



Daryaganj CPE Study Circle



DISCUSSION ON PENALTY U/S 270A AND 271AAC OF THE INCOME TAX ACT, 1961

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Presented by

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AGENDA FOR TODAY

- Legal position before penalty u/s 270A
- Why has the Penalty provision been replaced ?
- Penalty on Under-Reporting & Misreporting of Income
 - Levy
 - Under-reporting
 - Computation of under-reported income
 - Misreporting
 - Quantum of Penalty
 - Practical Issues
- Immunity from penalty under section 270A
- Penalty under section 271AAC

Legal position before penalty u/s 270A

Penalty u/s 271(1)(c) of the Act

- Imposed in case of
 - i. Concealment of particulars of income or
 - ii. Furnishing of inaccurate particulars
- “Concealment” - an intentional, malafide or dishonest act on the part of an assessee to hide or conceal the particulars of income.
- “Inaccurate particulars” - furnishing of inaccurate particulars with an intention to evade tax.

Legal position before penalty u/s 270A

Important Case Laws

➤ CIT v. Anwar Ali [1970] 76 ITR 696 (SC)

Mere giving false explanation doesn't result in penalty. There should be **cogent material or evidence** from which it could be inferred that the **assessee had concealed the particulars** of his income or had **deliberately furnished inaccurate particulars** in respect of the same.

➤ Hindustan Steel Ltd. v. State of Orissa (1972) 83 ITR 26 (SC)

- An order imposing penalty is quasi-criminal proceeding,
- Penalty not to be imposed unless party acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation.

Legal position before penalty u/s 270A

Important Case Laws

➤ Hindustan Steel Ltd. v. State of Orissa (1972) 83 ITR 26 (SC)

- No penalty for technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

➤ T. Ashok Pai v. CIT [2007] 292 ITR 11/161 Taxman 340 (SC)

- i. Penalty proceedings are quasi-criminal in character - Penalty proceedings are quasi-criminal in nature, so that the burden primarily lies on the department to establish that assessee has concealed his income.

Legal position before penalty u/s 270A

Important Case Laws

- T. Ashok Pai v. CIT [2007] 292 ITR 11/161 Taxman 340 (SC)
 - ii. Interpretation of penalty provisions - Law relating to penalty should be **construed strictly in favour of the assessee**, more **stringent the law, stricter** the construction that is required in favour of the assessee.
 - iii. Penalty proceedings are independent proceedings - Since penalty proceedings are independent proceedings, the **matter has to be considered afresh** in the light of the law applicable to penalty.
 - iv. Burden on initiation of the proceedings - The burden of proof **placed on the assessee** under the Explanation is subject to conditions therein. It is necessary that there should be an inference of concealment at the time of initiation of the proceedings.

Legal position before penalty u/s 270A

Important Case Laws

➤ T. Ashok Pai v. CIT [2007] 292 ITR 11/161 Taxman 340 (SC)

- v. Extent of burden on taxpayer - Even where a burden is placed on the taxpayer, such **burden cannot be the same as that of prosecution** as was decided in Krishna Lal (P.N.) v. Government of Kerala (1995) Supp 2 SCC 187.

- vi. Relevance of *mens rea* - Inference of *mens rea*, that is **necessary** for concealment penalty, is essentially based on facts. Penalty has two components, one prescribing conditions for imposition and the other for computation.

Legal position before penalty u/s 270A

Important Case Laws

➤ T. Ashok Pai v. CIT [2007] 292 ITR 11/161 Taxman 340 (SC)

- vii. Relevance of assessment to penalty proceedings- A finding in the **assessment proceedings**, that there is an omission in income **does not by itself lead to the inference that there is concealment**, notwithstanding the fact, that the omission may constitute a good evidence for concealment, but it is not conclusive.
- viii. Effect of omission of requirement of deliberateness - The omission of the word "deliberate" in the penalty provision is **not of much significance**, so as to change the law on penalties.

Legal position before penalty u/s 270A

Important Case Laws

➤ T. Ashok Pai v. CIT [2007] 292 ITR 11/161 Taxman 340 (SC)

- ix. Legal advice can be a shield - Where an assessee acts on legal advice, though wrong, the omission should be treated as bona fide with no **deliberateness** involved.

Why has the Penalty provision been replaced ?

The replacement is explained as follows in the Memorandum explaining the provisions of the Finance Bill, 2016 :

- To rationalize 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 AY commencing on or after the 01-04-2017.
- From AY 2017-18, Penalty shall be levied under the newly inserted section 270A.
- The new section 270A provides for levy of penalty in cases of under reporting and misreporting of income."



Penalty on Under-Reporting & Misreporting of Income

Section 270A (1) of the Act

- AO or CIT(A) or the Pr. CIT or CIT 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**.

Section 270A (1) of the Act

Levy of Penalty is discretionary or Mandatory

- **'May'** : Refers to **discretionary aspect** which must be exercised judiciously and with application of mind (refer Delhi high court Madhushree Gupta 317 ITR 107)
- **'Direct'** : Requires **positive and express satisfaction** and **recording of reasons** in writing on part of authority initiating penalty for underreporting etc. (refer Karnataka high court in Manjunath case)
- **Section 274** requires **issue of show cause notice** and an **opportunity of hearing** to be given to the assessee.
- Thus, “**may / direct**” implies that the power conferred is **discretionary**.
- Thus, **not obligatory** for the officer or the authority to levy the penalty.

Section 270A (1) of the Act

During the course of any proceedings under the Act:

- Requires **live and pending proceedings** during which cognizance of stipulated action can be taken;

Section 270A (2) - Under-reporting of income

Person shall be considered to have under-reported his income, if

Clause	Circumstances	Income	Greater/ Less than	Income
(a)	Return filed	Assessed income	Greater than	Income which is processed u/s 143(1)(a)
(b)	Return not filed / 1 st time filed u/s 148	Assessed income	Greater than	Maximum amount not liable to tax
(c)	Reassessment	Reassessed income	Greater than	Assessed income/reassessed income (as per previous re-assessment)
(d)	Return filed - Assessed reassessed u/s 115JB/115JC	Assessed/re-assessed Deemed total income u/s 115JB/115JC	Greater than	Deemed total income u/s 115JB/115JC) which is processed u/s 143(1)(a)]

Section 270A (2) – Under-reporting of income

Person shall be considered to have under-reported his income, if

Clause	Circumstances	Income	Greater/ Less than	Income
(e)	No return filed / 1 st Time filed u/s 148 - Assessed u/s 115JB/115JC	Assessed deemed total income u/s 115JB/ 115JC	Greater than	Maximum amount not liable to tax
(f)	Assessee/reassessed u/s 115JB/115JC	Assessed/reassessed Deemed total income u/s 115JB/115JC	Greater than	Assessed/reassessed Deemed total income u/s 115JB/115JC (as per previous assessment/ reassessment)
(g)	Loss case	Assessed/ reassessed loss	Greater than	Returned/assessed loss
		Assessed/ reassessed income		As against returned/ assessed loss

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

The amount of under-reported income shall be (A) - (B)

Clause	Circumstance	(A)	Less	(B)
(i) (a)	Income assessed 1 st Time – ITR furnished	Income assessed	(-)	Income u/s 143(1)(a)
(i) (b)	Income assessed 1 st Time – ITR not furnished / 1 st time furnished u/s 148	Income assessed	(-)	Maximum amount not chargeable to tax
(ii)	Any other case	Income reassessed or recomputed	(-)	Income assessed, reassessed or recomputed in a preceding order

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

The amount of under-reported income if it arises due to section 115JB or section 115JC shall be:

$$(A - B) + (C - D)$$

A = the total income assessed as per general provisions

B = the total income that would have been chargeable as per general provisions been reduced by the amount of under-reported income;

C = the total income assessed as per section 115JB or section 115JC;

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

- If under-reported income on any issue is considered both under section 115JB or section 115JC and under general provisions,
- such amount shall not be reduced from D.

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

The amount of under-reported income in case of loss:

- If assessment or reassessment results in reducing the loss declared in the ITR 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.

Section 270A (6) – Exclusion from under-reported income

The under-reported income, for the purposes of this section, shall not include the following, namely:-

Clause A – Bonafide Explanation

- **Under-reported** income shall **not include** amount of income for which
 - i. the **assessee offers an explanation**;
 - ii. The specified authority is **satisfied** about the **explanation** that it **is bona fide**; and
 - iii. The assessee has **disclosed all the material facts** to substantiate the explanation.

- Satisfaction of ALL three above conditions cumulatively is mandatory

Section 270A (6) – Exclusion from under-reported income

The under-reported income, for the purposes of this section, shall not include the following, namely:-

Clause A – Bonafide Explanation

➤ Bonafide Meaning

➤ In GTO v. Gautam Sarabhai Ltd. [1989] 29 ITD 212 (Ahd.)

- ❖ Mean "in good faith", "genuinely" which are suggestive of honesty of purpose.
- ❖ Absence of intention to deceive

➤ GTO v. Rajmata Shanta Devi P. Gaekwad [2001] 76 ITD 299 (Ahd.)

- ❖ Means **good faith** implying the **absence of fraud, unfair dealing** or acting, whether it consists in simulation or dissimulation.
- ❖ Must be shown that **everything was done** in an **open** and **straight-forward** manner.

Section 270A (6) – Exclusion from under-reported income

The under-reported income, for the purposes of this section, shall not include the following, namely:-

Clause B – Under-reported income Estimated : Accounts correct and complete

- **Under-reported** income shall **not include**
 - i. Amount of under-reported income determined on the basis of an **estimate**,
 - ii. **Accounts** are **correct** and **complete** (mng – books not rejected)
 - iii. but the **method employed** is such that the income **cannot properly** be **deduced** therefrom;

- Satisfaction of ALL three above conditions cumulatively is mandatory

Section 270A (6) – Exclusion from under-reported income

The under-reported income, for the purposes of this section, shall not include the following, namely:-

Clause C – Under-reported income Estimated : Enhancement of disallowance

- **Under-reported** income shall **not include**
 - i. Amount of under-reported income determined on the basis of an **estimate**
 - ii. Assessee has, **on his own, estimated a lower amount** of addition or disallowance
 - iii. has **disclosed** all the **facts material** to the addition or disallowance;
- Satisfaction of ALL three above conditions cumulatively is mandatory

Section 270A (6) – Exclusion from under-reported income

The under-reported income, for the purposes of this section, shall not include the following, namely:-

Clause D – Under-reported income due to TP adjustment

- **Under-reported** income shall **not include**
 - i. the amount of under-reported income due to **addition made in ALP** determined by TPO
 - ii. Assessee had **maintained proper** information and **documents**
 - iii. **Properly declared the international** transaction and, disclosed all the material facts relating to the transaction; and
- Satisfaction of ALL three above conditions cumulatively is mandatory

Section 270A (6) – Exclusion from under-reported income

The under-reported income, for the purposes of this section, shall not include the following, namely:-

Clause E – Undisclosed Income

- **Under-reported** income shall **not include**
 - i. the amount of **undisclosed income** referred to in **section 271AAB**.

- Section 271AAB deals with **penalty where search has been initiated**

Section 270A (7) & (8) – Amount of Penalty

➤ **Penalty shall be**

- i. In case of **Under- Reporting** : **50%** of tax payable on under-reported Income
 - ii. In case of Under- Reporting is because of **Misreporting** : **200%** of tax payable on under-reported income
- In case of misreporting, exclusions under sub-section 6 will be not applicable

Section 270A (9) – Cases of misreporting of income

Cases of misreporting of income referred to in sub-section (8) shall be the following, namely:-

A. Misrepresentation or suppression of facts

- 'Misrepresentation' dictionary meaning (Merriam-Webster)
To give a false or misleading representation of usually with an **intent to deceive or be unfair**
- 'Suppression' dictionary meaning (Merriam-Webster)
An act or instance of suppressing ; the **conscious intentional** exclusion from consciousness of a thought or feeling

B. Failure to record investments in the books of account

- As per **Pannalal Nandlal Bhandari v.CIT [1956] 30 ITR 57 (Bom.)** failure must connote that **there is an obligation which has not been carried out** and

Section 270A (9) – Cases of misreporting of income

Cases of misreporting of income referred to in sub-section (8) shall be the following, namely:-

C. Claim of expenditure not substantiated by any evidence

➤ Use of the word 'ANY'

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

F. Failure to report any international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.

Section 270A (10) – Tax payable on under-reported income

Clause	Circumstance	Tax on Under-Reported Income
(a)	Income assessed 1 st Time – ITR not furnished / 1 st time furnished u/s 148	Tax on the under-reported income as increased by the maximum amount not chargeable to tax
(b)	Income determined u/s 143(1)(a) or assessed, reassessed or recomputed in a preceding order is a loss	tax calculated on the under-reported income as if it were the total income
(c)	Any other case	$(X - Y)$ X = Tax on the under-reported income as increased by income determined u/s 143(1)(a) or total income assessed, reassessed or recomputed in a preceding order and Y = Tax calculated on the total income determined u/s 143(1)(a) or total income assessed, reassessed or recomputed in a preceding order.

ISSUES IN LEVY OF PENALTY U/S 270A

Burden of Proof

POSITION UNDER SECTION 271(1)(C)

- AO to **initially allege** whether concealment or furnishing of inaccurate particulars.
- Explanation 1 to section 271(1)(c) shifted **burden on the assessee** to establish his bona fides and innocence.

POSITION UNDER SECTION 270A

In case of Under-Reporting

- As per formula stated in 270A (2) &(3), there is underreporting the moment when there is an addition.
- Thus, as per the mechanism provided, computation of under-reported income is simply automatic.
- Onus now on assessee to prove that he is covered by exclusions u/s 270A(6)CA Paras Dawar

Burden of Proof

In case of Misreporting

- No mechanism to automatically allege misreporting.
- Onus is on AO to prove that there is misreporting under 6 cases prescribed u/s 270A(9)

Recording of Satisfaction

POSITION UNDER SECTION 271(1)(C)

- **Specific provisions** to record satisfaction before initiating penalty.

POSITION UNDER SECTION 270A

- **No specific provisions** to record satisfaction before initiating penalty.
- However, use of term “**may**” which qualifies the term “**direct**” indicates that **penalty is not automatic.**
- If penalty is not automatic, then **to initiate penalty AO must be satisfied** that there is under-reported income or misreporting of income

No Penalty on income returned v/s income u/s 143(1)(a)

- Under-reported income **difference** between
 - income **assessed** and
 - income **determined u/s 143(1)(a)**
- Hence, amount of under-reported income will not include amount of adjustments made in the returned income u/s 143(1)(a) of the Act and accordingly, no penalty is leviable with reference to the same.

Penalty on debatable issue or question of law

POSITION UNDER SECTION 271(1)(C)

- No penalty in case of a legal or a debatable issue.

POSITION UNDER SECTION 270A

- **No specific provisions u/s 270A.**
- However, section **270A(6)(a)** **excludes from under-reporting, cases where *bonafide explanation*** is provided subject to satisfaction of all three conditions.
- However, protection of **no such exclusion for misreporting cases.**

Penalty where tax already paid

Will penalty be levied u/s 270A in a case where ITR was not filed but taxes were fully paid. Upon completion of assessment, a refund has been determined as due to the assessee ?

POSITION UNDER SECTION 271(1)(C)

- Penalty was on '*tax sought to be evaded*',
- Since, there was no evasion of tax, penalty couldn't be levied.

POSITION UNDER SECTION 270A

- Penalty here is on under reported income. Tax paid already has no implication.
- However, **prior tax payment** may become a good **ground** to fall under **exclusion** provided under section **270A(6)(a) (i.e. *bonafide explanation*)**

Impact of SSA Emerald – Supreme Court

Notice issued by AO u/s 274 read with section 271(1)(c) was bad in law, as it did not specify under which limb of section 271(1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income

- Can we apply this judgment in section 270A penalty cases ?
- Implication ?

A wooden gavel with a dark, polished finish and a textured head is positioned diagonally across the right side of a white document. The document is placed on a stack of light brown, textured paper. A silver paperclip is attached to the left edge of the white document. The word "WAIVER" is printed in large, bold, black, serif capital letters across the center of the white document. The entire scene is set against a dark wood-grain background.

WAIVER

Immunity from penalty under section 270A

Section 270AA – Immunity

Applications

- Assessee shall make application to AO from **grant of immunity from**
- **imposition of penalty** under section **270A** and
- **initiation of proceedings** under section **276C** or section **276CC**

Conditions

- **Conditions** to be fulfilled prior to application -
- **Tax and interest** payable has been **paid within the period specified** in notice of demand; and
- **no appeal** against the order has been filed.

Time Limit

- Application must be made **within one month** from the end of the month in which the order is received

Section 270AA – Immunity

AO

- AO **shall**, subject to fulfilment above and after the expiry of the appeal filing period
- grant immunity from imposition of penalty u/s 270A and initiation of proceeding u/s 276C or 276CC where
- **However, penalty proceedings immunity N.A. in case of misreporting.**

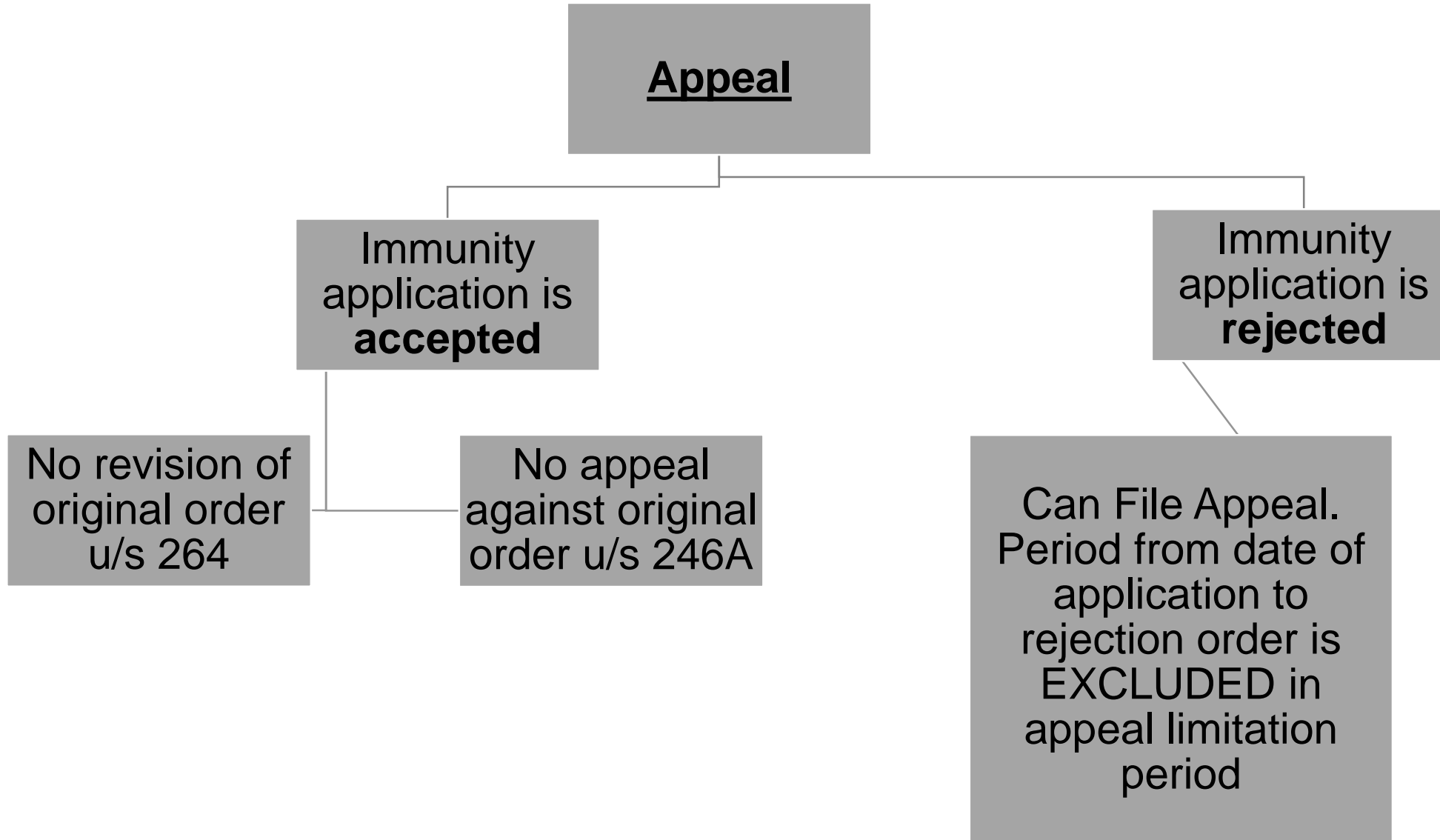
Time
Limit

- AO shall pass an order accepting or rejecting within **one month** from the end of the month in which the application is received,
- No order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.

Appeal

- AO order is Final. Only remedy is Writ.

Section 270AA – Immunity



Section 270AA – Immunity – Some Issues

- Can immunity be granted in a case where the assessee concedes only some of the additions and decides to contest the rest of them
- Can immunity be granted in a case where penalty has been initiated by CIT(A)/CIT / Pr. CIT?
 - If yes, will AO grant such immunity ?
- Can order granting immunity be revised u/s 263 of the Act?



Penalty under section 271AAC

Section 271AAC - Penalty

- AO may,
- notwithstanding anything contained in this Act other than the provisions of section 271AAB,
- **direct** that, in a case where the **income determined includes** any income referred to
 - section 68
 - section 69
 - section 69A
 - section 69B
 - section 69C or
 - section 69D :
- the assessee **shall pay** by way of penalty a sum computed at the rate of **ten per cent of the tax payable** under section 115BBE.

Section 271AAC - Penalty

- No penalty shall be levied to the extent such income has been included in the ITR furnished under section 139 and the **tax** in accordance with the provisions of **section 115BBE(1)(i)** has been **paid on or before the end of the relevant previous year**
- **Penalty u/s 270A shall not be imposed** upon the assessee **in respect of the above income.**
- Provisions of **sections 274 and 275** shall, as far as may be, **apply** in relation to the penalty referred to in this section.

Tax Payable under section 115BBE

Example : Income u/s 68 of Rs. 1,00,00,000/- added in AY 2017-18 and date of order is 31-12-2019.

Tax u/s 115BBE	=	60% of Rs. 1,00,00,000/-	=	Rs. 60,00,000/-
Surcharge	=	25% of tax u/s 115BBE	=	Rs. 15,00,000/-
Cess	=	3% of (Tax + Surcharge)	=	Rs. 2,25,000/-
Penalty u/s 271AAC	=	10% of tax u/s 115BBE	=	<u>Rs. 6,00,000/-</u>
		Total		<u>Rs. 83,25,000/-</u>

Effective Tax Rate = 83.25% (excluding interest)

Questions ???



THANK YOU



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