



Penalty under s. 270A and Immunity from penalty under s. 270AA

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Background of introduction of S. 270A

- Levy of penalty for concealment of income or furnishing inaccurate particulars of income has always been a matter of litigation between the department and the assessee. The discretion regarding quantum of penalty left a scope for corruption. The scope of such provisions was always a subject matter of litigation since the tax authorities always levied the penalty whenever there was an addition or disallowance made by the AO, may be because of pressure of higher authorities, even in cases where there was no prima facie case against the tax payer.
- The Finance Act, 2016 (FA, 2016) has inserted section 270A in the Income-tax Act, 1961 with a view to substitute the provisions of section 271(1)(c) dealing with levy of penalty for concealment of income or furnishing of inaccurate particulars.

Background of introduction of S. 270A

- Section 270A provides for a levy of penalty for “under reporting of income” and “misreporting of income”.
- It appears that with a view to reduce litigation and remove the discretion of tax authority, the FA, 2016 has inserted new provisions in section 270A and 270AA in the Act which will replace the existing provisions of section 271(1)(c).
- The provisions of S. 270A have been introduced with a view to –
 - rationalise the penalty provisions; and
 - bring
 - objectivity;
 - certainty; and
 - clarity;in the penalty provisions

Objective as stated in Explanatory Memorandum

- The Explanatory Memorandum to the provisions of Finance Bill, 2016 explains the objective of inserting section 270A as follows –
 - “Under the existing provisions, penalty on account of concealment of particulars of income or furnishing inaccurate particulars of income is leviable under section 271(1)(c) of the Income-tax Act. In order to rationalise and bring objectivity, certainty and clarity in the penalty provisions, it is proposed that section 271 shall not apply to and in relation to any assessment for the assessment year commencing on or after the 1st day of April, 2017 and subsequent assessment years and penalty be levied under the newly inserted section 270A with effect from 1st April, 2017. The new section 270A provides for levy of penalty in cases of under-reporting and misreporting of income.”

Objective as stated in Explanatory Memorandum

- The Finance Minister in the Budget Speech mentioned as follows –
 - “At present, the Income-tax Officer has discretion to levy penalty at the rate of 100% to 300% of tax sought to be evaded. I propose to modify the entire scheme of penalty by providing different categories of misdemeanour with graded penalty and thereby substantially reducing the discretionary power of the tax officers”

Text of section 270A

- **Penalty for under-reporting and misreporting of income.**
- **270A.** (1) The Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner may, during the course of any proceedings under this Act, direct that any person who has under-reported his income shall be liable to pay a penalty in addition to tax, if any, on the under-reported income.
- (2) A person shall be considered to have under-reported his income, if—
 - (a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;
 - (b) the income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished;
 - (c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;

Text of section 270A

- (d) the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;
- (e) the amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is greater than the maximum amount not chargeable to tax, where no return of income has been filed;
- (f) the amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;
- (g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

Text of section 270A

- (3) The amount of under-reported income shall be,—
 - (i) in a case where income has been assessed for the first time,—
 - (a) if return has been furnished, the difference between the amount of income assessed and the amount of income determined under clause (a) of sub-section (1) of section 143;
 - (b) in a case where no return has been furnished,—
 - (A) the amount of income assessed, in the case of a company, firm or local authority; and
 - (B) the difference between the amount of income assessed and the maximum amount not chargeable to tax, in a case not covered in item (A);
 - (ii) in any other case, the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order:

Text of section 270A

- **Provided** that where under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB or section 115JC, the amount of total under-reported income shall be determined in accordance with the following formula—
 - $(A - B) + (C - D)$
 - where,
 - A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);
 - B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of under-reported income;
 - C = the total income assessed as per the provisions contained in section 115JB or section 115JC;

Text of section 270A

- D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of under-reported income:

Text of section 270A

- **Provided further** that where the amount of under-reported income on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.
- Explanation.—For the purposes of this section,—
- "preceding order" means an order immediately preceding the order during the course of which the penalty under sub-section (1) has been initiated;
- in a case where an assessment or reassessment has the effect of reducing the loss declared in the return or converting that loss into income, the amount of under-reported income shall be the difference between the loss claimed and the income or loss, as the case may be, assessed or reassessed.

Text of section 270A

- (4) Subject to the provisions of sub-section (6), where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income or deducted while computing loss, as the case may be, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (hereinafter referred to as "preceding year") and no penalty was levied for such preceding year, then, the under-reported income shall include such amount as is sufficient.
- (5) The amount referred to in sub-section (4) shall be deemed to be amount of income under-reported for the preceding year in the following order—
- the preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year; and
- where the amount added or deducted in the first preceding year is not sufficient to cover the receipt, deposit or investment, the year immediately preceding the first preceding year and so on.

Text of section 270A

- (6) The under-reported income, for the purposes of this section, shall not include the following, namely:—
 - (a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;
 - (b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced therefrom;

Text of section 270A

- (c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;
 - (d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where the assessee had maintained information and documents as prescribed under section 92D, declared the international transaction under Chapter X, and, disclosed all the material facts relating to the transaction; and
 - (e) the amount of undisclosed income referred to in section 271AAB.
- (7) The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

Text of section 270A

- (8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of the amount of tax payable on under-reported income.
- (9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—
 - (a) misrepresentation or suppression of facts;
 - (b) failure to record investments in the books of account;
 - (c) claim of expenditure not substantiated by any evidence;
 - (d) recording of any false entry in the books of account;
 - (e) failure to record any receipt in books of account having a bearing on total income; and
 - (f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction,

Text of section 270A

- (10) The tax payable in respect of the under-reported income shall be—
 - (a) where no return of income has been furnished and the income has been assessed for the first time, the amount of tax calculated on the under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income;
 - (b) where the total income determined under clause (a) of sub-section (1) of section 143 or assessed, reassessed or recomputed in a preceding order is a loss, the amount of tax calculated on the under-reported income as if it were the total income;

Text of section 270A

- (c) in any other case, determined in accordance with the formula—
 - $(X - Y)$
 - where,
 - X = the amount of tax calculated on the under-reported income as increased by the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order as if it were the total income; and
 - Y = the amount of tax calculated on the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order.

Text of section 270A

- (11) 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.
- (12) The penalty referred to in sub-section (1) shall be imposed, by an order in writing, by the Assessing Officer, the Commissioner (Appeals), the Commissioner or the Principal Commissioner, as the case may be.

Overview of Section 270A

Sub-section	what it deals with
(1)	Levy of penalty
(2)	What constitutes “under-reporting”
(3)	Computation of “under-reported” income
(4) / (5)	Telescoping of past additions
(6)	Exclusion from “under-reported” income
(7) / (10)	Quantum of penalty for “under-reported” income
(8) / (10)	Quantum of penalty for “mis-reported” income
(9)	What constitutes “mis-reporting”
(11)	No double levy
(12)	Order to be passed in writing

Since when are the provisions of S. 270A are applicable

- Section 270A has been inserted by the FA, 2016 with effect from 1.4.2017, therefore a question arises as to whether the provisions of section 270A are applicable to –
 - Penalty orders passed on or after 1.4.2017
 - Penalty initiated on or after 1.4.2017
 - Returns filed on or after 1.4.2017 irrespective of the assessment year to which they pertain
 - For returns filed on or after 1.4.2017 for AY 2017-18 or thereafter
- Sub-section (7) has been inserted to s. 271 w.e.f. 1.4.2017
 - “(7) The provisions of this section shall not apply to and in relation to any assessment for the assessment year commencing on or after the 1st day of April, 2016.”

Since when are the provisions of S. 270A are applicable

- Para 62.1 of the Circular No. 3 of 2017 explaining the provisions of FA, 2016 –
 - “..... Section 271 of the Income-tax Act has been made non-applicable in relation to any assessment for assessment year commencing on or after 1st day of April, 2017 and subsequent assessment years and penalty shall be levied under the newly inserted section 270A of the Income-tax Act with effect from 1st day of April, 2017.”

Broad provisions of sub-section (1) of s. 270A

- The Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner are empowered to direct payment of penalty.
- The direction for penalty should be during the course of any proceedings under the Act. ‘any proceedings’ would mean proceedings for assessment, appeal, rectification, revision, passing of an order giving effect to the appellate order, etc.
- A question also arises as to whether the proceedings have to be for the same assessment year for which penalty is proposed to be levied or the proceedings could be for any other year. It appears that the general rule is that it should be proceedings for that very same assessment year. However, a view is possible that the exception to the rule being situations provided by sub-section (4) and (5) where an intangible addition is made in an assessment year and in a subsequent year the assessee explains source of deposit, receipt or investment to be such intangible addition for which penalty was not levied in the past. In such cases, in the course of assessment proceedings for later year, the direction may be given for levy of penalty for earlier

Is the levy of penalty under s. 270A discretionary?

- The power to direct levy of penalty is discretionary.
- The direction is that any person who has under-reported his income shall be liable to pay a penalty, in addition to tax, if any.
- The power can be exercised where a person has under-reported his income.
- Penalty is to be on under-reported income.
- S. 270A(1) reads as under –
 - “The Assessing Officer or the Commissioner (Appeals) or **may**, during the course of any proceedings under this Act, **direct** that
- Section 271(1) reads as under –
 - “If the AO or the Commissioner (Appeals) or the Principal Commissioner or Commissioner in the course of any proceedings under this Act, is satisfied that,
 - (a) ...
 - (b)
 - (c)
 - he **may direct** that such a person shall pay by way of penalty, -

Is the levy of penalty under s. 270A discretionary?

- Mansukhlal v. CIT [1969] 73 ITR 546 (SC)
 - Penalty need not be imposed when there is a minor breach of law and having regard to the facts, ends of justice require that the assessee need not be penalised.
- Hindustan Steel Ltd. v. State of Orissa [1972] 83 ITR 26 (SC)
 - Penalty cannot be levied for a mere technical / venial breach
- Section 274 requires issue of show cause notice and an opportunity of hearing to be granted to the person concerned and also approval of higher authority is required if levy of penalty is in excess of Rs. 25,000.
- The above indicate that the levy of penalty is **not mandatory**

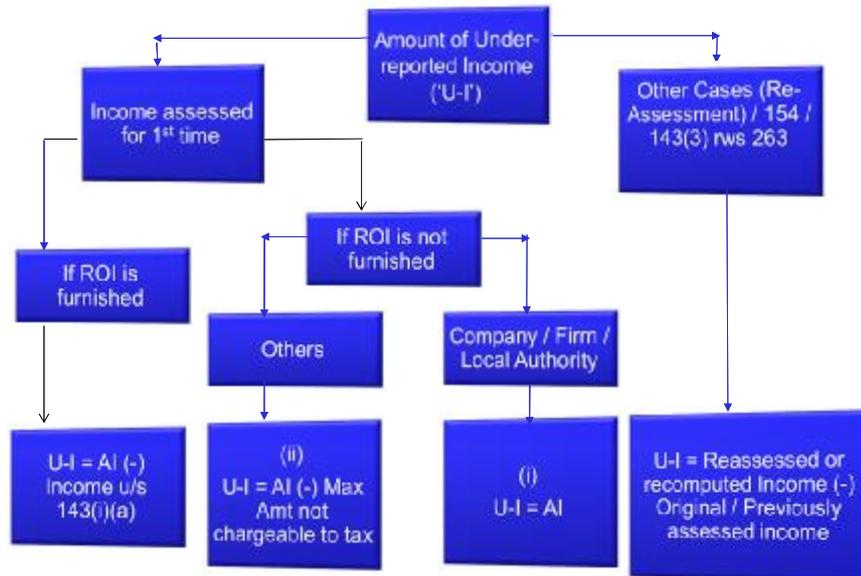
Circumstances in which a person can be said to have “under-reported” his income – Sub-section (2)

Clause	Circumstances	Condition for being regarded as “under-reporting” of Income		
(a)	ROI filed	Assessed Income	>	Income determined in return processed u/s 143(1)(a)
(b)	Return not filed	Assessed Income	>	Maximum amount not chargeable to tax
(c)	Reassessment	Reassessed Income	>	Assessed Income / Reassessed income as per immediately previous reassessment
(d)	ROI filed	Assessed / Reassessed deemed total income u/s 115JB / 115JC	>	Deemed total income u/s 115JB / 115JC in the return processed under s. 143(1)(a)

Circumstances in which a person can be said to have “under-reported” his income – Sub-section (2)

Clause	Circumstance	Condition for being regarded as “under-reporting” of Income		
(e)	Return not filed	Assessed / Reassessed deemed total income u/s 115JB / 115JC	>	Maximum amount not chargeable to tax
(f)	Reassessment	Assessed / Reassessed deemed total income u/s 115JB / 115JC	>	Assessed / Reassessed deemed total income u/s 115JB / 115JC as per immediately previous assessment / reassessment
(g)	In case of a loss	Assessed/ Reassessed loss	<	Returned / Assessed loss
		Assessed / Reassessed income		As against returned / previously assessed loss

Amount of under-reported income – Section 270A(3)



Quantification of under-reported income – sub-section (3)

- The first step in computation and levy of penalty under this section, is computation of under-reported income. The sub-section provides for objectivity to identify the amount of under-reported income.
- In principle, the difference between the assessed income and processed income is treated as under-reported income.
- Various situations, contemplated by this sub-section, are as under –
- (i) In a case where income has been assessed for the first time
 - (a) Return has been furnished : $UI = AI - PI$
 - (b) No return has been furnished :
 - (A) in case of a company/ firm / local authority : $UI = \text{Income assessed}$
 - (B) in other cases : $UI = AI - \text{maximum amount not chargeable to tax}$

Quantification of under-reported income – sub-section (3)

- (iii) In case under-reported income arises on account of determination of deemed total income under S. 115JB / 115JC
- It requires aggregation of under-reported income as per normal provisions as well as deemed total income (under S. 115JB/JC)
- (A) Under Reported Income (as per S. 115JB/115JC, as returned / assessed)
 - Assessed income under s. 115JB Rs. 12,00,000
 - Processed income as per S. 115JB Rs. 10,00,000
 - Under Reported Income Rs. 2,00,000
- (B) Total Under reported income = (A-B) + (C-D)

Quantification of under-reported income – sub-section (3)

- (B) Total Under reported income = (A-B) + (C-D)

Particulars		Rupees
Total income assessed as per normal provisions	A	10,00,000
Income assessed under normal provisions reduced by URI	B	8,00,000
Total income assessed as per S. 115JB/115JC	C	12,00,000
Income assessed under S. 115JB/115JC	D	10,00,000
Total under-reported income	(A-B)+(C-D)	4,00,000

Determination of income in case of losses

- The amount of under-reported income will be difference between –
 - (a) amount of losses assessed/reassessed/recomputed (if it results into reduced losses); and
 - (b) the amount of losses determined / assessed / re-assessed / re-computed in the preceding assessment order
- In case of first assessment, it appears that in view of the language of Explanation the losses claimed i.e. the losses as per Return of Income need to be considered and not losses as per Intimation under s. 143(1)(a). This interpretation leads to a differential treatment between assessees who have returned income and one who has returned a loss.
- In case of second and subsequent assessments it will be difference between losses as per two assessments.

Points to be noted in connection with quantification

- Even in relation to the quantification, it is based on the difference; and not the aggregate of various additions (which may represent under-reported income);
- If, in the assessment, there are additions as well as reductions, the net amount would be considered as under-reported income exigible to penalty;
- Where a return is furnished, the difference between assessed income (being greater) and income as per intimation would be considered as under-reported income. The difference between the returned income and intimation income, if any, would not be considered as under-reported income for the purposes of quantification thereof as well as for determining the penalty;

Points to be noted in connection with quantification

- One of the provisions, for quantification, refers to re-computation of total income. It implies that an order giving effect to could result in to re-computation of total income and, therefore, it may be considered;
- In respect of deemed total income assessment, pursuant to section 115JB or section 115JC, in a case where the additions made to the normal total income and the deemed total income are different, the aggregate of the additions made to the normal total income and deemed total income would be considered as under-reported income. Thus, additions made for different purposes would be considered as under-reported income where the income assessed is as per the deemed total income either under section 115JB or section 115JC.
- Where no return is furnished, in case of a company, the income assessed could be regarded as under-reported income; in case of a foreign company, on account of deduction of tax at source and other related matters and provisions, it may not file its return of income (although, the tax is paid). In such a case, if an assessment is made, the entire difference could be treated as under-reported income exigible to penalty, subject to the provisions of sub-section (6);

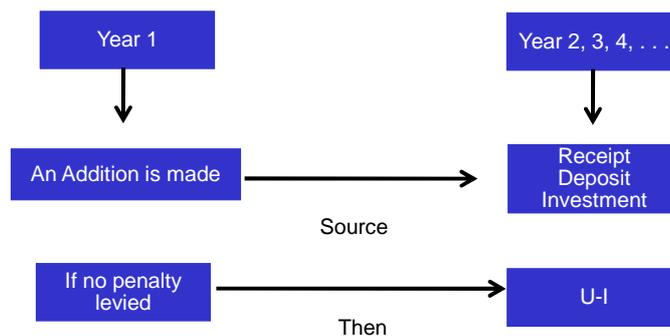
Enlargement of scope of adjustments u/s 143(1)(a)

- While processing a return made u/s 139, or in response to a notice issued u/s 142(1) u/s 143(1), the total income or loss shall be computed after making the adjustments mentioned in clause (a) of sub-section (1) of section 143.
- The scope of adjustments which can be made while processing a return of income has increased w.e.f. AY 2017-18
- Of course, before making any adjustments an intimation of such adjustments is required to be given to the assessee in writing or in an electronic mode.
- In case a response is received from the assessee, such response shall be considered before making any adjustment
- In case no response is received within 30 days of the issue of such intimation, such adjustments shall be made
- The income determined in an intimation under s. 143(1)(a) is hereafter referred to as "processed income"

Enlargement of scope of adjustments u/s 143(1)(a)

Adjustments provided earlier	Additional adjustments w.e.f. AY 2017-18
Any arithmetical error in the return	<i>disallowance of loss claimed, if return of the previous year for which set off of loss is claimed was furnished beyond the due date specified under section 139(1);</i>
An incorrect claim, if such incorrect claim is apparent from any information in the return	<i>disallowance of expenditure indicated in the audit report but not taken into account in computing the total income in the return;</i>
	<i>disallowance of deduction claimed under sections 10AA, 80-IA, 80-IAB, 80-IB, 80-IC, 80-ID or section 80-IE, if the return is furnished beyond the due date specified under sub-section (1) of section 139; or</i>
	<i>addition of income appearing in Form 26AS or Form 16A or Form 16 which has not been included in computing the total income in the return:</i>

Intangible Additions – Ss. (4) and (5) of S. 270A



- If additions made in > 1 year, then to cover up the R/D/I in subsequent years, - Go backwards.
- If penalty was initiated, but dropped ? (not 'levied')
- Refer Circular 204 dated July 24, 1976 – Additions for technical reasons – eg GP addition, presumptive, estimated disallowance, shortfalls, wastage.

Intangible Additions – Ss. (4) and (5) of S. 270A

- Sub-section (4) dealing with intangible additions of earlier years is subject to provisions of sub-section (6)
- Sub-section (4) provides that subject to sub-section (6) where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income /deducted while computing loss, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (“hereinafter referred to as “preceding year”); and
- No penalty was levied for such preceding year
- then,
 - under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment

Order in which intangible Additions will be deemed to be under-reported income of preceding year – Ss. (5)

- The amount referred to above shall be deemed to be under-reported income of the preceding year in the following order -
- Preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year; and
- Where the amount added / deducted in the first preceding year is not sufficient to cover receipt, deposit or investment – year immediately preceding the first preceding year and so on

Order in which intangible Additions will be deemed to be under-reported income of preceding year – Ss. (5)

- To state in simple words what sub-section (4) and (5) provide is –If in Year 1 an addition was made and in year 2, 3, 4 there is a receipt, deposit or investment, the source of which is claimed to be the addition made in Year 1 then, if no penalty was levied in Year 1 on the amount of addition made then the amount of receipt, deposit or investment shall be deemed to be under-reported income of the preceding year in which the addition was made.
- If the addition was made in more than one year, then to cover up the amount of receipt, deposit or investment in subsequent years one has to go backwards.
- Question will arise if in an earlier year penalty was initiated but was dropped (i.e. not "levied")
- Would the situation be different if penalty was levied but was dropped in an appeal
- Refer Circular 204 dated July 24, 1976 – Additions for technical reasons – e.g. GP addition, presumptive additions, estimated disallowance, shortfalls, wastage, etc.
- In respect of intangible additions made prior to AY 2017-18, can the section apply and penalty be levied under this section?

Order in which intangible Additions will be deemed to be under-reported income of preceding year – Ss. (5)

- Provision similar to sub-sections (4) and (5) was made through Explanation 2 in section 271 of the Act. In relation to the said Explanation 2, CBDT has in Circular No. 204, dated 24.7.1976 explained the matter as follows –
 - "61.9 New *Explanation 2* makes a provision in respect of 'intangible additions'. Additions are sometimes made by the Income-tax Officers for purely technical reasons, for example, application of a presumptive rate of gross profit or of yield, or on account of estimated disallowance of certain expenses, shortfalls, wastage, etc., but no penalty for concealment is levied in respect of these additions for want of adequate evidence to establish that these additions represent the assessee's concealed income. In later assessments, when called upon to explain certain deposits, etc., the assessee's urge at times that such deposits, etc., have come out of the income represented by the aforesaid additions made earlier. Despite this virtual confession of concealment on the part of the assessee, no penalty was hitherto leviable in such cases as the time limit for initiating concealment penalty proceedings in respect of the earlier year in which the addition was made would have expired. The penalty could also not be imposed in respect of the year in which the deposit was made, as there was no concealment in that year, the deposit having been explained as out of an earlier year's income. New *Explanation 2* provides that in such cases, the assessee would become liable to penalty for concealment in respect of additions made in the earlier year in which the additions were made."

Order in which intangible additions will be deemed to be under-reported income of preceding year – Ss. (5)

- In Chaturvedi and Pithisaria's Income-tax Law, (Sixth Edition, Vol. 9, page 14229), the said *Explanation* is discussed with decided case laws and illustrations as under:
 - " **Earlier intangible additions made also liable to penalty - Explanation 2** - In *S. Kuppuswami Mudaliar v. CIT* [1964] 51 ITR 757, the Madras High Court held that where the income-tax authorities make an addition to the income of the assessee over and above the income disclosed by him, on an estimate basis, the amount so added must be treated as the real income of the assessee. It is not open to the authorities to take the view that the addition was only for purposes of taxation and that it should not be regarded as the true income of the assessee. Later, the same High Court in *B. Abdul Qadir v. CIT* [1964] 52 ITR 364 (Mad.) and the Allahabad High Court in *CIT v. Ram Achal Ram Sewak* [1969] 73 ITR 501 held that such intangible addition may be employed by the assessee to explain cash credits, etc. found in the assessee's book in that, or a later, year or years [see, "Intangible addition to be treated as real income", under section 68, ante.].
 - Thus, if an intangible addition of Rs. 30,000 was made in assessment year 1972-73, and a cash credit of an amount Rs. 20,000 is found in the assessee's books in, say, 1973-74, the assessee could well say that Rs. 20,000 came out of Rs. 30,000 so added to the income of 1972-73.
 - It may be that when the amount of Rs. 30,000 was added in 1972-73, no penalty proceeding was initiated against the assessee and no penalty was imposed.

Order in which intangible additions will be deemed to be under-reported income of preceding year – Ss. (5)

- The New *Explanation 2* has been introduced, with effect from April 1, 1976, in order to deem the utilised amount Rs. 20,000 as the assessee's income, particulars of which had been concealed or inaccurate particulars of which has been furnished for the assessment year 1972-73. Thereafter section 271(1A) provides that penalty proceedings in respect of the assessment year 1972-73 may be initiated during the course of assessment proceedings for 1973-74.
- There may be a complex case in which intangible additions were made in more than one year, say, Rs. 10000 in 1970-71; Rs. 20000 in 1971-72 and Rs. 30000 in 1972-73. Cash credit of Rs. 20000 in 1973-74 and Rs. 40000 in 1974-75 are explained by the assessee to have come out of intangible additions made in 1970-71, 1971-72 and 1972-73, *Explanation 2* may be invoked to deem the additions made in 1970-71, 1971-72 and 1972-73 as income, etc. concealed in those years. Sequence as to which year's income is to be deemed to have been concealed first and which year's income last, is to be decided according to the language used in *Explanation 2*. It may be that the sequence is direct, i.e. 1970-71, 1971-72, 1972-73 or it may be in the reverse order i.e. 1972-73, 1971-72, 1970-71. The practical significance of the sequence may arise in cases where the amount sought to be explained is lesser than the sum total of the intangible additions in more than one year, and that too from the assessee's point of view in terms of the quantum-burden. So far as the Officer's jurisdiction to initiate penalty proceedings is concerned, it makes little difference.

Order in which intangible additions will be deemed to be under-reported income of preceding year – Ss. (5)

- In *Calicut Trading Co. v. CIT* [1989] 178 ITR 430 (Ker.), special leave petition dismissed by the Supreme Court: (1989) 180 ITR (St.) 40 (SC), the petitioner firm filed a return for the assessment year 1983-84 on April 28, 1984, disclosing a total income of Rs. 274510. The Income-tax officer wrote to the assessee pointing out certain cash credits and other credit balances not accounted for and, therefore, the assessee was asked to furnish evidence to prove the source of the said credits. The assessee then filed a return on December 22, 1984, which, according to the assessee, was to purchase peace. The assessment order was passed by the Income-tax Officer, accepting the return, on December 28, 1984, on a total income of Rs. 524510 which included Rs. 250000 the enhanced income returned by the assessee. Subsequently, in the course of the assessment for the assessment year 1984-85, the income-tax officer found that the accounts of the partners were credited with a total sum of Rs. 250000 in proportion to their profit sharing ratio along with a narration that these credit represented additional income offered for assessment in the assessment year 1983-84. The Income-tax Officer, on December 1985, initiated penalty in respect of the said income of Rs. 250000 disclosed by the assessee and issued notice to the assessee. Penalty was imposed by the income-tax officer and the same was confirmed by the first appellate authority and the tribunal. This was so held by virtue of the provision of *Explanation 2* which squarely apply to the facts of the case as the assessee had credited the accounts of the partners with the some of Rs. 250000 in the subsequent year. Such view was upheld by the High Court.'

Exclusions from under-reported income – Ss. (6)

- Sub-section (6) provides that under-reported income shall not include certain specified amount of income under specified circumstances like bonafide explanation; estimation; undisclosed income liable to penalty under s. 271AAB, etc.
- Opening language of sub-section (6) reads : 'the under-reported income, for the purposes of this section, shall not include the following'; and, thereafter it lists five different situations providing that the amount of income or under-reported income referred to in each of them shall not be included.
- While providing the circumstances in which it can be said that the income is under-reported and/or quantification thereof, the section compares and/or treats the difference between total income as per return or intimation and total income as per assessment or reassessment as the under-reported income. In other words, it does not add up various additions made in the course of assessment to quantify the same as under-reported income. However, while providing for exclusions, it does refer to components of income (added while computing total income)

Exclusions from UI – bonafide explanation offered – clause (a) of Ss. (6)

- Five exclusions are provided in clauses (a) to (e) of sub-section (6) of s. 270A
- **Clause (a)**
- The amount of income in respect of which –
 - the assessee offers an explanation;
 - the AO/CIT(A)/CIT/PCIT is satisfied that the explanation is bonafide; and
 - the assessee has disclosed all material facts to substantiate the explanation offered
- If all the 3 conditions mentioned above are cumulatively satisfied in respect of an addition to total income, then such addition will not be regarded as under-reported income.

Meaning of 'bonafide'

- **GTO v. Gautam Sarabhai Ltd. [1989] 29 ITD 212 (Ahd.)**
- 'The words "*bona fide*" used in the language of clause (c) are also required to be taken due note of. These words mean "in good faith", "genuinely" which are **suggestive of honesty of purpose**. They convey **absence of intention to deceive** and connote that the transaction in question is a true and genuine transaction and not a colourable and sham one and there are no strings of any kind attached to that transaction and that there is no secret or covert arrangement.'
- **GTO v. Rajmata Shanta Devi P. Gaekwad [2001] 76 ITD 299 (Ahd.)**
- '...under the provisions of section 4(1)(c) the value of a debt in case of release, discharge, surrender etc. becomes liable to gift tax in so far as the said release, discharge, surrender, etc. is not *bona fide*. "**Bona fide**" means **good faith implying the absence of fraud, unfair dealing or acting, whether it consists in simulation or dissimulation**. In order that the transaction is *bona fide*, it must be shown that everything was done in an open and straight-forward manner. The language used in the clause has been so drafted so as to throw onus on the assessee for establishing to the satisfaction of the GTO that the transaction in question was *bona fide*.'

Meaning of 'satisfaction' - *CIT v. Parmanand M Patel* [2005] 149 Taxman 403/278 ITR 3 (Guj.)

- "What is the meaning of the terms 'satisfied' and 'satisfaction' One may usefully refer to the legal meaning given to the aforesaid expression:
- (i) 'Satisfied:' . . . The phrase 'is satisfied' means, in my view simply 'makes up its mind'; the court on the evidence comes to a conclusion which, in conjunction with other conclusions, will lead to the judicial decision. . . .
- New Zealand [The Marriage Act, 1955, section 15(2) provides (in relation to applications for leave to marry within the degrees of affinity) that the court must be 'satisfied' of certain circumstances] 'the best opinion I can form is that on such an application as this the evidence must enable the judge to feel what Dixon J [in *Brignishaw v. Brignishaw* [1938] 60 CLR 336] defined as "an actual persuasion". That means a mind not troubled by doubt or, to adapt the language used by Smith J. in *Angland v. Payne* [1944] NZLR 610 at 626, (CA), "a mind which has reached a clear conclusion". If a formula has to be phrased, I would adopt one analogous to that expressed in *Edwards v. Edwards* [1947] SASR 258 at 271, and would say that the Judge must be "satisfied with the preponderance of probability arrived at by due caution in the light of the seriousness of the charge".' *Re Woodcock* [1957] NZLR 960 at 963, 964, CA, per Finlay A.C.J.

Meaning of 'satisfaction' ...

- '...The mind of the court must be "satisfied"—that is to say, it must arrive at the required affirmative conclusion—but the decision may rest on the reasonable probabilities of the case, which may satisfy the court that the fact was as alleged, even though some reasonable doubt may remain'.
- [Source: Words and Phrases Legally Defined: Third Edition: Volume 4 : R-Z Butterworths pages 131-132]

Meaning of 'satisfaction' ...

- Satisfied: To be satisfied with a state of things means to be honestly satisfied in your own mind. The phrase 'satisfied' occurs in many taxing statutes and is a familiar one for a great many years (see for example section 271 of the Income-tax Act, 1961, and section 56 of the Delhi Sales Tax Act, 1975). The phrase 'is satisfied' means simply 'makes up its mind' [per Lord Pearson in *Blyth v. Blyth* [1966] 1 All ER 524 at page 541]. Dixon J. defined it as 'actual persuasion'. That means 'a mind not troubled by doubt or, to adapt the language of Smith J.' a mind which has reached a clear conclusion—See *England v. Payne* [1944] NZLR 610 (CA) at page 626 : *Jiten & Co. v. STO* [1977] 39 STC 308 (Delhi)/Tax LR 1921 (Delhi) at pages 1923-24. . ."
[Source: Law Lexicon: Legal Dictionary with Legal Maxims: Second Edition in Four Volumes page 2167)."
- **"The term satisfied means make up one's mind not troubled by doubt or reach a clear conclusion on the evidence before the authority."**

Meaning of 'material facts'

- "*Mohammad Yusuf v. Bhairon Singh Shekhawat* AIR 1995 Raj. 239/[1995] 2 WLN 441 (Raj.)¹
- 'Following settled position of law emerges from the decisions already referred:
- ... The material facts mean (a) facts necessary to formulate a complete cause of action, (b) all the preliminary facts which must be proved by the party to establish a cause of action, (c) the basic facts which constitute ingredients of particular corrupt practice, (d) all the facts which are essential to clothe the petitioner with complete cause of action, (e) the facts which If established would give the petitioner the relief asked for, (f) the facts on the basis of which the Court could give a direct verdict in favour of the election petitioner in case the returned candidate did not appear to oppose the petition, (g) facts which if not proved, the petition must fail.

Meaning of 'material facts'

- ...There is a difference between the 'material facts' and 'particulars'. The function of particulars is to present as full a picture of a cause of action with such information in details as to make the opposite party understand the case he will have to meet. There may be some overlapping between 'material facts' and 'particulars' but the two are quite distinct. The distinction is one of degree. The 'material facts' are those which the party relies upon and which if it does not prove, he fails.'
- [for the purpose of: the Representation of the People Act 1951]
- **Seth Kirorimal Adwani v. ITO [1970] 77 ITR 789 (Assam)**
- **'the expression 'material facts' refers only to primary facts**
- [For the purpose of: Section 147(a) of the Income-tax Act, 1961]
- On a careful reading of the clause, it is evident that the disclosure of all the material facts should be at the time of substantiating the explanation, pursuant to the Notice received under the section giving an opportunity of being heard, and not earlier.

Exclusions from UI – under-reported income estimated though accounts are correct and complete – clause (b) of Ss. (6)

- **Clause (b)**
- If,
 - the amount of under-reported income is estimated;
 - the accounts are correct and complete to the satisfaction of the AO/CIT(A)/CIT/PCIT;
 - the method employed may not enable proper determination of income
- then,
 - the amount of under-reported income should be excluded from the under-reported income determined as per sub-section (3)
- Prima facie, it seeks to cover, to illustrate, additions based on estimation of gross profit, as against declared profits, without rejecting books of account and/or without finding that the audited financial statements of the assessee are not true and correct. In such a case, the difference attributable to estimated amount of gross profit can be excluded from the under-reported income.

Exclusions from UI – enhancement of estimate of the assessee resulting in UI – clause (c) of Ss. (6)

- **Clause (c)**
- **If,**
 - an assessee estimated an amount in respect of a claim or disallowance;
 - such claim is reduced or disallowance is increased in the assessment;
 - the assessee has disclosed all the facts material to the addition or disallowance;
- **then,**
 - such difference in the estimate may not be considered as amount of under-reported income.

Exclusions from UI – enhancement of estimate of the assessee resulting in UI – clause (c) of Ss. (6)

- Examples of such a situation can be a case where personal expenditure is estimated at a certain amount in respect of travel or conveyance or like expenditure and accordingly disallowed in computing total income, which is accepted in the intimation or adopting of transfer price to determine profits for claiming deduction under Chapter VI-A in respect of Specified Domestic Transaction. In the assessment, the disallowance is increased or deduction decreased. The incremental disallowance or reduction may not be treated as under-reported income provided all facts necessary in relation to the same are disclosed.
- In the above case, prima facie, all the facts should have been disclosed in the course of assessment or penalty proceedings.

Exclusions from UI – under-reported income represented by transfer pricing adjustment – clause (d) of Ss. (6)

■ Clause (d)

■ If,

- addition is made to the total income returned on account of adjustment in arm's length price determined by the Transfer Pricing Officer;
- the assessee has maintained information and documents prescribed under s. 92D of the Act;
- the assessee has declared the international transaction under Chapter X; and
- the assessee has disclosed all the material facts relating to the transaction,

■ then,

- the addition will not be regarded as an under-reported income

Exclusions from UI – under-reported income represented by transfer pricing adjustment – clause (d) of Ss. (6)

- The first requirement is factual and is based on the addition made.
- The second requirement can be established based on the finding of the TPO about maintenance of information and documents and where there is no adverse remarks or comments, it can be inferred that the assessee has maintained the information and documents prescribed under s. 92D of the Act.
- The third requirement can be established on the basis of the Transfer Pricing Report furnished by the auditors and/or the finding by the TPO or AO to the effect that all the transactions have been reported or absence of finding by the TPO and/or the AO that the international transactions in question were not reported.
- As far as the material facts disclosure is concerned, finding or absence of finding by the TPO and/or the AO would be relevant apart from the disclosures made in or along with the return of income or in the Transfer Pricing reports or in the course of proceedings before the TPO and/or the AO.

Exclusions from UI – undisclosed income – clause (e) of Ss. (6)

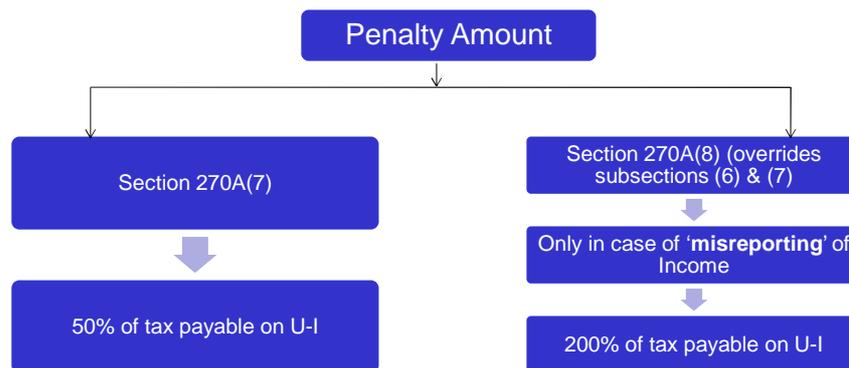
- Section 271AAB levies penalty on undisclosed income.
- Undisclosed income referred to in section 271AAB should be excluded from under-reported income determined in terms of the provisions of sub-sections (3) and (6).
- Explanation (c) below section 271AAB defines 'undisclosed income'. Such undisclosed income can be excluded in computing under-reported income.

Exclusions from UI – undisclosed income – clause (e) of Ss. (6)

- Explanation (c) below section 271AAB defines 'undisclosed income' as –
 - undisclosed income" means—
 - (i) income of the specified previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has—
 - (A) not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or
 - (B) otherwise not been disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search; or
 - (ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.'

Computation of Penalty

- u/s 270A(7) : 50% of the amount of tax payable on U-I
- u/s 270(8) : Misreporting of Income
 - Subsection (8) overrides subsections (6) and (7);
 - 200% of tax payable on U-I.



computation of penalty in respect of UI – Sub-sections (7) and (8)

- Penalty on under-reported income : 50% of tax payable on under-reported income [sub-section (7)]
- Sub-section (8) deals with quantum of penalty in a case where under-reporting is in consequence of mis-reporting thereof by any person. Provisions of sub-section (8) are notwithstanding provisions of sub-sections (6) or (7).
- In a case where under-reporting of income is in consequence of mis-reporting thereof by any person, the penalty shall be 200% of amount of tax payable on under-reported income. [sub-section (8)]
- Sub-section (10) lays down the manner of computing the amount of tax payable on under-reported income.

penalty in case of mis-reporting of income – sub-section (8)

- Sub-section (8) is notwithstanding any thing stated in sub-sections (6) or sub-section (7) i.e. in cases where there is mis-reporting of income, the exceptions stated in sub-section (6) shall not apply. Sub-section (7) provides for penalty for under-reporting @ 50% of tax payable on under-reported income.
- Sub-section (8) reads as : “where under-reported income is in consequence of any misreporting thereof by any person,”
- Therefore, mis-reporting is a subset of under-reporting. Sub-section (8) will apply in cases where under-reporting is as a result of mis-reporting. If there is mis-reporting which does not result in under-reporting, there will be no consequence.
- In cases of under-reporting as a consequence of mis-reporting, penalty is 200% of amount of tax payable on under-reported income.

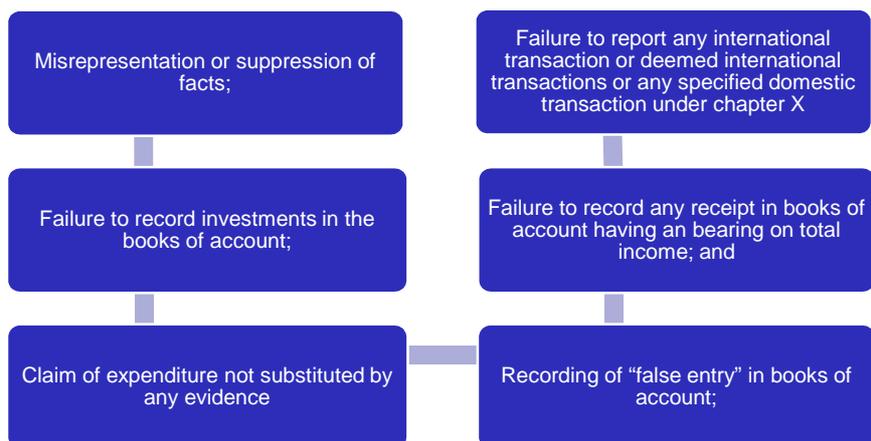
mis-reporting of income – Sub-sections (9)

- Sub-section (9) provides for the circumstances in which it could be said that the underreported income represents misreported income.
- As per Merriam Webster dictionary, 'mis-' is a prefix meaning: '1a: *badly; wrongly* , *misjudge*> b: *unfavourably*<*misesteem*> c: *in a suspicious manner* <*misdoubt*> 2 *bad: wrong* <*misdeed*> 3: *opposite or lack of* <*mistrust*> 4: *not* <*misknow*>'
- Hence, generally, it can be said that misreporting implies a wrong reporting to mean a deliberate action with a view to achieve a result (in the context, reduce the total income liable to tax and accordingly the tax).

cases of mis-reporting of income – sub-section (9)

- The section prescribes six circumstances in which it could be said that underreported income amounts to misreporting of income.
 - Misrepresentation or suppression of facts [clause (a)]
 - Failure to record investments in the books of account [clause (b)]
 - Claim of expenditure not substantiated by any evidence [clause (c)]
 - Recording of any false entry in the books of account [clause (d)]
 - Failure to record any receipt in books of account having a bearing on total income [clause (e)]
 - Failure to report an international transaction [clause (f)]

Cases of misrepresentation of Income : UI-I represents misreported income – Section 270A(9)



computation of tax payable in respect of UI – sub-section (10)

- The provisions of sub-section (10) are tabulated hereunder –

Situation	Condition	Tax payable on
Return of income not furnished	Assessed for first time	Under-reported income + maximum amount not chargeable to tax
Total Income as per intimation / assessed / reassessed / recomputed	Total income is a loss	Under-reported income (as if UI is the total income)
All other cases		UI + Income u/s 143(1)(a) / assessed / reassessed / recomputed (as if it were total income) minus Income u/s 143(1)(a) / assessed / reassessed / recomputed

Illustrations on computation of tax payable on under-reported income

- Situation 1 : ROI not furnished + assessed for the first time**

- In case of Mr. X, assessed income is Rs. 5,00,000, tax payable will be computed on Rs. 7,50,000 (Rs. 5,00,000 + Rs. 2,50,000 being maximum amount not chargeable to tax in the case of an individual)

- Situation 2: TI as per intimation / assessed / reassessed / recomputed is a loss**

- If TI is a loss of Rs. 1,00,000 and under-reported income is Rs. 4,00,000 then tax payable on under-reported income will be computed on Rs. 4,00,000

- Situation 3: Other cases**

- If TI as per intimation is Rs. 5,00,000; under-reported income is Rs. 3,00,000; then tax payable on under-reported income is tax on (Rs. 8,00,000 minus Rs. 5,00,000)

Features of tax payable

- In case of assesseees other than a company or a firm, where the income is positive, tax (to calculate penalty) needs to be determined in the same manner as is to be determined for the purposes of payment of tax at progressive rates.
- Further, in the above cases, the under-reported income needs to be increased by maximum amount not chargeable to tax, so as to determine the tax payable on under-reported income in as much as in determining the under-reported income, maximum amount not chargeable to tax is deducted;
- Also, in the above cases, in case of a loss, the under-reported income itself is treated as total income and accordingly while determining the tax benefit of the maximum amount not chargeable to tax would be available, and
- In other cases, the tax would be calculated at the applicable rate.
- In computing the tax payable on under-reported income (or for that matter misreported income) no credit is allowed or allowable for any withholding tax or tax paid in advance in respect of under-reported income.

Illustrations

- Return of income not furnished and income is assessed for the first time
- An individual, aged 50 years, does not furnish his return of income for AY 2017-18 and total income assessed is Rs. 6,00,000 then the penalty will be calculated as under –

Total income assessed (A)		6,00,000
Threshold limit (B)		2,50,000
Under-reported income (A) – (B) = (C)		3,50,000
Tax payable on B + C		6,00,000
Tax payable on above:		
upto Rs. 2,50,000	Nil	
from Rs. 2,50,001 to 5,00,000 @ 10%	25,000	
from Rs. 5,00,001 to 6,00,000 @ 20%	20,000	45,000
Penalty under s. 270A(7) (50% of amount of tax payable)		22,500

Illustrations

- Where total income (as per intimation) or assessed / reassessed / recomputed total income is a loss
- An individual, aged 50 years, filed his return of income for AY 2017-18;
- Income is assessed determining loss of Rs. 5,00,000 pursuant to under-reported income of Rs. 10,00,000
- Then penalty will be calculated as under –

Total income assessed (A)		(5,00,000)
Under-reported income (B)		10,00,000
Tax payable on B		
upto Rs. 2,50,000	Nil	
from Rs. 2,50,001 to 5,00,000 @ 10%	25,000	
from Rs. 5,00,001 to 10,00,000 @ 20%	1,00,000	1,25,000
Penalty under s. 270A(7) (50% of amount of tax payable)		62,500

Dual penalty not leviable – sub-section (11)

- **Conditions to be satisfied**
- In the case of the person
- For same or any other assessment year
- An addition or disallowance –
 - has suffered or formed the basis for imposition of penalty
- Then,
 - such addition or disallowance cannot be the basis for levying penalty under the section.
- Illustration : The penalty is levied under s. 271(1)(c) of the Act in respect of an intangible addition, which is explained as a source for investment in AY 2018-19;but, not accepted and an addition is made, apparently, penalty under the section cannot be levied.

Order to be made in writing – sub-section (12)

- The order levying penalty under section 270A has to be passed in writing.

Penalty not automatic

- In the light of the above discussion, it may be said that the penalty is not automatic implying 50% (or 200%) of the tax on underreported (or misreported) income representing the difference between the assessed income and the processed income. In the Chapter and/or the section itself there is evidence to suggest that the penalty can be levied if and only if the facts and the circumstances justify and while considering the initiation and/or imposition of the penalty, the empowered authority must consider the specific provisions, namely:
 - the penalty is discretionary and not mandatory (which has its own obligations as highlighted earlier);
 - the discretion needs to be applied having regard to the facts, circumstances and the legal position [to illustrate, merely because a legal claim is made and there is a difference upon assessment, apart from the specific provisions of sub-section (6)], the empowered authority needs to exercise restraint and use the discretion accordingly;

Penalty not automatic

- usual procedure for imposing penalty needs to be followed inasmuch as the Chapter obliges an opportunity of being heard to the assessee;
- opportunity of being heard implies that the assessee has the rights to explain as to why the penalty is not leviable; and
- sub-section (6) permits the adjustments to the difference for final determination of underreported income, if any.

Power to reduce penalty – section 273A

- Section 273A, prior to its amendment by the FA, 2016, empowered the Principal Commissioner or Commissioner to use discretion for waiver of penalty imposable on the tax payer under section 271(1)(c).
- There is no time limit prescribed for accepting or rejecting the petition for waiver of penalty.
- Consequent to introduction of section 270A, FA, 2016 has made consequential amendment to section 273A for making reference to section 270A instead of section 271(1)(c) which would stand omitted from 1.4.2017.
- S. 273A, as amended by the FA, 2016, provides that the order granting or rejecting immunity from penalty under section 273A (for all the penal provisions wherever applicable), the Pr. CIT or CIT must pass an order within a period of 12 months from the end of the month in which the application was received.
- No order shall be passed without giving an opportunity of being heard to the taxpayer.
- All applications pending as on 1.6.2016 are to be disposed by 31.5.2017.

Revised power of waiver of penalty in respect of under-reported and mis-reported income

Type of income added to returned income	AO	Pr. CIT / CIT
Under-reported income under s. 270A where assessee has paid tax and interest and complied with the conditions of section 270AA	Yes	Not applicable
Under reported income under section 270A where the assessee did not get relief under section 270AA from the AO. Seeks waiver under s. 273A	Not applicable	Yes
Misreported income under section 270A where the assessee seeking relief under section 273A	No power of waiver	Yes

Issues u/s 270A

- Is initiation / levy of penalty for under-reporting of income discretionary or mandatory in nature?
- Can there be a case of mis-reporting without there being under-reporting?
- Will penalty be levied u/s 270A in a case where return of income was not filed but taxes were fully paid. Upon completion of assessment, a refund has been determined as due to the assessee.
- Can immunity be granted in a case where the assessee concedes only some of the additions and decides to contest the rest of them
- Can immunity be granted in a case where penalty has been initiated by CIT(A)/CIT / Pr. CIT?
- Can order granting immunity be revised u/s 263 of the Act?
- In a case where an appeal lies to the ITAT against the order passed by AO, will the time period taken from the date of application u/s 270AA till the date of passing of the order thereunder be excluded for computing the period of

Issues u/s 270A

- limitation prescribed for filing an appeal to the Tribunal?
- What is illustration of a case covered by sub-section (9) which states that qua the same addition penalty will not be levied twice?
- Can reasonable cause be a ground for non-levy of penalty specially since there is no consequential amendment in the provisions of section 273B of the Act?
- Are instances of what does not constitute under-reporting exhaustive or can there be any other case in which it may be held that there is under-reporting but penalty need not be levied?
- If the notice does not specify whether the proceedings are initiated for under-reporting or for mis-reporting of income, will an order passed pursuant to such a notice be bad in law?
- Is recording of satisfaction necessary for initiation of penalty under this section?
- On whom is the onus to establish that penalty is not leviable under this section?

Issues u/s 270A

- If there are several additions in the assessment, some of which constitute mis-reporting, will the entire under-reported income be regarded as mis-reported income or will separate components of under-reported income be taxed partly as under-reported income and partly as mis-reported income?
- Will penalty be levied under this section if under-reporting of income is as a consequence of change in head of income by the AO?
- Can a ridiculous estimate made by the assessee be a ground for contending that penalty for under-reporting is not leviable as the case of the assessee falls in the exclusions mentioned in sub-section (6)?
- Is it necessary that the penalty under this section for an assessment year should be initiated in the course of proceedings for the very same assessment year?
- If income is assessed under normal provisions of the Act i.e. provisions other than S. 115JB/115JC and there is no under-reporting but an adjustment is made while computing income under s. 115JB/115JC, will penalty under this section

Immunity from imposition of penalty - Section 270AA

- FA, 2016 has with effect from 1.4.2017 inserted a new section 270AA in the Act empowering the AO to grant immunity from imposition of penalty under section 270A of the Act as well as initiation of prosecution proceedings under section 276C and 276CC of the Act on certain terms and conditions.
- The assessee can make an application, in the prescribed form (Form No. 68 – Rule 129) and verify the same in the prescribed manner, within one month from the end of the month in which assessment order under s. 143(3) of the Act or reassessment order under section 147 of the Act is received.
- The tax and interest, as demanded, as per the assessment or reassessment are paid within the time specified in the notice of demand issued under section 156 of the Act.
- The assessee does not file any appeal against the order of assessment or reassessment.

Immunity from imposition of penalty - Section 270AA

- **Immunity from imposition of penalty, etc.**
- **270AA.** (1) An assessee may make an application to the Assessing Officer to grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, if he fulfils the following conditions, namely:—
 - (a) the tax and interest payable as per the order of assessment or reassessment under sub-section (3) of section 143 or section 147, as the case may be, has been paid within the period specified in such notice of demand; and
 - (b) no appeal against the order referred to in clause (a) has been filed.
- (2) An application referred to in sub-section (1) shall be made within one month from the end of the month in which the order referred to in clause (a) of sub-section (1) has been received and shall be made in such form and verified in such manner as may be prescribed.

Immunity from imposition of penalty - Section 270AA

- (3) The Assessing Officer shall, subject to fulfilment of the conditions specified in sub-section (1) and after the expiry of the period of filing the appeal as specified in clause (b) of sub-section (2) of section 249, grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, where the proceedings for penalty under section 270A has not been initiated under the circumstances referred to in sub-section (9) of the said section 270A.

- (4) The Assessing Officer shall, within a period of one month from the end of the month in which the application under sub-section (1) is received, pass an order accepting or rejecting such application:
 - **Provided** that no order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.

Immunity from imposition of penalty - Section 270AA

- (5) The order made under sub-section (4) shall be final.

- (6) No appeal under section 246A or an application for revision under section 264 shall be admissible against the order of assessment or reassessment, referred to in clause (a) of sub-section (1), in a case where an order under sub-section (4) has been made accepting the application.

Immunity from imposition of penalty - Section 270AA

- Upon cumulative satisfaction of all the conditions mentioned above, the AO shall grant immunity from penalty and the prosecution, provided :
 - the above conditions (making application, payment of tax and interests and no appeal) are fulfilled;
 - the time limit for filing an appeal against the assessment or reassessment order has expired; and
 - the penalty levied is not for underreported income on account of misreporting of income [as set out in s. 270A(9)].
- The AO shall pass the order, within one month from the end of the month in which the assessee makes the application, accepting or rejecting the application for immunity.
- The order rejecting the application shall not be passed without giving an opportunity of being heard to the assessee;
- The order passed under this section would be final; and
- Where the application for immunity is accepted and an order is passed under this section, no appeal or revision would lie against the assessment or reassessment order.

Application

- The Application has to be made to the AO, that is, the AO having jurisdiction over the applicant.
- It should be made in the prescribed form. Rule 129 has prescribed Form No. 68 for this purpose. Thus, the contents of the application are governed by and be as per the Form as is prescribed. The form prescribed does not require any significant details to be filled in.
- The application has to be verified in the prescribed manner. This implies that the application should be made and signed by a person who can and may be authorised to verify such application in terms of the provisions of law or other requirements as may be applicable.
- The Application needs to be made within a period of one month from the end of the month in which the order passed under s. 143(3) or s. 147 is received.

Conditions

- Tax and interest mentioned in the notice of demand has to be paid within the time specified in the notice of demand. Usually, for payment of tax and interest, a period of 30 days is available. However, the AO has a power to stipulate lesser number of days than 30 days. Thus, based on the period specified in the Notice, the payment will have to be made.
- While determining income and/or the total income and/or tax payable and/or interest, there may be some mistakes (arithmetical or otherwise) in the order or 147 order; however, there may not be enough time for rectification thereof. Accordingly, prima facie, it appears, the entire amount of tax may have to be paid, irrespective of any mistake, of whatever nature, which is apparent on the face of records. In some such cases, simultaneously, an application for rectification and/or revision could be filed for the purposes of curing the mistakes in the assessment or reassessment order.

Appeals

- There is a prohibition on filing any appeal; however, at that point in time, there is no prohibition for revision or rectification. Further, there is no prohibition against suo motto rectification or revision of the order of assessment or reassessment.
- In the context, the appeal will mean the appeal which can be filed under the applicable provisions of the Act. Possibly, it would not refer to any other proceedings, which may not be regarded as an appeal against the order.

Assessment / reassessment order passed pursuant to direction by a higher authority

- The order or 147 order could be a fresh order of assessment or reassessment; or an order of assessment or reassessment pursuant to some other proceedings or direction of the authorities.
- The order of assessment or reassessment may have been passed after seeking appropriate directions of the appropriate authorities (say, Dispute Resolution Authority) in terms of the applicable provisions of the Act.
- The cause of action relating to the imposition of penalty or initiation of the prosecution proceedings may arise from any such order of assessment or reassessment.
- Having regard to the language of the section, it appears, the AO would have power to grant immunity as contemplated by the section even in a case where the order of assessment or reassessment is passed pursuant to any direction by the higher authorities.

Who is to pass the order?

- The section confers power only on the Assessing Officer [as defined in S. 2(7A)].
- The order granting / rejecting immunity needs to be passed by the Assessing Officer.
- In certain circumstances, the other authorities, like Additional Commissioner or the like may discharge the function of the AO and the order is passed by him in that capacity (that is, Assessing Officer). In such a case, it appears, the other authorities, acting as Assessing Officer, would have power to grant the immunity.
- However, the Commissioner and/or the Commissioner (Appeals) does not have some such power under the section.
- Accordingly, where the penalty is initiated by the Commissioner (Appeals), prima facie, an application for immunity under the section cannot be made.

Proceedings for penalty under s. 270A(9)

- In the assessment or reassessment, there could be various additions to the total income (as per the intimation and/or the Return of income filed by the assessee); where in some cases, although, the difference represents under-reported income, in respect of different additions, different situations may arise, namely : some additions may be excluded by applying the provisions of section 270A(6); some additions may be regarded as under-reported income; and some additions could be regarded as misreported income. In such a case, the proceedings may be initiated for levy of penalty for under-reported income as well as misreported income.
- In such a situation, prima facie, it appears, the assessee may not be able to make the application and even if the application is made, the AO may reject the application on a ground that it is not only for under-reported income and it includes misreported income, and, for which, penalty proceedings are initiated.

Proceedings for penalty under s. 270A(9)

- In some such case, possibly, the assessee may not be in a position to apply for the immunity. The application would not enable him to file an appeal against the order of assessment or reassessment, pursuant to which the penalty proceedings for misreported income are initiated. Non-filing of appeal may amount to admission of the misreported income leading to 200% of tax as penalty as well as prosecution proceedings.

Rejection of application

- Prima facie, it appears, if the application is compliant with all the provisions of the section and, in particular, there are no penalty proceedings for misreported income, the Assessing Officer has to grant immunity and the application cannot be rejected. Suppose after passing the assessment or reassessment order but before passing any order under the section, he initiates penalty proceedings for misreported income, can he reject the application? Prima facie, he can.

Order granting immunity

- The order passed by the AO, under this section, is final. There is no appeal provided against the same.
- Where the application is rejected, the section fairly provides that the appeal or revision would not be possible against the assessment or reassessment only in a case where the application is accepted. Otherwise, it should be possible to file an appeal. This is also evident from the fact that in section 249 of the Act, consequential amendment has been to exclude the period from the date of application till the date of service of the order rejecting the application of the assessee, to determine the period of limitation for filing an appeal.

Limitation period for passing the order, opportunity of being heard and immunity

- **Limitation period for passing the order** - The order needs to be passed within one month from the end of the month in which application is made.
- **Opportunity of being heard** – Before rejecting the application for immunity, the assessee is entitled to an opportunity of being heard implying presenting his case as to why the application cannot be rejected.
- **Immunity** – If the conditions stipulated and the procedural requirements are fulfilled and/or complied with, this section mandates grant of immunity by the AO.
- The immunity is from the penalty on under-reported income. It is also from the possible prosecution provisions relating to wilful attempt to evade tax under section 276C as also relating to failure to furnish return under section 276CC of the Act.

Finality of the order

- The application implies acceptance of the additions made and payment of tax and interest accordingly. Further, it may also imply that the additions could attract penalty under section 270A of the Act and may attract prosecution proceedings (for which immunity is claimed).
- If pursuant to application for immunity, an order is passed under section 270AA, the effect thereof would be –
 - the assessment or reassessment is accepted; the additions, tax and interest are also accepted and interest and tax paid are not refundable in any manner;
 - the AO has granted immunity from the penalty under section 270A of the Act as well as from the prosecution under sections 276C and 276CC of the Act;
 - no further proceedings against the order of assessment or reassessment or order under the section;
 - accordingly, assessment or reassessment proceedings could be regarded as final and concluded (as far as the assessee is concerned; the Department may be able to initiate reassessment proceedings, subject to fulfilment of the applicable conditions).

Implications of rejection of the application

- If the application is rejected, the implications could be –
 - against the order passed under the section, further proceedings may not lie against the order (save, possibly, a writ petition);
 - the assessee is free to file an appeal against the order of assessment / reassessment and question the additions made therein;
 - the Assessing Officer will initiate penalty proceedings under section 270A of the Act to levy penalty in respect of the under-reported income and/or misreported income;
 - the assessee would be free to agitate the penalty proceedings before the appropriate authorities;
 - finality, if any, would be achieved upon conclusion of the appeal or other proceedings by the assessee and/or the Tax Department.
- Will the finality of rejection mean that the assessee has accepted misreporting of income by him. If yes, what are the safeguards, precautions, if any which need to be

Can order under s. 270AA be revised

- Section 270AA(5) declares the order to be final. Hence, it cannot be re-opened or revised or reviewed.
- Issues:
 - Possibility of appeal being delayed in case of rejection of immunity
 - Does rejection of immunity mean that the assessee has accepted mis-reporting
 - Payment of entire amount of tax and interest gets locked up if application for immunity is rejected.

Proviso to section 270A(3)

- U-I where MAT / AMT is applicable :



- If same item is included in both, take it only once

