

SECTIONS 270A & 270AA OF THE INCOME TAX ACT, 1961: AN OVERVIEW



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I. BACKGROUND

1. For any law to be implemented in an effective manner, it must provide for the consequences of contravening the provisions of such law. The very purpose of any legislation would be defeated in the absence of a mechanism to regulate and ensure its efficacious enforcement.

2. The Income Tax regime in India, as laid down under the Income Tax Act, 1961 ("the Act"), periodically amended by the Finance Act, enlists various penal provisions which are enforced in the event an assessee attempts to evade tax, thereby contravening the provisions of the Act.

3. Chapter XXI of the Act deals with '**Penalties Imposable**'. The provisions contained in this Chapter enumerate the following three aspects w.r.t. penalties –

- Levy
- Imposition, and
- Collection

4. The penal provision which has been most litigated upon is section 271(1)(c) of the Act. As per the provisions of this section, the Assessing Officer, Commissioner/Principal Commissioner or Commissioner (Appeals) ["Designated Authority"] is empowered to levy penalty in the course of any proceedings if he was *satisfied* that there had been concealment of particulars of income or furnishing of inaccurate particulars of income on part of the assessee.

5. The quantum of penalty to be levied was left wholly to the *discretion* of the Designated Authority which could be any amount ranging from a minimum of 100% to a maximum of 300% of the tax sought to be evaded.

6. The condition imposed upon the Designated Authority to record *satisfaction* of concealment or furnishing of inaccurate particulars of income by the assessee, coupled with the *discretionary* power granted to it with regard to the quantum of penalty to be levied, gave rise to uncurbed litigation between the assessee and the department.

II. MOST LITIGATED PROVISION

7. As mentioned above, the provisions of Section 271(1)(c) of the Act have been extremely contentious. In the recent past, the one point that has been vehemently argued before the authorities is whether penalty proceedings

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initiated will be held good in law if the Assessing Officer ("the AO") failed to specify the charge for levying penalty, i.e. concealment of particulars of income *OR* furnishing inaccurate particulars of income.

8. The argument generally advanced by the assessee is that in the penalty notice u/s 274 r.w.s. 271, the applicable limb is not ticked nor struck off, i.e. concealment of particulars of income or furnishing inaccurate particulars of income is not specified/mentioned. In other words, prima-facie, there was failure on the part of the AO to frame a specific charge against the assessee for which the assessee was being penalised. It has been held by various jurisdictional High Courts and Tribunals that in the absence of a specific charge against the assessee, it would not satisfy the requirement of law since the assessee should know the ground which is being raised against him. This amounts to violation of principles of natural justice.

9. The Courts have also ruled in favour of the assessee in situations where penalty had been initiated on both charges, i.e. concealment of particulars of income *AND* furnishing inaccurate particulars of income. It has been held by the Apex Court in *Sri T. Ashok Pai v. CIT (SC)* [\[i\]](#) that both the charges are distinct from one another and carry different connotations. The non-mentioning of a specific charge, i.e. either one of them, would vitiate the penalty proceedings. This position has been upheld in *CIT v. Manjunatha Cotton & Ginning Factory (Kar HC)* [\[ii\]](#) and reiterated in *CIT v. Samson Perinchery (Bom HC)* [\[iii\]](#). The decision of the Hon'ble Karnataka High Court was subsequently followed by the same court in *CIT v. SSA's Emerald Meadows (Kar HC)* [\[iv\]](#) which was challenged by the Revenue before the Apex Court. However, the Special Leave Petition [\[v\]](#) against the same was dismissed by the Hon'ble Supreme Court.

10. There are a catena of judgments supporting the above views. For the sake of brevity, some of them have been mentioned hereinbelow –

- *Balaji Telefilms Ltd. v. DCIT (Mum ITAT)* [\[vi\]](#)
- *Balaji Motion Pictures Ltd. v. DCIT (Mum ITAT)* [\[vii\]](#)
- *YKM Holding Pvt. Ltd. v. ITO (Delhi ITAT)* [\[viii\]](#)
- *Virgo Marketing Pvt. Ltd. (Del HC)* [\[ix\]](#)

III. SECTION 270A: PENALTY FOR UNDER-REPORTING & MISREPORTING OF INCOME

Introduction

11. In order to reduce the litigation and corruption resulting from the discretionary application of the provisions under section 271(1)(c) of the Act, a new **section 270A** has been inserted vide Finance Act, 2016, w.e.f. 1-4-2017 resulting in non-operation of Section 271(1)(c) of the Act from even date.

12. Section 270A of the Act provides for levy of penalty in the case of 'under-reporting of income' and under-reporting of income as a consequence of 'misreporting of income'. The section lays down its primary offence, i.e., *under-reporting of income*, as against the erstwhile section 271(1)(c) of the Act which provided for two offences, viz., concealment of particulars of income and furnishing inaccurate particulars of income. Misreporting of income is simply a consequence of under-reporting of income and will be invoked in the event any of the specified offence(s) laid down under sub-section (9) of section 270A of the Act is committed.

Objectives of new penalty provisions

13. Section 270A of the Act was inserted vide Finance Act, 2016 to bring in objectivity, certainty, and clarity in the already prevalent penal provisions of the Act. The then Finance Minister in his Budget Speech said –

“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 misdemeanor with graded penalty and thereby substantially reducing the discretionary power of the tax officers.” Even the text of the Explanatory Memorandum to the provisions of the Finance Bill, 2016 highlight the objective of Section 270A of the Act very clearly –

“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 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 assessment year commencing on or after 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.”

In addition to the above, the intent of the legislature behind the introduction of section 270A of the Act has also been reiterated in Para 62.1 of CBDT Circular No.3/2017[[x](#)].

14. Along with section 270A of the Act, sub-section (7) to section 271 of the Act was also introduced vide Finance Act, 2016, w.e.f. 1-4-2017. Section 271(7) of the Act states that the provisions of section 271 of the Act shall not apply to any assessment pertaining to any assessment year commencing on or after 1st April, 2017. The simultaneous introduction of section 270A and sub-section (7) to section 271 of the Act clearly brings out that the former is applicable only to assessment years 2017-18 onwards. In the event any penalty proceedings are initiated by the designated authority for any year prior to A.Y. 2017-18, only the provisions of section 271 of the Act shall apply and not the provisions of section 270A of the Act.

15. In short, section 271 of the Act shall continue to be in force even if proceedings are initiated after 1-4-2017 for any year prior to A.Y. 2017-18. Whereas the provisions of section 270A of the Act shall apply in respect of any proceedings for A.Y. 2017-18 onwards, irrespective of the date of completion of proceedings and date of initiation of penalty.

Section 270A vis-à-vis Section 271(1)(c).

PARTICULARS	SECTION 270A	SECTION 271(1)(c).
Applicability	To any assessment from Assessment Year 2017-18 onwards	To any assessment up to Assessment Year 2016-17
Nature of Offence	<ul style="list-style-type: none"> • Under-reporting of income • Misreporting of income as a consequence of under-reporting 	<ul style="list-style-type: none"> • Concealment of particulars of income • Furnishing inaccurate particulars of income
When is levy attracted?	In the course of any proceedings	In the course of any proceedings
Definitions	<ul style="list-style-type: none"> • Under-reporting of income – Sub-section (2) & (6) • Misreporting of income – Sub-section (9) 	Concealment of particulars of income & furnishing inaccurate of particulars of income – Not defined
Quantum of penalty	<ul style="list-style-type: none"> • Under-reporting – 50% of tax sought to be evaded • Misreporting – 200% of tax sought to be evaded 	100% to 300% of amount of tax sought to be evaded in either case
Need for recording satisfaction for levy of penalty	No	Yes
Discretion regarding quantum of penalty	No	Yes

Designated Authority	<ul style="list-style-type: none"> • Assessing Officer • Commissioner • Commissioner (Appeals) 	<ul style="list-style-type: none"> • Assessing Officer • Commissioner • Commissioner (Appeals)
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Section 270A – In Detail

Sub-section (1) – Levy of Penalty & by Who

16. As per sub-section (1) the Designated Authority is empowered to levy penalty in the course of any proceedings, whether assessment proceedings or appellate proceedings. However, the appellate proceedings include only the first level of appeal.

17. The Designated Authority may direct any person who has under-reported his income, to pay a penalty in addition to tax, as prescribed in sub-sections (7) & (8) of the section.

18. Now, the onus of recording satisfaction by the Designated Authority to levy penalty does not arise, since the offence, being under-reporting & misreporting of income, is more clearly defined as against section 271(1)(c) of the Act.

Sub-sections (2), (3) & (10) – Under-reporting of Income: Situations, Computation & Taxability

19. The term “under-reporting” has not been defined anywhere in the Act. However, sub-section (2) lays down seven situations which shall be considered as under-reporting of income.

20. Sub-section (3) lays down the method of computation of under-reported income.

21. Sub-section (10) lays down the tax calculation in respect of under-reported income as calculated in sub-section (3).

<u>SR. NO.</u>	<u>SITUATION CONSIDERED AS UNDER-REPORTING OF INCOME [SECTION 270A (2)]</u>	<u>COMPUTATION OF UNDER-REPORTED INCOME [SECTION 270A (3)]</u>	<u>COMPUTATION OF TAX PAYABLE ON UNDER- REPORTED INCOME [SECTION 270A (10)]</u>
1.	Return has been filed and assessment made for the first time, where <i>Income assessed > Income determined u/s 143(1)(a)</i>	Income assessed minus Income determined u/s 143(1)(a)	Tax on [under-reported income + income determined u/s 143(1)(a)] minus Tax on income determined u/s 143(1)(a)
2.	No return has been filed and assessment made for first time OR where the return has been furnished for the first-time u/s 148, where <i>Income assessed > Maximum amount not chargeable to tax</i>	<ul style="list-style-type: none"> • In case of assessee other than individual/HUF = Amount of income assessed • In case of assessee being individual/HUF = Amount of income assessed minus Rs.2,50,000/-	<ul style="list-style-type: none"> • Tax on under-reported income as if it were the total income • Tax on [under-reported income + Rs.2,50,000/-] as if it were total income of the assessee
3.	In case of reassessment, where <i>Income reassessed > Income assessed or reassessed immediately before such reassessment</i>	Amount of income reassessed minus Amount of income assessed in preceding order	Tax on [under-reported income + income assessed in preceding order] minus Tax on income assessed in preceding order

4.	Where section 115JB or 115JC applies and return has been filed by the assessee and assessment made for the first time, where <i>Deemed total income as per section 115JB/115JC > Deemed total income as per section 115JB/115JC determined u/s 143(1)(a)</i>	(A+B) + (C-D), where; A = Total income assessed as per general provisions B = Total income assessed as per general provisions reduced by under- reported income C = Total income assessed as per section 115JB/115JC D* = Total income assessed as per section 115JB/115JC reduced by under- reported income *If under reported income is same as per 'B' & 'D', then under-reported income shall not be considered under 'D'	
5.	Where section 115JB/115JC applies and no return has been filed and assessment made for the first time OR where return has been furnished for the first-time u/s 148 where <i>Deemed total income assessed as per section 115JB/115JC > Maximum amount not chargeable to tax</i>	(A+B) + (C-D), where; A = Total income assessed as per general provisions B = Total income assessed as per general provisions reduced by under- reported income C = Total income assessed as per section 115JB/115JC D* = Total income assessed as per section 115JB/115JC reduced by under- reported income *If under reported income is same as per 'B' & 'D', then under-reported income shall not be considered under 'D'	
6.	Where section 115JB/115JC applies and it is a case of reassessment, where <i>Deemed total income reassessed as per section 115JB/115JC > Deemed total income as per section 115JB/115JC assessed immediately before such reassessment</i>	(A+B) + (C-D), where; A = Total income reassessed as per general provisions B = Total income reassessed as per general provisions reduced by under- reported income C = Total income reassessed as per section 115JB/115JC D* = Total income reassessed as per section 115JB/115JC reduced by under- reported income *If under reported income is same as per 'B' & 'D', then under-reported income shall not be considered under 'D'	
7.	Returned Income is a loss and assessment made, where <i>Loss is reduced OR Loss is converted into income</i>	Amount of loss assessed minus Amount of loss claimed OR Amount of income assessed plus Amount of loss claimed	Tax on under-reported income as if it were total income of the assessee
	Case of reassessment, where <i>Loss in assessment immediately before such assessment is reduced OR Loss in assessment immediately before such assessment is converted into income</i>	Amount of loss reassessed minus Amount of loss assessed in preceding assessment order OR Amount of income reassessed plus Amount of loss assessed in preceding assessment order	Tax on under-reported income as if it were total income of the assessee

Sub-sections (4) & (5) – Penalty for Intangible Additions

22. At times, in an assessment, the Assessing Officer may make an addition which may not be a source of income in itself. There may be situations where addition(s) is made on a presumptive or an estimated basis. Penalty will not be levied w.r.t. such addition(s). This situation has been specifically dealt with in sub-section (6) explained below.

23. Sub-section (4) provides that if in an assessment year the source of any receipt, deposit or investment is claimed to be from an intangible addition of an earlier year which was not subjected to penalty for that assessment year, then such income (as is sufficient to cover such receipt, deposit or investment) shall be treated as under-reported income and will be subject to penalty in the year in which such addition is made.

24. Sub-section (5) provides that where addition was made in several years then the amount of under-reported income of the preceding year shall be determined by going backwards.

For example, if in the assessment of A.Y. 2021-22 source of receipt of Rs.10 lakh is claimed to be from intangible additions made in earlier years in respect of which penalty was not levied in those years, then the additions of earlier years to the extent of Rs.10 lakh would be deemed to be under-reported income of those years.

Sub-sections (6) – Under-reporting of income: Exclusions

25. Sub-section (6) provides for five specific exclusions from the scope of under-reported income, covered in the following table:

<u>CLAUSE UNDER SECTION 270A(6).</u>	<u>NATURE OF EXCLUSION OF UNDER-REPORTED INCOME</u>	<u>UNDER-REPORTED INCOME EXCLUDED IF</u>
(a)	Income in respect of which assessee offers a bonafide explanation	The assessee offers an <i>explanation</i> with which the Designated Authority is <i>satisfied</i> and the assessee has <i>disclosed</i> all material facts to substantiate the explanation
(b)	Income determined on the basis of an estimate, where accounts are correct and complete	The amount of income is <i>estimated</i> , the accounts are correct and complete to the <i>satisfaction</i> of the Designated Authority and the method employed for estimation may not enable proper determination of income
(c)	Income determined on the basis of an estimate, where the assessee estimated a lower amount of addition/higher disallowance as compared to estimate calculated by the department	The assessee has <i>estimated</i> a lower amount of addition in respect of claim or disallowance, where such claim is reduced, or disallowance is increased in the assessment and the assessee has <i>disclosed</i> all the facts material to the addition or disallowance
(d)	Addition made to total income on account of adjustment in arm’s length price determined by Transfer Pricing Officer under Transfer Pricing	The assessee has maintained information and documents prescribed u/s 92E of the Act and the assessee has declared the international transaction under Chapter X along with disclosures of material facts relating to the transaction
(e)	Undisclosed income referred to u/s 271AAB [xi] .	

Sub-sections (7) & (8) – Quantum of Penalty.

26. The quantum of penalty to be levied has now been provided for in absolute terms in sub-sections (7) & (8). With the introduction of this provision, the Designated Authority does not have any discretionary powers with regard to the quantum of penalty that shall be levied under this section as it used to earlier possess under section 271(1)(c) of the Act.

27. Penalty under sub-sections (7) & (8) is levied on the amount of tax worked out on under-reported income as per the provisions of sub-section (10). The amount of penalty to be levied is as follows:

<u>SECTION & SUB-SECTION</u>	<u>NATURE OF OFFENCE</u>	<u>AMOUNT OF PENALTY</u>
270A (7)	Under-reporting of income	50% of tax sought to be evaded

270A (8)	Misreporting of income	200% of tax sought to be evaded
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Sub-sections (9) – Misreporting of income

28. As mentioned in Para 27 above, where under-reporting of income is in consequence of misreporting thereof, sub-section (8) provides for a penalty to be levied @ 200% of tax sought to be evaded.

29. Sub-section (9) enlists the following six cases which would amount to misreporting –

- 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 the 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

30. Here, special attention is drawn to the [\[xii\]](#) Second Proviso [\[xiii\]](#) of clause (viib) of sub-section (2) of section 56 of the Act which specifically lays down a case which shall be deemed to be under-reporting of income as a consequence of misreporting as per sub-section (9) of section 270A of the Act.

31. It appears that the above list is exhaustive, and a case not mentioned in sub-section (9) would not fall under misreporting. A perusal of the above-mentioned cases reveals that misreporting would mean a deliberate action with a view to evade or reduce tax liability.

Sub-section (11) – No penalty to be imposed twice on same Addition/Disallowance

32. Sub-section (11) states that where an addition or disallowance has already been subjected to the levy of penalty under the Act, then the same addition or disallowance cannot be subject to penalty under this section.

33. Simply put, an assessee cannot be penalized more than once for the same addition or disallowance.

Sub-section (12) – Order to be in writing

34. Sub-section (12) states that the penalty order must be in writing. This order is an appealable order.

IV. SECTION 270AA: IMMUNITY FROM IMPOSITION OF PENALTY, ETC.

Synopsis

35. Section 270AA of the Act was also introduced vide Finance Act, 2016 w.e.f. 1-4-2017 along with section 270A and 271(7) of the Act. This section provides for grant of immunity to an assessee from imposition of penalty under section 270A of the Act and from initiation of prosecution under section 276C or 276CC of the Act, if the following two conditions have been complied with –

- Demand raised for tax and interest as per the assessment order has been duly paid
- No appeal has been filed by the assessee against such assessment order

36. However, the benefit of immunity under section 270AA of the Act is *not available* to the assessee if the penalty levied under section 270A of the Act is due to misreporting of income even if the above-mentioned conditions are

complied with.

37. The benefit of immunity is only available for penalty initiated under section 270A of the Act, i.e., for any assessment from assessment year 2017-18 onwards and not for penalty initiated under section 271(1)(c) of the Act.

38. With the introduction of this section, there were many apprehensions raised that in the event an assessee avails the benefit of immunity under section 270A of the Act, and penalty proceedings have also been initiated under section 271(1)(c) of the Act for earlier years on the same issue, then availing of the immunity benefit may be treated as acceptance of default by the assessee for earlier years as well. This would lead to the Designated Authority to take an adverse view in the penalty proceedings of earlier years under section 271(1)(c) of the Act.

39. In order to clear these apprehensions, the CBDT, vide Circular No.5/2018^[xiv] clarified that an application made by an assessee under section 270AA of the Act seeking immunity from penalty under section 270A of the Act, will not bar the assessee from contesting the same issue in any earlier assessment year. This circular also clarifies that the Designated Authority shall not take an adverse view in penalty proceedings of earlier years, i.e., under section 271(1)(c) of the Act, merely because the taxpayer has applied for immunity under section 270AA of the Act.

In short, the CBDT has clarified that the disputes of earlier assessment years shall be decided on merits of each case which will avoid further potential disputes between the department and assessee.

V. CONCLUSION

40. As we are aware, Section 271(1)(c) of the Act has been subject matter of excessive litigation. However, over the years, most of the disputes arising therefrom have been settled by various appellate forums, jurisdictional High Courts and also the Supreme Court.

With the introduction of Section 270A and 270AA of the Act, one can expect some level of objectivity, certainty and clarity in penal provisions, if not completely. These sections have been discussed above in a comprehensive manner by throwing light on important terms and provisions which can be helpful to understand the intent of the legislature. That said, these sections are fairly recent and have not yet become subject matter of litigation and hence one cannot say how effective they have been in their implementation. With the application of these sections to various situations and cases, a deeper understanding will be created which would absolve the shortcomings of the erstwhile section 271(1)(c).

Disclaimer

The material contained herein is brief and not comprehensive, contains generalisations and is only illustrative. Any views or opinions expressed are those of the author/s. The reader must seek independent legal counsel based on his/her particular facts and circumstances. The latest provisions of the applicable laws, judgements and notifications of the authorities must be considered.

^[i] (2007) 292 ITR 11

- [ii] (2013) 359 ITR 565
- [iii] (2017) 88 taxmann.com 413
- [iv] (2016) 73 taxmann.com 241
- [v] 73 taxmann.com 248 SLP dismissed on 05-08-2016
- [vi] ITA Nos. 5580, 7645-7650/Mum/2016 dated 18-09-2020
- [vii] ITA No.7643/Mum/2016 dated 03-01-2018

- [viii] ITA No.2174/Del/2016 dated 12-10.2018
- [ix] (2008) 171 taxman 156
- [x] F.No.370142/20/2016-TPL dated 20-01-2017
- [xi] Penalty where Search has been initiated
- [xii] Inserted vide Finance (No.2) Act, 2019, w.e.f. 01-04-2020
- [xiii] Section 56(2)(viib) ...

Provided that ...

- (i) ...
- (ii) ...

Provided further that where the provisions of this clause have not been applied to a company on account of fulfilment of conditions specified in the notification issued under clause (ii) of the first proviso and such company fails to comply with any of these conditions, then, any consideration received for issue of share that exceeds the fair market value of such share shall be deemed to be the income of that company chargeable to income-tax for the previous year in which such failure has taken place and, it shall also be deemed that the company has under reported the said income in consequence of the misreporting referred to in sub-section (8) and sub-section (9) of section 270A for the said previous year.

- [xiv] F.No. 370149/155/2018-TPL dated 16-08-2018

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