

Penal Provisions u/s 270A - Important conceptual divergence from earlier penalty provisions u/s 271(1)(c)

The Hon'ble Finance Minister introduced the new penal provisions u/s 270A by justifying that it will lead to a reduction in disputes between taxpayers and tax authorities and will impede the present system of arbitrary imposition of penalty.

In this article, an attempt is made to touch upon the important conceptual divergence from the earlier penalty provisions and how it will be a better structure of governance leading to fewer disputes.

Earlier Provisions:

At first, let us discuss the earlier penalty provisions and their shortcomings to understand the need for the amendments:

- Under the earlier legislation, the levy of penalty for concealment or furnishing of inaccurate particulars of income under the section 271(1)(c) of [Income-tax Act 1961](#) has **always been a matter of dispute between the revenue authorities and the taxpayers.**
- There was **lack of specificity in terms of quantum of penalty.** Under the earlier provisions, Income-tax Officer had the discretion to levy penalty ranging from 100% to 300% of tax sought to be evaded.
- The **discretion regarding quantum of penalty led to corruption and a large number of pending disputes** despite a number of judicial precedents on the interpretation of statutory provisions.
- The tax authorities **always tried to levy the penalty** whenever there was an addition or disallowance made by the assessing officer, even in cases where there was no prima facie case against the taxpayer.

Under the new scheme for the imposition of the penalty, matters are classified into two parts:

1. Under Reporting of Income; and
2. Misreporting of Income.

Under Reporting of Income:

The under-reported income has been defined in sub-section (2) section 270A. Accordingly, assessee shall be considered to have unreported his income where:

- (a) The **Income Assessed > Income Determined** in the return processed u/s 143(1);
- (b) The **Income Assessed > Basic exemption**, (In case of Individual/ HUF) where **no return** of income has been furnished.
- (c) the **Income Reassessed > Income Assessed** or **reassessed immediately before** such reassessment;

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

Cases where MAT/ AMT applies:

(e) the amount of deemed total income **assessed or reassessed** as per the provisions of section 115JB or 115JC, as the case may be, > **deemed total income determined** in the return processed under section 143(1);

(f) the amount of deemed **total income assessed** as per the provisions of section 115JB or 115JC > **Basic Exemption (In case of Individual/ HUF/ AOP/ BOI where AMT applies)**, where **no return** of income has been filed;

(g) the amount of **deemed total income reassessed** as per the provisions of section 115JB or section 115JC > **deemed total income assessed or reassessed** immediately before such reassessment;

Exclusions from the term "Unreported income":

However, in order to reduce disputes between the taxpayers and the tax authorities, there are exclusions of certain amounts from the scope of the expression "Unreported income". Such exclusions are enumerated in sub-section (6) which are summarized as below:

Case	Conditions
1. Amounts in respect of which assessee offers a bona fide explanation	The tax authority is satisfied that the explanation is bona fide and all the material facts have been disclosed to substantiate the explanation.
2. Where the amount of under-reported income is determined on the estimate basis	If the accounts are correct and complete to the satisfaction of the income-tax authority but the method employed is such that the income cannot properly be deduced therefrom
3. Where the amount of under-reported income is determined on the estimate basis	If the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue and has included such amount in the computation of his income and disclosed all the facts material to the addition or disallowance
4. 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 and disclosed all the material facts relating to the transaction
5. The amount of undisclosed income on account of a search operation	Where the penalty is leviable under section 271AAB in respect of such undisclosed income.

Misreporting of Income:

It has been defined in sub-sections (8) & (9) of section 270A. Collective reading of the subsections reveals that misreporting of income will be where under-reported income is because of following reasons:

- (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 false entry in the books of account;
- (e) Failure to record any receipt in the books of account having a bearing on the total income;
- (f) Failure to report any international transaction or deemed international transaction or any specified domestic transaction to which provisions of chapter X applies.

Quantum of the Penalty:

The method of determination of quantum of the penalty to be levied under the new provisions is much clear unlike the discretionary method of erstwhile provisions.

Under the new provisions, the tax authority may 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 underreported income at the following percentage:

- The penalty shall be **50% of the amount of tax payable on underreported income.**
- Where under-reporting of **income results from misreporting of income** then penalty shall be **200% of tax payable** on such under-reported income.

Conceptual Divergence from earlier provisions:

Under the existing provisions, the tax authority has the onus to prove and record the reasons that the assessee had concealed the particulars of income or furnished inaccurate particulars in the return of income.

Under the new scheme, there is **only partial statutory requirement**.

For Under-Reporting of Income: there is no such requirement since the difference between the assessed income and income determined u/s 143(1)(a) or maximum amount not chargeable to tax, where no return is filed by the assessee is deemed to be the amount of underreported income.

However, **in case of misreporting of income**, the tax authority will have to prove or demonstrate that case of assessee falls within the criteria mentioned in subsection (9).

Under the existing provisions, there is a discretion with the tax authority to impose the penalty ranging between 100% to 300% of the tax.

Under the new scheme, the tax authority has no such discretion. It is **required to impose the penalty at a flat rate** of 50% of tax payable on unreported income and 200% of tax payable on misreported income.

Under the new provisions, certain exclusions have been provided to reduce the number of disputes arising. However, no such exclusions were present under older provisions.

Food for thought:

Whether penalty proceedings can be initiated after completion of assessment proceedings?

In my opinion, the answer is NO based on the reasons given as follows:

- a. According to section 275(1)(c), no penalty order can be passed:

b. Either, after the expiry of financial year in which the proceedings, in the course of which action for imposition of penalty has been initiated, is completed; or

c. 6 months from the end of the month in which action for imposition of penalty is initiated, whichever is later.

d. Therefore, it is a prerequisite that the penalty proceedings are initiated in the course of assessment proceedings, the period of limitation cannot be worked out.

e. Moreover, for availing the immunity u/s 270AA, the assessee is required to make an application within 30 days from the end of the month in which the order of assessment is received. Thus, the assessee must be aware of such order that penalty proceeding u/s 270A has been initiated or not.

f. Further, immunity u/s 270AA is available only in case of under-reporting of income. Hence, the tax authority must demonstrate whether the penalty is initiated for underreporting of income or misreporting of income. This can be done only by initiating the same in the assessment order or by issuing the notice.

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