

## PENALTIES AND PROSECUTION UNDER INCOME TAX ACT, 1961



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### 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.

<sup>1</sup>1996 *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:

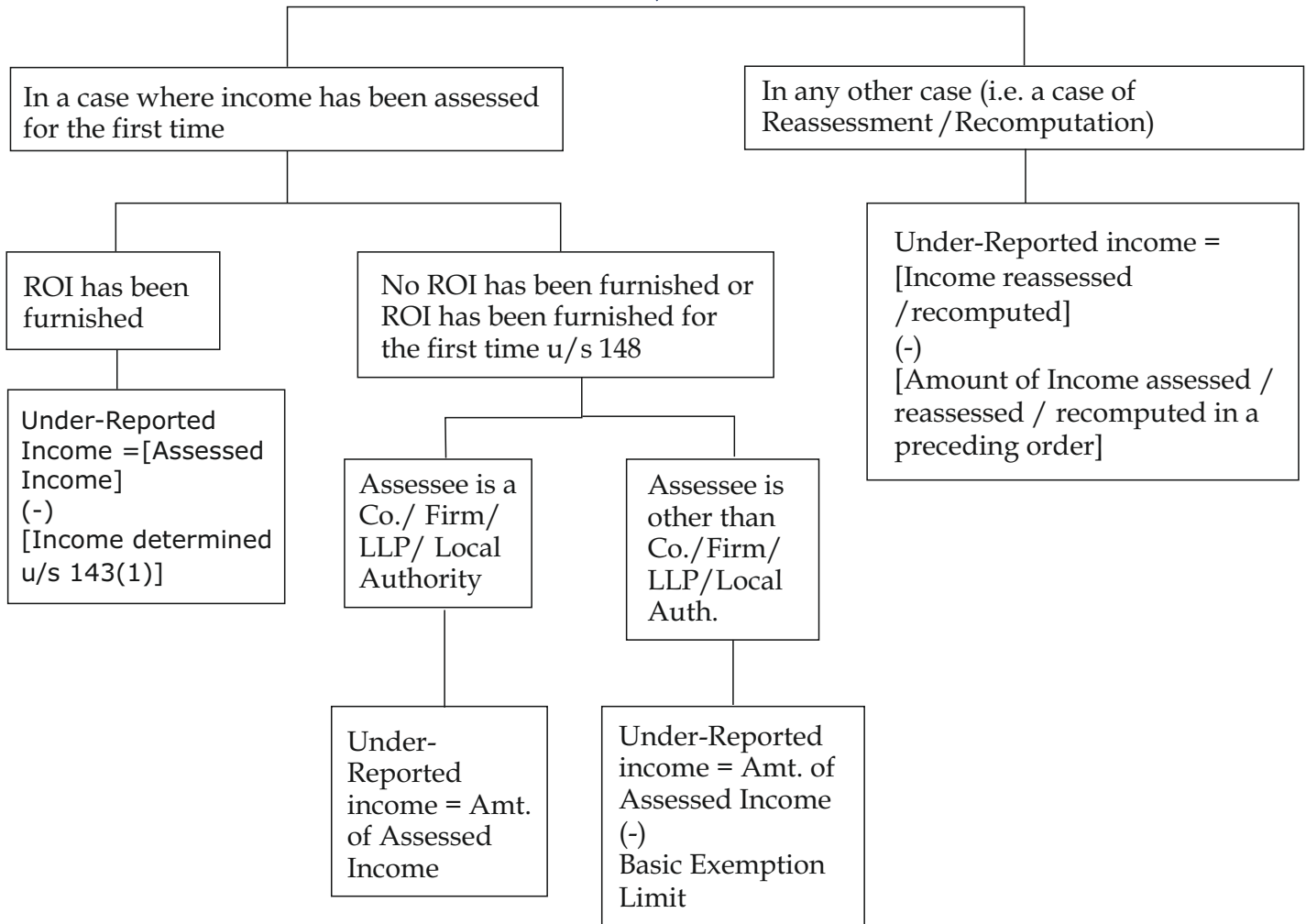
As per the section a person shall be considered to have under-reported his income in the following seven situations:

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:

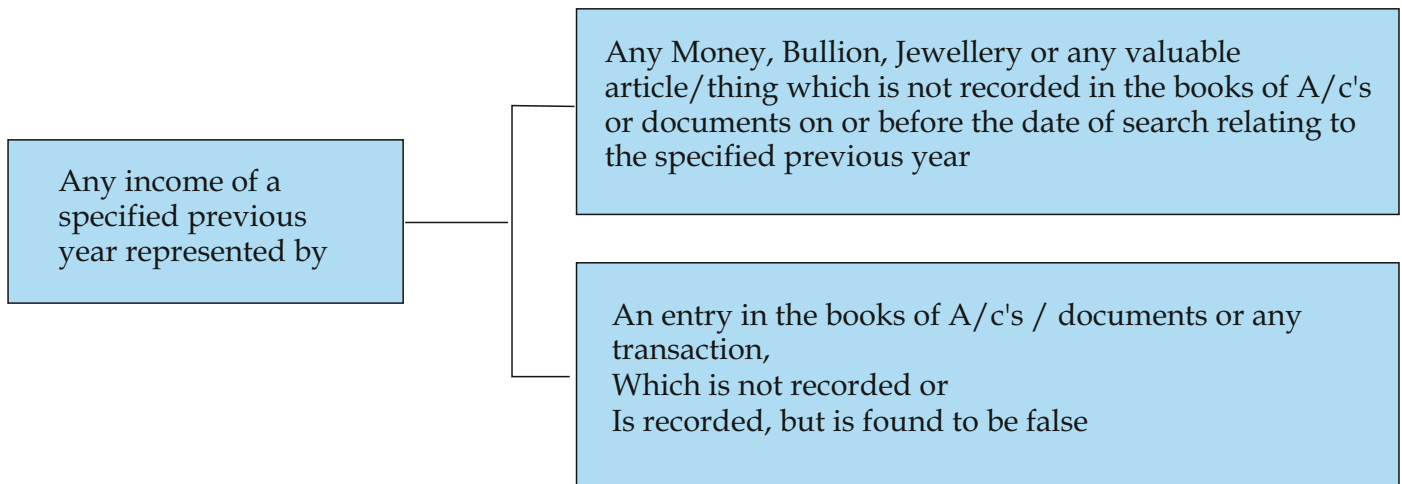
- a) No penalty shall be levied u/s 270A, for an amount of undisclosed income for which penalty is leviable under this Section 271AAB.
- b) Specified Date' means the due date of filing ROI given in Section 139(1) or the last date given in a Notice u/s 148 / 153A to furnish ROI in response to that notice.
- 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	<b>Failure to keep, maintain, or retain books of account, documents, etc., as required under section 44AA</b>  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)	<b>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)]</b>	Rs.5,00,000/-

Sections	Nature of Defaults	Quantum of Penalty
271AAD	<p><b>During the course of any proceeding under the Act, if it is found that there is:</b></p> <ul style="list-style-type: none"> <li>- False Entry in the Books of Accounts of a person; or</li> <li>- 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.</li> </ul> <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"> <li>a) Forged or falsified documents (like false invoice / false piece of documentary evidence); or</li> <li>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</li> <li>c) Invoice in respect of supply / receipt of goods/services/both, to or from a person who does not exist.</li> </ol>	<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><b>Penalty for violation of the provisions section 10 (23C) or section 13, pertaining to passing of unreasonable benefits to trustees or specified person.</b></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"> <li>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);</li> <li>b) For any violation in subsequent years: twice the amount of such income so applied (i.e. double penalty).</li> </ol>
271B	<p><b>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)</b></p>	<p>Penalty would be lower of:-</p> <ol style="list-style-type: none"> <li>a) 0.5% of Gross Receipt / Sales / Turnover, or</li> <li>b) Rs.1,50,000/-</li> </ol>

Sections	Nature of Defaults	Quantum of Penalty
271BA	<b>Failure to furnish a report as required u/s 92E</b> (i.e. Report of a CA in Form No. 3CEB, with regards to international transactions or domestic transactions)	Rs.1,00,000/-
271FA	<b>Failure to furnish an annual information return as required under section 285BA(1)</b> 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	<b>A person, who is required u/s 285BA to furnish</b> a Statement of Financial Transaction or Reportable Account, provides inaccurate information	Rs.50,000/-
271FAB	<b>If any Eligible Investment Fund, which is required to furnish</b> 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). <b>Note:</b> - 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	<b>Failure to furnish certain document / information, in connection with:</b> 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><b>If any Indian Concern, which is required to furnish any information or document u/s 285A (in Form No. 49D), fails to do so</b></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><b>Penalty for failure to furnish report u/s 286</b></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><b>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)</b></p>	Rs. 5,000 per day of default.
271GB(3)	<p><b>If default given u/s 271GB(1) or 271GB(2) continues even after service of Penalty Order</b></p>	Penalty will be 50,000 per day from the date of service of Penalty Order.
271GB(4)	<p><b>In a case where the Reporting Entity provides inaccurate information in the report u/s 286(2)</b></p>	Rs. 5,00,000/-

Sections	Nature of Defaults	Quantum of Penalty
271H	<p><b>Penalty for failure to deliver TDS / TCS Statement within time or to furnish incorrect information in such statement.</b></p> <p><b>No Penalty shall be levied, if proved that</b> 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><b>Failure to deliver a Statement or furnish a Certificate</b> 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"> <li>- 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</li> <li>- fails to furnish a Certificate to the Donor within the time limit prescribed u/s 35(1A)(ii),</li> </ul> <p>or</p> <p>b) If the Institution / Fund referred to in Sec. 80G(5),</p> <ul style="list-style-type: none"> <li>- fails to deliver / cause to be delivered a Statement within the time limit given in Sec. 80G(5)(viii) or</li> <li>- fails to furnish a Certificate to the Donor prescribed u/s 80G(5)(ix)</li> </ul>	Rs. 10,000/- to Rs. 1,00,000/-
271I	<p><b>If a person who is required to furnish information u/s 195(6), [in Form 15CA / 15CB] either:</b></p> <p>a) fails to furnish such information; or</p> <p>b) furnishes inaccurate information</p>	Rs. 1,00,000/-
271J	<p><b>If it is found by AO or CIT(A) that</b></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><b>If any person, without reasonable cause, fails to or refuses to :-</b></p> <ul style="list-style-type: none"> <li>a) Answer any question put to him during the course of investigation;</li> <li>b) Sign any statement made by him during the course of investigation;</li> <li>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</li> <li>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).</li> </ul>	Rs.10,000/- for each failure
272A(2)	<p><b>If any person, without any reasonable cause, fails to :-</b></p> <ul style="list-style-type: none"> <li>a) furnish requisite information as required u/s 94(6) in respect of securities</li> <li>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.</li> <li>c) give notice of discontinuance of business or profession as required u/s 176(3) within 15 days of the said event taking place;</li> <li>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</li> <li>e) to deduct and pay tax u/s 226(2)</li> </ul> <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 <b>no reasonable cause fails to comply with the provisions of section 133B</b> (i.e. Door to Door survey).</p>	Upto Rs.1,000/-

Sections	Nature of Defaults	Quantum of Penalty
272B	<p><b>Non-compliance of section 139A</b></p> <ul style="list-style-type: none"> <li>• 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.</li> <li>• 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.</li> <li>• Failure to quote or authenticate his PAN / Aadhaar No. for certain prescribed transactions as prescribed in Section 139A(6A).</li> </ul>	Rs.10,000/- for each default
272BB	<p>If any person who is required to apply and obtain a <b>Tax Deduction and Collection Account Number</b> (Other than those as required to deduct TDS u/s 194-(IA)/194(IB)/194(M) <b>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</b></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"> <li>○ Return is furnished by the person before the expiry of assessment year or before time provided u/s 139(8A)</li> <li>○ 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/-</li> </ul>	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.

