

Issues under Penalties Income Tax Part II

By

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Burden of Proof

- Primary burden of proof is on department. The AO is required to satisfy to show that there is primary evidence to establish concealment.
- Proof varies during assessment proceedings.
- It is required to be looked from different angle.

Procedure for imposition of penalty

No order shall be made without

- Opportunity of being heard is given to assessee
- Prior approval of Joint Commissioner

Limitation – Sec.275

- In case of Appeal before Commissioner
 - – no order for penalty
 - After the expiry of financial in which proceedings initiated
 - 1 year from the end of financial year in which the order of the commissioner (appeals) is received
- Appeal before Tribunal

Expiry of financial year in which action for imposition of penalty is initiated

6 months from the end of the month in which the Tribunal Order is received by the Principal Commissioner

Issues – Levy of Penalty

- Applicable of the prevailing law :
 - Date of Original Return or revised return
 - Levy of penalty is as per law which existed on the date on which original return was filed. If there is no change the calculations in revised return u/s.139(5).
 - Concealment of income applicable on the date of original return.
- No appeal against additions to income in respect of cash credits (Sec.68). It will not lead to concealment and no penalty.
- Non disclosure of amount unutilized (us.54F). The amount was not deposited in specified account with bank but under other account.

Issues

- GST / any tax Collected and not deposited till due date of furnishing of return of income (Sec.43B).
- It is also not included in taxable income (Deemed Income u/s.41) amounts concealment and penalty is leviable.
- Total Mistake:
 - If it is not deliberate is not a ground for levy of penalty.
 - Not treated as inaccurate particulars.

Quantum of Penalty

- Penalty u/s.271(1)(c) is attracted, no discretion lies with AO to reduce the minimum penalty.
- Section 271(1)(c) cast responsibility upon the AO to reach the clear finding with respect to levy of penalty under the specific charge and if the AO fails to do so then the penalty cannot be levied as such penalty order shall not be maintainable in the eyes of law. In the light of the above stated discussion, we see the case on hand. It is noticed that the AO in the penalty order has levied the penalty under both the charges i.e. concealment of particulars of income and furnishing inaccurate particulars of income

In the instant case assessee has concealed particulars of his income to reduce the income. In view of the above, the undersigned is left with no other option but to levy the penalty u/s 271(1)(c) of the Act, 1961.

Legal Advice

- If an assessee claims deduction under ***bona fide*** belief based on legal advice by his council relating to capital gains in the ITR.
- Held that it is not concealment. But if the legal advice is wrong, penalty is imposable. (Kol) 2012.
- Fictitious brought forward loss carried forward relating earlier years (when there was no such loss). Penalty for concealment is imposable.

Different opinion

- If a certain disclosure is based on opinion of expert
- If this opinion is not accepted
- Some other expert gives another opinion.
- It may not be sufficient cause for arriving conclusion that the assessee has furnished inaccurate particulars attracting penalty u/s.271(1)(c).

Authority for levy of penalty

- Sec.271 and 271A
 - AO or Commissioner (Appeals)
- Sec.271B and 271BB
 - AO. Exceeds Rs.10,000. AC or DC When Penalty exceeds Rs.20,000
 - Prior approval of Joint Commissioner
- Sec.272A – Contravention. Failure or default during proceedings before the authority - Joint Commissioner)

Power to reduce or waive of penalty

- Sec.273A and 273AA
 - By The Commissioner
 - Conditions
 - Full and True Disclosure before detection
 - Co-operation by the Assessee
 - Payment of Interest
 - Relief only once for a assessee
 - In some cases Genuine Hardship if satisfied
- If the exceeds Rs.5,00,000
 - Prior approval of the Chief Commissioner or Director-General
- Order under section 273A is final and cannot be questioned in a court of law.

Under-reported income –Sec.270A(2)

- Income assessed is greater than the income determined in the return
- Income assessed is greater than the maximum amount not chargeable to tax when return is not furnished.
- Income assessed is greater than the income reassessed immediately before such reassessment.
- Deemed income as per Sec.115JB or 115 JC is greater than determined in the return
- Deemed income is more when return is not furnished
- The assessed income has the effect of reducing the loss or converting the loss into income

Misreporting of Income – Sec.270(8)

- Misrepresentation or suppression of facts
- Failure to record investments in the books of accounts
- Claim of expenditure not substantiated by any evidence
- Recording of any false entry in the books of accounts
- Failure to record any receipt in books of accounting
 - Which has bearing on total income
- Failure to report any international transaction or any specified domestic transaction (Sec.92D and Sec.40A(2))

Penalty leviable

- Under reporting(270A(7)) 50% of tax payable on under reported income
- Misreporting (270A(8)) 200% of tax payable on such income which has not been reported

How to calculate penalty - example

Particulars of Income	Rs.	
Relating to a Company		
As per Return	20,00,000	
Determined u/s.143(1)(a)	35,00,000	
Assessed u/s.143(3) (Scrutiny)	50,00,000	
Reassessed u/s.147	80,00,000	
The assessee is deemed to have under-reported the income		
Reassessed income exceeds income u/s.143(3)		
Computation of Tax and Penalty		
Total Income u/s.143(3)	50,00,000	
Less: Income Determined u/s.143(1)(a)	35,00,000	
	15,00,000	
Tax Payable		
Tax on Rs.15 lakhs + Tax on Rs.35 lakhs		
30% of Rs.50 Lakhs plus HEC 4%	1560000	
Less: Tax on income u/s.143(1)(a)	1092000	
30% of Rs.35 lakhs + HEC at 4%	468000	
Penalty at 50% of Tax Payable		234000
Reassessment u/s.147		
Total Income	8000000	
Less: Income u/s.143(3)	5000000	
	3000000	
Tax on Rs.80 lakhs	2496000	
Less: Tax on Rs.50 lakhs	1560000	
	936000	
Penalty at 50%		468000

Example 2

Particulars	General Provisions	MAT
Income /Book Profit as per Return	10,00,000	40,00,000
Add: Addition on estimated basis (no under report)	40,000	-
Add: Misreporting (not recorded in books)	60,000	60,000
(noticed by AO)		
Add: Under reported income - wrongly deducted u/s.35	75,000	-
Add: Under ported income (Deferred taxdebit not added by the assessee)		1,20,000
Net Income / Book Profit (as per assessment order)	11,75,000	41,80,000

Calculations

Computation

Under-reported income

A = Total income assessed under general provisions

11,75,000

B = Under reported income 1040000+40000

10,40,000

C = Book Profit

41,80,000

D = Book Profit - under - reported - mis reported

40,60,000

4180000-120000

(A-B) + (C-D) (Rs.60,000 is mis-reporting income)

2,55,000

Tax on under-reported income

31.2% of 1,95,000 (1,20,000+75,000)

60,840

31.2% of Rs.60,000

18,720

Penalty - Sec.270A

50% of Tax Payable (Under-reported income

30,420

200% of tax payable (Misreported income)

37,440

Granting Immunity – Sec.270AA

- Immunity for imposing penalty
- Conditions
 - Assessee to make application (u/s.276C / 276CC)
 - Tax and interest as per the order has been paid within the specified period of notice.
 - No appeal against the assessment or reassessment order has been filed.

Time Limit

One month from the end of the month in which the order is issued.

Granting Immunity

- AO subject to fulfilment, grant immunity if proceedings for penalty u/s.270A has not been initiated.
- Order to Grant Immunity to be passed within one month
- If it is rejected: Opportunity of being heard should be given to the assessee.
- Order is final and no further appeal/revision (Sec.264)