



## **Penalty under s. 270A and Immunity from penalty under s. 270AA**

Jagdish T Punjabi

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## **General**

## Penalties imposable under Chapter XXI of Income-tax Act, 1961

- Chapter XX-B of the Act containing Sections 269SS, 269ST, 269SU, 269T and 269TT. is captioned "Requirement as to mode of Acceptance, Payment or Repayment in certain cases to counteract evasion of tax".
- Chapter XXI of the Act containing Sections 270 to 275 deals with Penalties imposable and is captioned "Penalties Imposable".
- Penalties imposable vide each of the Sections contained in Chapter XXI are listed in the table below –

Sr.No.	Section	Particulars
1	270A	Penalty for under reporting and misreporting of income
2	270AA	Immunity from imposition of penalty, etc.
3	271	Failure to furnish returns, comply with notices, concealment of income, etc. [Applies upto AY 2016-17]
4	271A	Failure to keep, maintain or retain books of account, documents, etc.
5	271AA	Penalty for failure to keep and maintain information and document, etc., in respect of certain transactions

## Penalties imposable under Chapter XXI of Income-tax Act, 1961

Sr.No.	Section	Particulars
6	271AAA	Penalty where search has been initiated – for searches initiated on or after 1.6.2007 but before 1.7.2012
7	271AAB	Penalty where search has been initiated – for searches initiated on or after 1.7.2012
8	271AAC	Penalty in respect of certain income
9	271AAD	Penalty for false entry, etc in books of account – inserted by the Finance Act, 2020 w.e.f. 1.4.2020
10	271AAE	Benefits to related persons – inserted by the Finance Act, 2022 w.e.f. 1.4.2023
11	271B	Failure to get accounts audited
12	271BA	Penalty for failure to furnish report under section 92E
13	271BB	Failure to subscribe to eligible issue of capital
14	271C	Penalty for failure to deduct tax at source

### Penalties imposable under Chapter XXI of Income-tax Act, 1961

Sr.No.	Section	Particulars
15	271CA	Penalty for failure to collect tax at source
16	271D	Penalty for failure to comply with the provisions of section 269SS
17	271DA	Penalty for failure to comply with the provisions of section 269ST
18	271DB	Penalty for failure to comply with provisions of section 269SU – inserted by Finance (No. 2) Act, 2019 w.e.f. 1.11.2019
19	271E	Penalty for failure to comply with the provisions of section 269T
20	271F	Penalty for failure to furnish return of income
21	271FA	Penalty for failure to furnish statement of financial transaction or reportable account
22	271FAA	Penalty for furnishing inaccurate statement of financial transactions or reportable account

### Penalties imposable under Chapter XXI of Income-tax Act, 1961

Sr.No.	Section	Particulars
23	271FAB	Penalty for failure to furnish statement or information or document by an eligible investment fund
24	271FB	Penalty for failure to furnish return of fringe benefits
25	271G	Penalty for failure to furnish information or document under section 92D
26	271GA	Penalty for failure to furnish information or document under section 285A
27	271GB	Penalty for failure to furnish report or for furnishing inaccurate report under section 286
28	271H	Penalty for failure to furnish statements, etc.
29	271I	Penalty for failure to furnish information or furnishing inaccurate information under section 195
30	271J	Penalty for furnishing incorrect information in reports or certificates

## Penalties imposable under Chapter XXI of Income-tax Act, 1961

Sr.No.	Section	Particulars
31	271K	Penalty for failure to furnish statements – inserted by Taxation and Other Laws (Relaxation and Amendment of certain Provisions) Act, 2020, w.e.f. 1.4.2021
32	272A	Penalty for failure to answer questions, sign statements, furnish information, returns or statements, allow inspections, etc.
33	272AA	Penalty for failure to comply with the provisions of section 133B
34	272B	Penalty for failure to comply with the provisions of section 139A
35	272BB	Penalty for failure to comply with the provisions of section 203A
36	272BBB	Penalty for failure to comply with the provisions of section 206CA
37	273	False estimate of, or failure to pay, advance tax

## Powers, immunity, procedure and limitation in relation to penalties

- The other sections in Chapter XXI deal with the following –

Sr.No.	Section	Particulars
1	273A	Power to reduce or waive penalty, etc., in certain cases
2	273AA	Power of Principal Commissioner or Commissioner to grant immunity from penalty
3	273B	Penalty not to be imposed in certain cases
4	274	Procedure
5	275	Bar of limitation for imposing penalties

- In addition to above, penalty could be imposed under Black Money Act for failure to disclose Foreign Asset.

## **Section 270A – Penalty for underreporting of income and mis-reporting**

## **Section 270AA Immunity from penalty**

9

### **Background of introduction of S. 270A**

- Levy of penalty for concealment of particulars of income or furnishing inaccurate particulars of income has always been a matter of litigation between the department and the assessee. It was felt that the discretion regarding quantum of penalty left scope for corruption. The scope of such provisions was always a subject matter of litigation since the tax authorities always levied the penalty whenever there was an addition or disallowance made by the AO even in cases where there was no prima facie case against the tax payer.
- The Finance Act, 2016 (FA, 2016) has, with effect from 1.4.2017, inserted section 270A in the Income-tax Act, 1961 with a view to substitute the provisions of section 271(1)(c) dealing with levy of penalty for concealment of income or furnishing of inaccurate particulars.
- The Finance (No. 2) Act, 2019 has amended section 270A with retrospective effect from 1.4.2017. Subsequently, there are amendments to section 270A by the Finance Act, 2023 as well.

## Background of introduction of S. 270A

- Section 270A provides for a levy of penalty for “under reporting of income” and “misreporting of income”.
- It appears that with a view to reduce litigation and remove the discretion of tax authority, the FA, 2016 has inserted new provisions in section 270A and 270AA in the Act which will replace the existing provisions of section 271(1)(c).
- The provisions of S. 270A have been introduced with a view to –
  - rationalise the penalty provisions; and
  - bring
    - objectivity;
    - certainty; and
    - clarity;in the penalty provisions

## Objective as stated in Explanatory Memorandum

- The Explanatory Memorandum to the provisions of Finance Bill, 2016 explains the objective of inserting section 270A as follows –
  - “Under the existing provisions, penalty on account of concealment of particulars of income or furnishing inaccurate particulars of income is leviable under section 271(1)(c) of the Income-tax Act. In order to rationalise and bring objectivity, certainty and clarity in the penalty provisions, it is proposed that section 271 shall not apply to and in relation to any assessment for the assessment year commencing on or after the 1<sup>st</sup> day of April, 2017 and subsequent assessment years and penalty be levied under the newly inserted section 270A with effect from 1<sup>st</sup> April, 2017. The new section 270A provides for levy of penalty in cases of under-reporting and misreporting of income.” [emphasis supplied]

### Objective as stated in Explanatory Memorandum

- The Finance Minister in the Budget Speech mentioned as follows –
  - “At present, the Income-tax Officer has discretion to levy penalty at the rate of 100% to 300% of tax sought to be evaded. I propose to modify the entire scheme of penalty by providing different categories of misdemeanour with graded penalty and thereby substantially reducing the discretionary power of the tax officers” [emphasis supplied]
- **Meaning of ‘misdemeanour’ :**
  - a minor wrongdoing ; a non-indictable offence, regarded in the US (and formerly in the UK) as less serious than a felony.
  - an action that is slightly bad or breaks a rule but is not a crime [Cambridge Dictionary]
  - A misdemeanour is an act that some people consider to be wrong or unacceptable [Collins Dictionary]
  - In the United States and other countries where the legal system distinguishes between very serious crimes and less serious ones, a misdemeanour is a less serious crime [Collins Dictionary]

### Section 270A – meaning of applicable from 1.4.2017 ?

- Consequent to introduction of section 270A, the provisions of section 271 had to cease to have effect. S. 271(7) introduced by the FA, 2016 provides that the provisions of section 271 shall not apply to and in relation to assessment for the assessment year commencing on or after 1.4.2017. Therefore, the provisions of section 270A will apply to assessments for assessment year 2017-18 and subsequent assessment years. This view is also supported by –
  - the Explanatory Memorandum which states that “*These amendments will take effect from 1st day of April, 2017 and will, accordingly apply in relation to assessment year 2017-18 and subsequent years.*”; and
  - Para 62.1 of the circular issued by CBDT being Circular No. 3/2017[F.NO.370142/20/2016-TPL], dated 20-1-2017 which states that “*In order to rationalize and bring objectivity, certainty and clarity in the penalty provisions, section 271 of the Income-tax Act has been made non-applicable in relation to any assessment for the assessment year commencing on or after the 1st of April, 2017 and subsequent assessment years and penalty shall be levied under the newly inserted section 270A of the Income-tax Act with effect from 1st of April, 2017.*”

## Overview of Section 270A

Sub-section	what it deals with
(1)	Levy of penalty
(2)	What constitutes “under-reporting”
(3)	Computation of “under-reported” income
(4) / (5)	Penalty for intangible additions of earlier years if it is claimed that the same constitute source of investment, deposit or receipt in any assessment year
(6)	Exclusion from “under-reported” income
(7) / (10)	Quantum of penalty for “under-reported” income
(8) / (10)	Quantum of penalty for “mis-reported” income
(9)	What constitutes “mis-reporting”
(11)	No double levy
(12)	Order to be passed in writing

## Dictionary meanings of ‘under-reporting’ and ‘mis-reporting’

- The Act does not define any of the two words – ‘underreporting’ and ‘mis-reporting’.
- Section 270A merely attributes different meanings to the words ‘under-reporting’ and ‘mis-reporting’ by specifying certain instances thereof vide sub-sections (6) and (9) respectively.
- Instances of mis-reporting are carved out of the instances of under-reporting, for limited purpose of prescribing different rates of penalties.
- The Act considers (assumes) that in cases of mis-reporting, an assessee commits an offence which is greater than in case of under-reporting. But it does not explain the reasons for such differential treatment and fails to classify the cases between under-reporting and mis-reporting intelligently.

## Dictionary meanings of 'under-reporting' and 'mis-reporting'

- The ordinary meaning of these two words as defined by different dictionaries are under -

Dictionary	"under-report"	"misreport"
Cambridge Dictionary	To record that you have earned less than you really have on your tax return	To make known information that is not completely true or correct
Oxford	Fail to report (something, especially news or data) fully	Give a false or inaccurate account of (something). A false or incorrect report.
Free Dictionary	To report to be less or lower than is correct	To report falsely or inaccurately, an inaccurate or false report/to report mistakenly or falsely. An inaccurate or wrong report.
Meriam-Webster	To report to be less than is actually the case	

## Text of section 270A

- Penalty for under-reporting and misreporting of income.**
- 270A.** (1) The Assessing Officer or the Joint Commissioner (Appeals) or 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.
- (2) A person shall be considered to have under-reported his income, if—
  - (a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;
  - (b) the income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished [or where the return has been furnished for the first time under section 148](#);
  - (c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;

## Text of section 270A

- (d) the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;
- (e) the amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is greater than the maximum amount not chargeable to tax, where ~~no return of income has been filed~~ no return of income has been furnished or where return has been furnished for the first time under section 148;
- (f) the amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;
- (g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

## Text of section 270A

- (3) The amount of under-reported income shall be,—
  - (i) in a case where income has been assessed for the first time,—
    - (a) if return has been furnished, the difference between the amount of income assessed and the amount of income determined under clause (a) of sub-section (1) of section 143;
    - (b) in a case where ~~no return has been furnished~~ no return of income has been furnished or where return has been furnished for the first time under section 148,—
      - (A) the amount of income assessed, in the case of a company, firm or local authority; and
      - (B) the difference between the amount of income assessed and the maximum amount not chargeable to tax, in a case not covered in item (A);
  - (ii) in any other case, the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order:

### Text of section 270A

■ **Provided** that where under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB or section 115JC, the amount of total under-reported income shall be determined in accordance with the following formula—

■  $(A - B) + (C - D)$

where,

- A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);
- B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of under-reported income;
- C = the total income assessed as per the provisions contained in section 115JB or section 115JC;

### Text of section 270A

■ D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of under-reported income:

■ **Provided further** that where the amount of under-reported income on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.

■ Explanation.—For the purposes of this section,—

- "preceding order" means an order immediately preceding the order during the course of which the penalty under sub-section (1) has been initiated;
- in a case where an assessment or reassessment has the effect of reducing the loss declared in the return or converting that loss into income, the amount of under-reported income shall be the difference between the **loss claimed** and the income or loss, as the case may be, assessed or reassessed.

### Text of section 270A

- (4) Subject to the provisions of sub-section (6), where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income or deducted while computing loss, as the case may be, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (hereinafter referred to as "preceding year") and no penalty was levied for such preceding year, then, the under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment.
- (5) The amount referred to in sub-section (4) shall be deemed to be amount of income under-reported for the preceding year in the following order—
  - the preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year; and
  - where the amount added or deducted in the first preceding year is not sufficient to cover the receipt, deposit or investment, the year immediately preceding the first preceding year and so on.

### Text of section 270A

- (6) The under-reported income, for the purposes of this section, shall not include the following, namely:—
  - (a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Joint Commissioner (Appeals) or Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;
  - (b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or the Joint Commissioner (Appeals) or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced there-from;

### Text of section 270A

- (c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;
  - (d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where 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; and
  - (e) the amount of undisclosed income referred to in section 271AAB.
- (7) The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

### Text of section 270A

- (8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of the amount of tax payable on under-reported income.
- (9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—
- (a) misrepresentation or suppression of facts;
  - (b) failure to record investments in the books of account;
  - (c) claim of expenditure not substantiated by any evidence;
  - (d) recording of any false entry in the books of account;
  - (e) failure to record any receipt in books of account having a bearing on total income; and
  - (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.

## Text of section 270A

- (10) The tax payable in respect of the under-reported income shall be—
  - (a) where no return of income has been furnished or where the return has been furnished for the first time under section 148 and the income has been assessed for the first time, the amount of tax calculated on the under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income;
  - (b) where the total income determined under clause (a) of sub-section (1) of section 143 or assessed, reassessed or recomputed in a preceding order is a loss, the amount of tax calculated on the under-reported income as if it were the total income;

## Text of section 270A

- (c) in any other case, determined in accordance with the formula—
  - $(X - Y)$
  - where,
    - X = the amount of tax calculated on the under-reported income as increased by the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order as if it were the total income; and
    - Y = the amount of tax calculated on the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order.

## Text of section 270A

- (11) No addition or disallowance of an amount shall form the basis for imposition of penalty, if such addition or disallowance has formed the basis of imposition of penalty in the case of the person for the same or any other assessment year.
- (12) The penalty referred to in sub-section (1) shall be imposed, by an order in writing, by the Assessing Officer, the Joint Commissioner (Appeals) or the Commissioner (Appeals), the Commissioner or the Principal Commissioner, as the case may be.
- Note: The underlined words in red and the words which have been struck through are the amendments by the Finance (No. 2) Act, 2019 w.r.e.f. 1.4.2017. EM states as under -
- **Rationalisation of penalty provisions relating to under-reported income**
- Section 270A contains provisions relating to penalty for under-reporting and misreporting of income. The existing provisions provide for various situations for the purposes of levy of penalty under this section. However, these provisions do not contain the mechanism for determining under-reporting of income and quantum of penalty to be levied in the case where the person has under-reported income and furnished the return of income for the first time under section 148 of the Act.

## Other provisions which affect Section 270A

- **Section 271AAB(2) reads as under –**
  - (2) No penalty under the provisions of section 270A or clause (c) of sub-section (1) shall be imposed upon the assessee in respect of the undisclosed income referred to in sub-section (1) or sub-section (1A).
- **Section 271AAC(2) reads as under –**
  - (2) No penalty under the provisions of section 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (1).

## Text of section 56(2)(viib)

### ■ Income from other sources.

■ 56. (1) .....

■ (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

■ .....

■ .....

■ (viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

## Text of second proviso to section 56(2)(viib)

■ **Provided** that this clause shall not apply where the consideration for issue of shares is received—

■ (i) by a venture capital undertaking from a venture capital company or a venture capital fund <sup>66a</sup>[or a specified fund]; or

■ (ii) by a company from a class or classes of persons as may be notified<sup>6Z</sup> by the Central Government in this behalf.

■ **Provided further** that where the provisions of this clause have not been applied to a company on account of fulfilment of conditions specified in the notification issued under clause (ii) of the first proviso and such company fails to comply with any of those conditions, then, any consideration received for issue of share that exceeds the fair market value of such share shall be deemed to be the income of that company chargeable to income-tax for the previous year in which such failure has taken place and, it shall also be deemed that the company has under-reported the said income in consequence of the misreporting referred to in sub-section (8) and sub-section (9) of section 270A for the said previous year.

## Section 155(18) – deemed under-reporting

- Finance Act, 2022 has w.e.f. 1.4.2005 inserted Explanation 3 to section 40 to provide that the term “tax” shall include and shall be deemed to have always included surcharge and cess by whatever name called.
- Finance Act, 2022 has inserted sub-section (18) to section 155 which provides that –
  - where in any previous year, an assessee has claimed and has been allowed a deduction of any surcharge and cess, which is not allowable as a deduction under section 40, then for the purposes of section 270A(3) such claim shall be deemed to be under-reported income of the assessee for such previous year. It is expressly provided that this deeming fiction is notwithstanding anything contained in S. 270A(6).
  - the AO shall recompute the total income and make the necessary amendment and for the purposes of section 154 the period of 4 years shall be reckoned from 31.3.2021.

## Section 155(18) – deemed under-reporting

- Proviso to section 155(18) provides that where an assessee
  - makes an application to the AO requesting for recomputation of total income without allowing claim for deduction of surcharge or cess; and
  - pays the amount due thereon within the specified time.then  
such claim shall not be deemed to be under reported income for the purpose of section 270A(3).
- The application stated above has to be made in a prescribed form and within the prescribed time
- It is debatable as to whether the deeming fiction can operate for a period when the section was not on the statute i.e. for assessment years prior to AY 2017-18.

## Section 270A (1)

- **Penalty for under-reporting and misreporting of income.**
- **270A.** (1) The Assessing Officer or the Joint Commissioner (Appeals) 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.
- **Let us consider –**
- Meaning of the term `any proceedings`. Meaning of “shall be liable”.
- For what and when can a direction be given that a person is liable to pay a penalty under section 270A
- Can direction be given during the course of proceedings for a different assessment year? If not, is there any exception provided?
- Is the power to direct payment of penalty under section 270A mandatory or discretionary?

## Power to initiate and/or levy – mandatory or discretionary

- The Finance Minister in his Budget Speech mentioned as follows –
  - *“At present, the Income-tax Officer has discretion to levy penalty at the rate of 100% to 300% of the amount of tax sought to be evaded. I propose to modify the entire scheme of penalty by providing different categories of misdemeanor with graded penalty and thereby **substantially reducing the discretionary power** of the tax officers.”*
- The Explanatory Memorandum to the provisions of the Finance Bill, 2016 explains the objective of inserting section 270A as follows –
  - *“Under the existing provisions, penalty on account of concealment of particulars of income or furnishing inaccurate particulars of income is leviable under section 271(1)(c) of the Income-tax Act. **In order to rationalise and bring objectivity**, certainty and clarity in the penalty provisions, it is proposed that section 271 shall not apply to and in relation to any assessment for the assessment year commencing on or after the 1<sup>st</sup> day of April, 2017 and subsequent assessment years and penalty be levied under the newly inserted section 270A with effect from 1<sup>st</sup> April, 2017. The new section 270A provides for levy of penalty in cases of under-reporting and misreporting of income.”*

## Power to initiate and/or levy – mandatory or discretionary

- Thus, the provisions of section 270A have been introduced to bring in objectivity, certainty and clarity in the penalty provisions. The objects for which the section has been introduced suggest that the levy of penalty is mandatory and not discretionary.
- **Meaning of `discretion`, Difference between “may” and “shall” – when is “may” to be understood as “shall”?**

## Power to initiate and/or levy – mandatory or discretionary

- Section 270A(1) reads as under –
  - *“The Assessing Officer or the Joint Commissioner (Appeals) or the Commissioner (Appeals) or .. **may**, during the course of any proceedings under this Act, **direct** that ..... **shall be liable to pay** a penalty .....- ”*  
(emphasis supplied)
- Section 271(1) of the Act also provides that -
  - *“the AO or .... **may direct** that such a person **shall pay** by way of penalty, - ....”* (emphasis supplied)
- It is a settled position that the levy of penalty under section 271 is discretionary and not mandatory. As is evident, the language of the two provisions granting power to direct payment of penalty is similar. Therefore, it may be contended that the ratio of the decisions holding that the levy of penalty under section 271 is discretionary will hold good even for the purposes of section 270A;

## Power to initiate and/or levy – mandatory or discretionary

- The Apex Court, in ***Mansukhlal v. CIT [(1969) 73 ITR 546 (SC)]*** held that penalty need not be imposed when there is a minor breach of law and having regard to the facts, ends of justice require that the assessee need not be penalized;
- The Apex Court, in ***Hindustan Steel Ltd. v. State of Orissa [(1972) 83 ITR 26 (SC)]***, held that penalty cannot be levied for a mere technical / venial breach;
- Section 158BFA(2) provided for levy of penalty on undisclosed income in search cases. Sub-section (2) provided that “*the AO or CIT(A) may direct that a person shall pay ...*”. The proviso to section 158BFA(2) provided that no order imposing penalty shall be made in respect of a person if the conditions stated in the proviso are satisfied.

## Power to initiate and/or levy – mandatory or discretionary

- The Chennai Bench of the Tribunal, in ***Ch. Suresh Reddy v. ACIT [(2009) 120 ITD 428 (Chennai)]***, interpreted the words ‘*may direct*’ in section 158BFA(2) to indicate that the discretion is available with the Assessing Officer and the CIT(A). The Tribunal held as follows –
  - *“The provisions under section 158BFA(2) gives a scope for exercising discretion of the Assessing Officer. This section which allows the Assessing Officer to impose a penalty begins with the word ‘may’ and not ‘shall’. In our opinion, the Assessing Officer has a discretion to impose or not to impose the penalty. The words ‘may direct’ in the section 158BFA(2) do indicate that a discretion is available with the Assessing Officer and CIT(A) to levy penalty even where technically the provisos are attracted.”*
- It appears that the ratio of the above decision will also apply to the provisions of section 270A which are similar to the provisions dealt with by the Tribunal except that section 270A uses the phrase “*shall be liable to pay*” instead of “*shall pay*” used by section 158BFA(2).

## Power to initiate and/or levy – mandatory or discretionary

- The use of the word `may' imports a discretion and "shall" an obligation – ***P C Puri v. CIT [(1985) 151 ITR 584 (Delhi)]***
- When the Legislature has used "shall" and "may" in the same section, they cannot be loosely construed so as to carry the same meaning – ***Taraben Ramanlal Modi v. Jashbhai Shanker Bhai Bin Talsibhai, [AIR 1980 Guj. 126 at p. 135 (FB)]***
- The discretion is evident in clause (a) of sub-section (6)
- Section 274 of the Act requires issue of show cause notice and an opportunity of being heard has been granted to the assessee. Certainly, the requirements of issue of notice and providing an opportunity to show cause cannot be empty formalities
- Levy of penalty in excess of Rs. 20,000 requires approval of higher authority

## Power to initiate and/or levy – mandatory or discretionary

- While the arguments mentioned above can be canvassed to support the proposition that the levy of penalty under section 270A is discretionary and not mandatory, the contrary view cannot be ruled out considering the language of the provisions read with the object with which the same have been introduced
- The counter arguments could be that the provisions have been made objective by laying down situations in which a person shall be considered to have under-reported his income, situations / items of income which are to be excluded while computing under-reported income are provided in sub-section (6) and the exclusions are exhaustive. Opportunity for show cause is provided to ensure that the assessee has an opportunity to contend that his case falls within the exclusions of sub-section (6) or that his under-reported income is not as a consequence of misreporting.
- It is uncertain whether a court would construe the word "may" as "shall"

**Arguments for and against the proposition that levy of penalty under section 270A is mandatory**

Arguments to suggest levy is mandatory	Arguments to suggest levy is NOT mandatory
'may' can be mandatory where conditions are satisfied	It provides that penalty 'may be levied'
Object is that discretion be taken away	Decisions under section 271(1)(c) on similar language suggest that the levy is discretionary
Issuance of show cause notice is to ensure that the case does not fall under sub-section (6)	The fact that legislature has provided for issuance of show cause notice suggests that levy of penalty is not mandatory

**Arguments for and against the proposition that levy of penalty under section 270A is mandatory**

Arguments to suggest levy is mandatory	Arguments to suggest levy is NOT mandatory
Section 273B providing that penalty shall not be levied if the assessee establishes a reasonable cause has not been amended to incorporate section 270A	

## Does anything turn upon use of the word `may`?

- In the context of s. 271, the Madhya Pradesh High Court has, in **Todarmal Safarishmal Lashkar v. CIT [(1979) 118 ITR 759 (MP)]**, explained the discretion of the Authorities to levy penalty as under –
  - *“The language of the section is abundantly clear and certain. Penalty can be imposed only under one or more of the circumstances mentioned in clause (a), (b) and (c) of sub-s. (1) of s. 271 of the I.T. Act, 1961, and the quantum of penalty is prescribed in clause (i), (ii) and (iii) of the same sub-section. Much argument was constructed on the words "may" and "shall" (which have both been applied in the same sense in the sentence) to urge that the first is discretionary, while the quantum of penalty is fixed, certain and mandatory. In our opinion, nothing much turns upon the use of the word "may". The income-tax authorities have been empowered to impose penalty only if there exists one or more of the circumstances enumerated in clause (a), (b) and (c), but not otherwise.*

## Does anything turn upon use of the word `may`?

- Explanation of `discretion of Authorities to levy penalty', by the Madhya Pradesh High Court has, in **Todarmal Safarishmal Lashkar v. CIT [(1979) 118 ITR 759 (MP)]**, continued .... –
  - *But, where any of these circumstances exist, the authority has power to impose penalty. The element of discretion steps in when, under cl. (a), the authority has to satisfy itself whether the return was not furnished " without reasonable cause ", so also in cl. (b). Now, in order to determine whether the cause was reasonable or not, the matter is left to the discretion of the authority. So also under cl. (c), it is for the authority to decide whether there has been concealment of the particulars of the income or that there was any inaccurate furnishing of the particulars. If the ITO is satisfied that under cl. (a) or (b), there was absence of reasonable cause or under cl. (c) there was concealment or inaccurate furnishing of the particulars, and imposes the penalty, no other reason need be given for imposing the penalty.*

## Meaning of 'discretion'

- Explanation of 'discretion of Authorities to levy penalty', by the Madhya Pradesh High Court has, in *Todarmal Safarishmal Lashkar v. CIT* [(1979) 118 ITR 759 (MP)], continued .... –
  - "In *Susannah Sharp v. Wakefield* [1891] AC 173 (HL), Lord Halsbury's classical observations may be recalled (p. 179):
    - " 'Discretion' means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself".

## Meaning of 'discretion' ...

- In *U. J. S. Chopra v. State of Bombay* [(1955) 2 SCR 94, 115 (SC)], their Lordships have reiterated the above dictum.
- "In our opinion, the decisions relied on by Shri Dabir in *Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd.* [1962] 32 Comp Cas 604; AIR 1962 SC 1543, *Neel v. State of West Bengal*, AIR 1972 SC 2066, *Union of India v. M. L. Capoor*, AIR 1974 SC 87 and *Hindustan Steel Ltd. v. State of Orissa* [1972] 83 ITR 26 (SC) do not help the assessee. The quantum of penalty is a matter of arithmetic calculation, which has to be peremptorily based on the second part of s. 271(1). The penalty can be neither more nor less than that prescribed."

### What must be regarded to decide whether 'may' is permissive or compulsive ?

- In King v. Mitchell [(1913) 1 KB 561], Ridley, J. said –
  - *“If a right is conferred upon a person and another person is empowered by the word “may” to recognize the right, not because the empowering words oblige him but because it is his duty to recognize the right, in that sense it is true that ‘may’ is equivalent to ‘must’. In the same case, Lord Coleridge at p. 568 said; “Regard must be had to the surrounding circumstances whether the word “may” is to have a permissive or a compulsory meaning.”*
- The question as to whether a statutory provision is mandatory or directory would depend upon the statutory scheme. It is now well known that use of the expression “shall” or “may” by itself is not decisive. The Court while construing a statute must consider all relevant factors including the purpose and object the statute seeks to achieve – **Ashok Lanka v. Rishi Dixit [AIR 2005 SC 2821 at p. 2834]**.

### Does the phrase 'shall be liable' mean that the direction to pay shall be in the course of assessment proceedings?

- Sections 271C, 271CA, 271D, 271DA, 271DB and 271E use the phrase “*shall be liable*”. However, unlike the provisions of section 270A(1) these provisions do not begin with “*may direct*”.
- Section 158BFA(1) provided for levy of interest if the return of total income including undisclosed income for the block period, was furnished after the date mentioned in the notice. This section uses the phrase “shall be liable.” However, section 158BFA(2) imposing penalty uses the phrase “*may direct*” with “*shall pay*”.
- Sections levying interest under 234A, 234B, 234C, 234D use the phrase “*shall be liable*”.
- The phrase ‘*shall be liable*’ could even suggest that in the course of proceedings of the person who has under-reported his income, there needs to be a direction by the Specified Authority that the person shall be liable to pay a penalty. In other words, an imposition of penalty needs to happen in the course of assessment proceedings itself.

## Meaning of “shall be liable”

- Section 270A provides that an assessee may make an application to the Assessing Officer for grant of immunity from imposition of penalty under section 270A and such application, subject to satisfaction of conditions mentioned in sub-section (1) of section 270AA, may be made within a period of one month from the end of the month in which the order of assessment or reassessment is received.
  
- Also, Explanation (a) to sub-section (3) of section 270A which defines the term “*preceding order*” indicates that what is contemplated is that the proceedings for levy of penalty will be initiated in the course of assessment proceedings.
  
- It appears that Section 270A(1) does not envisage / require an Assessing Officer to pass an order, in the course of assessment proceedings, levying penalty under S. 270A but only requires initiation of the proceedings for levy of penalty under S. 270A.

## Section 270A(2)

- **270A. (1)** .....
  
- (2) A person shall be considered to have under-reported his income, if—
  - (a) the income assessed is greater than the income determined in the return processed under clause (a) of sub-section (1) of section 143;
  - (b) the income assessed is greater than the maximum amount not chargeable to tax, where no return of income has been furnished or where the return has been furnished for the first time under section 148;
  - (c) the income reassessed is greater than the income assessed or reassessed immediately before such reassessment;
  - (d) the amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income determined in the return processed under clause (a) of sub-section (1) of section 143;

## Section 270A(2)

- (e) the amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is greater than the maximum amount not chargeable to tax, where ~~no return of income has been filed~~ no return of income has been furnished or where return has been furnished for the first time under section 148;
  
- (f) the amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;
  
- (g) the income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

## Circumstances in which a person can be said to have "under-reported" his income – Sub-section (2)

Clause	Circumstance	Condition for being regarded as "under-reporting" of Income		
(a)	ROI filed	Assessed Income	>	Income determined in return processed u/s 143(1)(a)
(b)	Return not filed or where return has been furnished for the first time under section 148	Assessed Income	>	Maximum amount not chargeable to tax
(c)	Reassessment	Reassessed Income	>	Assessed Income / Reassessed income as per immediately previous reassessment
(d)	ROI filed	Assessed / Reassessed deemed total income u/s 115JB / 115JC	>	Deemed total income u/s 115JB / 115JC in the return processed under s. 143(1)(a)

## Circumstances in which a person can be said to have "under-reported" his income – Sub-section (2)

Clause	Circumstance	Condition for being regarded as "under-reporting" of Income		
(e)	Return not filed or where return has been furnished for the first time under section 148	Assessed / Reassessed deemed total income u/s 115JB / 115JC	>	Maximum amount not chargeable to tax
(f)	Reassessment	Assessed / Reassessed deemed total income u/s 115JB / 115JC	>	Assessed / Reassessed deemed total income u/s 115JB / 115JC as per immediately previous assessment/ reassessment
(g)	In case of a loss	Assessed/ Reassessed loss	<	Returned / Assessed loss
		Assessed / Reassessed income		As against returned / previously assessed loss

## scope of the word 'income assessed'

- Clauses (a), (b) and (c) of sub-section (2) require comparison of "income assessed" with income determined in an intimation under section 143(1)(a) of the Act or with maximum amount not chargeable to tax or with income assessed or reassessed in the immediately preceding order. While the phrase used in these clauses is "income assessed" clauses (d), (e) and (f) use the phrase "deemed total income". What is assessed under the Act is "total income" and not "income". Therefore, a question arises as to whether the phrase "income assessed" in clauses (a), (b) and (c) means "total income assessed" or is it that the legislature has consciously chosen to use a different language so as to convey a different meaning than what is conveyed by the phrase "total income". In other words, should the comparison of the income assessed with the processed income be on a total basis or on an item to item basis. The difference being that in a comparison of income assessed with processed income on total basis the reduction, if any, will be set off against items of addition whereas if the comparison is to be done on an item by item basis then the individual items of additions will need to be aggregated, possibly without considering the reduction, if any.

## Are the situations mentioned in sub-section (2) exhaustive?

- The penalty under section 270A of the Act is for under-reporting of income. However, the term 'under-reporting' is not defined. Sub-section (2) merely mentions seven situations, in clauses (a) to (g), in which a person ***shall be considered*** to have under-reported his income.
- The Supreme Court, in *Chairman, LIC of India v. A Masilamani [(2013) 6 SCC 350]*, observed as under –
  - *"The word "**consider**", is of great significance. Its dictionary meaning of the same is "to think over", "to regard as", or "**deem to be**". (emphasis supplied)*
- In the present context, it appears that the phrase "*shall be considered*" has been used to mean "*shall be deemed*". Therefore, the seven instances covered by seven clauses of sub-section (2) are cases where the legislature deems that a person has under-reported his income

## Are the situations mentioned in sub-section (2) exhaustive?

- It is difficult to conceive a situation which is not covered by any of the seven clauses mentioned in sub-section (2).
- One such situation could be a case where there is addition in the course of assessment but such addition does not change assessed income but reduces the amount of loss carried forward to subsequent year.
- It may be debatable as to whether the above situation is covered by clause (g).
- Another situation could be a case where there are additions made while assessing total income but total income assessed is lower than the returned income, because of claims which have been made in the course of assessment proceedings. Therefore, assessed income is lower than or same as returned income but there are additions made as well.

## Are the situations mentioned in sub-section (2) exhaustive?

- If one takes a view that the above situation is not covered by clause (g), it may be possible to contend that the seven situations mentioned in sub-section (2) are deemed to be cases of `under-reporting`. A deeming fiction expands the scope of the term but does not exclude what is covered in it by its natural meaning. Since the term `under-reporting` is not defined in the Act, the dictionary meaning thereof will have to be considered. Dictionaries have explained the meaning of the term as under -

Dictionary	“under-report”
Cambridge Dictionary	To record that you have earned less than you really have on your tax return.
Oxford	Fail to report (something, especially news or data) fully.
Free Dictionary	To report to be less or lower than is correct.

- It appears that it would be possible to contend that the situations mentioned in sub-section (2) are not exhaustive

## Are the clauses of sub-section (2) mutually exclusive?

- Seven clauses of sub –section (2) deal with seven situations in which a person is considered to have under-reported his income
- Prima facie, it appears that the case of an assessee may be covered by one of the situations in clauses (a) to (c) and may also be covered by one of the clauses (d) to (f)
- Clauses (a) to (c) envisage comparison of income assessed with processed income whereas clauses (d) to (f) envisage comparison of `deemed total income` with processed book profits.
- It is quite possible that in an assessment there may be additions to income computed under normal provisions of the Act and also there may be additions to the “book profits”.
- However, it is relevant to note that there can be only one amount of “income assessed”. If income is assessed under the normal provisions then the question of book profits being “deemed total income” does not arise.

## Are the clauses of sub-section (2) mutually exclusive?

- While the matter is not free from doubt, a better view of the matter appears that the seven clauses of sub-section (2) are mutually exclusive. However, since sub-section (2) merely provides the circumstances in which a person shall be considered to have under-reported his income and not the quantification thereof, this question may not have any practical consequence when it comes to imposition of penalty under section 270A.
- There appears to be some overlap between clauses (d) and (f), however, this overlap appears to be inadvertent. This is a result of clause (f) being inserted at the Act stage. While clause (f) was inserted the reference of reassessment appears to have inadvertently not been deleted from clause (d).

## Scope of 'loss' in clause (g) of sub-section (2)

- For the situation under consideration to be covered by this clause one has to consider whether 'loss' referred to in clause (g) is the carried forward loss or is it a loss for the year under consideration. While the loss for the year under consideration has not been reduced, as a result of the assessment of income, what has been reduced is the carried forward loss.
- It is possible to take a view that 'loss' here appears to be loss for the year and not brought forward loss because if the reference is to brought forward loss then how could loss be converted into income? However, equally possible it is to argue that when the quantum of additions is such that the entire brought forward loss is set off and a positive income is assessed, it is a case of 'converting such loss into income'.

## Scope of 'loss' in clause (g) of sub-section (2)

- When one looks at the position of a similar case under section 271(1)(c) era one finds that the Apex Court in the case of CIT v. Gold Coin Health Foods (P.) Ltd. [(2008) 172 Taxman 386 (SC)], while dealing with the question as to whether the amendment of Explanation 4 to section 271(1) was prospective or retrospective has held as under –
  - *Section 2(24) defines 'income' which is an inclusive definition and includes losses, i.e., negative profit. The position has been elaborately dealt with by the Supreme Court in CIT v. Harprasad & Co. Ltd. [1975] 99 ITR 118. The Court held with reference to the charging provisions of the statute that the expression 'income' should be understood to include losses. The expression 'profits and gains' refers to positive income whereas losses represent negative profit or in other words minus income. This aspect does not appear to have been noticed by the Bench in Virtual Soft Systems Ltd.'s case (supra). The view of the Court in Harprasad & Co. (P.) Ltd.'s case (supra) leads to the irresistible conclusion that income also includes losses. The Explanation 4(a) to section 271(1)(c) as it stood during the period 1-4-1976 to 1-4-2003, has to be considered in the background. [Para 7]*

## Scope of 'loss' in clause (g) of sub-section (2)

- *A combined reading of the recommendations of the Wanchoo Committee pursuant to which the Explanation 4(a) was inserted with effect from 1-4-1976 and the Department Circular No. 204, dated 24-7-1976 makes the position clear. The Explanation 4(a) to section 271(1)(c) intended to levy the penalty not only in a case where after addition of concealed income, a loss returned, after assessment, becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. Therefore, even during the period between 1-4-1976 to 1-4-2003, the position was that the penalty was leviable even in a case where addition of concealed income reduced the returned loss. [Para 10]*

## Scope of 'loss' in clause (g) of sub-section (2)

- When the word 'income' is read to include losses as held in Harprasad & Co. (P.) Ltd.'s case (supra ), it becomes crystal clear that even in a case where on account of addition of concealed income the returned loss stands reduced and even if the final assessed income is a loss, still penalty was leviable thereon even during the period 1-4-1976 to 1-4-2003. Even in the circular dated 24-7-1976, the position was clarified by the CBDT by stating that in a case where on setting off of the concealed income against any loss incurred by the assessee under any other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even to a minus figure, the penalty would be imposable because in such a case 'the tax sought to be evaded' would be tax chargeable on concealed income as if it is 'total income'. [Para 11]

## Scope of 'loss' in clause (g) of sub-section (2)

- Law is well-settled that the applicable provision would be the law as it existed on the date of the filing of the return. **It is of relevance to note that when any loss is returned in any return, it need not necessarily be the loss of the concerned previous year. It may also include carried forward loss which is required to be set off against future income under section 72.** Therefore, the applicable law on the date of filing of the return cannot be confined only to the losses of the previous accounting years. [Para 12] (emphasis supplied)

### Text of section 270A(3)

- (3) The amount of under-reported income shall be,—
  - (i) in a case where income has been assessed for the first time,—
    - (a) if return has been furnished, the difference between the amount of income assessed and the amount of income determined under clause (a) of sub-section (1) of section 143;
    - (b) in a case where ~~no return has been furnished~~ no return of income has been furnished or where return has been furnished for the first time under section 148,—
      - (A) the amount of income assessed, in the case of a company, firm or local authority; and
      - (B) the difference between the amount of income assessed and the maximum amount not chargeable to tax, in a case not covered in item (A);
  - (ii) in any other case, the difference between the amount of income reassessed or recomputed and the amount of income assessed, reassessed or recomputed in a preceding order:

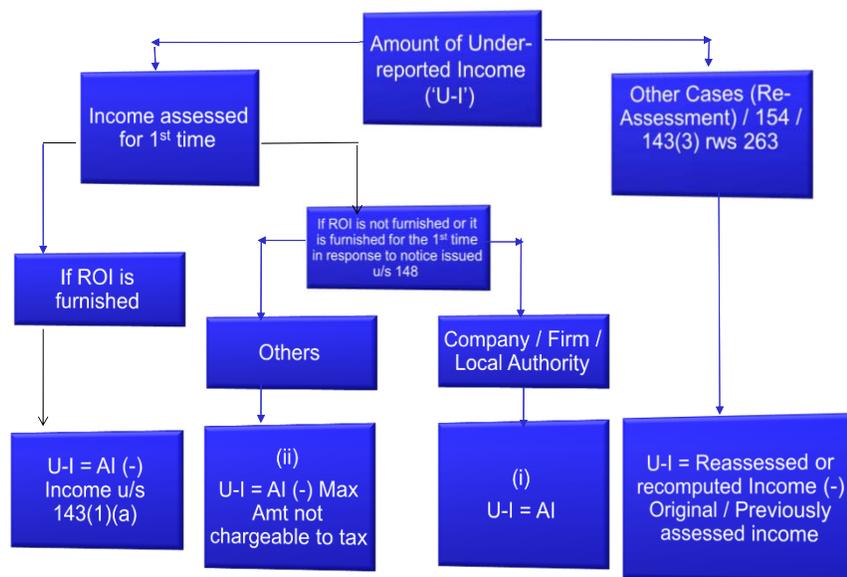
### Text of section 270A(3)

- **Provided** that where under-reported income arises out of determination of deemed total income in accordance with the provisions of section 115JB or section 115JC, the amount of total under-reported income shall be determined in accordance with the following formula—
  - $(A - B) + (C - D)$where,
  - A = the total income assessed as per the provisions other than the provisions contained in section 115JB or section 115JC (herein called general provisions);
  - B = the total income that would have been chargeable had the total income assessed as per the general provisions been reduced by the amount of under-reported income;
  - C = the total income assessed as per the provisions contained in section 115JB or section 115JC;

### Text of section 270A(3)

- D = the total income that would have been chargeable had the total income assessed as per the provisions contained in section 115JB or section 115JC been reduced by the amount of under-reported income:
- **Provided further** that where the amount of under-reported income on any issue is considered both under the provisions contained in section 115JB or section 115JC and under general provisions, such amount shall not be reduced from total income assessed while determining the amount under item D.
- Explanation.—For the purposes of this section,—
- "preceding order" means an order immediately preceding the order during the course of which the penalty under sub-section (1) has been initiated;
- in a case where an assessment or reassessment has the effect of reducing the loss declared in the return or converting that loss into income, the amount of under-reported income shall be the difference between the **loss claimed** and the income or loss, as the case may be, assessed or reassessed.

### Amount of under-reported income – Section 270A(3)



### Quantification of under-reported income – sub-section (3)

- The first step in computation and levy of penalty under this section, is computation of under-reported income. The sub-section provides for objectivity to identify the amount of under-reported income.
- In principle, the difference between the assessed income and processed income is treated as under-reported income.
- Various situations, contemplated by this sub-section, are as under –
  - (i) In a case where income has been assessed for the first time
    - (a) Return has been furnished :  $UI = AI - PI$
    - (b) No return has been furnished or where return has been furnished for the first time under section 148:
      - (A) in case of a company/ firm / local authority :  $UI = \text{Income assessed}$
      - (B) in other cases :  $UI = AI - \text{maximum amount not chargeable to tax}$

### Quantification of under-reported income – sub-section (3)

- (iii) In case under-reported income arises on account of determination of deemed total income under S. 115JB / 115JC - it requires aggregation of under-reported income as per normal provisions as well as deemed total income (under S. 115JB/JC)
  - (A) Under Reported Income (as per S. 115JB/115JC, as returned / assessed)
    - Assessed income under s. 115JB Rs. 12,00,000
    - Processed income as per S. 115JB Rs. 10,00,000
    - Under Reported Income Rs. 2,00,000
  - (B) Total Under reported income = (A-B) + (C-D)

### Quantification of under-reported income – sub-section (3)

- (B) Total Under reported income = (A-B) + (C-D)

Particulars		Rupees
Total income assessed as per normal provisions	A	10,00,000
Income assessed under normal provisions reduced by URI	B	8,00,000
Total income assessed as per S. 115JB/115JC	C	12,00,000
Income assessed under S. 115JB/115JC	D	10,00,000
Total under-reported income	(A-B)+(C-D)	4,00,000

### Determination of income in case of losses

- The amount of under-reported income will be difference between –
  - (a) amount of losses assessed/reassessed/recomputed (if it results into reduced losses); and
  - (b) the amount of losses determined / assessed / re-assessed / re-computed in the preceding assessment order
- In case of first assessment, it appears that in view of the language of Explanation the losses claimed i.e. the losses as per Return of Income need to be considered and not losses as per Intimation under s. 143(1)(a). This interpretation leads to a differential treatment between assesseees who have returned income and one who has returned a loss. However, example of loss to loss situation given in Explanatory Memorandum indicates that the computation of under-reported income is with reference to loss processed and not loss claimed in the return of income.
- In case of second and subsequent assessments it will be difference between losses as per two assessments.

### Points to be noted in connection with quantification

- Even in relation to the quantification, it is based on the difference; and not the aggregate of various additions (which may represent under-reported income);
- If, in the assessment, there are additions as well as reductions, the net amount would be considered as under-reported income exigible to penalty;
- Where a return is furnished, the difference between assessed income (being greater) and income as per intimation would be considered as under-reported income. The difference between the returned income and processed income, if any, would not be considered as under-reported income for the purposes of quantification thereof as well as for determining the penalty;

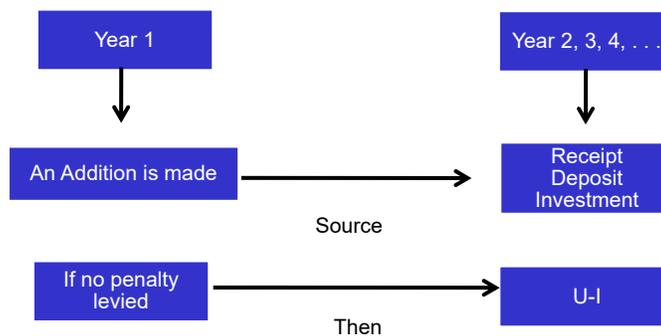
### Points to be noted in connection with quantification

- One of the provisions, for quantification, refers to re-computation of total income. It implies that an order giving effect to an appellate order could result in to re-computation of total income and, therefore, it may be considered;
- In respect of deemed total income assessment, pursuant to section 115JB or section 115JC, in a case where the additions made to the normal total income and the deemed total income are different, the aggregate of the additions made to the normal total income and deemed total income would be considered as under-reported income. Thus, additions made for different purposes would be considered as under-reported income where the income assessed is as per the deemed total income either under S. 115JB or S. 115JC.
- Where no return is furnished or where return has been furnished for the first time under section 148, in case of a company, the income assessed could be regarded as under-reported income; in case of a foreign company, on account of deduction of tax at source and other related matters and provisions, it may not file its return of income (although, the tax is paid). In such a case, if an assessment is made, the entire difference could be treated as under-reported income exigible to penalty, subject to the provisions of sub-section (6).

### Text of section 270A(4) and 270A(5)

- (4) Subject to the provisions of sub-section (6), where the source of any receipt, deposit or investment in any assessment year is claimed to be an amount added to income or deducted while computing loss, as the case may be, in the assessment of such person in any year prior to the assessment year in which such receipt, deposit or investment appears (hereinafter referred to as "preceding year") and no penalty was levied for such preceding year, then, the under-reported income shall include such amount as is sufficient to cover such receipt, deposit or investment.
- (5) The amount referred to in sub-section (4) shall be deemed to be amount of income under-reported for the preceding year in the following order—
  - the preceding year immediately before the year in which the receipt, deposit or investment appears, being the first preceding year; and
  - where the amount added or deducted in the first preceding year is not sufficient to cover the receipt, deposit or investment, the year immediately preceding the first preceding year and so on.

### Intangible Additions – Ss. (4) and (5) of S. 270A



- If intangible additions made in more than 1 earlier year, then to cover up the Receipt/Deposit/Investment, - Go backwards.
- If penalty was initiated, but dropped ? (not 'levied')
- Refer Circular 204 dated July 24, 1976 – Additions for technical reasons – eg GP addition, presumptive rate of GP or yield, estimated disallowance of certain expenses, , shortfalls, wastage, etc.

### Text of section 270A(6)

- (6) The under-reported income, for the purposes of this section, shall not include the following, namely:—
  - (a) the amount of income in respect of which the assessee offers an explanation and the Assessing Officer or the Joint Commissioner (Appeals) or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, is satisfied that the explanation is bona fide and the assessee has disclosed all the material facts to substantiate the explanation offered;
  - (b) the amount of under-reported income determined on the basis of an estimate, if the accounts are correct and complete to the satisfaction of the Assessing Officer or the Joint Commissioner (Appeals) or the Commissioner (Appeals) or the Commissioner or the Principal Commissioner, as the case may be, but the method employed is such that the income cannot properly be deduced there-from;

### Text of section 270A(6)

- (c) the amount of under-reported income determined on the basis of an estimate, if the assessee has, on his own, estimated a lower amount of addition or disallowance on the same issue, has included such amount in the computation of his income and has disclosed all the facts material to the addition or disallowance;
- (d) the amount of under-reported income represented by any addition made in conformity with the arm's length price determined by the Transfer Pricing Officer, where 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; and
- (e) the amount of undisclosed income referred to in section 271AAB.

## Exclusions from under-reported income – Ss. (6)

- Sub-section (6) provides that under-reported income shall not include certain specified amount of income under specified circumstances like bonafide explanation; estimation; undisclosed income liable to penalty under s. 271AAB, etc.
- Opening language of sub-section (6) reads : “the under-reported income, for the purposes of this section, shall not include the following ....”; and, thereafter it lists five different situations providing that the amount of income or under-reported income referred to in each of them shall not be included.
- While providing the circumstances in which it can be said that the income is under-reported and/or quantification thereof, the section compares and/or treats the difference between total income as per return or intimation and total income as per assessment or reassessment as the under-reported income. In other words, it does not add up various additions made in the course of assessment to quantify the same as under-reported income. However, while providing for exclusions, it does refer to components of income (added while computing total income)

## Meaning of ‘shall not include’

- The under-reported income computed under sub-section (3) is to be further adjusted by reducing those amounts which satisfy the conditions mentioned in various clauses of sub-section (6).
- Sub-section (6) has five clauses.
- Sub-section (6) uses the term “shall not include”
- The Apex Court in the case of **Narpatchand A Bhandari v. Shantilal Moolshankar Jain [AIR 1993 SC 1712]** was considering the scope of definition of landlord in the Explanation to section 13(1)(g) which stated that Landlord will not include a rent-farmer or rent collector or estate manager.
- The Apex Court held that a mortgagee with possession would qualify as a landlord as it is not specifically excluded.
- Thus, the exclusions mentioned in sub-section (6) are exhaustive.
- Clause (a) of sub-section (6) is a general / universal clause which can help assessee to raise all bonafide defences against levy of penalty.

## Exclusions from UI – bonafide explanation offered – clause (a) of Ss. (6)

- Five exclusions are provided in clauses (a) to (e) of sub-section (6) of s. 270A
- **Clause (a)**
- The amount of income in respect of which –
  - the assessee offers an explanation;
  - the AO/JCIT(A)/CIT(A)/CIT/PCIT is satisfied that the explanation is bonafide; and
  - the assessee has disclosed all material facts to substantiate the explanation offered
- If all the 3 conditions mentioned above are cumulatively satisfied in respect of an addition to total income, then such addition will not be regarded as under-reported income.

## scope of the word 'income' as used in 270A(6)(a)

- Subject to satisfaction of conditions mentioned in the respective clauses, the exclusion in clause (a) is of 'income' whereas the exclusion in clauses (b), (c) and (d) is of 'under-reported income'.
- While under-reported income represents difference between assessed income and processed income which could be on account of disallowance of expenditure and/or on account of an item of income being added to the processed income, a question arises as to whether 'income' in clause (a) would cover disallowance of expenditure or it would seek to exclude only items of addition to income and not disallowance of expenditure / allowance / deduction.

### scope of the word `income' as used in 270A(6)(a)

- In the context of section 28 of the 1922 Act, corresponding to section 271 the Act, the Lahore High Court, in *Nagin Chand Shiv Sahai v. CIT* [(1938) 6 ITR 534 (Lahore)] held that the word 'income' has been used in this section in a much wider sense and it connotes the assessable figure arrived at after accounting for all the legitimate deductions and exemptions.
- The normal course of construction requires that when the Court finds in a statute two different expressions used, as far as possible, two different meanings must be given to these expressions, but instances are not unknown when two different expressions have been used to convey the same meaning. From this variation of the language, variation of intention cannot necessarily be inferred in construing the two expressions, taking into account the legislative intent – *Indirabai Ganpatrao Kuhikar v. House Allotment Officer* [Nagpur, 1984 MahLJ 397].

### scope of the word `income' as used in 270A(6)(a)

- When different terminologies are used by the legislature, it must be presumed that the same had been done consciously with a view to convey different meanings – *DLF Qutab Enclave Complex Educational Charitable Trust v. State of Haryana* [AIR 2003 SC 1648 at p. 1656]. Also, the Andhra Pradesh High Court in the *Madhucon Projects Ltd. v. CCE for Settlement Commission* [(2016) 72 taxman.com 71 (AP)], at para 50, has held that two different expressions in a statute must be construed to carry different meanings.

## Meaning of 'bonafide'

- **GTO v. Gautam Sarabhai Ltd. [(1989) 29 ITD 212 (Ahd.)]**
- 'The words "*bona fide*" used in the language of clause (c) are also required to be taken due note of. These words mean "in good faith", "genuinely" which are **suggestive of honesty of purpose**. They convey **absence of intention to deceive** and connote that the transaction in question is a true and genuine transaction and not a colourable and sham one and there are no strings of any kind attached to that transaction and that there is no secret or covert arrangement.'
- **GTO v. Rajmata Shanta Devi P. Gaekwad [(2001) 76 ITD 299 (Ahd.)]**
- '...under the provisions of section 4(1)(c) the value of a debt in case of release, discharge, surrender etc. becomes liable to gift tax in so far as the said release, discharge, surrender, etc. is not *bona fide*. "***Bona fide***" means **good faith implying the absence of fraud, unfair dealing or acting, whether it consists in simulation or dissimulation**. In order that the transaction is *bona fide*, it must be shown that everything was done in an open and straightforward manner. The language used in the clause has been so drafted so as to throw onus on the assessee for establishing to the satisfaction of the GTO that the transaction in question was *bona fide*.'

## Meaning of 'satisfaction' - *CII v. Parmanand M Patel* [(2005) 278 ITR 3 (Guj.)]

- 'What is the meaning of the terms 'satisfied' and 'satisfaction' One may usefully refer to the legal meaning given to the aforesaid expression:
- (i) 'Satisfied:' . . . The phrase 'is satisfied' means, in my view simply 'makes up its mind'; the court on the evidence comes to a conclusion which, in conjunction with other conclusions, will lead to the judicial decision. . . .
- New Zealand [The Marriage Act, 1955, section 15(2) provides (in relation to applications for leave to marry within the degrees of affinity) that the court must be 'satisfied' of certain circumstances] 'the best opinion I can form is that on such an application as this the evidence must enable the judge to feel what Dixon J [in *Brignishaw v. Brignishaw* [(1938) 60 CLR 336] defined as "**an actual persuasion**". That means **a mind not troubled by doubt or**, to adapt the language used by Smith J. in *Angland v. Payne* [(1944) NZLR 610 at 626, (CA)], "**a mind which has reached a clear conclusion**". If a formula has to be phrased, I would adopt one analogous to that expressed in *Edwards v. Edwards* [(1947) SASR 258 at 271], and would say that **the Judge must be "satisfied with the preponderance of probability arrived at by due caution in the light of the seriousness of the charge"**.' *Re Woodcock* [(1957) NZLR 960 at 963, 964, CA,] per Finlay A.C.J.

### Meaning of `satisfaction' ...

- '...The mind of the court must be "satisfied"—that is to say, it must arrive at the required affirmative conclusion—but the decision may rest on the reasonable probabilities of the case, which may satisfy the court that the fact was as alleged, even though some reasonable doubt may remain'.
- [Source: Words and Phrases Legally Defined: Third Edition: Volume 4 : R-Z Butterworths pages 131-132]

### Meaning of `satisfaction' ...

- Satisfied: To be satisfied with a state of things means to be honestly satisfied in your own mind. The phrase 'satisfied' occurs in many taxing statutes and is a familiar one for a great many years (see for example section 271 of the Income-tax Act, 1961, and section 56 of the Delhi Sales Tax Act, 1975). The phrase '**is satisfied**' means simply '**makes up its mind**' [per Lord Pearson in *Blyth v. Blyth* [(1966) 1 All ER 524 at page 541]. Dixon J. defined it as '**actual persuasion**'. That means '**a mind not troubled by doubt** or, to adapt the language of Smith J.' **a mind which has reached a clear conclusion**—See *Angland v. Payne* [1944] NZLR 610 (CA) at page 626 : *Jiten & Co. v. STO* [(1977) 39 STC 308 (Delhi)/Tax LR 1921 (Delhi)] at pages 1923-24. . ." [Source: Law Lexicon: Legal Dictionary with Legal Maxims: Second Edition in Four Volumes page 2167]."
- **"The term satisfied means make up one's mind not troubled by doubt or reach a clear conclusion on the evidence before the authority."**

## Meaning of `material facts`

- "*Mohammad Yusuf v. Bhairon Singh Shekhawat* AIR 1995 Raj. 239/[1995] 2 WLN 441 (Raj.)<sup>1</sup>
- 'Following settled position of law emerges from the decisions already referred:
- ... The material facts mean (a) facts necessary to formulate a complete cause of action, (b) all the preliminary facts which must be proved by the party to establish a cause of action, (c) the basic facts which constitute ingredients of particular corrupt practice, (d) all the facts which are essential to clothe the petitioner with complete cause of action, (e) the facts which if established would give the petitioner the relief asked for, (f) the facts on the basis of which the Court could give a direct verdict in favour of the election petitioner in case the returned candidate did not appear to oppose the petition, (g) facts which if not proved, the petition must fail.

## Meaning of `material facts`

- ...There is a difference between the 'material facts' and 'particulars'. The function of particulars is to present as full a picture of a cause of action with such information in details as to make the opposite party understand the case he will have to meet. There may be some overlapping between 'material facts' and 'particulars' but the two are quite distinct. The distinction is one of degree. The 'material facts' are those which the party relies upon and which if it does not prove, he fails.'
- [*for the purpose of: the Representation of the People Act 1951*]
- ***Seth Kirorimal Adwani v. ITO [1970] 77 ITR 789 (Assam)***
- ***'the expression 'material facts' refers only to primary facts***
- [*For the purpose of: Section 147(a) of the Income-tax Act, 1961*']
- On a careful reading of the clause, it is evident that the disclosure of all the material facts should be at the time of substantiating the explanation, pursuant to the Notice received under the section giving an opportunity of being heard, and not earlier.

### Meaning of `substantiate`

- Here, in our opinion **the phrase `to substantiate` will not mean to prove beyond doubt.** The degree of proof required for assessment proceedings and penalty proceedings will be different. If the phrase to substantiate is interpreted to prove beyond doubt then the penalty will be compulsorily leviable in every case of addition / disallowance, which is not the intention of the Legislature. **When, on preponderance of probabilities, the explanation given by the assessee is a plausible explanation, the assessee shall be deemed to have substantiated his explanation, for the purpose of penalty proceedings, notwithstanding the fact that such explanation was not accepted during the quantum proceedings – Matura Property Dealer v. ITO [(1995) 53 ITD 187 (Delhi)] – for the purpose of Explanation to section 271(1)(c) of the Income-tax Act, 1961.**

### Exclusions from UI – under-reported income estimated though accounts are correct and complete – clause (b) of Ss. (6)

- **Clause (b)**
- If,
  - the amount of under-reported income is estimated;
  - the accounts are correct and complete to the satisfaction of the AO/CIT(A)/CIT/PCIT;
  - the method employed may not enable proper determination of income
- then,
  - the amount of under-reported income should be excluded from the under-reported income determined as per sub-section (3).
- Prima facie, it seeks to cover, to illustrate, additions based on estimation of gross profit, as against declared profits, without rejecting books of account and/or without finding that the audited financial statements of the assessee are not true and correct. In such a case, the difference attributable to estimated amount of gross profit can be excluded from the under-reported income.

**Exclusions from UI – enhancement of estimate of the assessee resulting in UI – clause (c) of Ss. (6)**

- **Clause (c)**
- **If,**
  - an assessee estimated an amount in respect of a claim or disallowance;
  - such claim is reduced or disallowance is increased in the assessment;
  - the assessee has disclosed all the facts material to the addition or disallowance;
- **then,**
  - such difference in the estimate may not be considered as amount of under-reported income.

**Exclusions from UI – enhancement of estimate of the assessee resulting in UI – clause (c) of Ss. (6)**

- Examples of such a situation can be a case where personal expenditure is estimated at a certain amount in respect of travel or conveyance or like expenditure and accordingly disallowed in computing total income, which is accepted in the intimation or adopting of transfer price to determine profits for claiming deduction under Chapter VI-A in respect of Specified Domestic Transaction. In the assessment, the disallowance is increased or deduction decreased. The incremental disallowance or reduction may not be treated as under-reported income provided all facts necessary in relation to the same are disclosed.
- In the above case, prima facie, all the facts should have been disclosed in the course of assessment or penalty proceedings.

**Exclusions from UI – under-reported income represented by transfer pricing adjustment – clause (d) of Ss. (6)**

- **Clause (d)**
- If,
  - addition is made to the total income returned on account of adjustment in arm's length price determined by the Transfer Pricing Officer;
  - the assessee has maintained information and documents prescribed under s. 92D of the Act;
  - the assessee has declared the international transaction under Chapter X; and
  - the assessee has disclosed all the material facts relating to the transaction,
- then,
  - the addition will not be regarded as an under-reported income

**Exclusions from UI – under-reported income represented by transfer pricing adjustment – clause (d) of Ss. (6)**

- The first requirement is factual and is based on the addition made.
- The second requirement can be established based on the finding of the TPO about maintenance of information and documents and where there is no adverse remarks or comments, it can be inferred that the assessee has maintained the information and documents prescribed under s. 92D of the Act.
- The third requirement can be established on the basis of the Transfer Pricing Report furnished by the auditors and/or the finding by the TPO or AO to the effect that all the transactions have been reported or absence of finding by the TPO and/or the AO that the international transactions in question were not reported.
- As far as the material facts disclosure is concerned, finding or absence of finding by the TPO and/or the AO would be relevant apart from the disclosures made in or along with the return of income or in the Transfer Pricing reports or in the course of proceedings before the TPO and/or the AO.

## Exclusions from UI – undisclosed income – clause (e) of Ss. (6)

- Section 271AAB levies penalty on undisclosed income.
- Undisclosed income referred to in section 271AAB should be excluded from under-reported income determined in terms of the provisions of sub-sections (3) and (6).
- Explanation (c) below section 271AAB defines 'undisclosed income'. Such undisclosed income can be excluded in computing under-reported income.

## Exclusions from UI – undisclosed income – clause (e) of Ss. (6)

- Explanation (c) below section 271AAB defines 'undisclosed income' as –
  - undisclosed income" means—
    - (i) 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 Principal Chief Commissioner or Chief Commissioner or Principal 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.'

### Text of section 270A(7)

- (7) The penalty referred to in sub-section (1) shall be a sum equal to fifty per cent of the amount of tax payable on under-reported income.

### Text of section 270A

- (8) Notwithstanding anything contained in sub-section (6) or sub-section (7), where under-reported income is in consequence of any misreporting thereof by any person, the penalty referred to in sub-section (1) shall be equal to two hundred per cent of the amount of tax payable on under-reported income.
- (9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—
  - (a) misrepresentation or suppression of facts;
  - (b) failure to record investments in the books of account;
  - (c) claim of expenditure not substantiated by any evidence;
  - (d) recording of any false entry in the books of account;
  - (e) failure to record any receipt in books of account having a bearing on total income; and
  - (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.

**Does presence of a circumstance of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income**

- Sub-section (8) of section 270A provides that in the event under-reported income is in consequence of any misreporting thereof by any person, the penalty will be 200% of the amount of tax payable on under-reported income
- Provisions of sub-section (8) are non-obstante the provisions of sub-section (6) and (7).
- A question arises as to whether the non-obstante clause would apply only qua the items of under-reported income in consequence of misreporting thereof or will it be qua all the items.
- A look at the circumstances mentioned in various clauses of sub-section (9) indicates that they are basically acts or omission which are contumacious, done intentionally and with malice. Is it that the legislature says that if the conduct of a person is contumacious he needs to be punished harshly and therefore such a person is liable to pay penalty qua the entire difference between the assessed income and returned income no matter what is the reason of such a difference.

**Does presence of a circumstance of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income**

- Under-reported income is one amount and not an aggregate of several amounts. Sub-section (8) refers to under-reported income and not to 'any' under-reported income nor does it refer to a part of under-reported income
- With a view to avoid double penalty sections 271AAB and 271AAC have a provision that in a case where the penalty under these sections is leviable, penalty shall not be levied under section 270A. Mention of section 271AAB in clause (e) is because the presence of one of the items which is as a result of circumstances mentioned in sub-section (9) will make the provision of sub-section (6) not workable and therefore but for sub-section (2) of section 271AAB, there would have been double penalty.
- There is no mechanism to allocate amount of tax payable on under-reported income to that part of under-reported income which is as a consequence of misreporting thereof and to the other part which is not as a consequence of misreporting thereof.

**Does presence of a circumstance of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income**

- Counter arguments could be –
- Non-obstante clause applies in the event of the conflict between the two provisions. If there is a case of misreporting and such a case is sought to be covered by one of the clauses of sub-section (6) then it would not be open for a person to take shelter under sub-section (6) qua such an item e.g. in case of bogus purchase where an addition is made on the basis of estimate, the exclusion referred to in sub-section (6) would not apply. Similarly, if there is an estimate of section 14A disallowance based on misrepresentation or suppression of certain facts about investments then exclusion referred to in sub-section (6) would not apply.
- If only a small part of under-reported income is as a result of misreporting, a question arises as to whether only that part which is as a result of misreporting will attract penalty @ 200% and the balance under-reported income will attract penalty @ 50% or will the entire under-reported income attract penalty @ 200% of the amount of tax payable on under-reported income. This doubt arises in view of the language of sub-section (8).

**Does presence of a circumstance of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income**

- The relevant portion of the Explanatory Memorandum to the Finance Bill, 2016 reads as under –
  - *“It is proposed that the rate of penalty shall be fifty per cent of the tax payable on under-reported income. However in a case where under-reporting of income results from misreporting of income by the assessee, the person shall be liable for penalty at the rate of two hundred per cent of the tax payable on **such** misreported income.”* (emphasis supplied)
- To the similar effect, as the Explanatory Memorandum, is the explanation given in Para 62.10 of the circular dated 20.1.2017, issued by CBDT, being *Circular No. 3/2017 [F. No. 370/142/20/2016-TPL]* explaining the provisions of the Finance Act, 2016. Para 62.10 of the said Circular reads as under –
  - **“62.10** *The rate of penalty shall be fifty per cent of the tax payable on under-reported income. However in a case where under reporting of income results from misreporting of income by the assessee, the person shall be liable for penalty at the rate of two hundred per cent of the tax payable on **such** misreported income.”* (emphasis supplied)

**Does presence of a circumstance of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income**

- On a reading of the Explanatory Memorandum as also para 62.10 of the CBDT Circular it appears that it is only that part of under-reported income which is in consequence of misreporting which will attract penalty @ 200% and not entire under-reported income. While, both the Explanatory Memorandum and also the CBDT Circular use the word `such` before misreported income, this word `such` is missing in sub-section (8). It appears that omission in sub-section (8) is unintentional. Even equitably, only that part of under-reported income which is as a result of misreporting should attract penalty @ 200% of the amount of tax payable on under-reported income. However, in view of the peculiar language of sub-section (8) and the fact that sub-section (8) is non-obstante sub-section (6) and absence of mechanism to work out tax payable on misreported income separately from tax payable on under-reported income which is not in consequence of misreporting thereof, the matter cannot be said to be free from doubt. With a view to advance the objects for which the section has been introduced viz. certainty and clarity, it is advisable that CBDT issues a circular clarifying this position.

**Does presence of a circumstance of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income**

- The Finance Minister, in the Budget Speech, has stated as under –
  - *“At present, the Income-tax Officer has discretion to levy penalty at the rate of 100% to 300% of tax sought to be evaded. I propose to modify the entire scheme of penalty by providing **different categories of misdemeanor with graded penalty** and thereby substantially reducing the discretionary power of the tax officers.” [emphasis supplied]*
- The word `misdemeanor` has been explained as follows –
  - *a minor wrongdoing ; a non-indictable offence, regarded in the US (and formerly in the UK) as less serious than a felony.*
  - *an action that is slightly bad or breaks a rule but is not a crime [Cambridge Dictionary]*
  - *A misdemeanor is an act that some people consider to be wrong or unacceptable [Collins Dictionary]*

**Does presence of a circumstance of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income**

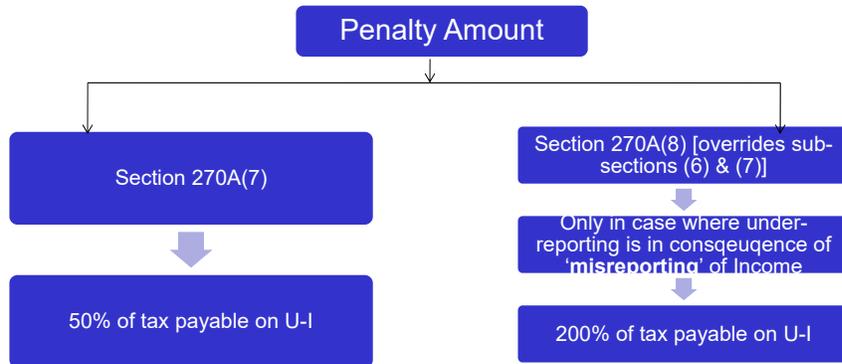
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  - *A misdemeanor is an act that some people consider to be wrong or unacceptable [Collins Dictionary]*

**Does presence of a circumstance of misreporting trigger the non-obstante part of sub-section (8) qua all the items of under-reported income**

- Therefore, it can be contended that “*under-reporting in consequence of misreporting*” and “*under-reporting*” (which is not in consequence of misreporting) are two different categories of misdemeanor (minor offences) with different rates of penalty being 50% of tax payable and 200% of tax payable. This is in consonance with what has been stated by the Finance Minister in the Budget Speech.

## Computation of Penalty

- u/s 270A(7) : 50% of the amount of tax payable on U-I
- u/s 270(8) : Misreporting of Income
  - Subsection (8) overrides subsections (6) and (7);
  - 200% of tax payable on U-I.



## computation of penalty in respect of UI – Sub-sections (7) and (8)

- **Penalty on under-reported income :**
- 50% of tax payable on under-reported income [sub-section (7)]
- Sub-section (8) deals with quantum of penalty in a case where under-reporting is in consequence of mis-reporting thereof by any person. Provisions of sub-section (8) are notwithstanding provisions of sub-sections (6) or (7).
- In a case where under-reporting of income is in consequence of mis-reporting thereof by any person, the penalty shall be 200% of amount of tax payable on under-reported income. [sub-section (8)]
- Sub-section (10) lays down the manner of computing the amount of tax payable on under-reported income

### penalty in case of mis-reporting of income – sub-section (8)

- Sub-section (8) is notwithstanding any thing stated in sub-sections (6) or sub-section (7) i.e. in cases where there is mis-reporting of income, the exceptions stated in sub-section (6) shall not apply. Sub-section (7) provides for penalty for under-reporting @ 50% of tax payable on under-reported income.
- Sub-section (8) reads as : “*where under-reported income is in consequence of any misreporting thereof by any person, ....*”
- Therefore, misreporting is a subset of under-reporting. Sub-section (8) will apply in cases where under-reporting is as a result of misreporting. If there is misreporting which does not result in under-reporting, there will be no consequence.
- In cases of under-reporting as a consequence of misreporting, penalty is 200% of amount of tax payable on under-reported income.

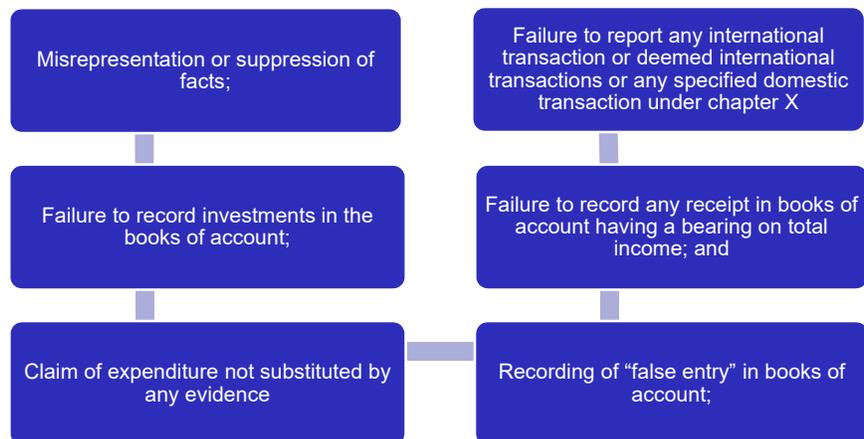
### Text of section 270A(9)

- (9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—
  - (a) misrepresentation or suppression of facts;
  - (b) failure to record investments in the books of account;
  - (c) claim of expenditure not substantiated by any evidence;
  - (d) recording of any false entry in the books of account;
  - (e) failure to record any receipt in books of account having a bearing on total income; and
  - (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.

## mis-reporting of income – Sub-sections (9)

- Sub-section (9) provides for the circumstances in which it could be said that the underreported income represents misreported income.
- As per Merriam Webster dictionary, 'mis-' is a prefix meaning: '1a: *badly; wrongly*, *misjudge*> b: *unfavourably*<*misesteem*> c: *in a suspicious manner* <*misdoubt*> 2 *bad: wrong* <*misdeed*> 3: *opposite or lack of* <*mistrust*> 4: *not* <*misknow*>'
- Hence, generally, it can be said that misreporting implies a wrong reporting to mean a deliberate action with a view to achieve a result (in the context, reduce the total income liable to tax and accordingly the tax).

## Cases of misrepresentation of Income : UI-I represents misreported income – Section 270A(9)



### Meaning of `misrepresentation`

- According to Halsbury's Laws of England, **a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact.**
- ..... It is not misrepresentation under Section 21 to state that the premises shall be needed by the landlord after expiry of the lease even though the premises in occupation of the landlord on the date of application or, after expiry of period were or may be sufficient. **A non-disclosure of fact which is not required by law to be disclosed does not amount to misrepresentation** ..... Fraud or misrepresentation resulting in violation of permission in context to Section 21 therefore could mean disclosure of false facts but for which the Controller would not have exercised jurisdiction – Smt. Shrisht Dhawan v. Shaw Brothers [AIR 1992 SC 1555] – for the purpose of section 21 of the Delhi Rent Control Act, 1958.

### Meaning of `misrepresentation`

- i.e., **suggestion falsi, whether by acts, words or by positive assertions. It is immaterial whether the person making the misrepresentation knew the matter to be false or asserted it without knowing if it were false or true.**
- The courts will grant relief against a contract induced by misrepresentation if it be shown that such misrepresentation was material, and that the party claiming relief was misled by it. 3 Steph. Com. – Mozley and Whiteley's Law Dictionary, Second Edition, 1904, page 200.
- It is a settled proposition of law that where an applicant gets an order / office by making misrepresentation or playing fraud upon the Competent Authority, such order cannot be sustained in the eyes of law. "Fraud avoids all judicial acts ecclesiastical or temporal." (vide S. P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. & Ors. AIR 1994 SC 853.

## Meaning of `misrepresentation`

- It is also well settled that **misrepresentation itself amounts to fraud. Indeed, innocent misrepresentations may also give reason to claim relief against fraud.**
- A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood proceeded may nothave been bad. [Ram Chandra Singh v. Savitri Devi (2003) 8 SCC 319]

## Meaning of `suppression`

- The word “**suppression**”, according to the Shorter Oxford English Dictionary, **means: The action of keeping secret; refusal to disclose or reveal.**
- Consequently, the meaning given to the word “suppression” in the Shorter Oxford English Dictionary referred to above will clearly show that **suppression always implies a wilful non-disclosure** – P. M. Perianna Pillair v. Commissioner, Board of Revenue (Commercial Taxes) [(1980) 46 STC 94 (Mad.)].

### Meaning of `suppression`

- The use of the word “suppression” shows that what the assessing officer found was wilful non-disclosure. If it was not a wilful non-disclosure, the assessing officer would have stated as merely omissions. The use of the word “suppression” clearly brings out the wilful nature of the non-disclosure and, therefore, the Tribunal was not right in setting aside the penalty merely on the ground that there was no finding of wilful non-disclosure – State of Tamil Nadu v. Sri Swamy and Company, [(1977) 39 STC 85 (Mad.)] followed in The State of Tamil Nadu v. R. R. Ramachari and Sons [(1977) 40 STC 542 (Mad.)] - for the purpose of section 16 of the Madras Sales Tax Act.

### Meaning of `suppression`

- The word “suppression” in section 11A of the 1944 Act is accompanied by the words “fraud” or “collusion” and, therefore, the word “suppression” should be construed strictly. That, **mere omission to give correct information did not constitute suppression unless that omission was made wilfully in order to evade duty.** That, suppression would mean failure to disclose full and true information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party would not constitute suppression. **That, an incorrect statement cannot be equated with a wilful mis-statement. The latter implies making of an incorrect statement with the knowledge that the statement made was not correct** – Continental Foundation Joint Venture Sholding v. CCE, Civil Appeal No. 3139/2002 explained in CCE v. Ballarpur Industries Ltd. [(2007) 8 SCC 89].

### Meaning of `failure`

- In Oxford English Dictionary, the word `default` has been defined, as `failure of something` and **`failure` is a noun from the word `fail`, which from the very nature of things refers to some volitional act** – Ramanlal Nagindas Jariwala v. State Bank of India [AIR 1983 Guj 82]
- Penalty may be imposed under section 272A(2)(e) for failure to furnish the return of income in accordance with the provisions of section 139(4A) r.w.s. 139(1). **An attempt of deliberateness or deceptiveness is associated with the word `failure`** – HTSL Community Service Trust v. JCI [(2012) 20 taxmann.com 4 (Bang.)] – for the purpose of section 272A(3) of the Income-tax Act, 1961.

### Meaning of `failure`

- **Failure must connote that there is an obligation which has not been carried out and if there was no obligation upon the assessee to make a return then it would not be a failure on his part to carry out that obligation.** But the Legislature has also used the expression “omission”, and it is clear that the expression “omission” does not connote any obligation as the expression “failure” does. “Omission” is a colourless word which merely refers to not doing something, and if the assessee in fact does not make a return, it is an omission on his part, whether the law casts any obligation upon him or not – Pannalal Nandlal Bhandari v. CIT [(1956) 30 ITR 57 (Bom.)] and Harshendu Upendre Kaka v. ITO [(2001) 116 Taxman 658 (Bom.)] – For the purpose of section 34(1)(a) of the Income-tax Act, 1922 (corresponding to section 147 of the Income-tax Act, 1961).

### Meaning of `failure`

- The Concise Oxford Dictionary to which the learned District Munsif himself refers, gives the following meanings to the word “fail” : “neglect; not remember or not choose”. The term “failure” is given amongst other meanings : “non-occurrence non-performance”; and some of the meanings given to the verb “fail” in the Oxford Dictionary are `to make default; to be a defaulter; to leave undone, omit to perform; to be at fault,” and amongst other meanings there given to “failure” are : “a failing to occur, be performed or be produced; an omitting to perform something due or required; default”. In my view, this was a “failure” by the Delhi Post Office to stop payment of the money order within the meaning of Rule 100 made under the Indian Post Office Act (6 of 1898) and Rule 276, Post and Telegraph Guide – Ambalanattath Pareri Balaram v. Secretary of State, AIR 1937 Mad. 797 – for the purpose of Rule 276 in Post and Telegraph Guide.

### Meaning of `substantiate`

- Here, in our opinion the phrase `to substantiate` will not mean to prove beyond doubt. The degree of proof required for assessment proceedings and penalty proceedings will be different. If the phrase to substantiate is interpreted to prove beyond doubt then the penalty will be compulsorily leviable in every case of addition / disallowance, which is not the intention of the Legislature. **When, on preponderance of probabilities, the explanation given by the assessee is a plausible explanation, the assessee shall be deemed to have substantiated his explanation, for the purpose of penalty proceedings, notwithstanding the fact that such explanation was not accepted during the quantum proceedings – Matura Property Dealer v. ITO [(1995) 53 ITD 187 (Delhi)] – for the purpose of Explanation to section 271(1)(c) of the Income-tax Act, 1961.**

### Meaning of `any`

- The Apex Court in Lucknow Development Authority v. M. K. Gupta [(1994) 1 SCC 243] has held that the word **`any` is a word of wide amplitude**. Its dictionary meaning is `one or some or all'. Referring to Black's Law Dictionary it has been stated as follows –
- In Black's Law Dictionary it is explained thus, the word **`any` has a diversity of meaning and may be employed to indicate `all' or `every' as well as `some' or `one' and its meaning in a given statute depends upon the context and the subject matter of the statute.**
- It was held therein that **the word `any` was used in the statute which was under consideration before the Apex Court in wider sense extending from one to all** – Chaubey Overseas Corporation v. CIT, [(2008) 303 ITR 9 (All.)] - for the purposes of section 269T of the Income-tax Act, 1961

### Meaning of `any`

- The word **“any”** may have one of several meanings; **according to the circumstances it may mean “all”, “each”, “every”, “some”, or one or more out of several**. In Gangadhar Narinsgdas Agarwal v. Union of India [(1967) (1) MLJ 197], it was held that the word “any” means all except where this wide construction is limited by the subject matter and context of a particular statute. In Ashiq Hassan Khan v. SDO AIR 1965 Part 444 and Chandi Prasad v. Rameshwar Prasad AIR 1967 Pat. 41, it was held that the expression given to the word “any” in certain context and subject matter excludes limitation or qualification – K. V. Kadar Haji (Decd.) through LR v. CIT [(2004) 268 ITR 465 (Ker.)] – for the purpose of section 127 of Companies Act.
- The word **`any` is a word which excludes the limitation and qualification and can mean `all', `each' and `every'** – Birla Cement Works v. CBDT [(1997) 95 Taxman 377 (Raj.)] – for the purpose of section 194C of the Income-tax Act, 1961.

### Meaning of `any`

- **The word “any” when used affirmatively, means “whichever, of whatever kind, or whatever quantity”** – See Murray’s Oxford English Dictionary. The Shorter Oxford Dictionary defines it as “every one of the sort named” – Manubhai A. Sheth v. ITO [(1981) 128 ITR 87 (Bom.)] – for the purpose of section 2(1A) of the Income-tax Act, 1961.
- **“Any” possibly means that for all purposes** the winding up has to be deemed to be a winding up by the court and the liquidator has to act in practically the same way – B. L. Sharma v. Om Prakash Malhotra [(1979) 49 Comp. Cases 402 (Delhi)].
- When determining the profits of “any business” the expenditure wholly laid out for that business has to be allowed. **“Any” does not necessarily mean one business** – Makhantal Ram Swarup v. CIT [(1966) 61 ITR 214 (All.)] – for the purpose of section 10(2)(xv) of the Income-tax Act, 1922 (corresponding to section 29 of 1961

### Meaning of `false`

- We are called upon to adopt the narrow meaning of the word “false” and to confine the inclusion of any amount claimed by way of deduction or allowance as undisclosed income, only if the same are claimed with an evil intention or with knowing that it is false. There can be no doubt that widely interpreted the words “false” is capable of taking in intentional and innocent falsehoods. In other words, if widely interpreted, it is capable of bearing the meaning that the claim is untrue on the basis of mistake or accident or it was untrue even though care had been taken and the appellant had honestly thought that the claim was sustainable – Medical Land v. CIT [(2014) 363 ITR 81 (Ker.)] – for the purpose of section 158B of the Income-tax Act, 1961 defining undisclosed income as including any expense, deduction or allowance claimed under this Act which is found to be false]

### Meaning of `false`

- the legislature has, in the said Section, used the expression “falsely represents” in contradistinction to “wrongly represents”. Therefore, what we are required to construe is whether the words “falsely represents” would cover a mere incorrect representation or would embrace only such representations which are knowingly, wilfully and intentionally false.
- ... According to the Black’s Law Dictionary (6<sup>th</sup> Edition), the word “false” has two distinct and well recognised meanings: (1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care. A thing is called “false” when it is done, or made, with knowledge, actual or constructive, that it is untrue or illegal, or is said to be done falsely when the meaning is that the party is in fault for its error.

### Meaning of `false`

- .... Likewise, P. Ramanatha Aiyar in Advance Law Lexicon (3<sup>rd</sup> Edition, 2005) explains the word “false” as :
- “In the more important uses in jurisprudence the word implies something more than a mere untruth; it is an untruth coupled with a lying intent ..... or an intent to deceive or to perpetrate some treachery or fraud. The true meaning of the term must, as in other instances, often be determined by the context.”
- **In view of the above, we are of the considered opinion that the use of the expression “falsely represents” is indicative of the fact that the offence under Section 10(b) of the Act comes into existence only where a dealer acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct. – CST v. Sanjiv Fabrics [(2010) 9 SCC 630]**

## Meaning of `false`

- The words “false return” connotes certain amount of deliberateness or wilfulness, or an element of suppression on the part of the assessee. On the other hand, the words “incorrect and incomplete” do not imply such deliberateness, suppression or wilfulness in making a return. But even to come to a conclusion that a return is incorrect or incomplete, the assessing authority has to take note of the exceptional cases where an assessee bonafide believes that he is not liable to include a turnover in the return or whether a particular turnover attracts duty under one or other of the entries in the First Schedule to the Act or whether the item is taxable as a multi-point item, etc. To this extent we are of the opinion that the observation of the Supreme Court in Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax [(1980) 45 STC 197], which we have extracted above, do apply even in the case of an incorrect or incomplete return. The conclusion therefore is inevitable that each case will depend upon its own facts. It is said that in the game of chess, no two games are same after the fifth or sixth move. So also, the cases of assesseees which are brought to the portals of courts of law, are not always identical – State of Tamil Nadu v. India Silk Traders, Tax Case (Revision) No. 1008 of 1984] – for the purpose of section 43 of the Madhya Pradesh Sales Tax Act.

## Meaning of `false`

- What section 43 of the Madhya Pradesh General Sales Tax Act, 1958 requires is that the assessee should have filed a `false` return and a return cannot be said to be `false` unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may, in a given case, infer deliberateness and the return may be liable to be branded as a false return. But **where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable to include it, it would not be right to condemn the return as a `false` return inviting imposition of penalty.** – Cement Marketing Co. of India Ltd. v. ACST [AIR 1980 SC 346]

### Meaning of `false`

- Penalty under section 15-A(1)(1) is leviable only if a certificate issued is false. In the Law Lexicon Dictionary by P. Ramanatha Aiyar, 1987 **False has been stated to mean “erroneous, untrue, the opposite of correct or true”.** **The term does not necessarily involve turpitude of mind. In the more important uses in jurisprudence the word implies something more than an intent to deceive or to perpetrate some treachery or fraud”.** We are now dealing with a provision levying penalty for the issue of False declaration and, therefore, False in section 15-A(1)(1) would not merely mean untrue or incorrect and it is necessary that there should be lying intent. The circumstances of this case do not disclose any such intent and what is apparent is that the assessee as well as the assessing officer were under a wrong impression that the dealer was authorised to issue the forms in question. In my view, therefore, the Tribunal was not right in upholding the levy of penalty. – **Jwala Industries v. CST [(1996) 101 STC 359]** – for the purpose of section 15A(1)(1) of the U.P. Sales-tax Act.

### Meaning of `false`

- Bouvier's Law Dictionary, Volume I, page 1181, explains the term “**false**” thus: **“Applied to the intentional act of a responsible being, it implies a purpose to deceive.** In a statute prescribing punishment for False statements in making an entry of imported goods, **`false` means more than incorrect or erroneous. It implies wrong or culpable negligence, and signifies knowingly or negligently untrue.”**
- Thus the expression “**false**” **means something designedly untrue and deceitful and implies an intention to penetrate some treachery or fraud.** There is nothing in the provisions under discussion to show that the Legislature intended to punish a dealer or an assessee who honestly though incorrectly signed the declaration in Form 31 in blank without intending to defraud the Revenue. – **Singh Traders v. CST [(1996) 101 STC 203]** – for the purpose of Section 15A(1)(h) of the U.P. Sales-tax Act, 1948.

### Meaning of `false`

- According to Oxford Dictionary the word “false” may mean “erroneous, incorrect” or “purposely untrue, deceitful, etc.”
- .... It will thus be seen that the word “false” may be used in a wider or a narrower sense. In wider sense it will embrace all types of falsehoods whether they be intentional or innocent but in narrower sense it will cover only such falsehoods which are intentional. The question whether in a particular enactment the word “false” is used in a restricted sense or in a wider sense would depend on the context in which it is used.
- ... The presumption of existence of mens rea as a necessary constituent of the offence falling under clause (b) of Section 10 is not rebutted by anything in its object or language and consistent with the presumption it must be held that the word `false` is used in that clause in a restricted sense and does not include the element of mens rea – *CST v. Bombay General Stores*, AIR 1969 MP 213 – for the purpose of section 10(b) of the Central Sales Tax Act, 1956.

### Meaning of `false`

- It should be unnecessary to point out that a man may make a statement in the belief that it is true though good reasons exist for knowing it to be false, for, unfortunately, man's beliefs are not always influenced by good reasons – **Dwarka Nath Verma v. Emperor**, AIR 1933 PC 124 cited in **Emperor v. Lachmi Narain**, AIR 1947 All 235

### Meaning of `may`

- Often when a public authority is vested with power, the expression `may` has been construed as `shall` because power if the conditions for the exercise of it are fulfilled is coupled with duty. As observed in Craies on Statute Law, 7<sup>th</sup> Edition, page 229, the expression “may” and “shall” have often been subject of constant and conflicting interpretation. **“May” is a permissive or enabling expression but there are cases in which for various reasons as soon as the person who is within the statute is entrusted with the power, it becomes his duty to exercise it – Ambica Quarry Works v. State of Gujarat [AIR 1987 SC 1073]**

### Meaning of `may`

- The submission (of the Revenue) is that the word “may” in section 69 should be read as “shall”. We are unable to agree. As pointed out by the Tribunal, in the corresponding clause in the Bill which was introduced in the Parliament, the word “shall” had been used but during the course of consideration of the Bill and on the recommendation of the Select Committee, the said word was substituted by the word “may”. This clearly indicates that the intention of the Parliament in enacting section 69 was to confer a discretion on the ITO in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the ITO is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory ..... **in other words, a discretion has been conferred on the ITO under section 69 to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case – CIT v. Smt. P. K. Noorjahan (1999) 103 Taxman 382 (SC)] – for the purpose of section 69 of the Income-tax Act, 1961.**

### Meaning of 'may'

- .... **The word “may” must mean “shall”** – Dinkar Anna Paul v. State of Maharashtra [AIR 1999 SC 152] – for the purpose of Rule 4A of the Maharashtra Sales Tax Officers Class – 1 (Recruitment) Rules, 1982 providing that the State Government in consultation with the Maharashtra Public Service Commission, make appointments.
- **'Sometimes, the legislature uses the word “may” out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed.'** (see: State of Uttar Pradesh v. Joginder Singh (1964) 2 SCR 197 at page 202). **Indeed, when a provision is intended to effectuate a right** – here it is to effectuate a constitutional protection to the Judges under Article 124 (4) – **even a provision as in Article 124(5) which may otherwise seem merely enabling, become mandatory. The exercise of powers is rendered obligatory.** In Fred-eric Guilder Julius v. The Right Rev. The Lord Bishop of Oxford; the Rev. Thomas tellson Carter, [1879-80] 5 A.C. 214 at p. 24zt, Lord Blackburn said:

### Meaning of 'may'

- .... **The enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right ....”** – Sub Committee on Judicial Accountability v. UOI, AIR 1992 SC 320
- Ordinarily, expression “may” in a statutory context is not an expression of compulsion but is an enabling word intending capacity or discretion. Contextually it may constitute an expression of power coupled with duty. – Mohd. Shoib v. DCIT [(2010) 1 ITR (Trib.) 452 (Luck.)][For the purpose of section 50C of the Income-tax Act, 1961 providing that the AO may refer the matter to Valuation Officer].
- **The expression “may” appearing in section 250(4) is required to be interpreted as “shall”.** The powers conferred upon the CIT(A) under section 250(4) are not merely decorative or cosmetic. They cast upon the CIT(A) an obligation and duty to carry out such further inquiry as is necessary to arrive at a decision on merits on the facts of the case – JCIT v. Swarup Vegetable Products Industries Ltd. [(2005) 96 ITD 468 (Delhi)] [for the purpose of section 250(4) of the Income-tax Act, 1961]

### Meaning of 'may'

- In general the word “may” is an auxillary verb clarifying the meaning of another verb by expressing an ability contingency, possibility or probability. When used in Statute in its ordinary sense the word is permissive and not mandatory. But **where certain conditions are provided in the Statute and on the fulfilment thereof a duty is cast on the authority concerned to take an action then on the fulfilment of those conditions the word “may” take the character of “shall” and then it becomes mandatory.** Thus, **whether the word is to be construed as mandatory equivalent to “shall” or is merely permissive and conferring discretion has to be determined in each case from the apparent intention of the Statute as gathered from the context as well as the language of the particular provision.** But primarily the word is used in a permissive sense unless it becomes necessary to give effect to the intent of the Legislature where it becomes mandatory – DCIT v. Alok Banerjee [(2008) 111 ITD 339 (All.)] – for the purpose of section 147 of the Income-tax Act, 1961.

### Meaning of 'may'

- There is no doubt that the word “may” generally does not mean “must” or “shall” in the light of the context. It is also clear that **where a discretion is conferred upon a public authority coupled with an obligation, the word “may” which denotes discretion should be construed to mean a command.** Sometimes, the legislature uses the word “may” out of deference to the high status of the authority on whom the power and the obligation are intended to be conferred and imposed. In the present case, it is the context which is decisive. The whole purpose of rule 4(2) would be frustrated if the word “may” in the said rule receives the same construction in sub-rule (1) – State of uttar Pradesh v. Jogendra Singh [AIR 1963 SC 1618]

### Meaning of `reduced`

- The term `reduced` in sub-section (3) of section 225 would include a case where the demand consequent upon an appeal or any proceeding under the IT Act has been reduced to nil also – **Mohan Wahi v. CIT [(2001) 248 ITR 799 (SC)]** – for the purpose of section 225(3) of the Income-tax Act, 1961.

### Notice specifying the clause of sub-section (9)

- The provisions of section 274 are made applicable to section 270A. Therefore, before levying penalty under section 270A, the Specified Authority is required to issue a notice to the assessee. The proceedings for levy of penalty need to be initiated in the course of any proceedings under the Act.
- An assessee needs to be given an opportunity of being heard. Principles of natural justice need to be adhered to.
- The show cause notice should clearly state the nature of allegation against the assessee viz. whether the penalty proceedings are being initiated for levying penalty for having under-reported the income or for having under-reported the income in consequence of misreporting.

### Notice specifying the clause of sub-section (9)

- Karnataka High Court in the case of **CIT v. Manjunatha Cotton & Ginning Factory [(2013) 35 taxmann.com 250 (Karn.)]** has in the context of section 271(1)(c) of the Act held as under –
  - Notice under section 274 should specifically state the grounds mentioned in section 271(1)(c), *i.e.*, whether it is for concealment of income or for furnishing of incorrect particulars of income. Sending printed form, where all the grounds mentioned in section 271 are mentioned, would not satisfy requirement of law. The assessee should know the grounds which he has to meet specifically. Otherwise, principles of natural justice is offended. On the basis of such proceedings, no penalty could be imposed to the assessee. Taking up of penalty proceedings on one limb and finding the assessee guilty of another limb is bad in law. [Para 63]

### Notice specifying the clause of sub-section (9)

- Mumbai Bench of the Tribunal in **ACIT v. Bhushan Kamalnayan Vora [2017] 60 ITR(T) 82 (Mumbai - Trib.)** has held that for levying penalty under section 271(1)(c) of the Act, the AO has to be sure of the charge of concealment, whether it is for concealment of particulars of income or for furnishing of inaccurate particulars of income. The Tribunal, following the decision of the Bombay High Court in the case of *Samson Perinchery (supra)* on non mention of specific charge, held that the penalty levied by the Assessing Officer cannot be sustained.

### Notice specifying the clause of sub-section (9)

- The revenue in the case of **CIT v. SSA'S Emerald Meadows [2016] 73 taxmann.com 241 (Karnataka)** raised the following substantial question of law before the Karnataka High Court –
  - Whether, omission of assessing officer to explicitly mention that penalty proceedings are being initiated for furnishing of inaccurate particulars or that for concealment of income makes the penalty order liable for cancellation even when it has been proved beyond reasonable doubt that the assessee had concealed income in the facts and circumstances of the case?
- The Court observed that the Tribunal has by following the decision of the Division Bench of this Court rendered in the case of **CIT v. Manjunatha Cotton & Ginning Factory [2013] 359 ITR 565 (Kar.)** has allowed the appeal filed by the assessee holding the notice issued by the Assessing Officer under Section 274 read with Section 271(1)(c) of the Income Tax Act, 1961 (for short 'the Act') to be bad in law as it did not specify which limb of Section 271(1)(c) of the Act, the penalty proceedings had been initiated i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income.

### Notice specifying the clause of sub-section (9)

- A question arises as to whether section 270A contemplates one offence or two separate offences because misreporting is a sub-set of under-reporting. Section 271(1)(c) had two offences viz. concealment and furnishing of inaccurate particulars.
- The ratio of the decisions rendered in the context of section 271(1)(c) should apply with greater force to section 270A as the consequences of the two viz. under-reporting and under-reporting in consequence of misreporting are different and quite harsh. As against a penalty of 50% of under-reported income, the penalty is 200% of under-reported income where under-reporting is in consequence of misreporting thereof. Also, for under-reporting the assessee can apply for immunity under section 270AA whereas if the under-reporting is in consequence of misreporting thereof then the assessee is not entitled to apply for immunity under section 270AA.

### Notice specifying the clause of sub-section (9)

- Amritsar Bench of the Tribunal in the case of **Ravinder Aggarwal v. DCIT [ITA Nos. 410 & 409 (Asr.) /2018; AY 2014-15; Order dated 4.4.2019]** has in the context of section 271AAB of the Act held that it is mandatory for the AO to mention the specific clause under which penalty is proposed to be imposed. Notice issued without specifying the clause was held to be one issued in a stereotyped manner without application of mind and was not considered a valid notice sufficient to impose penalty under section 271AAB as the mind of the AO while initiating the penalty proceedings and issuing notice under section 274 of the Act was not clear as to under which limb, the assessee had to reply and to defend its case. Action of the AO being in contravention of the provisions of sections 274 and 271AAB of the Act, the Tribunal held that the penalty is not leviable.
- To the similar effect there are several decisions of various other Benches of the Tribunal as well.

### Notice specifying the clause of sub-section (9)

- It is necessary that a notice issued should mention the specific clause of sub-section (9) which is proposed to be invoked and which is alleged to be the one under which the case of the assessee is covered.

## Text of section 270A

- (10) The tax payable in respect of the under-reported income shall be—
  - (a) where no return of income has been furnished or where the return has been furnished for the first time under section 148 and the income has been assessed for the first time, the amount of tax calculated on the under-reported income as increased by the maximum amount not chargeable to tax as if it were the total income;
  - (b) where the total income determined under clause (a) of sub-section (1) of section 143 or assessed, reassessed or recomputed in a preceding order is a loss, the amount of tax calculated on the under-reported income as if it were the total income;

## Text of section 270A

- (c) in any other case, determined in accordance with the formula—
  - $(X - Y)$
  - where,
    - X = the amount of tax calculated on the under-reported income as increased by the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order as if it were the total income; and
    - Y = the amount of tax calculated on the total income determined under clause (a) of sub-section (1) of section 143 or total income assessed, reassessed or recomputed in a preceding order.

## computation of tax payable in respect of UI – sub-section (10)

- The provisions of sub-section (10) are tabulated hereunder –

Situation	Condition	Tax payable on
Return of income not furnished or where return has been furnished for the first time under section 148	Assessed for first time	Under-reported income + maximum amount not chargeable to tax
Total Income as per intimation / assessed / reassessed / recomputed	Total income is a loss	Under-reported income (as if UI is the total income)
All other cases		UI + Income u/s 143(1)(a) / assessed / reassessed / recomputed (as if it were total income) <b>minus</b> Income u/s 143(1)(a) / assessed / reassessed / recomputed

## Features of tax payable

- In case of assessee other than a company or a firm, where the income is positive, tax (to calculate penalty) needs to be determined in the same manner as is to be determined for the purposes of payment of tax at progressive rates.
- Further, in the above cases, the under-reported income needs to be increased by maximum amount not chargeable to tax, so as to determine the tax payable on under-reported income in as much as in determining the under-reported income, maximum amount not chargeable to tax is deducted;
- Also, in the above cases, in case of a loss, the under-reported income itself is treated as total income and accordingly while determining the tax benefit of the maximum amount not chargeable to tax would be available, and
- In other cases, the tax would be calculated at the applicable rate.
- In computing the tax payable on under-reported income (or for that matter misreported income) no credit is allowed or allowable for any withholding tax or tax paid in advance in respect of under-reported income.

## Text of section 87A

- Section 87A of the Act reads as under –
- **“Rebate of income-tax in case of certain individuals.**
- **87A.** *An assessee, being an individual resident in India, whose total income does not exceed three hundred fifty thousand rupees, shall be entitled to a deduction, from the amount of income-tax (as computed before allowing the deductions under this Chapter) on his total income with which he is chargeable for any assessment year, of an amount equal to hundred per cent of such income-tax or an amount of two thousand and five hundred rupees, whichever is less.”*
- For Assessment Year 2018-19, the maximum amount not chargeable to tax, for individual was Rs. 3,00,000 and tax rate was 5% if the total income was between Rs 3 lakh and Rs 5 lakh.

## Text of section 56(2)(viib)

- **Income from other sources.**
- **56. (1)** .....
- (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—
- .....
- .....
- (viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

### Text of second proviso to section 56(2)(viib)

- **Provided** that this clause shall not apply where the consideration for issue of shares is received—
- (i) by a venture capital undertaking from a venture capital company or a venture capital fund <sup>66a</sup>[or a specified fund]; or
- (ii) by a company from a class or classes of persons as may be notified<sup>6Z</sup> by the Central Government in this behalf.
- **Provided further** that where the provisions of this clause have not been applied to a company on account of fulfilment of conditions specified in the notification issued under clause (ii) of the first proviso and such company fails to comply with any of those conditions, then, any consideration received for issue of share that exceeds the fair market value of such share shall be deemed to be the income of that company chargeable to income-tax for the previous year in which such failure has taken place and, it shall also be deemed that the company has under-reported the said income in consequence of the misreporting referred to in sub-section (8) and sub-section (9) of section 270A for the said previous year.

### Possible situations under second proviso to S. 56(2)(viib)

- **The following situations are likely in the year in which the second proviso is triggered –**
- 1 The assessee offers for taxation, in the return of income filed, the difference between the issue price and fair market value of the shares so issued. Obviously, the Assessing Officer will accept the income as per return of income as that is in accordance with the provisions of the Act. Since there is no difference between assessed income and returned income, there is no under-reporting within the meaning of section 270A(2).
- 2 The assessee does not offer the income for taxation. In the course of assessment, the assessee, in response to show cause issued by the AO, substantiates the issue price is not in excess of the fair market value of the shares issued. The AO being satisfied does not make any addition on this count. Since, assessed income is same as returned income, there is no under-reporting within the meaning of section 270A(2)

## Possible situations under second proviso to S. 56(2)(viib)

- The following situations are likely in the year in which the second proviso is triggered ....
- 3 The assessee does not offer the income for taxation under second proviso to s. 56(2)(viib). In the course of assessment, the assessee is not able to satisfy the AO that the issue price is not in excess of the fair market value of the shares issued. The AO taxes the difference between the issue price and fair market value of the shares issued under section 56(2)(viib). Since, assessed income is greater than returned income, there is under-reporting.

## Possible alternate views

- The following possible 3 alternative views may arise
- View 1: The fiction applies even to cases where the assessee has voluntarily offered income in the year of breach of end-use conditions. Such deemed income under s. 56(2)(viib) is deemed to be under-reported income in consequence of misreporting thereof and therefore, there will be automatic levy of penalty under s. 270A at the rate of 200% of tax payable.
- View 2: Levy of penalty cannot be automatic. If an assessee has offered income in its return of income. Levy of penalty can be on a contumacious act of default and not automatically.
- View 3: Deeming fiction in second proviso does not deem the income taxed under second proviso as 'under-reported income'. It only categorises under-reported income to be in consequence of mis-reporting thereof. In the absence of 'under-reported income' the fiction contained in second proviso to s. 56(2)(viib) cannot apply. Therefore, the conditions mentioned in clauses of 270A(2) will there be under-reported income need to be satisfied..



*Jagdish T Punjabi*

*B.Com., B.G.L., FCA.*