

Finance Bill-2012: An Analysis of Major Amendments in Penal Provision under Direct Taxes



This article presents multi-dimensional discussion on the newly-introduced penal provisions proposed by the Union Finance Minister Shri Pranab Mukherjee in his Finance Bill-2012. Leave aside his intentions, it would be actually interesting to observe the proposed penal provisions under the Direct Taxes. Major amendment proposed in the penal provisions under the Direct Taxes through Finance Bill-2012 is in the form of newly-introduced Section 271AAB, which is related to the penalty imposable on the *undisclosed income* found during the course of search initiated under Section 132 of the Income-tax Act, 1961, which pertains to a *specified previous year*. The article also discusses the concerns of a *tax deductor* in our country, as compliance with TDS formalities not a simple job. In this regard, the article focuses on the further proposed penal provisions in this respect applicable for the TDS/TCS returns related to the tax deducted or collected for the period commencing on and from 1st July, 2012. Read on:

The Finance Minister Mr. Pranab Mukherjee, in Finance Bill-2012 presented on 16th March, 2012, has proposed very few changes in the penal provisions under Direct Taxes, but whatever proposed in this respect has a very wide effect on the taxpayer community. Let us first pay attention to an interesting quote from the Finance Minister during the presentation of his Budget speech: *The life of a finance minister is not easy. Various players, including policy-makers, politicians, agriculturists and business houses, participate in the making of the economy. When everything goes well with the economy, we all share in the joy. However, when things go wrong, it is the Finance Minister who is called upon to administer the medicine. Economic policy, as in medical treatment, often requires us to do something, which, in the short run, may be painful, but is good for us in the long run. As Hamlet, the Prince of Denmark, had said in Shakespeare's immortal words, "I must be cruel only to be kind."*

This quotation has many dimensions with applicability to most of the direct and indirect provisions proposed by Mr. Mukherjee; but if we are looking for some proposal where his words directly apply to, it would be the newly-introduced penal provisions proposed by him in the Finance Bill-2012. His intention may or may not literally be true, but it would be interesting to observe how that is suitably applicable to the proposed penal provisions under the Direct Taxes.



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Penalty on Undisclosed Income Found during Search Section- 271AAB

This *major amendment* proposed in the penal provisions under the Direct Taxes through Finance Bill-2012 is in the form of newly-introduced Section 271AAB, which is related to the penalty imposable on the *undisclosed income* found during the course of search initiated under Section 132 of the Income-tax Act, 1961 which pertains to a *specified previous year*. The provisions in this respect are still there in the form of Section 271AAA, but it is proposed to insert a new and stringent Section 271AAB, which will be applicable in the cases where search has been initiated on or after 1st July, 2012. New provisions proposed through this Section 271AAB applicable on search initiated on or after 1st July, 2012, can be understood:

1. **Penalty @ 10% of the undisclosed Income of the specified previous year:** if the assessee admits such *undisclosed income* during the course of search in his statement under Section 132(4), specifies and substantiates the manner in which such income is derived, pays the tax along with interest and files return before the *specified date*, he will be liable to a penalty of 10% of such *undisclosed income*, which can be described as *Concessional* penalty, i.e. first slab of penalty under Section 271AAB.
2. If such *undisclosed income* is not admitted during the course of search, but disclosed in the return of income filed after the search but before *specified date* along with paying the tax and interest thereon, the taxpayer will be liable to a penalty of 20% of such *undisclosed income*, i.e. second slab of the penalty.
3. If such *undisclosed income* is neither admitted during the course of search as mentioned in the aforementioned situation 1 nor disclosed in the ITR filed after the search with paying the tax and interest on it before specified date as in the aforementioned situation 2, the taxpayer will be liable to a penalty of a minimum of 30% and a maximum up to 90% of the undisclosed income, i.e. third and highest slab of the penalty.

Here, kindly note that the meaning of *undisclosed income* and *specified previous year* is the same as given in the existing corresponding Section 271AAA of the Income-tax Act, 1961 in this respect and, further, there was no mention of specified date in the existing Section 271AAA. Hence, it is defined in Section 271AAB. For better understanding of this newly-proposed penal provisions, let us observe the definitions of *specified date*, *specified previous year* and *undisclosed income*:

1. *Specified date means*—the due date of furnishing of return of income under sub-Section (1) of Section 139 or the date on which the period specified in the notice issued under Section 153A for furnishing of return of income expires, as the case may be.
2. *Specified previous year means*—the previous year (i) which has ended before the date of search, but the date of furnishing the return of income under sub-Section (1) of Section 139 for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or (ii) in which search was conducted.
3. *Undisclosed income means*—(i) any 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 Chief 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.

To analyse the newly-proposed penal provisions under Section 271AAB, let us observe the existing Section 271AAA in this respect:

The *existing provision* is given in Section 271AAA, which is only applicable on search initiated on or before 30th June, 2012. Let us observe the existing provision:

1. Undisclosed income found during the course of search pertains to a *specified previous year* — the definition of specified previous year is mentioned above.
2. If the taxpayer admits such undisclosed income during the course of search in a statement under Section 132(4), specifies and substantiates the manner in which he derives the income and pays the tax together with the interest thereon, *no* penalty is payable.
3. If such undisclosed income is not admitted at the time of search along with complying all the conditions mentioned in the above-mentioned point 2, a penalty of 10% of the undisclosed income will be payable.

See that *no penalty is payable* in the aforementioned situation mentioned in point 2 under existing Section 271AAA and we can consider *confession of such undisclosed income during the course of search and payment of tax and interest on it* as immunity from penalty at present, but now in the same type of situation, a penalty of 10% of the such *undisclosed income* has been proposed through the new Section 271AAB with respect to search initiated on or after 1st July, 2012. Further to get the benefit of this concessional penalty, the condition of *specified date* is also added.

If the *conditions in point 2* are not fulfilled by the taxpayer, a flat penalty of 10% of such *undisclosed income* is applicable under the existing Section 271AAA, which is applicable to the search initiated on or before 30th June, 2012. Irrespective of whether the income has been disclosed in the return of income, the rate of penalty applicable is 10% of the undisclosed income, but under the newly-proposed Section 271AAB, the penalty will be 20% if the taxpayer declares the income in the return of income before the *specified date* and pays the tax and interest before that specified date, though he does not admit it during the course of search.

If the *undisclosed income* is neither admitted during the course of search nor it is disclosed in the return filed after the search with paying the tax and interest on it before specified date then tax payer will be liable to a penalty of minimum of 30% and maximum up to 90% of the undisclosed income under the newly-proposed Section 271AAB, but under existing Section 271AAA, the amount of penalty under this situation is only 10%. Please note that the difference in quantum of penalty is very big.

Though *the immunity from the penalty* under the existing Section 271AAA if the undisclosed income pertains to a specified previous year and it is admitted during the course of search, etc., can be construed as very *liberal treatment*, but the newly-proposed provisions under Section 271AAB has negative aspects also, because the last part of the penal provisions having minimum 30% penalty and maximum 90% of the undisclosed income gives discretionary power to the assessing officer to decide the quantum of penalty, which, in case of penal provision, is not a desirable situation. In the existing provisions, the penalty of 10% is at flat rate and no discretionary power is given to the assessing officer to decide the quantum of the penalty amount.

Further the last part of the newly-proposed penal provisions, which is provided in the Section 271AAB(c), has a steep hike in the form of 30% (minimum) to 90% (maximum) from the existing 10% amount of penalty as mentioned in the existing Section 271AAA, which has a flat penalty of 10% in such a situation. Further, in

the corresponding *Clause 231* of the *Direct Taxes Code Bill-2010*, the penalty in such a situation is mentioned as *Not less than the amount of tax but not more than double of the amount of Tax*. Reason of such a massive upward change in the maximum amount of penalty up to 90% of *undisclosed income* can only be explained by the lawmakers especially when the *maximum limit* of penalty is crossing the limit, which is proposed by them in the DTC.

See here that the provisions of existing Section 271AAA and proposed Section 271AAB are applicable only when the undisclosed income found during the course of search, which pertains to a *Specified previous year* and if the undisclosed income does not pertain to a specified previous year, these Sections are not applicable and penalty mentioned under *Section 271(1) (c)* will be applicable.

The *proposal* will certainly *strengthen* the penal provisions with respect to the undisclosed income found during the course of search as compared to the existing provisions applicable in this respect. Further, it will also motivate and give the opportunity to the taxpayer to declare the undisclosed income in return of income and pay tax plus interest before specified date, *if it is not admitted during the course of search for any reason*, to avoid the more higher penalty. The phase-wise increase in penalty is the basic and special characteristic of this new penal provision, which is inspired by *Clause 231* of the Direct Tax Code Bill 2010.

Failure to Furnish Correct TDS/TCS Returns within Specified Time: Section 271H

The life of *tax deductor* in our country is not easy. It is always said that compliance with TDS formalities is a very tedious job for them. Kindly note that the further proposed penal provisions in this respect applicable for the TDS/TCS returns related to the tax deducted or collected for the period commencing on and from 1st July, 2012, will make the life of a TDS deductor more difficult.

On the other hand, lawmakers have their own reasons for introducing the stringent penal provisions in this respect, because delayed submission of TDS/TCS returns and submitting the inaccurate particulars in the TDS returns is the major hurdle in timely and accurate processing of the IT returns and giving timely credit to the deductees, and all this results in a delay in granting the refunds. We must admit here that, these days practically, if the particulars of TDS/TCS are correct, disposal and delivery of refunds to the deductees is very fast.

Presently, there is a penalty for delayed filing of TDS/TCS returns, but there is no specific penalty

for submitting inaccurate or wrong particulars in the quarterly TDS/TCS returns, and, now, a penal provision has been proposed in the form of *Section 271H* to motivate the deductor to file the correct and accurate particulars in TDS/TCS returns within time, so that the returns of the deductees can be processed fast and accurately.

The *proposed penalty* under *Section 271H* is the penalty ranging from ₹10,000 to ₹1,00,000 for delayed and incorrect TDS/TCS returns. The assessee has to pay penalty for furnishing the incorrect particulars in TDS/TCS returns like incorrect PAN, amount of tax deducted, wrong details of taxed posited, etc., in the TDS/TCS returns, hence the tax deductor must be careful now to file the correct details in the TDS/TCS returns. But in case of delayed filing of TDS/TCS returns, this provision has given *one year* time from the due date to file the TDS/TCS returns after depositing the TDS/TCS amount along with interest thereon to avoid this penalty. The reason for this relaxation for the delayed returns is the fact that a new *Section* is also introduced for prescribing a *prepaid fees* in case of delay in filing of TDS/TCS returns.

The *penalty under Section 271H* is applicable for the TDS/TCS returns, which are related for the TDS/TCS deducted or collected on or after 1st July, 2012, and further, if the assessee proves that he has reasonable cause for the failure, no penalty under this *Section* can be imposed because *Section 271H* is also proposed to be included in *reasonable cause Section 273 B* with effect from 1st July, 2012.

A new *Section 234E* is proposed to levy a fee of ₹200.00 per day (subject to a total amount of TDS/TCS for the period) in case of delayed furnishing of TDS/TCS returns. The above amendment is proposed to be introduced to ensure timely filing of TDS/TCS returns, so that the claim of TDS credit and consequent refund to the deductee can be processed and delivered and grievances in this respect can be minimised.

However, it may result in unnecessary and sometimes very heavy burden on the deductor in terms of cost, because it is a *prepaid mandatory fee* which has to be paid before filing of the TDS/TCS return. This fee is applicable to the TDS/TCS returns, which are related to the TDS/TCS for the period started on or after 1st July, 2012.

Kindly note that there is an existing provision for payment of ₹100 per day (subject to the total amount of TDS/TCS for the period) for such type of failure under *Section 272A* and this specific failure is mentioned in *Section 272A(2) (k)*, but it is not a *prepaid penalty* provision and, further, it is not mandatory penal provision and assessee has the *reasonable cause Section 273 B* to protect him from penalty, if he proves

that he has reasonable cause for such delay. The penalty under *Section 272A* shall not be applicable to the TDS/TCS returns related to the tax deducted/collected on or after 1st July, 2012, since after that prepaid fees provisions under *Section 234E* are applicable.

Note that the *TDS/TCS problem* is a *multi-dimensional problem*, because, at times the wrong or incorrect particulars are supplied due to negligence of the deductee also, so enhancing the amount of penalty may motivate the deductor to comply with the provisions within time. But it will not be the sole and desirable solution of the problem and, further, the TDS/TCS related existing problems of the taxpayers, especially when the procedural problems of TDS/TCS deductors, are not solved before introduction of this harsh and cost burden penal provision.

Failure to Maintain and Report Certain International Transactions: Section 271AA

The existing *Section 271AA* is proposed to be replaced by a new *Section 271AA* with effect from 1st July, 2012, and now a penalty @ 2% of the value of international transaction will be levied if the taxpayer:

1. Fails to maintain the prescribed documents or information as required by *Sections 92D(1)* and *92D(2)*, or
2. Fails to report such international transaction which he required to report, or
3. Maintains or furnish incorrect information and documents.

Kindly note that the existing provision under *Section 271AA* is application only if the person fails to keep and maintain the documents as required by *Sections 92D (1)* and *92D (2)* with respect to such international transactions and it is not applicable on failure to report such transactions or maintaining or furnishing the incorrect information and documents. The penalty for failure to submit report as required under *Section 92E* is provided in *Section 271BA* which is only ₹1 lakh and the same is considered at very low side so now non-reporting of such international transactions or maintain or furnish incorrect information and documents regarding these transactions has been covered under *Section 271AA* with a penalty @ 2% of the value of international transaction w.e.f. 1st July, 2012.

Penalty under *Section 271BA* will also continue with this new penal provision under *Section 271AA*. Further, *specified domestic transactions* are also proposed to be added with international transactions in *Section 271AA* w.e.f. 1st April, 2013, and accordingly this amendment will be applicable from the assessment year 2013-2014. ■