

# A Draconian Penal Provision: - Critical Analysis of Section 271AAD of Income Tax Act, 1961 introduced by Finance Act, 2020

## **Introduction**

This section was inserted by Finance Act, 2020 relating to penalty for false entry or omission of entry in the books of accounts. This section belongs to the family of penalty and is part of chapter XXI of Income Tax Act, 1961. The penalty u/s 271AAD can be imposed parallel with other penal provisions of Income Tax Act, 1961. The rationale behind the amendment was to stop fake invoices and other mal-practices and the same has been explained in the memorandum clause 98 of Finance Bill, 2020. The Hon'ble Finance Minister in her speech at para 6.8 has also stated that "*To discourage taxpayers to manipulate their books of accounts by recording false entries including fake invoices to claim wrong input credit in GST, it is proposed to provide for penalty for these malpractices*". There was a parallel amendment in CGST Act by inserting a sub-section (1A) to section 122.

**1. Applicability: -** There is one set of provisions in the Act which govern the computation of total income and any change in law will be in respect of the assessment year beginning with that date or thereafter. It is also trite law that penalty is to be levied as per the law as on the date of default. For applicability of penalty provisions, it is pertinent to see what is the default for which penalty is being levied and when such default may be said to have been committed. This section 271AAD having been made effective from 01/04/2020 and as such, is applicable from A.Y. 2021-22. The said section cannot be applied for the defaults committed before 31/03/2020 and as such can only be applied for the defaults committed on or after 01/04/2020. The clause 98 related to section 271AAD is in contrast to other clauses to memorandum as made by finance bill 2020, say Clause no.4, which is related to section 6 of income tax act 1961, with effect from 1st April, 2021 and will apply in relation to A.Y. 2021-22 and subsequent years. Thus, it is important to note that whenever a legislature wanted a particular date, in that case, the section provides the date and it means beginning of the assessment year. However, it is important to note that in section 271AAD, there is no such prescription. However, at the bottom, it has been mentioned that this amendment is applicable from 01st April, 2020, which clearly indicates that the said section will be applicable for the defaults committed on or after 01/04/2020 under the specified circumstances. Furthermore, the penal provisions cannot be applied retrospectively and can only be applied prospectively.

## **2. Applicability of Section 271AAD vis-a-vis other penalties in Income Tax Act,1961**

The provision sub-section 1 starts with the phrase "**without prejudice to any other provisions of this act**" which means that penalty u/s 271AAD can be imposed along with any of the penalty as mentioned in the Chapter XXI, such as, Section 271AAB, Section 270A, Section 271AAC, etc. Therefore, the intent of law is that the penalty u/s 271AAD shall be levied irrespective of the fact that such transactions have been taxed at normal rate or at higher rate (Sec 115BBE) or penalty was levied under some other section. The assessee will be precluded from taking the shelter of double jeopardy even if prosecution has been initiated against such person for the defaults as prescribed under section 271AAD. The penalty u/s 271AAD is not a penalty on one person but a penalty on all the parties involved in such mal-practices. The penalty u/s 271AAD is in respect of false entry or omission of entry which may or may not lead to tax evasion. But the intent of law to punish the act of use or intention to use fake or fabricated invoices.

3. **"During any proceedings under this Act" Section 271AAD(1)**

➤ The section clearly states that if the AO finds any such default, he may levy the penalty only if such default is identified **during proceedings under the act** that means it can be assessment, re-assessment, search, survey or other proceeding under the act. The other proceedings under this act will cover proceedings u/s 131, 131(1A), 133A, 133(6) and appellant proceedings, whether related to Income Tax matter or TDS matter. For instance, if the authority (CIT-Appeal) find such default during appellate proceeding before him then in such situation, the authority would refer the case to the concerned AO for invoking provision of section 271AAD, as the power of CIT is coterminous with that of AO and the **section 271AAD gives power to the AO** therefore, the authority will refer the matter to the concerned AO. The word used in the section is proceedings under this act, which clearly states that the AO may levy penalty without waiting for any information from other departments. The only thing is that there must be proceedings under this act for person covered in section 271AAD. There can be situation that proceeding is in progress before GST authority and the question arises that can AO levy the penalty u/s 271AAD in the absence of pending proceeding. The AO after assertion and satisfaction that of any malfeasances that books of accounts contain false entry or omitted entry then the penalty proceedings u/s 271AAD can be initiated subject to proceedings under the Act

➤ **Question which will lead to litigation is whether AO can levy penalty U/s 271AAD without assessment.**

- **Opponent View 1**:- As per different views, there should be proceedings (i.e. assessment proceedings) going on in case of assessee, the said interpretation is being made by relying on the decision of Apex Court in case of CIT versus Jai Laxmi Rice Mills [TS-5083-SC-2015-O], "No penalty can be levied or initiated until there is an assessment proceedings and satisfaction shall be recorded in an assessment order to levy the penalty".
- **Opponent View 2**:- This issue will depend on the facts of the case where there is false entry or omission of entry. The word false entry is not related to phrase "**evade tax" as used in section 271AAD(1)(ii)** (as explained in detail in succeeding paragraphs), and as such, in that case the word proceeding is to be read in wider terms and it can be done by AO even without making assessment. Whereas, if the defaults are related to **omission of entry, in that case there must be evasion of tax** and therefore the AO cannot invoke section 271AAD without making assessment. The said issue has to pass the test of judiciary therefore clarification is required on this issue in order to avoid litigation.
- **Author View**:- As provision penalty u/s 271AAD is a penal provision and is to be read in strict sense. As per the author the penalty u/s 271AAD, is De Hors assessment. Thus, penalty u/s 271AAD can be levied even if no assessment proceeding is pending in case of assessee. There is no doubt that while arguing the case before appellate authority the ground that penalty cannot be initiated until there is an assessment proceedings and satisfaction can be relied upon.

4. **The section 271AAD provides levy of penalty in respect of defaults committed by different persons**

- For an Instance, DDI has issued a summon u/s 131(1A) to Mr. X and in the statement Mr. X has admitted that he has taken false entry in respect of fake invoices from the entry operator Mr. Y. In the given case, the AO of Mr. X can proceed to initiate penalty proceedings u/s 271AAD (1) on Mr. X and can also impose penalty under 271AAD (2) on Mr. Y. On the other there is contrary view that competent authority to levy final penalty on other person in section 271AAD (2) is jurisdictional AO of such other person in section 2(7A) of the Act and not AO of main person in section 271AAD (1) although this issue is debatable from both sides. As per the author the AO of the main person can levy penalty on 'other person' in section 271AAD and the same gets support from section 274(3).
- Continuing the above example in practical scenario the AO of Mr. X will hand over all the information collected against Mr. Y to the AO to MR Y. In that case, the AO of Mr. Y can impose penalty in respect of all the fake invoices issued to Mr. X or other persons provided no penalty was levied by the AO of Mr. X in respect of fake invoices issued by Mr. Y to Mr. X. Alternatively, the AO of Mr. X can levy penalty on Mr. Y u/s 271AAD (1) for the invoices issued to Mr. X and handover other information regarding the invoices issued by Mr. Y to other parties. In this situation, the AO of Mr. Y will invoke penalty of all the fake invoices issued by Mr. Y to other parties except Mr. X. The AO of Mr. X will issue notice u/s 274(1) (opportunity of hearing and after confronting the material in support of the allegation) to Mr. Y in respect of transaction related to X and after passing an order shall send a copy of such order to the assessing officer of Mr. Y u/s 274(3). Section 274(3) deals with a situation where penalty is levied by the income tax authority who is not the AO of the assessee. The power to levy penalty will be subject to the procedure of law u/s 127 of the Act.
- There can be a situation that the department is able to locate an entry operator say Mr. Z, the AO of Mr. Z will invoke penalty on Mr. Z only for all the fake invoices issued by Mr. Z. Furthermore, the AO of Mr. Z will pass on the information to AO's of all the concerned parties whosoever has taken billing from Mr. Z. Their respective AO's will invoke the penalty in that case.
- There can be a situation where the assessment in the case of a person (say X) is completed without any adverse findings. Later on, during the course of assessment of Mr. Y it was noticed that Mr. X has taken fake invoices from Mr. Y. In this situation the AO of Mr. X will invoke penalty u/s 271AAD (1).
- There can be a situation that the penalty levied on a person was succeeded in appeal and penalty u/s 271AAD (1) is quashed. Now the question arises whether the relief based on the outcome of appeal of a person will be available to "other person" as referred in section 271AAD (2). The premise of section 271AAD (2) is only dependent on the person referred in section 271AAD (1). Therefore, what will be the position of penalty of 'other person' in such case? The provisions of section 275(1A) are applicable only on the same person proceeding and as such no benefit to other person. In the author's opinion a suitable amendment is required to be made in order to avoid multiplicity of appeal.

4.1 **Ingredients to be specified in notice issued U/s 274**

The show cause notice to be issued u/s 274 of the Act before levy of penalty in section 271AAD by AO should contain the relevant ingredients. Therefore, if any ingredient is missing that is any jurisdictional fact is lacking, the same may be countered as without authority of law and it may be appropriately challenged in appeal proceedings. Even precise charge of penalty in section 271AAD whether for false entry or omitted entry must be clearly spelt item wise in show cause notice.

5. **Defaults can be identified for any year during the proceedings under the Act.**

It is possible that the AO while making assessment for a particular year finds that the assessee has taken a fake invoice for earlier year. In that case the question arises whether the AO can levy the penalty for the earlier year by giving direction for payment of penalty? To illustrate, during the course of assessment proceedings for AY 2024-25, the Assessing Officer finds that a false entry is made in AY 2021-22. Whether the Assessing Officer can initiate penalty proceedings under Section 27AAD for Assessment 2021-22. The text of the provisions does appear to bestow such wide powers on the Assessing Officer. The Board must pass suitable circulars/instructions clarifying the scope of this new provision and the manner and circumstances in which the tax officer should be exercising such extraordinary powers. This would help in smooth administration of the provisions and in avoiding unnecessary litigation.

6. **False entry or omission of entry is found in the books of account maintained by any person**

The plain reading of section states that the penalty u/s 271AAD (1) will not be invoked if books of accounts are not maintained. Now there can be various possibilities:-

<b><u>Situation</u></b>	<b><u>Particular</u></b>
1	Books of account are not maintained
2	Assessee is filing return under presumptive taxation.
3	Books of account are rejected u/s 145(3)
4	A person being a racketeer only issuing invoices and not maintaining books of account
5	Deletion of invoices from the books of accounts
6	Whether the transaction amount will include GST element

**Situation 1: Books of accounts are not maintained**

- The section 44AA provides the maintenance of books of account by certain person carrying on profession or business. It is important to note that the section 271AAD (1)

uses the word books of account maintained and not the word requires to be maintained. Therefore, penal provision u/s 271AAD (1) cannot be triggered if no books of accounts are maintained.

- There are separate penalties for non-maintenance of books of account which will be imposed i.e. u/s 271A. Further, a penalty u/s 271B for not auditing books of account is also prescribed under the income tax Act. In various judgments (**322 ITR 86**) it has been held that the penalty u/s 271B shall not be levied if books of accounts are not maintained. The courts have taken a stand that it is a clearly a case of impossibilities of performance where it is expected that the assessee should get his books of account audited when it is known that there are no regular books of accounts. Keeping in view the said interpretation the same can be applied here that no penalty u/s 271AAD could be levied where no books of account are maintained. The books of accounts can't be assumed by AO to levy penalty in section 271AAD. Therefore, if there are no books of account and penalty u/s section 271A for non-maintenance of books is levied then penalty of section 271AAD might not survive or exist.

#### **Situation 2: Assessee is filing return under presumptive taxation**

- The assessee was not required to maintain the books of accounts as he/she is opting for a presumptive scheme. Now the big question arises whether such persons filing return under presumptive scheme and are indulged in supply or receipt of fake invoices can be penalized u/s 271AAD. The answer to this question will depend upon the circumstances and facts of each case. It is important to note that the schedule OL in ITR 4-Sugam requires the assessee to fill some optional fields and if such fields are filled then in that case it will be presumed that the assessee is maintaining books. The Schedule OL is reproduced for ready reference.

SCHEDULE OL		
PARTICULARS	CODE	AMOUNT
Partners/ Members own Capital	E11	
Secured Loans	E12	
Unsecured Loans	E13	
Advances	E14	
Sundry Creditors	E15	
Other Liabilities	E16	
Total Capital & Liabilities (E11-E16)	E17	
Fixed Assets	E18	
Inventories	E19	
Sundry Debtors	E20	
Balance with Banks	E21	
Cash-In-Hand	E22	
Loans & Advances	E23	
Other Assets	E24	
Total Assets (E18-E24)	E25	

<b>Particulars</b>	<b>Remarks</b>
Minimal records to identify turnover, Gross profit, Net profit, Debtors and Creditors.	Penalty u/s 271AAD will be imposed.
The turnover required u/s 44AAD is calculated by considering fake invoices.	Penalty u/s 271AAD will be imposed.

However, the opposite view is that the word maintained after books of account is of crucial importance and has to be read in strict sense. But, at this stage it is very difficult to say till the same passes the test of judiciary.

**Situation 3: Books of account rejected u/s 145(3) or Books of account not rejected during assessment even in the case of fake invoice.**

The penalty u/s 271AAD (1) will be imposed whether books of account rejected or not if during the course of assessment proceedings. Therefore, the assessee cannot take the shelter that once the books of account are rejected u/s 145(3) are not books and as such, provision of section 271AAD cannot be imposed. The word as used in section 271AAD(1) is the books of accounts maintained as such the provision of section 271AAD will be applicable even if the books of account were rejected by the AO during assessment proceedings. The second situation is that there were fake invoices and the AO made the addition without rejecting the books of accounts in that case also penalty provision u/s 271AAD will be applicable .

**Situation4: A person being a racketeer only issuing invoices and not maintaining books of accounts**

The racketeers will be liable to penalize u/s 271AAD (2) as in that case such person have      Caused the other person as referred in section 271AAD (1) to make a false entry or caused to omit. There can be a situation that the racketeer is maintaining books of accounts, then in that case the penalty can be levied u/s 271AAD(1) or under 271AAD(2) depending on the facts of the case.

**Situation 5: Deletion of invoices from Books of accounts**

The same has been discussed in detail in the subsequent para no.10

**Situation 6:-Whether the transaction amount will include GST element**

The text used in section 271AAD is a sum equal to the aggregate amount of such false or omitted entry therefore, one food for thought is that the penalty as per section 271AAD shall include GST

element also. But logically, there should be no penalty on tax element but the section uses the word aggregate amount, therefore clarification is needed on this part.

7. **Whether it is compulsory that penalty on account of false entry or omission of entry u/s 271AAD shall be invoked only if there is evasion of tax liability.**

➤ The legislature in section 271AAD (1) has used the word any person. To levy the penalty there must be two occasion as per section 271AAD(1)

(i) a false entry; or

(ii) an omission of any entry which is relevant for computation of total income of such person, to evade tax liability,

The word false entry is explained in the explanation given in the section and the word omission of any entry is not defined in the section. It is pertinent to note that the word false entry is followed by semicolon and whereas the word omission of entry is continued with further set of words "relevant for computation of total income of such person, to evade tax liability".

➤ Therefore, it is immaterial whether false entries in books of accounts have an impact on computation of total income or not. For example, say Mr. X has taken fake invoices for both sale and purchase of the same amount in order to show rosy picture to the bank. In this case, though there is no effect on the computation of income but section 271AAD (1) will be invoked in the hands of Mr. X for both the transactions. Therefore, it is concluded that the phrase 'to evade tax liability' is only to be read with the clause (ii) of sub section 1. This interpretation is in line with the memorandum which also speaks of claiming fraudulent input tax credit.

8. **Explanation to section 271AAD which seeks to explain 'false entry' is limited to fake invoice or not.**

The explanation u/s 271AAD refers to false entry and has been given in the inclusive manner. The explanation also covers scenarios of intention to use such falsified documents or invoices. The said explanation has been divided in three clauses as referred to as (a), (b) and (c). It is important to note that the clause (a) refers to forged or falsified documents and whereas other clauses (b) and (c) only talks about invoices. Now a question arises whether the penalty u/s 271AAD can be triggered on an unsustainable claim of expenditure. From the plain reading of explanation, it appears that the clause (a) will cover other transactions even not related to invoices, but the intent of the legislature is not the same and which can be visualized by reading the entire clause together. Therefore, the accommodation entry in respect of loan share capital gift does not appear to be covered within the meaning of false entry. The said intention is also in consonance with the memorandum explaining the finance Bill under the head "(H) Preventing Tax Abuse" a caption "Penalty for fake invoice" was introduced. Even the ejusdem generis rule of interpretation too dictates the same. The rule ejusdem generis used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them

**in general, the general statements only apply to the same kind of persons or things specifically listed.** Therefore, the word falsified of documentary evidence used in clause (a) of explanation would thus be read to have color from false invoice and subsequent clause (b) and (c) of explanation which also talks about invoice without actually supply of goods or services or invoice from nonexistence person.

- 8.1 The clause (b) of explanation to section 271AAD deals with supply/receipts of goods or services or both without actually supply or receipts of such goods or services. It can be a situation where the assessee has booked expenditure say commission but such services were never taken by the assessee and once it is established by the AO that such services were never taken then in that case the provisions of section 271AAD can be invoked. The next question which comes to the mind whether this provision can be used by the AO for all the expenses. For example, booking bogus claims of salary it appears that clause (b) will not cover such a situation as the word mentioned is invoice and therefore the legislature has tried to plug only goods and services which invoices had been issued without actually supplying or receipts thereof. **In the author's opinion, on mere absence of third-party voucher in genuine cases where it is inherently difficult to obtain voucher/invoice etc., charge of no actual supply of goods/services to infer false entry in section 271AAD might not survive. The given legislative intent is to plug fraudulent/manipulative intent on part of assessee.**
- 8.2 The Clause (c) of explanation to section 271AAD has covered those supply of goods or services from a person who does not exist. **The larger question to be addressed is how to infer a person does not exist, is an important aspect where existence of a person may mean its legal existence and also its actual existence .Mere non-response to enquiry notice u/s 133(6) might not establish fact of non-existence of a person. The AO has to prove that person from whom purchases were made doesn't exist in actual sense.**
- 8.3 **Non-existence on which date, whether on date of concerned entry in books or on date when assessment order is made or at stage of final penalty levy in section 271AAD is again a legal dilemma, to which in authors view, if on date when entry was made in books, the person is proved was existing by assessee, but later not found for certain reasons beyond control of assessee, may help to plead favorable view.**
9. The word used by the legislature in section 271AAD is any person and not the assessee therefore the scope of section 271AAD is wider. The word assessee has been defined u/s 2(7) and as per the definition "**assessee means a person by whom [any tax] or any other sum of money is payable and includes.....**" This have widened the scope of section 271AAD that it will cover that person also who are not supposed to pay tax.
10. **Omission of entry which is relevant for computation of total income of such person to evade tax liability. Section 271AAD (1) (ii)**

The question which needs to be clarified is that omission of entry is related to fake invoices or the other situation like entries as noted in diary found during search as not recorded in books of

accounts. On cursory reading it appears that the omission of entry will cover every situation but it is not the same. The clause (ii) of 271AAD (1) also deals with the omission of entry in context of fake/false invoice only. The same is clear from the memorandum explaining the finance bill "clause 98" and the same is reproduced as under:-

*"In the recent past after the launch of Goods & Services Tax (GST), several cases of fraudulent input tax credit (ITC) claim have been caught by the GST authorities. In these cases, fake invoices are obtained by suppliers registered under GST to fraudulently claim ITC and reduce their GST liability. **These invoices are found to be issued by racketeers who do not actually carry on any business or profession.** They only issue invoices without actually supplying any goods or services. The GST shown to have been charged on such invoices is neither paid nor is intended to be paid. Such fraudulent arrangements deserve to be dealt with harsher provisions under the Act"*

*Therefore, it is proposed to introduce a new provision in the Act to provide for a levy of penalty on a person, if it is found during any proceeding under the **Act that in the books of accounts maintained by him there is a (I) false entry or (ii) any entry relevant for computation of total income of such person has been omitted to evade tax liability.** The penalty payable by such person shall be equal to the aggregate amount of false entries or omitted entry. It is also proposed to provide that any other person, who causes in any manner a person to make or cause to make a false entry or omits or causes to omit any entry, shall also pay by way of penalty a sum which is equal to the aggregate amounts of such false entries or omitted entry. The false entries are proposed to include use or intention to use –*

- (a) Forged or falsified documents such as a false invoice or, in general, a false piece of documentary evidence; or*
- (b) invoice in respect of supply or receipt of goods or services or both issued by the person or any other person without actual supply or receipt of such goods or services or both; or*
- (c) Invoice in respect of supply or receipt of goods or services or both to or from a person who do not exist.*

**This amendment will take effect from 1st April, 2020".**

From the above it is very much clear that the word omission is introduced in order to plug the situation of the racketeers as mentioned above and there can be other situations also where the entries are omitted. The same is explained by an example that there was a survey by the GST department on the entry operator (Mr.Y). The total purchases made by Mr. X from Mr Y was Rs. 10 Lakh against which payment of Rs. 6 Lakh was made .The amount outstanding in the books of accounts of Mr. X was Rs. 4 lakhs. After getting aware of this, Mr. X deletes purchases to the extent of Rs. 4 Lakh. The fake sale invoices issued by entry operators were appearing in GSTR-2A of Mr. X Rs. 10 Lakh. Now the questions arise whether penalty u/s 271AAD will be levied for a sum of Rs. 10 Lakh or Rs. 6 Lakh. In such a situation the penalty u/s 271AAD will be levied on the entire amount of Rs.10Lakh.

11. **The persons covered in section 271AAD (2)**

The legislature has tried to cover middlemen, racketeers, accountants and any other person who causes the person referred in sub section (1) to make false entry or omits or causes to omit any entry as referred in 271AAD(1). Normally the middlemen liability in income tax was only limited to commission income earned and, as such, these persons were engaged in providing bogus billing as there were no provisions in the Income tax as well in the GST which curb the malpractices of fake invoices. This section was inserted to curb such practices. In practice it has been noticed that the GST number was taken in the name of employees by passing a benefit of some monthly payment. In turn kingpin used to get % of commission by selling GST invoice and only filing GST-R1 return. The bank account of such person is under control of such racketeer. There was no harsh punishment on such kingpin. The comparison of tax regime under income tax in old vs. new regime is given below

<b><u>Person being employee</u></b>			
<b><u>Old Regime</u></b>		<b><u>New Regime</u></b>	
<b><u>Section 122(1) of CGST Act #</u></b>	<b><u>Income Tax Act 1961</u></b>	<b><u>Section 122(1) of CGST Act #</u></b>	<b><u>Income tax 1961 Penalty u/s 271AAD</u></b>
Penalty Rs. 10000/- or tax evaded whichever is higher	<p>1) The real income of such person is salary or per month benefit transferred to such person by racketeer and will be taxed accordingly subject to slab benefit.</p> <p>2) The Penalty under section 270A will be imposed on such person.</p> <p>2) Benami proceedings will be initiated separately.</p>	Penalty Rs. 10000/- or tax evaded whichever is higher	<p>1) The real income of such person is salary or per month benefit transferred to such person by racketeer.</p> <p>2) The Penalty under section 270A will be imposed on such person.</p> <p>3) Benami proceedings will be initiated separately.</p> <p>4) 100% of aggregate transaction U/s 271AAD</p>
<b><u>Person being Racketeer Kingpin</u></b>			
<b><u>Old Regime</u></b>		<b><u>New Regime</u></b>	

Section 122(3) of CGST Act #	Income Tax Act 1961	Section 122(1A) of CGST Act #	Income tax 1961
Penalty Rs. 25000/-	<p>1) Tax on the income as earned for issuing fake invoices and is also required to own all bank transaction of accounts being used by racketeer.</p> <p>2) Penalty U/s 270A</p> <p>3) Benami proceedings will be initiated separately.</p>	<p>Penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on</p>	<p>1) Tax on the income as earned for issuing fake invoices and is also required to own all bank transaction of accounts being used by racketeer.</p> <p>2) Penalty U/s 270A</p> <p>3) Benami proceedings will be initiated separately.</p> <p>4) 100% of aggregate transaction U/s 271AAD</p>

<u>Person being buyer</u>			
<u>Old Regime</u>		<u>New Regime</u>	
Section 122(1) of CGST Act #	Income Tax Act	Section 122(1) of CGST Act #	Income tax
Penalty Rs. 10000/- or Input tax credit availed evaded whichever is higher	<p>1) Addition u/s 115BBE</p> <p>2) Penalty u/s 271AAC</p>	Penalty Rs. 10000/- or Amount of Input tax credit taken whichever is higher	<p>1) Addition u/s 115BBE</p> <p>2) Penalty u/s 271AAC</p> <p>3) 100% of aggregate transaction U/s 271AAD</p>

# Same penalty under SGST Act

## 12. Burden to Prove

The Section 271AAD is part of chapter XXI of Income Tax Act, 1961 which deals with the penal provisions and the burden to prove the default as envisaged under sub section 1 and 2 has been committed would rest upon the shoulder of revenue. The AO is required to gather the evidence and confront the same to the person. The Section 271AAD(2) deals with the situation where "any other person, who causes the person referred in sub section (1) in any manner to make false entry or causes to omit any entry. In this situation the burden to prove is still on the revenue and the same is discharge by the revenue through evidences gathered which form of direct evidence or by relying upon the statement recorded. It is important to note that the

statement recorded during the course of survey is not on oath and relying upon such statement has no evidentiary value.

13. **Double Jeopardy Principle vis-a-vis multiple penalties imposed in this Act.**

- The Double Jeopardy principle existed in India prior to the enforcement of the constitution of India. It was enacted under section 26 of The General Clauses Act, 1897. Section 26 states that “provision as to offences punishable under two or more enactments.
- Article 20(2) of the constitution says that no person shall be prosecuted and punished for the same offence more than once. This is called the **Doctrine of Double Jeopardy**. The objective of this article is to avoid harassment, which must be caused for successive criminal proceedings, where the person has committed only one crime. There is a law maxim related to this – *nemo debet bis vexari*. This means that no man shall be put twice in peril for the same offence.
- In the various cases, it has been held that double jeopardy' does not apply to tax cases .However, the use of the phrase “Without prejudice to any other provisions of this Act” has made it somewhere clear that such penalty will be in addition to any other provision of tax, penalty or prosecution under any other section of the Income Tax Act, 1961.

14. **Section 271AAD vis a Vis Rule of construction by reference to CONTEMPORANEA EXPOSITIO and other disputed issues**

- *Contemporanea expositio is a well-known doctrine of interpreting a statute by reference to the exposition it has received from contemporary authority, though it must give way where the language of the statute is plain and unambiguous.* The “administrative construction” (i.e., the contemporaneous construction placed by administrative or **executive officers charged with executing a statute**) generally should be clearly wrong before it is overturned. Such a construction, commonly referred to as *practical construction*, although non-controlling, is nevertheless entitled to considerable weight, and is highly persuasive. A contemporaneous exposition by administrative authorities is a very useful and relevant guide to the interpretation of the expressions used in the statutory instrument. The doctrine of *contempranea expositio* is relied on to remove any possible ambiguity in understanding the language of the relevant statutory instrument.

Thus applying this rule of interpretation to section 271AAD where legislative intent is primarily targeted on fraudulent and manipulative practices in issuing fake invoice, legislative intent must be considered while deciding the scope of section 271AAD. It is important to note that the Finance Ministry in its speech at para 6.8 has nowhere talked about the omission. Therefore this has to pass the test of the judiciary that whether the word omission as used in the section is ultra vires.

- *The section 276C dealing with tax evasion prosecution, in explanation of section 276C in clause(ii) and clause(ii) the word false entry and omission of entry has been used. When penalty and prosecution was already there in income tax act for stated offense and default of false and omitted entry which could also covers fake invoice cases , the reason to bring this section 271AAD in addition to section 270A(9) and section 276C already covering stated cases is unfounded and is subject matter of litigation. This argument gets support from para 6.8 of Hon'ble FM budget speech for 2020 "To discourage taxpayers to manipulate their books of accounts by recording false entries including fake invoices to claim wrong input credit in GST, it is proposed to provide for penalty for these malpractices". It is important to note that the word omitted entries is not used by FM in her speech. Whether provision of this section is constitutionally valid? Even if the constitutional validity of section 271AAD is challenged before the constitutional bench the revenue stand will survive as the purpose of introduction was to curb malpractices of issuing fake invoice.*

15. **Section 273B (Penalty not to be imposed in certain cases)**

Section 273B grants immunity from levy of penalty if the assessee proves in certain cases that there was a reasonable cause. The section 273B has not been amended as such the assessee cannot take the shelter of provision of section 273B for imposition of penalty under section 271AAD.

16. **Power of Settlement Commission to waive penalty**

The section 245H empowers the Settlement commission to provide immunity from penalty and prosecution. The word used in Section 245H is that immunity can be granted for any penalty under this act. As all the penalties are covered in chapter XXI therefore the Settlement commission has power to provide immunity from penalty u/s 271AAD subject to the conditions as mentioned in section 245H(1).

**Conclusion:-** This provision is a very harsh provision, because this provision leads to multiple penalties not under Income Tax, but under other Acts also. Furthermore this will also lead to prosecution as the section 276C also includes false entry or omission of entry