

# Faceless Penalty Scheme and some issues in penalty u/s 270A and 270AA

Prepared for  
Study Circle Meeting - Chamber of Tax Consultants

# Faceless Penalty Scheme

- ▶ The Faceless Penalty Scheme (“the Scheme”) was introduced vide Notification S.O. 117(E) [NO. 2/2021/F.NO.370142/51/2020-TPL], DATED 12-1-2021
- ▶ The said notification was issued in exercise of the power conferred by Section 274(2A) of the Income Tax Act, 1962 (hereinafter referred to as “Act”)
- ▶ Para 2 of the Scheme provides for definitions of certain terms. In the Scheme, “Penalty” is defined in Para 2 (xix) as penalty imposable under the Act. However, the CBDT has clarified that only penalties imposable under Chapter XXI of the Act are within the scope of the Scheme. [ORDER F. NO. 187/4/2021-ITA-I, DATED 10-3-2022]
- ▶ The Scheme will be administered by National Faceless Penalty Centre and Penalty Units. However, till the time they are constituted the Scheme will be administered by the National Faceless Assessment Centre and Assessment units thereunder. [ORDER F. NO. 187/4/2021-ITA-I, DATED 10-6-2022]

- ▶ Para 3 of the Scheme reads as follows:
- ▶ *3. The penalty under this Scheme shall be imposed in respect of such territorial area, or persons or class of persons, or income or class of income or cases or class of cases, or penalties or class of penalties as may be specified by the Board.”*
- ▶ Pursuant to the said powers the board has issued the following three circulars till date specifying the scope of the Scheme:
- ▶ ORDER F. NO. 187/4/2021-ITA-I, DATED 20-1-2021 clarifies that the Scheme would apply to all the penalty proceedings pending as well initiated subsequently except following:
  - ▶ (i) Penalty proceedings in cases assigned to Central Charges;
  - ▶ (ii) Penalty proceedings in cases assigned to International Tax Charges; and
  - ▶ (iii) Penalty proceedings arising in TDS charges.

# Scope of the Scheme

- ▶ Order F.No. 187/4/2021-ITA-I dated 20-1-2021 provides for the following further exclusions from the Scheme:
- ▶ Penalty proceedings arising/pending in the Investigation Wing, the Directorate of I&CI, erstwhile DG (Risk- Assessment) or by any prescribed authority for the purpose of specified penalties
- ▶ Penalty proceedings arising out of any statute other than the Income-tax Act, 1961
- ▶ All the penalties imposable by the officers of the level of Commissioner/Director/Commissioner (Appeals/Appeal Unit) and above.
- ▶ Further, ORDER F. NO. 187/4/2021-ITA-I clarifies that Penalty proceedings in cases where pendency could not be created on ITBA because of technical reasons or cases not having a PAN, as the case may be shall be outside the purview of the Scheme.

# Constitution of NFPC, PU and PRU

- ▶ Para 4 of the Scheme provides for the constitution of National Faceless Penalty Centre, Penalty Units and Penalty Review Units to facilitate the conduct of faceless penalty proceedings.
- ▶ It is provided that all communication among the penalty unit and penalty review unit or with the assessee or any other person, as the case may be, or any income-tax authority or the National Faceless Assessment Centre, with respect to the information or documents or evidence or any other details as may be necessary for the purposes of imposing penalty under this Scheme, shall be through the National Faceless Penalty Centre.

- ▶ The Scheme (**as amended on 27-05-2022**) provides for the following procedure to be followed in all cases for conduct of the faceless penalty proceedings. The procedure consists of 22 steps which are briefly mentioned hereunder:
- ▶ The Income tax authority or NFAC shall initiate the penalty proceedings, issue show cause notice and then refer the case to the NFPC
- ▶ NFPC shall assign the case to a PU through an automated allocation system
- ▶ The Income tax authority or NFAC may also recommend initiation of penalty proceedings to the NFPC in which the NFPC shall forward such recommendation to the PU. If the PU agrees with the recommendation it may send the show cause notice to NFPC. In case PU disagrees with the recommendation it shall send its reasons to the NFPC

- ▶ The NFPC shall serve the show cause notice received from the PU with the assessee
- ▶ In case the penalty proceedings have already been initiated, the PU shall send a draft show cause notice calling upon the assessee or any other person to the NFPC.
- ▶ The NFPC shall serve the show cause notice to the assessee or any other person
- ▶ The assessee or any other person shall file the response to the show cause notice with the NFPC
- ▶ The NFPC shall send the response received from assessee or any other person to the PU and if no response is received inform PU.

- ▶ The PU may make a request to the NFPC for:
  - ▶ obtaining further information, documents or evidence from any income-tax authority or the NFAC; or
  - ▶ obtaining further information, documents or evidence from the assessee or any other person; or
  - ▶ seeking technical assistance or conducting verification;
  
- ▶ The NFPC shall issue notice calling for information requested by the PU to the Income tax authority, NFAC, assessee or any other person.
  
- ▶ The Income tax authority, NFAC, assessee or any other person shall submit their responses to the NFPC.
  
- ▶ The NFPC shall forward the responses as received above to the PU



- ▶ Where the PU has requested for technical assistance or conducting verification, the NFPC shall send such request to the NFAC
- ▶ The NFPC shall forward the report received from the NFAC to the PU and if no report is received inform the PU
- ▶ The PU shall after considering all the material available on record propose for:
  - ▶ (a) imposition of the penalty and prepare a penalty imposition proposal;
  - ▶ (b) non-imposition of the penalty, for reasons to be recorded in writing
- ▶ and send the penalty imposition proposal or reasons, as the case may be, to the NFPC.

- ▶ The NFPC in accordance with the guidelines issued by the board may:
- ▶ (1) in a case where imposition of penalty has been proposed, convey to the PU to pass the penalty order as per penalty imposition proposal;
- ▶ (2) in a case where non-imposition of penalty has been proposed, convey to the PU to drop the penalty proceedings under intimation to the assessee or any other person, as the case may be; or
- ▶ (3) assign the case to a PRU through an automated allocation system, for conducting review of such proposal or reasons, as the case may be.
- ▶ In the first 2 situations mentioned above the PU may pass penalty order or drop the proceedings under intimation to the assessee through NFPC.

- ▶ The PRU shall review the penalty imposition proposal or reasons for non-imposition of penalty, whereupon it may concur with, or suggest modification to, such proposal or reasons, as the case may be, and prepare a review report and send such report to the NFPC.
- ▶ The NFPC shall forward the review report to the PU which had proposed the penalty imposition proposal or reasons for non-imposition of penalty, as the case may be;
- ▶ The PU shall, after considering such review report, accept or reject some or all of the modifications proposed therein and after recording reasons in case of rejection of such modifications, pass the order imposing penalty or drop the penalty proceedings, as the case may be, and serve the order imposing penalty or intimation for dropping penalty proceedings, as the case may be, on the assessee through the NFPC

- ▶ The Principal Chief Commissioner or the Principal Director General, in charge of the NFPC, may at any stage of the penalty proceedings, if considered necessary, transfer such proceedings to the income-tax authority or the NFAC having jurisdiction over the assessee or any other person, in whose case the penalty proceedings are initiated, with the prior approval of the Board.
- ▶ It is important to note that the **Scheme does not provide for recording of reasons** by the PCCIT or PDGIT before such transfer. **Even the assessee is not provided an opportunity of being heard before transfer** of penalty proceedings in his case unlike Section 127 of the Act. Hence such transfer may be challenged as arbitrary and in violation of the principles of natural justice
- ▶ The CBDT has vide Circular No. F. NO.225/97/2021/ITA-II, dated 6-9-2021 prescribed procedure for handling of assessment by Jurisdictional Assessing Officers in respect of penalties transferred out of Faceless Penalty Scheme, 2021.

# Rectification of Penalty Order

- ▶ Para 6 of the Scheme provided for the rectification order by the NFPC. However, the said Para has been deleted vide NOTIFICATION NO. S.O. 2425 (E) [NO. 54/2022/F. NO. 370142/51/2020-TPL(PART III)] , dated 27-5-2022.
- ▶ Thus, if the assessee is aggrieved he may take recourse to the procedure prescribed under Section 154 of the Act for rectification of the penalty order within four years.

# Other Important Provisions of the Scheme

- ▶ Exchange of all the communications shall be exclusively by electronic mode.
- ▶ A person shall not be required to appear either personally or through authorised representative in connection with any proceedings under this Scheme before the income-tax authority at the NFPC or PU or PRU set up under this Scheme.
- ▶ The assessee may make request for personal hearing. **Where the request for personal hearing has been received, the income-tax authority of relevant unit shall allow such hearing, through National Faceless Penalty Centre.**
- ▶ The CBDT has issued a letter F.NO. AA (NAFAC)-1/2021-22/439, dated 9-8-2021 providing for Standard Operating Procedure for Penalties Under Faceless Penalty Scheme, 2021

# Some issues u/s 270A and 270AA

# When and by whom can the Penalty Proceedings be initiated

- ▶ The Penalty proceedings u/s 270A may be initiated by the Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner ***during the course of any proceedings under this Act.***
- ▶ Thus, the penalty u/s 270A can only be initiated during the:
- ▶ Course of assessment proceedings by AO
- ▶ Course of revisionary proceedings by Principal Commissioner or Commissioner
- ▶ Course of appellate proceedings by the Commissioner (Appeals).
- ▶ **The proceedings cannot be initiated once the orders have been passed by the respective authorities.**



# Revisionary Jurisdiction for non initiation of Penalty Proceedings whether available?

- ▶ As observed earlier, the Commissioner or Principal Commissioner are suo moto empowered to initiate the penalty proceedings during the course of revisionary proceedings pending before them.
- ▶ **However, they cannot set aside the order of the AO merely due to non initiation of penalty proceedings and direct the AO to initiate penalty proceedings.**
- ▶ Initiation of the penalty proceedings is at the discretion of all those who are empowered to do so. It is necessary that such discretion is exercised judiciously, independently and not based on the borrowed satisfaction of some superior authority.
- ▶ Reference may be made to the following decisions:
- ▶ CIT v Parmanand M. Patel [2005] 278 ITR 3 (Gujarat)
- ▶ CIT v Rakesh Nain Trivedi [2016] 282 CTR 205 (Punjab & Haryana)

# Recording of Satisfaction u/s 270A whether mandatory?

- ▶ Section 271(1B) provided that where any amount is added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment and the said order contains a direction for initiation of penalty proceedings under clause (c) of sub-section (1), such an order of assessment or reassessment shall be deemed to constitute satisfaction of the Assessing Officer for initiation of the penalty proceedings under the said clause (c).
- ▶ There is no corresponding provision u/s 270A of the Act. However, it can be inferred from a holistic reading of the Section 270A that recording of satisfaction is still mandatory.
- ▶ Firstly, the section 270A begins as follows :
- ▶ *(1) The Assessing Officer or the Commissioner (Appeals) or the Principal Commissioner or Commissioner **may**, during the course of any proceedings under this Act.*
- ▶ It is settled law that a discretionary power granted to a quasi judicial authority has to be exercised with due care and based on independent satisfaction.

# Recording of Satisfaction u/s 270A whether mandatory?

- ▶ Even though Section 270A(2) is couched in mandatory terms in as much as it uses the term “shall” and provides that every case of difference between assessed income and returned income shall be considered as under reporting of income.
- ▶ However, it is subject to subsection (6) of Section 270A which provides that certain cases in which such difference will not be considered as under-reported income.
- ▶ One of the important carve out is when the income tax authority is satisfied that the explanation is **bonafide** and the assessee has disclosed all the material facts to substantiate the explanation offered.
- ▶ Thus, the authorities before initiating penalty proceedings have to first record a satisfaction that the case does not fall u/s 270A(6) of the Act

- ▶ Erstwhile, Section 271(1)(c) used the terms concealment of income or furnishing inaccurate particulars of income. The Supreme Court in case of Dilip N. Shroff v JCIT [2007] 291 ITR 519 (SC) held that:
- ▶ *'Concealment of income' and 'furnishing of inaccurate particulars' are different. Both concealment and furnishing inaccurate particulars **refer to deliberate act on the part of the assessee.** A mere omission or negligence would not constitute a deliberate act of suppressio veri or suggestio falsi. Although it may not be very accurate or apt but suppressio veri would amount to concealment, suggestio falsi would amount to furnishing of inaccurate particulars*

- ▶ However, the said decision of the Supreme Court may not be applicable u/s 270A.
- ▶ Section 270A has introduced strict liability. It contains no reference to the intention. It does not require that the action should be deliberately done by the assessee. The assessee would be liable even for mere omission or negligence.
- ▶ Certain clauses of Section 270A(9) are indicative in this regard wherein there is no reference to intention and **mere omission is sufficient to attract 200% penalty:**
- ▶ (b) failure to record investments 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.

# Case where full taxes paid but return of income was not filed

- ▶ Explanation 3 to section 271(1) provided that if a person had failed to file a return of income, then, such person shall be deemed to have concealed the particulars of his income in respect of such assessment year, notwithstanding that such person furnishes a return of his income at any time after the expiry of the period aforesaid in pursuance of a notice under section 148.
- ▶ However clause (c) to Explanation 4 at least granted the credit for taxes paid before issue of notice u/s 148 in any form. Erstwhile, Explanation 4(c) read as follows:
  - ▶ *Where in any case to which Explanation 3 applies, the amount of tax sought to be evaded shall be the tax on the total income assessed as reduced by the amount of advance tax, tax deducted at source, tax collected at source and self-assessment tax paid before the issue of notice under section 148.*
- ▶ In the section 270A as it stands today there is no such provision for grant of credit taxes paid earlier in the form of TDS, advance tax etc.

# Case where full taxes paid but return of income was not filed

- ▶ Thus, where the assessee does not file the return of income at all or files it for the first time in response to the notice issued u/s 148, the whole of the assessed income shall be treated as under reported income and the penalty shall be computed based on the tax payable determined on such assessed income u/s 270(10) without providing for any credit of taxes paid earlier in the form self assessment tax, TDS, advance tax etc.
- ▶ Non filing of return may also be considered as suppression of fact and such under reporting may be considered as misreporting and higher rate of penalty (200%) may apply.
- ▶ However, where the assessee suo moto files return of income belatedly or files an updated return u/s 139 (8A) he shall not be liable to tax on whole of the assessed income but shall be granted relief for income disclosed earlier suo moto in the belated or updated return.

# 270A – Can Penalty be levied if the issue involves Question of law or is subject to different interpretation

- ▶ The scope of under reported income as mentioned in Section 270A(2) is very wide and covers within its ambit any type of increase in the assessed income.
- ▶ It is only limited in its scope by section 270(6) which provides certain exclusions from the scope of under reported income.
- ▶ Section 270(6) provides that penalty shall not be levied if the explanation provided by the assessee is bona fide and all the material facts to substantiate the explanation offered have been disclosed. Thus, if an assessee takes certain tax position based on the decision of a High court or tribunal or takes a tax position based on interpretation which is plausible along with true and full disclosure it would certainly be covered by Section 270(6) and outside the scope of penalty.
- ▶ The scope of misreporting is exhaustively defined in Section 270A(9) and it can never include a situation wherein the assessee has taken a certain tax position based on different interpretation of law and disclosed all material facts.



# 270AA – Appeal or Rectification

- ▶ Section 270AA(5) of the Act provides that the order made by the AO accepting or rejecting the application for immunity from penalty u/s 270AA shall be final. Section 270AA(6) provides that no appeal under section 246A or an application for revision under section 264 shall be admissible against the order of assessment where application has been accepted.
- ▶ Hence, if the immunity application is rejected, there is no doubt that the assessee may go for appeal in 246A or revision in 264 against the order of assessment. However on rejection of application for immunity can the assessee file appeal or revision against such rejection itself?

# 270AA – Appeal or Rectification

- ▶ The Hon'ble Bombay High Court in case of *Haren Textiles (P.) Ltd v PCIT [2022] 284 Taxman 58 (Bombay)[08-09- 2021]* has held that the assessee may file revision application u/s 264 against the order of the AO rejecting the application for immunity.
- ▶ There is no precedent till date on whether the appeal can be filed against the order rejecting application for immunity. We are of the view that the appeal cannot be filed since order under Section 270AA(4) rejecting immunity application is not an order appealable u/s 246A before the Commissioner (Appeals).
- ▶ The the assessee is not remediless after rejection of application u/s 270AA(4) and may apply for revision u/s 264.

- ▶ What is the procedure for claiming immunity from penalty where the proceedings have been initiated on the ground of misreporting of income u/s 270A(9) but the assessee believes that it is not a case of mis reporting but only under reporting of income?
- ▶ The assessee may file the application u/s 270AA(1) explaining in detail as why he believes that the under reporting in his case is not due to the mis reporting income u/s 270A(9). There is no bar on making application for immunity wherein the penalty proceedings have been initiated for misreporting u/s 270A(9)
- ▶ The AO is not empowered to grant immunity from imposition of penalty under section 270A where the proceedings for penalty have been initiated u/s 270A(9).

- ▶ However, the AO if satisfied with the explanation given in the application for immunity u/s 270AA(1) by the assessee as to why it is not a case of mis reporting of income may amend the order initiating penalty proceedings to that of under reported income and grant immunity u/s 270AA(4) accepting the application.
- ▶ However, in case the AO is not so satisfied and still considers the under reporting as mis reporting and rejects the application for immunity the assessee may apply for revision of the rejection order passed by the AO u/s 270AA(4) relying on the judgement of the Bombay High Court in case of *Haren Textiles (P.) Ltd v PCIT [2022] 284 Taxman 58 (Bombay)[08-09- 2021]*
- ▶ Finally, if the revision application u/s 264 is also rejected, the assessee may avail writ remedy if he can demonstrate that ex facie in his case the under reporting is not due to mis reporting of income u/s 270A(9).

# Thanks