Missed the bus of uploading TAR. Not to worry, In my opinion no penal action can be taken.

Furnishing of TAR electronically and failure to do so by due date prescribed under section 139(1) of the Act has been a cause of concern for all of us during last couple of days and has given us many sleepless nights. Reason being the fear of initiation and levy of penalty u/s 271B.

In my view no penalty can be imposed under section 271B for failure to furnish TAR and I have reasons to believe so, which are detailed as under:

Before I proceed to give my reasons let us look at the provisions of section 271B which reads as under:

Failure to get accounts Audited.

271B. If any person fails to get his ***accounts audited*** in respect of any previous year or years relevant to an assessment year or ***furnish a report*** of such audit as required under section 44AB, the Assessing Officer may direct that such person shall pay, by way of penalty, a sum equal to one-half per cent 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 one hundred fifty thousand rupees, whichever is less.

The law lays down levy of penalty in two circumstances i.e. (1) for failure to get his account audited; and (2) for furnish a report of such audit as required under section 44AB of the Act.

Now let us go through section 44AB which state :

[**Audit of accounts of certain persons carrying on business or profession.**

44AB. Every person,—

(*a*) carrying on business shall, if his total sales, turnover or gross receipts, as the case may be, in business exceed or exceeds **[***One Crore rupees***]** in any previous year [***]; or

(*b*) carrying on profession shall, if his gross receipts in profession exceed **[***twenty lakh rupees***]** in any [previous year; or

(*c*) carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under [77]**[***section 44AD or section 44AE or section 44AF***]** [or section 44BB orsection 44BBB], as the case may be, and he has claimed his income to be lower than the profits or gains so deemed to be the profits and gains of his business, as the case may be, in any **[***previous year,***]**] [***]

(d) *carrying on the business shall, if the profits and gains from the business are deemed to be the profits and gains of such person under section 44AD and he has claimed such income to be lower than the profits and gains so deemed to be the profits and gains of his business and his income exceeds the maximum amount which is not chargeable to income-tax in any previous year,*

get his accounts of such previous year [***] audited by an accountant before the specified date and [furnish by] that 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 :

[**Provided** that this section shall not apply to the person, who derives income of the nature referred to in [***] section 44B or [section 44BBA], on and from the 1st day of April, 1985 or, as the case may be, the date on which the relevant section came into force, whichever is later :

Provided further that] in a case where such person is required by or under any other law to get his accounts audited [***], it shall be sufficient compliance with the provisions of this section if such person gets the accounts of such business or profession audited under such law before the specified date and [furnishes by] that date the report of the audit as required under such other law and a further report [by an accountant] in the form prescribed under this section.

Explanation.—For the purposes of this section,—

(*i*) "accountant" shall have the same meaning as in the *Explanation* below sub-section (2) of section 288;

[(*ii*) "specified date", in relation to the accounts of the assessee of the previous year relevant to an assessment year, means [the due date for furnishing the return of income under sub-section (1) of section 139]]

Section 44AB mandates to such assessee to whom the provisions of section are applicable getting his accounts audited from a chartered accountant by specified date and furnishing of the same by that date.

Chartered Accountant has been defined under sub-section (2) of section 288 of the Act and specified due date means the due date for furnishing of Returns u/s 139(1) of the Act as applicable from year to year. For the AY 2013-2014 due date is 30^{th} Sep 2013 except for the States of Uttrakhand and Gujrat for which due date has been extended.

Prior to insertion of Section 139C and 139D by Finance Act 2007 w.r.e.f. 01-06-2006 Every person to whom the provisions applied was required to furnish TAR on or before due date, but with the insertion of section 139C and 139D which read as under, the said requirement was dispensed with.

[**Power of Board to dispense with furnishing documents, etc., with return.**

139C. (1) The Board may make rules providing for a class or classes of persons who may not be required to furnish documents, statements, receipts, certificates, reports of audit or any other documents, which are otherwise under any other provisions of this Act, except section 139D, required to be furnished, along with the return but on demand to be produced before the Assessing Officer.

(2) Any rule made under the proviso to sub-section (9) of section 139 as it stood immediately before its omission by the Finance Act, 2007 shall be deemed to have been made under the provisions of this section.

Filing of return in electronic form.

139D. The Board may 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 documents, statements, receipts, certificates or audited reports* which may not be furnished along with the return in electronic 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 transmitted.]

Prior to amendment of Rule 12 a person was not required to furnish any documents, statements, receipts, certificates or audited reports but was required to keep and maintain with him to be produced before Assessing Officer on Demand. However Rule 12 was amended by **NOTIFICATION NO. 42/2013 [F.NO.142/5/2013-TPL]/SO 1513(E), DATED 11-6-2013 and proviso to sub-rule 2 was substituted with the following :**

"Provided that where an assessee is required to furnish a report of audit specified under sub-clauses (iv), (v), (vi) or (via) of clause (23C) of section 10, section 10A, clause (b) of sub-section (1) of section 12A, section 44AB, section 80-IA, section 80-IB, section 80-IC, section 80-ID, section 80JJAA, section 80LA, section 92E or section 115JB of the Act, he shall furnish the same electronically.";

Which required a person who is required to furnish audit report shall furnish the same electronically.

In the entire law, rules and schemes framed there under it is Tax Payer who is required to comply with various provisions of Law and the role of intermediatery like Tax Return

Preparer or ERI has been clearly defined in various schemes framed by DIT (System) but no where the role of chartered accountant has been defined, except that of requirement of getting accounts audited from him.

Penal provision under the Income-tax Act are quasi Criminal and are governed by the procedure laid down in Criminal Procedure Code.

In criminal jurisprudence it is well stated law that no one can be punished for acts of others.

The income tax act and rules as amended till date, no where define as to how a tax payer would upload his TAR electronically. The scheme drafted and implemented by DIT (System) requires chartered accountant to upload TAR of a person, whose accounts he has audited, and such person is further required to approve upload TAR. He has been provided option of rejecting also, but no where it is provided as to how ***he would*** furnish the said reports electronically.

In the absence of any procedure through which a tax payer can furnish his audit report electronically, he cannot be held violating any law and no penal action can be taken against him.

How a person can be held guilty of violating law or for non-compliance while the law has not made enabling provision to comply with.

He cannot be held responsible for acts of others.

I would further clarify presuming that a person has got his accounts audited by a chartered accountant before due date and such chartered accountant ***fail to or does not upload the said report for whatever reason***, how such tax payer can be held guilty of not furnishing the report and liable for penal action.

Another example would show as the law is not enabled to comply with. Presuming a chartered accountant who has audited books of accounts of a client, has prepared and delivered audit report to his client on or before the specified date, dies before uploading the same in ITD portal, ***there is no mechanism in the scheme as to how and by whom the said report shall be uploaded failure of which would make an assesse liable for penal action.***

Conclusion

The entire law and mechanism of furnishing of TAR is illegal, devoid of merit and ultra virus, hence no action can be contemplated for non compliance thereof, unless our law maker reverse the law by amending it suitably and i.e. with retrospective effect.

It is now up to our law makers to frame a scheme where the tax payer is enabled to furnish his TAR like ITR. ITD may ask such chartered account to verify the correctness and genuineness of such uploaded return through suitable mechanism.