

Shades of Updated Return

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Many a times, the Tax Payers are not able to file their return of income before the due date or do not disclose the correct income in their return of Income. Small tax payers face difficulty when they approach bank or financial institution for borrowing and find helpless for non-filing of their return of income. In case of reporting of the incorrect income in returns, the Tax Payers do not get the chance to revise the return due to expiry of the due date, and any enhancement in income is automatically billed with penalty which is followed by prosecution. Considering the same, the Parliament has introduced the concept of Updated Return, put into effect through Form ITR-U notified by CBDT whereby, the Tax Payer can file the Updated Returns for two Assessment Years prior to the present Assessment Year i.e. presently the Updated Return can be filed for AY 2020-21 & AY 2021-22.

- Assessment & Updated Return:** The scheme of updated return is not applicable if the Tax Payer has received notice for Regular Assessment, which has to be issued within 3 months from the end of assessment year. Hence, considering the exclusion of regular assessment, the Tax Payer, in effect, is getting maximum time of 3 months from the assessment year to file the Updated Return, if he prone to scrutiny assessment. The Tax Payer cannot file updated return in cases where proceedings of reopening, revision, Search (Including Other Person), Survey etc has been initiated on him. Hence, in such cases, if the updated returns are filed by Tax Payers till the date of above proceedings, then the scrutiny of updated return will be conducted by the Department.
- Punitive Provisions on Undisclosed Income or Additions:** The Income Tax Department is inclined to treat the untaxed income noticed during assessment at higher tax rate under section 115BBE of the Act. On such exaggerated Tax Rate of 78%, there is penalty provision of 10% on the additional undisclosed income which effectively results into Tax Rate of 88% on the income along with interest under section 234A/B/C. The total tax payable under this type of addition during assessment often ends up being more than the undisclosed income. Any other type of addition made during assessment may be subject to penalty under section 270A which is ranging between 50% of Income Tax to 200% of Income Tax on such untaxed income. If the income has been subject to addition during Search Proceedings, then the penalty is 60% of the undisclosed income. Hence, the complacency of any Tax Payer to offer the income in regular returns can cost him either 50% or 60% or 200% of the Tax evaded.

The biggest advantage of introducing the concept of Updated Return is saving of penalty that could have

levied during assessment. However, there are no consequential amendments in any of the provisions of penalty to treat the income offered in updated return at par with income offered as regular return of income. Hence, if the Tax Payer has not offered any income during original return and has offered that income during updated return then if the department enhances the income, then penalty should be ideally be levied on such income enhanced during assessment only by the department. The department is often inclined to treat the assessed income subject to penalty to avoid the audit risk.

Prosecution

One of the greatest advantage of Updated Return is that one can avoid prosecution proceedings for non-filing return of income or evasion of Tax. It is quite possible that the department may initiate prosecution on the basis of addition of income during any assessment proceedings. In such scenario, say the Tax Payer wants to go for compounding of offence whereby the compounding fees are payable from due date of return. Here, it would be required to be clarified as to whether Updated Return filed will be considered as filed within due date of return? Say a person has not filed return of income for AY 2020-21, he filed updated return on 10th August 2022 showing additional income amounting to Rs.10 Lakhs. Now search is conducted on his premises and there is confirm addition of 2 Crores, the department initiates prosecution proceedings for non-filing return and evasion of tax. The Tax Payer wants to opt for compounding of offense, where the question arises the fees for tax on Rs.10 Lakhs would start from due date of return u/s 139(1) for AY 2020-21 or will start from August 2022? The question arises as to whether return filed u/s 139(8A) will be considered as original return or not. The only issue that can cause the practical difficulty, will be that what can be considered to be due date of return.

Applicability of Other Laws on additional income disclosed in updated return

Considering the current scenario of wide spread use of Technological Features, the information flow of any proceedings cannot be expected to be stopped. There are several departments of exchequer like Customs, GST, Registrar of Properties, ROC, PF, ESIC etc who are scrutinizing, cross-verifying the data of Income Tax Return or sharing information with the Income Tax Department and vice versa. Considering the same, it is very much possible that the nature of additional income that Taxpayer discloses with the return, may be shared with the other concerned Government Department. Say the details of undisclosed sales or bogus purchases or bogus expenditure may have been shared with GST department to verify whether any GST liability has been escaped. The details of additional salary declared may be subject to PF, ESI, Professional Tax etc which may need such regulatory compliance. Considering the same, the implication of exchange of information with the other Government Department cannot be ruled out.

Sharing of data between CBDT & CBIC

A [Memorandum of Understanding \(MoU\)](#) was signed between CBDT and CBIC in July 2020 for data exchange between two departments, replacing an old 2015 agreement, whereby CBDT and CBIC will be sharing data and information on an automatic and regular basis. In addition to regular exchange of data, CBDT and CBIC will also exchange with each other, on request and spontaneous basis, any information available in their respective databases which may have utility for the other organization. The same clearly implies that there is high possibility that any income reported in updated return (Form ITR-U) shall be shared by the CBDT to CBIC to ensure GST applicability. Needless to say, if updated return has GST implication, the same will also be automatically loaded by interest, penalty and/or prosecution.

It is pertinent to understand different type of exposure of the Taxpayer under GST Regime if the additional income offered in updated return has GST implication. Let us try to understand those shades of GST Implication:

a) GST vis-à-vis Undisclosed sales

Any income disclosed in Form U could be in nature of taxable supply or exempt (including non-taxable) supply as per provisions of GST Law. If such income reported in Form U is taxable supply and earned in normal course of business with actual supply of goods/service, then it will be treated at par with other genuine sale transaction. However, if Form U is filed as a result of voluntary admission of undisclosed sales, then under GST laws, such undisclosed sale is generally linked to either;

1. Supply of tax invoice only without actual supply of goods or service, and/or
2. Supply of goods or service without cover of tax invoice.

Supply of tax invoice without actual supply of goods or services.

Circular No. 171/03/2022-GST dated 6-7-22 clearly specifies that where there is only an issuance of tax invoice without underlying supply of goods or services or both, such an activity does not satisfy the criteria of taxable event 'Supply', as defined in Section 7 of the CGST Act and accordingly no tax can be demanded. Since charging mechanism fails here, no demand or recovery can be made u/s. 73 or 74 of the CGST Act. However, such persons issuing tax invoice without supply of goods or services shall be liable to penalty u/s. 122(1)(ii) of the CGST Act which shall be higher of Rs.10,000/- or amount of tax evaded. Similar Penalty under section 271AAD has been incorporated under Income Tax Act which is quantifying equal amount of false entry passed in books of accounts.

Supply of goods or service without cover of tax invoice.

It shall be treated at par with normal sales for the purpose of tax liability. However, such tax liability shall be subject to interest u/s. 50 i.e. 18% p.a. Here, interest is required to be paid for the period of delay. Therefore, for the purpose of interest, such annual undisclosed sales may be bifurcated month wise (if feasible) and accordingly from the due date of GST Return, interest shall be calculated. Interestingly, in a recent Notification No.14/2022 dt. 5-7-22, the government introduced a new rule 88B prescribing manner of calculation of interest especially for those transactions which are not reported in regular monthly returns. Since the additional tax liability due to undisclosed sales was never reported in GSTR 3B, interest shall be payable on gross amount of tax ignoring payment through ITC.

The GST authorities will be inclined to adjudicate such non-payment of tax proceedings u/s. 74 of the CGST Act along with applicable interest and penalty on various charges mentioned therein. Here, u/s. 74, penalty is ranging from 15% to 100% of tax evaded. If penal action is initiated u/s. 74 then no penalty for the same act can be imposed on under any other section including section 122 of the CGST Act.

The taxpayers may voluntarily pay tax along with interest & penalty and intimate GST authorities by filing form DRC 03 (Voluntary tax payment form). Alternatively, such transaction can be reported in the monthly GST return period in which disclosure is made, not less with interest and penalty. These actions may be saviour to avoid suppression charges and thereby invocation of provisions of Section 74. During the adjudication proceedings, then again, a plea can be made regarding the payment of GST and interest on undisclosed income as reported in Form U and filing of Form DRC 03 which may be considered as a voluntary compliance before issuance of SCN and therefore in view of Section 73(5) of the CGST Act, 2017 if tax is paid (along with interest) on the basis of own ascertainment, penalty cannot be levied. Under Section 73, even if tax and interest is paid within 30 days of issuance of SCN, no penalty shall be payable. However, if tax and interest is paid after issuance of adjudication order then quantum of penalty shall be 10% of tax or Rs.10,000/-, whichever is higher. Nevertheless, as stated supra, GST authorities will be more inclined to adjudicate such cases under the provisions of Section 74 and instead of Sec. 73.

b) GST vis-à-vis Bogus purchases/expenditure

Under GST law, bogus purchases/expenditures can be related to receiving tax invoice without actual receipt of underlying goods or services which is widely known as Fake Invoice. Here recipient takes or utilises input tax credit (ITC) without actual receipt of goods or services, either fully or partially. In the hands of recipient such ITC shall be considered as fraudulent, being in contravention of the provisions of section 16(2)(b), and due to non-receipt of goods or services the recipient shall be liable to reverse such ITC along with applicable interest. Here, interest shall be levied at the rate of 18% p.a. Interest shall be levied on that portion of ITC which is availed AND utilised. Only availment of ITC without utilisation will not attract interest liability. Also, penal action for fraudulent availment of ITC shall be initiated against recipient u/s. 74 of the CGST Act which may range from 15% to 100% of ITC. Moreover, it is being now clarified by the government vide Circular No. 171/03/2022-GST dated 6-7-22 that if penal action is initiated u/s. 74, then no penalty for the same act can be imposed on recipient under section 122 of the CGST Act.

c) Prosecution under GST Law

Prosecution as stipulated in Section 132 of the CGST Act, 2017 is independent of and can be in addition to, tax, interest and penalty imposed under GST law. Prosecution shall be applicable for both undisclosed sales and/or bogus purchase/expenditure. Hence, the gravity of GST implication should be scrutinized before filing updated return.

Additional tax rate with interest analysis: it would be interesting to know what can be the maximum tax bill of the person who intends to disclose the income under the scheme of updated return:

Sr. No.	Particulars	Income Tax Bill			GST Bill			Net Exposure of Income)
		Normal Tax	Additional Tax	Total Income Tax	Penalty Saved on Income	Tax (Note 1)	Penalty (% of tax)	
1)	Section 115BBE - Undisclosed Sales & Bogus Purchases	78%	39%	117%	10%	18%	100%	135%
2)	Section 115BBE - Loan transactions, Cash Credits etc	78%	39%	117%	10%	Being transaction in money, may not be subject to GST.		117%
3)	Undisclosed Sales & Bogus Purchases found during Search	78%	39%	117%	60%	18%	100%	135%
4)	Loan transactions, Cash Credits etc found during search	78%	39%	117%	60%	Being transaction in money, may not be subject to GST.		117%
5)	Normal Incomes on which GST is not applicable	30%	15%	45%	60% (u/s No 270A being Tax on Income)	No Implication	No implication	45%
6)	Disallowance of Expenditure	30%	15%	45%	60% (u/s No 270A being Tax on Income)	No Implication	No Implication	45%

Note 1: For the sake of disclosing financial implication, the GST rate on additional income is presumed to be 18%.

Note: 2: The above calculations does not include interest on Income tax and GST, which shall have substantial impact on the workings.

Caution & Conclusion:

It may be the tendency of the tax payers to disclose additional income which may save him from GST, say additional Salary income. Such short cut may prove costly to the employer as well as employee since the additional salary automatically carries with itself the other regulatory obligations like PF, ESI, Professional Tax, Labour Welfare Fund etc. In such cases the cost of disclosing income in updated return can surmount like anything and the employer may face the music of even prosecution under other laws like PF, ESI, Professional Tax etc. Hence, before disclosing any income in updated return, the possible consequences should be critically analysed by the Tax Payers from 360 degree angle to avoid any unwanted guests.