



DISCUSSION ON PENALTY U/S 271A AND OF THE INCOME TAX ACT, 1961

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Presented by

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AGENDA FOR TODAY

- Object for bringing penalty u/s 271AAD
- Discussion on penalty u/s 271AAD
- Issues
 - Levy of penalty in the absence of “proceedings”
 - Levy of penalty in the absence of “books of accounts”
 - What is false entry ?
 - What is omission of entry ?
 - Quantum of Penalty
 - Penalty on person who causes false entry / omission of entry
 - Burden of Proof
 - Period of limitation
 - Can Penalty u/s 271AAD be imposed in case penalty is already leviable under any other provision

SECTION 271AAD

Object of bringing Section 271AAD

Memorandum to Finance Bill, 2020 -

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

Section 271AAD

Section 271AAD(1)

- Without prejudice to any other provisions of this Act,
- if during any proceeding under this Act,
- it is found that
- in the books of account maintained by any person there is—
 - (i) a false entry; or
 - (ii) an omission of any entry which is relevant for computation of total income of such person, to evade tax liability,
- the Assessing Officer may direct that such person shall pay by way of penalty
- a sum equal to the aggregate amount of such false or omitted entry.

Section 271AAD

Section 271AAD(2)

- Without prejudice to the provisions of sub-section (1),
- the Assessing Officer may direct that any other person,
- who causes the person referred to in sub-section (1)
- in any manner
- to make a false entry or omits or causes to omit any entry referred to in that sub-section,
- shall pay by way of penalty
- a sum equal to the aggregate amount of such false or omitted entry.

Section 271AAD

Section 271AAD

Explanation.—For the purposes of this section, “false entry” includes use or intention to use—

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

POINT BY POINT ANALYSIS

OF

SECTION 271AAD

ISSUE : PROCEEDING

Requirement of a 'Proceeding'

Section 271AAD(1)

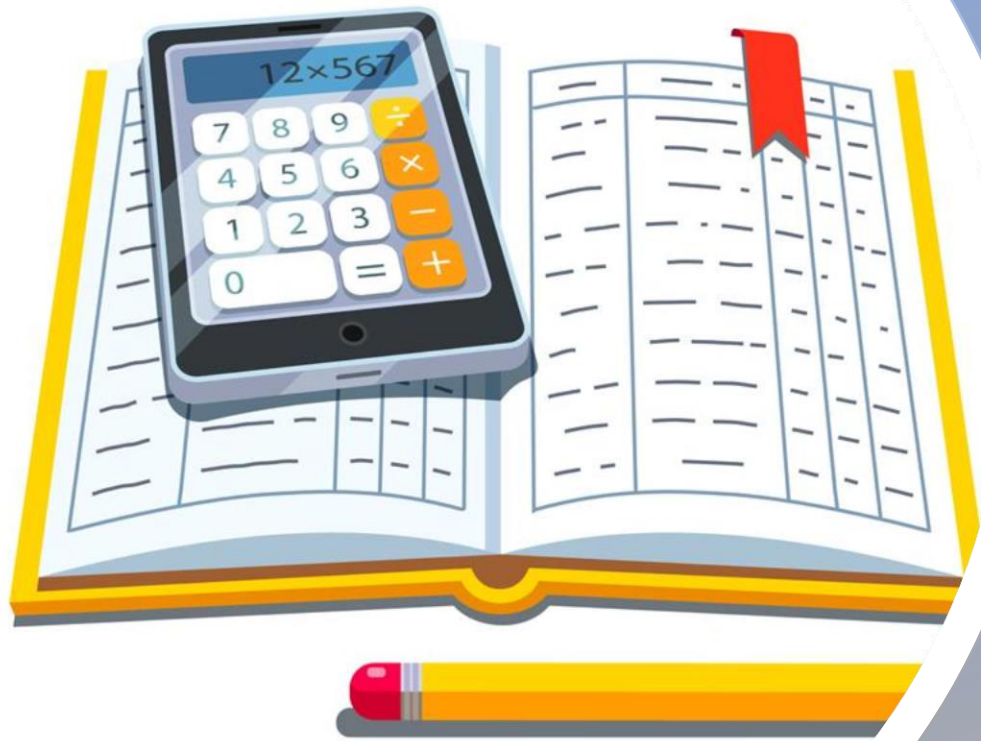
- Without prejudice to any other provisions of this Act,
- if **during any proceeding** under this Act,
- it is **found** that
- in the books of account maintained by any person there is—
 - (i) a false entry; or
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Requirement of a 'Proceeding'

- Finding must be made by AO during a Proceeding under income Tax Act, 1961
- **Bom HC in D.B.S. Financial Services (P.) Ltd. [1994] 207 ITR 1077 (Bombay)**
 - The reference to 'any proceeding under the Act' is clearly a reference to a **proceeding which is in existence at the material time**. It is with reference to such an existing proceeding that the concerned officer must require information which will be useful or relevant.

Issues

- Can penalty be invoked if a fake billing racket is busted under GST law ?
- Can penalty u/s 271AAD be invoked in case of any existing proceeding or a completed proceeding or both ?



ISSUE:
BOOKS OF ACCOUNTS

Requirement of Books of Accounts

Section 271AAD(1)

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- if during any proceeding under this Act,
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- in the **books of account maintained by any person** there is—
 - (i) a false entry; or
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- the Assessing Officer may direct that such person shall pay by way of penalty
- a sum equal to the aggregate amount of such false or omitted entry.

Definition of Books of Accounts

Section 2(12A)

'Books or Books of account' includes

- ledgers, day-books, cash books, account-books and other books,
- whether kept in the written form or
- as print-outs of data stored in a floppy, disc, tape or
- any other form of electro-magnetic data storage device;

Assessee not liable to maintain books (section 68 law)

Existence of books of accounts – essential for sec. 68 addition

- Gauhati HC – Anand Ram Raitani vs CIT [1997] 223 ITR 544 (Gauhati)
 - The **existence of books of account** is a **condition precedent** for invoking of the power. **Discharging of burden is a subsequent condition.**
 - If the first point is not fulfilled the question of burden of proof does not arise.

- Same position in
 - Punjab & Haryana HC – Smt. Shanta Devi v. CIT [1988] 37 Taxman 104 (Punjab & Haryana) : The cash credit entry of which the sum in question form part, was found in the books of account of the partnership firm, which in its own right, is an assessee. Section 68 would not be attracted to the present case.

Assessee not liable to maintain books

Bank passbook as books for making addition ?

CIT v Bhaichand N. Gandhi [1983] 141 ITR 67 (Bom.)

- **Pass book** supplied by the bank to its constituent is only a copy of the constituent's account in the **books maintained by the bank**.
- It is not as if the pass book is maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent.
- In view of this, the Tribunal was, with respect, justified in holding that the **pass book supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee**, that is, a book maintained by the assessee or under his instructions. In our view, the Tribunal was justified in the conclusions at which it arrived.

Books Rejected, can AO still make section 68 addition ?

Maddi Sudarsanam Oil Mills Co. v. CIT v Bhaichand N. Gandhi [1959] 37 ITR 369 (AP)

- If once the income-tax authorities have rejected the books, they **cannot have it both ways**, namely, adopting a flat rate to compute gross profit as well as **rely on the books for the purposes of adding unexplained cash credits** which were part of the scheme of balancing the accounts.

Malpani House of Stones v. CIT [2017] 88 taxmann.com 546 (Rajasthan)

- Assessee's books of account were rejected and they were assessed on the basis of estimation and while estimating the other income also addition was made under section 69C
- In view of the well settled principle of law that when income is estimated and while assessing the same and **rejecting the books of accounts, it would not be appropriate to rely on the books of accounts for any addition other than estimate made by A.O.**

Assessee liable to maintain books, but books not maintained

➤ Bombay HC – Arunkumar J. Muchhala vs CIT [2017] 85 taxmann.com 306 (Bombay)

- When Appellant is doing business, then it was incumbent on him to maintain proper books and/ or books of account. It may be in any form.
- Therefore, if he had not maintained it, then he can not be allowed to take advantage of his own wrong.
- Burden lies on him to show from where he has received the amount and what is its nature.

➤ Same position in

- Punjab & Haryana HC – Sudhir Kumar Sharma (HUF) v. CIT [2014] 46 taxmann.com 340 (Punjab & Haryana) : Various amounts in cash were deposited in the bank account of the assessee and the onus was upon the assessee to explain the nature and source of the said cash deposits.

Bank Passbook also Books of Accounts ?

- **Del ITAT - Jenna Goel v. Dy. CIT [IT Appeal Nos. 937 and 98 (Delhi) of 2012]**
 - In view of this, even if the assessee **does not maintain any books of accounts** but the **amount is deposited in the bank account** of the assessee, which remains unexplained the **addition could be correctly made under section 68** of the act.
 - Further looking at the **definition of the 'books or books of accounts'** it is **apparent that passbook is a daybook** which is kept in the return form or as a printout of data stored in a floppy. Therefore, after the introduction of the definition of the books or books of account under section 2 (12A) of the act, the **passbook can also be considered as books or books of account**.
 - There is no distinction who writes it, but it is record of the transactions entered into by the assessee with the bank.
 - The provisions of **section 68** of the income tax act also **does not make any distinction about who maintains the books of account**, the only requirement is that the books should be of an assessee. There is no requirement that the books of account should be maintained by the assessee himself.
- **Same position upheld by by Del ITAT in 2020 in the case of - Jagdish Prasad Sharma vs ITO [2020] 115 taxmann.com 162 (Delhi - Trib.)**

ISSUE : FALSE ENTRY

Section 271AAD

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 - (i) **a false entry**; or
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- (c) invoice* in respect of supply or receipt of goods or services or both to or from a *person who does not exist.*’

Issues in 'False Entry'

- Inclusive definition
- 'Intention to use' also constitutes 'false entry'
- Covers both 'supply' or 'receipt' of goods or services
- How to prove 'supply' / 'receipt' in case of SERVICES ?
- Whether covers 'over-billing' situation ?
- False entry not linked to element of 'income'
- 'Person who does not exist' – What if somebody closes the shop ?
- 'Person who does not exist' – Who decides ? And on what basis ?
- No invoice cases ?

ISSUE : OMISSION OF ENTRY

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 - (ii) an **omission** of any entry which is **relevant for computation of total income** of such person, **to evade tax liability**,
- the Assessing Officer may direct that such person shall pay by way of penalty
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Issues : Omission on Entry

- Omission of exempt income
- There was no tax liability because of omission of income : E.g. : Loss
- Intention must be to evade tax
- To evade tax – What if bonafide omission ?

ISSUE : QUANTUM OF PENALTY

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ISSUE : APPLICABILITY ON PERSON
WHO CAUSES FALSE ENTRY /
OMMISSION OF ENTRY

Section 271AAD

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Issues : Penalty on some other person

- Which AO will proceed ?
- Whether fresh opportunity will be given to such person ? E.g. : Cross-examination, confirmations etc.
- Whether such person is required to maintain books of accounts ?
- Whether employees get covered ?
- Can mere statement of person who entered the FE in books be sufficient to levy penalty ?

ISSUE : BURDEN TO PROOF

Burden of Proof

- Penal Provisions – Burden on AO
- AO to lead with evidence that case falls under the realm of false entry or omission of entry.
- AO has to prove documents are forged / falsified etc.
- Burden once discharged, will shift onto assessee
- Burden for levying penalty in case of 'other person' causing such transaction will include both :
 - Burden to prove 'other person' **caused** FE/OE
 - Burden to prove FE/ OE (mere fact that penalty has been levied on person who entered in books won't discharge this burden)

ISSUE : PERIOD OF LIMITATION

Period of Limitation

Section 275(1)(c)

No order imposing a penalty under this Chapter shall be passed—

...

(c) in any other case,

- after the **expiry of the financial year in which the proceedings**, in the course of which action for the imposition of penalty has been initiated, are **completed**,

or

- **six months from the end of the month in which action for imposition of penalty is initiated**,

whichever period expires **later**.

ISSUE :

CAN PENALTY U/S 271A AND BE
IMPOSED IN CASE PENALTY IS
ALREADY LEVIABLE UNDER ANY
OTHER PROVISION

Parallel levy of more than 1 penalty

Cases of parallel levy

Section 270A(9)

(9) The cases of misreporting of income referred to in sub-section (8) shall be the following, namely:—

...

(c) recording of any **false entry** in the books of account;

(d) **failure to record** any **receipt** in books of account having a **bearing on total income**;

Section 271AAC

Penalty where addition is made u/s section 68, section 69, section 69A, section 69B, section 69C or section 69D

Section 271AAB

Penalty where search has been initiated.

Parallel levy of more than 1 penalty

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Parallel levy of more than 1 penalty

View One – Simultaneous levy allowed

- Section 271AAD(1) uses the words – “*Without prejudice to any other provisions of this Act*”
- **Literal Interpretation** – Section 271AAD does not affect operation of any other provision.
- Hence, penalty can be levied simultaneously

Parallel levy of more than 1 penalty

View One – Simultaneous levy allowed

- Section 271AAD(1) uses the words – “*Without prejudice to any other provisions of this Act*”
- **Literal Interpretation** – Section 271AAD does not affect operation of any other provision.
- Hence, penalty can be levied simultaneously

Parallel levy of more than 1 penalty

View One – Simultaneous levy not allowed

- **Rule of Double Jeopardy under Article 20(2) of the Constitution**
“No person shall be prosecuted and punished for the same offence more than once”

Challenge – Are penalties under income tax ‘quasi-criminal’ ?

- **Specific vs General**
 - Principle of ‘*generalia specialibus non derogant*’.
 - A special provision normally excludes the operation of a general provision.
 - `

Questions ???



THANK YOU



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