

**A STUDY**

**PENALTY U/S 271B**

**OF THE INCOME TAX ACT, 1961 (as amended)**

**FOR FAILURE TO FURNISH THE AUDIT REPORT U/S 44AB**

**BY THE SPECIFIED DATE (DUE DATE)**

**i.e 30th September of the assessment year**

**1** | **271B** | **Failure to get accounts audited**

- \* Section 271B of the Income Tax Act, 1961 provides that -
  - \* If any person {*section 2(31)*}
  - \* **fails**
    - \* to get his **accounts** audited in respect of any previous year relevant to an assessment year 'or'
    - \* furnish a report of such audit
  - \* **as required under section 44AB,**
  - \* the Assessing Officer {*section 2(7A)*}
  - \* **may**
    - \* direct that such person shall pay,
    - \* by way of penalty,
    - \* a sum equal to 1/2% of the
      - \* total sales, turnover or gross receipts, as the case may be, in business, 'or'
      - \* of the gross receipts in profession,
      - \* in such previous year or years 'or'
    - \* a sum of Rs. 150000/-, {*increased from Rs. 100000/- by the Finance Act, 2010 w.e.f 1.4.2011*}
    - \* which ever is less.

**Comments**

- \* It means that a penalty u/s 271B *may* be imposed on account of **two failures** -
  - \* to get his accounts audited in respect of any previous year relevant to an assessment year.
  - \* furnish a report of such audit.**as required under section 44AB,**
- \* Both the failures are mutually exclusive. Therefore, the penalty can be imposed for any of the failures.
- \* It means that in order to avoid penalty u/s 271B such person has **to get the accounts** of his business or profession, as the case may be, **audited** as well as **to furnish a report of such audit as required under section 44AB.**

**2** | **273B** | **Penalty not to be imposed in certain cases**

- \* Section 271B confers discretionary power upon Assessing Officer to impose penalty, as the word used in the section is '**may**'.
- \* Besides above, section 273B provides that notwithstanding anything contained in section 271B {*besides in other penal provisions under the Act*}, no penalty shall be imposed on the person or the assessee, as the case may be, for any failure referred to in the said provisions **if he proves that there was reasonable cause for the said failure.**

**Comments**

- \* It means that the penalty u/s 271B is neither mandatory nor automatic.
- \* If there is any reasonable cause for the failure and such person is able to prove such reasonable cause, penalty can not be imposed.

3	44AB	<b>Audit of accounts of certain persons carrying on business or profession</b>
---	------	--

- \* Section 44AB provides that every person {as specified in clause (a) to (d)} -
  - \* **to get** his accounts of such previous year audited by an accountant {Section 288(2)Explanation}
  - \* before the specified date {Explanation (ii)}
  - \* and
  - \* **to furnish** by {as substituted for 'obtain before' by the Finance Act, 1995 w.e.f 1.7.1995}
  - \* that date {the specified date}
  - \* the report of such audit
    - \* in the prescribed form
    - \* duly signed and verified by such accountant 'and'
    - \* setting forth such particulars
    - \* as may be prescribed {Section 2(33) r/w rule 6G and Form 3CA, 3CB and 3CD}
  
- \* *Explanation (ii)* defines '**specified date**', in relation to the accounts of the assessee of the previous year relevant to an assessment year, to **mean 'due date' for furnishing the return of income under sub-section (1) of section 139.** {substituted for "the 30th day of September of the assessment year " by the Finance Act, 2012 w.e.f. 1.4.2012}

4	139(1)	<b>Return of Income</b>
---	--------	-------------------------

- \* As per *Explanation 2* to sec-section 139(1) '**due date**' means -
  - \* 30th day of September of the assessment year >>>>>
  - \* 30th day of November of the assessment year >>>>>
  - \* 31st day of October of the assessment year >>>>>
  - \* 31st day of July of the assessment year >>>>>

Clause (a)
Clause (aa)
Clause (b)
Clause (c)

<b>Comments</b>
-----------------

- \* As per clause (a) of the *Explanation 2*, in the case of a **company** or a **person** {section 2(31)}; whose accounts are required to be audited under Income Tax Act, 1961 (including section 44AB) or under any other law for the time being in force; or a **working partner of a firm** whose accounts are required to be audited under the Income Tax Act, 1961 (including section 44AB) or under any other law for the time being in force, the "**due date**" means **30th September of the assessment year**.
  
- \* It means that for the purpose of **section 44AB**, the "**specified date**" is 30th September of the assessment year.
  
- \* **Therefore, under section 44AB an assessee is required to get his accounts audited and furnish the report by 30th September of the assessment year.**
  
- \* Though '**accounts**' is not defined under the Act but it may mean '**books or books of account**', which is defined in **section 2(12A)** of the Act {as inserted by the Finance Act, 2001 w.e.f 1.6.2001}.

5	139(9)	<b>Defective return</b>
---	--------	-------------------------

- \* As per clause (bb) of *Explanation* to section 139(9){as inserted by the Finance Act, 1988 w.e.f 1.4.1989 which was substituted by the Finance Act, 1995 w.e.f 1.7.1995}, a return of income shall be regarded as defective if the return is not accompanied by the audit report referred to in section 44AB, or where, the report has been furnished prior to the furnishing of the return, by a copy of such report togetherwith proof of furnishing the report.

**6 139C Power of Board to dispense with furnishing documents, etc. with the return**

\* The **Finance Act, 2007 w.r.e.f. 1.6.2006** inserted section 139C to empower the Board {section 2(12)} to make rules providing for a class or classes of persons **who may not be required to furnish -**

* documsnts
* statements
* receipts

* certificates
* reports of audit
* or any other document

which are otherwise required to be furnished along with the return under any other provision of the Income Tax Act, 1961.

\* But **on demand** to be produced before the Assessing Officer {section 2(7A)}.

**7 139D Filing of return in electronic form**

\* The Finance Act, 2007 w.r.e.f. 1.6.2006 also inserted section 139D to empower the Board to make rules providing for -

- (a) the **class or classes of persons** who shall be required to furnish the return in **electronic form**;
- (b) the **form and the manner** in which the return in electronic form may be furnished;
- (c) the

* documsnts
* statements
* receipts

* certificates
* or audit reports

which **may not be furnished along with the return** in electric form **but shall be produced before the Assessing Officer on demand.**

- (d) the **computer resource or the electronic record** to which the return in electronic form may be furnished.

**8 295 (2) Power to make rules**

(eeba)  
(eebb)

\* Vide section 295(2)((eeba) and (eebb) of the Act the Central Board of Direct Taxes (*Board*) has been empowered to provide rules for the -

* documsnts
* statements
* receipts

* certificates
* or audit reports

- \* which **may not be furnished along with the return**
- \* but **shall be produced before the Assessing Officer on demand** u/s 139C & 139D.

**Comments**

\* Deriving the powers under section 139C, section 139D, section 2(7){Board}, section 2(33){prescribed} and section 295(2)(eeba) and (eebb), the CBDT has made rule 12(2) for filing '**annexureless returns**', which are mandatory in nature.

- 9 Rule 12(2) Sub-rule (2) of Rule 12 of Income Tax Rules, 1962 provides that the return of income required to be furnished in Form ITR 1(Sahaj), ITR 2, ITR 3, ITR 1, ITR 4S(Sugam), ITR 5 and ITR-6 **shall not be accompanied** by-
- \* a statement showing the computation of the tax payable on the basis of the return, 'or'
  - \* proof of the tax, if any, claimed to have been deducted or collected at source 'or'
  - \* the advance tax or tax on self-assessment, if any, claimed to have been paid 'or'
  - \* any document 'or'
  - \* **form 'or' report of audit**
- required to be attached with the return of income** under any of the provisions of the Act.

10 Circular **Circular No. 5/2007 dated 26.7.2007**

**Circular No. 3/2009 dated 21.5.2009**

- \* In order to clarify certain issues arising from the above mentioned provisions regarding filing of return of income, including **annexureless returns**, CBDT had issued **Circular No. 5/2007 dated 26.7.2007** and **Circular No. 3/2009 dated 21.5.2009**.
- \* In **para 5 of the said Circulars** the CBDT had clarified that - taxpayers should not enclose with the returns form (except in ITR 7) any statement showing the computation of income or tax, copies of balance-sheet, profit and loss account, TDS/TCS certificates, proof of payment of advance tax or self assessment tax.
- \* It is further clarified therein that, however, these documents shall have to be produced by the assessee before the Assessing Officer **on demand**.
- \* In **para 6 of the said Circulars** the CBDT had also clarified that -
  - \* The report of audit under section 44AB is **not to be attached with the return**.
  - \* The report of audit under section 44AB **should not be furnished separately also before or after** the due date of the furnishing of the return.
  - \* The assessee should **fill out the relevant columns of these forms** on the basis of such report.
  - \* The assessee should **retain** the report with himself.
  - \* The report of audit under section 44AB may be **furnished in original during the assessment proceedings**.

\* **No penalty u/s 271B shall be initiated or levied for not furnishing the tax audit report on or before the due date.**

\* **However, if the audit report has not been obtained before the due date, provisions of section 271B may be invoked.**

**Conclusion**

- \* A conjoint reading of the above provisions and the Circulars it clear that -
  - \* **Penalty u/s 271B can be initiated or levied if the assessee fails to get the accounts audited and obtain a report u/s 44AB before the specified date, i.e. due date u/s 139(1) {30th September of the assessment year}.**
  - \* **Penalty u/s 271B could also be initiated or levied if the assessee fails to furnish the audit report obtained u/s 44AB by the specified date, i.e. due date u/s 139(1) {30th September of the assessment year}.**
  - \* **However, in view of the fact that under the provisions of sections 139C, 139D and amended rule 12(2), returns of income (except in ITR 7), from assessment year 2007-08, are to be filed without**

any annexure, therefore, the audit report obtained u/s 44AB **can neither be furnished** by the specified date (i.e the due date) as required u/s 44AB r/w section 139(1) Explanation - 2(a) **nor be furnished along with the return** as required u/s 139(9) Explanation (bb).

- \* This view is retified by the above mentioned **Circular No. 5/2007 and 3/2009** issued by the CBDT.

**Note :** In the case of **Navnit Lal C Javari vs. K.K.Sen, AACIT (1965) 56 ITR 198 (SC)** the Apex Court had held that benevolent circulars issued by the CBDT would be binding on all officers and persons employed in the execution of the Income tax Act.

- \* Therefore, the return, which is filed annexureless, can neither be termed as defective u/s 139(9), nor any penalty be initiated or levied u/s 271B for failure to furnish the same along with the return **or otherwise** (unless the same is demanded by the Assessing Officer).
- \* Penalty u/s 271B can be initiated or levied if an assessee fails to get his accounts audited and obtain a report u/s 44AB before the specified date {due date u/s 139(1)}
- \* Penalty u/s 271B can also be initiated or levied if an assessee fails to furnish a report, obtained u/s 44AB, in original before the Assessing Officer **as and when demanded** as provided u/s 139C, u/s 139D and amended rule 12(2).
- \* It is important to note that the audit report obtained u/s 44AB **should not even be filed otherwise** because the same has to be furnished on demand by the Assessing Officer.
- \* **Therefore, if the accounts of an assessee are audited u/s 44AB before 30th September of an assessment year and he obtains the audit report by such date but fails to file his return of income by that date, no penalty can be initiated or levied u/s 271B.**
- \* **If under such circumstances such assessee files his return of income after 30th September of the assessment year and fill the relevant columns of the ITR Form seeking details of the audit and information related to the audit report, still no penalty can be initiated or levied u/s 271B.**
- \* **However, in my opinion, if such assessee failes to fill the relevant columns of the ITR Form seeking the details of the audit and files return after 30th September of the assessment year, he will have to prove that he had obtained the audit report before 30th September of the assessment year, otherwise the provisions of section 271B may be invoked against him.**

### **Disclaimer**

This document has been prepared for academic use and sharing knowledge only. Though every effort has been made to avoid errors or omissions, yet any such thing may happen. Therefore, it is notified that I shall not be responsible or liable for any loss or damage of action to any one, of any kind, in any manner, from its use. I shall also not be responsible or liable for any damage or loss to any one on account any error or omission or difference of opinion with regards to interpretation of the text. On the contrary, it is suggested that to avoid any doubt the user should check the contents with the relevant print/notified/Gazetted materials.



Dated : 14.1.2013

### **Conceived and prepared by**

CA. Rajiv Kumar Jain  
5269, Ajit Mansion, Shardhanand Marg,  
Delhi-110006  
PH : 23214596 Cell : 9810288997  
E'mail ID : rajivkjain0608@rediffmail.com  
E'mail ID : rajivkjain0608@gmail.com