Nil*	*Nil*	*Nil*
Condition 3 - How much is total of income covered by sections 193, 194, 194A and 194EE	Not to exceed the amount of exemption limit‡			

Notes—

1. If the aforesaid conditions are satisfied no tax is deductible if the recipient submits a declaration in duplicate in the prescribed form (Form No. 15H for a senior citizen and Form No. 15G for any other person).

2. Condition 3 is not applicable up to May 31, 2002.

3. Condition 3 is not applicable from June 1, 2002 if the income of recipient is exempt under section 10(*20*), (*23AA*), (*23AAB*), (*23BB*), (*23BBA*) (*23BBC*), (*23BBD*), (*23BBE*), (*23C*), (*23EB*), (*25*), (*25A*), (*26BB*) and (*29A*)—Circular No. 4/2002, dated July 16, 2002.

4. Condition 3 is not applicable from June 1, 2003 if the recipient is a resident individual who is 65 years or more at any time during the financial year.

5. From April 1, 2003, no tax is deductible under section 194 in respect of dividend referred to in section 115-O.

6. The payer of the income is required to deliver to the Commissioner of Income-tax (to whom the Assessing Officer having jurisdiction to assess the payer is subordinate) one copy of the aforesaid declaration on or before seventh day of the month, next following the month in which the declaration is furnished to him [sec. 197A and rule 29C]. Where payments are to be made to the same person more than once in a year, the declaration in the relevant form may be furnished before the first payment in a year becomes due. It may also be noted that in the declaration in Form No. 15G or 15H particulars of only such securities are to be furnished the income from which is payable by a person to whom declaration is furnished—Circular No. 351, dated November 26, 1982.

7. It is the duty of the Assessing Officer to give an opportunity to rectify the defects in the declarations in Form No. 15G or 15H and imposition of tax liability without given an opportunity to the petitioner to rectify the defects in the declarations, in spite of the petitioner asking for an opportunity to rectify the defects, is not justified in the eyes of law—*Vijay Hemant Finance & Estates Ltd.* v. *ITO* [1999] 105 Taxman 519/238 ITR 282 (Mad.).

426.2 ***Obtaining a certificate of lower rate from the Assessing Officer [Sec. 197]*** - The provisions of section 197 are given below—

1. Tax is deductible under section 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194-I, 194J, 194K, 194LA or 195.

2. The recipient can apply in Form No. 13 to the Assessing Officer to get a certificate authorizing the payer to deduct tax at lower or deduct no tax as may be appropriate.

3. The certificate of lower rate shall be issued on plain paper directly to the person responsible for paying income, under an advice to the applicant.

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‡Exemption limit for the assessment year 2009-10 is as follows : Rs. 1,80,000 in the case of resident woman (below 65 years), Rs. 2,25,000 in the case of resident senior citizen (65 years or more), Rs. 1,50,000 in the case of any other individual or every HUF.