DISCUSSION ON PENALTY U/S 270A

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ISSUES U/S 270A (1)

- Apparently no need for recording any satisfaction by the authority that assessee has under-reported income.
- Contrast with S.271(1)(c) r.w.s 271 (1B)
- But the rigour is not whittled down as the

ISSUES U/S 270A (2)

- Under-reported income is the difference between the assessed income and the income determined u/s 143(1)(a) Intimation
- Please note that the under-reported income is not a difference between the assessed income and the returned income unlike present S.271(1)(c)
- In case of any addition made in the intimation u/s 143(1) there is no penalty u/s 270A
- Income assessed will include assessment u/s 143(3), 144

ISSUES U/S 270A (2)

- It will also include an assessment for the first time u/s 147 of the Act.
- S. 270 A(2)(c) refers to income re-assessed
- The expression “re-assessed” does not include all assessment u/s 147
- It presupposes that there was an earlier assessment u/s 143(3) or 144 or 147
- In case of multiple reassessments immediately preceding reassessment order should be considered for finding out whether there is any under-reported income or not

ISSUES U/S 270A (2)

- But this is not material because an assessment for the first time u/s 147 will fall u/s 270A(2)(a)
- Clause (b) uses the expression “deemed total income” in case of book profits determined u/s 115JB or 115JC
- There is no concept of deemed total income under the Act
- Though S.115JB uses expression “book profits shall be deemed total income”. There is no fiction therein as such “total income” is also computed in the manner laid down in the Act satisfying the definition u/s 2(45) of the Act

ISSUES U/S 270A (2)

- It looks like S. 270A(2)(d) has been introduced by way of abundant caution.
- Even in the absence of Clause (d) this type of cases may fall under clause (a)
- S.270 A (g) is not happily worded
- It uses the expression “reducing the loss” or “converting such loss into income”
- The clause does not give a reference point. What is the loss referred to therein?

ISSUES U/S 270A (2)

- Is it with reference to returned loss or with reference to loss determined u/s 143(1)(a) Intimation ?
- Since clause (a) deems the difference between assessed income and the income determined in the Intimation as under-reported income, it can be said that the comparison in clause (g) is the difference between the loss intimated in the Intimation and assessed loss.

ISSUES U/S 270A (3)

In the case of individuals, HUF and AOP :

- S. 270A(3) provided for quantification of under-reported income.
- S. 270A(3) makes a distinction between a case where return has been filed and a case where no return has been filed
- If a return is furnished the difference between the amount of income assessed and the amount of income determined under an Intimation is under-reported income
- But if an individual, HUF or AOP does not file the return the under-reported income is the difference between assessed income and the maximum amount not

ISSUES U/S 270A (3)

The following example will clarify:

Returned income - 1,00,000

Assessed income - 3,00,000

Under-reported income - 2,00,000

Return filed

Assessed income - 3,00,000

Under-reported income - 50,000

ISSUES U/S 270A (3)

- It looks like an assessee is penalized if he files the return
- The issue needs to be discussed is whether a return filed showing an income which is less than the maximum amount not chargeable to tax is a valid return at all u/s 139(1)

ISSUES U/S 270A (3)(ii)

- S. 270A(3)(ii) deals with a case where there is a re-assessment
- The quantum of under-reported income is to be determined with reference to the immediately preceding order
- Clause (a) of the Explanation defines preceding order
- In the case of a multiple reassessment one must determine the under-reported income with reference to the immediately preceding order

ISSUES U/S 270A (3)

- Examples:

Income determined under the order u/s 143(3) - 10 Lakh

Income determined under the first assessment order - 12 Lakh

Income determined under the second assessment order - 15 Lakh

<u>Under-reported income</u>

With reference to first re-assesment order - 2 Lakh

With reference to second reassessment order - 3 lakh

ISSUES U/S 270A

- Definition of “Preceding order”in clause (a) of Explanation below S.270A(3) uses the expression “during the course of which penalty under sub-section 1 has been initiated”
- A look at S.270A(1) shows that there is a requirement of the initiation of penalty during the course of any proceeding under the Act
- Therefore, the AO should mention in the assessment order the penalty is initiated
- The initiation of penalty can only be on account of satisfaction that an assessee has under-reported his income

ISSUES U/S 270A

- Therefore, the AO has to record his satisfaction even though S.270A(1) does not uses the expression " is satisfied" as is used in S.271(1) of the Act
- In the absence of any similar provision to S.271(1B) it can be stated that mere direction in the assessment order " issue notice u/s 274 for penalty u/s 270A" will not be sufficient . Refer to the earlier decisions and the law laid down therein will apply and a penalty order u/s 270A can be challenged if satisfaction is not demonstrated on the face of the assessment order or other orders .

ISSUES U/S 270A (4)

- S. 270A (4) and (5) are similar to Explanation 2 below S.271(1)
- In simple terms if an assessee justifies the investments as coming out of an intangible additions made in the earlier year
- The AO can levy penalty for the earlier year if penalty has not already been levied for that year
- S. 271(1A) permitted the AO to levy penalty even though in the proceedings of the earlier year there was no initiation of penalty

ISSUES U/S 270A (4)

- Similar provision is absent in S. 270A
- Since initiation of penalty during the course of any proceedings under this Act is a must
- Whether it can be said that the penalty cannot be levied in the earlier years because there was no such initiation in the earlier years
- It seems to be a lacuna and needs to be filled up
- S.270A(4) does not refer to “out going” as in the case of Explanation 2 below S. 271(1)

ISSUES U/S 270A (4) & (5)

Example 1 :

Investment in FY 2019-20 - 5 Crore

Addition in FY 2018-19 - 2 Crore

FY 2017-18 - 4 Crore

Penalty can be levied for the FY 2017-18 relevant to AY 2018-19 on a sum of Rs. 4 crore

Penalty on ₹ 1crore can be levied for A.Y 2019-20

* It is assumed that in both the years no penalty u/s 270A was levied on the additions

If penalty was levied in the earlier assessment year, no penalty can be levied again.

ISSUES U/S 270A (4) & (5)

Example 2 :

Investment in FY 2019-20	-	5 Crore
Addition in FY 2018-19	-	2 Crore
FY 2017-18 (Penalty levied)	-	4 Crore

Penalty can be levied for the FY 2018-19 relevant to AY 2019-20 on a sum of Rs. 1 crore

ISSUES U/S 270A (4)

- Obviously the provision of S.270A(4) and (5) are not applicable to the assessment year commencing on or before 1st April 2017 i.e AY 2017 or earlier year
- If a preceding year is any of these years 270A(4) and (5) cannot be invoked.
- Can Explanation 2 below S. 271(1)(c) be invoked?

ISSUES U/S 270A (6)

- Clause 270A(6)(a) - is applicable if the officer is satisfied that the Explanation is bonafide and the assessee has disclosed all the material facts to substantiate Explanation.
- This is a positive test as compared to Explanation 1 below S.271(1) which is a negative test
- Estimate cases fall under clause (c) of 271A(6)
- But it uses the expression " a lower amount of addition or disallowance"

ISSUES U/S 270A (6)

- It appears that clause (c) of 270A(6) will apply only in respect of an estimate of addition or an estimate of disallowance and not to an estimate of income itself
- If the books of account are rejected and the income is determined on estimated basis can penalty be levied ?
- In such case assessee's case may fall under S. 270A(6)(a)
- He may avoid penalty by offering a bonafide explanation

ISSUES U/S 270A (6)

- S. 270 A (6) (b) states that if any addition is made because the method of accounting is rejected there will be no under-reported income
- In the cases covered under clause (b) no need to proffer any bonafide explanation
- Mere fact that the addition is because of rejection of method of accounting is sufficient for non-levy of penalty
- S. 270A (6)(d) excludes a TP adjustment under certain circumstances from the scope of under-reported income
- But the TP adjustment should be only with respect to international transaction and

ISSUES U/S 270A (6)

- This is a lacuna which requires to be filled.
- There cannot be any rationale to differentiate between an international transaction and Specified Domestic Transaction
- Contrast with present Explanation 7 below S. 271(1) which includes SDT
- Another important difference between Explanation 7 and S. 270A (6)(d) is that 270A(6)(d) is less rigorous
- In Explanation 7 the assessee has to establish good faith and due diligence

ISSUES U/S 270A (9)

- S. 270A (8) levies penalty @ 200% tax on under-reported income if such under-reported income amounts to mis-reported income
- Mis-reported income is defined in S. 270A (9)
- The burden of proof that the assessee has mis-reported the income is on the AO
- All cases of mis-reported income involve an intention to evade tax or furnish inaccurate particulars which will result in escapement of tax
- Hence, mensrea is a must

ISSUES U/S 270A (9)

- Therefore, the burden of proof that the assessee has mensrea is on the assessing officer who alleges the same
- S. 270A(9)(b) state that failure to record investments in the books of account is mis-reporting of income
- Is it necessary for an individual who is carrying on business and maintain books in respect of business source
- To record his personal investments in such books
- Answer is no

ISSUES U/S 270A (9)

- S. 270A (9)(b) would apply only to investments which are required to be recorded in the books
- Where the assessee does not record his investments in books but offers a satisfactory explanation for his source –
- Would it be mis-reporting of income?
- The answer seems to be no
- The main intention behind classifying something as mis-reported income is the levy of higher penalty in cases of concealment with an intention to evade tax

ISSUES U/S 270A (9)

- S. 270A(9)(f) states that a failure to report international transaction or SDT is mis-reporting of income
- Can a mere failure be mis-reporting ?
- Consistent with the view that mensrea is required one can say that even in respect of S. 270A (9)(f) the non-reporting should be with an intent to evade tax
- It is always possible for an assessee to content that he had acted in the bonafide manner and any of the failures mentioned in S. 270A(9) (a) to (f) is not with an intention to evade tax

ISSUES U/S 270A (10)

- If return is not filed the tax payable on under-reported income will be the total tax determined in the order
- The language of S.270A(1)9a) is very cumbersome and convoluted
- In the case of loss adjustment the under-reported income will be the tax on actual loss disallowed as if such a loss is the total income

ISSUES U/S 270A (10)

- Therefore, in the case of individuals,
- If the disallowed loss is less than Rs. 2,50,000 there will be no penalty
- In our cases formula is given for calculation of under-reported tax. This formula is explained in the later portion

EXAMPLES AS PER PARA 62.15 OF CIRCULAR NO. 3/2017 (391 ITR (ST) (Page 330)

Example 1 : Case is of a firm liable to tax at the rate of 30 per cent.

(Figures in Rs. lakh)

- Returned total income - 100
- Total income determined under section 143(1)(a) of the Income-tax Act - 110
- Total income assessed under section 143(3) of the Income-tax Act- 150
- Total income reassessed under section 147 of the Income-tax Act- 180

EXAMPLES AS PER PARA 62.15 OF CIRCULAR NO. 3/2017 (391 ITR (ST) (Page 330)

- Considering that none of the additions or disallowances made in assessment or reassessment as above qualifies under sub-section (6) of section 270A of the Income-tax Act, the penalty would be calculated as under :

	Assessment under section 143 (3) of the Income-tax Act	Reassessment under section 147 of the Income-tax Act
Under-reported income	(150-110) = 40	(180-150) = 30
Tax payable on under-reported income	30 % of 40 = 12	30 % of 30 = 9

EXAMPLES AS PER PARA 62.15 OF CIRCULAR NO. 3/2017 (391 ITR (ST) (Page 330)

Considering that none of the additions or disallowances made in assessment or reassessment as above qualifies under sub-section (6) of section 270A of the Income-tax Act, the penalty would be calculated as under :

	Assessment under section 143 (3) of the Income-tax Act	Reassessment under section 147 of the Income-tax Act
Under-reported income	(150-110) = 40	(180-150) = 30
Tax payable on under-reported income	30 % of 40 = 12	30 % of 30 = 9
Penalty Leviable*	50 % of 12 = 6	50 % of 9 = 4.5

* Considering under-reported income not falling under misreporting

EXAMPLES AS PER PARA 62.15 OF CIRCULAR NO. 3/2017 (391 ITR (ST) (Page 330)

Example 2 : Case is of an individual below 60 years of age and no return of income has been furnished liable to tax at slab rates as : income up to 2,50,000- Nil ; 2,50,000- 5,00,000-10% ; 5,00,000-10,00,000-20% ; income > 10,00,000- 30% :

Total income assessed under section 143(3)

of the Income-tax Act 10,00,000

Under-reported income 10,00,000-2,50,000* =7,50,000

Under-reported income as increased by

maximum amount not chargeable to tax 7,50,000 + 2,50,000 = 10,00,000

Tax payable 10% of 2,50,000 + 20% of 5,00,000 =

EXAMPLES AS PER PARA 62.15 OF CIRCULAR NO. 3/2017 (391 ITR (ST) (Page 330)

- Example 3 : Case is of a company liable to tax at the rate of 30 per cent. (Figures in Rs. lakh)

Returned total income (loss)	(-)100
Total income (loss) determined under section 143(1)(a) of the Income-tax Act	(-)90
Total income (loss) assessed under section 143(3) of the Income-tax Act	(-)40
Total income reassessed under section 147 of the Income-tax Act	20

EXAMPLES AS PER PARA 62.15 OF CIRCULAR NO. 3/2017 (391 ITR (ST) (Page 330)

Considering that none of the additions or disallowances made in assessment or reassessment as above qualifies under sub-section (6) of section 270A of the Income-tax Act, the penalty would be calculated as under :

	Assessment under section 143(3) of the Income-tax Act	Reassessment under section 147 of the Income-tax Act
Under-reported income	(-)40 minus (-)90 = 50	20 minus (-)40 = 60
Tax payable on under-reported income	30 % of 50 = 15	30 % of 60 = 18
Penalty leviable*	50 % of 15 = 7.5	50 % of 18 = 9

* Considering under-reported income is not on account of misreporting

ISSUES U/S 270A (11)

- This is what S. 270A(11) states:

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

- This seems to state the obvious
- Do we really need a provision which states that if penalty had already been levied, penalty cannot be levied once again
- Seems to be more out of abundant caution

THANK YOU