

Webinar for WRC- Navi Mumbai Branch on Penalty provisions u/s. 270A and 271AAD

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Penalty for under-reporting of income under Income Tax

Inserted by Finance Act, 2016

WEF 01/04/2017

PENALTY

Section 270A
Penalty imposed for

Section 270AA
Immunity from
imposition of penalty

**Under-reported
income**

**Misreporting
of income**

Under-reporting

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graph TD; A[Under-reporting] --> B[Misreporting]; A --> C[Exempt]; A --> D[Other]; B --- B1[S.S. 8]; B --- B2[200%]; C --- C1[S.S. 6]; C --- C2[0%]; D --- D1[S.S. 2]; D --- D2[50%];
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Misreporting

S.S. 8

200%

Exempt

S.S. 6

0%

Other

S.S. 2

50%

Year of applicability :

- Applicable w.e.f. AY 2017-18
- For orders passed for AY 2017-18 and subsequent AYs.
- Effect : Penalty u/s. 271 is not applicable for AY 2017-18 and onwards.

Specified Authority and powers : [Sec 270A(1)]

- AO or CIT or CIT(A)
- “*May*” direct – implies power is discretionary i.e. not obligatory to levy the penalty
[Hindustan Steel Ltd. v. State of Orissa (1972) 83 ITR 26 (SC)]
- During any “*proceedings*” under this Act
- Any person who has “*under-reported*” his income
- “*Shall*” pay a penalty.
- By an order in writing [sec 270A(12)]

Meaning = “Under – reported” his income

- Not defined in Income Tax Act, 1961
- Cambridge English Dictionary
 - to say that you have done, earned, sold, etc., less than you really have.
- Sec. 270A(7) :

Penalty on under-reporting

=

50% of amount of “tax payable” on under-reported income.

Circumstances treated as Under-reported income [Sec. 270A(2)]

Clauses	Circumstances	Income	Greater than (>) / less than (<)	Income
(a)	Return filed	Assessed income	>	Returned income [which is processed u/s. 143(1)(a)]
(b)	Return not filed	Assessed income	>	Maximum amount not liable for tax
(c)	Reassessment	Reassessed income	>	Assessed income / reassessed income (as per previous assessment / reassessment)

Clauses	Circumstances (in case of sec. 115JB / 115JC)	Income	Greater than (>) / less than (<)	Income
(d)	Return filed	Assessed / reassessed deemed total income u/s. 115JB / 115JC	>	Returned deemed total income u/s. 115JB / 115JC [return is processed u/s. 143(1)(a)]
(e)	Return not filed	Assessed deemed total income u/s. 115JB / JC	>	Maximum amount not liable for tax
(f)	Reassessment	Reassessed deemed total income u/s. 115JB / 115JC	>	Assessed / reassessed deemed total income (as per previous assessment / reassessment)
(g)	Loss case	Assessed / reassessed as income / loss reduced <i>Acelegal</i> ©		

Implication in respect of under-reporting :

- Whether only an arithmetical exercise?
- Penalty levied only on the basis of difference.
- Whether net amount would be considered as “under-reported” income if in assessment there are additions as well as reductions?



CASE STUDY - I

AY 2017-18		AY 2018-19	
Income from Business	Rs.10,00,000	Income from Business	Rs.200,000
Income from other sources	Rs.45,000	Income under head Capital Gain	Rs.13,50,000
Loss under head Capital Gain	(Rs.105,000)	Set off c/f loss under head Capital Gain from AY 2017-18	(Rs.105,000)
Total income	Rs.10,45,000	Net income under head Capital Gain	Rs.12,45,000
Carry forward loss under head Capital Gain	(Rs.105,000)	Total income	Rs.14,45,000

- Assuming c/f of loss under head capital gain is disallowed by the AO in AY 2017-18.
- Effect, no set off of c/f of loss under head capital gain in AY 2018-19. Accordingly, income increased by Rs.105,000/- in AY 2018-19.
- **Whether disallowance in AY 2017-18 resulting in adjustment to loss in AY 2018-19 would amount to under-reporting of income in AY 2018-19?**

- **Section 270A(11)** : No addition or disallowance of an amount shall form the basis for imposition of penalty, if such addition or disallowance has formed the basis of imposition of penalty in the case of the person for the same or any other assessment year.

CASE STUDY - II

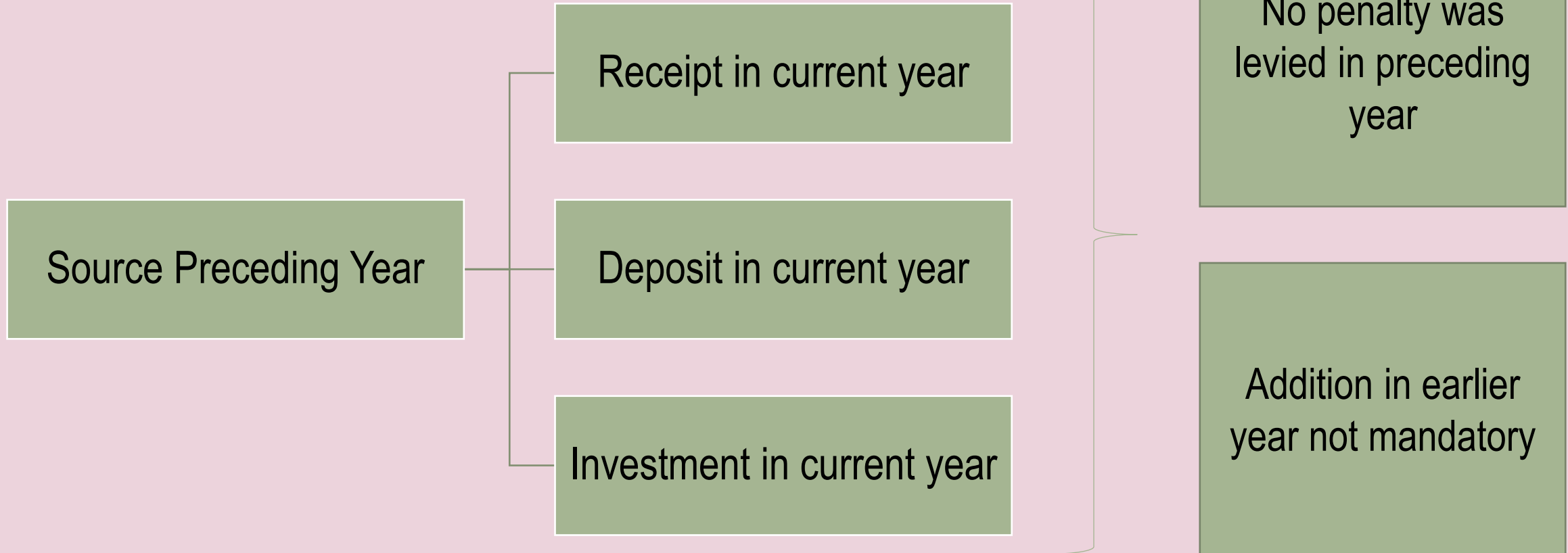
AY 2017-18 [Intimation u/s. 143(1)(a)]		AY 2017-18 [Order u/s. 143(3)]	
Loss in Business	(Rs.10,00,000)	Income from Business	(Rs.10,00,000)
Income from other sources	Rs.45,000	Add : Expenses disallowed	Rs.450,000
		Income from other sources	Rs.45,000
Total Loss	(Rs.955,000)	Total Loss	(Rs.505,000)

Q. ***In case of loss, on what amount penalty shall be levied ?***

A. Explanation (b) to Sub-section 3 r.w. Sub-Section 10(b) :

Thus, penalty shall be levied on Rs.450,000/-

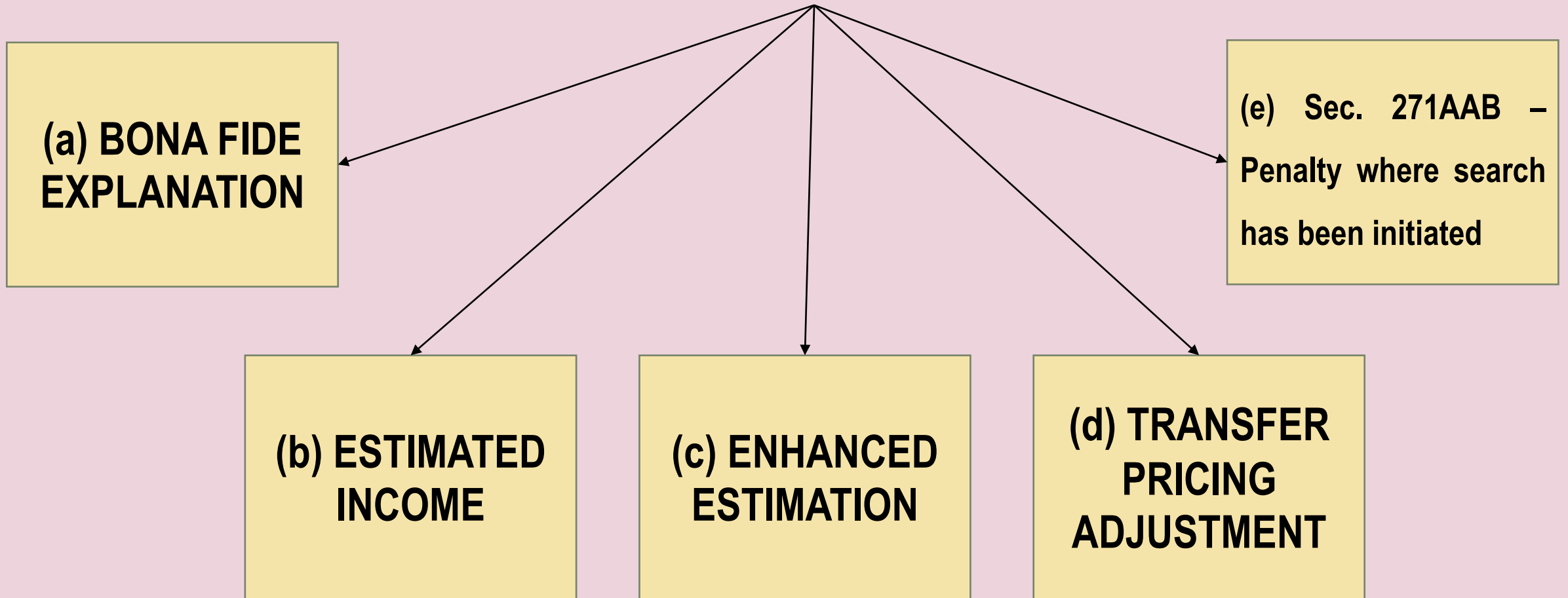
Sub-section (4) + (5)



Example :

- Estimate addition of Rs.500,000/- in AY 2016-17.
- No penalty for concealment levied.
- Cash credit of Rs.300,000/- found in Assessee's book in say AY 2017-18.
- Assessee's explanation = Rs.300,000/- came out of Rs.500,000/- added in AY 2016-17.
- Thus, as per Sec.270A(4) and (5) – penalty proceedings in respect of AY 2016-17 may be initiated during assessment proceedings for AY 2017-18.

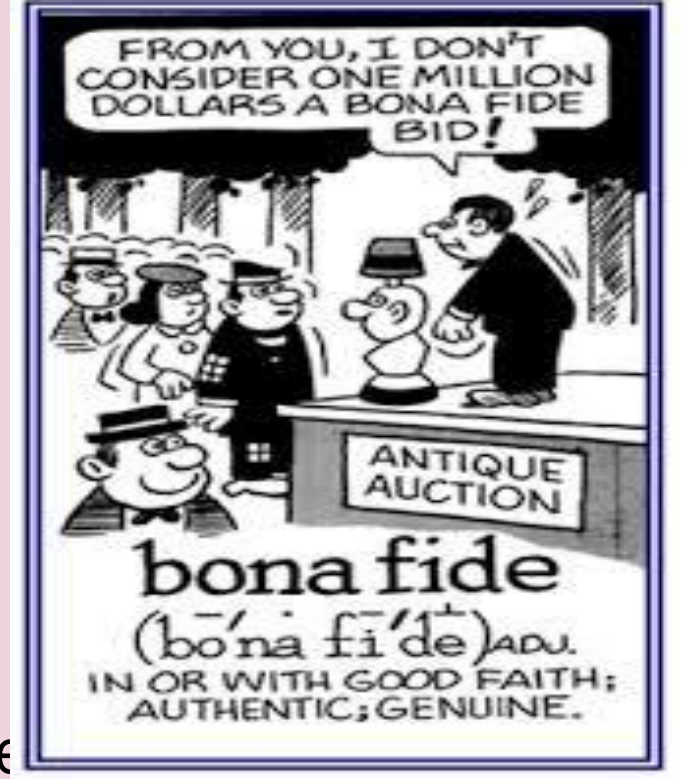
Exclusion from definition of under-reporting Sec. 270A(6)



(a) BONA FIDE EXPLANATION :

- Assessee offers an explanation
- Specified authorities “satisfied” that it is “bona fide”
- By disclosing all “material facts”
- Substantiating the explanation
- This will cover the cases of legal claims raised which are not accepted

- *Where as section 271(1)(c) explanation 1 says : “Where in respect of any facts material to the computation of the total income of any person under this Act :*
- *(B) such person offers an explanation which he is not able to substantiate ¹[and fails to prove that such explanation is bona fide and that all the facts relating to the same and material to the computation of his total income have been disclosed by him”.*



Meanings

Words used	Meaning	Source
Bona fide	In good faith (bona fide effort)	<i>William Statsky Legal thesaurus/dictionary</i>
	omission and not a deliberate action– disallowance not made though stated in Tax Audit report could be regarded as “bona fide” mistake not liable to penalty	<i>PWC v. CIT (2012) 348 ITR 306 (SC)</i>
Material facts	<ul style="list-style-type: none">- Entire bundle of facts which would constitute a complete cause of action.- Primary facts	<ul style="list-style-type: none">- <i>K. R. Sampath Dictionary on tax laws</i>- <i>Seth Kirorimal Adwani v. ITO (1970) 77 ITR 789 (Assam)</i>
Satisfied	Makes up his mind	<i>1977 Tax LR 1921 (DB)(Del.)</i>

(b) ESTIMATED INCOME :

- Addition is made on estimation
- Accounts are correct and complete
- To the satisfaction of specified authorities
- Method employed may not enable proper determination of income.
- Eg. – calculating GP on estimate basis without rejecting books of accounts

\$100,000	Estimated Gross Income
– \$15,000	Above-the-Line Deductions
<hr/>	
\$85,000	Adjusted Gross Income
– \$12,000	Standard 2018 Deduction (if filing as single)
\$73,000	Taxable Income

(c) ENHANCED ESTIMATION :

- Assessee estimated an amount
- Such estimation is reduced or increased in the assessment
- Eg. Estimated disallowance of Rs.10,000/- on personal account increase in assessment to Rs.20,000/-

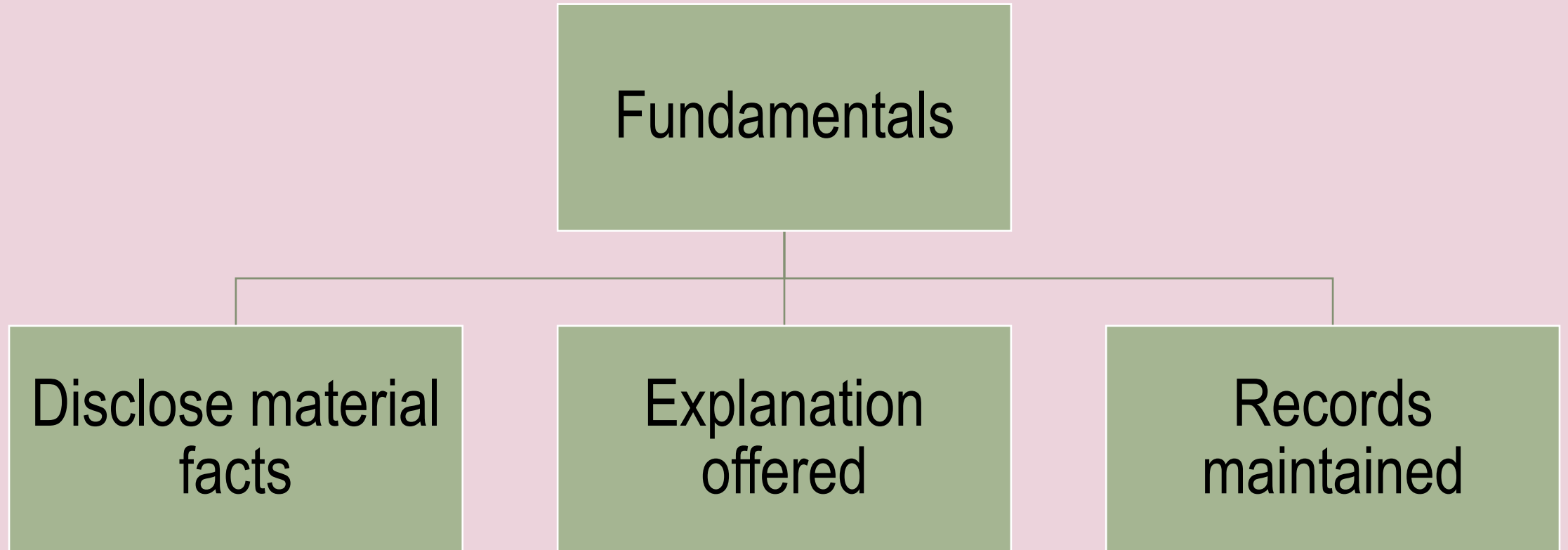
(d) Under-reported income represented by Transfer Pricing Adjustment

(e) Amount of undisclosed income referred in Sec. 271AAB – Penalty where search has been initiated

“Disclose all material facts”



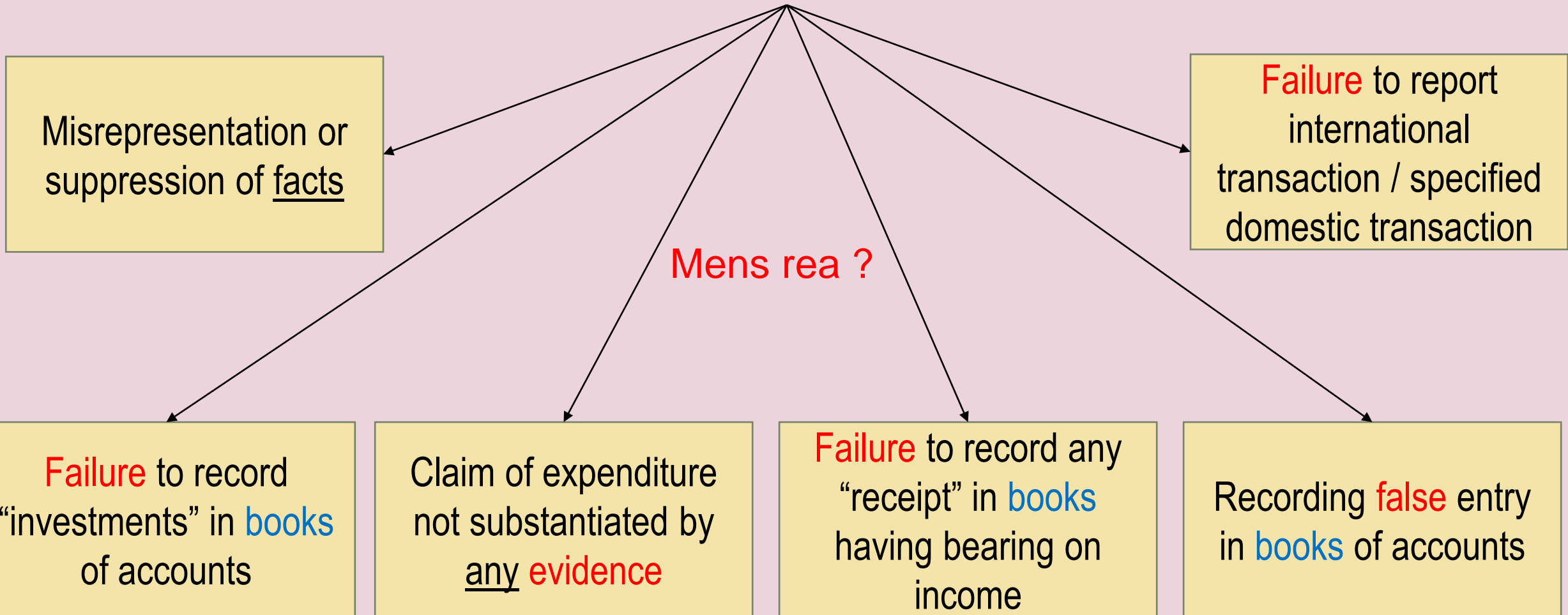
Exclusion Sec. 270A(6)



“Misreporting” Sec.270A(9)



Situation under which “Under-reporting” treated as “Misreporting” Sec.270A(9)



A Misrepresentation or suppression of facts

Words used	Meaning	Source
Misrepresentation	Any breach of duty which, without an <u>intent to deceive</u> , gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him.	<i>“Indian Contract Act, 1872, Section 18</i>
Suppression	It does not mean any omission. The <u>act must be deliberate</u> . In taxation, it can have only one meaning that the correct information was not disclosed <u>deliberately</u> to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.	<i>Pushpam Pharmaceutical Company v. CCE Bombay [1995 Supp (3) SCC 462]</i>

- *Commissioner of Central Tax GST v. Team HR Services Ltd. - SERTA No. 23/2018 & CM No.34017/2018, order dt. 24/08/2018 (Delhi High Court)*
- Held : Mere omission to fulfil one's tax liability cannot automatically lead the authorities to conclude that the assessee had practiced fraud or misrepresentation without any material or evidence.

B Failure to record “investments” in books of accounts

Words used	Meaning	Source
Failure	There is an obligation which has not been carried out. If there was no obligation then it would not be a failure on his part to carry out that obligation.	Pannalal Nandlal Bhandari v. CIT (1961) 41 ITR 191 (SC)
Books of accounts	Any book which formed an integral part of a system of book keeping employed in any particular business and included the ledger and the books of original entry.	CIT v. Taj Borewells (291 ITR 232 Madras)

- **Example 1 : Addition u/s. 69 of IT Act, 1961 – “Unexplained Investments”**

Investments “which are not recorded in books of accounts”, if any.

- **Example 2 : What if, assessee is not required to maintain “books of accounts” u/s. 44AA?**

The use of the words ‘**if any**’ in the section indicates that it is not compulsory that the assessee must have maintained the books of accounts. He can prove the genuineness of the investments by some other evidence which proves investment out of disclosed source.

C. Claim of expenditure not substantiated by any evidence

- **Meaning : “Evidence”** : *Evidence Act, 1872- Section 3*

Both oral and documentary and electronic records can be produced as evidence.

- **“Any”** means single.
- **“Evidence”** v. **“Material”** u/s. 143(3)

CIT v. Metal Products of India (1984) 150 ITR 714 (P&H)

- **Example : Penny stock : Evidence to be filed to prove the transaction genuine : *Mahavir Jhanwar vs. ITO I.T.A. No. 2474/Kol/2018, order dt. February 01,2019***

(a) purchase of shares	(e) evidence of sale of shares through stock exchange
(b) payment by account payee cheque	(f) bank statement reflecting sale receipts
(c) balance sheet disclosing investments	(g) brokers ledger
(d) demat statement	(h) Contract Notes

D. Failure to record any “receipt” in books having bearing on income

Words used	Meaning
Receipt	Cash sales, as well as money received on a customer's account include any cash received in the business from any source and loan or credit line proceeds or funding from investors. “Capital receipt” or “revenue receipt”.
Income	Includes : (i) Profit and gain (ii) dividend (iii) sum chargeable to income tax under section 28 / 45 / 56, etc. Section 2(24) under Income Tax Act, 1961

- **Example 1 : Gift from relatives :**

- As per Section 56(2)(vii) if any gift received from relative will be exempt in the hands of receiver.
- No impact on income. If failure to disclose, no penalty u/s. 270A(9).

- **Example 2 : Compensation received in connection with the termination or the modification of the terms and conditions, of any contract relating to his business.**

- Taxable u/s. 28(ii)(e) w.e.f. 01/04/2019.
- Thus, has impact on income under head “PGBP”.
- If not disclosed in ROI, penalty leviable u/s. 270A(9)

E Recording “false entry” in books of accounts

- Not defined in this section.
- “False entry” defined in new section 271AAD inserted vide Finance Bill, 2020 w.e.f. 01/04/2020. (Dealt in detail in section 271AAD below).
- Whether “false entry” in this section 270A(9) will be limited to definition mentioned in Section 271AAD?

Penalty under “Mis-reporting”

Penalty in case of “misreporting”	=	200% of amount of “tax payable” on under-reported income
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Appeal against penalty order passed u/s. 270A

Order passed
u/s. 270A

Appeal to
CIT(A) – Sec.
249(2)

Appeal to
ITAT – Sec.
253(c)



Section 271 v. Section 270A

Section 271(1)	Section 270A
In the course of any proceedings	In the course of any proceedings
If satisfied	May direct
Only satisfaction in the course of proceedings	No concept of satisfaction at the stage of issuing notice



- **Q : Whether Penalty is automatic ?**

- A : No. Sec 274 says “No order imposing a penalty under this chapter shall be made” provided

- “show cause notice” is issued ;

- “opportunity of hearing” is granted to the assessee ; and

- “approval of higher authority” is taken if levy of penalty is in excess of Rs.10,000 (by ITO) and Rs.20,000 (by AC/DCIT).

- “And” means all the above conditions are mandatory to be fulfilled.

- **“Reasonable cause”** u/s. 273B not covered while imposing penalty u/s. 270A

- Q : Whether penalty to be initiated in assessment order ?

Whether notice to specify penalty for “underreporting” and / or “misreporting” as held in *CIT v. Manjunatha Cotton & Ginning factory* [2013] 359 ITR 565 (Kar.)?

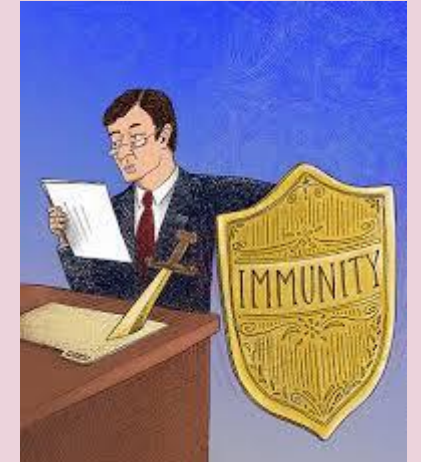
Q : Will change of head of income / as per opinion of expert business loss treated as capital loss would fall under the definition of “under-reporting” or “misrepresentation” ?

- **Q : Penalty proceedings to be separate then assessment ?**
- **A : Yes**

- **Q : Whether fresh evidence can be submitted in penalty proceedings ?**
- **A : Yes**

- **Q : Time limit u/s. 275 for passing penalty order applicable ?**
Discuss

Immunity from imposition of penalty & prosecution – Section 270AA



- Assessee can make an application to AO
- In From no. 68, Rule 129
- Within **one month** from the end of the month in which the assessment order has been received
- On fulfilling the following conditions :
 - No appeal against assessment order is filed before CIT(A) ; and
 - Tax and interest as per demand notice is paid within time prescribed in the notice of demand.

Form no. 68

<http://abcaus.in>

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THE GAZETTE OF INDIA : EXTRAORDINARY

[PART II—SEC. 3(ii)]

**“FORM No.68
Form of application under section 270AA(2) of the Income-tax Act, 1961**

Personal Information	First Name	Middle Name	Last Name or Name of Entity	PAN
	Flat/ Door/ Block No.		Name of Premises/ Building/ Village	Road/ Street/ Post Office
	Area/ Locality		Town/City/District	State
	Country	Pin Code	Phone No. with STD code/ Mobile No.	Email Address

Details of orders and payments	1	Assessment Year				
	2	Section under which assessment/reassessment* order is passed				
	3	Date of the assessment/reassessment* order				
	4	Date of service of the assessment/reassessment* order				
	5	Amount of income assessed as per the assessment/reassessment* order				
	6	Tax and interest payable as per notice of demand (in Rs.)				
	7	Due date for payment as per notice of demand				
	8	Details of amounts paid				
		Sl. No.	BSR Code	Date of Deposit (DD/MM/YYYY)	Serial Number of Challan	Amount (Rs.)
		(i)				
	(ii)					
	(iii)					

Form of verification

I, _____ son/daughter* of _____ do hereby declare that what is stated above is true to the best of my information and belief. I further declare that no appeal has been filed in respect of the order mentioned in column 2 above. I also undertake that no appeal shall be filed in respect of the said order before the expiry of the period specified in section 270AA(4) of the Income-tax Act, 1961. I declare that I am making this application in my capacity as _____ and I am also competent to file this application and verify it.

Place
Date

Signature
Seal
(wherever applicable)

*Strike off whichever is not applicable**

[Notification No. 90 /2016/F.No.370142/26/2016-TPL]

DR. T. S. MAPWAL, Under Secy.

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- The AO may grant immunity from “penalty” and “prosecution” provided :
 - Above conditions are satisfied
 - Time limit for filing of appeal against assessment order is expired
 - Penalty levied is not for “misreporting” u/s. 270A(9)
- AO may “accept” or “reject” the application
- By passing of an “order” = 1 month from the end of the month in which application is received

Application



Accepted

Rejected

Order is final

Opportunity of hearing to be granted before rejection

Effect – no appeal / revision would lie against assessment order

Effect – File appeal before CIT(A) against assessment order



Time limit for filing appeal before CIT(A) - Period of application till order of rejection is served not to be considered – **Sec. 249(2) Proviso**

Section 271AAC:Penalty in respect of certain income.

- Penalty levied where :
- Income determined includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D.
- No penalty u/s. 270A shall be imposed on such income.
- The provisions of section 274 and 275 shall apply.

Section 271AAD: Penalty for false entry, etc. in books of account

100. After section 271AAC of the Income-tax Act, the following section shall be inserted, namely:—

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—

As a fact. Not disputed

(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, — *Men's rea*

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.

(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.

Broad term

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.

This is subservient to 270A

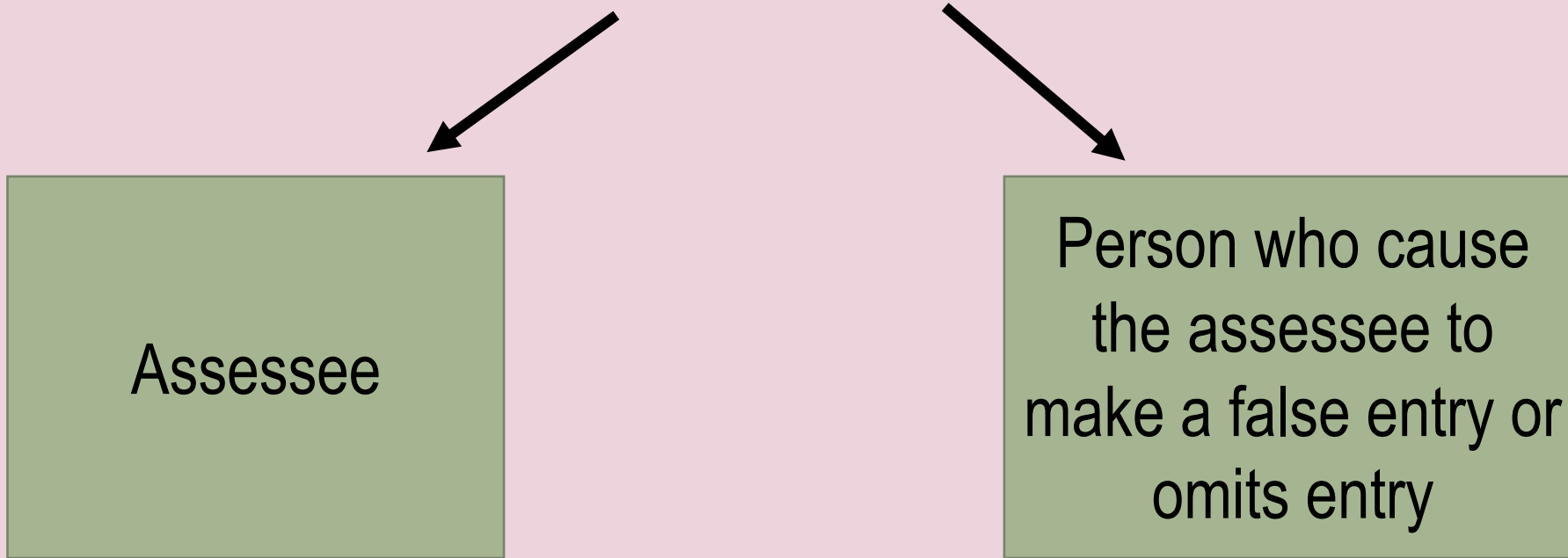
Can include survey?

Pen fals etc. of

Applicability of Section 271AAD

- Applicable in addition to any other penalty levied.
- **Applicability :**
 - If AO found that in books of account maintained by any person there is—
 - (i) a false entry; or**
 - (ii) an omission of any entry**
 - The entry has an impact on total income and there is evasion of tax liability.

Penalty leviable on



Penalty Amount u/s. 271AAD

=

Amount equal to false / omitted entry

Meaning of “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**.

Questions emerging from section 271AAD

I. In case of “Assessee” :

Q. Penalty invoked upon “false entry / invoice”. What if the AO presumes every invoice to be false unless proved otherwise?

Q. What if the assessee fails to produce the invoice? Penalty leviable in this section or Sec 270A(9)(c) : claim of expenditure not substantiated by any evidence?

Q. What if the assessee enter into bonafide transaction and produces invoice but failed to produce delivery challan can it be said that the purchase is false?

Q. Whether penalty u/s. 271AAD is automatic or an opportunity of being heard will be granted ?

A. Yes. Sec 274 states “No order imposing a penalty under this chapter shall be made” unless a show cause notice is issued and opportunity of being heard is provided.

Q. Whether reasonable cause covered ?

Q. Whether mens rea involved ?

Q. Whether burden of proof is on “department” or on “assessee” ?

Q. Whether “false entry” in section 270A(9) will be limited to definition mentioned in Section 271AAD?

II : In case of other person :

Q. What if the assessment of such other person is complete and there is no such adverse finding relating to false invoicing in the assessment order?

Q. What if the assessee files an appeal against the order of penalty and gets relief from the appellate authority, whether the other person will also get the relief for the same or vice versa?

Q. Whether such other person will get the opportunity of being heard before invoking penalty under this section ?

A. Yes. Sec 274 states “No order imposing a penalty under this chapter shall be made” unless a show cause notice is issued and opportunity of being heard is provided.

Intention to use

- “False entry” includes “used or intention to use”.
- What is the meaning of “intention to use”?
- When can a AO say that there was an intention to use.

“Omitted Entry” :

- Meaning of “Omitted entry” is not explained in this section.
- Oxford Dictionary meaning : “Omit” : is to not include something either deliberately or because you have forgotten it.
- **Q : If the assessee omitted any entry which is relevant for computation of total income, whether the penalty u/s. 270A (9) will be invoked or penalty u/s 271AAD will be invoked?**

A : Penalty u/s. 271AAD will be invoked first as the section starts with “without prejudice to any other provision of this Act”.

Section 270A(11) states : No addition or disallowance of an amount shall form the basis for imposition of penalty, if such addition or disallowance has formed the basis of imposition of penalty in the case of the person for the same or any other assessment year.

Precautions in e-assessment proceedings :

- Maintenance of correct books of accounts.
- Proper recording of all investments and receipts (affecting total income) in books of accounts.
- Maintenance of “records” and “material” in respect of each transaction / entry in books of accounts – through a support if :
 - Newspaper reports,
 - Legal opinions,
 - Valuation reports,
 - Comparable cases,
 - Association letters.



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