

## How Section 270A Carved Out So Far...

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Section 270A of the Income Tax Act, relating to penalty on addition made by AO upon finalising assessment proceedings was introduced by Finance Act 2016, hence the provision has elapsed 8 years which is generally a shorter span to be tested on different judicial floors. The carving of provision so far has been considered in some of the judicial pronouncements however honourable Supreme Court has yet to consider any major landmark judgement on the provision. Hence, it would imperative to discuss how the provision is interpreted by various Tribunals and honourable High Courts so far. Let us discuss some of facets of provisions:

**1) Penalty is mechanically automatic or reasonable cause can dilute it:** Before insertion of section 270A, the penalty on concealment of income was governed by provisions of section 271(1)(c) of the Act which contained specific provision by way of Explanation 1 that the penalty would be levied if the person fails to explain or could not substantiate explanation or without bonafide reason for not including income in return of income and detected by AO. Explanation 3 of the erstwhile section also states that if the person without reasonable cause fails to furnish return, shall be subject to penalty if income is detected by AO. Hence, the earlier provisions of section 271(1)(c) were subject to reasonable cause and bonafide reason before levy of penalty on concealed income or inaccurate income reported by Tax Payers.

On the other hand, sub-section (6) of section 270A contains some of the exceptions whether it can be immune by a bonafide reason or a reasonable cause for not furnishing income in the tax return or furnishing inaccurate particulars thereof. The said immunity is further available in cases of under-reported income (not misreported income) under section 270AA of the Act at the discretion of the AO as per conditions covered by the said section. Let us consider some of the facets of immunity under section 270AA as below:

**a) Time Limit for application:** One of conditions of Section 270AA is to make application for immunity within 30 days of the order passed by the AO. However, in case of **Nirajita Mitra** [\[TS-483-ITAT-2023\(HYD\)\]](#) Hyderabad ITAT directs CIT(A) to adjudicate Assessee's application under Section 270AA for immunity from penalty despite being filed beyond the stipulated period of 30 days. Section 270AA(4) clearly casts a duty on the AO to mandatorily pass order accepting or rejecting such application even if the application is filed belatedly and even CIT(A) is empower under Section 249(3) to condone the delay. Tribunal remarked *"the power of condoning the delay vests with all the quasi-judicial authorities and judicial authorities in case a reasonable cause has shown by the Assessee for not filing the requisite application within the period provided under the Act..... the whole*

*purpose of granting the immunity to the Assessee is to give quietus to the litigation in case Assessee accepts and pays due taxes....”.*

**b) Whether mentioning Mis-reporting of income can debar assessee for claiming immunity:** In case of **Schneider Electric South East Asia (Hq) Pte Ltd** [\[TS-226-HC-2022\(DEL\)\]](#) the honourable Delhi High Court observes that entire edifice of the assessment order was voluntariness to buy peace and avoid litigation which Revenue noted and accepted in the assessment order, thus, there was no question of ‘misreporting’. Notes revenue’s stand contrary to the legislative intention behind Section 270AA which is to encourage or incentivize a taxpayer to: (i) fast-track the settlement of issue, (ii) recover tax demand; and (iii) reduce protracted litigation.

In case of **Chambal Fertilizers and Chemicals Ltd. V. PCIT** [\[TS-16-HC-2024\(RAJ\)\]](#), GST Input Credit was mistakenly merged with expenses and same was suo motu surrendered by assessee by revising return, however revenue imposed penalty under section 270A. The assessee filed immunity under section 270AA which was rejected. The HC held that since revenue wasn't sure whether it was a case of misrepresentation or suppression of facts or claim of expense sub-clauses (a) and (c) of section 270A(9) were not attracted and, thus, assessee was to be granted immunity under section 270AA. Aspect of merging GST Input Credit with expenses was not pointed out/detected by the Revenue and same was only pointed out voluntarily by petitioner, hence sub-clauses (a) and (c) of section 270A(9) were not attracted. Therefore, penalty orders were to be set aside and revenue was to be directed to grant immunity to assessee under section 270AA.

Considering the above, unless the revenue astringents operation of Section 270AA by way of amendment, Section 270AA seems to be muted by the judiciary in coming times and will give considerable relief to the tax payers.

## **2) Bonafide mistake and reasonable cause :**

**a) Reasonable Cause and Bonafide case:** Following are gist of some of the judicial pronouncements whereby the penalty is deleted on account of bonafide reason or reasonable cause for not offering correct income to tax:

In case of **Parulben Vijaykumar Patel v. ITO [2024] (Ahmedabad - Trib.)**, the honorable ITAT noted that the assessee did not filed return of income under a bona fide belief that since entire transaction of sale of property had been correctly reported in Form No. 26AS, there was no further requirement to file return of income and disclose such transaction in return of income, hence it could not be said that assessee had intention to misrepresent or suppress any facts. It would be a different matter if the Department would have alleged that there was a difference/mismatch between the sale consideration as reflecting in Form No. 26AS on which TDS has been deducted and the actual sale consideration which had been received by the assessee.

In case of **Jaibalaji Business Corporation (P.) Ltd. v. [2023] (Pune - Trib.)**, the Tax Payer had sold land at a price less than stamp duty value and on receipt of report from DVO, rectification order was passed and additions were made on basis of difference between value declared by assessee and value determined by DVO. Since the difference between value determined by assessee and by DVO was minimal, additions made on basis of estimation could not be foundation for under-reported income for purpose of imposition of penalty under section 270A.

In case of **Ravindra Madhukar Kharche v. ACIT [2024] (Nagpur - Trib.)**, The tax payer had claimed higher exemption of for Gratuity under the belief to be a Government Servant. The honourable Tribunal held that the explanation offered by the appellant in support of his mistaken but bonafide belief and disclosed all material facts of his service and the circumstance which swayed to claim full exemption in his ITR squarely falls within clause (a) of sub section (6) of section 270A, therefore pardonable and finally, the imposition of penalty is at the discretion of the Assessing Officer, since sub section (1) of section 270A, refers to the word 'may' and not as 'shall'. However, the tax authorities below failed to appreciate the facts and circumstance of the present case holistically and further in right spirit of law, but dealt therewith without application of mind and perfunctory imposed / confirmed the penalty at the accelerated rate of 200 per cent under section 270A in unwarranted case.

In case of **Kavita Jasjit Singh [TS-606-ITAT-2023(Mum)]** Mumbai ITAT deletes the penalty under Section 270A over non-disclosure of interest on tax refund in the return of income where the Assessee had neither received the refund nor was intimated regarding the refund at the time of filing of return. Revenue argued that interest was offered since case was selected in scrutiny however assessee contended that case was selected for limited scrutiny of examining foreign assets, hence not disclosed due to only scrutiny proceedings. The honourable Tribunal opines that, *"the explanation of the assessee for not offering the interest on income tax refund while filing its return of income is bona fide, and thus, the non-declaration of interest on income tax refund cannot be said to be under-reporting of income by the assessee within the meaning of section 270A"*.

**b) Voluntary surrender before detection by AO:** In case of Jaypee Cement it has been held that if the Assessee voluntarily surrenders the income or addition during assessment, it can resort to the reasonable cause theory and immunity can be given directly from section 270A for levy of penalty. **Jaypee Cement Corporation Ltd. [TS-562-ITAT-2023(DEL)]**: During assessment proceedings, assessee surrendered deduction under Section 32AC be restricted to 15% as the same was inadvertently claimed at 100%. Assessee made this submission after the third notice under Section 142(1) was issued whereby the Assessee was required to furnish complete tax audit report along with annexures whereas in prior two notices contained no query on Section 32AC deduction. ITAT observes that the Revenue is bound to bring on record whether: (a) assessee underreported the income as per Section 270A(2), (b) whether assessee misreported the income as per Section 270A(9), (c) whether assessee's explanation falls under any of the exceptions provided in section 270A(6), and (d) whether assessee underreported the income in consequence of misreporting of income to be attracted higher rate of penalty under Section 270A(8). ITAT holds that Assessee voluntarily withdrew excess claim of deduction before Revenue detected it, hence, the case would squarely fall under the exception under Section 270A(6)(a) since the Assessee gave a bona fide explanation and disclosed all the material facts relevant for the explanation.

**c) Conflicting Judgements a reasonable cause:** In case of **IBM Canada Limited [TS-375-ITAT-2024(Bang)]**, the assessee had bonafide belief for not offering the reimbursement cost of salary of seconded employees originally, but voluntarily offered the same to tax later on. The honorable ITAT observed that the assessee at all material times have disclosed secondment receipts in its Form 3CB and also gave explanations for not offering the said receipts for taxation, thus finds Assessee's conduct to be bonafide and cannot be construed that Assessee have concealed any material facts from the Revenue authorities or furnished inaccurate particulars of income. Further holds that Assessee's doubt with regards to taxability of the impugned receipts is bonafide in light of the

conflicting judgments of the High Courts, being Delhi HC Judgment in [Centrica](#) (which ruled against the Assessee and held that the reimbursement of seconded employees salary is taxable) and Delhi HC judgment in [HCL infosystems](#) and Jurisdictional HC judgment in [Abbey Business services](#), which ruled in favour of the Assessee. Considering the same penalty order was quashed.

**3) Mens rea essential?:** Under the regime of previous penalty proceedings under section 271(1)(c) of the Act, there was considerable debate amongst judicial floors regarding whether Mens rea or existence of guilty state of mind is pre-requisite for levying of penalty. The landmark judgements in case of Dharmendra Textile, Dilip Shroff and Reliance drew line of majority of the submissions before authorities and courts. Considering the limited touch of section 270A with the judicial forum, the test of mens rea has not been extensively conducted for the section. However in case of **Saltwater Studio LLP** [\[TS-300-ITAT-2023\(Mum\)\]](#), the honorable Mumbai Tribunal has noted that Section 270A(9) refers to 6 distinct instances which can qualify underreporting as a consequence of misreporting and Section 270A(9) can be applied only where there is mens rea as can be deciphered from the instances of misreporting of income as given in sub-section (9). Holds that *“Since AO failed to bring the addition/disallowance he made in quantum assessment, under the ken of (a) to (f) of the sub section(9) of section 270A of the Act, the penalty levied for misreporting @ 200% cannot be sustained because it is trite law that penalty provisions have to be strictly interpreted.”* Accordingly, ITAT refers to the provisions of Section 270A and observes that the Section gives discretion to the AO to levy or not levy penalty as the Parliament has not used the word ‘shall’ and by using the word ‘may’ in Section 270A(1), it conveys the intention of the Parliament that penalty under Section 270A is not mandatory.

Further, in case of **Bagaria Trade Impex** [\[TS-803-ITAT-2022\(JPR\)\]](#), ITAT holds that mere underreporting of interest income against against which TDS was also not claimed cannot be considered as wilful misreporting to levy Section 270A penalty given the fact that no loss was caused to the Revenue and the intention does not demonstrate evasion of tax. The allegation made by Revenue cannot be termed as misrepresentation or suppression of facts to levy penalty and Assessee did not claim TDS against the undeclared interest income which appears to be bonafide mistake as the Chartered Accountant of Assessee was not able to detect this fact during audit.

Hence, it be concluded that mens rea seems to essential to be satisfied before levying of penalty for misreporting of income whereas penalty for under-reporting of income seems to be much automatic subject to reasonable cause theory.

**4) Misreporting v. Underreporting:** A question would arise whether penalty proceedings held to be in nature of Misreporting can be litigated to underreporting and obtain the benefit of immunity. Couple of judicial pronouncements has held that under considered circumstances the penalty can be considered as underreporting and not misreporting:

In case of **G R Infraprojects Limited v. ACIT** [\[TS-17-HC-2024\(RAJ\)\]](#), the Tax Payer had claimed education cess on Income Tax as deduction relying on the judgements of **Chambal Fertilisers and Chemical Ltd. vs. JCIT** [\[TS-489-HC-2018\(RAJ\)\]](#) and **Sesa Goa Limited v. JCIT** [\[TS-163-HC-2020\(BOM\)\]](#). The said issue was overturned by insertion of Sub-section (18) of Section 155 of the Income Tax Act via the Finance Act, 2022, under section 40(a)(ii). The AO made addition and levied penalty for mis-reporting of Income at the rate of 200% of Tax. The Tax Payer filed the writ petition before the honourable Rajasthan High Court which emphasized that when a controversy is purely legal and does

not involve a disputed question of fact but only a question of law, it should be decided by the High Court rather than dismissing the writ petition on the grounds of an alternative remedy. The Court highlighted that the AO failed to specify the applicable part of sub-section (9) of Section 270A in the assessment order and subsequent notices. The Court also noted that the application filed by the petitioner-company under Section 270AA seeking immunity from penalty imposition has not been decided within the prescribed time as per sub-section (4) of Section 270AA. Hence, quashed penalty.

In case of **Prem Brothers Infrastructure LLP [TS-445-HC-2022(DEL)]**, Delhi HC quashes penalty order passed under Section 270A by holding that underreporting of disallowance under Section 14A did not amount to misreporting as all the relevant details were duly furnished by the Tax Payer. Revenue and the Assessee used the same details to arrive at different conclusions i.e. differing quantum of disallowances under Section 14A, thus holds that lower disallowance under Section 14A would not amount to misreporting.

**5) Notice to specify under which head penalty is proposed:** As we have seen considerable controversy in Section 271(1)(c) regarding exact nature of penalty proposed to be initiated, the same issue has been prevalent in section 270A also.

In case of **GE Capital Us Holdings Inc [TS-381-HC-2024(DEL)]**, HC notes that Revenue has failed to allude to specific charge of misreporting or under-reporting in show cause notice. Court states AO's failure to record specific findings in the Assessment Order "*which may be viewed as indicative of the contingencies spelt out in clauses (a) to (f) of Section 270A(9) being attracted..... The order of assessment as well as the SCNs' clearly fail to meet the test of "specific limb" as propounded in Minu Bakshi and Schneider Electric*". Relying on SC judgment in Puri Constructions HC emphasizes importance of clarity and comprehensiveness in issuing notices hence quashes penalty proceedings under section 270A as well as immunity proceedings under section 270AA of the Act.

In case of **Enrica Enterprises Pvt. Ltd [TS-369-ITAT-2024(CHNY)]**, The Tribunal held that "*In absence of proper notice, which is mandatory, the AO cannot impose penalty, because, it is a clear violation of principles of natural justice, because, issuing a vague notice without specifying the charge under which limb the proposed penalty proceedings is initiated, would vitiate the entire proceedings, because, the assessee was not given an opportunity to explain its case on specific charge*". Relies on SC judgment in **SSA's Emerald Meadows, Madras HC judgment in Babuji Jacob, Karnataka HC in Manjunatha Cotton & Ginning Factory, Delhi HC judgment in Prem Brothers Infrastructure** wherein it was held that in view of vague notice without any whisper as to which limb of section 270A is attracted and how ingredients of Section 270A(9) is specified, initiation of penalty under Section 270A for 'misreporting of income' is not only erroneous, but also arbitrary and bereft of any reason and consequently, penalty order, cannot be sustained.

**6) Notice of underreporting and penalty for misreporting:** Many a times it happens that the AO might have issued notice for underreporting and the penalty is finally levied for misreporting. Considering the situation, in case of **Mohd. Sarwar [TS-260-ITAT-2024(HYD)]**, it is held that "*If at all, the Revenue authorities are intending to charge the assessee for misreporting of income, the specific notice is required to be issued, which has not been done in the present case..... once the assessee himself admitted the fact that there was under-reporting of income which was also accepted by the Assessing Officer then the penalty should have been levied only on account of under reporting of income and not for mis-reporting of income*". Consequently, the honorable ITAT holds that

when the finding in the assessment order is that there was under-reporting of income and even the notice proposing to levy penalty under Section 270A was on the same ground, revenue was not justified in passing penalty order on the ground of misreporting of income.

In the light of the above set of litigation it is clear that before initiation of the penalty proceedings under section 270A, it is essential to differentiate whether it is underreporting of income or misreporting if income. Further, sou moto surrender of claim by the person at the time of assessment or by filing revised return before being noticed by AO, the penalty under section 270A is not justified. However, as stated above, there is no landmark judgement of Supreme Court on this aspect, till then such controversy will continue. We further hope to carve out the penalty proceedings by judiciary in more positive manner which can strike balance of penalizing assessee and understanding genuine bonafide cases.