

**Penalties dealing with misreported
and underreported income,
unexplained credits
(Sec 270A, 271AAC, 271DA, 270AA)**

By

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Agenda

1. Background & Objective of new penalty regime
2. Short trip down memory lane – S.271(1)(c)
3. S.270A – A bird’s eye view
4. **Deep dive into S.270A**
5. Points to ponder
6. S.270AA – Immunity
7. S.270AA - 3 recent HC WP’s
8. S.271DA and related issues
9. S.271AAC and related issues
10. S.274, S.275
11. Wrap-up

Background

- Finance Act, 2016 introduced new penal provisions under section 270A
- It replaced the (in)famous Section 271(1)(c) of the Income Tax Act, 1961 with 270A regime w.e.f. AY 2017-2018
- **‘inaccurate particulars’ & ‘concealment’** has been replaced by **‘under reporting of income’**.
- The new section provides for different category of violation with graded penalty of 50% & 200% *apparently* substantially reducing the discretionary power of the Officer.
- **What was the objective of the new penalty provisions?**

Objective

Explanatory Memorandum Finance Act 2016

*In order to rationalize 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***

Objective

Finance Minister Speech, Budget 2016

*“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 misdemeanour with graded penalty and thereby substantially reducing the discretionary power of the tax officers**”*

Applicable from when?

- **S. 271(7)** introduced by the FA, 2016 provides that the provisions of section 271 shall not apply to and in relation to assessment for the assessment year commencing on or after 1.4.2017.
- **Therefore, the provisions of section 270A will apply to assessments for AY 2017-18 and subsequent assessment years.**
- **Explanatory Memorandum** which states that *“These amendments will take effect from 1st day of April, 2017 and will, accordingly apply in relation to assessment year 2017-18 and subsequent years.”*
- **Para 62.1 of the circular issued by CBDT being Circular No. 3/2017[F.NO.370142/20/2016-TPL]**, dated 20-1-2017 which states that *“In order to rationalize and bring objectivity, certainty and clarity in the penalty provisions, section 271 of the Income-tax Act has been made non-applicable in relation to any assessment for the assessment year commencing on or after the 1st of April, 2017 and subsequent assessment years and penalty shall be levied under the newly inserted provisions”*

What was the previous regime?

S.271(1)(c)

*S. 271. (1) If the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is **satisfied** that any person—*

.....

*(c) **has concealed the particulars of his income or furnished inaccurate particulars of such income, or***

*(d) **has concealed the particulars of the fringe benefits or furnished inaccurate particulars of such fringe benefits, he may direct that such person shall pay by way of penalty,—***

What was the previous regime?

S.271(1)(c)

- Large amount of jurisprudence built around S.271(1)(c) thrown out of the window?
 - Some may be applicable to new S.270A regime as we are going to see!
- Need to prepare for new litigation and legal battles based on the wording of S.270A

Chapter XXI – Penalties Imposable

S.270A – A Bird’s eye view

Section	What it deals with
270A(1)	Define the scope of penalty – introduce concept of ‘under reported’ income
270A(2)	Define ‘under reported income’
270A(3)	Computation of ‘under reported income’
270A(6)	Exclusion from penalty of under reported income
270A(7)	Amount of penalty = 50% of tax payable if under reported income
270A(8)	Amount of penalty = 200% of tax payable on under reported income if it is in consequence of any misreporting thereof
270A(9)	What is ‘mis reported income’
270A(10)	Tax payable on ‘under reported income’
270A(11)	No double penalty
270A(12)	Order in Writing

S.270A(1)

‘Under-reported’

*270A. (1) 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 in addition to tax, if any, on the under-reported income.*

.....

Contrast with S.271(1)(c) r.w. 271(1B). No need for recording any satisfaction by the authority that assessee has under-reported income?

S.270A(2) - What is 'Under-reporting' of income?

(2) A person shall be considered to have **under-reported** his income, if—

(a) the **income assessed is greater than the income determined in the return processed** under clause (a) of sub-section (1) of section 143;

(b) 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;

(c) the **income reassessed is greater than the income assessed or reassessed immediately** before such reassessment;

(d) 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;

(e) 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;

(f) 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;

(g) the income assessed or reassessed has the **effect of reducing the loss** or converting such loss into income.

What is 'Under-reporting' of income?

S.270A(2)

- **When return of income is filed?**
 1. Normal income / Book profit assessed *exceeds* the same assessed u/s 143(1)
 2. Income / book profit assessed *exceeds* maximum amount not chargeable to tax
 3. Normal income / Book profit reassessed *exceeds* the same assessed or reassessed previously
 4. Total income assessed or reassessed has effect of reducing the loss or converting such loss into income.
- **When return of income not filed? Or filed first time under S.148?**
 1. Income / book profit assessed *exceeds* Maximum amount not chargeable to tax

What is 'Under-reporting' of income?

S.270A(2) – “shall be considered”

- The Supreme Court, in *Chairman, LIC of India v. A Masilamani [(2013) 6 SCC 350]*, observed as under –
“The word “consider”, is of great significance. Its dictionary meaning of the same is “to think over”, “to regard as”, or “deem to be”.
- Thus, it appears that the phrase “shall be considered” has been used to mean “shall be deemed”.
- Bottomline: Seven instances in 270A(2) are cases where the legislature deems that a person has under-reported his income

Computation of under-reported income

S.270A(3)

(i) in a case where income has been assessed for the first time

(a) if return has been furnished

the difference between the amount of income assessed and the amount of income determined under clause (a) of sub-section (1) of section 143;

(b) no return (or) first return filed in response to S 148

(A) the amount of income assessed, in the case of a company, firm or local authority; and
(B) the difference between the amount of income assessed and the maximum amount not chargeable to tax, in a case not covered in item (A)

Computation of under-reported income

S.270A(3)

(ii) in any other case, the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order:

“Preceding Order”

an order immediately preceding the order during the course of which the penalty under sub-section (1) has been initiated;

in a case where an assessment or reassessment has the effect of **reducing the loss** declared in the return or converting that loss into income

the amount of under-reported income shall be the difference between the loss claimed and the income or loss, as the case may be, assessed or reassessed.

Computation of under-reported income

S.270A(3)

Provided that where under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB or section 115JC

$(A - B) + (C - D)$ where,

A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (“general provisions”);

B = the 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;

C = the total income assessed as per the provisions contained in section 115JB or section 115JC;

D = the 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.

[Note: Similar to S.271(1) Explanation 4!]

Provided further that where the amount of under-reported income on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.

S.270A(4) / (5) – Intangible additions

(4) Subject to the provisions of sub-section (6), where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income or deducted while computing loss, as the case may be, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (hereinafter referred to as "preceding year") and no penalty was levied for such preceding year, then, the under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment.

(5) The amount referred to in sub-section (4) shall be deemed to be amount of income under-reported for the preceding year in the following order—

(a) the preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year; and

(b) where the amount added or deducted in the first preceding year is not sufficient to cover the receipt, deposit or investment, the year immediately preceding the first preceding year and so on.

S.270A(4) / (5) – Intangible additions

- S.270A(4) is somewhat similar to erstwhile explanation 2 to section 271(1) and provides that where the source of any receipt, deposit or investment in any AY is claimed to be an amount added to income or deducted while computing loss in any preceding AY and no penalty was levied in such preceding AY then, the underreported income shall include such amount as is sufficient to cover such receipt, deposit or investment.
- Further, section 270A(5) specifies that the amount for the purpose of subsection (4) shall firstly be from the immediately preceding assessment year and then from the year preceding that and so on.

Escape route for under-reported income

S.270A(6)

(6) The under-reported income, for the purposes of this section, **shall not include the following, namely:—**

- (a) 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;**

Example: Claim of deduction based on advice from expert?

Escape route for under-reported income

S.270A(6) (a) - Three conditions

- The amount of income in respect of which:
 - Assessee offers an explanation *and*
 - AO etc is **satisfied** explanation is **bonafide** *and*
 - Assessee discloses all **material facts**
- If all the 3 conditions mentioned above are cumulatively satisfied in respect of an addition to total income, then such addition will not be regarded as under-reported income.
- Burden envisaged is **identical** to the burden placed under Explanation 1(B) of section 271(1)(c) on the shoulders of the assessee

**Escape route for under-reported income
S.270A(6) (a) - 'bonafide'**

***GTO v. Rajmata Shanta Devi P. Gaekwad
[2001] 76 ITD 299 (Ahd.)***

'...."Bona fide" means good faith implying the absence of fraud, unfair dealing or acting, whether it consists in simulation or dissimulation. In order that the transaction is bona fide, it must be shown that everything was done in an open and straightforward manner.'

Escape route for under-reported income S.270A(6) (a) - 'satisfied'

- The phrase '**is satisfied**' means simply '**makes up its mind**' (*Lord Pearson in Blyth v. Blyth [1966] 1 All ER 524 at page 541*)
- Dixon J. defined it as '**actual persuasion**'. That means '**a mind not troubled by doubt**' or, to adapt the language of Smith J.' a mind which has reached a clear conclusion' (*Angland v. Payne [1944] NZLR 610 (CA)*)

Escape route for under-reported income

S.270A(6) (a) - 'material facts'

- ***Calcutta Discount vs. ITO (1961 AIR 372)***

*“The question whether by the sale of shares the assessee in the instant case intended to change the form of investment or to make a business profit was one of **an inferential fact** and the failure to disclose such intention could not by itself amount to a failure or omission to disclose **a material fact** within the meaning of S. 34(1)(a) of the Act. Where, however, the Income-tax Officer has prima facie reasonable grounds for believing that there has been a nondisclosure of a primary material fact, that by itself gives him the jurisdiction to issue a notice under s. 34 of the Act, and the adequacy or otherwise of the grounds of such belief is not open to investigation by the Court. It is for the assessee who wants to challenge such jurisdiction to establish that the Income-tax Officer had no material for such belief. Since, in the instant case, there was no non-disclosure of a primary material fact which the assessee was bound to disclose under S. 34(1)(a) of the Act, the Income-tax Officer had no jurisdiction to issue the notices in question.”*

- ***H.B. Shamithkumar v. A.M. Somanna, 2017 SCC OnLine Kar 3020 dated 16.10.2017***

*The High Court observed that there is a **difference between 'material facts' and 'particulars'**. **'Material facts' are the primary basic facts which must be pleaded by the plaintiff to prove his cause of action.** 'Particulars' on the other hand, are the details in support of the material facts pleaded by the parties.*

Escape route for under-reported income

S.270A(6)

(b) 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**

Example:

- Estimation of GP as against declared profits without rejecting the books of accounts / without finding audited financials are not correct.
- Project completion vs Percentage completion

Escape route for under-reported income

S.270A(6)

(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

Example: 14A disallowance made on estimate by assessee and enhanced by AO. Increase in estimated personal expenditure disallowed by the assessee. Incremental disallowance will not under-reported income provided all material facts are disclosed?

Points to Ponder:

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

Escape route for under-reported income

S.270A(6)

(d) 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**

Example: TP addition made based on rejection of TNMM comparables in TP study due to multiple year approach and filters adopted by assessee, and then TNMM redone by TPO.

Escape route for under-reported income

S.270A(6)

(e) the amount of **undisclosed income** referred to in section 271AAB.

- S.271AAB : Penalty where search has been initiated.
- 271AAB(2): In case of Penalty where search has been initiated, penalty u/S.270A does not lie.

[Similarly, S.271AAC also has similar exclusion which we will see in more detail...]

Burden of proof – 270A(6)

- Initial burden on proof will be on the assessee to establish in the facts of its case, an item of under-reported income is covered by the exclusion clauses
- The Burden of proof will shift to the Department once this initial burden is discharged

Penalty Amount

S.270A(7) – under reported income

(7) The penalty referred to in sub-section (1) shall be a sum equal to **fifty per cent of the amount of tax payable on under-reported income.**

The Damocles Sword: `Misreported Income'

S.270A(9)

(8) Notwithstanding anything contained in sub-section (6) or (7), **where under-reported income is in consequence of any misreporting thereof by any person**, the penalty referred to in sub-section (1) shall be **two hundred per cent of amount of tax payable on under-reported income**.

(9) The cases of misreporting of income referred to in sub-section (8) shall be the following

(a) **misrepresentation or suppression of facts;**

(b) **failure to record investments** in the books of account;

(c) **claim of expenditure not substantiated** by any evidence;

(d) **recording of any false entry** in the books of account;

(e) **failure to record** any receipt in books of account having a bearing on total income; and

(f) **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.

Difference between under-report & misreport

	“under-report”	“misreport”
Cambridge Dictionary	To record that you have earned less than you really have on your tax return	To make known information that is not completely true or correct
Oxford	Fail to report (something, especially news or data) fully	Give a false or inaccurate account of (something). A false or incorrect report.
Free Dictionary	To report to be less or lower than is correct	To report falsely or inaccurately, an inaccurate or false report/to report mistakenly or falsely. An inaccurate or wrong report

S.270A(9)(a)

What is 'misrepresentation'?

- According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date **false in substance and in fact**.
- *suggestion falsi*, whether by acts, words or by positive assertions. It is immaterial whether the person making the misrepresentation knew the matter to be false or asserted it without knowing if it were false or true.
- It is well settled that **misrepresentation itself amounts to fraud**. Even *innocent misrepresentations* may also give reason to claim relief against fraud.

S.270A(9)(a)

What is 'suppression'?

- The word “suppression as per Shorter Oxford English Dictionary, means: **The action of keeping secret; refusal to disclose or reveal.**
- *Consequently, the meaning given to the word “suppression” in the Shorter Oxford English Dictionary referred to above will clearly show that suppression always implies a wilful non-disclosure – P. M. Perianna Pillair v. Commissioner, Board of Revenue (Commercial Taxes), (1980) 46 STC 94 (Mad.)].*

S.270A(9)(a)

What is 'suppression'?

- The use of the word “suppression” shows that what the assessing officer found was **wilful non-disclosure**. If it was not a **wilful non-disclosure**, the assessing officer would have **stated as merely omissions**. The use of the word “suppression” clearly brings out the wilful nature of the non-disclosure and, therefore, the Tribunal was not right in setting aside the penalty merely on the ground that there was no finding of wilful non-disclosure – ***State of TN v. Sri Swamy & Co., [39 STC 85 (Mad.)]***

S.270A(9)(a)

What is 'suppression'?

- The word “suppression” in section 11A of the 1944 Act is accompanied by the words “fraud” or “collusion” and, therefore, the word “suppression” should be construed strictly. **That, mere omission to give correct information did not constitute suppression unless that omission was made wilfully in order to evade duty. That, suppression would mean failure to disclose full and true information with the intent to evade payment of duty.** When the facts are known to both the parties, omission by one party would not constitute suppression. That, an incorrect statement cannot be equated with a wilful mis-statement. The latter implies making of an incorrect statement with the knowledge that the statement made was not correct – ***CCE v. Ballarpur Industries Ltd. 8 SCC 89***

S.270A(10)

Tax payable on Under-reported income

(10) The tax payable in respect of the under-reported income shall be—

1. **where no return of income has been furnished or where return has been furnished for the first time u/S.148 and income assessed for first time**

the amount of tax calculated on under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income;

2. **where no return of income has been furnished or where return has been furnished for the first time u/S.148 and income assessed for first time**

the amount of tax calculated on the under-reported income as if it were the total income;

3. **in any other case, determined in accordance with the formula—**

(X-Y) where,

X = **the amount of tax calculated on the** (under-reported income as increased by the total income determined u/S.143(1)(a) or total income assessed, reassessed or recomputed in a preceding order as if it were the total income);

Y = **the amount of tax calculated on the total income** u/S.143(1)(a) or total income assessed, reassessed or recomputed in a preceding order.

Example 1: Under-reported income

Status	Amount (INR in lakhs)	Under-reported income	Tax on under-reported income	Penalty Leviable
Returned Total Income	100			
Total income determined u/S 143(1)(a)	110			
Total income determined u/S 143(3)	150	$150 - 110 = 40$	$30\% \text{ of } 40 = 12$	$50\% \text{ of } 12 = 6$
Total income determined u/s 147	180	$180 - 150 = 30$	$30\% \text{ of } 30 = 9$	$50\% \text{ of } 9 = 4.5$

Example 2: Under-reported income

No return filed, 143(3) carried out

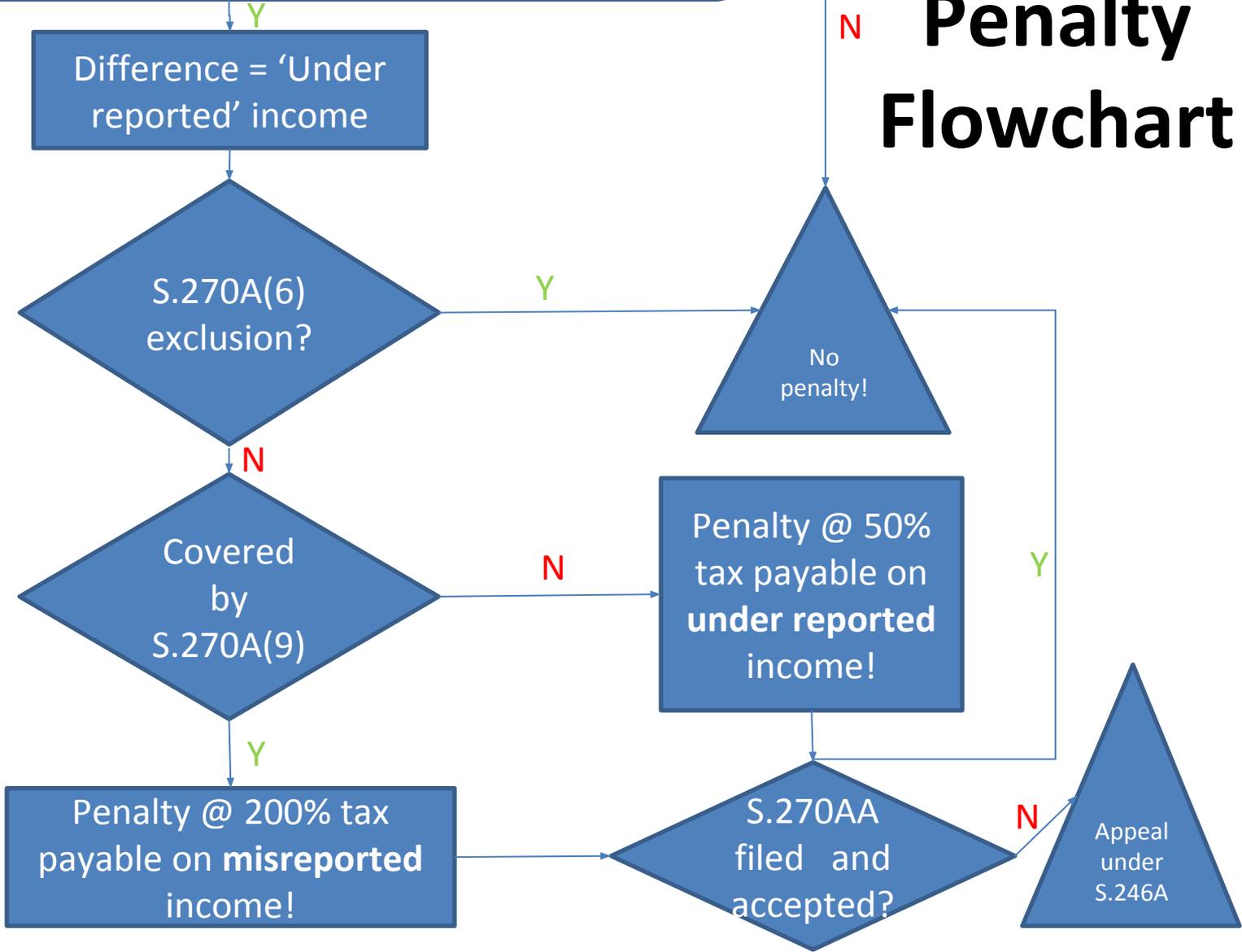
Status	Amount (INR)	Under-reported income	Tax on under-reported income	Penalty Leviable
Returned Total Income	10,00,000	10,00,000 – 2,50,000 = 7,50,000	30% of 7.5L = 2,25,000	50% of 2.5L = 1,12,000

Example 3: Under-reported income Loss-making company

Status	Amount (INR in lakhs)	Under-reported income	Tax on under-reported income	Penalty Leviable
Returned Total Income	-100			
Total income determined u/S 143(1)(a)	-90			
Total income determined u/S 143(3)	-40	$-40 - (-90) = 50$	$30\% \text{ of } 50 = 15$	$50\% \text{ of } 15 = 7.5$
Total income determined u/s 147	20	$20 - (-40) = 60$	$30\% \text{ of } 60 = 18$	$50\% \text{ of } 18 = 9$

S.270A Penalty Flowchart

If Assessed income >
a. Income u/s 143(1) or Income as per preceding Order
b. Max exemption limit (if no ITR or 148 ITR filed first time)



S.270A(11) & (12)

No double penalty & Order in writing

(11) No addition or disallowance of an amount shall form the basis for imposition of penalty, if such addition or disallowance has formed the basis of imposition of penalty in the case of the person for the same or any other assessment year.

*(12) The penalty referred to in sub-section (1) shall be imposed, by **an order in writing**, by the Assessing Officer, the Commissioner (Appeals), the Commissioner or the Principal Commissioner, as the case may be.*

Points to ponder #1

Reasonable cause

S.273B : Notwithstanding anything contained in the provisions of clause (b) of sub-section (1) of section 271, section 271A, section 271AA, section 271B, section 271BA, section 271BB, section 271C, section 271CA, section 271D, section 271E, section 271F, section 271FA, section 271FAB, section 271FB, section 271G, section 271GA, section 271GB, section 271H, section 271-I, section 271J, clause (c) or clause (d) of sub-section (1) or sub-section (2) of section 272A, sub-section (1) of section 272AA or section 272B or sub-section (1) or sub-section (1A) of section 272BB or sub-section (1) of section 272BBB or clause (b) of sub-section (1) or clause (b) or clause (c) of sub-section (2) of section 273, no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure. only under S.270A(6) exclusions?

***S.271(1)(b)** has failed to comply with a notice under sub-section (2) of section 115WD or under sub-section (2) of section 115WE or under sub-section (1) of section 142 or sub-section (2) of section 143 or fails to comply with a direction issued under sub-section (2A) of section 142, or*

Points to ponder #2

Is 270A penalty mandatory?

- 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- ”*
- Section 271(1) of the Act also provides that -
*“the AO or **may** direct that such a person **shall** pay by way of penalty, -”*
- Section 271 is discretionary and not mandatory as per jurisprudence. The language of the 2 provisions being similar, can we say decisions holding that the levy of penalty under S.271 is discretionary will hold good even for the purposes of section 270A?

Points to ponder #2

Is 270A penalty mandatory?

- 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) holding as follows –
“The provisions under section 158BFA(2) gives a scope for exercising discretion of the Assessing Officer. This section which allows the Assessing Officer to impose a penalty begins with the word `may' and not `shall'. In our opinion, the Assessing Officer has a discretion to impose or not to impose the penalty. The words `may direct' in the section 158BFA(2) do indicate that a discretion is available with the Assessing Officer and CIT(A) to levy penalty even where technically the provisos are attracted.” It appears that the ratio of the above decision will also apply to the provisions of section 270A which are similar to the provisions dealt with by the Tribunal except that section 270A uses the phrase “shall be liable to pay” instead of “shall pay” used by section 158BFA(2).
- However, it is clear that: **Object of 270A is to remove discretion**, 273B reasonable cause doesn't include 270A, 'may' can be mandatory subject to fulfillment of conditions
“The question as to whether a statutory provision is mandatory or directory would depend upon the statutory scheme. It is now well known that use of the expression “shall” or “may” by itself is not decisive. The Court while construing a statute must consider all relevant factors including the purpose and object the statute seeks to achieve” – Ashok Lanka v. Rishi Dixit [AIR 2005 SC 2821]

Points to ponder #2

Is 270A penalty mandatory?

- SC had in ***Gujarat Travancore Agency v. CIT [(1989) 177 ITR 455 (SC)]*** held that mens rea is not required to be proved in proceedings under s. 271(1)(a)
- The law laid down in ***Dilip Shroff 291 ITR 519 (SC)*** caused much confusion but was overruled in ***Dharmendra Textile Processors 306 ITR 277 (SC)*** only with respect to the point that **mens rea** was not an essential requirement for penalty s/s 271(1)(c)
 - And these rulings are not to be confused with *Mak Data* or *Reliance Petroproducts* rulings!
- S.270A would seem to follow the Gujarat Travancore, Dharmendra rationale to the extent that mens rea isn't required in the context of S.270A(2) and also fact that 276C imposes criminal liability in case of tax on under-reported income > Rs.25L

Points to ponder #3

‘income’ vs ‘under reported income’

- Do you see that 270(a) refers to ‘income’ and (b), (c) and (d) refers to ‘under reported income’?
- Under-reported income represents difference between *assessed income* and *processed income* which could be on account of disallowance of expenditure and/or on account of an item of income being added to the processed income,
- Question is whether ‘income’ in clause (a) would cover disallowance of expenditure or it would seek to exclude only items of addition to income and not disallowance of expenditure / allowance / deduction?

“The normal course of construction requires that when the Court finds in a statute two different expressions used, as far as possible, two different meanings must be given to these expressions, but instances are not unknown when two different expressions have been used to convey the same meaning. From this variation of the language, variation of intention cannot necessarily be inferred in construing the two expressions, taking into account the legislative intent – Indirabai Ganpatrao Kuhikar v. House Allotment Officer [Nagpur, 1984 MahLJ 397]”

Points to ponder #4

270A(2) clauses

- Are under-reporting clauses under S.270A(2) exhaustive? Mutually exclusive?
 - Mutual exclusivity doesn't matter given the instances are not for quantification but selection

Points to ponder #5

Does mere presence of misreporting trigger 270A(8) *qua* all the items of under-reported income?

- A question arises as to whether the non-obstante clause would apply only qua the items of under-reported income in consequence of misreporting thereof or will it be qua all the items
- If only a small portion of under-reported income is as a result of misreporting, question arises as to whether only that part which is due to misreporting will attract penalty @ 200% and the balance under-reported income will attract penalty @ 50% (or) will entire under-reported income attract penalty @ 200% ? This doubt arises in view of the language of sub-section (8).

*270A (8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is **in consequence of any misreporting thereof by any person**, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of **the amount of tax payable on under-reported income**.*

Points to ponder #5

Does mere presence of misreporting trigger 270a(8) *qua* all the items of under-reported income?

- Explanatory Memorandum to the Finance Bill, 2016 reads

*“It is proposed that the rate of penalty shall be fifty per cent of the tax payable on under-reported income. However in a case where underreporting of income results from misreporting of income by the assessee, the person shall be liable for penalty at the rate of two hundred per cent of the tax payable on **such** misreported income.”*

- Para 62.10 of the circular dated 20.1.2017, issued by CBDT, reads

*“62.10 The rate of penalty shall be fifty per cent of the tax payable on under-reported income. However in a case where under reporting of income results from misreporting of income by the assessee, the person shall be liable for penalty at the rate of two hundred per cent of the tax payable on **such** misreported income.”*

- The above make the intention of legislature clear and should clear the ambiguity due to S.270A(8) wording?
- Thus, **in my view**, “under-reporting in consequence of misreporting” and “under-reporting” (not due to misreporting) are **two different categories** of misdemeanor with different penalty rates (50% and 200% of tax).

Points to ponder #6

Notice ought to specify 270A(9) clause

- Karnataka High Court in the case of CIT v. Manjunatha Cotton & Ginning Factory [(2013) 35 taxmann.com 250 (Karn.)] has in the context of section 271(1)(c) held as under –

Notice under section 274 should specifically state the grounds mentioned in section 271(1)(c), i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form, where all the grounds mentioned in section 271 are mentioned, would not satisfy requirement of law. The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee. Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law. [Para 63]

- Isn't it reasonable to assume that this applies to S.270A also? Especially given difference is 50% versus 200%! (Delhi HC Schenider case has confirmed this viewpoint....)

Points to ponder #6

Notice ought to specify 270A(9) clause but in reality.....



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
National e-Assessment Centre
Delhi



To, 	
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PAN: 	Assessment Year: 2018-19	Date : 20/04/2021	DIN : 
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Notice for Penalty under section 274 read with section 270A of Income-tax Act,1961

Ms/Mr/M/s,

Whereas in the course of proceedings before me for the Assessment Year 2018-19, it appears to me that you have under-reported income.

- You are required to show cause why an order imposing penalty u/s 270A of Income-tax Act,1961 should not be passed.
- You are required to submit your reply online electronically in 'e-Proceeding' facility through your account in e-filing website (www.incometaxindiaefiling.gov.in) by the midnight (23:59 hours) of 20/05/2021.
- In case reply is not submitted, the order shall be passed without the benefit of your explanation.

Additional / Joint / Deputy / Assistant Commissioner of Income Tax
Income-tax Officer,
National e-Assessment Centre,
Delhi

Points to ponder #6

Notice ought to specify 270A(9) clause but in reality.....



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
National e-Assessment Centre
Delhi



To,	
[REDACTED]	

PAN:	Assessment Year:	Date :	DIN :
[REDACTED]	2017-18	27/02/2021	[REDACTED]

Show Cause Notice for penalty under section 270A of the Income-tax Act,1961

Ms/Mr/M/s,

Faceless Penalty Scheme was launched on 12/01/2021 and henceforth all penalties will be disposed of in a faceless manner similar to Faceless Assessment.

- Kindly refer to penalty proceedings under section 270A initiated vide notice dated 23/12/2019 bearing DIN [REDACTED], in your case for the aforementioned Assessment Year.
- You are required to show cause why order imposing penalty under section 270A of Income-tax Act,1961 should not be passed as initiated by the penalty notice referred above.
- Kindly submit your response along with supporting documentary evidence(s) if any, electronically in 'e-Proceeding' facility through your account in e-filing website (www.incometaxindiaefiling.gov.in) by the midnight (23:59 hours) of 15/03/2021.
- In case you had requested for keeping the penalty proceedings in abeyance, you are requested to upload a copy of the said reply.**
- In case no response is received by the given time and date, the penalty order shall be passed without the benefit of your explanation.**

Yours faithfully,

Additional/Joint/Deputy/Assistant Commissioner of Income-tax
National e-Assessment Centre, Delhi

Note: Refer to Annexure for additional details, if any.

Points to ponder #7

Take a step back: What is the basis of classification?

- Instances of mis-reporting are carved out of the instances of under-reporting, for limited purpose of prescribing different rates of penalties.
- The Act considers (assumes) that in cases of mis-reporting, an assessee has committed an offence greater than in case of under-reporting.
- But it does not explain reasons for such differential treatment failing to distinguish the specific cases between underreporting and mis-reporting

S.270AA – Immunity from imposition of penalty & prosecution

- Immunity u/S.270AA is possible subject to certain conditions
 - But only for ‘under reporting’
 - Not for ‘misreporting’ 😞

S.270AA – Application for immunity

Form 68

(1) **Application** to the Assessing Officer to grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, IF following conditions fulfilled

(a) the tax and interest payable as per the order of assessment or reassessment under sub-section (3) of section 143 or section 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.

(2) An application referred to in sub-section (1) shall be made within one month from the end of the month in which the order referred to in clause (a) of sub-section (1) has been received and shall be made in such form and verified in such manner as may be prescribed. [**Rule 129, Form 68**]

S.270AA: Granting immunity only for penalty due to under-reporting income

(3) The Assessing Officer shall, subject to fulfilment of the conditions specified in sub-section (1) and after the expiry of the period of filing the appeal as specified in clause (b) of sub-section (2) of section 249, **grant immunity from imposition of penalty under section 270A** and initiation of proceedings under section 276C or section 276CC, **where the proceedings for penalty under section 270A has not been initiated under the circumstances referred to in sub-section (9) of section 270A.**

S.270AA – Order passed accepting or rejecting immunity application

(4) The Assessing Officer shall, within a period of one month from the end of the month in which the application under sub-section (1) is received, pass an order accepting or rejecting such application:

Provided that no order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.

S.270AA: No appeal

(5) The order made under sub-section (4) shall be final.

(6) 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 sub-section (4) has been made accepting the application.

Note: Time from the date of filing the application till the rejection of application by the AO shall be excluded for counting thirty days u/s 249(2)

S.270AA : No estoppel

CBDT Circular 5/2018

“3. In this matter, it is hereby clarified that where an assessee makes an application seeking immunity under section 270AA of the Act, it shall not preclude such assessee from contesting the same issue in any earlier assessment year. Further, the Income-tax Authority, shall not take an adverse view in the proceedings for penalty under section 271(1)(c) of the Act in earlier assessment years merely on the ground that the assessee has acquiesced on the issue in any later assessment year by preferring an immunity on such issue under section 270AA of the Act.”

Schneider Electric South East Asia PTE Ltd Vs ACIT (Delhi HC)
W.P.(C) 5111/2022 dated 28/03/2022 (AY 18-19)

- HC grants immunity as in Section 270A Penalty notice AO failed to specify the limb under which Penalty was levied[!!]
- Court found there is not even a whisper as to which limb of Section 270A of the Act is attracted and how the ingredient of 270A(9) is satisfied. Mere reference to the word “misreporting” by the Respondent is not enough
- *“This Court is further of the view that the impugned action of Respondent No.1 is contrary to the avowed **Legislative intent of Section 270AA** of the Act to encourage/incentivize a taxpayer to (i) fast-track settlement of issue, (ii) recover tax demand; and (iii) reduce protracted litigation.”*

NIRMAN OVERSEAS PRIVATE LIMITED vs. NFAC Delhi
(W.P.(C) 5839/2022 dated 8.4.2022)

4. She states that the Respondent issued the impugned order dated 16th denying the immunity from penalty and prosecuting the Petitioner **on the ground that since no order under Section 270AA had been passed by the jurisdictional Assessing Officer within the statutory timeline, it may be treated as no order granting immunity to the assessee had been passed.** She further states that the Respondents while denying statutory immunity to the Petitioner under Section 270AA of the Act has failed to appreciate that once the conditions specified in Section 270AA of the Act are satisfied, the assessing officer was bound to grant immunity to the Petitioner

NIRMAN OVERSEAS PRIVATE LIMITED vs. NFAC Delhi
(W.P.(C) 5839/2022 dated 8.4.2022)

*6. This Court is also of the view that the **petitioner cannot be prejudiced by the inaction of the Assessing Officer in passing an order under Section 270AA of the Act within the statutory time limit** as it is settled law that no prejudice can be caused to any assessee on account of delay/default on the part of the Revenue.*

*7. In the present case, **the petitioner has satisfied the aforesaid conditions, inasmuch as, (i) the tax has been paid on the additions; (ii) appeal has undisputedly not been filed; and (iii) penalty (as would be evident from the penalty notice) has been initiated on account of “underreporting” of income.***

*8. Consequently, this Court is of the view that the **petitioner acquired a right to be granted immunity under Section 270AA of the Act.***

9. Consequently, the impugned order under Section 270A of the Act is set aside and the respondent is directed to grant immunity under Section 270AA of the Act to the petitioner.

GE CAPITAL US HOLDINGS INC vs. DCIT (Intl. Taxation & Ors)
WP (C) 1646/2022 dated 28.1.2022

“(a) issue a writ, order or direction in the nature of Certiorari for declaring Section 270AA(3) as ultra vires the Constitution of India or suitably reading down the provision of Section 270AA(3) to exclude cases wherein the Assessing officer has denied immunity from penalty without ex-facie making out a case of misreporting of income”

GE CAPITAL US HOLDINGS INC vs. DCIT (Intl. Taxation & Ors)

WP (C) 1646/2022 dated 28.1.2022

- Final Assessment Order for AY 2018-19 contained a line that penalty proceedings under Section 270A of the Act for misreporting are being initiated separately
- S.270A r.w 274 Order reads “Whereas in the course of proceedings before me for the Assessment Year 2018-19, it appears to me **Under-reporting/ misreporting of income**”
- S.270AA application rejected stating *“Ascertaining the outcome of the penalty proceedings at this stage will be precocious and premature-as they are separate and independent proceedings, on which a decision must be taken independently. **Mere payment of demand does not, ipso facto, amount to protection against or claim against misreporting as envisaged by section 270A(9) of the Income-tax Act, 1961.** In view of the above facts and assessee's applicationfor granting immunity from penalty u/s 270A(9) of the Act, the application of the assessee is hereby not accepted*”

GE CAPITAL US HOLDINGS INC vs. DCIT (Intl. Taxation & Ors)

WP (C) 1646/2022 dated 28.1.2022

Assessee's contentions:

- It is not disclosed by the Assessing Officer as to how it is claimed that the petitioner had either resorted to misreporting or under-reporting of income, since the final assessment order is cryptic in this regard.
- Even the Show Cause Notice does not disclose on what basis the allegation of under reporting or misreporting of income is alleged.
- In fact, the respondents are, themselves, not clear, whether they are alleging misreporting, or under-reporting against the petitioner.
- He further submits that in any event, the petitioner complied with all the pre-requisites and other conditions for grant of immunity. Yet, the application has been rejected by the respondents.

S.246 – Appealable Orders before Commissioner (Appeals)

S.246A(1)

(j) an order imposing a penalty under—

(A) section 221; or

(B) section 271, section 271A, section 271AAA, section 271AAB, section 271F, section 271FB, section 272AA or section 272BB;

(C) section 272, section 272B or section 273, as they stood immediately before the 1st day of April, 1989, in respect of an assessment for the assessment year commencing on the 1st day of April, 1988, or any earlier assessment years;

(ja) an order of imposing or enhancing penalty under sub-section (1A) of section 275;

....

(l) an order imposing a penalty under sub-section (2) of section 158BFA;

(m) an order imposing a penalty under section 271B or section 271BB;

(n) an order made by a DC imposing a penalty under section 271C, section 271CA, section 271D or section 271E;

(o) an order made by a DC or DD imposing a penalty under section 272A;

(p) an order made by a DC imposing a penalty under section 272AA;

(q) an order imposing a penalty under Chapter XXI;

S.271DA - Penalty for failure to comply with provisions of section 269ST.

(1) If a person receives any sum in contravention of the provisions of section 269ST, he shall be liable to pay, by way of penalty, a sum equal to the amount of such receipt:

Provided that no penalty shall be imposable if such person proves that there were good and sufficient reasons for the contravention.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner.

S.271D – Time limit for initiation

- There is no time limit mentioned for initiation of penalty proceedings but it should be reasonable after the contravention of such provisions.
- In the context of S.271D (which is for penalty u/S.269SS), the Hon'ble Delhi High Court in the case of *Commissioner of Income Tax vs. Worldwide Township Projects Ltd 2014-LL-0521-71(NJRS).*, vide its order dated 21.5.14 in ITA No. 232/2014, considered the issue and observed that,

“It is well settled that a penalty under this provision is independent of the assessment. The action inviting imposition of penalty is granting of loans above the prescribed limit otherwise than through banking channels and as such infringement of Section 269SS of the Act is not related to the income that may be assessed or finally adjudicated. In this view Section 275(1)(a) of the Act would not be applicable and the provisions of Section 275(1)(c) would be attracted.” The judgment has been accepted by the Central Board of Direct Taxes in Circular 10/2016

S.269ST - Mode of undertaking transactions.

No person shall receive an amount of two lakh rupees or more—

(a) in aggregate from a person in a day; or

(b) in respect of a single transaction; or

(c) in respect of transactions **relating to one event or occasion from a person,**

otherwise than by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account or through such other electronic mode as may be prescribed:

Provided that the provisions of this section shall **not** apply to—

(i) any receipt by—

(a) Government;

(b) any banking company, post office savings bank or co-operative bank;

(ii) transactions of the nature referred to in section 269SS;

(iii) such other persons or class of persons or receipts, which the Central Government may, by notification in the Official Gazette, specify.

Explanation.—For the purposes of this section,—

(a) "banking company" same as clause (i) of the Explanation to section 269SS;

(b) "co-operative bank" same as clause (ii) of the Explanation to section 269SS.

S.271AAC - 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.

Section - 115BBE

Tax on income referred to in section 68, 69, 69A, 69B, 69C, 69D

(1) Where the total income of an assessee,—

(a) includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or

(b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a),

the income-tax payable shall be the aggregate of—

(i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of **sixty per cent**; and

(ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).

(2) Notwithstanding anything contained in this Act, **no deduction in respect of any expenditure or allowance or set off of any loss** shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) and clause (b) of sub-section (1).

Brief note on Demonetization → S.115BEE → S.271AAC

- Number of cases across India selected for scrutiny with S.143(2) notices issued predominantly on the basis of info gathered during the Operation Clean Money (OCM) drive launched by the Department for verification of large cash deposits made during the demonetization period.
- Most cases culminated in S.143(3) order wherein additions in respect of deposits of SBNs during the demonetization period were perfunctorily made by the assessing officers under Sec.69A of the Act as Unexplained Money, and brought to tax under Sec.115BBE
- This is notwithstanding that in most cases, the essential ingredients for the invoking of Sec.69A, as expounded by various Courts, **were conspicuously absent**. Typically, such receipts are duly recorded in the books of accounts of the taxpayer, and Sec.69A of the Act dealing with unexplained money does not no application
- Number of these Orders have been challenged in appeal across country and are pending adjudication. It is my view that, in most cases, S.115BBE and consequently S.271AAC cannot be levied.

S.274 – Procedure

S.274. (1) No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.

S.274(2A)/(2B)/(2C) - Faceless penalty scheme!

S.275 – Time limit

Explanation.—In computing the period of limitation for the purposes of this section,—

- (i) the time taken in giving an opportunity to the assessee to be reheard under the proviso to section 129;
- (ii) any period during which the immunity granted under section 245H remained in force; and
- (iii) any period during which a proceeding under this Chapter for the levy of penalty is stayed by an order or injunction of any court,
shall be excluded.

S.275 - Bar of limitation for imposing penalties.

Case	Time limit to pass penalty Order
Subject-matter of an appeal to the Commissioner (Appeals) under section 246 or section 246A or an appeal to the Appellate Tribunal under section 253,	Expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the Order is received
Relevant assessment or other order is the subject-matter of revision under section 263 or section 264	Expiry of six months from the end of the month in which such order of revision is passed
Any other case	Expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later.

S.275 - Bar of limitation for imposing penalties.

(1A) Where relevant assessment is the subject-matter of an appeal to the CIT(A), ITAT, HC or SC and an order imposing or enhancing or reducing or cancelling penalty is passed before the Order of CIT(A), ITAT, HC or SC is received, an order imposing or enhancing or reducing or cancelling penalty may be passed on the basis of assessment as revised by giving effect to such order of CIT(A), ITAT, HC or SC:

Provided that no order of imposing or enhancing or reducing or cancelling penalty or dropping the proceedings for the imposition of penalty shall be passed—

- (a) unless the assessee has been heard, or has been given a reasonable opportunity of being heard;
- (b) after the expiry of six months from the end of the month in which the order of the CIT(A), ITAT, HC or SC is received

Takeaways

- New regime is not *old wine in new bottle*.
- Entire existing jurisprudence on S.271(1)(c) to be now relooked at and applied selectively.
- Unsatisfactory distinction of under-reported & misreported with harsh gradation of 50% and 200%.
- Expect large number of litigation on the new penalty regime especially around whether items fall under misreported & under-reported income.
- Penalty orders are being “automatically” issued on under-reporting/mis-reporting.
- S.270AA seems to be one possible effective remedy...in cases where it is affordable to buy peace.
- Bottomline: Get a good tax lawyer 😊

Thank you!

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(2 v's!)