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# Latest Landmark Judicial Developments in July 2009

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# OBJECT/SCOPE

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*To discuss some latest landmark Judicial Developments on Income Tax Front*

- ❑ *DHC ruling in Madhushree Gupta and British Airways in Writ Petition No 6272/2008; 24/7/2009 Ruling*
- ❑ *Jaipur ITAT Ruling Jaipur Vidyut Vitran Limited in 26 DTR 79*
- ❑ *Supreme Court SLP Dismissal in Important Stay Ruling Of DHC in Valvoline 4/8/2009 Order*
- ❑ *Latest Concealment Penalty Rulings u/s 271(1)(c) explaining SC Larger Bench Dharmendra Textiles*

# DHC Ruling in Madhushree- Background of the case

- Section 271(1)(c) Relevant Text “

*“271. Failure to furnish returns, comply with notices, concealment of income, etc. (1) If the Assessing Officer or the Commissioner (Appeals) or the Commissioner in the course of any proceedings under this Act, is satisfied that any person - ....*

...

*(c) has concealed the particulars of his income or furnished inaccurate particulars of such income, he may direct that such person shall pay by way of penalty, -*

.....

*iii) (ii) in the cases referred to in clause (c), in addition to tax, if any, payable by him, a sum which shall not be less than , but which shall not exceed three times, the amount of tax sought to be evaded by reason of the concealment of particulars of his income or the furnishing of inaccurate particulars of such income. ...”*

# DHC Ruling in Madhushree- Background of the case

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- *DHC rulings which held that satisfaction as to income concealment must be REFLECTED/APPARENT FROM ASSESSMENT ORDER ITSELF, while initiating penalty proceedings:*

*Before subject amendment:*

- *DHC in Ram Commerical 246 ITR 568 (Noted with approval by SC in Dilip Shroff)*
- *DHC in Diwan Enterprises 246 ITR 571*
- *DHC Full Bench in Rampur Engg 309 ITR 141*
- *DHC in Vikas Promoters 277 ITR 337*
- *DHC in Auto Lamps 278 ITR 32*
- *DHC in Shree Bhagwant 280 ITR 412.....*

# DHC Ruling in Madhushree- Background of the case

- *Memorandum Explaining Provisions in the Finance Bill, 2008* Satisfaction for initiation of penalty under section 271(1) Sub-section (1) of Section 271 of the Income-tax Act 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. 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 issue of penalty notice under this sub-section. **Some judicial authorities have held that such a satisfaction need not be recorded. However, Hon'ble Delhi High Court in the case of CIT v. Ram Commercial Enterprises Ltd (246 ITR 568) has held that such a satisfaction must be recorded by the Assessing Officer.**

# DHC Ruling in Madhushree- Background of the case

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- .....*Given the conflicting judgments on the issue and the legislative intent, it is imperative to amend the Income Tax Act to unambiguously provide that where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment; and such order contains a direction for initiation of penalty proceedings under sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of penalty proceedings under sub-section(1). Similar amendment has also been proposed in the Wealth-tax Act. **These amendments will take effect retrospectively from 1st April, 1989.***

# DHC Ruling in Madhushree- Background of the case

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*Amendment by Finance Act, 2008 With Retrospective Effect from 1/4/1989 in section 271*

**[(1B) Where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and *the said order contains a direction for initiation of penalty proceedings under clause (c) of subsection (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).*]**//

# DHC Ruling in Madhushree-

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*Assessee's Submissions before High Court (Interalia):*

(iv) In view of the position of law professed by the learned counsel, it was submitted by him that such satisfaction which is required to be arrived at by the Assessing Officer before initiation of penalty proceedings and issuance of notice under Section 274 of the Act, is a question of fact which cannot be legislatively presumed by creating a fiction, as is sought to be done, by the impugned provision. Furthermore, he contends that the decision to levy penalty is discretionary which has to be exercised by the Assessing Officer, acting in his quasi judicial capacity, based on facts and circumstances of each case and hence cannot be substituted by legislative presumption



# DHC Ruling in Madhushree-

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*Assessee's Submissions before High Court (Interalia):*

....(v) The impugned provision is violative of Article 14 of the Constitution as there is no nexus between the object sought to be achieved by the legislature and the impugned provision. He impugned the provisions of Section 271(1B) of the Act on the ground that it confers on the Assessing Officer wholly arbitrary power, there being no in-built guidelines laid down for exercising such power

# DHC Ruling in Madhushree-

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*Assessee's Submissions before High Court (Interalia):*

...submitted that a bare reading of the Memorandum explaining the Finance Bill, 2008 (hereinafter referred to as the 'Memorandum') and the Notes on Clauses, i.e., Clause 48 would show that the object and reasons stated therein do not get reflected in the impugned provision. He contends that the very fact that sub-section (1B) of Section 271 of the Act deems satisfaction in the order of assessment, re-assessment or rectification, the Revenue would accept that satisfaction is required to be arrived at by the Assessing Officer during the course of any such proceedings. Being a quasi-judicial function the satisfaction should be reasoned. ....

# DHC Ruling in Madhushree-

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*Assessee's Submissions before High Court (Interalia):*

".....The learned counsel further submitted that while he does not question the power of legislature to enact law retrospectively; the retrospective amendment is not only oppressive but also fails to supply any rationale for its applicability from 1.4.1989. ....The learned counsel further contended that penalty proceedings being penal in nature, the principle of greater latitude in economic matters cannot apply to such like provisions. He also contends that while constitutionality of a provision is presumed and the onus is on the party which challenges its constitutionality; the onus in the instant case would shift, as no plausible reason has been given with regard to the provision coming into force w.e.f. 01.04.1989....

# DHC Ruling in Madhushree-

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## Revenue's Contention before High Court:

(i) There is always a presumption with regard to the constitutionality of a provision. The constitutionality of legislation should be judged from the generality of its provision and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. He submitted that hardship, financial or otherwise cannot be a ground for challenging the constitutionality of a legislation, particularly while dealing with complex economic issues....

# DHC Ruling in Madhushree-

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## Revenue's Contention before High Court:

(ii) He refuted the submissions of the petitioner that there was no nexus between the impugned provision and the objects sought to be attained by the impugned legislation. The learned ASG submitted that the purpose and object of the amendment was to clarify the interpretation of the provisions of Section 271(1)(c) of the Act. It was his contention that the legislative intent in bringing about the amendment was; that the satisfaction is required to be recorded in writing only at the time of levy of penalty and not at the time of initiation of penalty proceedings. He submitted that taxing statute has to be construed strictly. ....

# DHC Ruling in Madhushree-

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Revenue's Contention before High Court:

(ii) .. ..He submitted that amendment was clarificatory in as much as it sought to make clear that the Assessing Officer is not required to record his satisfaction in writing before initiating penalty proceedings and such satisfaction can be specifically arrived at and hence recorded, only at the stage of levy of penalty as against prima facie satisfaction which is arrived, at the stage of initiation. He contended that instead of satisfaction at two stages, by virtue of the amendment, satisfaction be arrived at and recorded only at the stage of imposition. Therefore, according to the learned ASG a simple endorsement in the assessment order that penalty proceedings are initiated would suffice

# DHC Ruling in Madhushree-

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## High Court Analysis/Reasoning:

*15.5 In our opinion the impugned provision only provides that an order initiating penalty cannot be declared bad in law only because it states that penalty proceedings are initiated, if otherwise it is discernible from the record, that the Assessing Officer has arrived at prima facie satisfaction for initiation penalty proceedings. The issue is of discernibility of the 'satisfaction' arrived at by the Assessing Officer during the course of proceeding before him...*

# DHC Ruling in Madhushree-

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## High Court Analysis/Reasoning:

*15.6 As indicated hereinabove, the position is no different post-amendment. The contra-submission of the learned ASG that prima facie satisfaction of the Assessing Officer need not be reflected at the stage of initiation but only at the stage of imposition of penalty is in the teeth of Section 271(1)(c) of the Act. Section 271(1)(c) has to be read in consonance of Section 271(1B). ....*



# DHC Ruling in Madhushree-

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High Court Analysis/Reasoning:

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*The presence of prima facie satisfaction for initiation of penalty proceedings was and remains a jurisdictional fact which cannot be wished away as the provision stands even today, i.e., post amendment. If an interpretation such as the one proposed by the Revenue is accepted then, in our view, the impugned provision will fall foul of Article 14 of the Constitution as it will then be impregnated with the vice of arbitrariness....*

# DHC Ruling in Madhushree-

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## High Court Analysis/Reasoning:

*.....The Assessing Officer would in such a situation be in a position to pick a case for initiation of penalty merely because there is an addition or disallowance without arriving at a prima facie satisfaction with respect to infraction by the assessee of clause (c) of sub-section (1) of Section 271 of the Act. A requirement which is mandated by the provision itself... ..*

# DHC Ruling in Madhushree-

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## High Court Analysis/Reasoning:

*..... Even though both the Memorandum as well as Notes On Clauses refers to the conflict in judicial opinion and gives that, as the section (1B) of Section 271 does not do away with the principle that the prima facie satisfaction of the Assessing officer must be discernible from the order passed by the Assessing Officer during the course of assessment proceedings pending before him.....*

# DHC Ruling in Madhushree-

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## High Court Analysis/Reasoning:

...15.8 If there is no material to initiate penalty proceedings; an assessee will be entitled to take recourse to a court of law. ... **16. In our view the submission of the Revenue that the impugned provision deals with procedural aspect of the matter and hence cannot be challenged on the ground of retrospectivity is a surplusage. Suffice it to say that the legislature had plenary powers to enact a law both prospectively and retrospectively subject to certain constitutional limitations, as long its competency to do so is not under challenge and it is not unfair or unreasonable, i.e., falls foul Article 14 of the Constitution. ...**

# DHC Ruling in Madhushree-

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High Court Analysis/Reasoning:

*In the instant case the legislature has expressly made a retrospective amendment by inserting Section 271(1B) w.e.f. 01.04.1989. The competency of the legislature to enact the impugned provision is not under challenge before us. In so far as the challenge to the impugned provision is laid on the ground of violation of Article 14; the same is not sustained when read in the manner, in which, we have read and interpreted the impugned provision...*

*..The fact that retrospectivity is limited to 01.04.1989, as indicated hereinabove even though perhaps carried out for obscure reasons, cannot enure to benefit of those to whom the amended law is to apply*

# DHC Ruling in Madhushree-

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## Final Conclusion:

held: "quote

Section 271(1B) of the Act is not violative of Article 14 of the Constitution. (ii) The position of law both pre and post amendment is similar, in as much, the Assessing Officer will have to arrive at a prima facie satisfaction during the course of proceedings with regard to the assessee having concealed particulars of income or furnished inaccurate particulars, before he initiates penalty proceedings. (iii) Prima facie` satisfaction of the Assessing Officer that the case may deserve the imposition of penalty should be discernible from the order passed during the course of the proceedings. Obviously, the Assessing Officer would arrive at a decision, i.e., a final conclusion only after hearing the assessee

# DHC Ruling in Madhushree-

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**Final Conclusion:** (iv) At the stage of initiation of penalty proceeding the order passed by the Assessing Officer need not reflect satisfaction vis-a-vis each and every item of addition or disallowance if overall sense gathered from the order is that a further prognosis is called for. (v) However, this would not debar an assessee from furnishing evidence to rebut the 'prima facie' satisfaction of the Assessing Officer; since penalty proceeding are not a continuation of assessment proceedings. [See Jain Brothers v. Union of India (1970) 77 ITR 107(SC)] (vi) Due compliance would be required to be made in respect of the provisions of Section 274 and 275 of the Act.

# DHC Ruling in Madhushree-

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## Final Conclusion:

(vii) the proceedings for initiation of penalty proceeding cannot be set aside only on the ground that the assessment order states ‘penalty proceedings are initiated separately’ if otherwise, it conforms to the parameters set out hereinabove are met.”



# Jaipur ITAT ruling on section 40(a)(ia) 26 DTR...

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*ITAT accepted assessee's contention that said provision cannot be applied in a scenario where there were genuine doubts on interpretation/application of TDS provisions and payment made is genuine in nature. For this ITAT pressed into service CBDT Circular No 5/2005.*

*Further, ITAT also held that section 40(a)(ia) is only applicable where amount is PAYABLE (DUE AND OUTSTANDING) and not where expenditure stands PAID, reasoning that section 40(a)(ia) being deeming fiction needs strict interpretation and since, word payable is different from PAID.*

# P&H High Court in 314 ITR 215

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Haryana Warehousing Corporation case:  
Revenue's Contention regarding Supreme Court ruling in Dharmendra Textiles 306 ITR 277

The second contention advanced by the learned counsel for the appellant-revenue was, that the impugned order passed by the Income Tax Appellate Tribunal deleting the penalty imposed on the respondent-assessee under section 271(1)(c) of the Act, was not sustainable in law because of the clear judgment rendered by the Supreme Court in Union of India v. Dharamendra Textile Processors and others, 306 ITR 277. According to the learned counsel for the appellant-revenue the entire income which remained undisclosed, "with or without" any conscious act of the assessee, was liable to penal action.

# P&H High Court in 314 ITR 215

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Haryana Warehousing Corporation case:  
Revenue's Contention regarding Supreme Court  
ruling in Dharmendra Textiles 306 ITR 277

*It is submitted by the learned counsel for the appellant revenue, that the concept of law, with regard to levy of penalty has drastically changed in view of the said judgment, inasmuch as, now penalty can be levied even when an assessee claims deduction or exemption by disclosing the correct particulars of its income. According to the learned counsel, if an addition is made in quantum proceedings by the revenue authorities, which addition attains finality, an assessee per se becomes liable for penalty action under section 271(1)(c) of the Act. ..*

# P&H High Court in 314 ITR 215

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Haryana Warehousing Corporation case:  
Revenue's Contention regarding Supreme Court  
ruling in Dharmendra Textiles 306 ITR 277

*. It is the vehement contention of the learned counsel for the appellant-revenue, that a penalty automatically became leviable against the respondent-assessee under section 271(1)(c) of the Act, after the finalisation of quantum proceedings. In this behalf, it is also pointed out, that in view of the judgment of the Supreme Court referred to above, the dichotomy between penalty proceedings and assessment proceedings stands completely obliterated.....*

# P&H High Court in 314 ITR 215

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Haryana Warehousing Corporation case:  
High Court rejecting revenue's plea:

It is also essential for us to notice, while dealing with the second submission advanced by the learned counsel for the appellant revenue, that the issue which arose for determination before the Supreme Court in *Union of India v. Dharamendra Textiles Processors and others*, 306 ITR 277 was, whether under section 11AC inserted in the Central Excise Act, 1944, by the Finance Act 1996, penalty for evasion of payment of tax had to be mandatorily levied in case of short of levy or non-levy of duty under the Central Excise Act, 1944, irrespective of the fact whether it was an intentional or innocent omission.

# P&H High Court in 314 ITR 215

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Haryana Warehousing Corporation case:

*High Court rejecting revenue's plea:*

*In other words, the Apex Court was examining a proposition, whether mens-rea was an essential ingredient before penalty under section 11AC of the Central Excise Act, 1944 could be levied. In view of the factual position noticed here in above, the issue of mens-rea does not arise in the present controversy because the ingredients before any penalty can be imposed on an assessee under section 271 (1)(c) of the Act, were not made out in the instant case, as has been concluded in the foregoing paragraph.*

# P&H High Court in 314 ITR 215

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Haryana Warehousing Corporation case:  
High Court rejecting revenue's plea:

*Thus viewed, the judgment relied upon by the learned counsel for the appellant-revenue is, besides being a judgment under a different legislative enactment, is totally inapplicable to the facts and circumstances of this case.* Accordingly, we find no merit even in the second contention advanced by the learned counsel for the appellant revenue.....

# P&H High Court in Siddharth Entp.

- *Siddharth Enterprises: Concealment Penalty : SC Dharmendra Textiles Analysed :*

*"Learned counsel for the revenue submits that even if claim of set-off of capital loss against profits of business was by negligence or mistake, the fact remains that the particulars of income furnished were not correct and willful concealment not being an essential requirement for levy of penalty under section 271(1)( c) of the Act, as held by the Hon'ble Supreme Court in Union of India v. Dharmendra Textile Processors, (2008) 306 ITR 277, the penalty could not be deleted.*

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# P&H High Court in Siidharth Entp.

- *Siddharth Enterprises: Concealment Penalty : SC Dharmendra Textiles Analysed : We are unable to accept the submission. The judgment of the Hon'ble Supreme Court in Dharmendra Textile (supra) cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. What has been laid down is that qualitative difference between criminal liability under section 276C and penalty under section 271(1) ( c) had to be kept in mind and approach adopted to the trial of a criminal case need not be adopted while considering the levy of penalty. Even so, concept of penalty has not undergone change by virtue of the said judgment.*

# P&H High Court in Siddharth Entp.

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- *Siddharth Enterprises: Concealment Penalty : SC Dharmendra Textiles Analysed :*

*.....Penalty is imposed only when there is some element of deliberate default and not a mere mistake. This being the position, the finding having been recorded on facts that the furnishing of inaccurate particulars was simply a mistake and not a deliberate attempt to evade tax, the view taken by the Tribunal cannot be held to be perverse."*

# Asst & Stay

- DHC in Valvoline 217 CTR 292 and Soul 173 Taxman 468 recently held stay must be granted in routine manner where asst is made more than twice of returned income (In Valvoline case, DHC imposed Rs 15000 costs on revenue for unnecessarily forcing litigation on assessee)
- further refer CBDT Instruction No. 96- 21/8/1969 and 1914 dated 2/12/1993,
- **On 4/8/2009 SC has Dismissed revenue's SLP in above matter**

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# Thank You

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