# GUIDE TO OFFENCES AND PROSECUTION UNDER THE INCOME TAX ACT 1961.

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# Offences Under Income-tax Act, 1961
# Contained in Chapter XXII

| S. No | Section of the I.T. Act | Brief Description of offence | Punishment Rigorous imprison | Cognizable/ or Non-Cognizable | Bailable/ or Non-Bailable | Summons Case/Warrants case | Triable by |
|---|---|---|---|---|---|---|---|
| 1. | 275A w.e.f 12-3-1965 | Remove, parting with or otherwise dealing with books of accounts, documents, money, bullion, jewellery or other valuable article or thing put under restraint during the search. Sec 132(1) or (3), second proviso | Upto 2 years with fine | Non-Cognizable | Bailable | Summons Case | Special Court/ Magistrate of first class |
| 2. | 275B w.e.f. 1-6-02 | Failure to afford necessary facility to the Authorised Officer for inspection of books or other documents as required u/s 132(1)(iib) | Upto 2 years with fine | Non-Cognizable | Bailable | Summons Case | Special Court/ Magistrate of first class |

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| 3. | 276 w.e.f 1/4/1989 | Fraudulently removal, concealment, transfer or delivery of property or any interest in the property with intention to thwart tax recovery u/s. 222 | Upto 2 years with fine | Non-Cognizable | Bailable | Summons Case | Special Court/ Magistrate of first class |
| 4. | 276A w.e.f 1/4/1965 | Failure on the part of a liquidator or receiver of a company to give notice of his appointment to the A.O, or parting away of company's properties in contravention of income-tax provision. | 6 months to 2 years | Non-Cognizable | Bailable | Summons Case | Special Court/ Magistrate of first class |
| 5. | 276AB Effective till 30-6-2002 | Failure to comply with the provision of Section 269UC. 269UE & 269UL relating to acquisition of immovable property. | 6 months to 2 years and fine | Non-Cognizable | Bailable | Summons Case | Special Court/ Magistrate of first class |

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| 6. | 276B | Failure to pay to the credit of the Central Government the tax deducted at source under chapter XVII or contravention of section 115-O | 3 months to 7 years with fine | Non-Cognizable Sec.279 A | Bailable | Warrant Case | Special Court/ Magistrate of first class |
| 7. | 276BB | Failure to pay the tax collected under the provisions of Sec. 206C | 3 months to 7 years with fine | Cognizable | Non-Bailable | Warrant Case | Special Court/ Magistrate of first class |
| 8. | 276C(1) | Wilful attempt in any manner to evade any tax, penalty or interest imposable or under report his income under the Act<br>a) Where tax evaded exceeds Rs. 1,00,000/- (Rs. 25 lakh w.e.f. 1-7-2012)<br>a) In other cases | a) 6 months to 7 years with fine<br>b) 3 months to 3 yrs with fine (2 years w.e.f. 1-7-2012) | Non-Cognizable (**sec 279A)** | a) Non-Bailable<br>a) Bailable | a) Warrant Case<br>a) Summons Case | Special Court/ Magistrate of first class |

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| 9. | 276C(2) | Wilful attempt in any manner to evade payment of tax, penalty or interest. | 3 months to 3 years with fine (2 years w.e.f. 1-7-2012) | Non-Cognizable | Bailable | Summons Case | Special Court/ Magistrate of first class |
| 10. | 276CC | Wilful failure to file return of income u/s 139(1), or in response to notice u/s 142(1) or 148 or 153A<br>a) Where tax evaded exceeds Rs. 1,00,000/- (Rs. 25 lakh w.e.f. 1-7-2012)<br>a) In other cases<br>Note: No prosecution if RI is filed before the expiry of the asst. year or if the tax payable on regular asst. as reduced by TDS & advance tax does not exceed Rs. 3,000/- | 6 months to 7 years with fine<br>3 months to 3 years with fine .(2 years w.e.f. 1-7-2012) | Non-Cognizable | a) Non-Bailable<br>a) Bailable | a) Warrant Case<br>a) Summons Case | Special Court/ Magistrate of first class |
| 11. | 276CCC w.e.f 1-1-1997 | Failure to furnish return of income in search cases as required section 158BC . | 3 months to 3 years with fine | Non-Cognizable | Bailable | Warrant Case | Special Court/ Magistrate of first class |

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| 12. | 276D | Wilful failure to produce accounts and documents u/s 142(1) or to get accounts audited u/s 142(2A) . | Upto 1 years and fine | Non-Cognizable | Bailable | Summons Case | Special Court/ Magistrate of first class |
| 13. | 277 | Making a false statement in verification or delivering a false account or statement and which the concerned person knows or believes to be false or does not believe to be true.<br>a) Where tax sought to be evaded exceeds Rs. 25,00,000/-<br>b) In other cases | 6 months to 7 years with fine<br>3 months to 3 years with fine .<br>(2 years w.e.f. 1-7-2012) | Non-Cognizable | a) Non-Bailable<br>a) Bailable | a) Warrant Case<br>b) Summons Case | Special Court/ Magistrate of first class |
| 14. | 277A | Falsification of books of accounts or documents, etc. | 3 months to 3 years with fine (2 years w.e.f. 1-7-2012) | Non-Cognizable | Bailable | Summons Case | Special Court/ Magistrate of first class |

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| 15. | 278 | Abetment or inducing another person to make and deliver an account or statement or declaration relating to any taxable income which is false and which he either knows or believes to be false.<br>a) Where tax, penalty or interest sought to be evaded exceeds Rs. 25,00,000/-<br>b) In other cases | 6 months to 7 years with fine<br>3 months to 3 yrs with fine (2 years w.e.f. 1-7-2012) | Non-Cognizable | a) Non-Bailable<br>a) Bailable | a) Warrant Case<br>a) Summons Case | Special Court/ Magistrate of first class |
| 16. | 278A | Second and subsequent offences u/s 276B, 276C(1), 276CC, 277 or 278 | 6 months to 7 years with fine | | | | Special Court/ Magistrate of first class |
| 17. | 280(1) | Disclosure of particulars by public servants in contravention of section 138(2).<br>( Prosecution to be instituted with the previous approval of central government) | 6 months with fine | Non cognizable | Bailable | | Special Court/ Magistrate of first class |

- **Notes :**
- As per the provisions of section 279A, the offences punishable u/s 276B, 276C, 276CC, 277, or 278 are deemed to be non-cognizable offence.

- If penalty imposed u/s 270A or 271(1)(iii) has been reduced or waived u/s. 273A; no offence u/s 276C or 277[ sec. 279(1A)]

- No person is punishable for any failure under section 276A, 276AB or 276B if he proves that there was reasonable cause for such failure (vide section 278AA).

(a) Prosecution for offences under section 275A, section 275B, section 276, section 276A, section 276B, section 276BB, section 276C, section 276CC, section 276D, section 277, section 277Aand section 278 to be instituted with previous sanction of Principal Director General/Principal Chief Commissioner/Principal Commissioner/Director General/Chief Commissioner/Commissioner, except where prosecution is at the instance of the Commissioner (Appeals) or the appropriate authority (vide section 279).

(b) The offences under Chapter XXII can be compounded (either before or after the institution of proceedings) by Principal Director General/Director General or Principal Chief Commissioner/Chief Commissioner.

# Code of Criminal Procedure First Schedule
# II-CLASSIFICATION OF OFFENCES AGAINST – OTHER LAWS.

| S. No | Offence | Cognizable/ or Non- Cognizable | Bailable/ or Non-Bailable | By what court triable |
|---|---|---|---|---|
| 1. | If punishable with death, imprisonment for life, or imprisonment for mote than 7 yeas | Cognizable | Non- Bailable | Court of Session. |
| 2. | If punishable with imprisonment for 3 years, and upwards but not more than 7 years | Ditto | Ditto | Magistrate of the first class. |
| 3. | If punishable with imprisonment for less than 3 years or with fine only. | Non-Cognizable | Bailable | Any Magistrate. |

# DEFINITIONS.

**Section 2 of CrPC**

(a)“ bailable offence” means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force: and “non-bailable offence” means any other offence.

In case of bailable offence, the grant of bail is a matter of right.

A non-bailable offence is one in which the grant of Bail is not a matter of right. Here the Accused will have to apply to the court, and it will be the discretion of the court to grant Bail or not.

(b) “charge” includes any head of charge when the charge contains more heads than one:

(c) “cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under and other law for the time being in force, arrest without warrant.

(d) “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation. A report made by a police officer in a case, which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaints and the police officer by whom such report is made shall be deemed to be the complainant;

# DEFINITIONS contd...

**Section 2 of CrPC**

(g) “inquiry” means every inquiry, other than a trial, conducted under this Code by a Magistrate or court;

(h) “investigation” includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf,

(i) “judicial proceeding” includes any proceeding in the course of which evidence is or may be legally taken on oath;

(l) “non-cognizable offence” means an offence for which, and “non-cognizable case” means a case in which, a police officer has no authority to arrest without warrant;

(n) “offence” means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattletrespass Act, 1871 (1 of 1871);

# DEFINITIONS contd...

**Section 2 of CrPC**

(o) “officer in charge of a police station” includes, when the officer in charge of the police station is absent from the station-house or unable from illness or other cause to perform his duties, the police officer present at the station-house who is next in rank to such officer and is above the rank of constable or, when, the State Government so directs, any other police officer so present;

(r) “police report” means a report forwarded by a police officer to a magistrate under sub-section (2) of section 173;

(s) “Police report” means any post or place declared generally or specially by the state government, to be a police station, and includes any local area specified by the state government in this behalf;

(w) “summons-case” means relating to an offence, and not being a warrant-case;

(x) “warrant-case” means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years;

# 1.Introduction.

The word ‘ offence’ has not been defined under the Act. Wilful attempt to evade tax is an offence . The word ‘ offence’ has to be understood in the context of an offence generally under the Act.

The Income Tax Act, 1922 provided for the prosecution of taxpayers who were guilty of the offences mentioned in section 51 and section 52 of the Act.

Under the Income-tax Act, 1961 there are various provisions for compliance with taxing provisions and the collection of taxes. The Income-tax Act seeks to enforce tax compliance in a three fold manner; namely :-

1. Imposition of interests.

2. Imposition of penalties and,

3. Prosecutions

The genesis for the need of stringent imposition of prosecutions find its roots in the Wanchoo Committee Report. The said Committee in their final report recommended as under:-

*“Need for vigorous prosecution policy:*

# Introduction contd.

**Law Commission 47th Report dt 28/2/1972 :**

A few instances stated in the report are as follows:-

(a) CBDT did not utilise the prosecution mechanism for ensuring compliance u/s. 276CC of the Act,

(b) there were inadequate measure to monitoring the cases,

(c) compounding of offences was not used as an alternative mechanism effectively to reduce litigation and realise the due revenue

(d) prosecution mechanism was not working effectively and efficiently,

(e) Central economic intelligence bureau established for gathering, collation and dissemination of information among the tax gathering agencies like CBDT, CBEC etc. had not worked in the manner as intended to arrest tax evasion by prosecution etc.;

(f) Pending of cases as on March, 2012 was 2,603 cases of which 1,530 are more than 15 years old etc.

# Introduction contd.

i. assessees in general may not be worried by levy of interest or penalties which they can afford to pay, the idea of undergoing imprisonment if convicted of offences can be a strong deterrent from brazen tax evasion and non-compliance.

ii. Recently it has been observed that a slew of show cause notices for launching of prosecution have been issued to a large number of assessees,

iii. (a) to file an appropriate replies, (b) to make an application for waiver of penalties, (c) approach for Settlement Commission, (d) Compounding of Offences, (e) proceedings before the Magistrate Court or (f) approach the Central Govt. for immunity and to effectively attempt to quash wrongful prosecutions that may have been initiated.

# 2.Offences and prosecutions under Income tax Act, 1961

- The sections dealing with offences and prosecution proceedings are included in Chapter XXII of the Income tax Act, 1961 i.e. S. 275A to S. 280D of the Act (hereinafter referred as " said Act").

However, the provisions contained in said Chapter XXII of the Act do not *inter se* deal with the procedures regulating the prosecution itself, which is governed by the provisions of the Criminal Procedure Code, 1973. The provisions of the said Code are to be followed relating to all offences under the Income-tax Act, unless the contrary is specially provided for by the Act.

The Finance Act, 2012, w.e.f. 1-7-2012 has inserted S. 280A to 280D, wherein the Central Government has been given the power to constitute Special Courts in consultation with the Chief Justices of the respective jurisdictional High Courts.

# Offences and prosecutions under Income tax Act, 1961 contd....

Normally, the Magistrate Court in whose **territorial jurisdiction** an offence is committed tries the offence. For direct tax cases, the offence is said to committed at the place where a false return of income is submitted, even though it is completely possible that the return has be prepared elsewhere or that accounts have been fabricated at some other place.

In ***J. K. Synthetics Ltd. v. ITO (1987) 168 ITR 467 (Delhi) (HC),*** the Court held that the offence u/s. 277 of the Act can be tried only at the place statement is delivered (SLP was rejected (1988) 173 ITR 98 (st). also refer ***Babita Lila v. UOI (2016) 387 ITR 305 (SC)***. A First Class Magistrate or a Metropolitan Magistrate, should try the prosecution case under the direct taxes. If a Special Economic Offences Court with specified jurisdiction is notified, the complaint is to be filed before the respective court. For ready reference an easy to understand summary of prosecutions provisions under Income–tax Act has been reproduced in a chart as per annexure “A”.

# 3. S. 278E : Presumption as to culpable mental state

The concept of ***mens rea*** is integral to criminal jurisprudence. An offence cannot be committed unintentionally. Generally a **guilty mind** is a *sine qua non* for an offence to be committed. The rule in general criminal jurisprudence established over the years has evolved into the concept of 'Innocent until proven guilty' which effectively places the burden of proving the guilt of the accused beyond reasonable doubt squarely on the prosecution.

However, The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, inserted S. 278E with effect from 10th September, 1986 has carved out an exception to this rule. The said Section places the burden of proving the absence of *mens rea* upon the accused and also provides that such absence needs to be proved not only to the basic threshold of 'preponderance of probability' but 'beyond reasonable doubt'. **The scope and effect of this provision has been explained by the Board in Circular No. 469 dt. 23-9-1986 (1986) 162 ITR 21(St) (39).**

# S. 278E : Presumption as to culpable mental state contd...

Section 278E of the Act, which is analogous to S. 138A of the Customs, Act, 1962, S.92C of the Central Excise and Salt Act, 1944, S.98B of the Gold (Control) Act, 1968 and S.59 of the Foreign Exchange Regulation Act, 1973. Similar provision was introduced under Wealth-tax Act, 1957, i.e. S. 35-0 and Gift–tax Act, S.35D.

Constitutional validity of the said provision was upheld in ***Selvi J. Jayalalitha v. UOI and Ors. (2007) 288 ITR 225 (Mad) (HC), Selvi J. Jayalalithav. ACIT (2007) 290 ITR 55 (Mad) (HC)*** **which was affirmed by Apex court in** ***Sasi Enterprises v. ACIT (2014) 361 ITR 163 (SC).***

# S. 278E : Presumption as to culpable mental state contd...

According to this section, wherever *mens rea* is a necessary ingredient in an offence under the Act, the Court shall presume its existence. No doubt, this presumption is a rebuttable one. The Explanation to the section provides for an inclusive definition of culpable mental state which is broad enough in its field so as to include intention, motive, knowledge of a fact and belief in or a reason to believe a fact. The presumption arising under sub-section (1) may be rebutted by the accused, but the burden that is cast upon the accused to displace the presumption is very heavy. The accused has to prove absence of culpable mental state not by mere preponderance of probability.

In ***Prakash Nath Khanna v. CIT (2004) 266 ITR 1 (SC) (12),*** the Court observed that the Court has to presume the existence of culpable mental state, and the absence of such mental state can be pleaded by an accused as a defence in respect of the Act charged as an offence in the prosecution. It is therefore open to the appellants to plead absence of a culpable mental state when the matter is taken up for trial.

# S. 278E : Presumption as to culpable mental state contd...

In ***J. Tewari v. UOI (1997) 225 ITR 858 (Cal.) (HC) (861)*** the court observed that the rule of evidence regarding presumptions of culpability on the part of the accused does not differentiate between a natural person and a juristic person and the court will presume the existence of culpable state of mind unless the accused proves contrary.

In ***ACIT v. Nilofar Currimbhoy (2013) 219 Taxman 102 (Mag.) (Delhi) (HC),*** prosecution was launched u/s. 276CC for a failure to file the return of income, the court held that the onus was on the assessee to prove that delay was not wilful and not on the department (SLP of assessee is admitted in the case of ***Nilofar Currimbhoy v. ACIT (2015) 228 Taxman 57 (SC).***

S. 278E being penal in nature is not applicable for those offences that have been committed on or before 9-9-1986 even if the prosecution proceedings are launched after the said date.

# S. 278E : Presumption as to culpable mental state contd...

Before the amendment to S. 276A, 276B, 276B, 276D and 276E, the onus was on the prosecution to prove beyond a reasonable doubt that the accused had no reasonable cause or excuse to commit any of the offences as envisaged by the aforesaid sections. However, in the light of the amendment by the Taxation Laws (Amendment and Misc. Provisions) Act, 1986 to the aforesaid, sections wherein the word "without reasonable cause or excuse" have been deleted and with the insertion of S. 278AA, the onus of proving the existence of reasonable cause has shifted on to the accused. However reasonable cause can be proved in cases related to offence 276A , 276AB or 276B (see 278AA) .

# S. 278E : Presumption as to culpable mental state contd...

***Instances of Reasonable cause accepted by courts:***

In ***UOI v. Bhavecha Machinery & Ors. (2009) 320 ITR 263 (MP)(HC),***

Where the delay in filing the return was explained by the accused firm due to the illness of the old part time accountant of the accused firm, the cause shown by the accused firm was held to be a reasonable cause for delay in filing the return of its income.

***Sonali Autos P. Ltd. v. State of Bihar (2017) 396 ITR 636 (Patna) (HC)***

S. 278AA : Offences and prosecutions – Tax deduction at source - Reasonable cause – No punishment. [S. 201 (IA), 276A, 276AB, 276B, 279, Code of Criminal Procedure, 1973, S.482]

**In *Shaw Wallace & Co. Ltd. v. CIT (TDS) (No. 2) (2003) 264 ITR 243 (Cal.)(HC***) held that it is for appellant to produce sufficient evidence for non-deposit of tax deducted at source during criminal trial to avail of benefit of section 278AA.

# 4.Procedure governing prosecution proceedings :

The procedure governing prosecution proceedings under the Act can be divided into two parts i.e.

I. Procedure to be followed by the Department while launching prosecution proceedings, and

II. The procedure before the Court.

I. **Procedure followed by the department while lunching the prosecution**

Though there is no specific procedure provided under the Act or Rules, the Department has framed their own guidelines and instructions for initiating prosecution proceedings. The said instructions are referred in the following cases while quashing the prosecutions under S. 271C(1) read with Ss. 277 and 276CC of the Act.

***Madan Lal v. ITO (1998) 98 Taxman 395 (Raj.) (HC), PatnaGuinea House v. CIT (2000) 243 ITR 274 (Pat.) (HC), Satya Narain Dalmia v. State of Bihar (2000) 110 Taxman 28 (Pat.) (HC), K. Inba Sagaran v. ACIT (2000) 247 ITR 528 (Mad.) (HC)*.**

# Procedure governing prosecution proceedings contd...

The Income-tax department's manual deals with various guidelines to be followed before launching prosecution proceedings and the broad parameters as laid down are as follows:

1. The Assessing Officer on the basis of the records of the assessee sends the proposal to the respective Commissioner.

2. The Commissioner issues the show cause notice to the assessees.

3. If Commissioner is satisfied with the reply of the assessee he may not grant sanction to the Assessing Officer to file complaint before the Court. The commissioner has to apply his mind to the reply and material produce before him.

# Procedure governing prosecution proceedings contd...

**II. Procedure before Court [see Trial Chart]**

On the basis of complaint filed before a court, the court sends summons to the accused along with the copy of complaint, to attend before the court on a particular date. The complaint being criminal complaint, the accused must be present before the court, unless the court gives a specific exemption.

If the accused is not present on such particular date, the court can issue a warrant against the accused. If the warrant is issued, unless the accused secures bail, he may be arrested and produced before the court.

In normal Course Complainant and his witnesses are required to be examined on oath by the Magistrate before the accused can be summoned u/s 200 of Cr.Pc

But as the Complainant in the cases under Income Tax Act are “Public Servants” the Magistrate need not examine him on oath before summoning the accused. If the opinion of the magistrate there is sufficient ground for proceeding:

# Procedure governing prosecution proceedings contd...

If it is a “Summons Cases” – Issue summons

If it is a “Warrant Cases” – Issue summons or Warrants

Cases instituted otherwise than on police report.

Relevant sections 244 to 250 of Cr.P.C.

**Steps :**

Case is instituted u/s 190

Summons is issued u/s 204

Summons can be challenged in revision before the sessions court/under criminal application u/s 482 of CR.P.C. accused appears and file for bail

The accused can file discharge application u/s. 245.

Arguments on discharge application. if discharged the matter is over, if not discharged,

The prosecution will lead evidence of the complainant.

The evidence is recorded by the magistrate.

Opportunity is granted to the accused to cross examine the complainant or not to cross examination at this stage also discharge can be filed by the accused u/s. 245 of CR.P.C.

# Procedure governing prosecution proceedings contd...

Charges are framed. u/s. 246(1).
Again evidence is lead by the prosecution of the complainant and other witnesses.

Cross examination of the complainant and the other witnesses by the accused advocate. (u/s 246(4) Cr.P.C.

Accused statement is recorded u/s. 313.

Opportunity is given to the accused to examine any witnesses, defence witness (u/s. 247, provisions of section 243 if applied here).

The accused enters his defence and produces his evidence, can file written statement too which is taken on record.

Accused can call for his defence witnesses too or for examination or cross examination of witnesses. Arguments by both the parties.

Judgement.

If the trial results in a conviction, then an appeal to the court of session will lie under S. 374(3) of the Criminal Procedure Code. The said appeal will be heard under S.381 of the CrPC, either by the a Sessions Judge or by an Additional Sessions Judge. The petition of appeal is to be presented in the form prescribed accompanied by a copy of the Judgment appealed against within a period of 30 days from the date of order, as per the Limitation Act.

# 5. Certain aspects to be kept in mind relating to launching of prosecution, proceedings are:

## 5.1 Sanction for launching of prosecutions

Under S. 279, the competent authority to grant sanction for prosecution is Commissioner, Commissioner (Appeals), Chief Commissioner or the Director General. Prosecution, without a requisite sanction shall make the entire proceedings void *ab initio*. The sanction must be in respect of each of the offences in respect of which the accused is to be prosecuted.

Where the Commissioner has held that an assessee had made a return containing false entries and gave sanction for prosecution for an offence under S. 277, and the accused was found guilty of an offence under S. 276CC, and not under S. 277, it was held in revision that an offence under S. 276CC was of a different nature from that under S. 277, and as there was no sanction for prosecution for an offence under S. 276CC, the conviction was illegal ***(Champalal Girdharlal v. Emperior (1933) 1 ITR 384 (Nag) (HC))***

# Certain aspects to be kept in mind relating to launching of prosecution, proceedings are contd...

**5.2 Opportunity of being heard**

When an Assessing Officer takes a decision to initiate proceedings or a Commissioner grants sanction for such proceedings. He has to apply his mind and on the basis of the circumstances and the facts on record, he has to come to the conclusion whether prosecution is necessary and advisable in a particulars case or not.

The said Act does not provide that the Commissioner has to necessarily afford the assessee an opportunity to be heard before deciding to initiate proceedings. The absence of an opportunity to be heard will not make the order of sanction void or illegal as held in ***CIT v. Velliappa Textiles Ltd. (2003) 263 ITR 550 (SC) (567 to 569)*****.** However, it is being observed that the commissioners are issuing a show cause notice before sanctioning the Sanction for prosecution based on the internal manual.

# Certain aspects to be kept in mind relating to launching of prosecution, proceedings are contd...

**5.3 Circumstances under which the Commissioner cannot initiate proceedings**

S. 279(1A) has provided for the exception to the Power of Commissioner to initiate proceedings. Therefore, if a particular case falls and is established u/s. 276C or 277 of the said Act and if an order u/s. 273A has been passed by the Commissioner, by using the phrase “has been reduced or waived by an order under S. 273A” in S. 279(1A),the legislature has made it clear that the order referred to in S. 279(1A) is the order of the Commissioner waiving or reducing the penalty u/s. 273A and not the order of non imposition of penalty by the ITO or the order of cancellation of penalty for lack of ingredients as required by S. 271 by Appellate Authorities. This is relevant because in the cases where the penalty is waived partly u/s. 273A, the Commissioner is precluded from granting sanction u/s. 279 of the Act.

Therefore, the non-existence of the circumstances enumerated in S. 273A is a precondition for the initiation of proceedings for prosecution u/s. 276C or 277. Accordingly, the CIT should ascertain by himself that the circumstances prescribed in section 273A do not exist. A complaint filed for prosecution u/s. 276C or 277 would be illegal and invalid if the circumstances as provided in S. 273A exist.

# Certain aspects to be kept in mind relating to launching of prosecution, proceedings are contd...

**FEW CASE LAWS**:

***In Shravan Gupta v. ACIT (2015) 378 ITR 95 (Delhi)(HC)*** held that failure to produce accounts or documents-Accounts had been submitted when criminal complaint was issued-Sanction for prosecution was held to be not valid [S. 279, Criminal Procedure Code, 1973, S. 482.]

***T.D. Gandhi, ITO v. Sudesh Sharma (2015) 230 Taxman 572 (P&H)(HC)*** held that Falsification of books –False TDS certificate-Tax practitioner-Refund on the basis of TDS certificates- Respondent had no role in preparing TDS certificates- [IPC, S. 378 (4), 418, 465, 471]

# 6. Old age 70 Years

CBDT instruction No. 5051 of 1991 dated 07/02/1991 para 4 states “Prosecution need not normally be initiated against a person who has attained the age of 70 years at the time of commission of the offence”.

In ***Pradip Burman S. v. ITO 382 ITR 418 (Delhi)*** the Court laid down that the person should have reached the age of 70 at the time of commission of the offence. The case of the petitioner was that the complaint filed is liable to be quashed on the ground that at the time of filing of the criminal complaint, the petitioner had attained the age of 70 years and thus no prosecution can be initiated against him. Instruction number 5051 of 1991 dated February 7 1991 mandated that no prosecution could be initiated against a person who is above 70 years, “at the time of commission of offence”.

Further the said instructions do not mandate or make it compulsory since the words “need not normally” used in para 4 do not provide an absolute bar on initiation of prosecution. Thus the emphasis is on time of commission of the offence.

# 7. Whether prosecution can be initiated before completion of assessment or when the matter is pending in appeal

**The assessment proceedings and criminal proceedings are independent proceedings**.

In ***P. Jayappan v. ITO (1984) 149 ITR 696 (SC),*** the court held that the two types of proceedings could run simultaneously and that one need not wait for the other. the court held that, there is no bar on continuation of prosecution just because a proceeding which may ultimately affect the prosecution or is likely to favour the assessee has been initiated or is pending. This can't be a ground for stay or adjournment of prosecution proceeding

In ***Kalluri Krishan Pushkar v Dy. CIT(2016) 236 Taxman 27 (AP& T) (HC)***, the court held that, existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings. In that particular case the prosecution was initiated u/s. 276C, for non-payment of admitted tax and interest.

# Whether prosecution can be initiated before completion of assessment or when the matter is pending in appeal contd...

In ***Vijay Kumar Mallik v. CIT (2017) 397 ITR 130 (Patna) (HC),*** Held, dismissing the writ petition, that it was apparent that the assessee had not been exonerated by the Income-tax Department in the adjudication proceedings till date. According to the assessee, the special leave petition filed by him was still pending in the Supreme Court. In such circumstances, there was no illegality in the order passed by the criminal court taking cognizance against the assessee under section 276C (1) and (2) .

In ***V. Sadasiva Chetty (HUF) v. ITO (2003) 264 ITR 527 (Mad.)(High Court)*** held that because of the pendency of reassessment, the prosecution cannot be whittled down and original assessment alone is to be considered for prosecution. (A.Y. 1982-83)

In **Kingfisher Airlines Ltd. .v. ACIT (2014) 265 CTR 240(Karn.)(HC)** held that Criminal proceedings are not dependent on the recovery proceedings. Therefore, the pendency of proceedings initiated u/s. 201(1) and s. 201(1A) is not a legal impediment to continue the criminal prosecution against the petitioner.

# Whether prosecution can be initiated before completion of assessment or when the matter is pending in appeal contd...

**In *CIT v. Bhupen Champak Lal Dalal & Anr (2001) 167 CTR 283 (SC),*** the Supreme court Held:

" The prosecution in criminal law and proceedings arising under the Act are undoubtedly independent proceedings and, therefore, there is no impediment in law for the criminal proceeding to proceed even during the pendency of the proceedings under the Act.

However, a wholesome rule will have to be adopted in matters of this nature where courts have taken the view that when the conclusions arrived at by the appellate authorities have a relevance and bearing upon the conclusions to be reached in the case necessarily one authority will have to await the outcome of the other authority"

This judgement has been followed by many High Courts including **Delhi High Court in Income Tax Officer v Giggles(p) Ltd. And Ors.(2007) 301 ITR 32**

# Whether prosecution can be initiated before completion of assessment or when the matter is pending in appeal contd...

In ***Naresh Prasad v. UOI (2005) 276 ITR 633 (Patna)(High Court),*** If appeal is pending against assessment order, prosecution proceedings should not be launched.

In ***Gauri Shankar Prasad v. UOI (2003) 261 ITR 522 (Patna)(High Court)*** held that during pendency of appeal before Commissioner (Appeals), interim stay of criminal proceedings is to be granted.

S. 276(C)(1) Prosecution for bogus transaction: If a stay application is filed before the CIT(A) to seek a stay of the assessment order, during the pendency of such application, the criminal prosecution should not be launched and, if it has been already launched, the same shall not proceed . ***Ramchandran Ananthan Pothi vs. UOI, W.P NO.761 OF 2018, dtd: 04/09/2018 (Bombay High Court)***

# 8.Findings of the Appellate Tribunal

The Appellate Tribunal is the final fact finding authority under the Act. Hence, the findings and the orders of the Appellate Tribunal are binding on the Commissioner of Income tax. On the aforesaid proposition, the two important questions that may arise are:

(1) If there is a finding of the Appellate Tribunal that there is no concealment and no false statement, etc., then whether or not the Commissioner of Income tax would be stopped from initiating proceedings under S. 277? and

(2) How far are the findings of the Appellate Tribunal in the assessment proceedings binding upon the trial court in respect of the proceedings for prosecution u/s. 277?

The Supreme Court, in ***Uttam Chand v. ITO (1982) 133 ITR 909 (SC),***

Prosecution u/s 277 was for filing of false return because the registration of the firm was cancelled on the ground that it was not genuine The Appellate Tribunal reversed the finding and held the registration of the firm to be genuine and consequently the return as valid. The Supreme Court held that once the ITAT had held that the firm was genuine & returns valid, the prosecution under IT Act could not contine.

# Findings of the Appellate Tribunal contd...

The P & H Court, **in** ***ITO v. Janta Trading Co. (2003) 263 ITR 24(P&H)(High Court)*** held that Where no prima facie case was made out that assessee willfully concealed sale of bags of cement, prosecution of assessee under section 276C / 277 was unsustainable.

If the penalty for concealment is quashed on technical grounds due to limitation or due to violation of the due process of law, as the penalty is not quashed on merits it cannot be said that there should not be any prosecution. Similarly, when the Appellate Tribunal holds that the assessee is liable for penalty, the conviction is not automatic. The concerned court has to examine the witnesses and has to come to an independent finding as to whether the accused is guilty of the offences by following the due process of law.

# Addition made in assessment having been deleted

- In ACIT v. Poorna Cine Theatre(P) Ltd & Ors. 126 Taxation 337(AP) the addition made in assessment having been deleted by the Tribunal the court held following Supreme Court's decision in *KTMS Mohammed v. UOI (1992) 197 ITR 196 (SC),* that the very basis of prosecution was nullified and no offence under section 276C and 277 was made out.
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# Estimated Addition

- In **Raghunath Prasad Mohanlal & Ors v. UOI (2003) 259 ITR 663 (MP),** it was held following **Prem Kumar Keshri(1998) 230 ITR 230 ITR 252(Pat)**, that in a case of addition made on estimate based by AO, which is reduced in appeal, it is difficult to comprehend any convection based on such evidences. On the facts no material was available in the case.

# 9.Penalty and prosecution – S. 271(1)(c) and S. 277

Simultaneous action for imposing a penalty and launching prosecution for the same offence is not barred under the I T Act, 1961.

In ***S.P. Sales Corporation v. S. R. Sikdar (1993) 113 Taxation 203 (SC)*** **and G.** ***L. Didwania v. ITO (1995) 224 ITR 687 (SC),*** the Hon'ble Apex Court laid down the principle that "The Criminal Court no doubt has to give due regard to the result of any proceedings under the Act having bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act."

In ***K. C. Builder v. ACIT (2004) 265 ITR 562 (SC),*** the court held that when the penalty is cancelled, the prosecution for an offence u/s 276C for wilful evasion of tax cannot be proceeded with thereafter. *(Shashichand Jain & Ors. v UOI (1995) 213 ITR 184 (Bom) (HC).*

*In* ***Suresh Chand Gupta v. UOI (1997) 223 ITR 183 (MP)***, it was held, following *smt. Mohini Devi Agarwal v. CIT (1997) 224 ITR 742 (Pat)* and *G.L. Didwania v. ITO (1997) 224 ITR 687(SC)* that in view of cancellation of penalty on the same point, prosecution under section 276C and section 277 was liable to be quashed.

# Penalty and prosecution – S. 271(1)(c) and S. 277 contd...

Various courts have held that, when the substantial question of law is admitted by a High Court, it is not a fit case for the levy of penalty for concealment of Income ***(CIT v. Nayan Builders and Developers (2014) 368 ITR 722 (Bom.) (HC), CIT v. Advaita Estate Development Pvt. Ltd. (ITA No. 1498 of 2014 dt. 17/2/2017) (Bom.)(HC), (www.itatonline.org) CIT v. Dr. Harsha N. Biliangady (2015) 379 ITR 529 (Karn.) (HC)***.

A harmonious reading of the various ratios it can be contended that if penalty cannot be levied upon the admission of a substantial question of law by the Jurisdictional High Court, it cannot be a fit case for prosecution.

In ***V. Gopal v. ACIT (2005) 279 ITR 510 (SC)***, the court held that when the penalty order was set-aside, the Magistrate should decide the matter accordingly and quash the prosecution.

In ***ITO v. Nandlal and Co. (2012) 341 ITR 646 (Bom.) (HC),*** the court held that, when the order for levy of penalty is set aside, prosecution for wilful attempt to evade tax does not survive.

# Penalty and prosecution – S. 271(1)(c) and S. 277 contd...

- In **ITO v. Ashoka Biscuit Works 126 Taxation 225(AP)**, the court found that the Tribunal had deleted the penalty under section 271(1)(c) levied on the same facts on holding that ITO had not brought home any concealment of income and there was only postmen of the payment of tax and no loss of revenue. Following ***Uttam Chand v. ITO (1982) 133 ITR 909 (SC),***

# Penalty and prosecution – S. 271(1)(c) and S. 277 contd...

**Non-initiation of penalty proceedings does not lead to a presumption that the prosecution cannot be initiated as held in**

***Universal Supply Corporation v. State of Rajasthan (1994) 206 ITR 222 (Raj) (HC) (235), A.Y. Prabhakar (Kartha) HUF v. ACIT (2003) 262 ITR 287 (Mad.) (288).***

However, if penalty proceedings are initiated and after considering the reply, the proceedings are dropped, it will not be a case for initiating prosecution proceedings. CBDT guidelines had instructed that where quantum additions or penalty have been deleted by the departmental appellate authorities, then steps must be taken to withdraw prosecution **(Guidelines F. No. 285/16/90-IT (Inv) 43 dated 14-5-1996).**

If the penalty is quashed on " technical grounds such as " Limitation" or " Violation of the due process of law" penalty not quashed on merits as such it does not impact the prosecution proceedings.

# Penalty and prosecution – S. 271(1)(c) and S. 277 contd...

In ***Radheshyam Kejriwal v. State of West Bengal (2011) 333 ITR 58 (SC)***

The following principles were laid down by the Supreme court:

1. Adjudication proceeding and criminal prosecution can be launched simultaneously.
2. Decision in adjudication proceeding is not necessary before initiating criminal prosecution.
3. Adjudication proceeding and criminal proceeding are independent in nature to each other.
4. The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution.
5. The finding in the adjudication proceeding in favour of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue and

# Penalty and prosecution – S. 271(1)(c) and S. 277 contd...

In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue underlying principle being the higher standard of proof in criminal cases.

**In term of Circular dated February 7th 1991, if there is evade tax of less than Rs. 25,000/-, no prosecution could be lunched u/s. 276C(1) and 277.**

In the case of **Magdum Dundappa Lokappa v. Income tax Dept. (rep by its Income tax Officer, Angad Kumar) / Suresh Sholapurmath v. Income tax Dept (rep by its Income tax Officer, Angad (Kumar) (2017) 397 ITR 145 (SC)**

**Supreme Court held:**

Allowing the appeals; as the amount involved was small, and had been paid with interest long ago, the Circular dated February 7, 1991 squarely applied and no proceedings should have been filed as the amount was below Rs. 25,000. Proceedings against the appellants were to be quashed.

# 10.Monetary Limit

In ***ITO v. Rajan and Co. And Ors (2007) 291 ITR 345 (Del)(HC)***

Question before Delhi High Court was where ITAT had quashed the penalty leived and confirmed by the lower authorities on the ground that same was without recording satisfaction as contemplated u/s. 271(1)(c)

Whether a prosecution u/s 276C of the said Act can be allowed to be continued in such a case holding that the penalty proceeding u/s 271(1)(c) of the said Act were terminated merely on the ground of some technicality and not on merits ?

High Court said it was not a mere technicality and penalty was quashed on merits.

# 11. Charge in complaint under one section can it be shifted to another section

The complaint filed is in respect of each of the offence for which the accused is prosecuted under a specific section. At the time of trial, it is felt that the accused is guilty under another section charge on which the complaint was filed. Thus what is sought to introduce is a charge of a different nature under a different provision and section, in such a case the entire complaint is bad and the prosecution fails since the accused cannot be charged under different section which is different in nature and the offence is specifically different.

It may further be noted that while sanctioning prosecution under section 279 the CIT had applied his mind to the provisions of a particular section and offence in respect of which the section contemplates prosecution to change the complaint to a different charge is not permissible. In such a case the complaint is bad and vitiated in law.

# 12. Abetment

S. 278 of the said Act deals with the offence of abetment in the matter of delivering any accounts or a statement or a declaration relating to income chargeable to tax. Though abetment has not been defined in the Income-tax Act the provisions relating to abetment of an offence are dealt with in Chapter V of the Indian Penal Code. In particular S. 107, 108, 108A and 110 of IPC are important. On the perusal of S. 107, it is seen that the offence of abetment is committed in three ways, namely –

(a) by instigation;

(b) by conspiracy; or

(c) by intentional aid.

In order to constitute abetment, the abettor must be shown to have intentionally aided in the commission of a crime. Mere proof that the crime charged could not have been committed without the interposition of the alleged abettor is not enough to fulfil the ingredients of the offence as envisaged by S.107. It is not enough that an act on the part of the alleged abettor happens to facilitate the commission of the crime. Intentional adding and active complicity is the gist of the offence of abetment. ***(Shri Ram v. State of Uttar Pradesh 1975 (SC) (Cr. 87), 1975 AIR 175, 1975 SCC (3) 495).***

# Abetment contd...

For an offence of abetment, it is not necessary that the offence should have been committed. A man may be guilty as an abettor, whether the offence is committed or not. *(Faunga Kanata Nath v. State of Uttar Pradesh, AIR 1959 SC 673)*.

Further, a person can be convicted of abetting an offence, even when the person alleged to have committed that offence in consequence of abetment, has been acquitted. ***(Jamuna Singh v. State of Bihar, AIR 1967 SC 553, 1967 SCR (1) 469).***

In ***Umayal Ramanathan v. Income Tax Officer (1992) 194 ITR 487 (Mad)***, it was held that even if it is decided that the prosecution against an assessee under section 276C is to be dropped, the prosecution against the person accused of abetment under section 278 of false return can continue.

***In Smt. Sheela Gupta v. IAC (2002) 253 ITR 551 (Delhi) (HC) (552)***, the Court held that, when the Tribunal has set aside the order of the Assessing Officer, the complaint filed for abetment does not survive hence the complaint was quashed.

# 13. Liability of an advocate or a chartered accountant for abetment

**S. 278** of the said Act, imposes a criminal liability on the abettor for abetment of false return etc. **Circular No. 179 dt. 30/1975 (1975) 102 ITR 9 (St.)(25**) explain the provision. Under this section, if a person abets or induces in any manner, another person to make or deliver an account, statement, declaration which is false and which he either knows to be false or does not believe to be true, he shall be punishable with rigorous imprisonment of not less than three months. The section casts an onerous duty on the advocates, Chartered Accountants and Income Tax Practitioners to be cautious and careful. The legal profession is a noble one and legal practitioners owe not only a duty towards his client but also towards the court. It would be highly unprofessional if a legal practitioner is to encourage dishonesty or to file such returns knowing or having reason to believe that the returns or declarations so made are false.

In ***P. D. Patel v. Emperor, (1933) 1 ITR 363 (Rangoon) (HC),*** a warning has been given of which every legal practitioner has to take a serious notice

# Liability of an advocate or a chartered accountant for abetment contd...

In ***Navrathna & Co. v. State (1987) 168 ITR 788 (Mad.)(HC) (790).*** The court held that, merely preparing returns and statement on the basis of the accounts placed before the Chartered Accountant, the question of abetment or conspiracy cannot arise.

The Supreme Court in the case of ***Jamuna Singh v. State of Bihar, AIR 1967 SC 553*** **(Supra)**,has held that a person can be convicted of abetting an offence even when the person alleged to have committed that offence in consequence of abetment has been acquitted.

In ***Lalji & Co v. Delhi Administration (1985) 154 ITR 728 (Del),*** it was held that mere introduction of certain parties to the assessee in whose names the assessee has created certain fictitious entries of loans does not amount to abetment or inducement so as to invoke provisions section 278. The court held that criminal complaint must be independent of the assessment order passed by complaintant.

# 14.Offences by companies, etc.

**S.278B makes certain provisions with regard to offence committed by companies, firms, association of person and bodies of individuals, whether incorporated or not**. Where an offence has been committed by a company, a firm, association of persons, or body of individuals, the person, who was in charge of and was responsible for the conduct of its business at the time when the offence was committed will be deemed to be guilty of the offence, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of the offence.

Further, if in the case of a company it is proved that the offence bad been committed with the consent or connivance of or is attributable to any neglect on the part of the company, such director, manager, secretary or others will be deemed to be guilty of the offence and will be liable to be prosecuted and punished accordingly. This provision will also apply in relation to *mutatis mutandis* committed by a firm, association of persons or body of individuals.

Under sub-section (1) to sec 278B, the essential ingredient for implicating a person is his being “in charge of” and "responsible to" the company for the conduct of the business of the company. The term responsible is defined in Blacks Law dictionary to mean accountable

# Offences by companies, etc. Contd...

In ***Onkar Chand & Co. & Ors. v. Income-tax Department (2009) 237 CTR 530 (HP) (High Court)*** held that complaints for offences under sections 276C, 277 and 278B was filed against the firm and all the partners. In absence of any specific allegation against the partners of the firm other than those who had verified the return of the firm that they were responsible for the conduct of the business of the firm, prosecution against these partners was held to be not sustainable.

In ***Homi Phiroze Ranina v. State of Maharashtra (2003) 131 Taxman 100 / 263 ITR 636 (Bom.)(High Court)*** held that Unless complaint disclosed a *prima facie* case against applicant-directors of their liability and obligation as principal officers in the day-to-day affairs of company as directors of the company under section 278B, the applicants could not be prosecuted for offences committed by the company.

In ***Dhrupadi Devi (Smt.) v. State of Rajasthan (2001) 106 Comp. Cas 90 (Raj.) (HC)(93),*** the court held that criminal liability of partner cannot be thrust upon his legal heirs . In *ITO v Kamra Trading Co. (2004) 267 ITR 170 (P&H) (HC)* the court held that launching of prosecution against sleeping partner was held to be bad in law for failure to pay the tax.

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# Offences by companies, etc. Contd...

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Both the ingredients “in charge of” and "was responsible to" have to be satisfied as the word used is “and” **[Subramanyam vs. ITO (1993) 199 ITR 723 (Mad.)]**.

In case of **Jamshedpur Engg. & Machine Mfg. Co. Ltd.*v.*Union of India [1995] 214 ITR 556 (PAT.)** it was held *that every director or person associated with the company will not be held liable for the offence. It is only the person who was entrusted with the business of the company and was responsible to the company for the conduct of its business who will be liable for the offence alleged*.”

# Offences by companies, etc. Contd...

The Supreme Court in the case of **Girdharilal Gupta vs. D. N. Mehta, AIR 1971 S.C. 2162**, has held that since the provision makes a person who was in charge of and responsible to the company for the conduct of its business vicariously liable for an offence committed by the company. The provision should be strictly construed.

# 15.Offences by HUF

S. 278C provides for criminal liability of the Karta, or members of a HUF in respect of offences committed by the Hindu Undivided Family. Under this provision, when an offence has been committed by HUF, will be deemed to be liable to be prosecuted and punished accordingly, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the offence.

If the offence was committed with the consent or connivance of or is attributable to any neglect on the part of any other member of the family, such other member shall be deemed to be guilty of the offence and shall be liable to be prosecuted and punished accordingly. **In *Roshan Lal v. Special Chief Magistrate (2010) 322 ITR 353 (All.) (HC),*** the Court held that a member of HUF cannot be held liable for delay in filing of return of HUF though he has participated in the assessment proceedings.

# 16. Offences by Credit Institutions

If an offence is committed by a credit institution, then the credit institution as well as every person, who at the time of the offence being committed was in-charge and responsible to the credit institution for the conduct of the business of such institution, shall be deemed to be guilty and liable to be proceeded against.

Burden would be on such person to prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence, then he will not be liable to be proceeded against.

# 17. S. 136: Proceedings before income-tax authorities to be judicial proceedings

S. 136 provides that any proceedings under the Act shall be deemed to be a judicial proceeding within the meaning of S. 193 and 228 and for the purpose of S. 196 of the Indian Penal Code. However, all proceedings under the Act do not fall under the definition of judicial proceedings for all purposes. eg. penalty proceedings u/s.271(1)(c) do not fall within the ambit of S. 136 of the Act and therefore cannot be said to be judicial proceedings.

In *KTMS Mohammed v. UOI (1992) 197 ITR 196 (SC),* the Court held that Assessing Officer cannot launch prosecution for perjury in FERA proceedings in a statement recorded under FERA proceedings. However, if an assessee intentionally gives or fabricates false evidence, the said assessee is liable for prosecution under S. 193 of the Indian Penal Code.

# 18. The Benami Transactions (Prohibition) Amendment Act, 2016

The definition “benami transaction” as per S. 2(9) of the said Act is very wide, hence if any action is taken against the assessee under the said Act which is affirmed by the competent Court, the assessee may also be tried under the Income-tax Act for false verification in return etc.

# 18. Limitation for initiation of proceedings

Chapter XXXVI of the Code of Criminal Procedure, 1973 lays down the period of limitation beyond which no Court can take cognizance of an offence which is punishable with fine only or with imprisonment not exceeding three years. But, for Economic Offences (In respect of applicability of Limitation Act, 1974) it is provided that nothing in the aforesaid chapter XXXVI of the Code of Criminal Procedure, 1973, shall apply to any offence punishable under any of the enactment specified in the Schedule. The Schedule referred to includes Income tax, Wealth tax, etc.

In *Friends Oil Mills & Ors. v. ITO (1977) 106 ITR 571 (Ker.) (HC),* dealing with S.277 of the Act, the Hon'ble Kerala High Court held that the bar of limitation specified in section 468 of the Code of Criminal Procedure, 1973 would not apply to a prosecution, under the Income-tax Act (also refer *Nirmal Kapur v. CIT (1980) 122 ITR 473 (P&H) (HC).* In view of this, as there is no fixed period of limitation for initiation of proceedings under the Act, the sword of prosecution can be said to be perpetually hanging on the head of the assessee for the offences said to have been committed by him.

# Limitation for initiation of proceedings contd...

It may be noted that this may result in injustice to the assessee because a person who is in a better position to explain the issue or things in the initial stage, may not be able to do so later, if he is confronted with the act of commission of an offence under a lapse of time.

In *Gajanand v. State (1986) 159 ITR 101 (Pat) (HC))*, the Hon'ble High Court held that where the Criminal Proceedings had proceeded for 12 years and the Income tax department failed to produce the evidence, the prosecution was to be quashed.

In *State of Maharashtra v. Natwarlal Damodardas Soni AIR 1980 SC 593, 1980 SCR (2) 340,* the Court held that a long delay along with other circumstances be taken in to consideration in the mitigation of the sentence.

Where there is inordinate delay in initiating prosecution proceedings, the complaint is liable to be dismissed as in the case of Rakoor Industries P.Ltd v. R.L. Ball, ITO (2011) 332 ITR 56(Del)

In ***Narain Dev Dhablania v. ITO (2003) 262 ITR 206 (P&H)(High Court)*** held that though the cause of action for initiating prosecution is furnished on the date when income is concealed or on date when concealment becomes known to the Department, once proceedings are finalised, the prosecution has to be commenced within a reasonable period. (A.Y. 1975-76)

# 20.Whether the Courts have the power to reduce punishment

S.275A to 278A provide for punishment in terms of imprisonment but section 276D provides for fine as an alternative for imprisonment. Since the legislature has used the phrase “shall be punishable” in each of the sections, the question that arises whether the Court can interpret the phrase “shall be punishable” to mean “may be punishable” and whether the Court will have discretion to award the imprisonment or not, or to award only fine and not imprisonment.

The Supreme Court in *State of Maharashtra v. Jaymanderalal, AIR 1966 SC 940,* while interpreting section 3(1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956, held that by using the expression shall be punishable, the legislature has made it clear that the offender shall not escape the penal consequences”.

In *Modi Industries Ltd v. B.C. Goel, (1983) 144 ITR 496(All) (HC),* has taken the view that Courts have no power to reduce the punishment prescribed by the statute.

# 21. Compounding of offences

S. 279(2) empowers the Chief Commissioner or Director General to compound an offence under the Act, either before or after the initiation of proceedings. The Department has issued new set of guidelines for compounding of offences under direct taxes **vide notification F.No. 185/35/2013 IT (Inv.V)/108 dated December 23, 2014 (2015) 371 ITR 7 (St) (www.itatonline.org).**

These guidelines replace the existing guidelines issued vide F.No 285/90/2008, dated May 10 2008, with effect from January 1, 2015. However, cases that have been filed before this date shall continue to be governed by earlier guidelines. Under S.279(2), an offence can be compounded at any stage and not only when the offence is proved to have been committed. Once compounding is effected, the assessee cannot claim a refund of the composition amount paid on the ground that he had not committed any of said offences *(Shamrao Bhagwantrao Deshmukh v. The Dominion of India (1995) 27 ITR 30 (SC)).*

# Compounding of offences contd...

The requirement under S.279(2) is that the person applying for a composition must have allegedly committed an offence. The compounding charges might be paid even before a formal show cause notice has been issued. On the other hand, even if the accused is convicted of an offence and an appeal has been preferred against the same, there seems to be no particular bar to give effect to a compounding during the pendency of such appeal and the accused shall not have to undergo the sentence awarded if he pays the money to be paid for compounding. Prosecution initiated under Indian Penal Code, if any, cannot be compounded under the provisions of the Income-tax Act. However, S. 321 of the Criminal Procedure Code, 1973, provides for withdrawal of such offences.

Notwithstanding anything contained in the guidelines, the Finance Minister may relax restrictions for compounding of an offence in a deserving case on consideration of a report from the board on the petition of an appellant.

# 22.Procedure for compounding

The accused has to approach the Commissioner with a proposal for compounding. A hearing has to be given to the assessee by the Commissioner on the proposal for compounding made by him and thereafter the compounding fees are finally determined. The ultimate decision as to the acceptance or refusal of the compounding proposal lies with the Commissioner. If the Commissioner accepts the proposal for compounding, the same would have to be recommended by him to the Central Board of Direct Taxes. It may be noted that offences under Indian Penal Code cannot be compounded by the competent authority under the Income-tax Act. However, generally when the alleged offences under direct tax laws are compounded, the prosecution launched for the corresponding alleged offences under IPC are also withdrawn.

In *V.A. Haseeb and Co. (Firm) v. CCIT (2017) 152 DTR 306 (Mad.) (HC),* the Court held that, application for compounding cannot be rejected merely because of the conviction of assessee in the Criminal Court.

In *Punjab Rice Mills v. CBDT ( 2011) 337 ITR 251 (P& H) (HC),* it was held that the Court will not compel the Commissioner to compound the offence or interfere unless the exercise of discretionary statutory power was held to be perverse or against the due process of law.

# Procedure for compounding contd...

In ***S Anil Batra v. CCIT (2011) 337 ITR 251 (Delhi)(HC),*** The Court held that where three complaints had already been filed against petitioner for offence under section 276B and in two of those, petitioner stood convicted by Court, competent authority was not bound to effect compounding in violation of mandatory prohibitions prescribed, therefore, offence could not be said to be compoundable at instant stage. The Court up held the rejection order of Commissioner for not compounding the offences. Writ petition of assessee was dismissed. (A.Y. 1982 83 to 1984-85)

When High Court has given direction to consider the application for compounding, pendency of appeal against conviction could no longer be a reason for refusing consideration for compounding of offence.

**In the case of *Government of India, Ministry of Finance, Department of Revenue (CBDT) v. R. Inbavalli (2018) 400 ITR 352/301 CTR 225 (Mad.) (HC),***Allowing the petition the Court held that ;When High Court has given direction to consider the application for compounding, pendency of appeal against conviction could no longer be a reason for refusing consideration for compounding of offence ,with in meaning of clause 4.4 (f) of Guidelines dated 16-5-2008 (F.No. 285/90/2008 - IT (Inv) dt. 16 th May .2008) (AY. 1996-97 to 1998-99)

# Procedure for compounding contd...

Failure by assessee to deposit amount deducted as tax at source was beyond its control, Order rejecting application for compounding not sustainable.

In the case of ***Sports Infratech P. Ltd. v.Dy. CIT (2017) 391 ITR 98 (Delhi) (HC),*** allowing the petition the Court held that ;failure by assessee to deposit amount deducted as tax at source was beyond its control, Order rejecting application for compounding not sustainable - Guidelines issued by CBDT do not bar for consideration of application of offence having regard to facts of the case.

**Compounding of an offence – No time limit is prescribed-The CBDT has no jurisdiction to demand that the assessee pay a 'pre-deposit' as a pre-condition to considering the compounding application.**

In the case of ***Vikram Singh v. UOI (2017) 394 ITR 746 (Delhi) (HC)*** Allowing the petition ;the Court held that; As, there is no time limit prescribed for filing an application for compounding of an offense, the CBDT is not entitled to reject an application on the ground of 'inordinate delay'. The CBDT has no jurisdiction to demand that the assessee pay a 'pre-deposit' as a pre-condition to considering the compounding application. The larger question as whether in the garb of a Circular the CBDT can prescribe the compounding fee in the absence of such fee being provided for either in the statute or prescribed under the rules is left open.

# 23.Power of the Settlement Commission to grant immunity. S. 245H S.

245H(1)(2) (1) empowers the Settlement Commission under the specified circumstances to grant immunity to the assessee from prosecution for an offence, subject to such conditions as it may think fit to impose. However, sub-section (2) of S.245H also empowers the Settlement Commission to withdraw the immunity so granted if it is satisfied that such person has not complied with the conditions subject to which immunity was granted or that such person had in the course of the settlement proceedings concealed any particular relevant material or had led false evidence.

In ***Nirmal and Navin P. Ltd. And Others v. D. Ravindran (2002) 255 ITR 514 (SC)***, the Court held that when immunity is granted by Settlement Commission, it, was not open to Criminal Court to go behind order passed by Settlement Commission. As per the proviso to S. 245H(1), the Settlement Commission is precluded from granting immunity from prosecution in cases where prosecution has been instituted on the date of receipt of application for settlement, under section 245C.

In ***Anil Kumar Sinha v. UOI (2013) 352 ITR 170 (Pat.) (HC),*** the Court held that, if prosecution is already launched and thereafter the assessee moves Settlement Commission, the Settlement Commission was justified in not granting immunity in respect of prosecution which was already launched u/s. 276CC of the Act.

# 24.Power of Central Government to grant immunity. S. 291

S. 291(1) of the said Act, confers on the Central Government a power, under specified circumstances, to grant immunity to the assessee, from prosecution for any offence under the Direct taxes, IPC or any other Central Act to a person, with a view to obtain evidence. This is subject to condition of him making a full and true disclosure of the whole circumstances relating to the concealment of income or evasion of payment of tax on income. However, sub- section (3) of this section, empowers the Central Government to withdraw the immunity so granted, if such person has not complied with the condition on which such immunity was granted or is wilfully concealing anything or is giving false evidence.

## 25. Whether for the offences committed under the Income-tax Act, prosecution can also be launched under Indian Penal Code

As per the provisions of S.26 of the General Clauses Act, 1897, where an Act or omission constitutes an offence under two or more enactments, the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence and the punishment shall run concurrently. To strengthen the case of the revenue, generally the revenue also launches prosecution under the various provisions of the Indian Penal Code.

A chart indicating briefly therein the various acts or omissions under the Direct Tax laws which tantamount to commission of an offence under Indian Penal Code is given in Annexure " B".

# 26. QUASHING PETITION UNDER SEC. 482 OF THE CR.P.C.

One of the most resorted to and sought after remedy in prosecutions under Chapter XXII of the I.T. Act, is filing of a quashing petition under Sec. 482 of the Cr.P.C. However, one has to understand that for each and every case, quashing petition under Sec.482 of the Cr.C.P.C., may not be an effective remedy.

**The general and consistent law is that the inherent power of the High Court under Sec. 482 of Cr.P.C. for quashing has to be exercised sparingly with circumspection and in the rarest of rare cases.**

The Supreme Court in **Som Mittal vs Govt. Of Karnataka AIR 2008 SC 1528,** has held that the power under Sec. 482 Cr.P.C. must be exercised sparingly, with circumspection and in rarest of rare cases. Exercise of inherent power under Sec. 482 of the Code of Criminal Procedure is not the rule but it is an exception. The exception is applied only when it is brought to the notice of the Court that grave miscarriage of justice would be committed if the trial is allowed to proceed where the accused would be harassed unnecessarily if the trial is allowed to linger when prima facie it appears to Court that the trial would likely to be ended in acquittal.

# QUASHING PETITION UNDER SEC. 482 OF THE CR.P.C. Contd...

In the case of **Central Bureau of Investigation *v.* Ravi Shankar Srivastava 2006 Cri LJ 4050,** the Supreme Court was of the opinion that, the High Court in exercise of its jurisdiction under Sec. 482 of the Code does not function either as a court of appeal or revision, and held and envisaged that three circumstances under which the inherent jurisdiction may be exercised, namely,

1. to give effect to an order under the Code,
2. to prevent abuse of the process of the Court, and
3. to otherwise secure the ends of justice.

In another case, **State of Haryana and others v. Ch. BhajanLal &Ors AIR 1992 SC 604,** the Supreme Court laid down the categories of cases in which the High Court may, in exercise of powers under Sec. 226 of the Constitution of India or under Sec. 482 Cr.P.C., interfere in proceedings to prevent abuse of process of the Court or otherwise to secure the ends of justice.

In the case of **Pepsi Foods Ltd. *v.* Special Judicial Magistrate 1998 Cri LJ 1,** wherein it has been specifically held that though the Magistrate trying a case has jurisdiction to discharge the accused at any stage of the trial if he considers the charge to be groundless but that does not mean that the accused cannot approach the High Court under Sec. 482 of the Code or Article 227 of the Constitution to have the proceeding quashed against them when no offence has been made out against them and still why must they undergo the agony of a criminal trial.

# 27. A brief check-list for filing proper reply to avoid the prosecution

1. Whenever survey or search has taken place, if incriminating documents or unaccounted assets are found, the assessee concerned has to evaluate whether to approach the Settlement Commission or to take the said matter in appeal.

2. Whenever the additions are made in assessments on an agreed basis, it should be specifically brought to the notice of the Assessing Officer that the additions are agreed on to buy peace of mind as also with an understanding that penalty and prosecution proceedings shall not be initiated.

3. Where any large additions are made in an assessment, order should be agitated by preferring an appeal against the additions.

4. Whenever notice is issued for levy of the penalty for concealment of particulars of income, a detailed reply should be given stating therein the grounds for non-levy of the same and if the penalty is still levied, it should be agitated in appeal at least till the Tribunal stage.

# A brief check-list for filing proper reply to avoid the prosecution contd...

5. The prosecution proceedings are launched by the department on the basis of evidence collected by them and it is necessary that proper replies, explanation, etc. be given against the said evidence collected so that it cannot be used against the assessee for launching of prosecution proceedings.

6. In the course of search, seizure or survey proceedings under the Act, statements are recorded by the authorised officers and normally these statements are used as evidences in the assessment and prosecution proceedings. Hence, it would be advisable that specific answers be given to the queries put forward and in cases where the assessee is doubtful of the answer, the said doubt as to the answer may be specifically mentioned. In case of a statement on oath is recorded by using coercion or threat, it would be advisable to retract the same immediately by filing a letter or by filing an affidavit to that effect.

7. The directors of a company, before signing any return, such as TDS returns or other documents, should get the same initialed and verified by a responsible person such as the concerned manager, accountant, etc., to show that he has taken reasonable care before signing the return.

8. The part time Directors of the company should not sign the Balance sheet, and in the Director's report, they should make it very clear that they are not responsible for the day to day management of the Company.

# A brief check-list for filing proper reply to avoid the prosecution contd...

9. While giving reply to show cause notice, the Assessee has to give detailed reply on facts. If certain evidences were not produced before the Authorities, they should try to produce the same while giving reply to show cause notice. However, technical mistakes need not be corrected while giving the reply.

10. The professionals generally should not use their letterhead or their name for preparation of documents unless it is absolutely necessary.

11. While giving the certificate for the paper book compilation before the Tribunal or any other authority, the contents need to be verified and only then must the certificate be given. If the certificate is held to be incorrect thereafter, the one who has given wrong certificate may get the notice from the competent authorities to initiate prosecution proceedings.

12. If certain facts are not properly recorded by the Assessing officer, the assessee should file the rectification application before the Assessing Officer. In certain circumstances, it may be desirable to mention correct facts in the form of affidavit. Assessee should be very careful in given the statement on oath in the form of an affidavit.

# 28. Conclusion

Tax consultants may have to guide assessees to better comply with the provisions of the Act and adopt better tax management practices to maintain the peace of mind. It may not be advisable to venture into highly adventurous tax avoidance schemes just to avoid paying the Government the taxes due. One should appreciate that the tax administration, with the help of technology and reporting system, is well equipped to catch tax evaders. It is desired that all citizens must follow the Article 51A of the Constitution of India being fundamental duties read with 265 of the Constitution of India i.e., pay the taxes which are rightfully due to Government, neither less nor more. I hope the CBDT will also try to implement the suggestions of the Comptroller and Auditor General of India for better administration of prosecution proceedings. Objective suggestions from the readers will be highly appreciated.

# ISSUES

**DIFFERENCE BETWEEN SUB-SEC. (1) AND SUB-SEC. (2) OF SEC. 276C OF THE I.T. ACT**

The wording and language in both sub-Sec. (1) and sub-Sec. (2) of Sec. 276C of the I.T. Act appear to be identical except for two important differences.

The sub-Sec. (1) of Sec. 276C of the I.T. Act deals with evasion of any tax, penalty or interest 'chargeable or imposable' under the Act.

The sub-Sec. (2) of Sec. 276C of the I.T. Act deals with the evasion of the 'payment' of any tax, penalty or interest under the Act.

Therefore, it would appear that the provisions of sub-Sec.(1) of Sec. 276C operate when any tax, penalty or interest is chargeable or imposable and the same is alleged to have been evaded. On the other hand, the provisions of Sec. 276C(2) would operate when the payment of tax, penalty, or interest is due and an attempt is made to evade the payment there of **Vinodchandra C. Patel vs State Of Gujarat[2001]118TAXMAN526(Guj) and Vinaychandra Chandulal Shah vs State Of Gujarat[1995]213ITR307(Guj).**

# ISSUES Contd...

For being charged, under Sec. 276C(2) following three conditions are required to be fulfilled:

Wilful attempts in any manner,

To evade the payment of any tax, penalty or interest under this Act, and

The tax, penalty or interest that is assessed, imposed or charged as the case may be and not otherwise.

The Kerala High Court has held that "Sub-Sec. (1) and (2) of Sec. 276C of the I.T. Act, deal with two different situations. Sub-Sec. (1) deals with evasion of tax, penalty or interest *CHARGEABLE OR IMPOSABLE* under the Act. Therefore, evidently, *WHAT IS CONTEMPLATED IS EVASION BEFORE CHARGING OR IMPOSING tax, penalty or interest*. That may include wilful suppression in the returns before assessment and completion. But Sub-Sec. (2) *DEALS WITH EVADING THE PAYMENT OF TAX, PENALTY OR INTEREST* under the Act. The words *CHARGEABLE OR IMPOSABLE ARE NOT THERE*. What sub-Sec. (2) says is without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable..... Therefore, evidently, Sub-Sec. (2) *TAKES IN CASES OF TAX EVASION AFTER CHARGING OR IMPOSITION*. Evasion after completion of assessment also comes within the operation of the sub-Sec.2 **.**

# ISSUES Contd...

**FILING OF RETURN UNDER SEC. 276CC: WITHIN TIME – PROSECTION WRONG**

In a revision petition against the proceedings under Sec. 276C(1) of the I.T. Act before the Andhra Pradesh High Court, it was held that where the respondents have yet to file a return, the prosecution is premature and the dismissal of the complaint is right. Thus, even before the act of attempt to evade is started, on a mere anticipation or contemplation that there may be a possibility of accruing liability after finalization of regular assessment proceedings, it cannot be said that the accused is liable for conviction under Sec. 276C(1) of the I.T. Act[15].

For the interpretation of Sec.276CC of the I.T. Act, in a criminal appeal titled **Sasi Enterprises Vs. Assistant Commissioner of Income Tax***(2014) 361 ITR 163 (SC).*, the Hon'ble Supreme Court Of India formulated the following questions as under:

1.Whether an Assessee has the liability/duty to file a return under Sec. 139(1) of the Act within the due date prescribed therein?

2.What is the effect of best judgment assessment under Sec. 144 of the Act and will it nullify the liability of the Assessee to file its return under Sec. 139(1) of the Act?

3.Whether non-filing of return under Sec. 139(1) of the Act, as well as non-compliance of the time prescribed under Sec.s 142 and 148 of the Act are grounds for invocation of the provisions of Sec. 276CC of the Act?

# ISSUES Contd...

4.Whether the pendency of the appellate proceedings relating to assessment or non-attaining finality of the assessment proceedings is a bar in initiating prosecution proceedings under Sec. 276CC due to non-filing of returns?

5.What is the scope of Sec. 278E of the Act, and at what stage the presumption can be drawn by the Court?

While answering the above questions framed by it, the Supreme Court has held as under:

*"Sec.* 276CC *applies to situations where an Assessee has failed to file a return of income as required under Sec.* 139*of the Act or in response to notices issued to the Assessee under Sec.* 142 *or Sec.* 148*of the Act."*

The proviso to Sec. 276CC gives some relief to genuine assesses. The proviso to Sec. 276CC gives further time till the end of the assessment year to furnish return to avoid prosecution. In other words, even though the due date would be 31st August of the assessment year as per Sec. 139(1) of the Act, an Assessee gets further seven months' time to complete and file the return and such a return though belated, may not attract prosecution of the Assessee.

# ISSUES Contd...

Similarly, the proviso in clause ii(b) to Sec. 276CC also provides that if the tax payable determined by regular assessment has reduced by advance tax paid and tax deducted at source does not exceed Rs. 3,000/-, such an Assessee shall not be prosecuted for not furnishing the return under Sec. 139(1) of the Act. Resultantly, the proviso under Sec. 276CC takes care of genuine assesses who either file the returns belatedly but within the end of the assessment year or those who have paid substantial amounts of their tax dues by pre-paid taxes, from the rigor of the prosecution under Sec. 276CC of the Act.

Sec. 276CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings. The department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. The language of Sec. 276CC, is clear so also the legislative intention.

It is trite law that as already held by the Supreme Court in **B. Permanand v. Mohan Koikal** that "the language employed in a statute is the determinative factor of the legislative intent. It is well settled principle of law that a court cannot read anything into a statutory provision which is plain and unambiguous". If it was the intention of the legislature to hold up the prosecution proceedings till the assessment proceedings are completed by way of appeal or otherwise the same would have been provided in Sec. 276CC itself.

# ISSUES Contd...

Therefore, it would be wrong to hold that no prosecution could be initiated till the culmination of assessment proceedings, especially in a case where the Appellant had not filed the return as per Sec. 139(1) of the Act or following the notices issued under Sec. 142 or Sec. 148 does not arise.

The Revenue is entitled as per section 278D to reply on the presumption under section 132(4A) in a prosecution filed under section 275A.

Where the assessee had deposited Rs. 50,000 even prior to filing his reply to the show cause notice praying for time to deposit the entire amount and subsequently deposited the entire amount with interest, it was held that there had been no wilful attempt on the part of the assessee to evade payment of tax and prosecution u/s 276C was not proper.

***Sushil Kumar Saboo. v. State of Bihar (2011) 336 ITR 202 (Pat.)(High Court***)

# THANK YOU

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