

Penalty Under Section 270A – Underreporting and Misreporting

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Introduction to section 270A

Section 270A- Legislative Intent

- Upto AY 2016-17, section 271(1)(c) of the Act provided for levy of penalty for concealment of particulars of income or for furnishing inaccurate particulars of income. The provisions of section 271(1)(c) were subject matter of litigation between the department and the assessee.
- With a view to reduce litigation and to reduce the discretion of the tax authority, the Finance Act, 2016, with effect from 1.4.2017, substituted the provisions of section 271(1)(c) with the provisions of section 270A of the Act to bring in objectivity, certainty and clarity in the penalty provisions. Section 270A provides for a penalty for “under- reporting of income” and “misreporting of income”.
- The Finance Minister in his Budget Speech mentioned as follows:
“At present, the Income-tax Officer has discretion to levy penalty at the rate of 100% to 300% of the amount of tax sought to be evaded. I propose to modify the entire scheme of penalty by providing different categories of misdemeanour with graded penalty and thereby substantially reducing the discretionary power of the tax officers.”
- The Explanatory Memorandum to the provisions of the Finance Bill, 2016 explains the objective of inserting section 270A as follows –
“Under the existing provisions, penalty on account of concealment of particulars of income or furnishing inaccurate particulars of income is leviable under section 271(1)(c) of the Income-tax Act. In order to rationalise and bring objectivity, certainty and clarity in the penalty provisions, it is proposed that section 271 shall not apply to and in relation to any assessment for the assessment year commencing on or after the 1st day of April, 2017 and subsequent assessment years and penalty be levied under the newly inserted section 270A with effect from 1st April, 2017. The new section 270A provides for levy of penalty in cases of under-reporting and misreporting of income.”

Conditions for penalty under section 270A

Section 270A- Who can levy penalty ?

- Sub-section (1) of section 270A provides that ***the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner*** (these four authorities are hereinafter for brevity sake referred to as “the Specified Authority”) are empowered to direct payment of penalty, ***during the proceedings under this Act*** on the ***under- reported income***.
- **The Authority initiating the penalty has to levy penalty**
 - Hon’ble Karnataka High Court in CIT & Anr. Vs. Manjunath Cotton and Ginning Factory (2013) 359 ITR 565 (Kar HC)
 - Pune Tribunal in the case of Shri Ajit Ramchandra Jadhav v ACIT (2016) 178 TTJ 0204 (Pune)

Can direction be given during the course of proceedings for a assessment year to impose penalty for a different assessment year?

-No, except the cases involving intangible additions, covered in sub-section 4 and 5 of section 270A

Section 270A- Penalty on under-reporting of income

- Penalty under section 270A is on :-

**Under Reported
Income**

**Under reported income
is in consequence to
misreporting of income**

- While the penalty under section 270A of the Act is for **under-reporting of income**, the term 'under-reporting' is not defined in the Act. Dictionaries have explained the meaning of "under-report" as follows –

| Dictionary | Meaning |
|----------------------|--|
| Cambridge Dictionary | To record that you have earned less than you really have on your tax return. |
| Oxford | Fail to report (something, especially news or data) fully. |
| Free Dictionary | To report to be less or lower than is correct. |

Section 270A- Under-reporting of Income

- Sub-section (2) provides **seven situations**, in clauses **(a) to (g)**, in which a person shall be **considered to have under-reported his income**.
- We have classified the clauses in below category*

| Classification of clauses | Clause No |
|---|--------------|
| Applicable in cases where final tax liability is under General provisions | Clause a,b,c |
| Applicable in cases where final tax liability is under MAT provisions | Clause d,e,f |
| Other provision | Clause g |

**Such classification is not mentioned in the section*

Section 270A- Under-reporting of Income

Clause (a) of section 270A(2):-

- The income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143
- To illustrate :-

| Sr No | Particulars | Amount (in Rs.) |
|-------|--|-----------------|
| 1 | Income as per return filed u/s 139(1) | 10,00,000 |
| 2 | Income as per return processed u/s 143(1)(a) | 11,00,000 |
| 3 | Income as per order u/s 143(3) | 15,00,000 |
| 4 | Under reported income as per sub-section 2 (3-2) | 4,00,000 |

What is relevant is that the income assessed should be greater than the processed income.

- It may be recalled that section 143(1)(a) contains **6 different types of adjustments** which can be made while processing the return. However, legislature does intend to levy penalty on these additions under section 270A – Similar position also in earlier law [refer **Explanation 6 to 271(1)(c)**].

Section 270A- Under-reporting of Income

Clause (b) of section 270A(2):-

- The income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished [or where return has been furnished for the first time under section 148]
- **To illustrate** : Taxpayer (below age of 60) has not filed ROI

| Sr No | Particulars | Scenario-1 Amount (in Rs.) | Scenario-2 Amount (in Rs.) |
|-------|----------------------------|------------------------------------|-------------------------------|
| 1 | Returned Income | Nil | Nil |
| 2 | Income assessed u/s 143(3) | 10,00,000 | 2,00,000 |
| 3 | Under Reported Income | 10,00,000 - 2,50,000 = 7,50,000 | Nil |

The fact that the taxes due were duly paid and/ or a refund was determined to be payable to such an individual on completion of assessment, is irrelevant.

Section 270A- Under-reporting of Income

Clause (c) of section 270A(2):-

- The income reassessed is greater than the income assessed or reassessed immediately before such reassessment
- To illustrate :-

| Sr No | Particulars | Amount (in Rs.) |
|-------|--|-----------------|
| 1 | Returned Income | 10,00,000 |
| 2 | Income processed u/s 143(1)(a) | 11,00,000 |
| 3 | Income assessed u/s 143(3) <i>(no under-reporting at this stage assuming falls under the exclusion of sub-section 6)</i> | 12,50,000 |
| 4 | Income reassessed u/s 147 | 15,00,000 |
| 5 | Under-reported income (4-3) | 2,50,000 |

What is relevant is that the income reassessed is greater than the income assessed in the immediately preceding assessment.

- What happens in cases where return is processed u/s 143(1)(a) and no assessment takes places and subsequently the case is picked for reassessment ? – Whether covered under clause (a) or (c) or none?
- Rajesh Jhaveri Stock Brokers (P) Ltd 291 ITR 500 (SC) – Intimation u/s 143(1) is not order of assessment

Section 270A- Under-reporting of Income

Clause (d) of section 270A(2):-

- The amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143.

Clause (e) of section 270A(2):-

- The amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is greater than the maximum amount not chargeable to tax, where [no return of income has been furnished or where return has been furnished for the first time under section 148]

Clause (f) of section 270A(2):-

- The amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment

Clause (g) of section 270A(2):-

- The income assessed or reassessed has the effect of reducing the loss or converting such loss into income

Burden of Proof: Till this stage there is no question of any burden of proof because an **arithmetical exercise** determines whether the person shall be considered to have under-reported his income or not.

Exception/ Exclusion from the 'Under reported Income'

Section 270A- Exclusion from Under-Reported Income

- 270A (6) provides that under-reported income shall not include certain specified items
- **Clause (a) of section 270A(6) :-**
*the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the **explanation is bona fide** and the **assessee has disclosed all the material facts** to substantiate the explanation offered;*

Thus amount of `income' in respect of which the following conditions are cumulatively satisfied shall be excluded from the amount of under-reported income as computed under sub-section (3)

- (i) the assessee offers an explanation;**
- (ii) the Specified Authority is satisfied that the explanation is bonafide; and**
- (iii) the assessee has disclosed all material facts to substantiate the explanation**

“**Bonafide**” means good faith implying the absence of fraud, unfair dealing or acting, whether it consists in simulation or dissimulation - **GTO v. Rajmata Shantadevi P. Gaekwad [(2001) 76 ITD 299 (Ahd.)]**

The term `satisfied' means make up one's mind not troubled by doubt or reach a clear conclusion on the evidence before the authority.

Section 270A- Exclusion from Under-Reported Income

- The term “**material facts**” has been explained by the **Rajasthan High Court** in **Mohammed Yusuf v. Bhairon Singh Shekhawat [AIR 1995 Raj. 239]**, for the purpose of the Representation of People Act, 1951, as follows –

“Following settled position of law emerges from the decisions already referred:

... The material facts mean (a) facts necessary to formulate a complete cause of action, (b) all preliminary facts which must be proved by the party to establish a cause of action, (c) the basic facts which constitute ingredients of particular corrupt practice, (d) all the facts which are essential to clothe the petitioner with complete cause of action, (e) the facts which if established would give the petitioner the relief asked for, (f) the facts on the basis of which the Court could give a direct verdict in favour of the election petitioner in case the returned candidate did not appear to oppose the petition, (g) facts which if not proved, the petition must fail.

.....There is a difference between ‘material facts’ and ‘particulars’. The function of particulars is to present as full a picture of cause of action with such information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between ‘material facts’ and ‘particulars’, but the two are quite distinct. The distinction is one of degree. The ‘material facts’ are those which the party relies upon and which if it does not prove, he fails.”

Burden envisaged under this clause is akin & identical to the burden placed under Explanation 1(B) of section 271(1)(c) on the shoulders of the assessee

Section 270A- Exclusion from Under-Reported Income

- **Clause (b) of section 270A(6) :-**

*the amount of under-reported income determined **on the basis of an estimate**, if the **accounts are correct and complete** to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the **method employed is such that the income cannot properly be deduced therefrom**;*

Under-reported income shall not include an amount which satisfies the following conditions **cumulatively** –

- (i) **the amount of under-reported income is estimated;**
- (ii) **the accounts are correct and complete to the satisfaction of the Specified Authority;**
- (iii) **method employed may not enable proper determination of income.**

Eg :- Project completion method vs Percentage completion method, estimation of gross profits without rejection of books.

Section 270A- Exclusion from Under-Reported Income

- **Clause (c) of section 270A(6) :-**

*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;*

Under-reported income shall not include an amount which satisfies the following conditions **cumulatively –**

- (i) an assessee has estimated a lower amount of addition in respect of claim or disallowance;**
- (ii) such claim is reduced or disallowance is increased in the assessment;**
- (iii) the assessee has disclosed all the facts material to the addition or disallowance.**

Eg :- Increase in estimated personal expenditure disallowed by the Assessee, Deduction under section VI-A basis transfer price in respect of a specific domestic transaction which gets altered by the AO, Disallowance under section 14A r.w.r 8D.

- Clause (c) comes to rescue only when the Assessee himself has offered an amount to tax/disallowed a claim.
- **Interesting issue may arise as to whether “NIL” value can be considered as NIL estimate by taxpayer and any variation by authorities gets covered under clause (c).**

Section 270A- Exclusion from Under-Reported Income

- **Clause (d) of section 270A(6) :-**

*the amount of under-reported income represented by any **addition** made in conformity with the **arm's length price** determined by the Transfer Pricing Officer, 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;*

Under-reported income shall not include an amount which satisfies the following conditions **cumulatively –**

- (i) it represents an addition made to the total income returned on account of adjustment in arm's length price determined by the Transfer Pricing Officer;**
- (ii) the assessee has maintained information and documents prescribed under section 92D of the Act;**
- (iii) the assessee has declared the international transaction under Chapter X; and**
- (iv) the assessee has disclosed all the material facts relating to the transaction.**

For instance :- Where addition/adjustment has been made by the TPO due to the application of different method of transfer pricing analysis, or due to application of additional filters or rejection of filters applied by the assessee for making comparative analysis, or acceptance or rejection of comparable(s) so on etc

- Interestingly ***specified domestic transaction*** are not covered in the clause as compared to previous ***Explanation 7 to section 271(1)(c)*** – Taxpayer to defend case based on 270A(6)(a)

Section 270A- Exclusion from Under-Reported Income

- **Clause (e) of section 270A(6) :-**
Undisclosed income referred to in section 271AAB
- The under-reported income shall not include an amount of undisclosed income referred to in section 271AAB. Section 271AAB levies penalty on undisclosed income of a 'specified previous year' in a case where search has been initiated. The terms 'undisclosed income' and 'specified previous year' are defined in an Explanation to section 271AAB
- Even section 271AAB(2) states that no penalty is to be levied u/s 270A/ 271(1)(c) on the undisclosed income due to search
- 270A(8) states that notwithstanding exclusions of section 270(6), in case of misreporting, penalty will be levied at 200% of the under reported income. However, the undisclosed income referred to in section 271AAB needs to be excluded since the non-obstante clause in 270A(8) does not override section 271AAB(2). Therefore, by virtue of section 271AAB(2), even an assessee covered by sub-section (8) will not be adversely affected – **If AO initiates levy u/s 270A(8), then it will be incorrect levy.**

Burden of proof : Initial burden on proof will be on the assessee to establish that, in the facts of his case, an item of under-reported is covered by one of the five clauses mentioned in 270(6). The Burden of proof will shift to the Department once this initial burden is discharged

Section 270A- Issues for consideration

271AAC

- The Taxation Laws (Second Amendment) Act, 2016 introduced section 271AAC providing for levy of penalty in a case where total income determined includes any income referred to in sections 68, 69, 69A, 69B, 69C and 69D.
- Sub-section (2) of section 271AAC (*similar to sub-section (2) of 271AAB*) provides that penalty under section 270A shall not be imposed upon the assessee in respect of income referred to in sections 68, 69, 69A, 69B, 69C and 69D – **However, 270A(6)(e) does not cover section 271AAC**

Reasonable Cause

- Section 273B provides for non-levy of penalty in situation where assessee proves **reasonable cause**
- Upon introduction of section 270A, there is no consequential amendment carried out to provisions of section 273B to include section 270A in the list of sections.
- Does the above indicate that penalty under section 270A is imposable even though the assessee has reasonable cause for the failure?
 - Will only circumstances as specified u/s 270A(6) be outside the purview of penalty levy?

Intangible additions of earlier years

Section 270A(4) and (5)- Intangible Additions

- **Sub-section (4) and (5) of section 270A** deals with the penalty on intangible additions -- similar to **Explanation 2 to section 271**.
- Sub-sections (4) and (5) are triggered when a receipt, deposit or investment is found in current AY and the source of the same explained by the assessee to be an addition made in an earlier year and in respect of that addition no penalty was levied in an earlier year.

Eg:- Addition made on presumptive rate of gross profit or yield but no penalty was levied for want of adequate evidence.

- Sub-sections (4) and (5) are **exception to the rule** that the penalty under section 270A can be initiated in the course of any proceedings for the AY for which the penalty is to be levied.
- However, the provisions of sub-section (4) are **subject to the provisions of sub-section (6)** ie where the income is considered for exclusion u/s 270A(6), then the same will not be liable for penalty u/s 270(4)/(5)

Section 270A(4) and (5)- Intangible Additions

- **Illustration –**

If in the assessment of AY 2021-22 source of receipt of Rs. 20 lakh is explained by the assessee to be additions made in earlier years and in respect of these additions, penalty was not levied in earlier years.

Then whether the additions of earlier years to the extent of Rs. 20 lakh will be deemed to be under-reported income of earlier years or current year?.

To decide as to which year's under-reported income it will be, one has to go **backwards**.

Therefore, the amount deemed to be under-reported income for each of the assessment year will be say
AY 2020-21- 5 lakhs; AY 2019-20 :- 10 lakhs; AY 2018-19 :- 5 lakh
(assuming such amounts were added to income of earlier year without levying penalty on the same)

Issues for considerations :-

- Whether such penalty can be initiated/levied **after the expiry of limitation period prescribed under section 275?**
- **Whether such penalty can be initiated** even when there is no provision in section 270A on the lines of the provision contained in sub section 271(1A)?

Section 271(1A) : *Where any penalty is imposable by virtue of Explanation 2 to sub-section (1), proceedings for the imposition of such penalty may be initiated notwithstanding that any proceedings under this Act in the course of which such penalty proceedings could have been initiated under sub-section (1) have been completed.*

‘Misreporting of Income’

Section 270A(8)/(9)- Penalty on under-reporting in consequence of misreporting of income

- Sub-section (8) provides for levy of **penalty @ 200%** of the amount of tax payable on under-reported income **if the under-reported income is in consequence of any misreporting** thereof by any person.
- Sub-section (9) does not define the term 'misreporting' but only lists down **six cases** of misreporting for the purposes of sub-section (8).
- Misreporting implies **wrong reporting** i.e. it would mean a deliberate action with a view to reduce the total income liable to tax and therefore, reduce the liability to pay tax.
- Sub-section (9) provides **six situations**, in clauses **(a) to (f)**, in which a person shall be **considered to have under-reported his income in consequence of misreporting of income.**

Section 270A(9)- Penalty on under-reporting in consequence of misreporting of income

- **Clause (a) of section 270A(9) :-**
 - **Misrepresentation or suppression of facts**
 - **'Misrepresentation of facts'** as per its natural meaning would cover within its ambit, the cases where facts were something else but have been presented differently, thus leading to 'misreporting of income'. **For example**, income of a minor child which was to be included in the total income of the parent under section 64 was not so included and shown to have been earned by the child as if the child was major.
 - **'Suppression of facts'** would cover such cases where facts itself have been withheld, thus leading to 'misreporting of income'. **For example**, factum of some income though earned but was withheld from offering to tax.
 - If we closely examine 'Misrepresentation' and 'Suppression', we would end up in reaching the old concepts of 'furnishing inaccurately' & 'concealment' of particulars of income.
'Suppression' = 'concealment' whereas **'misrepresentation' = 'furnishing inaccurately'**.
 - In fact, if we examine further, we would find that all the clauses covered by (b) to (f) of 270A(9) may be covered under the clause (a) as every other clause would be a case of either misrepresentation of facts or of suppression of facts.

Section 270A(9)- Penalty on under-reporting in consequence of misreporting of income

- Further, it may be noted that all the 'misrepresentation' or 'suppression' of facts may not lead to addition of income or disallowance of a claim i.e. **in the absence of such addition or disallowance made in the assessment order, there would not be 'under reported income' and hence, there would be no question of penalty under section 270A.**
- For example,



- Such transaction & its real nature when exposed in the assessment would obviously **not lead to the addition of income in the hands of the company as the deemed dividend can be taxed in the hands of the shareholder.** The fact of the matter is that there would be no addition in the hands of the company on this score. **Accordingly, no difference between the assessed income and processed income and thus, there would be no 'under reported income' and there would be no penalty on the company under section 270A despite of misrepresentation of fact.**

Section 270A(9)- Penalty on under-reporting in consequence of misreporting of income

- **Clause (b) of section 270A(9) :-**

- **Failure to record investments in the books of account**

- For applicability of this clause, an assessee should be **required to maintain books of accounts and should have failed to record investments in the books of account** i.e. there is a deliberate attempt on the part of the assessee not to record investments in the books of account.

- But,



- Section 271AAC specifically mentions that penalty under section 270A shall not be imposed where penalty under section 271AAC is imposed. **Therefore, there may be a case of 'misreporting' of such income resulting into 'under reported income' yet it is outside the scope of penalty under section 270A.**
- In fact, this anomaly seems to have crept in the statute due to the reason that penalty provision of **section 270A was brought into effect by the Finance Act, 2016 whereas section 271AAC was brought subsequently by the Taxation Laws (Second Amendment) Act, 2016 and legislature seems to have glossed over this 'lapse' resulted subsequently in section 270A(9)(b).** Therefore, when there is no such penalty that can be levied for such a situation as mentioned under section 270A(9)(b), **there is no justification for continuing to retain clause (b) under subsection (9) of section 270A.**

Section 270A(9)- Penalty on under-reporting in consequence of misreporting of income

- **Clause (c) of section 270A(9) :-**

- **Claim of expenditure not substantiated by any evidence**
- It appears that this clause will cover expenditure in respect of which the assessee has **no** evidence whatsoever to substantiate the incurrence of expenditure. In other words, it appears that bogus or false expenditure is sought to be covered by this clause.
- In view of the use of the word '**any**' **before evidence**, it appears that this clause may not cover expenditure for which there is no direct evidence but circumstantial or indirect evidence of incurrence of expenditure is available.
- Further, there may be situation wherein disallowance of an expenditure does not lead to the 'under reported income', accordingly would not result into penalty.
For example, any **disallowance of expense on account of non-substantiation in case of 100% tax-exempt units** would go on to swell the business profits of that unit, thus resulting into no addition to the returned income. Since there would not be 'under reported income' in such a situation, there would be no case of penalty under section 270A.

- **Clause (d) of section 270A(9) :-**

- **Recording of any false entry in the books of account**
- This clause envisages that the **assessee is maintaining books of account** and has **recorded a false entry** in the books of account.

Section 270A(9)- Penalty on under-reporting in consequence of misreporting of income

- However, if a person has entered '**false entries**' of **purchase and sales of equal amounts** to show better financial position, then also despite such 'false entries' recorded in the books of accounts, such person may escape the levy of penalty under section 270A in the absence of any addition made.
- Section 271AAD levies penalty for making false entry/ omission of entry required relevant for computation of total income, to evade tax. **Accordingly, penalty in such cases to be levied under section 270A or 271AAD?**
- Also, there may be situations where '**false entries**' in the books of accounts may lead to the **addition to be made under section 68, 69, etc.** Such additions to the income may only be taxed under section 115BBE and accordingly, separate penalty under section 271AAC shall apply ruling out the applicability section 270A in view of clear stipulation to this effect in section 271AAC.
- **Clause (e) of section 270A(9) :-**
 - **Failure to record any receipt in the books of account having a bearing on total income**
 - This clause envisages that the **assessee is maintaining books of account** and **has failed to record any receipt** in the books of account which has a bearing on total income.

- **For example,**

| Situation | Impact |
|--|--|
| Non-recording of a loan or a gift from a relative (which is not taxable) | As the receipt is not taxable, hence, the same would not have a bearing on total income and accordingly, no penalty u/s 270A |
| Non-recording of a receipt of fee by a professional | As this receipt would have bearing on total income and accordingly penalty u/s 270A shall apply |

Section 270A(9)- Penalty on under-reporting in consequence of misreporting of income

- **Clause (f) of section 270A(9) :-**
 - failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.
 - If the under-reported income is on account of
 - (i) failure to report any **international transaction**; or
 - (ii) failure to report any transaction **deemed to be an international transaction**; or
 - (iii) failure to report any **specified domestic transaction**.
- AND**
- Chapter X applies to such transactions, then such under-reported income would be regarded as having arisen on account of misreporting.
 - A perusal of the above mentioned clauses reveals that each of the said clauses involves a deliberate attempt and conscious effort on part of the assessee as a result of which there is under-reporting.

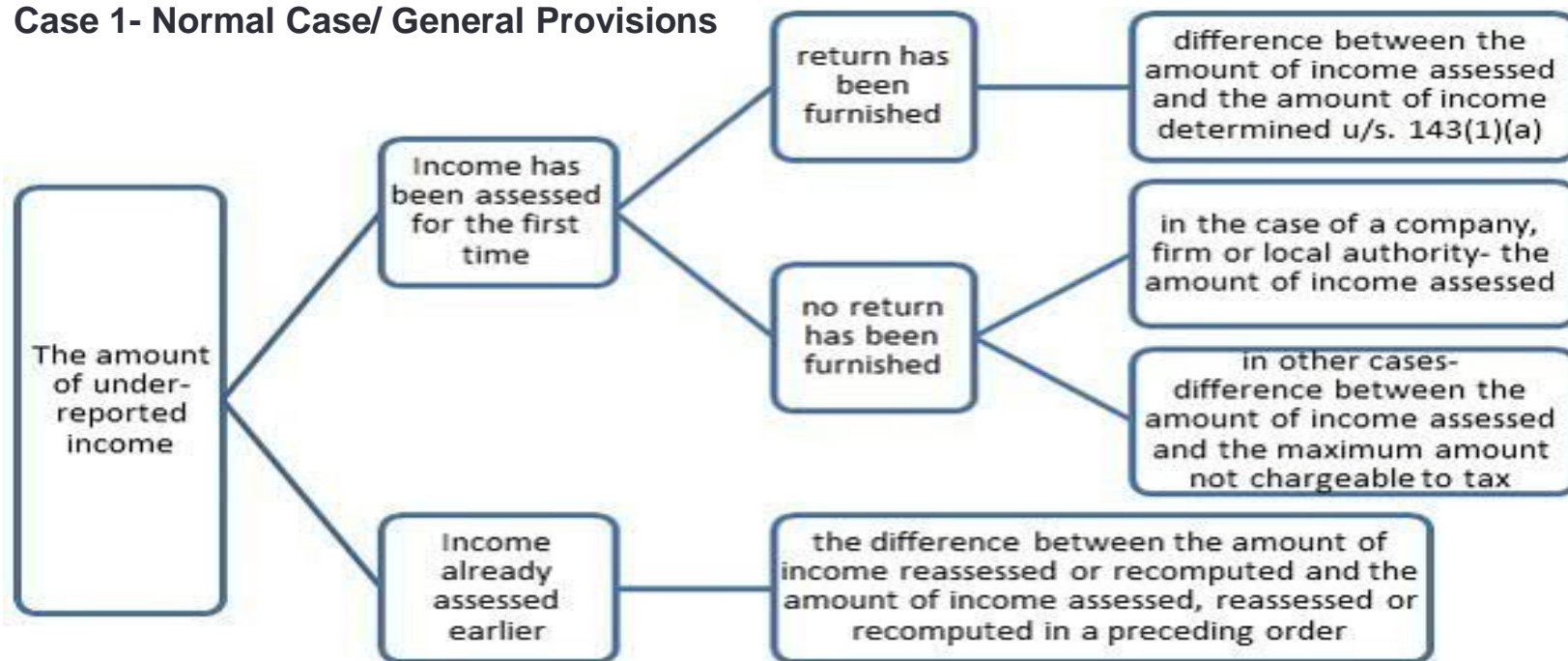
Burden of proof: The initial burden of proof will be on the Specified Authority to establish that the case of the assessee is covered by one of the six clauses of 270A(9) and hence, penalty of 200% is leviable. This burden of proof will shift on the assessee once the initial burden is discharged.

Computation of under-reported income

Section 270A(3) - Computation of under-reported income

- The penalty under section 270A is for under-reporting income. Penalty is @ 50% of the amount of tax payable on under-reported income. Therefore, the first step is to **ascertain if a person has to be considered as having under-reported his income** and if yes, the next step is to **compute the amount of under-reported income**.
- Sub-section (3) of section 270A deals with computation of the amount of under-reported income. Various situations dealt with by sub-section (3) and the amount of under-reported income in each of the situations can be computed as under –

- **Case 1- Normal Case/ General Provisions**



Section 270A(3) - Computation of under-reported income

- **Case 2- Where under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB/ 115JC [First proviso to section 270A(3)]**
- Total under-reported income = (A-B) + (C-D)

| A-B | | C - D |
|--|---|--|
| A = total income assessed as per general provisions of the Act | + | C = total income assessed as per the provisions contained in section 115JB or section 115JC |
| B = total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of under-reported income | | D = total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of under-reported income |

- If the amount of under-reported income on any issue is considered both under the general provisions and under MAT, such amount **shall not be reduced from total income assessed while determining the amount under item D**
- Further, explanation to sub- section (3) states that, in case where the assessment and re-assessment has the effect of reducing loss **declared in the return/** converting that loss into income, **Under reported income = Income/ loss assessed or reassessed (-) loss claimed**
- **The above formula of (A-B) + (C-D) is also similar to section 271 of the Act. However as per section 271 where MAT provisions are not applicable (C-D) is to be ignored. Section 270A is differently worded but give similar results.**

Section 270A(3) - Computation of under-reported income

- Where no return of income is furnished, in case of a company, the income assessed is to be regarded as under-reported income.
- Where a **foreign company**, from **whose income tax is deducted at source, may not have filed its return of income** as entire tax due from it is paid by way of TDS. In such a case, if an assessment is made, the entire total income will be regarded as under-reported income eligible to penalty, subject of course to exclusions mentioned in sub-section (6).
- For eg As per section 115A(5) [wef1 April 2020], the non resident (not being a company) and a foreign company, will not be required to file return of income where the income such as FTS, royalty, etc as per section 115A(1) and corresponding tax is deducted as per section 115A(1). In such cases, whether non filing of return will be considered as outside the purview of section 270A [since this is not a case where return is filed nor is a case where return is not filed – since assessee was not required to file the return of income] and hence, section 270A is not applicable since it falls outside the purview of section 270A(3)?

Computation of tax payable on under-reported income

Section 270A(10) - Computation of tax payable on under reported income

| Situation | Quantum of tax payable in respect of the under-reported income |
|--|--|
| No return filed or furnished for first time u/s 148 & income assessed for the first time | Quantum of tax = Tax payable on (under reported income + maximum amount not chargeable to tax) as if it were the total income |
| Total income as per intimation/ or assessed, reassessed or recomputed in a preceding order is a loss | Quantum of tax = Tax payable on under reported income, as if it were the total income |
| All other cases | X - Y where, X = amount of tax payable on (under-reported income + total income determined u/s 143(1)(a) / assessed income / reassessed income / recomputed income as if it were total income) Y = amount of tax payable on total income determined under section 143(1)(a) / total income assessed, reassessed or recomputed in a preceding order |

- While computing amount of tax payable on under-reported income, credit for prepaid taxes is not available.
- In the case of an assessee is an individual or an HUF whose **total income is a loss** and the amount of **under-reported income is less than the maximum amount not chargeable to tax**, tax payable on under-reported income will be Nil and consequently the amount of penalty will also be **Nil**.
- **Whether the rebate under section 87A will be available while computing the amount of tax payable on under-reported income?**

Illustrative examples of 270A(3) and 270A(10)

Illustrative examples of 270A(3) and 270A(10)

1. Addition made under normal provisions and MAT (addition on two separate issues in same year)

| Particulars | Normal Provision | MAT |
|---|------------------|-----|
| Income determined under section 143(1)(a) - (B) | 60 | 30 |
| Assessed Income - (A) | 75 | 150 |
| Under reported income (A-B) | 15 | 120 |

**As per proviso to section 270A(3) : Under reported income = (A-B) + (C-D) = 15+120
= 135**

As per 270A(10)(c): Penalty would be computed as under

| Particulars | Amount (Rs.) |
|---|--------------|
| Under reported income | 135 |
| Amount of tax for computing penalty: <ul style="list-style-type: none">• Addition under normal provision : $(75-60) * 30\% = 4.5$• Addition under MAT: $(150-30) * 18.5\% = \sim 22$ | 26.5 |
| Penalty leviable (50% of 26.5) | 13.25 |

Illustrative examples of 270A(3) and 270A(10)

2. Addition made under normal provisions and MAT (addition on same issues in same year)

| Particulars | | Normal Provision | MAT |
|---|--------------------------------------|------------------|-----|
| Income determined under section 143(1)(a) | | 100 | 200 |
| Assessed Income | | 150 | 280 |
| Total addition: | | 50 | 80 |
| (a) | Addition under both | 30 | 30 |
| (b) | Addition only under normal provision | 20 | - |
| (c) | Addition only under MAT | - | 50 |

As per the first proviso under section 270A(3) :

A=150, B=100, C= 280, D=230 (280-50)

$$\text{Under reported income} = (A-B) + (C-D) = (150-100) + (280-230) = 100$$

Illustrative examples of 270A(3) and 270A(10)

As per 270A(10)(c): Penalty would be computed as under-

| Particulars | Amount (Rs.) |
|--|--------------|
| Under reported income | 100 |
| Amount of tax for computing penalty: <ul style="list-style-type: none">• Addition under normal provision : $(150-100)*30\% = 15$• Addition under MAT: $(280-230) * 18.5\% = \sim 9$ | 24 |
| Penalty leviable (50% of 24) | 12 |

Though the cumulative addition under normal provision and MAT is Rs. 130, the under-reported income computed is Rs. 100, since addition of Rs. 30 was made under both mechanism as per second proviso to section 270A(3).

3. Reduction in finally assessed income under normal provisions (fresh claim admitted during assessment stage) and addition under MAT

| Particulars | Normal Provision | MAT |
|---|------------------|-----|
| Income determined under section 143(1)(a) | 60 | 80 |
| Assessed Income | 40 | 100 |
| Total addition | (20) | 20 |

Under reported income = $[(40-60) + (100-80)] = (20)+20 = \text{NIL}$

Illustrative examples of 270A(3) and 270A(10)

4. In case when assessment results in reducing loss or converting such loss into income in case of a resident company

| Particulars | Amount (Rs.) |
|---|--------------|
| Returned total income (Loss) | (-)100 |
| Income determined under section 143(1)(a) | (-) 90 |
| Income determined under section 143(3) | (-) 40 |
| Income reassessed under section 147 | 20 |

Computation of under reported income and penalty:

| Particulars | Assessment u/s 143(3) | Re-assessment u/s 147 |
|-------------------------------------|-----------------------|-----------------------|
| Under reported income | $(-40) - (-90) = 50$ | $20 - (-40) = 60$ |
| Amount of tax for computing penalty | 30% of 50 = 15 | 30% of 60 = 18 |
| Penalty leviable | 50% of 15 = 7.5 | 50% of 18 = 9 |

Mandatory vs Discretionary

Section 270A- Mandatory vs Discretionary

- Specified Authority's' power can be exercised when a person under-reports income. On a reading of the provisions of section 270A, at first blush, it appears that the power to direct payment of penalty under section 270A is mandatory and not discretionary. The objects for which the section has been introduced also suggest that the levy of penalty is mandatory and not discretionary.
- However, for the following reasons it appears that the power to direct payment of penalty under section 270A is discretionary and not mandatory –

(i) **Section 270A(1)** reads as under –

“The Assessing Officer or the Commissioner (Appeals) or .. **may**, during the course of any proceedings under this Act, **direct** that **shall be liable to pay** a penalty- ” (emphasis supplied)

Section 271(1) of the Act also provides that –

“the AO or **may direct** that such a person **shall pay** by way of penalty, -”
(emphasis supplied))

It is a settled position that the levy of penalty under section 271 is discretionary and not mandatory. As is evident, the language of the two provisions granting power to direct payment of penalty is similar. Therefore, it may be contended that the ratio of the decisions holding that the levy of penalty under section 271 is discretionary will hold good even for the purposes of section 270A;

Section 270A- Mandatory vs Discretionary

- (ii) **The Apex Court, in Mansukhlal v. CIT [(1969) 73 ITR 546 (SC)]** held that penalty need not be imposed when there is a minor breach of law and having regard to the facts, ends of justice require that the assessee need not be penalized;
- (iii) **The Apex Court, in Hindustan Steel Ltd. v. State of Orissa [(1972) 83 ITR 26 (SC)]**, held that penalty cannot be levied for a mere technical / venial breach;
- (iv) Section 158BFA(2) which provides for levy of penalty on undisclosed income in search cases. Sub-section (2) provides that, *“the AO or CIT(A) may direct that a person shall pay ...”*. The Chennai Bench of the Tribunal, in **Ch. Suresh Reddy v. ACIT [(2009) 120 ITD 428 (Chennai)]**, interpreted the words ‘**may direct**’ in **section 158BFA(2) to indicate that the discretion is available** with the Assessing Officer and the CIT(A);
- (v) The use of the word “may” imports a discretion and “shall” an obligation – **P C Puri v. CIT [(1985) 151 ITR 584 (Delhi)]**;
- (vi) When the Legislature has used “shall” and “may” in the same section, they cannot be loosely construed so as to carry the same meaning – **Taraben Ramanlal Modi v. Jashbhai Shanker Bhai Bin Talsibhai, [AIR 1980 Guj. 126 at p. 135 (FB)]**;
- (vii) **The discretion is evident in section 270A(6)(a);**

Section 270A- Mandatory vs Discretionary

(viii) Section 274 of the Act requires issue of **show cause notice and an opportunity of being heard** has been granted to the assessee. Certainly, the requirements of issue of notice and providing an opportunity to show cause cannot be empty formalities;

(ix) Levy of penalty in **excess of Rs 10,000 by ITO/ Rs. 20,000 by ACIT/DCIT** requires approval of Joint commissioner.

- While the arguments mentioned above can be canvassed to support the proposition that the levy of penalty under section 270A is discretionary and not mandatory.
- However, the counter arguments could be that the provisions have been made objective by:
 - laying down situations in which a **person shall be considered to have under-reported** his income,
 - **situations / items of income which are to be excluded while computing under-reported income** are provided in sub-section (6) and the exclusions are exhaustive,
 - opportunity for show cause is provided **to ensure that the assessee has an opportunity to contend that his case falls within the exclusions of sub-section (6)** or that his under-reported income is **not as a consequence of misreporting**.
- While one will have to wait for the decisions of the courts, it appears that considering the penal nature of the provisions, courts may hold that the provisions are discretionary and not mandatory.

Miscellaneous

Section 270A- Show Cause Notice

- The provisions of section 274 are made applicable to section 270A. Therefore, before levying penalty under section 270A, the **Specified Authority is required to issue a notice to the assessee in the course of any proceedings under the Act.**
- The show cause notice should **clearly state the nature of allegation** against the assessee viz. **whether the penalty proceedings are being initiated for levying penalty for having under-reported the income or misreporting of income.**

Whether the specific sub-clause of sub-section (9) which is sought to be invoked by the Specified Authority should be mentioned in the notice / order initiating penalty or it would suffice if the order initiating penalty / notice issued under section 274 merely states that the penalty is proposed to be levied for under-reporting of income in consequence of misreporting thereof

- The **Karnataka High Court in Manjunatha Cotton & Ginning Factory [359 ITR 565 (Kar.)]**, observed that the levy of penalty has to be clear as to the limb under which it is being levied. As per the High Court, where the **Assessing Officer proposed to invoke first limb being concealment, then the notice has to be appropriately marked.** The High Court held that the standard proforma of notice under section 274 of the Act without striking of the irrelevant clauses would lead to an inference of non-application of mind by the Assessing Officer.
- The Apex Court in **M/s SSA's Emerald Meadows, [(2016) 73 taxmann.com 248 (SC)]** dismissed the Special Leave Petition filed by the Revenue against the judgment rendered by the High Court of Karnataka whereby the High Court did not admit substantial question of law against the order of the Tribunal directing **deletion of penalty for not specifying the limb in the notice.**

Section 270A- Appeal against Penalty

Appeal against penalty under section 270A

- Consequent to introduction of section 270A levying penalty, an amendment has been carried out to the provisions of section 253(1)(a) and also to section 253(1)(c) providing for filing an appeal to the Tribunal against an order passed by Commissioner (Appeals)/ Principal Commissioner or Commissioner under section 270A.
- However, **no amendment** has been effected to the provisions of **section 246A**. So, at first blush, it appears that there is no appeal against an order under section 270A to the Commissioner (Appeals). **However, clause (q) of section 246A (1) provides for an appeal against an order levying penalty under Chapter XXI.** Section 270A is a section in Chapter XXI and therefore, an appeal does lie to the Commissioner (Appeals) against order under section 270A passed by the Assessing Officer.
- **Pune Tribunal** in case of **The Nasik Road Deolali Vyapari vs Director of Income Tax (ITA No. 827/PUN/2010)** in context of penalty u/s 271FA under similar circumstances has held that penalty order falling under chapter XXI shall be appealable before CIT(A) as per provisions of Section 246A(1)(q) of the Act.

Introduction to section 270AA

Background

- Section 270A provides for levy of penalty in case of under-reporting of income by an assessee. The provisions of section **270A have been introduced with an objective of reducing litigation and to provide objectivity and clarity in the provisions levying penalty.**
- Section 276C has also been amended w.e.f. 1.4.2017 to provide that a person who under-reports his income and the **amount of tax on under-reported income exceeds rupees twenty five lakh**, shall be **punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine** [Section 276C(1)(i)].
- **Making harsh provisions** for penalty and prosecution will **possibly increase litigation if the sections are not administered well** on the field. Probably, with the **objective of reducing litigation and to recover taxes along with interest, the legislature has, in its wisdom, thought it fit to introduce provisions of section 270AA granting power to the Assessing Officer** to grant immunity from penalty u/s 270A and from initiation of prosecution u/s 276C or section 276CC. If prosecution is stopped from initiation, there would no question of launching prosecution which is step II.
- Section 270AA captioned **`Immunity from imposition of penalty, etc'** having 6 sub-sections contained in Chapter XXI of the Act inserted by Finance Act, 2016 w.e.f. 1.4.2017 i.e. AY 2017-18.
- Assessee can avail immunity from penalty subject to fulfilment of conditions therein u/s **270AA in addition to provision to section 273A**. While immunity u/s **270AA is restricted to cases of under-reporting of income and waiver u/s 273A can also be in relation to misreporting of income.**
- **Immunity u/s 270AA is restricted to cases of penalty u/s 270A only.**

Section 270AA- Immunity from Penalty

Immunity from levy of penalty – 270AA

- Section 270AA provides that an assessee may make an application to the Assessing Officer for grant of immunity from imposition of penalty under section 270A/ initiation of penalty under section 276C/276CC if the following conditions are satisfied
 - (a) the tax and interest payable as per the order of assessment or reassessment u/s 143(3) or 147, as the case may be, has been paid within the period specified in such notice of demand; and
 - (b) no appeal against the order referred to in clause (a) has been filed.
- Such application shall be made within a period of one month from the end of the month in which the order of assessment or reassessment is received.
- The AO shall, subject to fulfilment of the conditions mentioned above and after the expiry of the period of filing the appeal, grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C/ 276CC provided the penalty initiated is not on account of misreporting
- The AO shall, within a period of one month from the end of the month in which the application is received, pass an order accepting or rejecting such application after giving an opportunity of being heard
- The order so passed by the AO shall be final and no appeal under section 246A or an application for revision under section 264 shall be admissible against the order of assessment or reassessment, in a case where an immunity order has been passed accepting the application.

CBDT vide Circular no 5/2018 dated 16 August 2018 has clarified that where an assessee makes an application seeking immunity u/s 270AA of the Act, it shall not preclude such assessee from contesting the same issue in any earlier AY u/s 271(1)(c) and department shall not taken an adverse view u/s 271(1)(c) on the sole ground that assessee has accepted the issue in later AY by asking for immunity u/s 270AA.

Section 270AA

- **Application to whom to be made and for what?**
 - An assessee may make an application –
 - i. To the **Assessing officer**;
 - ii. For grant of immunity from
 - imposition of penalty under section **270A** and
 - initiation of proceedings under section **276C** or section **276CC** [Section 270AA(1)].
- **Who can grant immunity?**
 - The section confers power of granting immunity **only on the Assessing Officer**.
 - While the penalty u/s 270A may be **levied** by either
 - the Assessing Officer or;
 - the Commissioner (Appeals) or;
 - the Principal Commissioner or Commissioner,

No rationale is provided as to why higher authority has not been given power to grant immunity when they are empowered to levy penalty u/s 270A. It seems in cases where penalty has been initiated / levied by the CIT(A) or PCIT or Commissioner, an assessee will not be able to make an application under this section.

Section 270AA(1) – Conditions to be satisfied

- **The application may be made if the assessee satisfies both the following conditions:**
 - (a) the **tax and interest payable** as per the order of assessment or reassessment u/s **143(3)** or **section 147**, as the case may be, has been **paid within the period specified in such notice of demand**; and
 - (b) **no appeal** has been filed against the order of assessment or reassessment under section 143(3) or under section 147 [Section 270AA(1)].
- **Condition (a) in section 270AA(1)**
- ***The order of assessment or reassessment under section 143(3) or section 147'***
 - Section 270A(1) provides that the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner may, during the course of **any proceedings** under this Act, direct that any **person who has under-reported his income shall be liable to pay a penalty** on under-reported income.
 - Therefore, the Commissioner (Appeals) may in the course of appellate proceedings enhance the income assessed by the Assessing Officer and may also levy penalty u/s 270A. **However, when it comes to grant of immunity u/s 270AA, condition (a) in section 270AA(1) makes a mention of only an order of assessment or reassessment under section 143(3) or section 147. Accordingly, no immunity shall be available in such case.**

Section 270AA(1) – Conditions to be satisfied

Excess/ short demand in the assessment order

- In a case, where the amount of tax and interest payable has **been excessively stated** in the assessment order which is arisen **due to non-grant of TDS** or other taxes. In such case whether **pending rectification** before AO, whether taxpayer is liable to pay such excess demand to fulfil condition(a)?

While section does not address this issue, following action may be explored:

1. Taxpayer should possibly **get the rectification done** before the date of filing of application.
 2. If not possible, may **pay the excess amount specified in order and later ask for the refund** so as to avoid litigation.
 3. Lastly an option to **pay correct demand** may also be considered assuming later, the AO shall rectify the demand but **the risk of litigation** exist there.
- In a case where demand of tax and interest has been **under stated** in the order and Assessee pays the amount as per the order and makes **application for grant of immunity which is allowed u/s 270AA(4)**. Subsequently, AO realizes this and passed order u/s 154 of the Act **withdrawing immunity so granted. Is the action of AO justified in law?**

Such withdrawal may **not be justified** and feasible as department **cannot take the benefit of their own mistake. Right course of action maybe to ask assessee to pay the additional demand.**

Section 270AA(1) – Conditions to be satisfied

- **Condition (b) in section 270AA(1)**
 - The second condition which needs to be satisfied with is that **no appeal** has been filed against the order u/s 143(3) or an order of reassessment u/s 147 of the Act. **The restriction is on filing an appeal. There is no restriction on the assessee filing an application for revision u/s 264 of the Act.**
 - However, **sub-section (6)** states that **once an order has been passed under section 270AA(4)** granting immunity then, **revision shall not be admissible** against the order of assessment or reassessment referred to in clause (a) of section 270AA(1).
 - **Can an assessee apply for revision and thereafter, make an application under section 270AA(1) and contend that he satisfies the conditions stated in the section 270AA?**

There is a **difference between filing an application for revision u/s 264 and admissibility of the same.**

Accordingly, even if application is filed, as per section 270AA(6), it shall not be admissible. **However, no such corresponding amendment is made in the provision of section 264 debarring assessee from filing revision application while he has applied for immunity u/s 270AA**

Section 270AA(2) – Time limit for making the application

- **Time within which the application is to be made**
 - The application has to be made **within a period of one month from the end of the month in which the order of assessment or reassessment u/s 143(3) or u/s 147, as the case may be, has been received** [Section 270AA(2)].
 - Further, Finance Act 2016, w.e.f 1 April 2017 added second proviso to sub-section (2) of section 249 which state that **where an application has been made** under sub-section (1) of section 270AA, **the period beginning from the date on which the application is made, to the date on which the order rejecting the application is served on the assessee, shall be excluded.** Accordingly, if the Assessing officer rejects the application u/s 270AA, the taxpayer shall have the option to file an appeal before CIT(A). However, if the application is accepted and the immunity is granted, no appeal shall be admissible as per section 270AA(6).
- **Form in which the application is to be made and verification of the Form [Rule 129 r.w.s. 270AA(2)]**
 - Rule 129 has prescribed **Form No. 68** for the purpose of making an application for grant of immunity from imposition of penalty and initiation of proceedings for prosecution.
 - Form 68, as has been prescribed, does not require any significant details to be filled in. The application form has to **be signed by a person who can and may be authorized** to verify such application in terms of the provisions of law or other requirements as may be applicable.

Section 270AA(3) and (4) – Duty of Assessing Officer on receipt of the application

- The Assessing Officer shall, **after expiry of the period for filing an appeal** to the Commissioner (Appeals), grant immunity from imposition of penalty under section 270A and from initiation of proceedings for prosecution provided –
 - i. the **two conditions mentioned in sub-section (1) are satisfied** by the assessee i.e. the assessee has paid tax along with interest as per the order of assessment or reassessment under section 143(3) or section 147 within the time specified in the notice of demand and has not filed an appeal against the order under section 143(3) or under section 147; and
 - ii. the **penalty proceedings under section 270A are not for under-reporting as a consequence of misreporting of income [Section 270AA(3)]**.
- **Within a period of one month from the end of the month in which application is received by the Assessing Officer, he shall pass an order accepting or rejecting such application. However, before passing an order rejecting the application, the assessee shall be given an opportunity of being heard [Sub-section (4)]**.

Illustration

| Order u/s 143(3) /147 passed on | Order received on | Time limit for filing of appeal expire on | Date of filing form 68 (last date of filing form 68) | Order accepting/ rejecting application to be passed by |
|---------------------------------|-------------------|---|--|--|
| 31 December 2020 | 2 January 2021 | 31 January 2021 * | 28 February 2021 ** | 31 March 2021 *** |

* As per section 249(2) – Date of filing of appeal expires within 30 days from the date of service of notice of demand i.e. 30 days from 2 January 2021 = **31 January 2021**

As per section 270AA(2) – Application to be made within 1 month from end of month in which order of assessment is received i.e. 31 January 2021+ 1 month = **28 February 2021

*** As per section 270AA(4) – Order accepting / rejecting the application to be passed within a period of one month from the end of the month in which application is received by the Assessing officer i.e. 28 February 2021 + 1 month = **31 March 2021**

On **rejection of the application** by the Assessing Officer, the assessee if wishes to file an appeal before CIT(A), the **delay would be from 31 January 2021 to 31 March 2021** out of which delay from 28 February 2021 to 31 March 2021 would be excluded [**Second proviso to section 249(2)**]. **However, for the period prior to that i.e. 31 January 2021 to 28 February 2021 is required to be condoned.**

Further, as per the decision of Ahmedabad ITAT in case of **Alkaben B. Patel [2014] 31 ITR(T) 231** states that the word ‘**month**’ **should not be considered as 30 days**. This will be relevant only where month is not equal to 30 days i.e. either 28 days or 31 days.

Section 270AA(5) and (6) – Finality of order passed under sub-section (4) of section 270AA

- The order passed under sub-section (4) accepting the application or rejecting such application shall be final.
- In other words, no appeal to the Commissioner (Appeals) or revision to the Commissioner shall lie against such an order even if the order is rejecting the application made by the assessee.
However, a writ petition may lie against such an order.
- In the event that an order is passed under sub-section (4) accepting the application made by the assessee, no appeal to the Commissioner (Appeals) or revision to the Commissioner under section 264 shall lie against an order of assessment under section 143(3) or of reassessment under section 147 [Section 270AA(6)].

Section 273A- Waiver from Penalty

Waiver of penalty – 273A

- Consequent to introduction of section 270A, the Finance Act, 2016 has amended the provisions of section 273A to incorporate reference to penalty levied under section 270A.
- The PCIT/CIT may waive or reduce the penalty subject to certain conditions
- Application for waiver of penalty shall now be **disposed within a period of 12 months** from the end of the month in which the application was received by the PCIT/ CIT

Some observations

- **No restriction on taxpayer for number of times that it may avail benefit.**
 - In the nature of the thing, **immunity is before levy of penalty.** Further, scheme of immunity is optional for taxpayer. Also, **scheme is open on year on year basis.**
- **No immunity even after paying the taxes.**
 - While it is a pre-condition that the amount of tax and interest as per notice of demand must be paid within the time period mentioned in the notice of demand, **it is quite possible that the assessee having paid the amount demanded, may not get immunity** as his application may be rejected and such order rejecting the **application is final and not appealable.**
- **No option for contending appeal for part addition and seek immunity for the balance.**
 - In a case where the penalty proceedings are **not** initiated in the circumstances mentioned in section 270A(9) but the **under-reported income comprises of various items some of which the assessee intends to contest in appeal and for the rest the assessee is desirous of seeking immunity** by paying tax and interest payable in respect of such additions. However, in view of the clear language of section 270AA(6), **it appears that the assessee will have to choose either to prefer an appeal against the order of assessment or reassessment or not. The assessee does not have an option to contest the order partly and seek immunity qua the balance.**

Some observations

- **Multiple penalties in same assessment order**

- Sub-section (6) is likely to create difficulty in cases where **multiple penalties have been initiated in the same order of assessment or re-assessment**

Eg: The order of assessment for a “specified previous year” in case of an assessee against whom a search was initiated, may have initiated penalties under sections 270A, 271AAB(1A), 271AAC, etc. **In case the assessee applies for grant of immunity under section 270AA against such an order then such an assessee will not be able to file an appeal against such an order of assessment.**

- **Penalty under section 270A(2) as well as section 270A(9) in same assessment order may lead to rejection of immunity application**

- **In an assessment order, there may be several additions/ disallowances to the total income.**

The under-reported income could comprise of different additions in different situations -

- some additions may be **excludible** from under-reported income as falling u/s 270A(6);
- some of the additions may be **regarded as under-reported income** and
- some of the additions may be regarded as **misreported income**.

In certain cases, penalty proceedings would be initiated in the circumstances mentioned in sub-**section (9) of section 270A**. In such a situation, **it appears that the assessee may not be able to make an application or even if he makes an application**, the Assessing Officer may pass an order rejecting the application made by the assessee on the ground that the immunity is only in cases of under-reported income and not in cases where under-reporting is as a consequence of misreporting.

Some observations

- **Action to be taken post rejection of order of the application on ground that under-reporting is in consequence of misreporting**
 - The order rejecting the application is final. Therefore, if the application is rejected on the ground that the under-reporting is in consequence of misreporting, it may so happen that the **department may, in the course of appellate proceedings, contend that the order under section 270AA(4) being final, the assessee has accepted** that there is misreporting of income. It is **advisable that upon receiving the order, rejecting the application the assessee writes a letter to Assessing Officer saying that he does not accept the findings in the order rejecting the application and that appeal is not being filed because the order is not appealable.** Such a letter on record will strengthen the case of the assessee that he did not accept the case of the Assessing Officer.
- **CBDT Circular no. 5/2018 dated 16 August 2018**
 - CBDT vide Circular no 5/2018 dated 16 August 2018 has clarified that where an assessee makes an application seeking immunity u/s 270AA of the Act, it shall not preclude such assessee from contesting the same issue in any earlier AY u/s 271(1)(c) and department shall not take an adverse view u/s 271(1)(c) on the sole ground that assessee has accepted the issue in later AY by asking for immunity u/s 270AA.

Some observations

- **Discretion of Assessing Officer to reject an application for grant of immunity.**
 - The Act is silent as to in which situation does the Assessing Officer have a discretion to reject an application for grant of immunity. No parameters/ benchmark are provided in the Act basis which the Assessing Officer shall reject the application.

Some observations

- **Whether it is possible to withdraw the application for immunity once filed before AO**
 - **View 1 : Application cannot be withdrawn**
 - No specific provision in the law for withdrawal;
 - Once AO receives valid application u/s 270AA, it shall be obligatory upon him to proceed in accordance with the law and shall pass order accepting/ rejecting the application;
 - Objective of the scheme is two fold. On one hand taxpayer gets immunity and on other Government can reduce litigation and recover demand upfront. Hence, unilateral withdrawal at whims of taxpayer after opting the scheme cannot be allowed.
 - **View 2 : Application can be withdrawn before the same is decided**
 - No specific restriction in the law for withdrawal;
 - Scheme is optional to the taxpayer and if going ahead with the scheme have genuine impact on the taxpayer's business, withdrawal from the scheme shall be allowed;
 - AO has power to allow withdrawal from the scheme before passing order u/s 270AA(4). Analogy can be drawn from CIT(A)/ITAT's power in relation to withdrawal of appeal.
 - Breach of conditions mentioned in section 270AA may allow withdrawing of application
- **Conclusion : View 2 appears to be better view**

Thank you