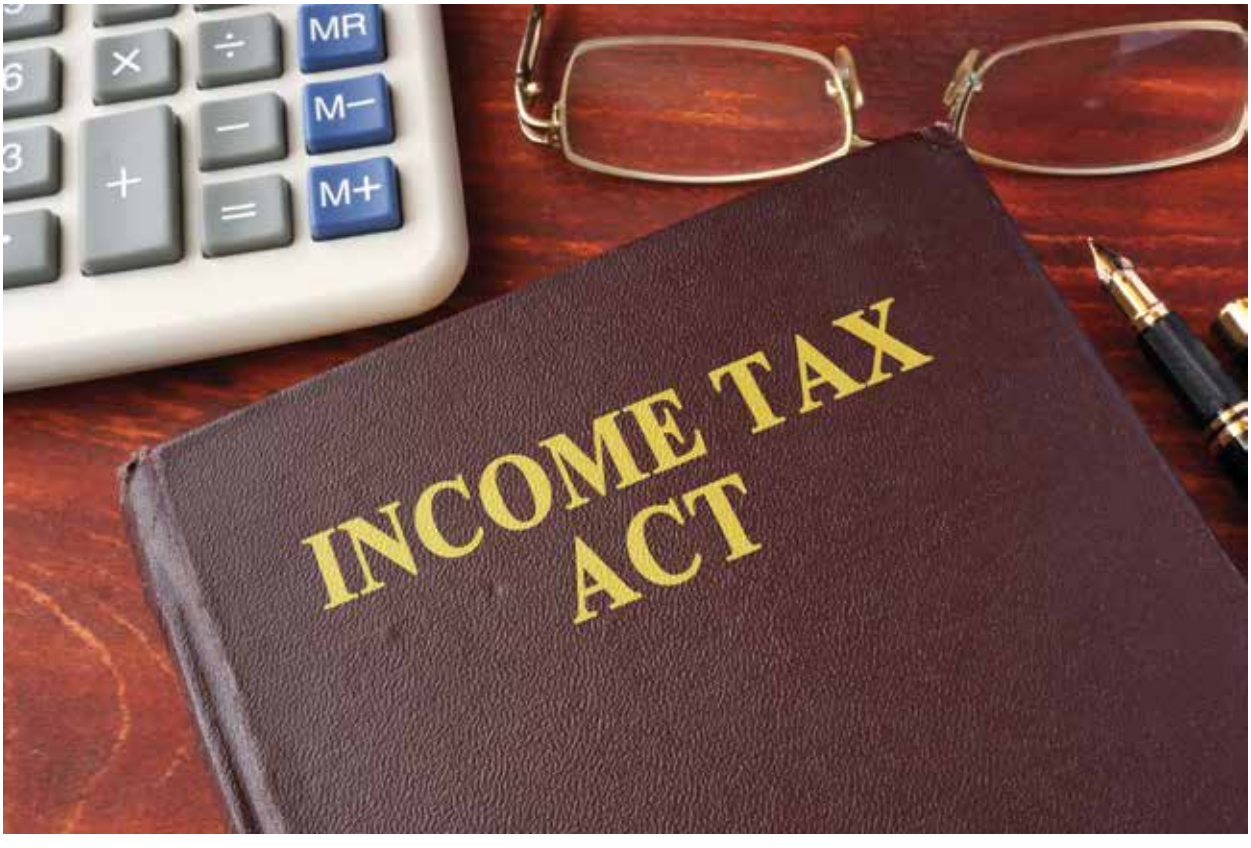
Roller Coaster of Penalty under the Income-tax Act



The law of penalty for evasion of Income Tax probably seems to have settled with a plethora of judgments on wide-ranging issues; from no less than the Apex Court. The decision in the case of Reliance Petroproducts[1] went on to become a stare decisis as it concluded some of the flip-flops on the basis of levy of penalty. While things looked to settle down, there came a new section to deal with the situation. The Finance Act, 2016 introduced Section 270A, which has provided for penalty for under reporting and misreporting of income. Following the insertion of Section 270A, naturally, the existing provision u/s. 271 to penalise such cases was made ineffective from 01.04.2017 by insertion of clause (7) to Section 271. Whether the new section brings in more stability compared to the earlier law or whether it poses more questions rather than solving the ones which were already existent, is a subject matter of this article. Read on to know more….

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The Finance Act, 2016 introduced Section 270A, which has provided for penalty for under reporting and misreporting of income. Following the insertion of Section 270A, naturally, the existing provision u/s. 271 to penalise such cases was made ineffective from 01.04.2017 by insertion of clause (7) to Section 271. The issue of tax evasion

[1] *(2010) 230 CTR 0320*

is extremely critical in the Indian context and post-demonetisation it has also become very sensitive. Ideally, law relating to penalty should be strict, leaving no room for imagination and discretion. Section 271, by its very design, gave an opportunity to the assessee to escape penalty. It gives a sense that only with the view to overcome the shortcomings of the existing provision, a new code in the form of Section 270A has seen the light of the day.

With the insertion of the new Section 270A, the lawmakers have coined two new terms; Under-reporting and Misreporting. Hitherto, the terms used to tackle cases of evasion were Concealment and Furnishing inaccurate particulars of Income. Both the terms were not defined under the Act and so to understand what it meant, one had to go by the judicial interpretation. The journey of Section 271(1)(c), was indeed a roller coaster ride, which saw a lot of ups and downs, and in turn made the levy complex and prone to multiple interpretations. Let us discuss the provisions of the new section and check if it has really changed the scenario for levying penalty for evasion of taxes.

Levy of Penalty [270A(1)]

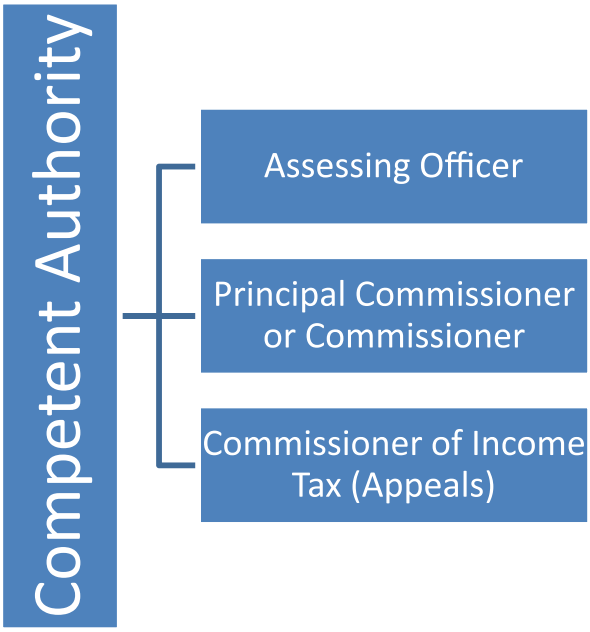
Section 270A(1) is the charging provision. It reads as under:

"(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."

The provision specifies the competent authority, entitled to levy penalty for under-reporting of income. The authority to levy a penalty, however, comes with an element of discretion. The officer *"may or may not"* direct the person to pay the penalty. However, once the officer directs; the person shall be liable to pay penalty, making it mandatory. The levy of penalty, is subject to the procedure prescribed under Section 274 of the Act.

It is essential that the directions to levy penalty shall be given during the course of any proceedings under the Income-tax Act. Thus, unlike the previous law, the satisfaction of the competent authority is not essential. A mere direction for payment of penalty for under-reporting in the order of assessment or reassessment shall be sufficient for levy of penalty. This is very much similar to the position of law which was put forth by the erstwhile Section 271(1B).

The careful use of the word "may" in the section has ensured that the assessee could still agree for an addition, in an ongoing proceeding, subject to the condition that no penalty should be directed to be paid under Section 270A. Time has proved that discretion in the penal provision helps give the benefit of doubt to bonafide cases, but so does it give a chance to unscrupulous elements to exploit the provisions for individual benefits.



Triggering Event [270A(2)]

The reading of Section 270A(1) indicates that the triggering event is under-reporting of income by the assessee. What amounts to under-reporting is defined under the Act, leaving no room for imagination. Section 270A(2) clearly and categorically explains the situations in which an assessee should be considered to have under-reported his income. Let us discuss each of those events one by one:

I] Where Assessee has Positive Income

a) Return is Filed: If the assessed income is greater than income processed u/s. 143(1).

b) Return is Not Filed: If the assessed income is greater than the maximum amount not chargeable to tax.

In order to ensure that every return processed u/s. 143(1), a new proviso was added to Section 143 (1D) which now mandates that every return shall be processed before the issuance of an order under Section 143 (3). The legal circle is, thus, completed. And now it could be only on account of negligence that a return assessed u/s. 143(3) is not processed u/s. 143(1).

c) Assessee is Reassessed: If the reassessed income is greater than the assessed or reassessed income immediately before such reassessment.

II] Where Assessee has deemed income under MAT or AMT

d) Return is Filed: If the assessed Books Profit u/s. 115JB or the Adjusted Total Income u/s. 115JC (hereinafter referred as "Deemed Income"), as the case may be, is greater than the Deemed Income, computed u/s. 143(1).

e) Return is not filed: If the assessed deemed income is greater than the Basic Exemption Limit.

f) Assessee is Reassessed: If the reassessed deemed income is greater than the assessed or reassessed deemed income immediately before such reassessment.

III] Where the Assessee has Loss (Negative Income)

g) If the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

Dependence on Processing of Return: The analysis of the cases of under-reporting indicates that the event of processing of return is extremely important. If the department fails to process a particular return, no under-reporting could arise and consequently no penalty could be levied u/s. 270A. In order to ensure that every return processed u/s. 143(1), a new proviso was added to Section 143 (1D) which now mandates that every return shall be processed before the issuance of an order under Section 143 (3). The legal circle is, thus, completed. And now it could be only on account of negligence that a return assessed u/s. 143(3) is not processed u/s. 143(1).

The dependence on processing of return while levying penalty is a little dangerous. So much so that there are cases of processing where the income computed is erroneous due to silly mistakes made in the return of income. These mistakes are rectifiable u/s. 154 of the Act. Now, hypothetically assuming, in case if the processing is incorrect and the assessee or the AO does not rectify the intimation u/s. 143(1) before passage of order u/s. 143(3), the penalty would be levied on such incorrectly processed return. The assessee would stand to gain if the processed income is on a higher side; as in such a case the quantum of unreported income shall be less and consequently penalty would also be less.

Moreover, the recent judgments[2] are in the favour of revision of return even after the return is processed u/s. 143(1). Thus, in my opinion penalty shall not be attracted if the return is revised any time before the time limit provided in Section 139(5), even if such revision is after detection of concealed income by the AO but before passage of the assessment order.

Anomaly arising out of under-reporting of Losses: There is at least one more area which needs to be attended. The sub-clause (g) of Section 270A (2) which deals with the situation of under-reporting in case of loss; does not specify the basis which shall be taken to rule under-reporting. So it is not clear if assessed loss got to be compared with the amount of loss intimated u/s. 143(1) or the amount of loss returned by the assessee.

Quantum of Income Under-Reported [270A(3)]

Once the case fits the definition of under-reporting as provided in clause (2) of Section 270A, it would be necessary to quantify the amount of under-reporting. The quantification for under-reported income shall be crucial in quantification of Penalty. The clause (3) of Section 270A provides for different scenarios for computing the amount of under-reported income, which are as under:

I] Where Assessee has Positive Income

a) Return is Filed: Difference between assessed income and income processed u/s. 143(1).

b) Return is Not Filed: Difference between assessed income and the maximum amount not chargeable to tax. (Obviously

[2] *(2015) 231 TAXMAN 0655 (Cal), (2011) 333 ITR 0508*

In case where MAT and AMT applies, the assessee computes income both as per the general provisions of the Act (for short "Normal Income") as well as the deemed income under those specific provisions. Thus, there could be an under-reporting of both the Normal Income as well as Deemed Income. The reasons for deviations in both the sets of income could be separate as well as common.

there is no basic exemption limit for Company, Firms, Local Authority or Co-Operative Society)

c) Assessee is subjected to Reassessment: Difference between reassessed income and income assessed or reassessed immediately before such reassessment.

II] Where the Assessee has Loss (Negative Income) [Dealt by Explanation (b) to Section 270A(3)]

The amount of under-reported income is the difference between the income or loss, as the case may be, assessed or reassessed and the loss claimed.

Again, there is no reference to the processed loss u/s. 143(1). There could be a difference between loss claimed and loss allowed. However, the Act uses the term loss claimed, while computing the amount of under-reporting. This is a classic case of loose drafting. The explanatory memorandum to Finance Bill, 2016 in Example 3 dealing with Section 270A, however, uses the basis of processed loss.

III] Where Assessee has deemed income under MAT or AMT [Dealt by Proviso to Section 270A(3)]

In case where MAT and AMT applies, the assessee computes income both as per the general provisions of the Act (for short "Normal Income") as well as the deemed income under those specific provisions. Thus, there could be an under-reporting of both the Normal Income as well as Deemed Income. The reasons for deviations in both the sets of income could be separate as well as common. In order to quantify the total under-reporting the Act has specified a formula viz. (A-B)+(C-D). The formula could be simplified as under:

Total Under-Reporting = *Under-Reported Normal Income* + *Under-Reported Deemed Income*.

Under-Reported Normal Income = Assessed/ Reassessed* Normal Income – Intimated/Pre-assessed* Normal Income

Under-Reported Deemed Income = Assessed/ Reassessed* Deemed Income – Intimated/Pre-assessed* Deemed Income

*The formula is a little obscure. It leaves the computation interdependent. One has to reduce the amount of under-reported income in elements "B" and "D" of the formula, while computing total under-reported income. Certain terms hereinabove, though not part of the section, have been used for harmonious construction and to make the understanding simple.

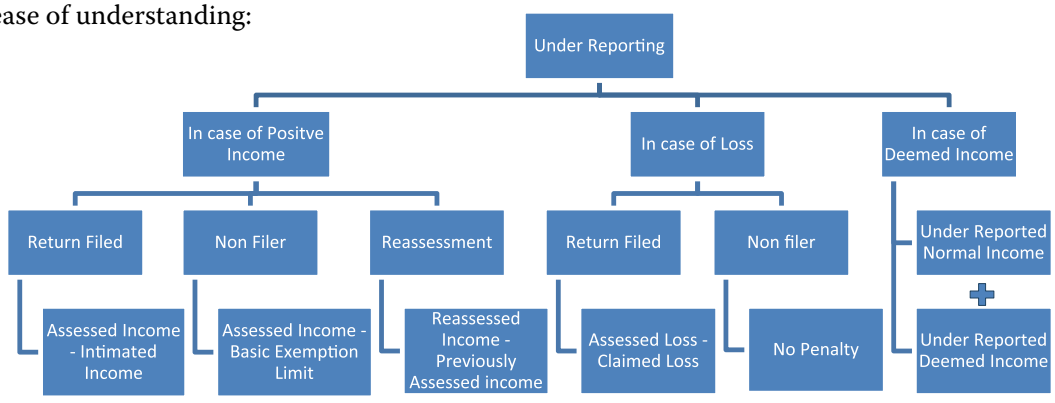
There seems to be no standard on the use of explanations and provisos while drafting a legal provision. Things are being made complex, even in the new sections that are added to the Act, indicating a disillusioned learning curve. Such an approach would only lead to generation of more litigation and misfired penalties from the department.

An example, could better illustrate the calculations required for computing the total amount of under-reporting in such cases:

Sr. No.	Particulars	Income as per General Provisions	Deemed Income u/s. 115JB/JC
1	Assessed Income	(A) 600,000	(C) 1200,000
2	Intimated Income	(B) 500,000	(D) 1000,000
3	Under Reported Income (2)-(1)	(A)-(B) 100,000	(C)-(D) 200,000
4	Total Under Reporting 3A+3B	(A-B) + (C-D) = 300,000	

As a thumb rule, one cannot levy penalty on the same amount of under-reporting twice. Hence, the second proviso to Section 270A(3) has clarified that if an item is included while computing under-reported normal income the same item would not be included in computing the under-reported deemed income. Thus, for example, if in the above table ₹50,000 is disallowed under both income assessed as per general provisions as well as u/s. 115JB/JC, then the figure of ₹10,00,000 (D) would be taken as ₹10,50,000. The total under-reporting would be ₹250,000 as against ₹3,00,000 computed in the above table.

The triggering events and quantum of under-reporting can be illustrated by way of a hierarchical depiction for the ease of understanding:



Deemed Under-Reporting [270A(4)]

There may be a situation where an assessee may invoke telescoping of addition of two different years. The situation could be best explained by way of an example:

Mr. X is assessed for the AY 2015-16 with an addition of ₹50,000 and for AY 2016-17 with an addition of ₹30,000. No penalty was levied on such addition by the AO in both the years (penalty is not levied for various reasons; say for instance, it was a case of intangible addition). Now Mr. X is also being assessed for AY 2017-18, where it is found that he has made a deposit of ₹50,000 which is outside books. Here, Mr. X could claim that he has made the deposit out of the addition made during AY 2015-16 and that the source of such deposit stands duly explained. Since the source is duly explained, there is no case of under-reporting and as such no penalty could be initiated in AY 2017-18 as well. Now, Mr X has walked away scot free, with no penalty in both the years.

In order to take care of such a situation, Section 270A(4) specifies that where the source of any receipt, deposit or investment made in the current assessment year is claimed by the assessee to be an amount added to income, in any of the previous assessments, on which no penalty was levied, then, the under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment.

Where the assessee offers a BONAFIDE explanation and also has disclosed all the material facts to substantiate the explanation offered in respect of under-reported income. This is similar to Explanation 1 to Section 271 and is framed in a positive way.

Thereby Section 270A(4); like Explanation 2 of Section 271(1)(c), has an effect of plugging the loophole of telescoping without penalty. Now, Mr. X in our example above, would not be in a position to go scot-free and ₹50,000 would be added to the amount of under-reported income computed under 270A(3).

Now the question is about deciding the year of under-reporting. In our example above, whether under-reporting would pertain to AY 2016-17 or AY 2015-16?

In order to bring uniformity in initiation of penalty proceedings, it is provided for in sub-Section (5) that under-reporting shall be deemed to have been done in the immediately preceding year and if the intangible addition of the immediately preceding year is insufficient to cover the amount of deemed under-reporting then the year preceding the immediately preceding year and so on. Thus, in our example, penalty proceeding would have to be initiated for both AY 2016-17 and AY 2015-16 for ₹30,000 and ₹20,000 respectively.

Exemptions from Levy of Penalty [270A(6)]

The clause (6) of the section brings a lot of relief for genuine cases of under-reporting. The cases of additions which are excluded from the under-reporting proceedings are as under:

a) Bonafide Under-Reporting: Where the assessee offers a BONAFIDE explanation and also has disclosed all the material facts to substantiate the explanation offered in respect of under-reported income. This is similar to Explanation 1 to Section 271 and is framed in a positive way. Thus, the decision of the Apex Court in case of

The earlier Section 271(1)(c) provided for a penalty ranging between 100% - 300%. This granted discretion, to the AO, which was used arbitrarily by the department. Now that no such range is provided, the AO has to calculate penalty at a fixed rate of 50% in the case of under-reporting not amounting to misreporting.

CIT v/s. Reliance Petroproducts (P) Ltd. (2010) 36 DTR 449 may still hold the ground under the new penalty regime.

b) Methodological Estimates: Despite accounts being correct and complete, owing to the method employed, income cannot be properly deduced therefrom, without application of estimates.

c) Suo-Motu Estimates: If the assessee has, on his own, estimated a lower amount of addition or disallowance and has disclosed all the facts material to the addition or disallowance, and AO further makes an addition to such estimate.

d) Arm's length price determined by TPO: If 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. This is similar to Explanation 7 to Section 271.

e) Specified Year in case of Search: Undisclosed income referred to in Section 271AAB. A similar sister provision is also contained in clause (2) of Section 271AAB.

The clauses (b) and (c) are welcome clauses as they have an effect of specifically clarifying the already settled law on levy of penalty. Hopefully, now at least, no penalty would be levied by the department on intangible additions and issues involving estimates.

Amount of Tax Payable on Under-Reported Income [270A(10)]

The term "tax sought to be evaded" in Section 271(1)(c) is now replaced by the term "tax payable on under-reported Income".

a) Return is not filed and first assessment: Tax Payable = Tax Payable on (Amount of Under-Reported Income + Basic Exemption Limit). Simply stated, in case of non-filers, the penalty shall be levied as a percentage of Tax on Assessed Income.
However, unlike clause (c) of Explanation 4 to Section 271(1), there is no reduction in penalty amount available for the amount of Advance Tax, TDS, TCS and self-assessment tax paid before the issue of notice under Section 148.

b) Return filed and Assessed/Reassessed Loss: Tax Payable on the under-reported income as if it were the total income. Thus, in case of an individual no penalty could be levied if under-reporting of loss is upto ₹250,000. This provision is similar to clause (b) of Explanation 4 to Section 271(1).

c) Other Cases i.e. Return filed and No Loss Case: Tax on (Assessed Income) – Tax on (Determined/ Previously Assessed Income)

Quantum of Penalty on Under-Reported Income [270A(7)]

50% of the amount of tax payable on under-reported income computed as per Section 270A(3).

The earlier Section 271(1)(c) provided for a penalty ranging between 100% - 300%. This granted discretion, to the AO, which was used arbitrarily by the department. Now that no such range is provided, the AO has to calculate penalty at a fixed rate of 50% in the case of under-reporting not amounting to misreporting. The new section has lowered the rate of penalty considerably, for simple cases of under-reporting. However, in cases where under-reporting is an outcome of misreporting a higher rate of penalty at 200% is fixed u/s. 270A(8).

Thus, if the total of under-reported income is ₹500,000 and the tax is payable @ 30.90%, then the tax on under-reported income shall be ₹154,500. The penalty payable for under-reporting (*simpliciter*) shall be ₹77,250.

Misreporting of Income [270A(9)]

Under-reporting of income is exhaustively illustrated in sub-Section (2) of Section 270A.

The new section has lowered the rate of penalty considerably, for simple cases of under-reporting. However, in cases where under-reporting is an outcome of misreporting a higher rate of penalty at 200% is fixed u/s. 270A(8).

There could be a hundreds of reasons for under-reporting of income by the assessee. Usually for an honest taxpayer, a mistake of law, could lead to under-reporting of income. It may be also because of negligence, oversight, technical error, or an ill advice; that an assessee makes an erroneous claim in the return. On the contrary, a dishonest taxpayer could manipulate his affairs with a sole objective of under-reporting of income. Such deceitful under-reporting could be difficult to detect if deep-laid or multi-layered and is more dangerous. Thus, the act of under-reporting is classified into two sub-classes viz. Simple Under-Reporting and Misreporting. While the under-reporting (*simpliciter*) is already discussed in the foregoing paragraphs, the one arising out of misreporting should have a flavour of any of the six misdeeds mentioned hereunder:

a. Misrepresentation or Suppression of Facts: The terms are not defined in the section or under the Act. The dictionary[3] defines Misrepresentation as "to describe falsely an idea, opinion, or situation, often in order to get an advantage." When applied in context, it would mean if an assessee gives a false account of fact leading to an under-reporting of income, such misrepresentation shall amount to misreporting. Whereas, suppression is defined to cover "the act of preventing something from being seen or expressed or from operating." Thus, when an assessee fails to disclose or hides necessary facts, which leads to under-reporting of income, such suppression shall also amount to misreporting.

   Similar terms have been used under the excise law, for penalising wilful evaders. The terms therein are clearly qualified by the word "wilful". Thus, under the excise law a mere omission to give correct information is not suppression of facts unless it was deliberate or wilful with intent to evade the payment of duty. The words "wilful", "deliberate" or "intentional" are missing from the scheme of Section 270A. On a plain reading, therefore, a mere fact that under-reporting has arisen out of misrepresentation or suppression of facts is sufficient for levy of a weighted penalty.

   A misrepresentation can be bonafide as well as intentional. An intentional misrepresentation is usually termed as "Fraud". Moreover, misrepresentation is a positive act of providing information tainted with error or deception.

In an event where the explanation is bonafide but is ripped by erroneous or non-disclosure of certain facts, the same would fall into the clutches of Section 270A. It would not be difficult to deem it as misrepresentation or suppression, especially when the word "wilful" is missing.

   By its very nature, a misrepresentation should be wilful else there would be no distinction left between Under-Reporting (*Simpliciter*) and Under-Reporting (*Misreported*). The clause (6) of Section 270A exempts only a situation where the assessee's explanation is bonafide and he has disclosed all material facts. Thus, in an event where the explanation is bonafide but is ripped by erroneous or non-disclosure of certain facts, the same would fall into the clutches of Section 270A. It would not be difficult to deem it as misrepresentation or suppression, especially when the word "wilful" is missing.

   This is going to be the most litigated clause of the entire section and it would also grant the maximum discretion to an officer while levying penalty. The generic nature of the terms used in this clause, has left the simple cases of under-reporting and the complex ones of misreporting, demarcated by a thin line which could go either way for an honest tax payer.

b. Failure to record investments in the books of account: A failure to record an investment, *ipso facto*, does not lead to under-reporting. However, if the investment is made out of unexplained sources, in such cases a failure to record could be fatal. Such unexplained investments are covered by provisions of Section 69/69B of the Act and also taxable at a special rate under Section 115BBE. This clause, however, would not apply to cases where there is no requirement to maintain books of accounts. Now, whether an assessee not required to maintain books could walk away scot-free? The answer would be a clear no, as in such cases the assessee would still continue to be covered by the clause of misreporting or suppression of facts.

c. Claim of expenditure not substantiated by any evidence: The Supreme Court in *Reliance Petroproduct (supra)* has held that a mere making

[3] *Cambridge Advanced Learner's Dictionary & Thesaurus*

of the claim, which is not sustainable in law, by itself, will not amount to furnishing of inaccurate particulars regarding the income of the assessee. However, there is a difference between unsustainable claim and unsubstantiated claim. It would amount to misreporting if any claim of expenditure is made without any evidence. Evidences are required to prove the facts. If facts are not proven, a claim would be disallowed and would lead to under-reporting. Such unsubstantiated claims made by an assessee would be tantamount to misreporting and a weighted penalty.

d. Recording of any false entry in the books of account: There are occasions when the assessee is found to have indulged into accommodation entries, hawala purchases and other kind of cooking up of books so as to manipulate income. Such false entries are made with a specific intent to evade tax. The clause applies only in cases where the assessee has maintained books of accounts. This clause takes care of additions made under Section 68 of the Act.

e. Failure to record any receipt in books of account having a bearing on total income: A taxable receipt, if left to be recorded, would have a direct impact on the total income of the assessee. Thus, any failure to record receipt is classified as misreporting. The clause would be ineffective in cases where the assessee has recorded receipts in books of accounts, but has not offered it to tax for any other reason.

f. Failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply: The sub-clause (d) of Section 270A(6) provides for exemption from penalty for under-reporting arising out of the computation of ALP by the TPO. However, the exemption is available only if proper records are kept and the transactions are duly substantiated and disclosed. If there is a failure to report an international or a specified domestic transaction, it shall be deemed to be a case of misreporting.

It is for the competent authority to bring on record that the under-reported income is a consequence of misreporting. It should squarely fit in any of the six situations so discussed. Unless that is the case, an under-reporting cannot amount to misreporting by an assessee. It is specifically clarified that the exemptions from levy of penalty as provided in Section 270A(6) shall not be available in cases involving misreporting.

Quantum of Penalty on Under-Reporting Amounting to Misreporting [270A(8)]

200% of the amount of tax payable on under-reported income computed as per Section 270A(3).

The cases of misreporting are grave and thus the penalty prescribed by the Act is also higher than the penalty prescribed for simple cases of under-reporting.

Partial Under-Reporting Under Both the Classifications

There may be a situation where the AO concludes under-reporting on multiple issues. Some of the issues are simple cases of under-reporting while the others arise out of misreporting. In such cases, the AO may levy penalty under both the classes to the extent of under-reported income under those classes.

Let's say the AO has made a total addition of ₹200,000 on two counts. The additions amounted to under-reporting with only one addition of ₹100,000 arising out of misreporting by the assessee. In such a case the AO may direct payment of penalty u/s. 270A. The quantum of such penalty, if the rate of tax is assumed @ 30.90% shall be as under:

Classification of Under-reporting	Amount of Under-Reporting as per 270A(3)	Tax on Under-Reported Income as per 270A(10)	Quantum of Penalty u/s. 270A(7)/(8)	Amount of Penalty
On under-reporting *simpliciter*	₹100,000	₹30,900	50%	₹15,450
On under-reporting amounting to misreporting	₹100,000	₹30,900	200%	₹61,800
			Total Penalty	**₹77,250**

Double Jeopardy [270A(11)]

The new scheme specifically clarifies that no penalty shall be imposed on an item of addition or disallowance, if based on such addition or disallowance a penalty has already been imposed,

The penalty shall be imposed, by an order in writing, by the competent authority. The procedure and limitation for imposition of penalty under this clause shall continue to be governed by the provisions of Section 274 and 275 respectively.

in the case of the person, for the same or any other assessment year. This is a welcome clarification for AOs. So at least now no man shall be penalised twice, for the same cause.

Written Order [270A(12)]

The penalty shall be imposed, by an order in writing, by the competent authority. The procedure and limitation for imposition of penalty under this clause shall continue to be governed by the provisions of Section 274 and 275 respectively.

However, the exemption from the imposition of the penalty provided by Section 273B (where assessee proves reasonable cause for failure) is not available for penalty levied u/s. 270A. The Act has fortunately made arrangements to grant immunity from penalty and prosecution, subject to fulfillment of certain conditions.

Immunity from Penalty & Prosecution [270AA]

The immunity from penalty under Section 270A and prosecution under Section 276C and Section 276CC is available for all cases of under-reporting. The immunity for under-reporting amounting to misreporting is subject to the discretion of the Assessing Officer. The immunity for penalty of under-reporting (*simpliciter*) is subject to fulfillment of certain conditions:

Pre-requisites for immunity [270AA(1)]

1. The assessee should pay 100% of the demand, including interest, and
2. The assessee should not file an appeal against the order of assessment or reassessment, as the case may be.

Application for immunity [270AA(2)]

If the pre-requisite conditions are met, the assessee can make an application to the AO in prescribed form (Form 68 is prescribed vide *Notification No. 90/2016 Dt. 05.10.2016*), within 1 month from the end of the month in which the order of assessment or reassessment is received by the assessee.

Compulsory immunity [270AA(3)]

The AO shall grant immunity in all the cases of under-reporting (*simpliciter*) if the pre-requisite conditions are met and the application is made before the AO in time. There is no option for the AO but to grant immunity in such cases.

However, in cases of misreporting the AO shall have the discretion to either accept or reject the immunity application, even if both the pre-requisites are met. Such discretions breed corrupt practices and harassment for taxpayers. Instead of providing discretion, a compulsory reduction of the amount of penalty to 25%, like under the excise law, would have been a wonderful solution.

Time limit for passing immunity order [270AA(4)]

The AO shall pass an order accepting or rejecting the immunity application within a period of 1 month from the end of the month in which such application is submitted by the assessee.

Rejection of immunity application [Proviso to 270AA(4)]

No order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard. Once the application is rejected, the department could not only recover penalty, but could also initiate prosecution proceedings u/s. 276C and 276CC, if applicable.

Finality of order [270AA(5)]

The sub-Section (5) of Section 270AA is extremely intimidating. It gives divine powers to the AO in cases classified as misreporting. The Section 246A dealing with appealable orders has not been amended to cover orders under Section 270A as well as Section 270AA. This might have certainly happened due to oversight, but by any probability if it is intentional, then the department wants to be a party to a lot of writ petitions.

An amendment made without a paradigm shift, not only unsettles the existing law, but also becomes a breeding ground for fresh controversies. The provisions of Section 270A and 270AA is a mirage created in the name of rationalisation of tax provisions. The manner in which both the sections are drafted, one would wonder if the provisions are really inserted to put an end to all the litigations. It is only a matter of time that we would see some more of amendments, provisos and explanations being inserted to plug the gaps left while drafting of the new sections. ■