Exegesis and Parsing of draconian penalty provision of Section 271AAD

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1. Prelude

   If chapter XXI of penalties imposable in Income Tax Act,1961 (Act) is analysed then it would be clear that in last few finance acts scope of penalties has been enlarged and widened to embrace penalties like section 269ST (penalty for Rs 2lac or more specified transaction done in cash mode ; penalty levied in section 271DA Subject to exception of "good and sufficient reasons for contravention of section 269ST"); 271J (penalty of Rs 10K for each certificate/report of accountant (CA) etc as found to be incorrect subject to section 273B : reasonable cause); penalty u/s 269SU (for non providing of facility of payment in prescribed mode by person engaged in specified business : penalty levied in section 271DB subject to exception of "good and sufficient reasons for contravention of section 269SU") and penalty in section 269SS/271D for acceptance of specified sum in cash etc (like advance for sale of immovable property: subject to reasonable cause in section 273B). Further on careful look to section 270A where concept of under reporting and mis reporting is introduced ,in provision of section 270A(9) where items of misreporting are spelt (penalty @ 200% of underlying tax) in said provision , one may find that false entry and omitted entry cases are directly covered which are now also penalised in new section 271AAD.

Further if one looks to prosecution provisions which is very old in income tax act that is section 276C dealing with tax evasion prosecution, in explanation of section 276C on items which are tagged under tax evasion , false entry and omitted entry can be very well located there also. When penalty and prosecution was already there in income tax act for stated offense and default of false and omitted entry which could also covers fake invoice cases , the reason to bring this section 271AAD in addition to section 270A(9) and section 276C already covering stated cases is unfathomable and is subject matter of guess. This arguments gets support from para 6.8 of Hon'ble FM budget speech for 2020 and clause 98 of Finance Bill 2020 where nothing is discernible on overlapping and existing provision for default of false and omitted entry. So when somebody would contest in constitutional courts the vires/validity of new section 271AAD there we may have more on it as in humble opinion of author constitutional validity of section 271AAD remains in zone of legal quandary as dealt in succeeding para in this paper. Nature of this provision remains penalty provision *(which penalty cant be treated at par with tax and interest as per settled law)* so sagacious words of Hon'ble Apex court constitution bench are apposite before diving deep into the horizon of section 271AAD which in authors humble opinion must goad and prick revenue authorities on invocation of section 271AAD:

The following observations by the Constitution Bench of this Court in Pannalal Binjraj v. Union of India [(1957) 31 ITR 565 : AIR 1957 SC 397] are apt:

'A humane and considerate administration of the relevant provisions of the Income Tax Act would go a long way in allaying the apprehensions of the assessees and if that is done in the true spirit, no assessee will be in a position to charge the Revenue with administering the provisions of the Act

with 'an evil eye and unequal hand'." ***(relied by Apex court in case of Commissioner of Income Tax, Bhopal v. Hindustan Electro Graphites, Indore, (2000) 3 SCC 595. & Commnr. Of Income Tax, Gauhati & ... vs M/S. Sati Oil Udyog Ltd. & Anr on 24 March, 2015),***

Further reference may be made to constitution bench verdict in case of Dilip Kumar case 9 SCC 1 (2018) where it is observed that: **"**.In construing penal statutes ***and taxation statutes, the court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. Insofar as taxation statutes are concerned, Article 265 of the Constitution rohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature…."***

Also reference may be made to guiding words of Apex court in case of Kum A.B.Shanti reported at 255 ITR 258 where constitutional validity of section 269SS was in issue before Apex court and same was upheld inter-alia with following observations :

"The next contention urged by the counsel for the appellant is that original Section 276DD is draconian in nature as penalty imposed for violation of Section 269SS is imprisonment which may extend to two years and shall also be liable to fine equal to the amount of loan or deposit. This Section was subsequently omitted and a new Section 271D was enacted. The penalty of imprisonment was deleted in the new Section. The new Section 271D provides only for fine equal to the amount of loan or deposit taken or accepted.

It is important to note that another provision, namely Section 273B was also incorporated which provides that notwithstanding anything contained in the provisions of Section 271D, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provision if he proves that there was reasonable cause for such failure and if the assesee proves that there was reasonable cause for failure to take a loan otherwise than by account-payee cheque or account-payee demand draft, then the penalty may not be levied. Therefore, undue hardship is very much mitigated by the inclusion of Section 273B in the Act. If there was a genuine and bona fide transaction and if for any reason the tax payer could not get a loan or deposit by account- payee cheque or demand draft for some bona fide reasons, the authority vested with the power to impose penalty has got discretionary power. In that view of the matter, we do not think that Section 269SS or 271D or the earlier Section 276DD is unconstitutional on the ground that it was draconian or exproprietory in nature."

In present case penalty u/s 271AAD is more expropriatory/draconian in nature as here penalty is equivalent to "aggregate of false and omitted entry" amount and here section 273B does not include section 271aad; so

section 271AAD needs more conservative and responsible and cautioned approach. 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 the prosecution. [See P.N. Krishna Lal and Others v. Govt. of Kerala and Another, 1995 Supp (2) SCC 187]

Also Delhi high court decision in New Holland Tractors vs CIT has observed on levy of penalty u/s 271(1)(c) that *"In assessment proceedings, we are primarily concerned with the assessment of income i.e. quantification and computation of total income as per the provisions of the Act, whereas in penalty proceedings we are primarily concerned with the conduct of the assessee.. referring to old Apex court verdict in case of Commissioner of Income Tax, West Bengal I, and Anr. Vs. Anwar Ali [1970] 76 ITR 696 (SC"). (Also refer Delhi high court in 393 ITR Page 1 on conscious default)*

Also old dictum of Apex court in Vegetable products case reported at 88 ITR 192 has observed that "…If we find that language to be ambiguous or capable of more meanings than one, then we have to adopt that interpretation which favours the assessee, more particularly so because the provision relates to imposition of penalty."

Observations of Apex court in case of Sree Krishna Electricals v. State of Tamil Nadu & Anr. [(2009) 23VST 249 (SC)] as regards the penalty are apposite. In the aforementioned decision which pertained to the penalty proceedings in Tamil Nadu General Sales Tax Act, the Court had found that the authorities below had found that there were some incorrect statements made in the Return. However, the said transactions were reflected in the accounts of the assessee .Apex Court, therefore, observed:

"So far as the question of penalty is concerned the items which were not included in the turnover were found incorporated in the appellant's account books. Where certain items which are not included in the turnover are disclosed in the dealer's own account books and the assessing authorities include these items in the dealer's turnover disallowing the exemption, penalty cannot be imposed. The penalty levied stands set aside."

So here was the case where penalty was deleted by Apex court because account books of assessee/dealer contained those items which here in section 271AAD may be branded as false entry liable to penalty therein. (relied in 322 ITR 158 Reliance Petro case)

With above introduction and rules for interpreting penalty provision being discussed , next aspect which is taken up the mischief behind section 271AAD and applicability of contemporaneia expositio (framer know better).

2. Legislative object to introduce section 271AAD as mentioned in budget speech of Hon'ble FM and explanatory memorandum are mentioned first before proceeding to corelate the same with present text of section 271AAD as passed in Finance Act 2020.

<u>Relevant extract of explanatory memorandum of Finance Bill 2020</u>

Penalty for fake invoice. In the recent past after the launch of Goods & Services Tax (GST), several cases of fraudulent input tax credit (ITC) claim have been caught by the GST authorities. In these cases, fake

invoices are obtained by suppliers registered under GST to fraudulently claim ITC and reduce their GST liability. These invoices are found to be issued by racketeers who do not actually carry on any business or profession. They only issue invoices without actually supplying any goods or services. The GST shown to have been charged on such invoices is neither paid nor is intended to be paid. Such fraudulent arrangements deserve to be dealt with harsher provisions under the Act. Therefore, it is proposed to introduce a new provision in the Act to provide for a levy of penalty on a person, if it is found during any proceeding under the Act that in the books of accounts maintained by him there is a (i) false entry or (ii) any entry relevant for computation of total income of such person has been omitted to evade tax liability. The penalty payable by such person shall be equal to the aggregate amount of false entries or omitted entry. It is also propose to provide that any other person, who causes in any manner a person to make or cause to make a false entry or omits or causes to omit any entry, shall also pay by way of penalty a sum which is equal to the aggregate amounts of such false entries or omitted entry. The false entries is proposed to include use or intention to use – (a) forged or falsified documents such as a false invoice or, in general, a false piece of documentary evidence; or (b) invoice in respect of supply or receipt of goods or services or both issued by the person or any other person without actual supply or receipt of such goods or services or both; or (c) invoice in respect of supply or receipt of goods or services or both to or from a person who do not exist. This amendment will take effect from 1st April, 2020. [Clause 98]

<u>Relevant extract of Hon'ble FM Budget speech of 2020</u>

6.8 To discourage taxpayers to manipulate their books of accounts by recording false entries including fake invoices to claim wrong input credit in GST, it is proposed to provide for penalty for these malpractices.

Hon'ble Apex Court in the case of K. P. Varghese v. Income Tax Officer, Ernakulam reported in131 ITR 597/ (1981) 4 SCC 173, while considering the binding nature on the circulars issued by the Central Board of Direct Taxes on the department, has also observed that the Rule of construction by reference to contemporanea expositio is a well established rule for interpreting a statute by reference to exposition it has received from contemporary authorities, though it must give way where a language of the statute is plain and unambiguous. It is useful to refer to the observation made by the Court, which reads as under:

> *"These two circulars of the Central Board of Direct Taxes are, as we shall presently point out, binding on the Tax Department in administering or executing the provision enacted in sub-section (2), but quite apart from their binding character, they are clearly in the nature of contemporanea expositio furnishing legitimate aid in the construction of sub-section (2). The rule of construction by reference to contemporanea expositio is a well established rule for interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous. This rule has been succinctly and felicitously expressed in Crawford on Statutory Construction (1940 Edn.) where it is stated in paragraph 219 that "administrative construction (i.e. contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is*

overturned; such a construction, commonly referred to as practical construction, although non- controlling, is nevertheless entitled to considerable weight; it is highly persuasive."

More decisions where K.P.Vargehse decision (supra) is recently followed and relied in various subsequent cases are enlisted here:

i) ***Apex court decision in case of Sati Oil Udyog Held*** **, (2015) 7 SCC 304**, That where it had occasion to consider elaborately the provisions of Section 143(1-A), its object and validity. There was a challenge to the retrospectivity of the provisions of Section 143(1-A) as introduced by Finance Act, 1993. The Gauhati High Court had held that retrospective effect given to the amendment would be arbitrary and unreasonable. The appeal was filed by the Revenue in this Court in which appeal, this Court had occasion to examine the constitutional validity of the provisions. This Court in the above judgment held that object of Section 143(1-A) was the prevention of evasion of tax. In paragraph 9 of the judgment following has been laid down:

"9. On a cursory reading of the provision, it is clear that the object of Section 143(1- A) is the prevention of evasion of tax. By the introduction of this provision, persons who have filed returns in which they have sought to evade the tax properly payable by them is meant to have a deterrent effect and a hefty amount of 20% as additional income tax is payable on the difference between what is declared in the return and what is assessed to tax."

*Notably r*elying on earlier judgment of Apex Court in K.P. Varghese v. ITO, (1981) 4 SCC 173, apex Court in the above case held that

provisions of Section 143(1-A) should be made to apply only to tax evaders

ii) *Apex court decision in case of Rajasthan State electricity board decision of 19/03/2020 in CIVIL APPEAL NO.8590 of 2010 followed Sati oil Udyog at length*

iii) *Apex court decision in case of Southern Motors case of 18/01/2017 in* CIVIL APPEAL NOS.10955-10971 OF 2016

Held after reviewing entire law on interpretation that in Para 35 That "35. In Seaford Court Estates Ltd. vs. Asker [1949] 2 All ER 155 hallowed by time, outlining the duty of the Court to iron out the creases, it was enunciated, that whenever a statute comes up for consideration, it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise and even if it were, it is not possible to provide for them in terms free from all ambiguity, the caveat being that the English language is not an instrument of mathematical precision. It was held that in an eventuality where a Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that or have been guilty of some or other ambiguity, he ought to set to work on the constructive task of finding the intention of the Parliament and that he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy and then he must supplement the written word so as to give "force and life" to the intention of the legislature."

iv) Further one may refer to illuminating discussion on heydon rule in Apex court decision in case of Ms Era vsGovt of NCT of delhi wherein it is held that:

"24. It is thus clear on a reading of English, U.S., Australian and our own Supreme Court judgments that the 'Lakshman Rekha' has in fact been extended to move away from the strictly literal rule of interpretation back to the rule of the old English case of Heydon, where the Court must have recourse to the purpose, object, text, and context of a particular provision before arriving at a judicial result. In fact, the wheel has turned full circle. It started out by the rule as stated in 1584 in Heydon's case, which was then waylaid by the literal interpretation rule laid down by the Privy Council and the House of Lords in the mid 1800s, and has come back to restate the rule somewhat in terms of what was most felicitously put over 400 years ago in Heydon's case."

While so holding the Hon'ble Supreme Court has emphasised that "Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That

interpretation is best which makes the textual interpretation match the contextual". .

On Income Tax Act , in above apex court decision of Ms Era (supra) , one criticism which was made by the court is worth noting here:

"13. The Indian Income Tax Act, 1960 has also been the subject matter of judicial criticism. Often, amendment follows upon amendment making the numbering and the meaning of its sections and sub-

sections both bizarre and unintelligible. One such criticism by Hegde, J. in Commissioner of Income Tax v. Distributor (Baroda) (P) Ltd., (1972) 4 SCC 353, reads as follows:

"We have now to see what exactly in the meaning of the expression "in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments" in the main Section 23-A and the expression "in the case of a company whose business consist wholly or mainly in the dealing in or holding of investments" in clause (i) of Explanation 2 to Section 23-A. The Act contains many mind-twisting formulas but Section 23-A along with some other sections takes the place of pride amongst them. Section 109 of the 1961 Income Tax Act which has taken the place of old Section 23-A of the Act is more understandable and less abstruse. But in these appeals we are left with Section 23-A of the Act." (Para 15)

14. All this reminds one of the old British ditty:

"I'm the Parliament's draftsman, I compose the country's laws, And of half the litigation I'm undoubtedly the cause!".."

v) Then on above rule was also recognized in Baleshwar Bagarti v. Bhagirathi Dass ILR 35 Cal. 701 where Mookerjee, J. stated the rule in these terms: It is a well-settled principle of interpretation that courts in construing a statute will give much weight to the

interpretation put upon it, at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. and this statement of the rule was quoted with approval by this Court in Deshbandhu Guptu & Co. v. Delhi Stock Exchange Association Ltd. [(1979) 4 SCC 565]. It is clear from these two circulars that the Central Board of Direct Taxes, which is the highest authority entrusted with the execution of the provisions of the Act, understood sub-section (2) as limited to cases where the consideration for the transfer has been understated by the assessee and this must be regarded as a strong circumstance supporting the construction which we are placing on that sub-section."

vi) Further one may refer to decision in the case of R & B Falcon (A) Pty Ltd. v. Commissioner of Income Tax1 wherein interpretation given by the Central Board of Direct Taxes (CBDT) to a particular provision was held binding on the tax authorities. The Apex Court in R&B Falcon has explained this principle in the following manner: *"33. CBDT has the requisite jurisdiction to interpret the provisions of the Income Tax Act. The interpretation of the CBDT being in the realm of executive construction, should ordinarily be held to be binding, save and except where it violates any provisions of law or is contrary to any judgment rendered by the courts. The reason for giving effect to such executive construction is not only same as contemporaneous which would come within the purview of the maxim* ***contemporanea expositio****, even in certain situation a representation made by an authority like Minister presenting the Bill before Parliament may also be found bound thereby. 34. Rules of executive construction in a situation of this nature may also be applied. Where a representation is made by the maker of*

legislation at the time of introduction of the Bill or construction thereupon is put by the executive upon its coming into force, the same carries a great weight. 35. In this regard, we may refer to the decision of the House of Lords in R. (Westminster City Council) v. National Asylum Support Service (2002) 1 WLR 2956 : (2002) 4 All ER 654 (HL) and its interpretation of the decision in Pepper v. Hart 1993 AC 593 : (1992) 3 WLR 1032 : (1993) 1 All ER 42 (HL) on the question of "executive estoppel". In the former decision, Lord Steyn stated: (WLR p. 2959, para 6) "6. If exceptionally there is found in the Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court." 36. A similar interpretation was rendered by Lord Hope of Craighead in Wilson v. First County Trust Ltd. (No. 2) (2004) 1 AC 816 : (2003) 3 WLR 568 : (2003) 4 All ER 97 (HL), wherein it was stated: (WLR p. 600, para 113) "113. ...As I understand it [Pepper v. Hart 1993 AC 593 : (1992) 3 WLR 1032 : (1993) 1 All ER 42 (HL), it recognised a limited exception to the general rule that resort to Hansard was inadmissible. Its purpose is to prevent the executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to those words when promoting the legislation in Parliament." 37. For a detailed analysis of the rule of executive estoppel useful reference may be to the article authored by Francis Bennion entitled "Executive Estoppel: Pepper v. Hart Revisited", published in Public Law, Spring 2007, p. 1 which throws a new light on the subject-matter."

From this it is clear that doctrine of contemporenea expositio (framer know better) and mischief based interpretation based on Heydon rule , is fairly well settled where further due consideration needs to be given to legislative intent targeted on tax evasion . **So applying these *three* interpretation rules to section 271AAD where legislative intent primarily targeted on <u>mischief</u> of fraudulent and manipulative practices in issuing fake invoice etc , in authors humble opinion said mischief and legislative intent must be appropriately fulfilled and coalesced while deciding <u>providence and horizon</u> of section 271AAD.**

3. Now it may be appropriate to peek into text of section 271AAD once we have undertaken exercise on applicable interpretation principles and relevance of legislative intent behind section 271AAD.

'271AAD. (1) Without prejudice to any other provisions of this Act, if during any proceeding under this Act, it is found that in the books of account maintained by any person there is— (i) a false entry; or (ii) an omission of any entry which is relevant for computation of total income of such person, to evade tax liability, the Assessing Officer may direct that such person shall pay by way of penalty a sum equal to the aggregate amount of such false or omitted entry.

(2) Without prejudice to the provisions of sub-section (1), the Assessing Officer may direct that any other person, who causes the person referred to in sub-section (1) in any manner to make a false entry or omits or causes to omit any entry referred to in that sub-section, shall pay by way of penalty a sum equal to the aggregate amount of such false or omitted entry.

Explanation.—For the purposes of this section, "false entry" includes use or intention to use— 50 (a) forged or falsified documents such as a

false invoice or, in general, a false piece of documentary evidence; or 55 (b) invoice in respect of supply or receipt of goods or services or both issued by the person or any other person without actual supply or receipt of such goods or services or both; or 55 (c) invoice in respect of supply or receipt of goods or services or both to or from a person who does not exist.'.

4. Now it may be apposite to refer to jurisdictional fact present in section 271AAD which must be first established by revenue to be existing in given case as sine qua non to invoke said provision with authority of law (apart from legislative intent/mischief ingredients) . For relevance and importance of jurisdictional fact one may allude to Apex court verdict in case of Raza Textile 87 ITR 539 wherein it is observed that "No authority, much less a quasi-judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income-tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assesses was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income-tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen. In our opinion the Appellate Bench is wholly wrong in opining that the Income-tax Officer can "decide either way"" (Same are observations of Madras high court decision in Karti Chidambram order dated 2/11/2018 held that "169. If the jurisdictional fact exists, the authority can proceed further and exercise his power and take a decision in accordance with law. No Court or tribunal, statutory

authority can assume jurisdiction, in respect of a matter which the statute does not confer on it. Error on jurisdictional fact, renders the order, ultra vires and bad.")

So on careful glance to section 271AAD following striking jurisdictional facts may emerge therefrom:

i) Firstly said provision requires ***valid and existing proceedings*** to be there wherefrom specified default in sec. 271AAD of false or omitted entry can be traced out;

ii) Secondly it requires person to be there (refer section 2(31) in Act for definition of person)

iii) Thirdly it requires finding in the proceedings by *Assessing Officer (refer section 2(7A) for definition of assessing officer)*

iv) Fourthly it requires books of account maintained wherein default of false or omitted entry can be found; (refer section 2(12A) for definition of books of account)

v) Fifthly it requires presence and existence of false and/or omitted entry as respectively defined and explained in section 271AAD dealt later in this paper;

Since discretion is given in section 271AAD to levy penalty as evident from phrase "may direct" which phrase on studied scrutiny of income tax act provisions would divulge that section 158BFA(2) dealing with penalty in block assessment search cases where also same phrase was used , on implication of same, various high courts (refer 323 ITR 626, 315 ITR 172, 336 ITR 8 etc) has held penalty to be directory and imposed only in deserving cases. Likewise section 271AAA/271AAB and section 271AAC also uses same phrase (may direct) on which various benches of ITAT in country has unanimously held penalty to be discretionary in nature and levied only in deserving cases (refer Vizag bench ITAT in

Marvel case 170 ITD 353) and its prodigee). So once it is abundantly clear that penalty in section 271AAD is discretionary and directory in nature, then what kind of show cause notice is is to be issued in section 271AAD is cogitated next.

If in show cause notice to be issued u/s 274 of the Act before levy of penalty in section 271AAD by competent authority (AO) any of above ingredient is missing that is any jurisdictional fact is lacking , same may be retorted as without authority of law (refer article 265 of Indian constitution) and further it may be appropriately challenged in appeal proceedings us 246A or in writ proceedings under article 226 of Indian constitution depending upon the facts of the case. Requirement of valid show cause notice in context of section 271AAD is very important and reference may be drawn to Apex court decision in case of Oryx Fisheries vs UOI (29.10.2010) Held that "…*31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi- judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence. 32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the*

guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice. 33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it." Even precise charge of penalty in section 271AAD whether for false entry or omitted entry must be clearly spelt item wise in show cause notice to be issued in authors humble opinion and for this reference may be made to decisions of ITAT benches in section 271AAB penalty wherealso requirement of specific show cause notice is insisted in various orders and vague and mechanical notice in section 271AAD might not be good enough . **For this reference may be made to Apex court decision in amrit food case 13 SCC 419 (2005) where in last paragraph it is held by apex court that where a penalty provision contain multiple clauses , it is must that authority issuing show cause notice must specify clearly exact charge and limb in which penalty is proposed (false and/or omitted entry :item wise) to be levied sans which said notice shall be invalid.**

5. Since this penalty in section 271AAD starts with phrase "without prejudice to any other provisions of this Act" as held by Apex court in cases of Ajay canu vs UOI (AIR 1988 SC 2027) ; Shiv Kripal Singh vs V.V.Giri (1970 2 SCC 567) ; Eli Lily company (312 ITR 225) it is stated that implication of said phrase means that given provision would apply in addition to other general provisions (here possible penalty of section 270A etc). Leading decision in this regard is of Privy council referred as King emperor vs Sibnath Banerjee AIR 1945 PC 156 to understand scope of phrase "without prejudice to….".

6. Now in this portion attempt is made to discuss implication of word proceedings in section 271AAD for which reference may be made to Bombay high court decision in case f D.B.S Financial Services Pvt Ltd reported as 207 ITR 1077 wherein it is held that reference to word proceeding in section 133 of the Act means some existing proceedings and which can be further understood in light of **Apex court decision in case of Jai Laksmi Rice Mills 379 ITR 521** wherein context of section 269SS (loan/deposit etc) penalty it is laid down that same can emanate from valid satisfaction being made in assessment order only so applying same analogy here one may confidently submit that section 271AAD penalty can be initiated validly only through proper satisfaction/direction in assessment order only as authority competent to levy penalty is Assessing officer here also.

7. Now we may examine requirement of books of account having been maintained which is a positive fact and cant be assumed by AO to levy penalty in section 271AAD like if in a given case there are no books of account and penalty in other applicable section 271A for non maintenance of books is levied then extant penalty of section 271AAD might not survive or exist on account of non existence of books of account which is important jurisdictional fact in section 271AAD. Even books of account in section 271AAD those books of account which are available at stage of examination in assessment proceedings should be subject matter of consideration to decide default of false or omitted entry and not books available at stage of search/survey proceedings in authors humble opinion as search and survey in section 132 and section 133A cant be called as qualifying proceedings for section 271AAD in authors

humble opinion. It is an issue which is not free from doubt. Now in cases of assessees where there is no requirement in section 44AA rule 6F to maintain books of account and also there is no books maintained for income tax purposes, only on basis of books mainained for other legislation, in author humble opinion, penalty of section 271AAD might not be leviable. Word **maintained** after books of account is of crucial importance . On judicial interpretation of books of account one may allude to detailed observation of Bombay high court in Sheraton Apparels case and Madras high court in Taj Browllers cases from which relevant portion is reproduced next.

From Bombay high court in Sheraton Apparel case reported in 256 ITR 20:

"29. In different legislations the concept of books of account has been employed. One of such oldest legislation is the law of evidence. Section 34 refers to the words "entries in books of account". Section 34 has been interpreted by various High Courts including the apex court. The Supreme Court in the recent judgment delivered in the case of Ishwar Dass Jain v. Sohan Lal, has observed as under (headnote) :

"Under Section 34 sanctity is attached in the law of evidence to books of account if the books are indeed 'account books', i.e., in original if they show, on their face, that they are kept in the 'regular course of business'."

30. So, the accounts under Section 34 means accounts which are maintained in the regular course of business.

31. The income-tax legislation has been using the term "book" or "books of account" right from its inception. But, these terms are defined in the Act for the first time by the Finance Act, 2001, with effect from June 1, 2001. Section 2(12A) defines the said terms to mean :

"(12A) 'books or books of account' includes ledgers, day-books, cash books, account books, and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electromagnetic data storage device."

32. Then above definition appears to have been framed by the Legislature keeping in view the development of computer technology. If the newly inserted definition of

books of account inserted in the Income-tax Act is examined in contrast to the definition given under Section 34 of the Evidence Act, it will be clear that the stringent requirements of Section 34 are not to be found in the said definition. Obviously, for the simple reason that the purpose of both the legislations are different.

Therefore, when books of account are tendered for claiming the benefit of Explanation 5 to Section 271(1)(c) of the Act, it must be shown to be a book, that book must be a book of account, and on the top of it that must be one maintained for the purposes of drawing the source of income under the Income-tax Act. These essential requirements must be carefully observed while implementing tax legislation in the country where secret and parallel accounts based on frauds and forgery are extremely common and responsibility of keeping and maintaining accounts for the purposes of the tax legislation is honoured in the breach rather than the observance."

From Madras high court in Taj Browllers case reported in 291 ITR 232 (in context of section 68 of income tax act where revenue treated P&L account /balance sheet as books of account) Held:

"…the Assessing Officer was of the view that the accounts of the assessee-firm are in the form of Profit and Loss Account and Balance Sheet and held that they are the books of account. One of the issues here is, whether the Profit and Loss Account and Balance Sheet are books of account or not.

6. In the judgment reported in 184 ITR 450 in the case of S.Rajagopala Vandayar Vs. Commissioner of Income-tax, this Court has taken a view that Profit and Loss Account does not form part of the books of account and held as follows:

"We may point out that that is not the situation here, as it had not been disputed by the assessee right through that no account books at all had been maintained. The Supreme Court, in CIT v. National Syndicate [1961] 41 ITR 225, dealing with section 10(2)(vii) of the Indian Income-tax Act, 1922, laid down that in order to claim deduction of the loss sustained under that provision, one of the essential conditions to be fulfilled was that the loss should have been brought into the books of the assessee and written off as provided by the first proviso to section 10(2)(vii) of the Indian Income-tax Act, 1922. At page 234, the Supreme Court has catalogued the four conditions required to be fulfilled and the fourth condition, according to the Supreme court, to be fulfilled is that in the books of account of the assessee, the loss should have been brought in and written off. It follows, therefore, that if this requirement is not fulfilled, the assessee is not entitled to the relief of allowance of the loss. We may now refer to the decision of this court in P.Appavu Pillai v. CIT [1965] 58 ITR 622. In that case, the Tribunal took the view that relief under section 10(2)(vii) of the Indian Income-tax Act, 1922, could be given only in cases where the assessee maintains regular books of accounts and the loss had been written off in the books and that as the assessee did not keep any accounts, the allowance was rightly refused. The court found that though there is no indication in section 10(2)(vii) of the Indian Income-tax Act, 1922, as to the particular type of

account book which should be maintained by the assessee, if accounts are produced, in which the relevant entry with regard to the allowance appeared, that would be sufficient compliance with the first proviso to section 10(2)(vii) of the Indian Income-tax Act, 1922. In that case, the assessee produced before the assessing authority the daily collection and expenditure account and notwithstanding the absence of a day-book and a ledger, the Income-tax Officer was satisfied that the obsolescence allowance claimed could be granted. But a contrary view was taken by the Appellate Assistant Commissioner and the Tribunal that the loss could be allowed only if such amount is actually written off in the books of the assessee and that books in that context would mean the books of account maintained by the assessee in the course of the business. However, the court took the view that though the accounts maintained by the assessee may be defective in that the entries therein do not lead to a correct assessment of trhe income profit and gains of the business, that has nothing whatever to do with the allowance that can be granted under section 10(2)(vii) of the Indian Income-tax Act, 1922, if such accounts are available in which the relevant entry with regard to the allowance appears, that would be sufficient compliance with the requirement of the proviso and in that view, it was held that the details in the accounts produced in that case would be sufficient to comply with the requirements of the first proviso to section 10(2)(vii) of the Indian Income-tax Act, 1922. We may, in this connection, point out that the argument of the Revenue in that case that the profit and loss account is the account which can be said to be a book of account was rejected and it was characterised as a statement representing the state of business as at the end of the accounting year with details culled from other books of account, which may be characterised as the primary books which a businessman generally maintains. In other words, according to that decision, a profit and loss account is not a book of account. We are, therefore, of the view that merely by relying upon the profit and loss account, the assessee in this case cannot claim the benefit of allowance of loss sustained on the sale of the cars."

The word "books of account" is not defined during the relevant assessment year. Later, Section 2 (12A) was introduced in the Act defining "books or books of account" by the Finance Act, 2001 with effect from 01.06.2001 and the same reads as follows:

"(12A) "books or books of account" includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device;"

The above definition is inclusive definition and it includes not only ledgers, day-books, cash books, account-books and other books, but also the print-outs of data stored in a floppy disc, tape or any other form of electro-magnetic data storage device. P.Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition 2005, also defines "Books of account" as follows:

"Books in which merchants, businessmen, and traders generally keep their accounts. "Books of Accounts" mean such books of account as are usual in the

business, and do not extend to "letters, cheques, and vouchers from which books of account can be made up"(Per CAVE, J., Re Winslow, 55 LJQB 238)"

"If the word 'account' is to be given wider meaning to include a record of financial transactions reckoned, a book containing a statement of monetary transaction would attract the definition of 'book of account' under Section 34 of the Act. CBI v. V.C.Shukla, (1998) 3 SCC 410, para 23. [Indian Evidence Act (1 of 1872), S.34]"

"Company's books in which business transactions are recorded, often consisting of journals, ledgers and various other records of accounts. They are normally held to be legal documents and should indicate the financial position of the business at any time. (International Accounting; Business Term)"

So, the books of account is defined as any book which forms an integral part of system of book keeping employed in any particular business and consequently includes both the ledger and the books of original entry. The Profit and Loss Account of a trade is the statement wherein the various items of profit and revenue on the one hand and the losses and expenditure on the other hand, are collected and offset, the one class against the other, that is, in compiling such an account being - debit all the losses, credit all the gains. The resulting balance of this account represents the Net Profits or the Net Losses for the period under review. The object of a Profit and Loss Account is to ascertain the income of a business and by offsetting the expenses of earning that income, to ascertain the net increase (profit) or decrease (loss) in the traders' "net worth" for the period. Balance Sheet lists the assets and liabilities and equity accounts of the company. It is prepared 'as on' a particular day and the accounts reflect the balances that existed at the close of business on that day. By following the judgment of the Madras High Court cited supra and taking note of the definition of the books or books of account in the Income-tax Act as well as in P.Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition 2005, and also the meaning of the Profit and Loss Account and Balance Sheet, we can safely conclude that the Profit and Loss Account and the Balance Sheet are not the books of account as contemplated under the provisions of the Act. The learned Standing Counsel for the Revenue has not placed any authority or any case law or any other material or evidence to show that the books of account includes Profit and Loss Account and Balance Sheet."

So on basis of above two detailed decisions of Madras and Bombay high courts in section 271AAD penalty one may plead that anything other proper books maintained in regular course by assessee himself for income tax act purposes would not be counted as books within meaning of section 271AAD in authors humble opinion.

8. Now we may turn to ambit of false entry in section 271AAD wherein emphasis on word FALSE is of primordial importance to which in

authors opinion one may straightway refer to leading decision of Apex court in case of Commissioner of sale tax UP vs Sanjiv Fabric (10/09/20100 where entire conundrum of implication arising from phrase False in pari-materia provision of penalty in sale tax law (section 10,10A etc) is adumbrated with lucidity in following words, which in authors humble opinion should act as guide in section 271AAD penalty also:

"11.Therefore, what we are required to construe is whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which have been made knowingly, wilfully and intentionally.

18.It is true that the object of Section 10(b) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said Section, used the expression "falsely represents" in contradistinction to "wrongly represents." Therefore, what we are required to construe is whether the words "falsely represents" would cover a mere incorrect representation or would embrace only such representations which are knowingly, wilfully and intentionally false.

19.According to the Black's Law Dictionary (6th Edition), the word "false" has two distinct and well-recognized meanings: (1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care. A thing is called "false" when it is done, or made, with knowledge, actual or constructive, that it is untrue or illegal, or is said to be done falsely when the meaning is that the party is in fault for its error.

20.Likewise, P. Ramanatha Aiyar in Advance Law Lexicon (3rd Edition, 2005) explains the word "false" as:

"In the more important uses in jurisprudence the word implies something more than a mere untruth; it is an untruth coupled with a lying intent.....or an intent to deceive or to perpetrate some treachery or fraud. The true meaning of the term must, as in other instances, often be determined by the context'."

21.In Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore & Ors.15, a similar question fell for consideration of this Court. In that case, a penalty under Section 43 of the Madhya Pradesh (1980) 1 SCC 71 General Sales Tax Act, 1958 and Section 9(2) of the Act was imposed on the dealer on the ground that he had furnished false returns by not including the amount of freight in the taxable turnover disclosed in the returns. Allowing the appeal of the dealer, this Court had observed as under:

"What Section 43 of the Madhya Pradesh General Sales Tax Act, 1958 requires is that the assessee should have filed a 'false' return and a return cannot be said to be 'false' unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberations and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a 'false' return inviting imposition of penalty."

The Court finally held that it was elementary that Section 43 of the State Act which provided for imposition of penalty is penal in character and unless the filing of an inaccurate return is accompanied by a guilty mind,

the section cannot be invoked for imposing penalty. It was emphasised that if the view canvassed by the Revenue were to be accepted, the result would be that even if a dealer raises a bona fide contention that a particular item was not liable to be included in the taxable turnover, he will have to show it as forming part of the taxable turnover in his return and pay taxes upon it on pain of being held liable for penalty in case his contention is ultimately found by the Court to be not acceptable. That surely could never have been the intention of the Legislature.

22.In view of the above, we are of the considered opinion that the use of the expression "falsely represents" is indicative of the fact that the offence under Section 10(b) of the Act comes into existence only where a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. Therefore, in proceedings for levy of penalty under Section 10A of the Act, burden would be on the revenue to prove the existence of circumstances constituting the said offence. Furthermore, it is evident from the heading of Section 10A of the Act that for breach of any provision of the Act, constituting an offence under Section 10 of the Act, ordinary remedy is prosecution which may entail a sentence of imprisonment and the penalty under Section 10A of the Act is only in lieu of prosecution. In light of the language employed in the Section and the nature of penalty contemplated therein, we find it difficult to hold that all types of omissions or commissions in the use of Form `C' will be embraced in the expression "false representation". In our opinion, therefore, a finding of mens rea is a condition precedent for levying penalty under Section 10(b) read with Section 10A of the Act."

Why aforesaid dictum applies with more stronger force in section 271AAD, reasons thereof in authors opinion are:

i) Use of phrase “intent” in explanation to section 271AAD defining false entry; (for meaning of word intent one may gainfully refer to Kerala high court in 240 ITR 539 wherein it is succinctly said that intent can be equated with object and objective so it may be required for revenue here to establish that deliberate purpose behind making of entry or omission of entry in section 271AAD to levy penalty therein)

ii) Use of phrase “to evade tax liability” in omission of entry clause in section 271AAD(1);

iii) Legislative intent, mischief and background behind section 271AAD

iv) Penalty in section 271AAD is discretionary in nature;

So without the establishment of fact that tax payer/assessee concerned has deliberately/willfully/knowingly and intentionally made false entry or omitted the stated entry , in authors humble opinion penalty in section 271AAD might not pass legal muster.

9. Now three illustrative clauses mentioned for false entry in explanation defining false entry in section 271AAD it may be relevant to peek into three pigeonholes of said explanation. First pigeonhole focus on forged or falsified documents such as false invoice or false piece of documentary **evidence;** here taking a pause, it is ingeminated that required falsity and forged character of a document must be first conclusively established by revenue (as in section 271AAD primary burden/onus lies on revenue to establish its case). then in second pigeonhole of definition of false entry, **actual supply of goods/services** vis a vis corresponding invoice is focussed (so here one can ask whether in a case where no 3rd party

voucher is there for certain expenses debited/claimed in P&L account for good/services supply like in construction sector etc can it be inferred that it is false entry because of no actual supply of goods/services ; in authors humble opinion , on mere absence of third party voucher in genuine cases where it is inherently difficult to obtain voucher/invoice etc given special circumstances , charge of no actual supply of goods/services to infer false entry in section 271AAD might not survive given legislative intent/mischief etc and absent any fraudulent/manipulative intent on part of assessee concerned) . On last pigeonhole in definition of false entry, it is referred that where person does not **exist** in respect of invoice for supply of goods/services same would be false entry, where how to infer a person does not exist , is an important aspect where existence of a person may means its legal existence and also its actual existence . So exist word in explanation to section 271AAD, may be required to be interpreted in light of overall context of section 271AAD that is where a person is no where found existing then only inference of false entry (given other ingredients of false word and legislative intent present) may be drawn validly. Mere non response to enquiry notice u/s 133(6) might not establish factum of non existence of a person in authors humble opinion in context of section 271AAD draconian penalty. Non existence on which date (whether on date of concerned entry in books or on date when penalty in section 271AAD is launched in assessment order or at stage of final penalty levy in section 271AAD) is again a legal quandary, to which in authors view, if on date when entry was made in books , the person is proved was existing by assessee concerned , but later not found for certain reasons beyond control of assessee , may help to plead favorable view given legislative intent/mischief and absent deliberate intent on assessee part.

10. Apropos omission of entry clause of penalty in section271AAD(1), meaning of omission may be referred from Calcutta high court decision in 30 ITR 535 wherefrom one may argue that omission in section 271AAD requires delibtrate/intentional/wilful/conscious omission and not which is inadvertent and accidental omission only like a mere punching/clerical error (refer SC in Pricewaterhouse case 348 ITR 306). This is more so because omission referred in section 271AAD is attached with ***phrase to evade tax liability*** which requires positive and clear evasive intent on part of concerned assessee. Further omission referred here is one which has **direct bearing to computation of total income and not any omission which is tax neutral in nature.**

11. Lastly most serious part of section 271AAD sub section 2 dealing with penalty levy **on any other person** who **has caused** first person as referred in sub section 1 (in whose books false or omitted entry are found) to make false entry or cause omission of entry , then penalty of amount of entry may be levied on said other person also. Here implication of **word cause to make/omit** must be understood in contextual sense that is unless revenue establish with reasonable certainty that stated other person has **caused that entry to be made (which is false entry) or has caused to omit said entry (which is omitted entry) , penalty in section 271AAD(2) might not kick start *as proximate cause and effect relationship is to be firstly established in section 271AAD(2) by revenue given its caustic/strident nature/implication*. Even when it comes to initiation of second tier/layer penalty in section 271AAD(2) in consequence to first layer/tier penalty of section 271AAD(1) , it seems that first main penalty of section 271AAD(1) needs to be *finally* concluded adversely then only any possible case of penalty of section 271AAD(2) might be initiated, qua other person, in authors humble**

opinion. Competent authority to levy final penalty on other person in section 271AAD(2), although debatable from both sides, in authors humble opinion, looks to be concerned and jurisdictional AO of such other person in section 2(7A) of the Act and not AO of main person in section 271AAD(1) although valid reference and trigger to initiate penalty in section 271AAD(2) has to mandatorily come from AO of main person in section 271AAD(1) only. On all this material, in authors view, said other person when show caused in section 271AAD(2) would be mandatorily required to be confronted/ supplied with all reference material relied to initiate said penalty in section 271AAD(2) sans which entire penalty in sub section 2 can be argued to be jurisdictionally defective.

12. **Closing words**

I would just refer to :Late Hon'ble Mr. Nani Palkhiwala who in the concluding paragraph of his Preface to the eighth edition of his monumental work S.R.JOSHI 56 of 61 WP1877-2013-.sxw "The Law and Practice of Income Tax" observed:- "Every Government has a right to levy taxes. But no Government has the right, in the process of extracting tax, to cause misery and harassment to the taxpayer and the gnawing feeling that he is made the victim of palpable injustice"