

Concealment Penalties – Proceedings and issues relating to representation in Penalty Proceedings

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Section 140A(3)

NATURE OF DEFAULT

- Failure to pay partly or fully:
 - Self Assessment
 - Interest or
 - Both

PENALTY LEVIABLE

- Such amount as Assessing Officer may impose but not exceeding tax in arrears

Section 221(1)

NATURE OF DEFAULT

- Default in payment of tax

PENALTY LEVIABLE

- Such amount as Assessing Officer may impose but not exceeding amount of tax in arrears

Section 234E

NATURE OF DEFAULT

- Failure to file statement within time prescribed in section 200(3) or in proviso to section 206C(3)

PENALTY LEVIABLE

- Rs. 200 for every day during which failure continues but not exceeding tax deductible/collectible

Section 270A(1)

NATURE OF DEFAULT

- Under-reporting and misreporting of income

PENALTY LEVIABLE

- A sum equal to 50% of the amount of tax payable on under-reported income.
- However, if under-reported income is in consequence of any misreporting thereof by any person, the penalty shall be equal to 200% of the amount of tax payable on under-reported income

Under-reported income

Covers

- Income assessed > income u/s 143(1)(a)
- Income assessed > maximum amount not chargeable to tax, where no return is filed

Excludes

- Income for which bonafide explanation and material facts are furnished
- Income based on an estimate, if the accounts are correct and complete but the method employed is such that the income cannot be properly deduced

Under reported Income

Includes

- Income reassessed > income assessed/
reassessed immediately before such reassessment
- Deemed total income assessed/reassessed u/s 115JB or 115JC > deemed total income u/s 143(1)(a)

Excludes

- Income based on an estimate, where the taxpayer has estimated a lower amount and included such amount in his income computation
- Income representing transfer pricing addition for which proper documents are maintained and material facts are disclosed

Under Reported Income

Includes

- Deemed total income assessed u/s 115JB or 115JC > maximum amount not chargeable to tax, where no return is filed

Excludes

- Undisclosed income on account of search where penalty is leviable under other provisions
- Income assessed/reassessed which results in reducing the loss or converting the loss into income

Misreporting

- Misrepresentation or suppression of facts;
 - Non-recording of investments in the books of account;
 - Claiming of expenditure not substantiated by evidence;
 - Recording of false entry in the books of account;
 - Failure to record any receipt in the books of account having a bearing on total income; and
 - Failure to report any transaction to which the transfer pricing provisions apply.

Impact

- Except for the deeming fiction provided under Explanation 1, section 271 does not expressly guide on the distinction between 'concealment of particulars of income' and 'furnishing of inaccurate particulars of income'.
- Tax officers are hence known to initiate penalty proceedings in a vague manner, without making specific reference to whether the allegation relates to concealment, inaccurate reporting or coverage under the deeming provisions.
- This being despite court decisions requiring the tax officer to demonstrate application of mind when invoking penalty provisions.

Impact

- Given the significant difference in the penalty rates under the two scenarios, the proposed provisions have spelt out instances which would qualify as under-reporting and those that would amount to misreporting.
- The same should compel the tax officer to give some thought before classifying a taxpayer's case either way.
- However, in view of the generic nature of some of these instances (eg: misreporting would cover 'misrepresentation or suppression of facts'), dispute around categorization cannot be ruled out.

Section 271(1)(b)

NATURE OF DEFAULT

- Failure to comply with a notice under section 115WD(2)/115WE(2)/142(1) or section 143(2) or failure to comply with a direction under section 142(2A)

PENALTY LEVIABLE

- Fixed at Rs. 10,000 for each failure.
- *Note:-* However, the above penalty shall not be levied to and in relation to any assessment for the A.Y commencing on or after the 1st day of April, 2017.

Section 271(1)(c)

NATURE OF DEFAULT

- Concealment of particulars of income or fringe benefits or furnishing of inaccurate particulars of income or fringe benefits

PENALTY LEVIABLE

- Minimum : 100 per cent
- Maximum : 300 per cent of tax sought to be evaded in addition to tax payable

Section 271(1)(c)

- Amount of tax sought to be evaded' shall be aggregate of tax sought to be evaded under the general provisions and the tax sought to be evaded under the provisions of MAT or AMT.
- However, if an amount of concealed income is considered both under the general provisions and provisions of MAT or AMT, such amount shall not be considered in computing tax sought to be evaded under provisions of MAT or AMT.
- Further, where provisions of MAT or AMT are not applicable, the computation of tax sought to be evaded under the provisions of MAT or AMT shall be ignored.

Section 271(1)(c)

- However, the above penalty shall not be levied to and in relation to any assessment for the A.Y commencing on or after the 1st day of April, 2017.

Case Laws

- CIT vs Thakur Prasad Sao & Sons (P) LTD
 - 386ITR 448 (CAL)(HC)
- Compensation was paid for mining ores and claimed as deduction in the year of payment but was allowed over five year period of mining. Assessee himself after accepting the assessment order and revising the subsequent returns himself,
- Hon High Court held that it was not possible to hold that the assessee furnished inaccurate particulars or concealed its income and imposition of penalty was not warranted

Case Laws

- Shivam Steel & Tubes Pvt Ltd vs ACIT
 - ITA No: 4691/Mum/2014
- Mak Data
 - 350 ITR 593
- Zoom Communications
 - 327 ITR 590
- CIT vs Somany Evergreen Knits Ltd
 - 352 ITR 592
- Non filing of appeal against the additions made cannot be a ground for justifying levy of penalty
- Penalty & Assessment proceedings are distinct and separate

Case Laws

- Oxford Softech P Ltd vs ITO
 - ITA No: 5100/DEL/2011
- CIT vs Shyama A Bijapurkar
 - ITA No 842/2010
- CIT vs Smt Rita Malhotra
 - 154 ITR 550 (Del)
- Making a claim for deduction under the provisions of section 80IA of the Act which has numerous conditions attached, is a complicated affair
- Since the assessee claimed deduction u/s 80IA, based on legal advice, and filed the report of Chartered Accountant in form 10CCB along with return of income and all details were also filed along with the return of income, it cannot be said there this is a case of furnishing inaccurate particulars of income

Case laws

- Suvaprasanna Bhattacharya vs ACIT
 - ITA No: 1303/Kol/2010
- Ms Madhushree Gupts vs Union of India
 - 317 ITR 107
- CIT vs Manjunatha Cotton and Ginning Factory
 - 359 ITR 565
- For valid initiation of penalty proceedings it is essential that (i) prima facie, the case may deserve the imposition of penalty should be discernible from the Order passed; (ii) Notice must specify as to whether the assessee was guilty of having “furnished inaccurate particulars of income” or of having “concealed particulars of such income”

Case Laws

- CIT vs Ankita Electronics Pvt Ltd
 - 379 ITR 50 (Kar)
- Allowability of deduction pending consideration of appeal makes it clear that addition is debatable
- There is no concealment of income
- Penalty could not be imposed

Case laws

- Harpreet Singh vs ITO
 - [2015]155 ITD 167/61(Chandigarh)
- No penalty can be imposed in a case where the assessee suo motto revises his return declaring additional income and has paid taxes there on before any detection of concealment by revenue authorities

Section 271(4)

NATURE OF DEFAULT

- Distribution of profits by registered firm otherwise than in accordance with partnership deed and as a result of which partner has returned income below the real income

PENALTY LEVIABLE

- Not exceeding 150 per cent of difference between tax on partner's income assessed and tax on income returned, in addition to tax payable

Section 271(4)

- However, the above penalty shall not be levied to and in relation to any assessment for the A.Y commencing on or after the 1st day of April, 2017.

Section 271A

NATURE OF DEFAULT

- Failure to keep, maintain, or retain books of account, documents, etc., as required under section 44AA

PENALTY LEVIABLE

- Rs 25000

Section 271AA(1)

NATURE OF DEFAULT

- Failure to keep and maintain information and documents required by section 92D(1) or 92D(2)
- Failure to report such transaction
- Maintaining or furnishing incorrect information or document

PENALTY LEVIABLE

- 2% of value of each international transaction/or specified domestic transaction entered into

Section 271AA(2)

NATURE OF DEFAULT

- Failure to furnish information and document as required under Section 92D(4)

PENALTY LEVIABLE

- Rs 5,00,000/-

Section 271AAA

NATURE OF DEFAULT

- Where search has been initiated before 1-7-2012 and undisclosed income found

PENALTY LEVIABLE

- 10% of undisclosed income

Case Law

- Nukala Ramakrishna Eluru v DCIT
 - ITA No: 189 to 192/Vizag/2014
- DCIT vs Subhash M Patel
 - ITA No 256/AHD/2012
- When specific provision is provided by way of section 271AAA to deal with penalty provisions, penalty order passed by AO u/s 271(1)(c) is void ab initio

Section 271AAB

NATURE OF DEFAULT

- Where search has been initiated on or after 1-7-2012 and undisclosed income found

PENALTY LEVIABLE

- 30% (earlier rate was 10%) of undisclosed income of the specified previous year if assessee admits the undisclosed income; substantiates the manner in which it was derived; and on or before the specified date pays the tax, together with interest thereon and furnishes the return of income for the specified previous year declaring such undisclosed income

Section 271AAB

PENALTY LEVIABLE

- 60% (earlier rate was 20%)of undisclosed income of the specified previous year if assessee does not admit the undisclosed income, and on or before the specified date declare such income in the return of income furnished for the specified previous year and pays the tax, together with interest thereon

Section 271AAB

PENALTY LEVIABLE

- 60% of undisclosed income of the specified previous year if it is not covered by (a) or (b) above

Current Scenario

- The Taxation Laws (Second Amendment) Act, 2016 has amended the penalty provisions in respect of search and seizure cases
- The existing slab for penalty of 10 per cent, 20 percent and 60 per cent of income levied under section 271AAB has been rationalized to 30 per cent of income, if the income is admitted and taxes are paid. Otherwise, a penalty at the rate of 60 per cent of income shall be levied

Section 271AAC

- New Section, provides for the levy of penalty if the income of the assessee includes income referred to in Section 68, 69, 69A, 69B, 69C and 69D
- The penalty @10% of tax payable u/s 115BBE may be levied by the AO
- The Tax includes surcharge and cess, the penalty leviable u/s 271AAC would be 7.725% i.e 10% of 77.25%

Section 271AAC

No penalty is leviable u/s 271AAC if the following conditions are satisfied-

- The income from undisclosed sources [i.e taxable u/s 68,69,69A,69B,69C &69D] has been included by the assessee in the return of income filed u/s 139
- Tax in accordance with the provisions of section 115BBE(@77.25%) has been paid on or before the end of the relevant previous year

Section 271AAC

- It may be noted that the assessee will not be able to escape this penalty by including such type of income in the return furnished in response to a notice u/s 148 or 153A
- The penalty u/s 270A due to under-reporting of income is not leviable in respect of the income on which penalty can be levied u/s 271AAC

271AAC

- Where penalty is imposable u/s 271AAB due to search being conducted u/s 132; penalty may be levied in accordance with that provision
- The levy of this penalty is subject to the provisions of section 274 providing for the procedure and sec 275 providing limitation period to pass the order

Section 271B

NATURE OF DEFAULT

- Failure to get accounts audited or furnish a report of audit as required under section 44AB

PENALTY LEVIABLE

- One-half per cent of total sales, turnover or gross receipts, etc., or Rs. 1,50,000, whichever is less

Section 271BA

NATURE OF DEFAULT

- Failure to furnish a report from an accountant as required by section 92E

PENALTY LEVIABLE

- Rs 1,00,000

Section 271BB

NATURE OF DEFAULT

- Failure to subscribe any amount to units issued under scheme referred to in section 88A(1)

PENALTY LEVIABLE

- 20% of such amount

Section 271C

NATURE OF DEFAULT

- Failure to deduct tax at source, wholly or partly, under sections 192 to 196D(Chapter XVII-B) or failure to pay wholly or partly tax u/s 115-O(2) or second proviso to section 194B

PENALTY LEVIABLE

- Amount equal to tax not deducted or paid

Case Laws

- H P State Electricity Board vs Add CIT
 - [2016] 177 TTJ 18 (Chandigarh)
- Remco (BHEL) House Building Co-operative Society Ltd vs ITO
 - [2015] 273 CTR 57 (KAR)(HC)
- ACIT vs Good Health Plan Ltd
 - ITA No 155/Hyd/2013
- Woodward Governor India (P) Ltd vs CIT
 - [2001] 168 CTR 394(DEL)(HC)
- Penalty u/s 271C is not leviable on an assessee who is not treated as an “assessee in default” as per section 201 of the Act more so when there was a reasonable cause for not deducting tax on payment made by the assessee

Section 271CA

NATURE OF DEFAULT

- Failure to collect tax at source as required under Chapter XVII-BB

PENALTY LEVIABLE

- Amount equal to tax not collected

Section 271D

NATURE OF DEFAULT

- Taking or accepting any loan or deposit or specified sum in contravention of the provisions of Section 269SS.
- "Specified sum" means any sum of money receivable, whether as advance or otherwise, in relation to transfer of an immovable property, whether or not the transfer takes place.

Section 271D

PENALTY LEVIABLE

- Amount equal to loan or deposit or specified sum so taken or accepted

Case Law

- Mohamed Taslim Shaikh vs Addl CIT
 - ITA No 7259/Mum/2012
- ITO vs Dattuprasad Manharlal Dave
 - ITA No 1816/AHD/2013
- CIT vs Smt Dimpal Yadav & Akhilesh Kumar Yadav
 - (2015) 379 ITR 177 (All)(HC)
- Penalty u/s 271 D cannot be levied in a case where assessee was prevented by a reasonable cause to accept money from his close relative like father for making payment for immovable property

Section 271E

NATURE OF DEFAULT

- Repayment of any loan or deposit or specified advance otherwise than in accordance with provision of Section 269T.
- "Specified advance" means any sum of money in the nature of advance, by whatever name called, in relation to transfer of an immovable property, whether or not transfer takes place.

Section 271E

PENALTY LEVIABLE

Amount equal to loan or deposit or specified advance so repaid

Case Laws

- Principal CIT vs JKD capital & Finlease Ltd
– 378 ITR 614 (Del)
- AY 2005-06 assessment order u/s 143(3) with a direction to initiate penalty proceedings u/s 271E passed on 28/12/2007
- Penalty order u/s 271E passed on 20/03/2012 is barred by limitation
- Penalty order could not have been passed later than 30/06/2008

Section 271F

NATURE OF DEFAULT

- Failure to furnish return as required by section 139(1) or by its provisos before the end of the relevant assessment year

PENALTY LEVIABLE

- Rs 5,000

Section 271FA

NATURE OF DEFAULT

- Failure to furnish an annual information return as required under section 285BA(1)

PENALTY LEVIABLE

- Rs 100 per day of default

NATURE OF DEFAULT

- Failure to furnish annual information return within the period specified in notice u/s285BA(5)

PENALTY LEVIABLE

- Rs 500 per day of default

Section 271FAB

NATURE OF DEFAULT

- Section 9A provides that fund management activity carried out by an eligible offshore investment fund through an eligible fund manager acting on behalf of such fund shall not constitute business connection in India (subject to certain conditions).
- The provision requires that eligible investment fund shall furnish within 90 days from the end of the financial year a statement, in respect of its activities in a financial year, in the prescribed form containing information relating to fulfilment of specified conditions and such other information or documents as may be prescribed. Penalty to be levied if investment fund failed to comply with the requirement

PENALTY LEVIABLE

- Rs 5,00,000

Section 271FB

NATURE OF DEFAULT

- Failure by an employer to furnish the return of fringe benefits as required under section 115WD(1)

PENALTY LEVIABLE

- Rs 100 per day of default

Section 271G

NATURE OF DEFAULT

- Failure to furnish any information or document as required by section 92D(3)

PENALTY LEVIABLE

- 2% of the value of the international transaction/specified domestic transaction for each failure

Section 271GA

NATURE OF DEFAULT

- Section 285A provides for reporting by an Indian concern if following two conditions are satisfied:
- a) Shares or interest in a foreign company or entity derive substantial value, directly or indirectly, from assets located in India; and
- b) Such foreign company or entity holds such assets in India through or in such Indian concern.
- In this case, the Indian entity shall furnish the prescribed information for the purpose of determination of any income accruing or arising in India under Section 9(1)(i).
- In case of any failure, the Indian concern shall be liable to pay penalty.

Section 271GA

- Penalty shall be:
- A sum equal to 2% of value of transaction in respect of which such failure has taken place, if such transaction had effect of, directly or indirectly, transferring right of management or control in relation to the Indian concern;
- A sum of Rs. 5,000 in any other case.

Section 271GB(1)

NATURE OF DEFAULT

- Failure to furnish report under section 286(2)

PENALTY LEVIABLE

- Rs. 5,000 per day upto 30 days and Rs. 15,000 per day beyond 30 days

Section 271GB(2)

NATURE OF DEFAULT

- Failure to produce the information and documents within the period allowed under section 271GB(6)

PENALTY LEVIABLE

- Rs. 5,000 for every day during which the failure continues.

Section 271GB(3)

NATURE OF DEFAULT

- Failure to furnish report or failure to produce information/documents under section 286 even after serving order under section 271GB(1) or 271GB(2)

PENALTY LEVIABLE

- Rs. 50,000 for every day for which such failure continues beginning from the date of serving such order.

Section 271GB(4)

NATURE OF DEFAULT

- Failure to inform about inaccuracy in report furnish under section 286(2)
- Or furnishing of inaccurate information or document in response to notice issued under section 286(6).

PENALTY LEVIABLE

- Rs 5,00,000

Section 271H

NATURE OF DEFAULT

- Failure to deliver/cause to be delivered a statement within the time prescribed in section 200(3) or the proviso to section 206C(3), or furnishes incorrect information in the statement
- W.e.f. 1-10-2014 Assessing Officer may direct payment of penalty. Penalty shall not be less than Rs. 10,000 but may extend to Rs. 1,00,000

Section 271-I

NATURE OF DEFAULT

- As per section 195(6) of the Act, any person responsible for paying to a non-resident or to a foreign company, any sum (whether or not chargeable to tax), shall furnish the information relating to such payment in Form 15CA and 15CB. Penalty shall be levied in case of any failure

PENALTY LEVIABLE

- Rs 1,00,000

Section 272A(1)

- NATURE OF DEFAULT

Refusal or failure to :

- Answer questions
- Sign statements
- attend to give evidence or produce books of account, etc., in compliance with summons under section 131(1)
- attend to give evidence or produce books of account, etc., in compliance with summons under section 131(1)

PENALTY LEVIABLE

- Rs 10,000 for each failure /default

Section 272A(2)

NATURE OF DEFAULT

Failure to

- furnish requisite information in respect of securities as required under section 94(6) ;
- give notice of discontinuance of business or profession as required under section 176(3) ;
- furnish in due time returns, statements or certificates, deliver de-claration, allow inspection, etc., under sections 133, 134, 139(4A), 139(4C), 192(2C), 197A, 203, 206, 206C, 206C(1A) and 285B;

Section 272A(2)

NATURE OF DEFAULT

Failure to

- deduct and pay tax under section 226(2)
- file a copy of the prescribed statement within the time specified in section 200(3) or the proviso to section 206C(3) (up to 1-7-2012)
- file the prescribed statement within the time specified in section 206A(1)
- Failure to deliver or cause to be delivered a statement under Section 200(2A) or Section 206C(3A) within prescribed time

Section 272A(2)

- With effect from June 1, 2015, it is mandatory for an office of the Government, paying TDS or TCS, as the case may be, without production of a challan, to deliver a statement in the prescribed form and manner to the prescribed authority.

Section 272A(2)

PENALTY LEVIABLE

- Rs. 10,000 for each failure/default. (In respect of penalty for failure, in relation to a declaration mentioned in section 197A, a certificate as required by section 203 and returns u/ss206 and 206C and statements under Section 200(2A) or section 200(3) or proviso to section 206C(3) or section 206C(3A), penalty shall not exceed amount of tax deductible or collectible)

Section 272AA(1)

NATURE OF DEFAULT

- Failure to comply with 133B

PENALTY LEVIABLE

- Not exceeding Rs. 1,000

Section 272B

NATURE OF DEFAULT

- Failure to comply with provisions of section 139A/139A(5)(c)/(5A)/(5C)

PENALTY LEVIABLE

- Rs 10,000

Section 272BB(1)

NATURE OF DEFAULT

- Failure to comply with section 203A

PENALTY LEVIABLE

- Rs. 10,000 for each failure/default

Section 272BB(1A)

NATURE OF DEFAULT

- Quoting false tax deduction account number/tax collection account number/tax deduction and collection account number in challans/certificates/statements/documents referred to in section 203A(2)

PENALTY LEVIABLE

- Rs 10,000

No Penalty

- No penalty is imposable for any failure under sections 271(1)(b), 271A, 271AA, 271B, 271BA, 271BB, 271C, 271CA, 271D, 271E, 271F, 271FA, 271FAB, 271FB, 271G, 271GA, 271GB, 271H, 271I, 272A(1)(c) or (d), 272A(2), 272AA(1), 272B, 272BB(1), 272BB(1A), 272BBB(1), 273(1)(b), 273(2)(b) and 273(2)(c) if the person or assessee proves that there was reasonable cause for such failure (section 273B).

Penalty – Immunity

- Section 273AA provides that a person may make application to the Principal Commissioner/Commissioner for granting immunity from penalty, if (a) he has made an application for settlement under section 245C and the proceedings for settlement have abated; and (b) penalty proceeding have been initiated under this Act. The application shall not be made after the imposition of penalty after abatement.

Section 274

Procedure

- Assessee should be given a reasonable opportunity of being heard
- The prior approval of the Joint Commissioner is required by the ITO (in case the penalty does not exceed Rs 10,000) and by the Assistant Commissioner /Deputy Commissioner (in case the penalty does not exceed Rs 20,000)
- Copy of penalty order to be send to ITO

Section 275

- This section prescribes time limits both for commencement and for completion of penalty proceedings.
- No order imposing a penalty under this chapter shall be passed:

In a case where the relevant assessment or order is the subject-matter of an appeal to the Commissioner (Appeals) under Section 246 or an appeal to the Appellate Tribunal under Section 253 after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty been initiated, are completed or six months from the end of the month in which the order of the Commissioner (Appeals) or as the case may be, the Appellate Tribunal is received by the Chief Commissioner or the Commissioner whichever period expires later.

Section 275

- In a case where the relevant assessment or other order is the subject matter of an appeal to the Commissioner (Appeals) under section 246 or section 246A, and the Commissioner. (Appeals) passes the order on or after the 1st day of June 2003 disposing of such appeal, an order imposing penalty shall be passed before the expiry of the financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, are completed, or within one year from the end of the financial year in which the order of the Commissioner (Appeals) is received by the Chief Commissioner or Commissioner, whichever is later.

Current Scenario

For black money holders:

- Will have to bear taxes and penalties amounting to as high as 137 percent (60 per cent tax, 60 per cent penalty, 15 per cent surcharge, 3 per cent education cess surcharge — amounting to 137.25 percent) if they do not admit to or fail to explain the source of undisclosed income after being raided.
- the total levy can touch 107.25 percent (60 percent tax, 30 percent penalty, 15 per cent surcharge, 3 percent education cess surcharge — totalling to 107.25 percent) if the undisclosed income is admitted during search operations and that income substantiated
- the tax dodgers can come clean by paying 50 per cent (under PMKY) on bank deposits post demonetisation.

THANK YOU