

Option to claim Immunity from penalty and prosecution in case of under reporting of income for Assessment Year 2017-18 and onwards provided tax and interest is paid before the due date and no appeal is filed against the assessment order

Dear Friends,

The end of the calendar year 2019 coincides with the last date to pass an assessment order in relation to assessment year 2017-18 under the Income Tax Act. As we are headed towards the end of calendar year, there are a number of assessments being framed on a daily basis. In many of the assessments orders, there are a few disallowances or additions which are of routine nature. It is a common perception amongst us that if an addition is made to the returned income, which may be on account of some disallowance of expenditure or some petty additions, then the penal consequences automatically follow. In view thereof, most of us advise our clients to file an appeal against the assessment order to contest such disallowances/additions, however insignificant these may be, so as to avoid levy of penalty which experience says is invariably levied by the AO by making allegation of concealment of income or of furnishing inaccurate particulars of income under section 271(1)(c) of the Act.

Just to refresh the memory, I may point out that the Finance Act, 2016 has deleted section 271(1)(c) from assessment year 2017-18. Now penalty for underreporting or misreporting of income is leviable under section 270A of the Act. Further, an option has been given to the taxpayers under Section 270AA of the Act, to seek immunity from imposition of even this penalty leviable under section 270A and also from initiation of prosecution in certain cases. The objective of this write up is to explain this option and to avoid filing appeals in such cases.

Background

In relation to any assessment year commencing prior to 1st April 2017, penalty is imposed under section 271(1)(c) for concealment of income as well as for furnishing inaccurate particulars of income. Finance Act, 2016 inserted a new section 270A to replace this section 271(1)(c) to provide for the provision in relation to levy of penalty in relation to an assessment year beginning on or after 1st April 2017. Under the new section 270A, penalty is leviable if an assessee is said to have under-reported or mis-reported his income. In case of under-reporting of income, penalty is levied at the rate of 50 per cent of the amount of tax payable on the under-reported income. In case of mis-reporting of income, the penalty is leviable at the rate of 200 percent of the amount of tax payable on the under-reported income.

Immunity from penalty and prosecution in case of under-reporting of income

Finance Act, 2016 has inserted section 270AA to provide immunity from penalty and prosecution in case of under-reporting of income. The said provision provides immunity from imposition of penalty under section 270A and initiation of prosecution in respect of cases of under-reporting of income if the tax and the interest payable as per the assessment or the reassessment order is paid within the period specified in the notice of demand i.e. within 30 days of the service of notice and also if no appeal has been filed against the assessment or the reassessment order. To avail this immunity, assessee is required to file an application in Form 68 within 1 month from the end of the month in which the assessment order is received by the assessee. It has been provided that in case conditions specified are fulfilled, then the assessing officer upon expiry of the period of filing of appeal i.e. 30 days from the date of service of notice of demand, shall grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC. The assessing officer is required to pass an order accepting or rejecting the application within a period of one month from the end of the month in the application is received by him. However, before passing any order rejecting the application, assessing officer is required to give to the assessee an opportunity of being heard.

It is to be noted that the assessment order has to be accepted in totality and no appeal can be filed to challenge any addition or disallowance. Further, it may be noted that this benefit of immunity from imposition of penalty and initiation of prosecution proceedings will be available only in case of under-reporting of income and not in cases of mis-reporting of income. The following are considered to be the cases of mis-reporting where this option can not be availed:-

- (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; 40
- (e) failure to record any receipt in books of account having a bearing on total income; or
- (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

All assessment framed for assessment year 2017-18 and onwards where variation between the assessed income and the returned income is not on account of mis-reporting

of income, as highlighted above, will be eligible for benefit of immunity from imposition of penalty and initiation of prosecution. This section 270AA gives an opportunity to the assessee where certain additions have been made which fall in the category of under-reporting of income and not in the category of mis-reporting of income to avoid penal consequences by paying tax and interest within the prescribed due date as per the notice of demand and by not filing any appeal against the order. However, there may be difficulty in those cases where additions have been made which fall in both categories i.e. under reporting of income and misreporting of income. In such cases benefit of this immunity will not be available.

It may be noted that in cases of under-reporting of income, if the assessee complies with the conditions prescribed i.e. pays the tax and interest before the due date and does not prefer an appeal, then the assessing officer is mandatorily required to grant immunity from penal consequences as the term used in section 270AA(3) is “shall” and not “may”. It may be relevant to point out that this is an option given to the assessee. In case an assessee doesn't exercise this option or the application filed is rejected, by the assessing officer, the assessee will still have the right to contest levy of penalty by offering an explanation with regard to the additions or disallowances made. It has been provided in section 270A itself that following income shall not be included for the levy of penalty:-

- (i) the amount of income in respect of which assessee offers an explanation and the Assessing Officer or the Commissioner (Appeals) is satisfied with the explanation as bonafide and assessee had disclosed all material facts to substantiate the explanation thereof;
- (ii) Income determined on the basis of an estimate, if the accounts are correct and to the satisfaction of the Assessing Officer but the method employed is such that income properly be deduced therefrom.
- (iii) Income determined on the basis of an estimate, if the assessee has on his own estimated the lower amount and deduction or disallowance on the same issue and has made appropriate adjustment of the same in the computation of his income and has disclosed all the facts and material to the addition or disallowance;
- (iv) Income represented by any addition on account of arm's length price determined by the TPO where assessee has maintained information and document pertaining to international transaction and disclosed all the material facts relating to the transaction;
- (v) Undisclosed income for which penalty is leviable under section 271AAB i.e. undisclosed income found during the course of the search for which return is not due as on the date of the search.

Further, it is a settled law that penalty proceedings and assessment proceedings are independent proceedings and that the levy of penalty is not automatic. Accordingly, the assessee may still be able to challenge the levy of penalty notwithstanding the fact that the application has been rejected or appeal has not been preferred against the assessment order.

Further, it may also be noted that in case the application is rejected, assessee will be eligible to file an appeal under section 246A in respect of the assessment order. In this regard, it may be pointed out that as per the second proviso to section 249(2)(b) of the Act, while computing the limitation period of 30 days to file an appeal, the time period beginning from the date on which the application is made under section 270AA to the date on which the order rejecting the application is served on the assessee shall be excluded. The effect of this proviso is that in case an application made under section 270AA is rejected by the assessing officer, then the extended period of filing the appeal will be available to the assessee and the assessee will be eligible to file the appeal.

Takeaway- Think before filing appeal

Considering the above, in cases where certain disallowances or additions have been made which fall in the category of under-reporting of income, it will be advisable that the assessee takes the benefit of section 270AA by paying tax and interest before the due date and not prefer an appeal against the assessment order and seek immunity from penal/prosecution provisions. It may be noted these provisions are applicable from assessment year 2017-18 only and not applicable to earlier assessment years. Accordingly, assessment of earlier years now being completed say under section 148 or 153A or 153C are not eligible for such benefit. In such cases, penalty will continue to be leviable under section 271(1)(c) of the Act.

Regards,

Ved Jain