

INCOME TAX PENALTY

NEW TURF - NEW RULES



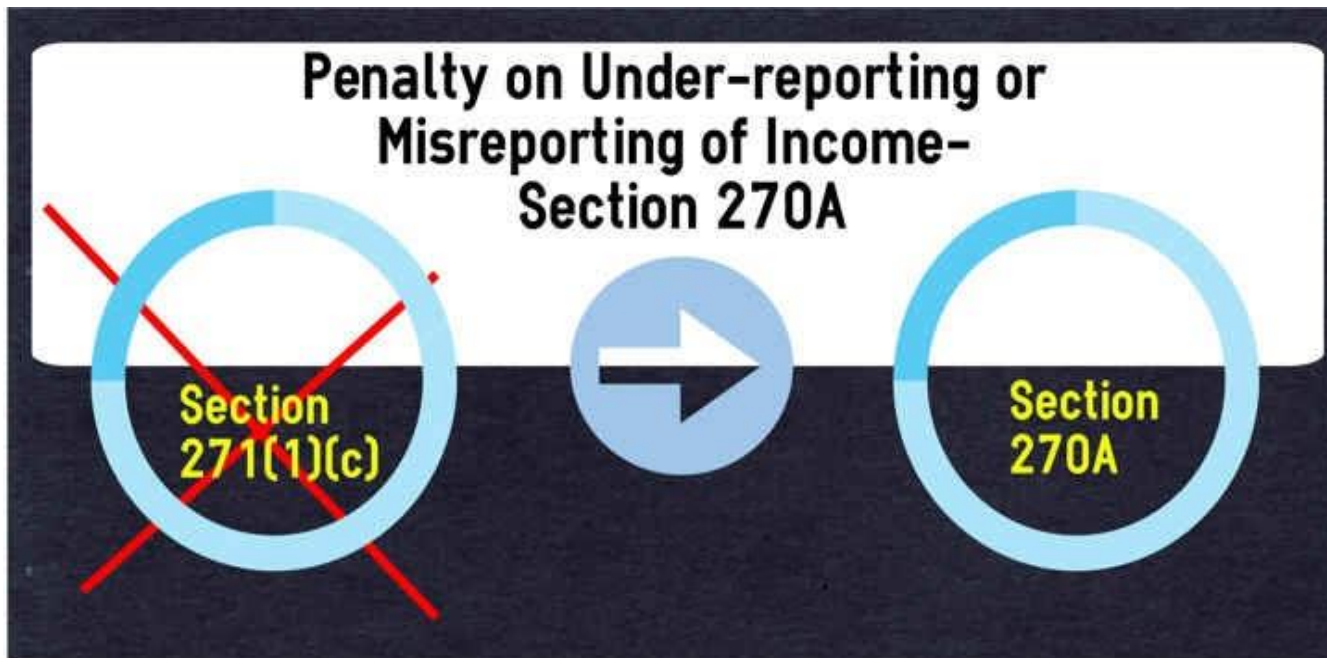
**NEW
RULES**



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PENALTY PROVISIONS



(A) Introduction



- On 29 February 2016, then Hon'ble Finance Minister in his budget speech acknowledged that levy of heavy penalty for concealment of income resulted in large number of disputes over the years despite a number of decisions of the Apex court on interpretation of statutory provisions and principles guiding imposition of penalty. Therefore, he proposed to replace the existing provisions of Section 271(1)(c) of the Income-tax Act ('the Act') with a new scheme of penalty under Section 270A effective from AY 2017-18 onwards as under:
- "At present the Income-tax Officer has discretion to levy penalty at the rate of 100% to 300% of tax sought to be evaded. I propose to modify the entire scheme of penalty by providing different categories of misdemeanor with graded penalty and thereby substantially reducing the discretionary power of the tax officers. The penalty rates will now be 50% of tax in case of underreporting of income and 200% of tax where there is misreporting of facts. Remission of penalty is also proposed in certain circumstances where taxes are paid and appeal is not filed."
 - Further, a new section 270AA was inserted in the Act empowering the AO to grant immunity from imposition of penalty under section 270A of the Act as well as initiation of prosecution proceedings under section 276C and 276CC of the Act on certain terms and conditions.
 - The memorandum expressed the intent of amendment, i.e., to rationalize and bring objectivity, certainty and clarity in the penalty provisions. With this intent, the newly incorporated penalty provisions will go live on completion of assessment proceedings for AY 2017-18 before the end of December 2019.



Provisions in Brief-270A

- According to the plain provision of section 270A, the sub section (1) provides the authorities who may direct levy of penalty under this section. The AO or the C IT(A) or the Pr. CIT or CIT **may 'direct'**, 'during the course of any proceeding' under the Income Tax Act, 1961, to levy the penalty on a person who has 'under reported' his income & such penalty shall be in addition to tax, if any, and it would be on the 'under reported income'.**(for short “URI”)**

Sub section (2) provides as to who can be a person considered to have 'under reported income'.

Sub section (3) provides as to how 'underreported income' shall be computed.



Provisions in Brief-270A

- Sub sections (4) & (5) speak for the 'under reported income' & the preceding year(s) to which such 'under reported income' would relate, in respect of the amount of intangible additions made in the past where no penalty was levied on such intangible additions, if any deposit, receipt or investment made in the current year is sought to be explained with the help of such past intangible additions and. In fact, sub section (4) & (5) of section 270A are on the lines of *Explanation 2* to section 271(1)(c).
- Sub section (6) provides five exhaustive situations in which additions/disallowances mentioned thereunder & made in the assessment order may not constitute 'under reported income'.
- Thereafter, sub section (7) provides the rate of penalty in respect of the 'URI simpliciter' equal to 50% of the tax payable on such 'URI'.



Provisions in Brief-270A

- Subsection (8) provides for the levy of penalty equal to 200% of the tax payable on the 'under reported income' if such 'under reported income is in consequence of misreporting of income' (For short called MRI”)instances of which have been listed in the form of six cases (a) to (f) under sub section (9).
- Sub section (10) provides for the methodology for computing tax payable in respect of the 'URI'.
- Sub section (11) is to provide that there would be no penalty on any addition or disallowance made if such addition or disallowance has already formed the basis of imposition of penalty on a person either in this year or in any other year.
- Sub section (12) mandates the passing of penalty order in writing by the relevant tax authority.



What is Under Reporting of Income – Section 270A(2)

- To put in simple terms, 'under reported income' would be the difference between the income assessed and income processed under section 143(1)(a). If it is a case of reassessment under section 147 or under section 153A, 'under reported income' would be the difference between the reassessed income and the earlier assessed income. There would be sufficient to say that there is in a way automatic 'under reported income' the moment there is difference between the assessed income and processed income subject to the exclusions given in sub section (6) of section 270A.

Quantification of Penalty Sec. 270A(7) and (8):



Tax payable as mentioned above shall be computed as per provision of sub-section 10. The same is tabulated as under:

Particulars	Quantification of Penalty
Under-reporting of income	Penalty @ 50% of amount of tax payable on under- reported income
Under-reported income is in consequence of any misreporting thereof	Penalty @ 200% of amount of tax payable on under- reported incom



Tax payable shall be computed as per provision of sub-Section 10

The same is tabulated as under:

Return of income not furnished – assessed for the first time	Under-reported income + maximum amount not chargeable to tax
Total Income as per intimation/assessed /reassessed/recomputed – where total income is a loss	Under-reported income (as if Under-reported income is the total income)
All other cases	Under-reported income + Income u/s. 143(1)(a)/assessed/reassessed/recomputed (as if it was total income) minus Income u/s.143(1)(a)/assessed/reassessed/recomputed

Exclusions from Under reported income –Sec 270A(6)



- The scope of under reported income is very wide and would technically cover each and every addition/disallowance made by the AO. However the Legislature has deemed fit to keep some specific exclusions of transactions which result into addition to total income, to be out of the ambit and scope of under-reported income. Accordingly, the under-reported income shall not include



(a)	the amount of income in respect of which the assessee offers bona fide explanation and the assessee has disclosed all the material facts to substantiate the explanation offered.
(b)	the amount of under-reported income determined on the basis of an estimate,
(c)	the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;
(d)	the amount of under-reported income represented by Transfer Pricing addition, where the assessee had maintained information and documents as prescribed under section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and
(e)	the amount of undisclosed income (during search cases) referred to in section 271AAB

Misreporting of Income – Sec 270A(9)



- Under section 270A(9), in the following six circumstances, under-reported of income shall be considered as a case of misreporting:
 - (i) Misrepresentation or suppression of facts (ii) Failure to record investments in books of account (iii) Claim of expenditure not substantiated by any evidence (iv) Recording of a false entry in books of account (v) Failure to record any receipt in books of account which has a bearing on total income, and (vi) Failure to report any international transaction or deemed international transaction or specified domestic transaction under Chapter X.
- Out of total 6 cases treated as misreporting, three relate themselves with books of accounts and remaining three covers conduct during assessment.



Misreporting of Income – Sec 270A(9)

Misreporting of Income - Books of Accounts	Misreporting of Income - found during Assessment
Non-recording of investments in books of Account	Misrepresentation or suppression of facts.
Recording of false entry in books of Account	Claiming of expenditure not substantiated by any evidence
Failure to record any receipt in books of account having a bearing on total income	Failure to report any international transaction or deemed international transaction under chapter X



Cases relating to Transfer Pricing and assessed u/s 115JB/115JC

- The exclusion of cases u/s 270A(6) relating to URI include URI referring to TP order only if the assessee has maintained information & documents as per Sec 92D, declared International transaction and disclosed all the material facts relating to it. But it may be noted that this exclusion do not cover case of deemed IT or specified domestic transaction which has resulted into addition.
- Sub sec-(2) provides that the amount of deemed income u/s 115JB/115JC exceeding maximum amount not chargeable to tax shall be the case of URI and the quantum of such URI shall be computed as per 270A(3) proviso. However in case of 115JC, unless ITR filed there cannot be claim u/s 1AA or Chp-VI-A.



Insertion of new Sec. – 270AA – immunity from imposition of penalty, etc.

- The new section 270AA provides for immunity from penalty u/s 270A and prosecution u/s 276C in certain cases.
- Pre-condition for Immunity
- An assessee may make an application to the Assessing Officer for grant of immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, provided he pays the tax and interest payable as per the order of assessment or reassessment within the period specified in such notice of demand and does not prefer an appeal against such assessment order.



Insertion of new sec. – 270AA – immunity from imposition of penalty, etc.

- Time Limit for making application :
- The assessee can make such application within one month from the end of the month in which the order of assessment or reassessment is received in the form and manner, as may be prescribed.
- Conditions for grant of Immunity
- Immunity from initiation of penalty and proceeding under section 276C will be granted if the penalty proceedings under section 270A has not been initiated on account of the of misreporting u/s 270A.



Insertion of new sec. – 270AA – immunity from imposition of penalty, etc.

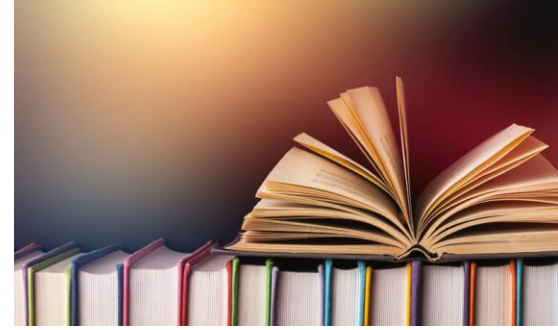
- Time limit for passing order.
- The Assessing Officer shall pass an order accepting or rejecting such application within a period of one month from the end of the month in which such application is received. However, in the interest of natural justice, no order rejecting the application shall be passed by the Assessing Officer unless the assessee has been given an opportunity of being heard. Binding Effect The order of Assessing Officer under the said section shall be final. Effect of order under Section 270AA accepting the application. No appeal under section 246A or an application for revision under section 264 shall be admissible against the order of assessment or reassessment referred to in clause (a) of sub-section (1), in a case where an order under section 270AA has been made accepting the application. Remedy against order rejecting application. By virtue of amendment in section 249 and section 253, an appeal against order of rejection passed under section 270AA is to be made before the Commissioner (Appeals) within thirty days of the receipt of the notice of demand relating to an assessment order. The period beginning from the date on which such application is made to the date on which the order rejecting the application is served on the assessee shall be excluded for calculation of the thirty days period.

ANALYSIS



- In case of penalty on under-reported income which is not as a consequence of misreporting AO is bound to grant immunity subject to fulfillment of other conditions. The AO has no discretion.
- · It appears that where penalty is levied on certain additions on ground of misreporting and certain additions on ground of only under-reporting than assessee will have to make a choice whether to file appeal or make application for immunity as he cannot file appeal on penalty levied on misreported income and immunity application for under-reported income. The only remedy under Act seems to be revision u/s 264 qua misreporting aspect or mercy petition for immunity u/s 273A to Pr. CIT/CIT.
- · There is no bar to filing appeal against quantum order with application for condonation of delay after rejection of application for immunity.
- · There is no specific bar prohibiting revision u/s 263 of order accepting immunity application.
 - ❖ There is no provision for condonation of delay in filing this application.
 - ❖ In case the CIT(A) has directed penalty in respect of enhancement resulting into URI, the recourse to this provision is not available.
 - ❖ In case the CIT(A) holds the difference as URI and not MRI, the assessee cannot go for application under this provision.
 - ❖ The assessee cannot contend that it is case of URI and not MRI so that this application is maintainable.
 - ❖ The CBDT, vide Circular No. 05/2018 dated 16 August 2018, has clarified that an application made by an assessee under section 270AA of the Act seeking immunity, will not bar the assessee from contesting the same issue in any earlier assessment year. The circular also clarifies that the tax authority shall not take an adverse view in penalty proceedings for earlier assessment years under old penalty regime merely because the taxpayer has applied for **immunity under the new penalty regime (i.e., section 270AA)**.

Posers :



1. Whether levy of penalty u/s. 270A is automatic?
2. commencement of penalty proceedings and initiation of penalty and recording of satisfaction
3. whether issue of show cause notice is mandatory for levying penalty u/s. 270A. in case this notice fails to specify URI or MRI, will it be fatal?
4. can penalty u/s. 270A be levied on an incorrect legal claim/debatable issue?
5. whether penalty u/s. 270A can be levied on agreed addition

Penalty in respect of certain income. 271AAC.



(1) The Assessing Officer may, notwithstanding anything contained in this Act other than the provisions of [section 271AAB](#), direct that, in a case where the income determined includes any income referred to in [section 68](#), section 69, [section 69A](#), [section 69B](#), [section 69C](#) or [section 69D](#) for any previous year, the assessee shall pay by way of penalty, in addition to tax payable under [section 115BBE](#), a sum computed at the rate of ten per cent of the tax payable under clause (i) of sub-section (1) of [section 115BBE](#):

Provided that no penalty shall be levied in respect of income referred to in [section 68](#), section 69, [section 69A](#), [section 69B](#), [section 69C](#) or [section 69D](#) to the extent such income has been included by the assessee in the return of income furnished under [section 139](#) and the tax in accordance with the provisions of clause (i) of sub-section (1) of [section 115BBE](#) has been paid on or before the end of the relevant previous year.

(2) No penalty under the provisions of [section 270A](#) shall be imposed upon the assessee in respect of the income referred to in sub-section (1).

(3) The provisions of [sections 274](#) and [275](#) shall, as far as may be, apply in relation to the penalty referred to in this section.]



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1. This provision is introduced from A.Y. 2017-18 and applicable in respect of income assessed by including income referred u/s 68 to 69D.
 2. The penalty is calculated with reference to tax payable u/s 115BBE(1)(i) and presently at 10 % of such tax payable.
 3. It overrides the penalty u/s 270A.
 4. It grants immunity in respect of such income included in ITR and tax paid as per 115BBE.

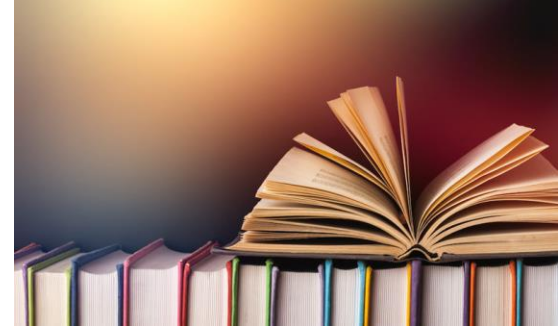


Section 271AAD.

(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.



Section 271AAD.

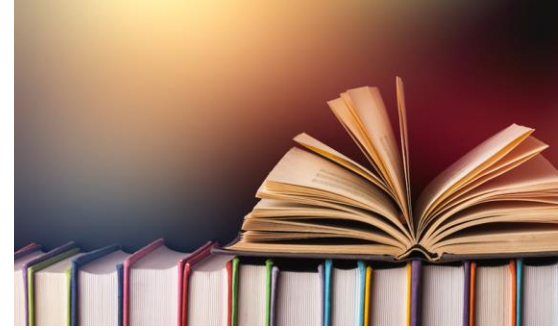
Explanation.--For the purposes of this section, "false entry" includes use or intention to use

- (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 does not exist.'



Section 271AAD.

1. ANALYSIS
2. The penalty is payable by a 'person' who may or may not be an 'assessee' under the Act. It's not a penalty in personam but a penalty in rem i.e. on all parties involved in the alleged false entry racket in the books of the assessee. To stretch it further, any other person who causes the person to make a false entry/omit the entry can also be directed to pay a penalty of a sum equal to the aggregate amount of such false or omitted entry!
3. Further, penalty can be invoked only if books of accounts are maintained by the person. (What will happen if books are rejected u/s 145 resulting in to best judgment assessment?)
4. It's an additional Tax in the guise of penalty ?. The penalty is without prejudice to any other provisions of the Act meaning thereby that the penalty under this section can be in addition to any other penalty, if any, levied or to be levied under any other provision of the Act. In other words, penalty under this section cannot be avoided on the ground that a penalty under some other provision of the Act say, section 270A(9) (which also covers penalty for recording false entry in books etc.) has already been levied on the person in respect of the same item of dispute. To further



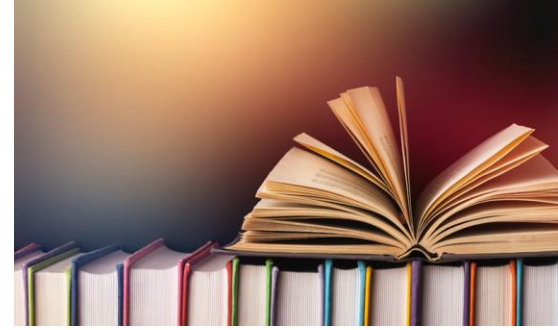
Section 271AAD.

ANALYSIS (Contd.)

5. The penalty is payable by a 'person' who may or may not be an 'assessee' under the Act. It's not a penalty in personam but a penalty in rem i.e. on all parties involved in the alleged false entry racket in the books of the assessee. To stretch it further, any other person who causes the person to make a false entry/omit the entry can also be directed to pay a penalty of a sum equal to the aggregate amount of such false or omitted entry!

6. Further, penalty can be invoked only if books of accounts are maintained by the person. (What will happen if books are rejected u/s 145 resulting in to best judgment assessment? Or he does not maintain it)

7. It's an additional Tax in the guise of penalty ?. The penalty is without prejudice to any other provisions of the Act meaning thereby that the penalty under this section can be in addition to any other penalty, if any, levied or to be levied under any other provision of the Act. In other words, penalty under this section cannot be avoided on the ground that a penalty under some other provision of the Act say, section 270A(9) (which also covers penalty for recording false entry in books etc.) has already been levied on the person in respect of the same item of dispute.



Section 271AAD.

- To further summarize, a person can be penalized twice for the same offence!! (Principle of double jeopardy as applicable in criminal proceedings does not apply to tax cases...)
- The intention should be to evade tax liability but under which law ? Income tax or GST law.?
- How to determine false entry i.e. Tax law or GST ? How AO will apply GST law or make determination as false entry under GST law? Who will have jurisdiction to levy penalty?
- During the course some invoices are found which are not used by recording in books, can the same be labeled as false invoices ? The term includes "used or intention to use", what is the meaning of intention to use, when the Ld. AO can say that there was intention to use.
- In case the AO imposes penalty u/s 270A and does not initiate penalty under this section, what will be consequences?
- What if the purchase is found to be bogus and addition made u/s 69C which will be subjected to the tax u/s 115BBE and penalty would be levied u/s 271AAC. Still penalty leviable u/s 271AAD ?

THANK YOU



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