



THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

JALGAON BRANCH OF WIRC OF ICAI

@E-Newsletter April 2017

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Chairperson Desk



Respected Members Greeting of the day !

I wish you all a very happy Financial Year 2017-18.
The hectic month of March has just passed and April has its own "To do list".
To talk of the activities of month of April we conducted seminars on 2 very important topics

Seminar on - Impact of PMLA

Prevention of Money Laundering Act, 2002 is an Act to prevent money-laundering and to provide for confiscation of property derived from money-laundering.
speaker CA Vinay Kawadiya in his usual manner covered all the provisions of the Act and replied all possible queries of the member in best possible manner.

Seminar on - "Issues in 269ST"

There is restriction imposed on cash transaction by sections 269ST & 271DA inserted by the Finance Act 2017 to the Income-tax Act. These sections provide that no person (other than those specified therein) shall receive an amount of two lakh rupees or more (a) in aggregate from a person in a day; (b) in respect of a single transaction; or (c) in respect of transactions relating to one event or occasion from a person, otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through a bank account.

This is an important provision. CA Dinar Daptari covered the topic very well and it was a very interactive session, helped in clearing the doubts of many members.

Jalgaon branch is really honored to have our own learned speaker to guide us on different Subject matters. Going a step ahead, I appeal to all the members to approach the branch if they want to deliver an oration on any topic.

I wish all the success to the students appearing for their CA exams in the month of May 2017.

The branch is planning to conduct a certification course; the details of the same are already circulated. I appeal to members to kindly give their preference towards the certification course.

Wish all the members a very busy season ahead.

Fill the brain with high thoughts, highest ideals, place them day and night before you, and out of that will come great work.

--Swami Vivekanand.

Regards

CA Pallavi Mayur
Chairperson

April 2017 Programmes





CA Vinay Kawdia

Penalty in case of search on or after 15.12.16

Introduction:

- The provisions relating to search and seizure were introduced in the Income Tax Act, 1961 (*hereinafter referred to as "The Act"*) to unearth the undisclosed income of any person represented by any money, bullion, jewellery or other valuable article or thing or any entry in any documents etc.
- The relevant provisions are contained in section 132, 132A, 132B of the Act.
- Procedure in search assessment is prescribed u/s 153A /153B/153C of the Act.
- As regards Tax and penalties in case of search, a lot has been changed after Taxation Laws (Second Amendment) Act 2016 w.e.f. 15.12.16.

Background:

- In the course of Search operations, generally assessee declares his undisclosed income in the statement recorded u/s 132(4). Practically speaking, the disclosure/admission of undisclosed income in the statement u/s 132(4) of the Act amounts to minimum offer made by assessee to the revenue regarding his unaccounted income, which is very difficult to retract subsequently.
- The assessee must be cautious enough about his disclosures and manner/source of disclosures of unaccounted income as the manner and way in which assessee makes the declarations, decides the fate of the assessee as regards penal provisions.
- It has been experienced that, the main hurdle in smooth completion assessment proceedings post search is possible penal consequences of the search action.
- If one can mitigate/avoid the penal consequences of search action, substantial litigation and harassment arising out of search proceedings can be avoided.
- Penal consequences or pending penalty proceedings are also the biggest hurdle in getting the valuable seized material released.

A.1) Penal Provisions applicable:

Penal provisions applicable in cases where a search is initiated on or after 1-7-2012:—

- penalty under section 271AAB(1) of the Act [*in case of search initiated before 15.12.16*]
- penalty under section 271AAB(1A) of the Act [*in case of search initiated on or after 15.12.16*]

- penalty under section 271(1)(c) of the Act read with the *Explanation* 5A thereof for concealment / furnishing inaccurate particulars of income; (*up to AY 16-17*)
- penalty under section 270A of the Act for underreporting of income; (*w.e.f. A.Y. 17-18*)
- penalty under section 271AAC of the Act on income chargeable u/s 115BBE; (*w.e.f. A.Y. 17-18*)

A.2) Penalty u/s 271AAB(1): Section 271AAB(1) provides for levy of penalty at slab rates of 10%, 20% and 30% to 90% of the undisclosed income, subject to fulfillment of certain conditions. **[in case of search initiated on or after 01.07.12 but before 15.12.16]**

Section	Conditions to be fulfilled	Quantum of Penalty as % of Undisclosed income of <u>Specified previous year</u>
271AAB(1)(a)	<ul style="list-style-type: none"> a) Assessee must have admitted the undisclosed income in statement recorded u/s 132(4) b) Assessee <u>specifies & substantiates</u> the manner in which such undisclosed income was derived c) Pays Tax & Interest on such undisclosed income before the specified date; d) Files the ROI for specified previous year declaring such undisclosed income therein 	10%
271AAB(1)(b)	<ul style="list-style-type: none"> a) Assessee <u>does not</u> admit the undisclosed income in statement recorded u/s 132(4) b) declares such income in the ROI furnished for the specified previous year on or before <u>the specified date</u> c) Pays the tax and interest on such undisclosed income <u>before the specified date</u>; 	20%
271AAB(1)(c)	Undisclosed income of specified previous year not covered in clause (a) and (b) of section 271AAB(1).	30% to 90% - (Flat 60% w.e.f. 01.04.17)

A.3) Penalty u/s 271AAB(1A): Section 271AAB(1A) provides for levy of penalty at rates of 30% or 60% of the undisclosed income, subject to fulfillment of certain conditions. **[in case of search on or after 15.12.16]**

Section	Conditions to be fulfilled	Quantum of Penalty as % of Undisclosed income of <u>Specified previous year</u>
271AAB(1A)(a)	<p>a) Assessee must have admitted the undisclosed income in statement recorded u/s 132(4)</p> <p>b) Assessee <u>specifies & substantiates the manner</u> in which such undisclosed income was derived</p> <p>c) Pays Tax & Interest on such undisclosed income before the specified date;</p> <p>d) Files the ROI for specified previous year declaring such undisclosed income therein</p>	Flat 30%
271AAB(1A)(b)	Undisclosed income of specified previous year not covered in clause (a) of section 271AAB(1A).	Flat 60%

➤ **Note:**

"Specified previous year" means previous year –

which has ended before the date of search, but the date of furnishing the return of income u/s 139(1) for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the date of search; or

➤ in which search was conducted;

"specified date" means the due date of furnishing of return of income u/s 139(1) or the date on which the period specified in the notice issued under section 153A for furnishing of return of income expires, as the case may be;

➤ **A.4) Both the penalties are mutually exclusive:** It is important to note that, both the penalties i.e. penalty under S. 271(1)(c) / 270A and u/s 271AAB are mutually exclusive in the sense that, in view of section 271AAB(2), no penalty under S. 271(1)(c) / 270A shall be imposed upon the assessee in respect of the undisclosed income referred to in section 271AAB.

➤ **In other words, once the case of the assessee falls under any of the clauses of section 271AAB(1) or 271AAB(1A), the respective provision shall apply and no penalty u/s 271(1)(c) or S. 270A can be levied.**

To summarize, the penal provisions can be analysed in four different contexts:

Previous year	Penalty leviable
1) Penalty in respect of undisclosed income of previous year in which search was conducted;	Section 271AAB
2) Penalty in respect of undisclosed income of previous year which has just ended before the date of search & due date prescribed u/s 139(1) for such year has not expired and assessee has not furnished the ROI for such year, before date of search;	Section 271AAB <i>[Even if due date u/s 139(1) is not expired and return is also pending, still penalty u/s 271AAB is leviable in respect of income found during search which has not been recorded on or before date of search in the books of accounts or other documents etc.]</i> <i>This provision presumes that, but for the search action the assessee would not have 'disclosed' in the return such undisclosed income. The presumption is neither fair nor proper as in any case it is a rebuttable one. It also runs contrary to the settled legal position that concealment is always vis-à-vis return filed, whether or not the concerned income is recorded in the books of accounts.</i>

Under situation (1) and (2) above, penalty shall be levied u/s 271AAB (1A) @ 30% or 60% of undisclosed income of the specified previous years, depending upon fulfillment of conditions as required by clauses (a), (b), (c) of the section 271AAB(1A) as listed in [A.2] above. [Search after 15.12.16]

3) Penalty in respect of undisclosed income of previous year which has just ended before the date of search in respect of which any of the conditions mentioned in (2) above is not satisfied; and	Section 271(1)(c) r.w. Explan. 5A thereof (up to A.Y. 16-17 / for search conducted during FY 16-17). <i>[In case due date u/s 139(1) has expired before the date of search, the immunity provided by S. 271AAB shall not be available even if return is pending on date of search.</i> <i>In other words, though, it is prerogative of the assessee to offer any income while filing pending return within extended due date u/s 139(4), here, immediately on expiry of due date u/s 139(1), Act presumes that intention of the assessee was to hide the income treated as "undisclosed income" due to search action and penal consequences u/s 271(1)(c) shall follow.</i>
4) Penalty in respect of undisclosed income of the rest of the block period	Section 271(1)(c) r.w. Explan. 5A thereof (up to A.Y. 16-17)
5) Penalty in respect of undisclosed income of the rest of the block period to which provisions of S. 271AAB does not apply (commencing from A.Y. 2017-18 and onwards)	Section 270A w.e.f. A.Y. 2017-18 <i>[As per S. 270A(6)(e), under reported income shall not include undisclosed income referred to in S. 71AAB]</i>

For the previous years mentioned at (3) & (4) / (5) above [period other than "specified previous years"], immunity provided u/s 271AAB shall not be available and penal consequences shall be as per section 271(1)(c) r.w. Explanation 5A thereof/ Section 270A, as the case may be.

Note: 'Undisclosed Income' is defined by Explanation (c) to Section 271AAB:

➤(c) "undisclosed income" means—

(i) any 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 u/s 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 Chief Commissioner/ 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.

Suggested Operating Procedure:

➤ **Year of declaration** – be cautious – prefer the year in which search is being conducted/Year just ended before the date of search:

Reason: No addition for the AY (in the block period) in respect of which no incriminating material is found during the course of search. Therefore, avoid any declaration, if possible, for such years in the block period so as to have outright NIL assessment for those years. [refer: *CIT v. Kabul Chawla [2016] 380 ITR 573 (Delhi)*, *Ideal Appliances Co. vs. DCIT -ITA No. 173/Mum/2015, etc.*]

➤ **Manner of declaration:** Explain source of unaccounted income/asset to avoid applicability of S. 115BBE and consequential penal action u/s 271AAC/271AAB.

➤ Generally, whatever excess stock, cash, unrecorded debtors etc. gets unearthed during search/survey action are generated only out of assessee's regular business activity. It represents nothing but assessee's hard earned regular business income, though represented by some undisclosed purchases etc. If assessee doesn't have any other secret business activity/other secret source of income, other than that disclosed in his returns of income from time to time, provisions of section 69 etc. and thereby s. 115BBE can't be made applicable.

➤ If it was not the case at the time of search/survey proceedings that declarant was doing some other secret activities in which such income was earned and alleged to have been invested in unrecorded stock, etc. as declared, the additional income can be said to have generated out of assessee's regular business activity, and accordingly, in author's opinion, there is no scope for application of S. 115BBE of the Act. [Refer: *Daulatram Rawatmal 64 ITR 593(Cal.)*];

➤ *Annamalai Reddier 53 ITR 601 (Ker); CIT vs Margret's Hope Tea Co. Ltd. (201 ITR 747), ITO v. Jamnadas Muljibhai (99 TTJ 197), M/s Dev Raj Hi-Tech Machines vs. DCIT (ITA no, 326 of 2014 dt. 07.10.15 (Amritsar), etc.]*

➤ **Practically, in many cases, assessee's struggle to specify and substantiate the manner in which the unaccounted income admitted in statement recorded u/s 132(4) was derived. This is main hurdle to enjoy the immunity u/s 271AAB(1A)(a) [i.e. 30% penalty].**

➤ However, where the AO, does not raise any query before the assessee to further specify and substantiate the manner of deriving undisclosed income, it cannot be said that the onus cast on an assessee u/s 271AAB of the Act has not been discharged.

➤ *Where during course of search assessee admitted undisclosed income, paid tax together with interest, filed return showing said income as business income and AO had accepted same, it could not be said that assessee had not specified manner or could not substantiate manner in which income was derived - Therefore, penalty under section 271AAA was not leviable as assessee's case fell under sub-section (2) of section 271AAA. (now 271AAB) [Concrete Developers Vs. ACIT (2013) 34 taxmann.com 62 (Nagpur), etc.]*

➤ *"We are of the view that as per section 132(4) of the Act unless authorized officer puts a question with regard to the manner in which income has been derived, it is not expected from the person to make a statement in this regard and in case in the statement the manner in which the income has been derived has not been stated but has been stated subsequently, that amounts to the compliance with Explanation 5(2) of the Act. In the absence of any specific statement about the manner in which such income has been derived, it can be inferred that such undisclosed income was derived from the business which he was carrying on or from other sources. The object of the provision is achieved by making the statement admitting the non-disclosure of money, bullion, jewellery, etc. Thus, we are of the opinion that much importance should not be attached to the statement about the manner in which such income has been derived. It can be inferred on the facts and circumstances of the case, in absence of anything to the contrary. Therefore, mere non-statement of the manner in which such income was derived would not make Explanation 5(2) inapplicable." [CIT vs. Radha Kishan Goyal 152 Taxman 290 (All.), Pramod Kumar Jain v. DCIT [2013] 33 taxmann.com 651 (Cuttak)]*

No penalty u/s 271AAA can be levied in respect of undisclosed income found during a search u/s 132 if the AO did not put a specific query to the assessee by drawing his attention to s. 271 AAA and asking him to specify the manner in which the undisclosed income, surrendered during the course of search, had been derived.

[Pr CIT vs. Emirates Technologies Pvt Ltd (Delhi -2017)-ITA No. 400/2017, ACIT vs. Shreenarayan S. Mundra (ITA No. 2878/2013)[Ahd.]

➤ **Filing of return after search:** ROI for year of search and for year which has just ended before the date of search – file within 139(1) due date, if possible.

➤ **These provision presumes that, but for the search action, the assessee would not have 'disclosed' the income/assets unearthed during search in the books/return, even if the return is pending on the date of search and time limit u/s 139(1) /139(4) has also not expired.**

➤ Therefore, follow habit of maintaining books on real time basis to get rid of the deeming fiction of section 271AAB/271(1)(c), as applicable.

➤ Give declaration during search, to the extent feasible, rather than directly offering the income in ROI after search, to get the benefit of 10%/30% penalty as per S. 271AAB(1)/(1A).

➤ File the ROI in response to notice u/s 153A within time allowed in the notice, again to get the benefit of 10%/30% penalty as per S. 271AAB(1)/(1A).

➤ **Alert –S. 115BBE:**

Income referred to in Section 68, 69,69A,69B,69C or 69D & detected in search is taxable @ 60% u/s 115BBE of the Act.

➤ Thus, the total incidence of tax in respect of income of the nature referred to above is 77.25%. [(60 + 3%) + 25% surcharge]. If penalty under section 271AAC is also levied then the incidence of tax works to 83.25% [77.25% + 6%].

➤ **SECTION 271AAC: (w.e.f. A.Y. 17-18)**

271AAC. In a case where the income determined includes any income referred to in section 68, 69, 69A, 69B, 69C or 69D for any previous year, the assessee shall pay by way of penalty, in addition to tax payable under section 115BBE, a sum @ 10% of the tax payable under clause (i) of sub-section (1) of section 115BBE:

Provided that no penalty shall be levied in respect of income referred to above, to the extent such income has been included by the assessee in the ROI furnished under S. 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.

(2) No penalty under the provisions of S. 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (1).

➤ **In respect of a specified previous years in a case where search has been initiated, penalty will be levied under section 271AAB and not under this section.**

➤ **Important Points:**

In respect of searches conducted **before 16.12.2016**, if total income referred to in S. 115BBE is chargeable for AY upto 2016-17, then tax will be at the rates mentioned in pre-amended section 115BBE (i.e. 30%) and also penalty under section 271AAB(1) [**i.e. 10% to 60%**] would apply and not under section 271AAB (1A) [**i.e. 30% or 60%**]. Penalty under section 271AAC also will not apply.

➤ In respect of income referred to S. 115BBE being detected in a search on or after 16.12.2016 and where income is chargeable for AY 2017-18, for every Rs 100 – tax plus penalty under section 271AAB would be Rs. 107.25 (77.25 + 30) / Rs. 137.25 (77.25 + 60).

➤ In respect of undisclosed income for years other than the “specified previous year”, penalty will not be levied under section 271AAB but will be levied under section 271(1) or 270A of the Act, as the case may be.

SUMMARY:

Sr. No.	Tax Payable u/s 115BBE? (Income u/s 68, 69 etc.)	Undisclosed income Voluntarily offered in ROI and taxes paid?	Specified Previous Year?	Penalty - S. 271AAC	Penalty - S. 271AAB (1A)		Penalty -S. 270A	Total Tax + Penalty
					Clause (a)	Clause (b)		
1	Y	Y	Y	N	N		N	77.25%
2	Y	N	Y	N	Y	N	N	107.25%
3	Y	N	Y	N	N	Y	N	137.25%
4	Y	N	N	Y	N		N	83.25%
5	N	N	Y	N	Y	N	N	Tax + 30%
6	N	N	Y	N	N	Y	N	Tax + 60%
7	N	N	N	N	N		Y	Tax + (50% / 200% of Regular Tax)

NOTES:

- All the percentages are in relation to amount of undisclosed income found during search.
- Penalty u/s 270A is 50% of tax payable on undisclosed income in case of under reporting.
- Penalty u/s 270A is 200% of tax payable on undisclosed income if under-reporting is due to misreporting.
- Specified previous year is defined u/s 271AAB(3)(b).

DISCLAIMER

Please note that the analysis is given by the author purely on the basis of his limited understanding of the subject matter and practical experiences. This is neither authoritative nor final and subject to change depending on changes in relevant laws, judicial updates and author’s interpretational wisdom. All the issues discussed are open for constructive criticism by the learned members.

Forthcoming Events of May 2017

Date	Subjects	Speaker	CPE Hours	Venue
5-May-17	Series of Intensive Workshop on GST ki Pathshala	CA Anilkumar Shah	2	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
6-May-17	Series of Intensive Workshop on GST ki Pathshala	CA Anilkumar Shah	2	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
7-May-17	Series of Intensive Workshop on GST ki Pathshala	Adv. M. R. Shirude	3	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
12-May-17	Series of Intensive Workshop on GST ki Pathshala	CA Kaushal Mundada	2	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
13-May-17	Series of Intensive Workshop on GST ki Pathshala	CA Kaushal Mundada	2	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
14-May-17	Series of Intensive Workshop on GST ki Pathshala	CA R. D. Jain	3	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
19-May-17	Series of Intensive Workshop on GST ki Pathshala	CA S. R. Maniyar	2	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
20-May-17	Series of Intensive Workshop on GST ki Pathshala	CA S. R. Maniyar	2	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
21-May-17	Series of Intensive Workshop on GST ki Pathshala	CA Aanand Nahar, CA Jayesh Lalwani	4	ICAI Bhavan, 10, Gajanan Colony, Ring Road, Jalgaon
11-May-17	Seminar on MAHARERA	CA Ramesh Prabhu	NA	Kantai Hall, Jalgaon