



C.V.O.CA'S

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VOL. 26 - NO. 4
OCTOBER 2022

NEWS & VIEWS

From President's Desk...



Dear Professional Colleagues and Readers,

I am taking this as an opportunity to narrate a story of a legend, truly an inspirational figure. When I read her story, I realized how lucky we all are, we have all means to live, we have a good life to live, we have relatives and friends to take care and still we all crib so much from our life. I am sure, when you all will read her story, you also will feel how we are wasting our life. I am going to talk about Sindhu Tai Sapkal. "Sindhu" stands for a river - the lifeline for many, and "Tai" stands for mother - the lifeline of a child. Sindhu Tai was indeed a lifeline for more than 1,500 orphaned children. She is not less than an incarnation of a god for abandoned children. Her story is no less than Mother Teresa's.

Sindhu Tai was born on 14th November 1948, in Maharashtra, just after Britisher's left India in a miserable state in a poor family. She was an unwanted child for their family and even mother never loved her. **Being an unwanted girl, she was called "Chindi"** (torn cloth in Marathi is called Chindi) by her family and villager. She used to love reading and completed her 4th Standard study. But poor financial condition of the family forced her to stop formal education. At the early age of 12 years, she was married to a person, who was 20 years elder than her. Her husband was very cruel to her, regularly used to beat her, and used to consider females inferior to men. Sindhu Tai was very fond of reading and whenever she will see any reading material, she will start reading it. Her husband, being uneducated, started having an ego issue with that and used to beat her whenever he will see her reading anything.

At an early age, she noticed injustice in society, especially toward woman of the society. Due to her leadership quality, she started raising her voice. The male-dominated society did not favor it and started conspiring against her. At the age of 20, she was pregnant for 9 months and her husband left her and forced her to leave the house. She said in one of her interviews, that she went door to door for a shelter but no one accepted her, not even her own family accepted her. With 9 months of pregnancy, finally, she had to take shelter in a cowshed. She quoted, she delivered her baby in that cowshed without any of doctor or nurse around her. She delivered her baby by her own under terrible pain. She remembers, at the time of birth of her kid, she took a stone from nearby in most unconscious state and hit the lifeline cord of the new born child as many as 16 times so as to detach it. She gave birth to a healthy girl child. With nowhere to go and no one accepting her, she started begging. She took care of her infant kid with whatever she could earn from bagging. To protect her from the bad element of society, she took shelter in the nearby cemetery. After begging for a full day at nearby railway station, she will sleep at the nearby cemetery. She felt more safe and secure as people are afraid of entering cemetery in night. She had lost all her hope in her life and many times attempted to kill her child and commit suicide but destiny had a different story for her. In the process, she realized that there are so many children abandoned by their parents and no one was there to feed those abandoned. She started adopting those children. To feed these infants, she started begging more vigorously. She had very good vocals and hence started reciting "Bhajans" in various temples. She said once, "Bhajan" used to give me and my children "Bhajans". Day and night she used to beg at temples and whatever she used to earn; she started feeding those all adopted kids.

Many of her adopted kids have stated on recorded TV programs, that Mother Tai, many a time remained hungry, to ensure, that all her adopted kids get good food. And that was done by singing bhajans on the street, railway stations, and temples. She started developing an attachment to her biological child. Just to eliminate the feeling of partiality between her biological child and the adopted children, she donated her biological child to a trust. By now, she had decided that she will spend her entire life for all these orphans. Many saw her Nobel work and then many Trusts, Societies came forward to help her with funds. With funds coming from all the corners, she took her mission to next level. During her life, she adopted more than 1500 children. She ensured proper education, food, and quality of life for all those kids. At the time of her death, she had 200+ sons-in-law, 36+ daughters-in-law, and more than 1000+ grandchildren. In the 2021, she was awarded with Padma Shri, which is the fourth-highest civilian award, after the Bharat Ratna, the Padma Vibhushan and the Padma Bhushan. Apart from Padma Shree, she has been awarded more than 15 nationally recognized awards. She was featured in "Kaun Banega Karorepati" once where, Shri Amitabh Bachanji after knowing her social work, touched her feet.

When I read her story, I literally had tears in my eyes. I thought to share her story, which is inspirational in so many senses. Friend, we it's time we realize importance of giving back to the society, whatever best we can. CVOCA, has taken a step towards it, where we are educating and promoting our members to come forward and start inculcating the feeling of donating. The details of the program will reach you soon.

Further, I would like to take this as an opportunity to announce our upcoming events:

We have a member-self contributory picnic to Dandeli from 4th to 6th November. The committee has ensured a perfect stay and memorable time for everyone. I would like to invite you all to join us for the picnic. For more details kindly connect to any of the managing members.

Events in retrospect:

On 22nd July' under our 50-year celebration committee, we had our 2nd public awareness seminar on "Will, Nomination, and joint ownership". The abled speaker answered all the issues being faced by the public at large. The event was jointly with Borivali KVO Mahajan. I would like to conclude with a famous saying "it's not about how much we give or we can give, it's all about how much love we put into giving"

Wish all our members a happy Diwali and a prosperous new year.

Thank you all..... Always in Gratitude


CA Amit Chheda

October 1, 2022

CONTRAVENTION, PENALTY AND PROSECUTION UNDER VARIOUS LAW

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CURIOUS CASE OF ELECTION FREEBIES



CA Ketan Rambhia

Email : ketan.r@skrambhia.com



FROM THE DESK OF CHAIRMAN

Economics of freebies is very simple. If you are not able to sell something, attach some freebies to it, and sell it as a combo, done. It is human nature that anything received without any cost attached, as gift or at substantial discounts, people are going to go for it, no questions asked. And this human nature is irrespective of one's economic status.

Same goes for the election freebies, as this very human nature is manipulated to lure people for votes. If any political party is not able to sell its ideas, its ideology, simply put cannot convince its electorate of its good governance and uncorrupt practices, it will attach freebies promises and attract the electorate to vote for it. It becomes easier in a country like India where large population is poor and has either no access or limited access to even basic necessities, to lure voters with freebies and achieve election goals. However, in doing so, the real economic principles are given a go by and country's finances are affected.

This has been matter of concern for long time and dissents or opposition to such acts have been shown in past, mainly by concerned economists, citizens and tax payer community. Surely, welfare schemes of Government have certain objectives and the same cannot be denied, but it has to be based on sound economic principles rather than ad hoc measures just to gain political mileage. One political party starting to dole out freebies leads to myopic competition in freebies which can lead to disastrous economic conditions.

The opposition to such election freebies was renewed once again and the same was for right reasons. The recent events in neighbouring countries and elsewhere in the world have again brought the issue in limelight. The alarm bells started ringing in India after the collapse of Sri Lankan economy where people came on streets with country wide protests against the Government. Economic situation as we learn is very bad in Sri Lanka and it will take years to get back on track. It is understood that one of the main reasons for its collapse is Government indulging in doling out free goods and services.

Venezuela is another instance of recent past how a rich country can be destroyed by not following simple economic principles and fell prey to such freebies. This led Venezuela to political and humanitarian crisis, the country plunged into sickness and starvation. As the story goes, the country turned toward socialism in 1999 and elected Hugo Chavez president. He championed populism, took loans in billions. Chavez ruled until his death in 2013, and is still seen today as a hero for the poor. But his government far overspent on welfare programs, and it fixed prices for everything. It declared farmlands state property and then abandoned them, and instead made the nation dependent on selling its oil abroad. Distributing everything free to people destroyed Venezuela, which was considered one of the richest countries.

These instances must be eye opener for India and rightly the discussion has started in this direction. Apathy of political leaders towards economic principles for personal political gains is definitely a matter of big concern.

Recently in India, an advocate filed a suit in Supreme Court to ban such promises of freebies at the time of Elections. Two judge benches of the Supreme Court, earlier in 2013 had ruled in a case of S Subramaniam Balaji vs State case of Tamil Nadu that such promises of freebies cannot be termed corrupt practice. A bench presided by Chief Justice of India N V Ramana said some of the parties had submitted "that the reasoning in the above judgment is flawed as it has not considered various provisions of the Representation of the People Act, 1951". "It was also submitted that the judgment incorrectly implies that the Directive Principles of State Policy can override the Fundamental Rights under Part III of the Constitution, which is against the law settled by a Constitution Bench of this court in" the 1980 decision in *Minerva Mills Ltd. v. Union of India* case, it said. Looking at the complexity involved, the matter was transferred to three-judge bench. It is good that the Supreme Court will give its thoughts on the matter, however, it seems it can only be legal / constitutional matter which can be considered by the Apex Court. What about the mindset of political leaders and people at large. It also seems that the outcome will not come very soon, and until then doling out unnecessary freebies will continue at cost of taxpayers and public exchequer. What really is required is a balanced law which makes concerned political party accountable with necessary penalties to stop election-based freebies. A strong public opinion against such freebies may force the authorities to take actions and surely many in government will also accept this stand. Only question is who will bell the cat.

In the mean time I am definitely curious about the outcome of the Supreme Court in this matter. Are you?

Wishing you all a very happy Navratri and best wishes on upcoming Dusshera, may Goddess Durga help you win over Mahishasurs in your life.

Thank you all..... Always in Gratitude

CA Ketan Rambhia



OFFENCES, PENALTIES & PROSECUTIONS UNDER GST ACT



CA Deep Chheda

Email : deep@cbcandco.com

News stories these days are flush with arrests made by the GST Department for different types of fake invoicing and input tax credit related frauds committed by certain anti-social elements. While the taxpayers who indulge in these types of nefarious activities are certainly anomalies amongst the taxpayers, there are various other inadvertent offences for which even the bona fide taxpayers can draw the ire of the Department.

In line with the theme of this month's journal, the focus of this current article is the various provisions of the GST Act which can draw any sort of penalty, or even lead to prosecution, for different types of offences.

Generally, a penalty is levied along with the demands raised by the Department under Section 73 or Section 74 of the Act. Therefore, we will begin with first understanding the basic tenets of Penalty levied under Section 73 and Section 74 of CGST Act, then draw our attention towards Sections 122, 125, 129 and 130 of the Act which prescribes different types of offences and the penalty for them. Thereafter we will discuss the scenarios which could lead to the prosecution of a taxpayer and conclude with an analysis of a few precarious case studies.'

1. Penalty' under Section 73/ Section 74:

The primary purpose of Section 73 and Section 74 of CGST Act is to empower the proper officer to issue show cause notice and then issue an order for recovery of tax dues which have not been paid / have been short paid or where ITC has been wrongly availed or utilised or refund has been wrongly sanctioned to the taxpayer. In short, these sections empower the proper officer to recover tax whenever the taxpayers have slipped up, due to whatever reason.

While Section 73 is the go-to proviso which is invoked under normal circumstances, Section 74 comes alive whenever the proper officer believes that the default has been done with an '*intention to evade payment of tax by way of fraud, misrepresentation or suppression.*'

Penalty levied under Section 73 is to the extent of 10% of tax or ten thousand rupees, whichever is higher. However, the penalty under Section 74 is equivalent to 100% of the tax amount. While the quantum of penalty is the apparent difference between Section 73 and 74, there are further nuances in the penalty levied under both the sections as can be seen from the following table:

Point of Distinction	Section 73	Section 74
Circumstances for levy of Penalty	In normal circumstances	Where tax intended to be evaded by way of fraud, misrepresentation or suppression
Quantum of Penalty	10% of tax or Rs. 10,000 whichever is higher	100% of tax or Rs. 10,000 whichever is higher
If demand confirmed is Rs. 5,00,000 then penalty would be?	Rs. 50,000	Rs. 5,00,000
If demand confirmed is Rs. 70,000, then penalty would be?	Rs. 10,000	Rs. 70,000
Section for levy of Penalty	Section 73(9) read with Section 122(2)(a)	Section 74(1) read with Section 122(2)(b)
Waiver of penalty before issuance of show cause notice	On payment of tax and interest	On payment of tax, interest and 15% penalty
Waiver of penalty after issuance of show cause notice	On payment of tax and interest within 30 days of show cause notice	On payment of tax, interest and 25% penalty within 30 days of show cause notice
Waiver of penalty before issuance of order	No such waiver available	On payment of tax, interest and 50% penalty within 30 days from issuance of order

Apart from the above, some important points to remember for Penalty under Section 73 and Section 74 are as follows:

- Show cause notice is to be mandatorily issued to the taxpayer before confirming levy of penalty.
- If show cause notice is not issued then a Penalty cannot be demanded, irrespective of the offence
- Taxpayer must be given an opportunity for a personal hearing before passing of the order.
- Where the demand for tax is dropped, the penalty also gets dropped

Fraud, Suppression or Misrepresentation:

As is obvious from the above, the penalty under Section 74 is harsher as compared to the Penalty under Section 73. Penalty under Section 74(1) / Section 122(2)(b) can be levied only under the scenario where the taxpayer has defaulted with –

- An intention to evade payment of tax and
- By way of fraud, willful misrepresentation or suppression

Goes without saying that both these conditions, being extremely grave, should be fulfilled in order to raise and confirm demand of tax and penalty under Section 74. These conditions placed in Section 74(1) are *pari materia* with Proviso to Section 78(5) of Finance Act, 1994. Under the erstwhile law, the following principles of law have developed which hold good even under the GST Act:

- Fraud, Misrepresentation and Suppression are very strong terms and cannot be used loosely
- There has to be some positive act on the part of the taxpayer which demonstrates the intention to evade payment of tax;
- Mere non-payment of tax does not amount to intention to evade payment of tax;
- Onus for proving intention to evade lies on the Department;
- Fraud cannot be alleged when the demand has been raised during Departmental audit, or when Department has prior information of the activities of the taxpayers
- If the taxpayer has not paid tax due to bona fide interpretational issues like Judgement of Court subsequently overturned, or a circular / exemption withdrawn by Department then it cannot be said that the taxpayer has the intention to evade payment of tax.

Some important judgements of the Apex Court in this regard are as follows:

- M/s Uniworth Textiles Ltd - 2013-TIOL-13 - Supreme Court
- M/s Anand Nishikawa Co Ltd - 2005-TIOL-118 - Supreme Court
- M/s Chemphar Drugs & Liniments - 2002-TIOL-266 - Supreme Court
- M/s Tamil Nadu Housing Board - 2002-TIOL-288 - Supreme Court
- M/s Pushpam Pharmaceuticals Co. - 2002-TIOL-235 - Supreme Court

While the entire levy of 100% penalty under Section 74 is dependent on the fact that whether or not the taxpayer has indulged in fraud, misrepresentation or suppression with an intention to evade payment of tax, and it would by and large accompany the tax demand i.e., if the demand of tax is confirmed under Section 74, penalty will also most likely be confirmed and if demand of tax is dropped then penalty would also be dropped.

It must also be noted that as per Section 75(2) of CGST Act, if the charges of fraud, misrepresentation or suppression are alleged and cannot be established, then the proper officer shall adjudicate the notice under Section 73. The implication of this is that if the charges of fraud, misrepresentation or suppression are dropped but the tax amount is confirmed, then taxpayer will be liable to 10% penalty instead of 100%. By virtue of Section 75(2) the liability to penalty does not go away entirely merely because charges of fraud, misrepresentation or suppression are not established.

However, every time a show cause notice is issued where it is proposed to levy 100% penalty under Section 74, one must always test the levy of the penalty on the above basis and include the defences for the same in the response to the show cause notice.

2. Offences of Section 122:

While penalty under Section 73 and Section 74 is general and accompanies the underlying demands raised under those Sections, Section 122 lists certain specific offences and also prescribes the penalty leviable for such offences.

A gist of Section 122 is as follows:

- Section 122(1) lists down 21 offences and prescribes a fixed penalty for them
- Section 122(1A) prescribes penalty when someone has benefited from an offence committed by another person
- Section 122(2) shall be read along with Section 73 and Section 74 which we have already discussed earlier in paragraph 1 above
- Section 122(3) lists 5 offences and prescribes an upper limit of penalty for them

Section 122(1)

Section 122(1) lists down 21 offences for which the prescribed penalty is Rs. 10,000 or the amount of tax not paid / ITC wrongly availed / refund claimed fraudulently, whichever is **higher**.

List of clause-wise offences is as follows:

Clause	Offence
(i)	Supplies made without issuing invoice or by issuing incorrect / false invoice
(ii)	Issuing bill without any actual supply of goods or services
(iii)	Any amount collected as tax but not deposited with Government within 3 months from date of collection
(iv)	Tax collected in contravention to the provisions of the Act and not paid to the Government within 3 months from date of collection
(v)	Failure to deduct TDS as per Section 51 or TDS short-deducted or deducted but not paid to the Government
(vi)	Failure to collect TCS as per Section 52 or TCS short-collected or collected but not paid to the Government
(vii)	Availment or utilisation of input tax credit without actual receipt, fully or partially, of goods or services

Clause	Offence
(viii)	Refund obtained fraudulently
(ix)	ISD takes or distributes credit in contravention of Section 50
(x)	Falsification of financial records or submitting fake accounts / documents / information with an intention to evade payment of tax
(xi)	Failure to obtain Registration when liable as per the Act
(xii)	Incorrect information furnished at the time of obtaining registration
(xiii)	Obstructing / preventing any officer from discharging their duty
(xiv)	Transportation of goods without the cover of documents
(xv)	Suppression of turnover leading to evasion of tax
(xvi)	Failure to maintain books of accounts as required in the GST Act
(xvii)	Failure to furnish documents called by the officer or furnishing false information
(xviii)	Supplying, transporting or storing any goods which are liable for confiscation
(xix)	Issuing invoice by using GSTIN of another registered person
(xx)	Tampering / destroying any evidence or document
(xxi)	Disposing / tampering with goods which have been detained, seized or attached under the provisions of GST Act

The above list of offences are self-explanatory. On plain reading it appears that the focal point of these offences are those transactions which are primarily entered into with an intention to evade payment of tax and to punish those who are directly involved in these offences. Therefore, a higher quantum of penalty has been prescribed for these offences, which is similar to the penalty prescribed under Section 74 of the Act, where demand is levied if tax is not paid with an intent to evade payment of tax.

Section 122(1A):

As per Section 122(1A), any person who has 'retained' the benefit of transactions covered under clause (i), (ii), (vii) and (ix) (*highlighted above*) and at whose instance such transactions have taken place, shall also be liable to **penalty equivalent to** the amount of tax evaded

Section 122(3):

Section 122(3) prescribes that any person guilty of any of the following offences shall be charged with penalty which **may extend upto** Rs. 25,000

Clause	Offence
(a)	Aiding or abetting any offence under Section 122(1)
(b)	Acquiring possession of or concerned with removal / transportation of goods which are liable for confiscation under GST Act
(c)	Receiving or concerned in any way with supply of services which are in contravention of the provisions of the GST Act
(d)	Failure to appear when summons issued by an officer
(e)	Failure to issue invoice as per the provisions of the Act

From a plain reading of Section 122(3) it appears that the purpose of Clause (a), (b) and (c) is to cover people who are knowingly complicit but not directly connected with offences covered under Section 122(1) or with removal of goods liable for confiscation or supply of services in contravention of the Act.

Similarly, clause (d) and (e) also seem to be intended to be more of a rap on the knuckles for minor offence of failure to appear for summons or failure to issue a 'proper' invoice as opposed to not issuing an invoice at all. The usage of words penalty 'may extend', which have not been used in Section 122(1) may also be used to interpret the intention of the legislature.

3. Penalty in case of Confiscation or Detention of goods:

Proper officer is empowered to detain goods which are being transported in contravention of the provisions of the CGST Act under Section 129, whereas goods are liable for confiscation for a wider array of offences under Section 130. Hon'ble Karnataka High Court in a recent judgement in the case of **M/s. Rajeev Traders - 2022 (9) TMI 786** has given the distinction between detention and confiscation which is as follows:

The power to detain is only to stop the transit of the goods and thereby prevent its movement till the tax and penalty is paid. However, the power to confiscate is the process of divesting the owner of the goods of all title to the goods for a contravention of the provisions of the Act and Rules.

(Emphasis supplied)

As is evident from the above judgement, the power to confiscate is much harsher, as it takes away the ownership of the goods, than the power to detain. The said principle is also discernible in the Penalties prescribed for both Sections.

In case of goods which are confiscated under Section 129, then the same can be released on payment of the following:

- If the owner comes forward to pay tax and penalty – Applicable tax and 100% Penalty. In case of exempted goods, 2% of the value of goods or Rs. 25,000, whichever is less

- b. If the owner does not come forward to pay tax and penalty – Applicable tax and 50% of the Market value of goods reduced by the tax paid as penalty. In case of exempted goods, 5% of the value of goods or Rs. 25,000, whichever is less
- c. Furnishing of security equivalent to (a) or (b) above.

However, the penalty charged under Section 130 is much harsher. As per Section 130(2), whenever the goods are confiscated, the taxpayer shall, in lieu of the confiscation, pay a fine which shall be decided by the Proper officer. However, the said fine shall not be more than the market value of the goods and should not be less than the Penalty leviable under Section 129.

Mitigating factors:

As discussed, goods are detained when they are transported in contravention of any of the provisions of the CGST Act. Generation of e-way bill for movement of goods beyond a certain distance and above a certain limit (different for each state) along with proper documentation is the most important condition for movement of goods. Penalty under Section 129 is generally levied when the goods are transported without an e-way bill or the e-way bill has expired. The intention is to basically deter taxpayers and transporters from transporting goods without an e-way bill i.e. to ensure there is no evasion of tax payment by supplying the goods but not disclosing it and not paying tax on the same.

In the following cases the Courts have waived off the entire tax and penalty collected by the officer under Section 129 for releasing the detained goods due to mitigating factors such as breakdown of vehicle, blockage of roads due to protests, intention to evade payment of tax is not evident, or some other minor clerical / procedural lapses and even restrictions on movement due to COVID-19:

- Satyam Shivam Papers - 2022-TIOL-07 – Supreme Court
- Greenlights Power Solutions - 2022-TIOL-482 - Kerala High Court
- Gobind Tobacco Manufacturing Co. - 2022 (5) TMI 1022 - Allahabad High Court
- Ashok Kumar Sureka - 2022-TIOL-309 – Calcutta High Court

4. Prosecution under Section 132:

Section 132 of the CGST Act prescribes the harshest punishment of all. It provides for jail-time in case of certain offences and the amount of time to be spent in jail is dependent on the quantum of tax evaded by the taxpayer. This section covers any person who commits, causes to commit or abets in committing the following offences:

Clause	Offence	Bailable /
(a)	Supply of goods or services without issuing an invoice, in order to evade payment of tax	Cognizable and Non-bailable Offence
(b)	Issuance of invoice without actual supply of goods or service in order to wrongfully pass on input tax	
(c)	Availment of ITC based on the invoice covered under Clause (b) above or availing ITC without any invoice	
(d)	Collection of any amount as tax but fails to pay the same to the Government within 3 months	
(e)	Evasion of tax or fraudulent availment of refund which is not covered above	Non-cognizable and Bailable Offence
(f)	Falsification of financial records or producing fake accounts or documents any other false information	
(g)	Obstructing / preventing any officer from discharge of duty	
(h)	Acquiring possession of or concerned with removal / transportation of goods which are liable for confiscation under GST Act	
(i)	Receiving or concerned in any way with supply of services which are in contravention of the provisions of the GST Act	
(j)	Tampering / destroying any evidence or document	
(k)	Failure to supply information or supplying false information	

Offences covered in clause (e) to (k) are non-cognizable i.e., not considered to be very serious offences and therefore require a warrant for arrest and the accused can get a bail from the Court during the course of investigation.

However, the legislature perceives the offences covered in clause (a), (b), (c) and (d) as very serious offences and therefore they are cognizable i.e., empower the officer to arrest the offender without a warrant and are non-bailable i.e., the accused cannot get a bail during the course of an investigation. On the contrary, the Courts have granted bail to an accused in such cases where they have spent a substantial time in the jail and the end of investigation is nowhere in sight. This is based on the norm of "Bail is the rule, Jail is the exception" followed by the Indian judiciary.

Jail time for the offences shall be as follows:

Quantum of Offence	Punishment
More than Rs. 5 crores	Upto 5 years and fine
Rs. 2 crores to Rs. 5 Crores	Upto 3 years and fine
Rs. 1 crore to Rs. 2 Crores	Upto 1 year with fine
Any person who has abetted in committing the offence	Upto 6 months with fine
Same offence for a second time and subsequent offences after one conviction, irrespective of the quantum	Upto 5 years with fine

5. General Penalty as per Section 125:

Where penalty for any offence has not been prescribed, then a penalty shall be levied under Section 125 which **may extend** to Rs. 25,000.

This is basically a residual section wherein a Penalty upto Rs. 25,000 can be levied by the proper officer if the offence committed by the taxpayer is not covered anywhere else in the GST Act.

For e.g.:

Mrs. Das is a management consultant receiving professional fees and she is paying GST on the same and disclosing it in her GST returns. She is also receiving rent from her residential property. Since the rental income is exempt, she has not shown the same in her GST Returns. During scrutiny of her returns, officer has come across this discrepancy and proposes to levy penalty under Section 125. Is this action by the officer, correct?

While it is true that the rental income is exempted from GST, it is responsibility of the taxpayer to disclose the same in their GSTR-1 and GSTR-3B. Since the taxpayer has failed to disclose correct value of supplier made by her, and penalty for the same has not been prescribed anywhere else, the approach of the officer is correct to that extent.

6. Important considerations for Penalty under Section 126:

As per Section 126, in case of offences where any fixed amount or percentage of penalty is not mentioned (for e.g. Section 122(3) or Section 125 where only the upper limit of penalty has been mentioned) the following points must be considered by the Proper officer before levying the penalty:

- No penalty shall be levied for minor breaches of law or breach of procedural requirements, which are **easily rectifiable**, the amount of tax **does not exceed Rs. 5,000** and the breach is not with an intention to evade payment of tax;
- Penalty shall depend on the facts of the case and shall be commensurate with the degree and **severity** of the breach;
- Penalty shall not be levied without giving the person an opportunity of being heard;
- Order for imposition of penalty shall clearly specify the nature of breach and the law under which the penalty is being levied;
- When the person voluntarily discloses the breach of law / procedural requirement before the discovery by the officer, the same shall be considered to be a mitigating factor.

7. Penalty should not be levied twice:

As per Section 75(13) of the Act, where a penalty has been levied under Section 73 or Section 74, then penalty shall not be levied under any other Section of the Act for the same offence. As we have seen in earlier discussion, offences under Section 122 are specific while Section 73 and 74 are general and a lot of times a person could be liable for penalty under Section 73 / 74 as well as Section 122 for the same offence. The basic idea here is to ensure that a person is not punished twice for the same offence.

For e.g.:

Mr. A has fraudulently availed certain input tax credit, without actual receipt of goods, in order to avoid paying taxes. The Proper Officer has confirmed the demand for reversal of input tax credit and levied a 100% penalty under Section 74(1) of the Act. The proper officer also wants to levy an additional 100% penalty under Section 122(1)(vii) for availing of input tax credit without actually receiving the goods.

As per Section 75(13), since the penalty has been levied once under Section 74 for availing ITC without receiving goods, then the penalty cannot be levied again under Section 122(1)(vii) for the same offence.

8. Importance of show cause notice:

Earlier we discussed how Section 126 requires the proper officer to give a personal hearing and mention the offence and the law under which penalty is being levied. Similar requirements have been mentioned elsewhere in other sections as well. These are in line with the set judicial norms. However, one important fact that needs to be paid attention to is the issuance of show cause notice.

While Section 73 and Section 74 mandate the issuance of show cause notice before passing of an order, similar requirement is not there in other Sections. Principles of Natural Justice require that an unambiguous show cause notice must be issued for initiating any proceedings entailing civil consequences against the assessee. Therefore, issuance of show cause notice is a compulsion for levying any penalty against the assessee even if the statute does not mandate it.

Show cause notice is nothing but an intimation of the allegations levelled against the taxpayer and therefore, must invariably contain unambiguous and detailed charges against the assessee, quantification of the penalty sought to be levied and offer a chance to the assessee to respond to the show cause notice.

It is trite law that show cause notice is a non-negotiable part of the entire adjudication process. Hon'ble Supreme Court in its judgement in the case **Brindavan Beverages Pvt. Ltd. - 2007-TIOL-118** has held show cause notice to be the foundation of any demand against the assessee and has struck down demand because the allegations in the show cause notice were ambiguous.

The Hon'ble Apex Court in its judgement in the case of **M/s Oryx Fisheries P. Ltd. - 2011 (266) E.L.T. 422** has held that if the show cause notice is meant to give person proceeded against a reasonable opportunity of making his objection against proposed charges so that he can take his defence and prove his innocence. Person who is subject of the show cause notice must get an impression that he will get effective opportunity to rebut allegations and prove his innocence. It is not fair when person of ordinary prudence on reading of show cause notice gets a feeling that reply will be empty ceremony and he will merely knock his head against impenetrable wall of prejudged opinion thereby not giving the assessee an effective opportunity of defending itself.

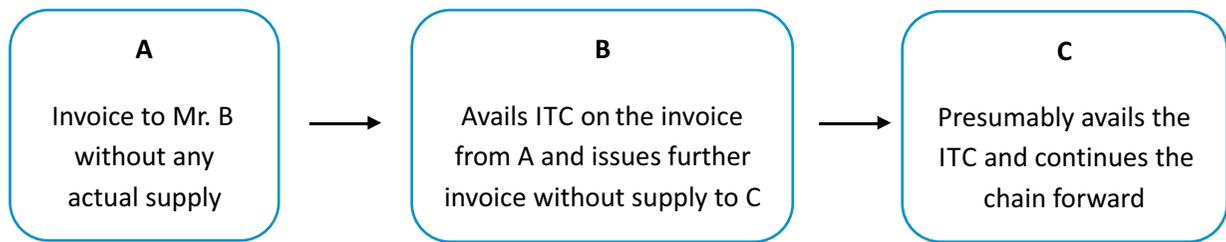
In view of the above, it is always important to have a show cause notice any time any penalty is proposed against the assessee, even if not mandated by law. And the said show cause notice shall fulfil the criteria laid down by the Hon'ble Apex Court.

9. The 'reality' of fake invoices:

The menace of fake invoicing is the biggest challenge faced by the Departmental authorities in the GST regime. While it is a legacy issue continuing from the previous regime, the extensive use of IT in return filings and the deployment of artificial intelligence has ensured quick detection of such transactions and brought it to the fore. Further, arrests made in such cases and publicised through the media have ensured that this issue remains well highlighted.

The basic modus operandi of these transactions is that one person issues an invoice without any actual supply and pays GST to the Government, the recipient of the invoice claims the input tax credit on such invoice. This chain goes on further. Whatever may be the motivation for a person to indulge in such transactions, prima facie there is no loss to the revenue as such. The problem is that these transactions lead to an undue transfer of input tax credit to those persons who are not legally eligible for such input tax credit under Section 16 of the CGST Act.

Department has issued Circular no. 171/03/2022 dated 06.07.2022 wherein they have laid down what course of action will be taken against persons involved in fake invoicing transactions. Gist of the circular can be gathered from the following:



As per the Circular, Since A has paid GST on a transaction which is not a supply, there is no tax which is recoverable from him and only penalty under Section 122(1)(ii) shall be levied for issuing invoice without making any supply.

The circular further states that since B has availed ITC without any receipt of supply, the ITC is ineligible under Section 16, however, since he has paid tax on a transaction which is not a supply, both these get offset and therefore, no recovery shall be made. However, penalty shall be levied under Section 122(1)(ii) for issuing invoice without supply and Section 122(1)(vii) for availing ITC without receiving supply.

In this case, allowing the ITC because tax has been paid on further transaction without actual supply seems to be in contradiction to Section 16 of CGST Act. Section 16 mandates that there has to be an actual receipt of goods for availing ITC and there is no alternative for the same on the ground that tax has also been paid without supply and both get offset. However, since the circular is in favour of the assessee, Department may not be able to deny its benefit to the offenders.

Further, the circular is silent on the treatment sought to be meted out to C. It can be presumed that if he continues the chain forward by claiming ITC and issuing another invoice, the treatment will be similar to B. If the chain stops with C, then ITC availed without receipt of supply shall be recovered under Section 74 along with Penalty. Since penalty under Section 74 is levied, penalty shall not be leviable under Section 122(1)(vii) as given in Section 75(13).

The basic idea brought forward by the Circular is that while recovery of tax will only be done once, i.e., at the end of the chain, each person involved will be levied with penalty. The circular has also clarified that any person who is connected shall be liable to penalty under Section 122(1A) and that action under Section 132 i.e., jail time may also be considered based on the facts of the case.

10. **Minor breaches:**

A lot of times, it may so happen that the assessee makes some bona fide mistakes due to lack of awareness or the circumstances are beyond control. These could range from procedural lapses, availing ineligible ITC or charging tax at the wrong rate or under wrong head.

From all the above discussion, it is evident that heavy penalty has been sought to be levied only when the taxpayers have committed heinous crimes to evade payment of taxes. However, treating bona fide mistakes at par with heinous crimes, done consciously to evade payment of tax, would be a bit unfair to honest taxpayers. Let us understand the same with the help of some examples:

- i. Ms. Jaya is required to issue an e-invoice as per the Rules but fails to do so. On realising her mistake, she generates the IRN after 3 months and communicates the same to all her customers. During audit, the officer observes the mistake and raises a query that since invoice have been issued without IRN, these are not proper invoices and alleges that Ms. Jaya has made supplies without issuance of an invoice and therefore liable for penalty under Section 122(1)(ii).

- In my view, the penalty will not sustain in this case because there is no intention to evade payment of tax evident here. Further, issuance of IRN maybe mandatory it is still a procedural aspect and the same has been rectified voluntarily by the assessee. Keeping both the points in mind, penalty cannot be levied.

The officer may consider levying penalty under Section 122(3) for failure to issue proper invoice which may extend upto Rs. 25,000. However, since Ms. Jaya has voluntarily taken corrective action by issuing e-invoices, as per Section 126 the same must be considered by the officer as a mitigating factor before deciding on the amount of penalty leviable.

- ii. Mr. Singh has a total taxable supply of Rs. 4.85 crores in FY 2021-22. He has filed his GSTR-9 within the prescribed time limit. During FY 2021-22 he has also disclosed some 'Interest from FD' of Rs. 21 Lakhs and 'Commission' income of Rs. 3 Lakhs in his Income Tax return, which has been discovered by the GST audit officer. GST officer has asked him to pay 100% penalty on the GST not paid on commission income and another additional penalty for not filing GSTR-9C even though the total turnover is more than Rs. 5 crores.

- In the present scenario, there are 2 alleged violations by Mr. Singh, one is to not pay GST on commission income and disclose it in the relevant returns and second is to not file GSTR-9C despite his aggregate turnover being Rs. 5.09 Crores. Let us analyse the levy of penalty in each of these cases:

Mr. Singh is liable to pay Rs. 54,000 (Rs. 3 Lakhs x 18%) on the commission income earned by him, along with interest. In the present case, there is no positive act done by Mr. Singh to evade payment of taxes. In fact, the officer has discovered this error from the ITR filed by Mr. Singh himself. Therefore, demand can only be made under Section 73 of CGST Act. If the payment of tax and interest is done before issuance of show cause notice or within 30 days of show cause notice then penalty cannot be levied on him. Otherwise, he will be liable to penalty of Rs. 5,400 (Rs. 54,000 x 10%). Therefore, the suggestion of the officer that Mr. Singh is liable to 100% penalty is not correct.

The contention of the officer that Mr. Singh was required to file GSTR-9C is correct and to that extent assessee is liable to pay the penalty for the same. However, no penalty has been prescribed for not filing GSTR-9C, therefore, penalty under Section 125 shall be leviable which can be upto Rs. 25,000. However, the officer must consider the severity of the breach before levying the penalty, as per Section 126.

- iii. NMK Pvt. Ltd. has dispatched a consignment and issued an invoice and generated an e-way bill for the same. E-way bill is expiring on 19th September 2022. Due to a few cases of riots and arson on the route normally taken by the truck, the road was closed by the police and the truck was forced to take a longer route which delayed the delivery by 36 hours and the truck was apprehended by GST officers a few kilometers before the destination at 4:15 am on 20th September 2022 and detained the truck for transporting goods with an expired e-way bill and asked them to pay penalty under Section 129 to secure release of the vehicle.
- In this particular case, transportation of the goods is being done under the cover of proper documents and the same has not been challenged by the officer. The only issue is that the e-way bill has expired a few hours before the destination. The reason for expiry is that the situation i.e., road closure due to riots and arson was beyond the control of the consignor and the transporter. This is clearly not a case of evasion of tax payment but of situation being out of control despite all the bona fides of the involved parties, and therefore, penalty should not be levied in this particular case. Similar judgement has been given by Hon'ble Supreme Court in the case of Satyam Shivam Papers - 2022-TIOL-07.

11. Conclusion:

From all the above discussions, one thing is clear, the purpose of Penalties under the GST Act is to deter offenders from committing offences to avoid payment of taxes, and to punish them if they do. However, due to the language of the law and complexity of the cases, it may very well be possible that an honest taxpayer may also face a situation where they are compelled to pay a heavy penalty.

While the most ideal way is to follow the law till the last mile and not make any mistakes, to err is human and when faced with such a situation, knowing the penalties and circumstances when they are levied and how to defend ourselves in such situations is equally important.



PENALTIES, FINES, OFFENCE, CONTRAVENTION UNDER COMPANIES ACT 2013



CS Dhruti Satia
Email : dhruti@dsatia.in

Introduction

Non Compliance of the provisions of any Act would attract its penal provisions. These penal provisions in the new Act are more stringent. The penal provisions in this Act may be classified into three categories as detailed below:

- Penal provisions for Companies;
- Penal provisions for officer who is in default ;
- Penal provisions for persons other than companies and officer in-default.

Officer who is in default

Section 2(60) of the Act defines the term defines the terms 'officer who is in default any provision in this Act which enacts that an officer of the company who is in default any penalty or punishment by way of imprisonment, fine or otherwise, means any officers of a company, namely -

- Whole-time director,
- Key managerial personnel,

Where there is no key managerial personnel, such director or directors as spec in this behalf and who has or have given his or their consent in writing to the B specification, or all the directors, if no director is so specified,

Any person who, under the immediate authority of the Board or any Key Managerial Personnel charged with any responsibility including maintenance, filing or distribution of ac records, authorizes, actively participation in, knowingly permits, or knowingly fail steps to prevent, any default,

Any person in accordance with whose advice, directions or instructions the Board the company is accustomed to act, other than a person who gives advice to the professional capacity.

Every director, in respect of contravention of any of the provisions of this Act, who such contravention by virtue of the receipt by him of any proceedings of the Board in such proceedings without objecting to the same, or where such contravention ha with his consent or connivance;

In respect of the issue of Transfer of any shares of a Company, the shares of a company, the Share transfer agents, registrars and merchants bankers to the issue or transfer.

Chapter II : Incorporation of Company and Matters Incidental thereto

Section No.	Nature of default	Person responsible	Punishment for Contravention
Section 8(11)	Formation of Companies with Charitable Objects -Default in compliance	In Case of Company	Fine:-Minimum -Rs. 10,00,000 Maximum -Rs. 1,00,00,000
		In case of Director and every officer of the company who is in default shall be punishable with	Fine:- Minimum-Rs. 25,000 Maximum -Rs. 25,00,000
Section 12(8)	Registered Office of Company	In Case of the company and every officer who is in default shall be punishable with	Fine: one thousand rupees for every day during which the default continues but not exceeding one lakh rupees.

Chapter III: Part-I Prospectus and Allotment of Securities

Section No.	Nature of default	Person responsible	Punishment for Contravention
Section 26	Matters to be stated in prospectus-Contravention of provisions relating to issue of a prospectus.	In Case of Company	Fine-Minimum -Rs.50,000
		In Case of every person who is knowingly a party to the issue of such prospectus shall be punishable with.	Fine-Minimum -Rs.50,000 Maximum -Rs. 3,00,000

Chapter VII: Management and Administration

Section No.	Nature of default	Person responsible	Punishment for Contravention
Section 92(1) Annual return	In case a company fails to file its annual return within specified period (i.e. 60 days from AGM).	Company and every officer who is in default shall be punishable with	Fine-Minimum -Rs.10,00,000 Maximum - Rs. 1,00,00,000
Section 92(6) Annual return	If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of this section or the rules made thereunder.	Such Company Secretary in practice	Liable to Rs.2,00,000

Chapter IX:Account of Companies

Section No.	Nature of default	Person responsible	Punishment for Contravention
Section128 Books of	If the MD, the WTD in charge of finance, CFO or any other person of accompany charged by the Board with the duty of complying with the provisions of this section, contravenes such provisions.	Such MD, WTD in charge of finance, CFO or such other person of the company shall be punishable.	Fine- Minimum-Rs. 50,000
Section134 Financial statement, Board's	If a company fails to comply with the provisions regarding signing of financial statement and contents & signing of Board's Report.	In case of Company	Penalty of Rs.3,00,000 and
		Every officer of the company.	Penalty of Rs.50,000.

Section No.	Nature of default	Person responsible	Punishment for Contravention
Section 135	Company is in default in complying with the provisions of sub-section (5) or sub-section (6),	In case of Company	Penalty of 2 x amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent CSR Account, as the case may be, or Rs. 100,00,000, whichever is less, and
		Every officer of the company.	Penalty of 1/10 the of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent CSR Account, as the case may be, or Rs. 2,00,000, whichever is less.
Section 137 Copy of financial statement to be filed with Registrar.	If a company fails to file the copy of the financial statements with the Registrar within the time specified there in (i.e. within 30 days from the date of AGM).	In case of Company	Minimum -10,000 and in case of continuous default Rs. 100 for each day during which the failure continues and Maximum amount of penalty Rs. 200,000.
		In case of MD/CFO/directors who is in default	Minimum -10,000 and in case of continuous default Rs. 100 for each day during which the failure continues Maximum amount of penalty Rs. 50,000.

Chapter X: Audit and Auditors

Section No.	Nature of default	Person responsible	Punishment for Contravention
Section 140 Removal, Resignation of Auditor and Giving of Special Notice	Auditor fails to file his resignation with the Registrar within the time specified therein (i.e.30days from the date of resignation).	Auditor	Penalty of Rs. 50,000 or an amount equal to the remuneration of the auditor, whichever is less, and in case of continuing failure, with further penalty Rs. 500 for each day after the first during which such failure continues, subject to a maximum of Rs. 200,000.
Section 143 Powers and duties of auditors and auditing standards.	If any auditor, cost accountant or company secretary in practice does not comply with the provisions regarding reporting of fraud.	Such professional shall be liable to a penalty:	In case of a listed company: Rs. 5,00,000; In case of any other company: Rs.1,00,000.

Chapter XII: Meetings of Board and its Powers

Section No.	Nature of default	Person responsible	Punishment for Contravention
Section184 Disclosure of interest by director.	If a director of the company does not disclose the nature of his interest under this section.	Director of a Company	Rs.1,00,000
Section 187 Investments of company to be held in its own name.	If a company contravenes the provisions of this section.	In case of Company	Rs.5,00,000.
		Every officer of the company.	Rs.50,000.
Section 188 Related Party transactions	Any director or any other employee of a company, who had entered into or authorized the contractor arrangement in violation of the provisions of this section.	Such director or employee	In case of listed company -Rs. In case of company other than listed company -Rs.

Chapter XII: Appointment and Remuneration of Managerial Personnel

Section No.	Nature of default	Person responsible	Punishment for Contravention
Section 204 Secretarial audit for bigger companies	Any director or any other employee of a company, who had entered into or authorized the contract or arrangement in violation of the provisions of this section.	Such director or employee	In case of listed company –Rs. 25,00,000
			In case of company other than listed company –Rs. 5,00,000

Recent Summary of the Cases on which penalty is levied:-

1. Penalty levied by the Registrar of Companies, Ahmedabad for not mentioning the DIN of directors in the financial statements. This is a violation of Section 158 of Companies Act, 2013. Total penalty of ₹6,00,000 on the company and the directors.

2. Summary of the Order Use of Designation- CEO

As we all know in Start-Up, Many founders or professional designated as a CEO of a Company (Private Company), As per the Indian Companies Act, 2013 we have to follow the provisions of appointment of a KMP, its applicability, process and penalty. Section 203 of the said Act, which deals with appointment of Key Managerial Persons i.e., CEO, MD, Manager or CFO is not applicable to private limited companies and hence many private limited companies designate their employees as CEO, MD, CFO etc. without passing a Board Resolution or filing Form DIR 12 with ROC for such appointments.

In one of the recent orders passed by Registrar of Companies, Karnataka, imposed a penalty on Company and its directors, where even though the company was not falling class of companies prescribed under section 203 of the Companies Act, 2013 and it didn't require to appoint a KMP, it was fined for usage of abbreviation 'CEO' as designation by one of the director, without having proper approval of the Board of Directors and filing of form DIR-12 with ROC. This was considered as a violation of the Companies Act, 2013 by the ROC.

It was observed that a Director cannot sign any official communication of the Company in the capacity the of CEO in such cases. Therefore, all companies including private limited companies are advised to follow the prescribed procedure as laid down under the Companies Act, 2013, before designating their employees or directors as CEO, MD, CFO etc and file Form DIR-12 with the ROC for such appointments.

3. Violation of provision of Section 161 of the Act.

ROC, Bangalore imposes penalty of Rs.10 lakh on the company, its Directors, KMPs & Company Secretary for failure to co-opt MD as Additional Director before his appointment as MD, in contravention of Sec. 161 of the Companies Act.

- (i) Company appointed as MD and CEO of a company (KMP) for a period of 5 years through Board Resolution.
- (ii) By inadvertence, Board had omitted to co-opt him as Additional Director before appointing him as MD.
- (iii) Pursuant to the said omission, the approval for his appointment by the shareholders (regularization) at the first AGM was omitted to be obtained.
- (iv) Consequently, MD was deemed to have vacated his office w.e.f. the date of the AGM in terms of Sec. 161 of the Companies Act.

4. Violation of provision of Section 56 of the Act.

In one of the recent orders by the Registrar of Companies ("ROC"), penalty of total INR. 2,00,000 (Indian Rupees Two Lakhs) were imposed on company and its officer in default, on occasion of non-compliance with respect to delay in issuance of share certificates to the subscribers within period of 2 (two) months from date of incorporation.

Section 56(4) requires every company to deliver the certificates within a period of two months from the date of incorporation, to the subscribers of the memorandum. However, in this particular instance, the company had issued a share certificate with a delay of 30 (thirty) days. Therefore, penalty was imposed as per Section 56(6) of the Companies Act, i.e. INR. 50,000 (Indian Rupee Fifty Thousand) each on company and every officer in default.

Conclusion:- The provisions of the Act are clear as regards the consequences of non-compliance. It is on the company and its officers to ensure that it functions in a fair, transparent, and compliant manner. If you think compliance is expensive, try noncompliance! Also it takes less time to do things right than to explain why you did wrong. So looking at above case laws and penalties it become important that along with doing business we do not side line the importance of compliance.



CONTRAVENTION, PENALTY AND PROSECUTION UNDER FEMA



CA Niraj Chheda
Email : niraj.chheda@gbcaindia.com
Varsha Galvankar
Email : varsha@gbcaindia.com

The current issue of the CVO CA's News & Views covering the subject of Contraventions, Offences, Penalties and Prosecution is an excellent endeavour in appraising the business community as well as enlightening the professionals on the impact of penal consequences if there is negligence in complying with stringent provisions under various Laws and Regulations in India.

In this article, we are going to cover the Contraventions, Offences, Penalties and Prosecution under the Foreign Exchange Management Act, 1999 (FEMA).

Any legislation demands strict observation of its provisions by the concerned parties whom it regulates in light of the spirit and philosophy of the said legislature. Hence, any legislature without penal provisions is like a lion without teeth or a snake without poison. The penal provisions deter the accused from repeating the offences in future and also give a warning for the others not to follow the same path of any violation under the law.

As we all understand that the philosophy of FEMA is to regulate the foreign exchange transactions and protect the foreign exchange reserves of the country. The objective of FEMA is to dissuade the Resident Indians and Entities from aggressively spending the foreign exchange or investing in foreign ventures with unlimited liability exposure in foreign exchange. It also regulates the inflow of foreign investment in India in a manner to encourage investment in the Indian economy and at the same time monitors such investments to prevent sudden exit from the investments disturbing the forex position of the country.

The shift from Foreign Exchange Regulation Act, 1974 (FERA) to Foreign Exchange Management Act 1999 (FEMA) was certainly a very welcome move for Indians and the Indian economy which liberalised the investment and expenditure regime for Indians substantially to go global. The most important comfort is that FEMA is a civil law as against FERA which was a criminal Law.

Many a time business expediency demands quick solutions to the regulatory restrictions due to which people try to find a suitable interpretation of the presence or absence of explicit provisions and take aggressive calls on the permissibility of capital account and current account transactions. At times it is ignorance or carelessness in following the regulations while entering into transactions which are not permissible and at times there are willful defaults. Such actions result in contraventions under FEMA attracting the penal provisions which we have dealt with in this Article.

In legal terminology, a 'mistake' is referred to as "contravention". Contravention of FEMA occurs when any person acts contrary to the provisions of FEMA or any rule, regulation, notification, direction or order issued in exercise of the powers under FEMA or any condition subject to which an authorization is issued by RBI.

Before we get into the analysis of the provisions dealing with the contraventions and penalties let us have a look at some instances which are considered a contravention under FEMA. The contraventions can be purely procedural or arising out of technical defaults or even the outcome of willful defaults.

Few common instances of contravention under FEMA:

- Delay in submission of Form FC-GPR to the Reserve Bank after issue of shares to a person resident outside India.
- Delay in the submission of Form ODI and Annual Performance Reports
- Gift of shares of an Indian company from Resident to Non-resident without prior RBI approval
- Utilization of ECB proceeds towards non-permissible end use
- Acquisition of agricultural land in India by Non-Resident Indian without prior RBI approval
- Remittance as a gift under the LRS from a person resident in India to a foreign currency account of another person resident in India which is not permitted under the Liberalised Remittance Scheme
- Making a total financial commitment in overseas JV/WOS in excess of 400% of net worth
- Extending loans to overseas Joint Venture (JV) without any equity participation in it.
- Disinvestment of stakes in overseas Wholly Owned Subsidiary with outstanding dues.
- Undertaking Overseas Direct Investment without prior approval of RBI when the Indian Party was being investigated by the Directorate of Enforcement under the Prevention of Money Laundering Act, 2002

The above list is illustrative and there can be many more instances of transactions undertaken by a person which are in contravention of the FEMA. Such contraventions may attract late submission fees or penalties under the penal provisions of the FEMA which can be followed by the other severe consequences of recovery proceedings and imprisonment too.

Let us also set the tone for the understanding of these provisions with the background of following

SALIENT FEATURES OF PENAL PROVISIONS UNDER FEMA

- FEMA is a civil law
- Authorities under FEMA are Government / RBI / Directorate of Enforcement (DoE)
- Penal provisions are exercised in two ways - Compounding (Voluntary) under Foreign Exchange (Compounding Proceedings) Rules, 2000 & Adjudication (Government) under Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000
- Investigation & Adjudication are segregated
- Prosecution needs to prove the guilt of the contravener -Absence of '*mens rea*'
- No arrest except for non-payment of penalty and in some exceptional cases
- Time-bound disposal
- Maximum penalty prescribed

Broad overview of the provisions under FEMA dealing with this subject are as under:

Section	Coverage
13(1)	Penalty for contravention levied by the Adjudicating Authorities.
13(1A) to 13(1D)	Penal provisions in respect of foreign exchange, foreign security and foreign immovable property above the prescribed threshold
13(2)	Confiscation of the assets in respect of which contravention has taken place
14	Enforcement of the orders of Adjudicating Authority
14A	Recovery of arrears of penalty
15	Compounding of Contraventions
16 to 19	Adjudication & Appeal related provisions

The powers to implement the provisions of sections 13 to 14 are with the Adjudicating Authorities whereas the compounding provisions are largely implemented by the Reserve Bank of India and by the Enforcement of Directorate in some cases as stated above.

Lastly, we shall also look into the fees for late filing of certain procedural forms which are covered under Master Direction on Reporting under FEMA.

With this background let us look into various penal provisions under FEMA.

I) Levy of Penalty [Section 13(1)]

In terms of section 13(1) of FEMA, the person committing contravention is liable to a penalty upon adjudication. The person contravening may be liable to a penalty of up to **thrice the sum involved** in such contravention where such amount is quantifiable, or **up to INR 200,000** where the amount is not quantifiable. Further, if such contravention is a continuing one, a penalty which may extend to **INR 5,000 for every day** after the first day during which the contravention continues may also be levied.

- As per the language of the section, the Act not only covers the cases where foreign exchange is involved but also contraventions involving any sum in rupees.
- The quantum of the penalty is based on the sum involved in the contravention and the continuity of the contraventions. However, where the impact of the contravention cannot be quantified e.g. carrying on business from a place of business in India in contravention of the regulations governing the establishment of branch/ office, the maximum penalty up to INR 200,000 can be levied in such cases as the quantum of the sum involved cannot be determined.
- In addition to any contravention of the Act, Rules Regulations etc., even contravention of any condition subject to which any authorisation was given by the RBI also attracts the above penalty.

II) Confiscation of the assets in respect of which contravention has taken place [Section 13(2)]

- The Adjudicating Authority is also empowered to direct confiscation of any currency, security or any other money or property in respect of the contravention that has taken place

- Confiscation of the assets in respect of which contravention is made would be in addition to the penalty which can be directed by the Adjudicating Authority.
- Under this:
 - a. Any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated by the Central Government.
 - b. The foreign exchange holdings if any of the persons committing the contravention or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions.

For this purpose, deposit in bank or Indian currency or any other property into which the impugned property has been converted would also be liable for confiscation.

- The powers of confiscation are discretionary and lie only with the Adjudicating Authority. However, the process is not automatic and needs conscious application of mind on the part of the Authority to the relevant fact and factors. It should be on some justifiable grounds and when the nature of the transaction does not involve any conscious wrongdoing on the part of the contravener, confiscation may not be justified.
- It is essential that the items to be confiscated have nexus with the contravention.

III) Contravention in respect of the foreign exchange or foreign security or foreign immovable property [Section 13(1A) to (1D)]

Sub-Sections 1A to 1D were introduced in section 13 w.e.f 9th September, 2015. The same is applicable if the aggregate value of these assets exceeds the threshold prescribed under section 37A(1) which currently is INR 1 Crore. The penal provisions for these contraventions are as under:

- If any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the prescribed threshold limit, **he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the foreign exchange, foreign security or immovable property.**
- The Adjudicating Authority can recommend initiation of prosecution against the defaulting party. He can also direct prosecution by filing a criminal complaint against a guilty person. The criminal complaint shall be filed by an officer, not below the rank of Assistant Director.
- In addition to the penalty imposed and confiscation under section 13(1A), the guilty shall also be exposed to the punishment of imprisonment for a term which may extend up to 5 years and with a fine.
- Under Section 13(1D), the Court shall take cognizance of an offence only upon a complaint in writing by an officer, not below the rank of Assistant Director.
- The provisions under this set of sections are harsher in terms of the directions to be given for prosecution by filing a criminal complaint against the guilty person.

The liability of penalty covered under section 13 is not automatic and can be determined only after adjudication under the Adjudication Proceedings.

Certain principles and guidelines arising out of various judicial decisions on the levy of penalty:

Taking guidance from various decisions held under FERA Regime it can be held that 'mens rea' may not be required for levying the penalty for the above contravention and a person can be held liable for the penalty notwithstanding the fact that he was not aware of the statutory provisions.

However, penalty cannot be based on conjecture or surmise and there needs to be some material on the basis of which a reasonable conclusion is possible.

The powers conferred upon the officers are quasi-judicial powers and hence they need to act judicially and consider all the circumstances as the liability to penalty under these sections does not arise merely on default being proved. **Since the powers conferred on the officers are quasi-judicial various principles set in the landmark Supreme Court decision in the case of Hindustan Steel Ltd (83 ITR 26) would also hold good in the penalty matters under these provisions of FEMA**

Under the FERA Regime, the adjudicating officers could order court prosecution in cases where the offences would be of such gravity that a mere penalty would not be adequate. However, under FEMA, the prosecution is confined to the cases where the penalty is not paid within the specified time except in cases covered under Section 13(1A) to 13(1D) dealing with contraventions in respect of foreign exchange-security and property.

IV) Once the penalties are determined by the Adjudicating Authorities, power for the enforcement of the said penalty and recovery thereof are covered as under:

A. Enforcement of the order of the Adjudication Authority [Section 14]

Section 14 provides for a mechanism for enforcement of the penalty imposed on the person and the important provisions are:

- The person on whom the penalty is imposed is required to pay the full penalty within 90 days from the service of the notice.
- If the payment is not made within 90 days such person is liable for civil imprisonment
 - Up to 6 months -if demand is upto INR 1 crore
 - Up to 3 years - if demand is more than INR 1 crore
- Such detention can be made in any part of India as per the Code of Criminal Procedure; 1973. Person detained shall be released from such detention on payment of the amount mentioned in the warrant for his detention to the officer-in-charge of the civil prison.
- Such imprisonment cannot be done unless a show cause notice is issued to such person and an opportunity is given to him to explain why he should not be put to prison. The Adjudicating Authority has to record reasons in writing that the defaulter has concealed or parted with his property after issuance of notice to obstruct recovery or does not pay the arrears despite the means available for payment.
- However, no Show cause notice would be required, if the Adjudicating authority is satisfied that the defaulter is likely to abscond or leave the local limits of the jurisdiction of the Adjudicating Authority.

- Further, where an appearance is not made pursuant to a notice issued and served under sub-section (1), the Adjudicating Authority may issue a warrant for the arrest of the defaulter. The defaulting person has to be immediately released if he pays the amount due in the arrest warrant along with the cost of the arrest.

The proceedings under these provisions are very strict and stringent. Considering the gravity of the defaults that can take place under the Act, there is very less time available for the payment of the penalty and its non-payment would attract imprisonment.

The process has to be carried out judiciously before initiating imprisonment. However, exceptional powers to fast track the process are provided in cases where there are chances of the defaulter playing mischief with the law or willfully avoiding the payment of penalty or can abscond to avoid the payment of penalty.

B. Power to recover arrears of penalty[Section 14A]:

- Adjudicating Authority in writing can authorize an officer of Enforcement not below the rank of Assistant Director to recover any arrears of penalty from any person who fails to make full payment of the penalty imposed on him under section 13 within the period of ninety days from the date on which the notice for payment of such penalty is served on him.
- The recovery procedure shall apply in the same manner as laid down under the Second Schedule to Income Tax Act, 1961.

Considering the powers for Enforcement of the penalty order and the recovery of penalty arrears as provided under Section 14 and Section 14A, any person charged with the penalty can face a difficult time as a consequence of non-payment of the penalty within 90 days.

Provisions under section 14 dealing with enforcement of the orders of the Adjudicating Authority provide for imprisonment if the full payment of the penalty is not made within 90 days from the date on which the notice for payment of such penalty is served on such defaulter.

Civil imprisonment covered under Section 14(1) is subject to the provision of section 19(2) of the Act which deals with the filing of appeals against the orders of the Adjudicating Authorities / Special Director (Appeals) with the Appellate Tribunal. The question is whether it means that once the appeal is filed with the Appellate Tribunal, actions cannot be taken under section 14 for recovery of the arrears? That does not seem to be the intention and hence there is a dilemma as regards the relief that can be obtained against payment of penalty when the defaulter is in Appeal before the Appellate Tribunal. This puts the defaulter in real hardship if he cannot make the payment of the full payment of the penalty since the consequences of imprisonment would follow in such a case.

Apparently, there are no specific remedies for the stay of demand. However, when an appeal is to be filed with the Appellate Tribunal, there is a prerequisite of deposit of the penalty amount with the Appellate Tribunal. And proviso to Section 19(1) provides that, in case the Appellate Tribunal is of the opinion that the deposit of penalty would cause undue hardship, the Tribunal may dispense with such deposit as it may deem fit.

In light of this position let us look at the possible reliefs that can be obtained under the Appellate provisions:

V. Appeals against the orders of the Adjudicating Authorities:

- The appeal against the order of the Adjudicating Authority can be filed with either the Special Director (Appeals) or Appellate Tribunal depending upon the rank of the adjudicating officer.
- Further, an appeal against the order of the Special Director can also be filed with the Appellate Tribunal.
- The appeal can be filed within 45 days from the date on which the order is received by the aggrieved person. Condonation for the delay in filing an appeal beyond 45 days can be considered if there is a sufficient cause of delay.
- As mentioned above the Appellate Tribunal can waive the deposit of the penalty amount in a case where it would cause genuine hardship to the defaulter
- The Appellate Tribunal can call for records of any proceedings before the Adjudicating Authority for examining the legality, propriety or correctness of any order made by the Adjudicating Authority and make such order as it deems fit. Thus there are powers of revision of the order of the Adjudicating Authority with the Appellate Tribunal.
- The civil court does not have jurisdiction to entertain any proceeding in respect of any matter before the Adjudicating Authority or Appellate Tribunal or Special Director (Appeals).
- Appeal to High Court can be filed only on a question of law and within 60 days. High Court does not have jurisdiction to condone delay beyond 60 days.
- There is no specific provision for appeal to Supreme Court. However, considering Article 136(1) of the Constitution, the aggrieved party has a right to prefer an appeal to the Supreme Court if such appeal is otherwise maintainable.

As we understand from the above analysis of the penal provisions and the relief under the Appellate provisions, it is clear that once a person is adjudicated as a defaulter and penalties are levied, the path ahead for a stay of the demands, relief from imprisonment and seeking relief at higher levels is a very long, strenuous and uncertain.

It is therefore very important that one is aware of the more straightforward option of going for compounding of contravention as provided under section 15 of the FEMA

VI. Compounding of Contravention by the Reserve Bank of India [RBI] and Directorate of Enforcement [DOE](Section 15)

Quite often, a contravention happens and the person contravening himself realizes that the contravention has happened. Normally, there is no remedy in such cases and the consequences are as severe as those in case of willful contravention.

Section 15 of FEMA deals with and provides for compounding of offence in such cases. The person contravening the provision is required to make an application for compounding. The authority dealing with compounding is required to compound the offence within a certain prescribed time limit from the date of making the application.

BENEFITS OF COMPOUNDING

- ✓ Absolutely transparent process providing comfort to citizens and corporate community.
- ✓ Time-bound disposal (180 days).
- ✓ Simple and hassle-free procedure.
- ✓ Mandatory personal hearing opportunity.
- ✓ No proceedings or further proceedings initiated or continued.
- ✓ Public disclosure of the guidelines on the amount imposed during the compounding.
- ✓ No arrest except non-payment of penalty.
- ✓ Maximum penalty prescribed.

The Framework of the Compounding Proceedings is provided under Master Direction on No.4/2015-16 - Compounding of Contraventions under FEMA, 1999:

Compounding of contravention means settlement of an offence committed by the contravener through the imposition of a monetary penalty without going in for litigation after the contravener acknowledges voluntarily of having committed the contravention.

Detection of contravention can be through any of the modes such as voluntary disclosure, information from ADs, analysis of data, market Intelligence, RBI's inspections; others – media reporting/complaints, etc.

Power to Compound to RBI	Power to Compound to DOE
<ul style="list-style-type: none"> ✓ Sec.3 – Dealing in Foreign Exchange except section 3(a) of FEMA ✓ Sec.4 – Holding of foreign currency ✓ Sec.5 – Current account transactions ✓ Sec.6 – Capital account transactions ✓ Sec.7 – Export of goods and services ✓ Sec.8 – Realization and repatriation of Foreign exchange ✓ Sec.9 – Exemption from realization & repatriation ✓ Sec.10 – Mis-utilization of Foreign Exchange ✓ Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 	<ul style="list-style-type: none"> ✓ Sec 3(a): dealing in or transfer of any foreign exchange or foreign security to any person not being an authorized person. ✓ Sec 37(A) relating to assets held outside India in contravention of Section 4 of FEMA. <p>If the compounding proceedings relate to a serious contravention suspected of money laundering, terror financing or affecting the sovereignty or integrity of the nation, RBI forwards the application to the Directorate of Enforcement.</p>

Circumstances under which Compounding cannot be done by RBI

- If an appeal under Sec. 17 of FEMA has been filed with Special Directorate (Appeals)
- If an appeal under Sec. 19 of FEMA has been filed with Appellate Tribunal
- Contraventions relating to any transaction entered into without proper approval or permission from the concerned Govt. or any Statutory Authority i.e., the requisite approval not obtained
- A contravention, prima facie, involving money laundering, terror financing or affecting sovereignty of the country and needs investigation
- Amount involved in the contravention is not quantifiable
- Contravention committed by any person within a period of 3 years from the date on which similar contravention committed by him was compounded

Powers delegated to the Compounding Authority in RBI to compound are as under:

Amount involved in the contravention	Compounding Authority in RBI
INR 10 lakhs or below	Assistant General Manager
More than INR 10 lakhs but less than INR 40 lakhs	Deputy General Manager
INR 40 lakhs or more but less than INR 100 lakhs	General Manager
INR 100 lakhs or more	Chief General Manager

The detailed mechanism for the compounding process, computing the compounding fees, and related guidance are mentioned in Master Direction on No.4/2015-16 - Compounding of Contraventions under FEMA, 1999.

Once a contravention has been compounded by the Compounding Authority, no proceeding or further proceeding will be initiated or continued, as the case may be, against the contravener.

In case of failure to pay the sum compounded within the time specified, it shall be deemed that the contravener had never made an application for compounding of any contravention under these Rules.

VII. Regularization of Reporting Delays

With this, we shall now deal with the process of regularization of reporting delays under FEMA which is the last section of this article.

For ease of regularizing **reporting delays**, RBI has introduced the levy of Late Submission Fees (LSF) as an option to regularize such delays without undergoing the compounding procedure. In case of procedural delay, reporting is conditionally acknowledged by RBI subject to payment of LSF. These delays are mainly pertaining to three types of reporting requirements namely FDI, ECB and ODI transactions. The matrix provided for calculating the late submission fees for these transactions is as under:

a. In the case of FDI

In case of reporting delays for FDI transactions,

Amount involved (in Rs.)	LSF as % of amount involved *	Maximum amount of LSF applicable
Up to 1 crore	0.05%	Rs.10 lakhs or 300% of the amount involved, whichever is lower
More than 1 crore	0.15%	Rs.1 crore or 300% of the amount involved, whichever is lower

* LSF % will be doubled every 12 months. The minimum LSF amount will be Rs. 100.

The period of contravention shall be considered proportionately (approx. rounded off to next higher month ÷ 12) X Amount for 1 year.

b. In the case of the ECB

Any borrower, who is otherwise in compliance with ECB guidelines, can regularise the reporting delay in the drawdown of ECB proceeds before obtaining LRN or delay in submission of Form ECB 2 returns, by payment of LSF as detailed in the following matrix:

Type of Return/Form	Period of delay from due date of submission/date of drawdown	Applicable LSF
Form ECB 2	Up to 30 calendar days	INR 5,000
Form ECB 2/ Form ECB	Up to 3 years	INR 50,000 per year
Form ECB 2/ Form ECB	Beyond 3 years	INR 1,00,000 per year

c. In the case of ODI

The LSF for the delay in reporting overseas investment-related transactions shall be calculated as per the following matrix:

Type of Reporting	LSF Amount (INR) per return*
Form ODI Part-II/ APR, FLA Returns, Form OPI, evidence of investment or any other return which does not capture flows or any other periodical reporting	7,500
Form ODI-Part I, Form ODI-Part III, Form FC, or any other return which captures flows or returns which capture reporting of non-fund-based transactions or any other transactional reporting	7,500 + (0.025% × A × n)

***A = Amount involved in the delayed reporting, n = Number of years of delay in submission rounded-upwards to the nearest month and expressed up to 2 decimal points.**

CONCLUSION

- FEMA has a very defined set of regulations for levy of penalties in case of contravention and the powers are with the Adjudicating Authority to levy penalties. Non-payment of the penalties may attract civil imprisonment subject to show cause notice and opportunity of hearing before the concerned authorities. Such show cause notices may not be required in certain grave situations.
- Penalty provisions are stricter in case of contraventions pertaining to foreign exchange / foreign securities and immovable properties outside India. At times, levy of penalties and confiscation of assets can be done simultaneously.
- The provisions for enforcement of penalties levied by adjudicating authority provide for a stay of payment of penalties in case an appeal is filed against the order of the Adjudicating Authority. However, such waiver cannot be taken for granted unless the Tribunal grants such waiver of pre-deposit of penalty while admitting the appeal. The proceedings before the Adjudicating Authorities and the Appellate Authorities are civil in nature.
- Compounding of contravention could be a better remedy at times as against orders of the Adjudicating Authority. However, compounding remedy after receipt of the order of the Adjudicating Authority sounds a difficult proposition.
- The order of the Adjudicating Authority can be appealed against within 45 days from the date of receipt of the notice. Payment of the penalty levied by Adjudicating Authority is to be made within 90 days. Beyond 90 days, the recovery provisions may get initiated including imprisonment. To put such proceedings on hold one has to file the appeal with Appellate Authorities. Further, remedy for compounding of contravention cannot be sought for an order against which an appeal has been filed under section 17 or 19 of FEMA.

So, it is always advisable for any person who realises of any contravention under FEMA to immediately initiate the steps for regularisation of the contravention with the RBI and apply for compounding of the said contravention which is civil in nature, with time-bound results and well determined procedures.

References Material:

- Foreign Exchange Management Act, 1999
- FED Master Direction No. 4/2015-16 dated 1.1.2016 - Compounding of Contraventions under FEMA, 1999 [Updated as on 24.5.2022]
- FED Master Direction No. 18/2015-16 dated 1.1.2016 - Reporting under Foreign Exchange Management Act, 1999 [Updated as on 22.8.2022]
- Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000 as amended from time to time
- Foreign Exchange (Compounding) Rules, 2000 as amended from time to time



PENALTIES AND PROSECUTION UNDER INCOME TAX ACT, 1961



Adv Paras Savla
Email : parassavla@gmail.com

I. INTRODUCTION

Article 265 of the Constitution states that no tax shall be levied or collected except by authority of law. While this Article postulates imposing taxes, it does not speak about 'interest' and 'penalty'. The Supreme Court in case of *Pratibha Processors vs. Union of India*, observed that in fiscal statutes, the import of the word-"tax", "interest", "penalty", etc are well known. They are different concepts. Tax is the amount payable as a result of the charging provision. It is a compulsory extraction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. Interest is compensatory in character and is imposed on an assessee who has withheld payment of any tax and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Thus, one can say that penalty is a monetary fine for committing a default or for failure to comply with a particular provision and usually is levied with a motive to discourage people from committing or repeating defaults.

The Government has taken various measures to curb black money and to streamline it into mainstream economy. This includes, inter alia, amendments to penalty and prosecution provisions under Income Tax Laws as well. In this chapter, we shall briefly deal with and restrict ourselves to the penalty and prosecution provisions under the Income-tax Act, 1961 for various defaults under the Act.

II. PENALTIES

A. Penalties - based on income

i) Penalty for Under-reporting and Misreporting of Income(Section 270A)

- 1) Section 270A has been introduced vide Finance Act, 2016 as a replacement of penalty u/s 271(1)(c) which was leviable in case of concealment or filing of inaccurate particulars. The erstwhile provisions operated for around 56 years, and the legal issues arising therefrom had been settled through various decisions. While the Income tax simplification Committee headed by Justice R. V. Easwar recommended enlarging the scope of section 273B to include penalty u/s 271(1)(c), Finance Act 2016, introduced new section 270A and in so doing completely revamped the provisions. New concepts of 'under-reporting of income' and 'mis-reporting of income' were brought in as against the terms 'inaccurate particulars of income' and 'concealment of income', which were earlier used in section 271(1)(c). Section 270A is effective from AY 2017-18 onwards. Thereby old penalty provision u/s 271 applies till AY 2016-17.
- 2) As per section 270A(1), any person who is found to have under-reported his income, may be levied with a penalty under this section which is in addition to tax on such under-reported income. This penalty can be levied by AO / PCIT / CIT / CIT(A) during the course of any proceedings under this Act.

¹1996 taxmann.com 72 (SC); Also see *J.K. Synthetics Ltd.v.The Commercial Tax Officer*1994 taxmann.com 370 (SC)

3) Quantum of penalty:

The quantum of penalty shall be 50% of the tax payable on the amount of under-reported income. However, if such under-reporting is in consequence of misreporting, then the penalty shall be 200% of the tax payable on under-reported income.

4) Under-reporting of income:

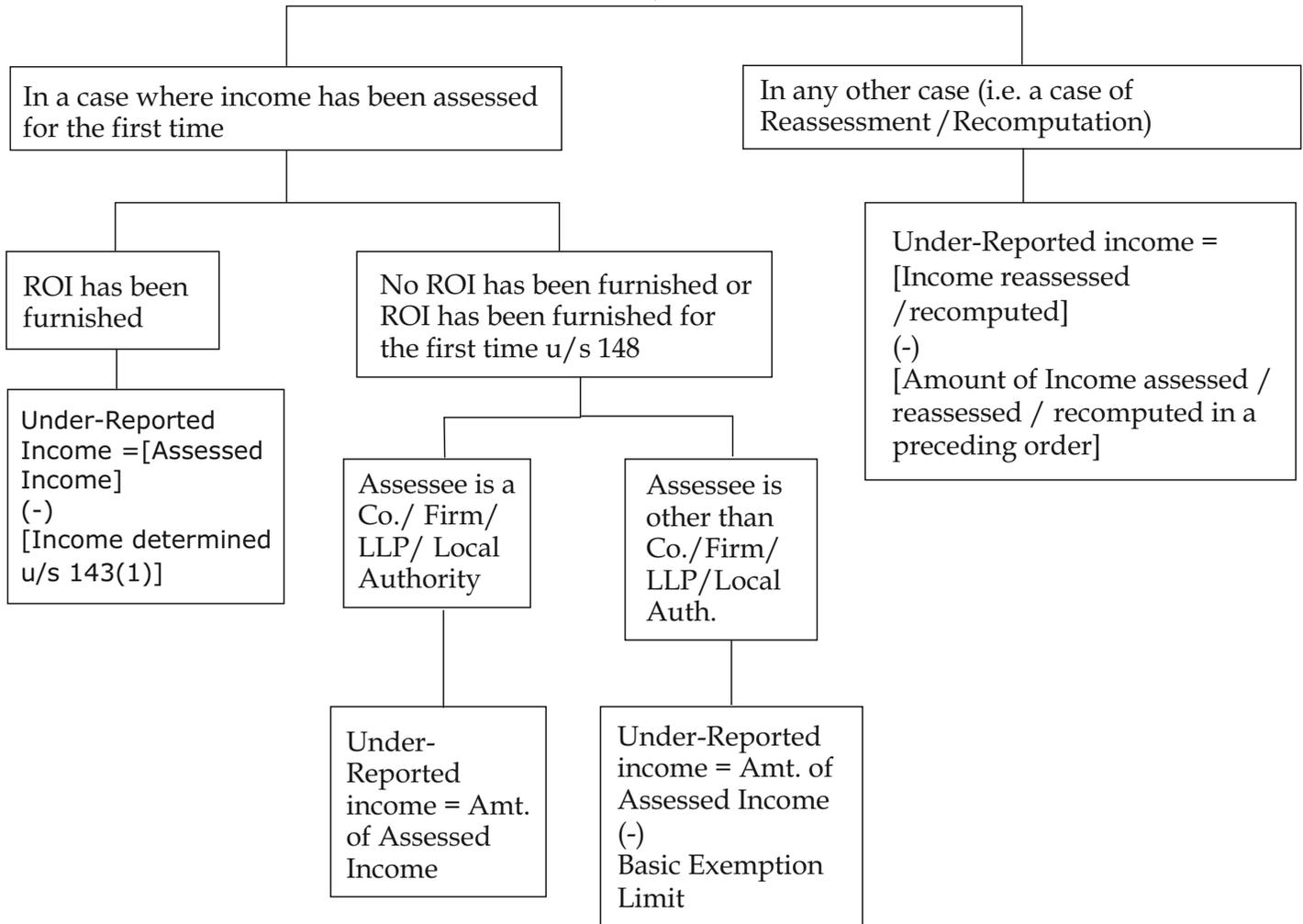
As per the section a person shall be considered to have under-reported his income in the following seven situations:

i)	If assessed income is	>	than return of income processed u/s 143(1)(a)
ii)	If assessed income is	>	than maximum amount not chargeable to tax [Where ROI not filed or is filed for the first-time pursuant to notice u/s 148 by assessee]
iii)	If re-assessed income is	>	than income assessed / reassessed immediately before such re-assessment
iv)	If assessed / re-assessed 'book profit' or 'adjusted total income' as per Section 115JB (MAT) or 115JC (AMT) is	>	than return of income processed u/s 143(1)(a)
v)	If assessed 'book profit' or 'adjusted total income' as per Section 115JB (MAT) or 115JC (AMT) is	>	than maximum amount not chargeable to tax [Where ROI not filed or is filed for the first-time pursuant to notice u/s 148 by assessee]
vi)	If re-assessed 'book profit' or 'adjusted total income' as per Section 115JB (MAT) or 115JC (AMT) is	>	than income assessed / reassessed immediately before such re-assessment
vii)	If income assessed or reassessed has the effect of reducing the loss or converting the loss into income.		

5) Amount of under-reported income assessed under normal provisions

Sub-clause 3 of section 270A deals with the manner in which the amount of under-reported income shall be computed. In case the income is assessed under normal provisions (i.e. not under 115JB or 115JC) then the amount of under-reported income shall be as per the chart below:

Amount of under-reported income



6) Amount of under-reported income assessed under MAT / AMT

If the under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB (i.e. MAT) / 115JC (i.e. AMT), then the amount of under-reported income shall be calculated in accordance with the following formula :

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

Where,

A= total income assessed (including under-reported income) without considering the provisions of MAT / AMT

B= total income assessed (excluding under-reported income) without considering the provisions of MAT / AMT

C= total income assessed (including under-reported income) as per the provisions of MAT / AMT

D= total income assessed (excluding under-reported income) as per the provisions of MAT / AMT. However, if any under-reported income is considered under the provisions of Section 115JB / 115JC as well as under the general provisions of the Act, both, then that much part of the under-reported income shall not be reduced in computing 'D' above.

7) Amount of under-reported income in case of loss to loss / income situation

In a case where, an assessment / reassessment has the effect of reducing loss declared in the ROI or has the effect of converting that loss into income, the under-reported income shall be the difference between the loss claimed and the income or loss, as the case may be, assessed or reassessed. In simple words, the amount of additions made by AO itself will be deemed to be the amount of under-reported income.

8) Penalty on telescoping theory

The telescoping theory has been accepted in many judgements. To describe the term 'Telescoping' as coined in many judgements, by way of an example, i.e. if an addition is made in year 1 and the said income is expended in year 3, then no separate addition shall be made at the time of expenditure as it is an application of such income. However, to argue such an application in year 3, would mean that the Taxpayer approves the addition in year 1 and cannot take contrary stands in different years. Section 270A(4) is somewhat similar to erstwhile explanation 2 to section 271(1), which states that if no penalty is levied in year 1 at the time of addition of income, penalty can be levied in year 3 when Assessee claims telescoping on the basis of such source i.e. Receipt / Deposit / Investment for which addition was made in preceding year i.e. year 1. In fact, for computing under-reported income, sub-section 5 postulates that 'Last In First Out (LIFO) Method' to be followed.

9) Exceptions to under-reporting of income

As per sub-clause 6 to section 270A, the amount of under-reported income shall not include the followings:

- a) Where Assessee offers an explanation; AO / PCIT / CIT / CIT(A) is satisfied that the explanation is bonafide and assessee has disclosed all the material facts to substantiate the explanation offered by him.
- b) Where the under-reported income is determined on the basis of an estimate,
 - i. if the accounts are correct and complete to the satisfaction of AO / PCIT / CIT / CIT(A), but the method employed is such that the income cannot properly be deduced therefrom, or
 - ii. if the assessee has, on his own motion, estimated a lower amount of addition / disallowance on the same issue and has included such amount in the computation of his income and has also disclosed all the facts which are material to such additions / disallowance.
- c) The amount of under-reported income is due to Transfer pricing addition and Assessee had maintained the documents and information prescribed u/s 92D as well as had declared the International Transaction and disclosed all the material facts relating to the transaction.

- d) The amount of undisclosed income referred to in Sec. 271AABi.e. where search has been initiated.

10) Mis-reporting of income

As mentioned earlier if under-reporting of income is in consequence of misreporting, then the penalty shall be 200% of the tax payable on under-reported income. Hence it is important to understand what would be considered as mis-reporting. As per section 270A(10) mis-reporting shall be;

- a) Misrepresentation or Suppression of facts;
- b) Failure to record investments in the books of accounts;
- c) Claim of expenditure, not substantiated by any evidence;
- d) Recording of any false entry in the books of accounts;
- e) Failure to record any receipt in the books of accounts having a bearing on total income and
- f) Failure to record any International Transaction / deemed International Transaction / specified Domestic Transaction to which the transfer pricing provisions i.e. Chapter X applies.

11) Burden of proof:

While the levy of penalty for under-reporting could be automatic, sub-section (6) requires assessee to offer a bonafide explanation and to substantiate such explanation with material facts. Hence, the initial burden lies on the assessee to fall within the exclusions. Au contrarie, to prove that an under-reporting was nothing but mis-reporting, it will be for the revenue to prove that there is misrepresentation, suppression, failure and falsity in terms of six cases of misreporting.

- 12) Penalty under section 270A is not automatic and is at the discretion of the department as the word 'may' has been used instead of the word 'shall'. Further such penalty may not be leviable in case of debatable issues. In CIT v. Reliance Petro Products 322 ITR 158, the Supreme Court stated: '*If we accept the contention of the revenue then in case of every return where the claim made is not accepted by the Assessing Officer for any reason, the assessee will invite penalty under Section 271(1)(c). That is clearly not the intendment of the legislature*'. Though the Supreme Court rendered its judgement in context of section 271(1)(c), it would yet be applicable for penalty u/s 270A as well.

i) Penalty in search cases, where search initiated on or after 01 July 2012 (Section 271AAB)

- 1) Penalty provisions where search has been initiated in case of a person **on / after 01/07/2012**, are governed by section 271AAB. This section bifurcates into two time zones,
 - a) where search is initiated on or after 01 July 2012 but before 15 December 2016 and
 - b) where search is initiated on or after 15 December 2016.

The penalty shall be levied as follows:

Particulars	Conditions					
Search Conducted between	Between 01 July 12 to 14 December 16	On or after 15 December 16				
1. Upon conclusion of search, in a statement recorded u/s 132(4), Assessee:						
- Admits the concealment of undisclosed income, and	Yes	No	No	Yes	No	No
- Also substantiates the manner of deriving such income	Yes	No	No	Yes	No	No
- On/before the Specified date, Assessee furnishes the ROI for the specified P.Y. by including such undisclosed income therein and pays the tax (+) interest if any in respect such undisclosed income	Yes	Yes	No	Yes	Yes	No
Quantum of penalty (as % of undisclosed income)	10%	20%	60%	30%	60%	60%

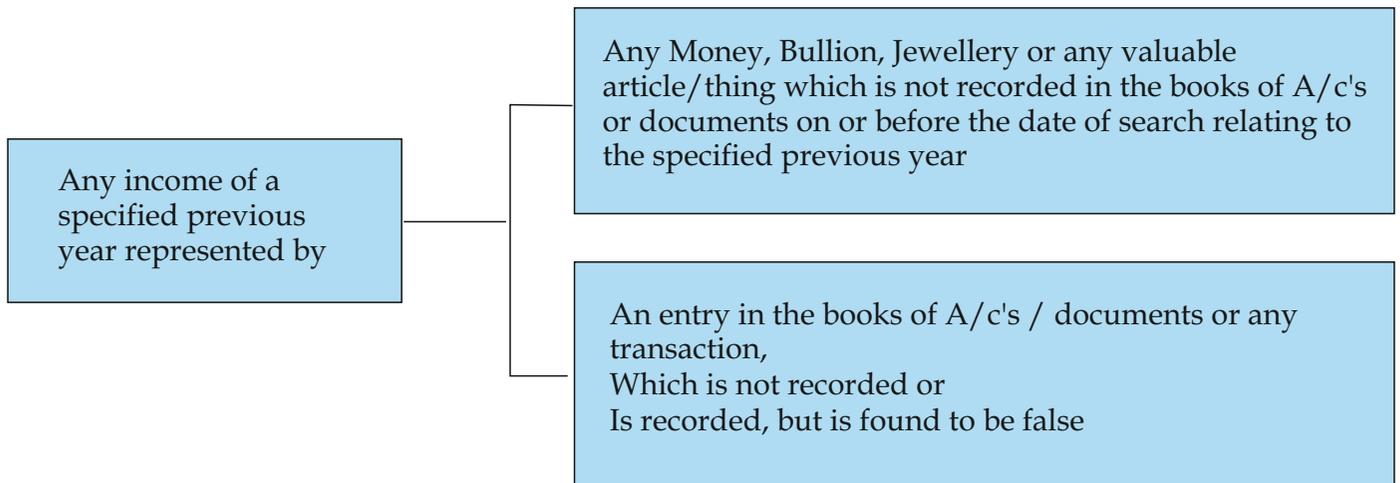
2) Few points to be considered:

- a) No penalty shall be levied u/s 270A, for an amount of undisclosed income for which penalty is leviable under this Section 271AAB.
- b) Specified Date' means the due date of filing ROI given in Section 139(1) or the last date given in a Notice u/s 148 / 153A to furnish ROI in response to that notice.
- c) Specified Previous Year' means
 - any previous year, which has already ended before the date of search but the time limit to furnish ROI as per Section 139(1) for such a year has not yet expired as on the date of search and the ROI has not been furnished for such a year.

OR

- The year in which the search is conducted.

d) 'Undisclosed income' means



i) **Penalty in respect of certain incomes, for example, cash credits, unexplained expenditure etc. (Section 271AAC)**

1) Section 271AAC empowers Assessing officer / Commissioner (Appeals) to levy penalty @ 10% in respect of certain type of incomes i.e. referred to in Sections 68 / 69 / 69A / 69B / 69C / 69D [on which the tax is payable as per Sec. 115BBE @ 60%]. It may be noted that Sections 68, 69, 69A, 69B, 69C and 69D are all deeming provisions. They cast an onus on the Assessee to offer a satisfactory explanation, failing which the Assessing Officer would deem the amounts as income, since its source may be Assessee's black income. Each of these sections deal with different items as under:

- a. Section 68 deals with credits found in the books of the Assessee. There are times where the Assessee is in need of funds. The books of accounts maintained by him may contain a credit entry, say as a loan or share premium etc. Section 68 empowers the Assessing Officer to deem such credits as income of the Assessee unless the Assessee provides a satisfactory explanation for the credit entries.
- b. Section 69 deals with investments made by an Assessee but not recorded in the books of accounts. This section casts the onus on an Assessee to provide a satisfactory explanation, failing which such investments would be deemed as income of the Assessee.
- c. Section 69A deals with situations where an Assessee is found to be an owner of any money, bullion, jewellery or other valuable article which are not recorded in the books of accounts. This section casts the onus on an Assessee to provide a satisfactory explanation, failing which such money would be deemed as income of the Assessee.
- d. Section 69B deals with situations where the above items are recorded in the books of accounts maintained by the Assessee but actual value of making such items exceeds the amount so recorded. This section casts the onus on an Assessee to provide a satisfactory explanation with respect to the excess, failing which such money would be deemed as income of the Assessee.
- e. Section 69C deals with expenditure incurred by an Assessee for which no explanation is provided by the Assessee. This section casts the onus on an Assessee to provide a satisfactory explanation, failing which such money would be deemed as income of the Assessee.

- f. Section 69D deals with deeming the amounts, which are either borrowed or repaid on a hundi otherwise than by way of an account payee cheque drawn on a bank, as income of the Assessee. However, it provides that once an amount is added on it being borrowed, it cannot be added once again when it is being repaid.
- 2) It may be noted that the above income is tax @ 60%. With a penalty of @ 10%, total outflow on such income could be 66% excluding interest. Also, once a Penalty is levied u/s 271AAC, the same income shall not be subjected to Penalty u/s 270A.

A. Penalties – For not deduction/payment of tax or non – collection of tax

i) Penalty for failure to deduct tax at source (Section 271C)

The Income tax Act, 1961 creates a vicarious liability on the Assessee to deduct tax at source. Section 271C empowers the Joint Commissioner to levy penalty, which is equal to the amount of tax, which such person failed to deduct or pay.

The TDS defaults being;

- a. Failure to deduct the tax at source u/s 192 to Section 196D of Chapter XVII-B, or
- b. Failure to pay whole or part of
 - i. Dividend Distribution Tax (DDT) u/s 115-O to the credit of Central Government within 14 days from the date of declaration or distribution or payment of dividend, or
 - ii. tax under proviso to Section 194B (winning income in kind),

ii) Penalty for failure to collect tax at source (Section 271CA)

Similar to penalty u/s 271C for failure to deduct tax at source, Section 271CA empowers Joint Commissioner to levy penalty equal to the amount of tax on account of failure to collect tax at source.

B. Penalty – For not payment of taxes

Section 221 empowers the Assessing officer to levy penalty when an 'assessee is in default' or is deemed to be in default in making a payment of tax. There is no prescribed formula for computation of penalty and Assessing officer may levy penalty on the basis of his/her judicial wisdom. However, the total amount of penalty does not exceed the amount of tax in arrears.

Few scenarios where Assessee can be considered as 'assessee in default' are as under;

- a) When an assessment order is passed, notice of demand is issued u/s 156. Usually demand notice gives time limit of 30 days within which payments have to be done. In case, an assessment order is challenged then an application for stay of demand is made. If the amount is not paid within 30 days or the time extended by the AO then the assessee shall be deemed to be in default.
- b) The above scenario also applies when TDS assessment order is passed.
- c) Non-payment of advance tax
- d) Non-payment of taxes on income distributed by Securitisation Trust

- e) Non-payment of taxes on income distributed to shareholders, by way of dividend, buyback, etc.
- f) Non-payment of self-assessment tax

C. Penalties – for dealing in cash transactions

Income tax Act has few inbuilt provisions which in current scenario, promote digital economy and discourage / deter cash transactions. Defaults, if any, attract penalty. Following penalties could be levied if a person indulges into cash transactions in violation of the provisions.

i) **Penalty for accepting any loan or deposit of Rs. 20,000/- or more in any mode other than banking transactions (Section 271D)**

Section 269SS provides that no person shall take or accept any loan or deposit or any specified sum of Rs.20,000/- or more otherwise than by way of an account payee cheque or an account payee draft or use of electronic clearing system through a bank account. The threshold limit of Rs.20,000/- applies to aggregate of amounts taken or accepted.

Default thereof attracts penalty leviable u/s. 271D to the extent of loan or deposit or any specified sum taken or accepted in contravention to section 269SS.

ii) **Penalty for receipt of an amount of Rs. 2 lacs or more (Section 271DA)**

Section 269ST, introduced vide Finance Act, 2017, inter-alia prohibits receipt of an amount of two lakh rupees or more by a person, in the circumstances specified therein, through modes other than by way of an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account.

The limit of Rs. 2,00,000/- or more is applicable to amounts receivable ;

- 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

As per section 271DA, non-compliance attracts a penalty of a sum equal to the amount of such receipt. Interestingly penalty is not on the amount in excess of Rs.2,00,000/- but the entire amount of the receipt.

iii) **Penalty for not providing facility to accept money through prescribed electronic modes (Section 271DB)**

Section 269SU mandates every person, carrying on business, to provide facility for accepting payment through prescribed electronic modes, if the total sales, turnover or gross receipts, exceeds Rs.50 Crores. Failure to provide such facility attract penalty of Rs.5,000/- per day till the day failure continues.

iv) Penalty for repaying any loan or deposit of Rs. 20,000/- or more in any mode other than banking transactions (Section 271E)

Section 269T provides that no person shall repay any loan or deposit or any specified sum of Rs.20,000/- or more otherwise than by way of an account payee cheque or an account payee draft or use of electronic clearing system through a bank account. The threshold limit of Rs.20,000/- applies to aggregate of amounts taken or accepted.

Default thereof attracts penalty leviable u/s. 271E to the extent of loan or deposit or any specified sum repaid in contravention to section 269T.

E. Penalties for other defaults

Penalties for other defaults are tabulated as under;

Sections	Nature of Defaults	Quantum of Penalty
271A	Failure to keep, maintain, or retain books of account, documents, etc., as required under section 44AA Note: Section 44AA read with Rule 6F prescribes the persons who are mandatorily required to maintain books of Accounts for	Rs.25,000/-
271AA (1)	In respect of an International Transaction: - Failure to keep and maintain certain information / documents, as are required u/s 92D (read with Rule 10D). - Failure to report such transaction or - Maintaining or furnishing incorrect information or document.	2% of value of each international transaction / or specified domestic transaction entered into
271AA (2)	Failure to furnish the information and the document as required u/s 92D(4) [Master File / Local File] [in Form No. 3CEAA with Joint Commissioner designated by DGIT (Risk Assessment)]	Rs.5,00,000/-

Sections	Nature of Defaults	Quantum of Penalty
271AAD	<p>During the course of any proceeding under the Act, if it is found that there is:</p> <ul style="list-style-type: none"> - False Entry in the Books of Accounts of a person; or - an Omission of any Entry in the Books of Accounts of a person (which is relevant for computation of total inc. of such person) to evade tax liability. <p>Further even any other person, who causes the above referred person to make a false entry or omits or causes to omit any entry as above, may also be subjected to the same penalty.</p> <p><u>Note:</u> 'False Entry' includes 'use' or 'intention to use':</p> <ol style="list-style-type: none"> a) Forged or falsified documents (like false invoice / false piece of documentary evidence); or b) Invoice in respect of supply / receipt of goods/services/both issued by the person or issued by the other person, without actual supply / receipt of such goods / services / both; or c) Invoice in respect of supply / receipt of goods/services/both, to or from a person who does not exist. 	<p>100% of such false entries or omitted entry in the books of accounts.</p> <p>In case of abetment 100% of such false entries or omitted entry in the books of accounts, in the hands of the abettor.</p>
271AAE	<p>Penalty for violation of the provisions section 10 (23C) or section 13, pertaining to passing of unreasonable benefits to trustees or specified person.</p> <p>Charitable and Religious Trusts, Institutions, Hospitals, etc., are not intended to pass on any unreasonable benefit to the trustee or any other specified person. In order to discourage such misuse of the funds of the trust or institution by specified persons, section 271AAE empowers the Officers to levy penalty in case of any such default.</p>	<ol style="list-style-type: none"> a) For first violation: to the extent of income applied by the institution for the benefit of any interested party referred to in section 13(3); b) For any violation in subsequent years: twice the amount of such income so applied (i.e. double penalty).
271B	<p>Failure to get the Books of A/c's audited as required u/s 44AB of the Act and furnish the audit report (i.e. Report of a CA in form no. 3CA, 3CB or 3CD as the case may be)</p>	<p>Penalty would be lower of:-</p> <ol style="list-style-type: none"> a) 0.5% of Gross Receipt / Sales / Turnover, or b) Rs.1,50,000/-

Sections	Nature of Defaults	Quantum of Penalty
271BA	Failure to furnish a report as required u/s 92E (i.e. Report of a CA in Form No. 3CEB, with regards to international transactions or domestic transactions)	Rs.1,00,000/-
271FA	Failure to furnish an annual information return as required under section 285BA(1) As per Section 285BA of the Income Tax Act, 1961, specified entities (Filers) are required to furnish a statement of financial transaction or reportable account in respect of specified financial transactions or any reportable account registered/recorded/maintained by them during the financial year to the income-tax authority or such other prescribed authority. This data forms AIR information or SFT	- Rs.500/- per day of default - Rs.1,000/- per day if notice is issued u/s 285BA(5)
271FAA	A person, who is required u/s 285BA to furnish a Statement of Financial Transaction or Reportable Account, provides inaccurate information	Rs.50,000/-
271FAB	If any Eligible Investment Fund, which is required to furnish a Statement / Information / Document, as required u/s 9A(5) fails to furnish such Statement / Information / Document, within the time limit prescribed u/s 9A(5). Note: - 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.	Rs.5,00,000/-
271G	Failure to furnish certain document / information, in connection with: An International transaction, or A Specified Domestic Transaction whenever called upon by TPO/AO or CIT(A) as required u/s	2% of the value of the international transaction/specified domestic transaction for each failure

Sections	Nature of Defaults	Quantum of Penalty
271GA	<p>If any Indian Concern, which is required to furnish any information or document u/s 285A (in Form No. 49D), fails to do so</p> <p>Section 285A provides for reporting by an Indian concern if following two conditions are satisfied:</p> <p>a) Shares or interest in a foreign company or entity derive substantial value, directly or indirectly, from assets located in India; and</p> <p>b) Such foreign company or entity holds such assets in India through or in such Indian concern.</p> <p>In such 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).</p>	<p>a) If such transaction had the effect of directly / indirectly transferring the right of management / control in relation to the Indian Concern, then, a sum equal to 2% of the value of the transaction in respect of which such failure has taken place.</p> <p>or</p> <p>b) In any other case: A sum of Rs.5 Lakhs.</p>
271GB(1)	<p>Penalty for failure to furnish report u/s 286</p> <p>If any Reporting Entity referred to in Section 286, which is required to furnish the Report u/s 286(2), fails to do so, such Reporting Entity may be levied with a penalty</p>	<p>- If default period does not exceed one month, Rs. 5,000 per day of default plus</p> <p>- If default continues beyond one month, Rs. 15,000 per day for which failure continues beyond one month</p>
271GB(2)	<p>If any Reporting Entity referred to in Section 286, which is required to produce the Information and Documents u/s 286(6) in response to Notice u/s 286(6), fails to do so within the time allowed (30 days)</p>	Rs. 5,000 per day of default.
271GB(3)	<p>If default given u/s 271GB(1) or 271GB(2) continues even after service of Penalty Order</p>	Penalty will be 50,000 per day from the date of service of Penalty Order.
271GB(4)	<p>In a case where the Reporting Entity provides inaccurate information in the report u/s 286(2)</p>	Rs. 5,00,000/-

Sections	Nature of Defaults	Quantum of Penalty
271H	<p>Penalty for failure to deliver TDS / TCS Statement within time or to furnish incorrect information in such statement.</p> <p>No Penalty shall be levied, if proved that after depositing the amount of TDS / TCS along with Interest [u/s 201(1A) or u/s 206C(7)] and Fees [u/s 234E] to the credit of Central Government, such person had delivered such TDS / TCS Statement, before expiry of one year from the expiry of time limit</p>	Penalty shall not be less than Rs. 10,000/- but may extend to Rs. 1,00,000/-
271K	<p>Failure to deliver a Statement or furnish a Certificate by Research Association / University / College / Company / Institution / Fund:</p> <p>a) If the research Association / University / College referred to in Sec. 35(1)(ii)/(iii) or a Company referred to in Sec. 35(1)(ia),</p> <ul style="list-style-type: none"> - fails to deliver / cause to be delivered a Statement to the prescribed Income Tax Authority within the time limit given in Sec. 35(1A)(i) or - fails to furnish a Certificate to the Donor within the time limit prescribed u/s 35(1A)(ii), <p>or</p> <p>b) If the Institution / Fund referred to in Sec. 80G(5),</p> <ul style="list-style-type: none"> - fails to deliver / cause to be delivered a Statement within the time limit given in Sec. 80G(5)(viii) or - fails to furnish a Certificate to the Donor prescribed u/s 80G(5)(ix) 	Rs. 10,000/- to Rs. 1,00,000/-
271I	<p>If a person who is required to furnish information u/s 195(6), [in Form 15CA / 15CB] either:</p> <p>a) fails to furnish such information; or</p> <p>b) furnishes inaccurate information</p>	Rs. 1,00,000/-
271J	<p>If it is found by AO or CIT(A) that</p> <p>a) any Chartered Accountant, or</p> <p>b) a Merchant Banker, or</p> <p>c) a Registered Valuer,</p> <p>has furnished incorrect information in any Report or any Certificate furnished under the Income Act or the Rules</p>	Rs. 10,000/- for each such report or certificate

Sections	Nature of Defaults	Quantum of Penalty
272A(1)	<p>If any person, without reasonable cause, fails to or refuses to :-</p> <ul style="list-style-type: none"> a) Answer any question put to him during the course of investigation; b) Sign any statement made by him during the course of investigation; c) Comply with the terms of any summons issued to him u/s 131(1), requiring him to attend, give evidence or produce Bks of A/cs, documents, etc d) Comply with the notice issued u/s 142 of the Act, Scrutiny assessment Notice u/s 143(2) or a direction of Special Audit u/s 142(2A). 	Rs.10,000/- for each failure
272A(2)	<p>If any person, without any reasonable cause, fails to :-</p> <ul style="list-style-type: none"> a) furnish requisite information as required u/s 94(6) in respect of securities b) furnish in due time Returns, Statements or Certificates or to deliver declarations, allow inspections, u/s 133, 134, 139(4A), 139(4C), 192(2C), 197A, 203, 206A(1), 206C, 285B. c) give notice of discontinuance of business or profession as required u/s 176(3) within 15 days of the said event taking place; d) to deliver or cause to be delivered, in due time, the declaration for non-collection of tax u/s 206C(1A) in form 27C e) to deduct and pay tax u/s 226(2) <p><u>Note:</u> The amount of penalty in case of TDS and TCS provisions should not exceed the amount of TDS or TCS to be paid.</p>	Rs.500/- for every day during which such failure continues.
272AA	<p>If any person having no reasonable cause fails to comply with the provisions of section 133B (i.e. Door to Door survey).</p>	Upto Rs.1,000/-

Sections	Nature of Defaults	Quantum of Penalty
272B	<p>Non-compliance of section 139A</p> <ul style="list-style-type: none"> • non-compliance with the provisions of section 139A with reference to Permanent account number (PAN)/ Aadhaar Number or the person responsible fails to obtain Permanent Account Number / Aadhaar Number or fails to quote Aadhaar Number in transactions mentioned in Rule 114B or quotes a false number knowing it to be false. • Failure fails to obtain PAN / Aadhaar Number or fails to quote Aadhaar Number in transactions mentioned in Rule 114B or quotes a false number knowing it to be false. • Failure to quote or authenticate his PAN / Aadhaar No. for certain prescribed transactions as prescribed in Section 139A(6A). 	Rs.10,000/- for each default
272BB	<p>If any person who is required to apply and obtain a Tax Deduction and Collection Account Number (Other than those as required to deduct TDS u/s 194-(IA)/194(IB)/194(M) fails to apply and obtain such number or fails to quote such number wherever required to be quoted or quotes a false number which he knows it to be false</p>	Rs.10,000/- for each default

F. Fees chargeable for few defaults

Recently a concept of fees has been introduced instead of the term penalty.

Sections	Nature of Defaults	Quantum of Penalty
234E	Failure to file TDS/TCS statement within time prescribed in section 200(3) or in proviso to section 206C(3)	Rs.25,000/-
234F	Default in furnishing return of income within time prescribed in section 139(1)	Rs. 5,000 if return is furnished after due date specified under section 139(1). However, if the total income of the person does not exceed Rs. 5,00,000/- then Rs.1,000/- shall be the late filing fees.
234G	Fee for default in submission of statement/certificate prescribed under section 35/ Section 80G	Rs.200/- per day
234H	Fee for default in intimating the Aadhaar Number	Rs. 500 / -, if such intimation is made between 01-04-2022 and 30-06-2022; and Rs. 1,000/-, in all other cases.

G. No penalty in case of reasonable cause in few defaults (Section 273B)

As per Section 273B, 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, 271-I, 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. The term 'reasonable cause' has not been defined. What is reasonable cause is subject matter of debate and needs to be examined/ determined on case to case basis. The Hon'ble Bombay High Court in case of CIT vs. Triumph International Finance (I) Ltd. , 345 ITR 270, had held that '*The expression 'reasonable cause' used in section 273B is not defined under the Act. Unlike the expression 'sufficient cause' used in sections 249(3), 253(5) and 260A(2A) of the Act, the legislature has used the expression 'reasonable cause' in Section 273B of the Act. A cause which is reasonable may not be a sufficient cause. Thus, the expression 'reasonable cause' would have wider connotation than the expression 'sufficient cause'. Therefore, the expression 'reasonable cause' in section 273B for non-imposition of penalty under section 271E would have to be construed liberally depending upon the facts of each case.*'

H. Immunity from imposition of penalty (Section 270AA)

Section 270AA provides immunity from imposition of penalty under section 270A and initiation of prosecution in respect of cases of under-reporting of income if the tax and the interest payable as per the assessment or the reassessment order is paid within the period specified in the notice of demand i.e. within 30 days of the service of notice and also if no appeal has been filed against the assessment or the reassessment order. To avail this immunity, assessee is required to file an application in Form 68 within 1 month from the end of the month in which the assessment order is received by the assessee. It has been provided that in case conditions specified are fulfilled, then the assessing officer upon expiry of the period of filing of appeal i.e. 30 days from the date of service of notice of demand, shall grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC. The assessing officer is required to pass an order accepting or rejecting the application within a period of one month from the end of the month in the application is received by him. However, before passing any order rejecting the application, assessing officer is required to give to the assessee an opportunity of being heard.

I. Power to waive penalty (Section 273A)

Section 273A empowers the Principal Commissioner or Commissioner to grant waiver or reduction from penalty imposed or imposable under section 270A (i.e., penalty for under-reporting and misreporting of income) or under section 271(1)(iii) (i.e., penalty for concealment of particulars of income or furnishing inaccurate particulars of income). Initiation to be taken by Principal Commissioner or Commissioner or the taxpayer The waiver or reduction under section 273A can be granted by the Principal Commissioner or Commissioner either on his own motion or otherwise, i.e., on an application made by the taxpayer.

This waiver is a one-time waiver. As per section 273A(3), where an order has been made under section 273A(1) in favour of any person, whether such order relates to one or more years, he shall not be entitled to any relief under section 273A in relation to any other year at any time after the making of such order.

Every order made under section 273A shall be final and shall not be called into question by any Court or any other authority.

J. Other aspects for levy of penalties (Natural justice and limitation)

Before levying any penalty, the officer has to mandatorily issue show cause notice u/s 274 and grant opportunity to the Taxpayer to oppose levy of penalty. Further section 275 lays down outer limit within which penalty can be levied.

III. PROSECUTION:

For the effective and satisfactory implementation of a fiscal legislature it is necessary to provide for the consequences of non-compliance of the law. Chapter XXII of the Income -tax Act, 1961 deals with Offences and prosecutions. The relevant provisions are contained in S. 275A, to S. 280D of the Act. Procedure regulating prosecution is governed by the Criminal Procedure Code, 1973, unless contrary is provided eg. S. 292A of the Act provides that S. 360 of the Code of Criminal Procedure Code, 1973 (Order to release on probation of good conduct or after admonition) and the Probation of Offenders Act, 1958 would not apply to a person convicted of an offence under the Income -tax Act, unless the accused is under eighteen years of age. The Finance Act, 2012, w.e.f. 1-7-2012 has inserted S. 280A to 280D, wherein the Central Government has been given the power to constitute Special Courts in consultation with the Chief Justices of the respective jurisdictional High Courts.

A. Various offences and punishments

Offences and the corresponding punishments have been tabulated as under;

Sections	Nature of Offence	Whether bailable or not	Punishment	
			Imprisonment	Fine
275A	The person who contravenes the order made under second proviso of section 132(1) or order u/s 132(3) passed during the course of search. Where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its dangerous nature, the authorized officer may pass an order on the person who has control and possession of thereof that such article and thing may not be removed otherwise than the officer's permission. Such order is deemed to be seizure.	Bailable	Upto 2 years	No limit
275B	Where during the course of search the concerned person fails to afford a reasonable facility to the authorized officer appointed for inspecting the books of accounts and other documents.	Bailable	Upto 2 years	No limit

Sections	Nature of Offence	Whether bailable or not	Punishment	
			Imprisonment	Fine
276	Where any person fraudulently removes, conceals, or delivers to any other person any property (incl interest therein) so as to prevent recovery of tax.	Bailable	Upto 2 years	No limit
276A	When a person being a liquidator or receiver of a company fails to give notice u/s 178 of his appointment to the A.O, or if he in the due course set aside the amount as required as per the relevant section or gets away with any property which is in his personal possession in contravention of the provisions	Bailable	2 years (Less than 6 mts only if special and adequate reasons)	No fine
276B	If a person fails to pay any of credits of the amounts to the Central Government which are as follows : a) Tax deducted at source; b) Tax payable by him u/s 115-O or 194B	Bailable (Section 279 A specifically treats this as non-cognizable offence)	3 months to 7 years	No limit
276BB	If a person fails to pay the credit of tax collected at source to the central government as per the provisions of section 206C	Non-bailable	3 months to 7 years	No limit
276C(1)	Willful attempt in any manner to evade any tax, penalty or interest imposable or under report his income under the Act a) Where tax evaded or tax on under-reported income, exceeds Rs. 25,00,000/- b) In other cases	Bailable (Section 279 A specifically treats this as non-cognizable offence)	a) 6 months to 7 years b) 3 months to 2 years	No limit
276C(2)	Willful attempt in any manner to evade <u>payment</u> of tax, penalty or interest.	Bailable	3 months to 2 years	No limit

Sections	Nature of Offence	Whether bailable or not	Punishment	
			Imprisonment	Fine
276CC	<p>Willful failure to file Return of income u/s 139(1) or in response to 142(1),148,153A</p> <p>a) Where tax evaded or tax on under-reported income, exceeds Rs. 25,00,000/-</p> <p>b) In other cases</p> <p>Note: This section shall not apply in cases where:</p> <ul style="list-style-type: none"> ○ Return is furnished by the person before the expiry of assessment year or before time provided u/s 139(8A) ○ Tax payable by the person excluding all the credits paid by him during the year (e.g. Advance tax, Self-assessment tax), does not exceed Rs.10,000/- 	Bailable (Section 279 A specifically treats this as non-cognizable offence)	<p>a) 6 months to 7 years</p> <p>b) 3 months to 2 years</p>	No limit
276D	Willful failure to produce accounts and documents under section 142(1) or to comply with a notice under section 142(2A) relating to special audit of books of accounts.	Bailable	Up to 1 year	No limit
277	<p>If a person makes a statement in any verification of facts or he delivers an account or statement which is false or he either knows or believes it to be false or does not believe it to be true</p> <p>a) Where tax evaded or tax on under-reported income, exceeds Rs. 25,00,000/-</p> <p>b) In other cases</p>	Bailable (Section 279 A specifically treats this as non-cognizable offence)	<p>a) 6 months to 7 years</p> <p>b) 3 months to 2 years</p>	No limit

Sections	Nature of Offence	Whether bailable or not	Punishment	
			Imprisonment	Fine
277A	Falsification of books of account or document, etc., to enable any other person to evade any tax, penalty or interest chargeable/leviable under the Act <u>Note</u> : To establish this charge it is not necessary to prove that the second person has actually evaded any tax, penalty or interest chargeable or imposable under the Act.	Bailable	3 months to 2 years	No limit
278	Abetment or inducing another person to make and deliver an account or statement or declaration relating to any taxable income which is false and which he either knows or believes to be false. a) Where tax evaded or tax on under-reported income, exceeds Rs. 25,00,000/- b) In other cases	Bailable (Section 279 A specifically treats this as non-cognizable offence)	a) 6 months to 7 years b) 3 months to 2 years	No limit
278A	For commitment of second and subsequent offence, in case of offence mentioned above i.e. under section 276C, 276CC, 276DD, 276E, 277, 278	Non-bailable	6 months to 7 years	No limit

B. Prosecution - Culpable mental state

The rule in general criminal jurisprudence established over the years has evolved into the concept of 'Innocent until proven guilty' which effectively places the burden of proving the guilt of the accused beyond reasonable doubt squarely on the prosecution. The concept of mens rea is integral to criminal jurisprudence. An offence cannot be committed unintentionally. Thus, a guilty mind is a sine qua non for an offence to be committed. However, Section 278E introduced by the Taxation laws (Amendment & Miscellaneous Provisions Act) Act, 1986, runs contrary to the well-established principle and states that Court shall presume the existence of culpable mental state, and it shall be for the accused / defendant to prove otherwise. Sub-section 2 to section 278E further states that a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. The said Section places the burden of proving the absence of mens rea upon the accused and also provides that such absence needs to be proved not only to the basic threshold of 'preponderance of probability' but 'beyond reasonable doubt'.

C. Prosecution –other aspects

- i) Reasonable cause - As per Section 278AA, no person shall be punishable for any failure under section 276A, 276AB or 276B if he proves that there was reasonable cause for such failure.
- ii) Sanction: Prosecution for offences can be instituted only with previous sanction of Principal Director General/Principal Chief Commissioner/Principal Commissioner/Director General/Chief Commissioner/Commissioner, except where prosecution is at the instance of the Commissioner (Appeals) or the appropriate authority vide section 279. Thus, any prosecution, without a requisite sanction shall make the entire proceedings void ab initio. Further sanction must be granted in respect of each of the offences for which the accused is to be prosecuted.

It may be noted that the Act does not provide that the Commissioner has to necessarily grant an opportunity to be heard before deciding to initiate prosecution proceedings. Usually, a show-cause notice is issued before initiating the proceedings.

- iii) Compounding of offences: As per Section 279(2), offences can be compounded (either before or after the institution of proceedings) by Principal Director General/Director General or Principal Chief Commissioner/Chief Commissioner. CBDT has issued a set of guidelines for compounding of offences under direct taxes.
- iv) Offences committed by persons other than individuals:

As per section 278B, where an offence has been committed by a company, a firm, an association of persons, or body of individuals, the person, who was in charge of and was responsible for the conduct of its business at the time when the offence was committed will be deemed to be guilty of the offence, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of the offence. The essential ingredient for implicating a person is his being "in charge of" and "responsible to" the company for the conduct of the business of the company.

Similarly in case of HUFs, as per section 278C, Karta shall be deemed guilty of the offence and shall be proceeded against. However, if the offence was committed with the consent or connivance of or is attributable to any neglect on the part of any other member of the family, such other member shall be deemed to be guilty of the offence and shall be liable to be prosecuted and punished accordingly.

IV. CONCLUSION

Lack of effective safeguards renders a law toothless. Any fiscal law usually enforces compliance through threefold obligations on the non-performances / offenders viz. (i) interest, (ii) penalty and (iii) prosecution. While interest is a monetary compensation on account of timing differences, penalty is for damages caused. Though, prosecution is a real deterrent, fear of which, ensures strict compliances, it should not hamper ease of doing business. In such scenarios heavy penalty also serves the purpose and acts as a deterrent. If we were to consider all the issues / intricacies on this subject, it would form a separate reference book, and hence considering the ideation and flow of this journal, I have restricted this article to disseminate basic concepts on penalties and prosecution under Income-tax Act.



EVENTS IN RETROSPECT

Day & Date	Committee	Program Name	Moderator / Speaker	Attendance / Views
Friday, 9th September 2022	Study Circle Committee	Recent Issues with respect to Tax Audit	CA Gautam Mota	35 participants

