

PROSECUTION

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. 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.

Some of the Sections under which the Income Tax Department has taken stringent steps in initiating the prosecution proceedings recently are:

1. **Section 276B relating to Failure to pay TDS deducted to the credit of Central Government.**

Prosecution can be initiated under this section, in case where a person fails to pay the TDS deducted to the Government Treasury as per the provisions of Chapter XVII Part B.

If there is **reasonable cause** for failure to deposit the said TDS deducted, no prosecution shall be initiated. [Section 278AA].

Case law: *Sonali Autos (P.) Ltd. vs. State of Bihar [2017] 396 ITR 636 (Patna)*

Summary: Oversight on part of accountant, who was appointed to deal with Accounts and Income Tax matters, can be presumed to be reasonable cause for not deposited the TDS deducted within the time.

2. **Section 276C relating to Willful attempt to evade Tax, etc.**

Sub-section (1):

Prosecution can be initiated under this section, in case where a person willfully attempts in any manner whatsoever to evade any tax, penalty or interest chargeable or imposable, or under reports his income, under this Act

The Explanation to S. 276C further extends the meaning of the term willful attempt to evade tax. In many decisions it has been held that imposition of penalty u/s 271(1)(c) is a pre requisite for prosecution u/s 276C. However, it does not mean that in every case where there is a penalty u/s 271(1)(c) has been imposed, it is a fit case for prosecution u/s 276C.

Case Law: *K.C. Builders vs. ACIT [2004] 135 Taxman 461 (SC)*

Summary: levy of penalties under section 271(1) (c) and prosecution under section 276C are simultaneous and, therefore, once penalties are cancelled on ground that there is no concealment, quashing of prosecution under section 276C is automatic.

Sub-section (2):

Prosecution can be initiated under this section, in case where a person willfully attempts in any manner whatsoever to **evade** the payment of **any tax, penalty or interest under this Act**

The word 'evasion' is defined in various dictionaries as under:

Stroud's Judicial Dictionary:

"Everybody agrees that 'evade' is capable of being used in two senses:

- (1) Which suggests underhand dealing;
- (2) Which means nothing more than the intentional avoidance of something disagreeable."

Webster's Dictionary:

- (1) An avoiding of a duty, question, fact, etc., by deceit or cleverness.
- (2) The means of doing this; excuse, subterfuge, equivocation, artifice.

Wharton's Law Lexicon:

"The art of escaping by means of artifice, a trick or subterfuge"

Thus, to conclude that a person attempted to evade the payment of tax, there must be allegation that by way of some device the assessee evaded to pay tax or played any tricks or there was any underhand dealing etc.,

Section 276C(2) deals with evasion after quantification. It becomes applicable only after the income is assessed and the assessee attempts to evade the payment of tax determined. What sub-section (2) of Section 276C requires is three things:

- (1) Willful attempts in any manner.
- (2) To evade the payment of any tax, penalty or interest under this Act, and
- (3) The tax, penalty or interest that is assessed, imposed or charged as the case may be and not otherwise.

In a case where the assessee has paid the tax liability before assessment, section 276C(2) is not at all applicable.

The following Judicial Pronouncements confirms the above view.

a. Gujarat Travancore Agency v. CIT [1989] 177 ITR 455, 457 (SC)

b. G. Viswanathan v. ITO [1987] 167 ITR 103 (Ker.)

c. Simms v. Registrar of Probates [1900] AC 323 (Privy Council)

d. Vinaychandra Chandulal Shah v. State of Gujarat. [1995] 213 ITR 307 (Guj)

e. Vinodchandra C Patel v. State of Gujarat. [2002] 253 ITR 289 (Guj)

Note: Provisions of Section 278AA shall not apply in case of S. 276C.

3. Section 276CC relating to Failure to Furnish Return of Income

Prosecution can be initiated under this section, in case where a person willfully fails to furnish in due time the return of Income.

Case Law: *ITO v/s Autofil*, [1990] 52 TAXMAN 343 (AP)

Summary: in absence of mens-rea, a bad motive and guilty mind on part of the assessee to evade the taxes, no prosecution could be initiated u/s 276CC.

Case Law: *Ito vs Sanjay Sawhney (CC No. 136/4) affirming the view of Hon'ble Supreme Court in Rang Bahadur Singh Vs. State of U.P. 2000 II AD(S.C.) 103.*

Summary: For prosecution, it is the department's onus to prove that it's a case beyond reasonable doubt.

Case Law: *Machinery v/s Union Of India [2010] 320 ITR 263 (MP)*

Summary: it is not merely failure to file the return in time, which constitutes the offence under section 276CC. The failure to file the return in time must be proved by clear, cogent and reliable evidence to be 'willful' and there should be no plausible doubt of its being 'willful'. It must be intentional, deliberate, calculated and conscious with full knowledge of the legal consequences flowing from them.

Case Law: *Inbasagaran vs Asst. Commr. Of Income Tax (2001 247 ITR 528 Mad)*

Summary: In case where there is no loss caused to the revenue nor is there any ultimate evasion of tax as such. It is only that there is a failure to furnish the return of income in due time which is technical in nature. Such a case is not fit one for prosecution u/s 276CC.

Note: Provisions of Section 278AA shall not apply to S. 276CC.

4. Some highlights on CBDT Guidelines on compounding of Offences dated 23/12/2014.

- a. The provisions of compounding of offences has been provided in Section 279 (2) of the Income Tax Act, 1961. However, as per Para 4 of the said guidelines Compounding of Offences is not the matter of Right.
- b. Eligibility for compounding has been specified in Para 7 of the said guidelines.
- c. Offences which are generally not compoundable have been specified in Para 8 of the said Guidelines.
- d. Procedures and Various time limits for disposing of compounding application has been specified in Para 11 of the said guidelines.
- e. The following are included in the term Compounding charges, which shall be intimated by the competent authority to applicant:
 - Compounding Fees
 - Prosecution Establishment Expenses
 - Litigation expenses

(A) Compounding Fees:-

Section 276B:

1st Application : 3% per month or part thereof of the amount of tax in default disclosed in compounding application.

Subsequent Application: 5% per month or part thereof of the amount of tax in default

Period : Date of deduction to Date of depositing the amount.

Section 276C(1): 100% of Amount sought to be evaded.

Section 276C(2): 3% per month or part thereof of the amount of Tax, etc. the payment of which was sought to be evaded, for the period of default.

Section 276CC: 2% per month or part thereof of tax and interest determined on assessment/reassessment.

Period: From the day immediately after due date of ROI filing to date of furnishing of ROI.
(In case if no ROI furnished, till date of completion of assessment)

(B) Prosecution Establishment Expenses:

Higher of the following:

- 10% of Compounding Fees or
- Rs. 25,000

(C) Litigation expenses shall include Counsel's fees.