THE CHAMBER OF TAX CONSULTANTS

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1. Wanchoo Committee Report.

Monetary penalties are not enough- Tax dodger finds it a profitable proposition to carry on evading taxes over the years, if the only risk to which he is exposed is a monetary penalty in the year in which he happens to be caught.

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"). Provisions of the Criminal Procedure Code, 1973 are to be followed relating to all offences under the Income-tax Act, unless the contrary is specially provided for by the Act.

3. 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. Normally, the Magistrate Court in whose territorial jurisdiction an offence is committed tries the offence.

4. An offence under the Act 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 been prepared elsewhere or that accounts have been fabricated at some other place.

5. 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 where false 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.

6. Prosecution can continue while assessment proceedings are in progress. The assessment proceedings need not be concluded

for launching of prosecution- ***P. Jayapan 149 ITR 696 (SC***).

7. However, if the assessment is set aside by the Tribunal, the prosecution cannot continue-***Uttam Chand 133 ITR 909 (SC***); ***Sheo Shankar Sah 106 Taxman 536 (Pat***.).

8. Once penalty u/s. 271(1)(c) of the Act is set aside by the Tribunal, prosecution would end automatically.- ***K.C. Builders 265 ITR 562 (SC***).

9. Finding given by the Tribunal would be binding on the Criminal Court- ***V. Gopal & Co. 279 ITR 510 (SC***); ***Nandlal & Co. 341 ITR 646 (SC***.).

10. Where additions are deleted by the Tribunal, prosecution would not survive- ***CIT V/s. Didwania 224 ITR 687 (SC***); ***Ashok Kumar Jhunjhunwala 310 ITR 160 (Pat***.).

11. Where appellate proceedings are in progress, the criminal court is expected to stay the proceedings- ***Bhupen Dalal 248 ITR 830 (SC***).

12. 'Continuous Offence'- Default in payment of TDS.

11. **<u>Section 277</u>**.

A) Sec. 277- No time limit for launching of prosecution-

Venkatesh Nayak V/s. ITO 202 ITR 575 (Karn.).

B) Prosecution possible only if there is tax evasion-

Gadamsetty Nagamiah Chetty 219 ITR 263 (AP).

12. Compounding of Offences.

13.**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 Circular No. 469 dt. 23-9-1986 (1986) 162

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).*The Apex Court in the afore mentioned decision observed that where ever specifically provided, in every prosecution case, the Court shall always presume culpable mental state and it is for the accused to prove the contrary beyond reasonable doubt. This is a drastic provision which makes far reaching changes in the concept of mens rea in as much it shifts the burden of proof to show the absence of the necessary ingredients of the intent to commit the crime upon the accused and is radical departure from the concept of traditional criminal jurisprudence. 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)*, 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 defense 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.

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)*.

Procedures.

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.

II. Procedure before Court

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. Before the trial itself is underway and regular hearings start in a matter, the court has to frame charge against the accused. Framing of the charge means that on the basis of the complaint and on seeing the primary evidence after hearing the accused, the court charges the accused of the offences purported to be committed by him. If on hearing the accused, the court feels that there is no apparent case against the said accused the court will dismiss the complaint. However, if the court feels that there is substance in the complaint the charges will be framed and the proceedings shall continue as per the Criminal Procedure Code. **Many of the Assessing Officers may not be aware that Assessing Officer who has filed the complaint may have to be examined before the final decision is taken.** Given the current pendency in courts, it is completely possible that prosecution that is launched in the year 2018 may very well come up for hearing after 15 or 20 years, and even though the officer who has launched the prosecution

might have retired, he may still have to attend the proceedings. Therefore, it is very essential that before launching the prosecution the officer concerned may have to examine the consequences, especially the possibility of the matter being tried several years after the prosecution has been initiated.

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 filed by the appellant or by his pleader 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))*

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.

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. It may be noted that, as per the instruction No. 5051 of 1991 dt. 7-2-1991 issued by the Board stated as under:

"Prosecution need not normally be initiated against a persons who have attained the age of 70 years at the time of commission of the offence".

In *Pradip Burma v. ITO (2016) 382 ITR 418 (Delhi) (HC)*, the court held that, at the time of commission of offence the petitioner has not reached the age of 70 years, hence the circular was held to be not applicable.

6. 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. The assessment proceedings are conducted by the Income Tax Authorities and are civil proceedings in nature, whereas prosecution for offences committed are tried before a competent court. The provisions of the Law of evidence that do not bind assessment proceedings, are to be strictly followed in criminal 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.

7. 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)*, while dealing with prosecution proceedings u/s. 277, held that the finding given by the Appellate Tribunal is binding on the criminal courts. Therefore, when there is a finding of the Appellate Tribunal leading to the conclusion that there is no prima facie case against the assessee for concealment, then that finding would be binding on the court and the court will have to acquit or discharge the assessee.

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.

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

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. Following this principle the courts have quashed prosecution proceedings on the basis of the cancellation of penalty by the Appellate Authority (Shashichand Jain & Ors. v UOI (1995) 213 ITR 184 (Bom) (HC). When Tribunal decides against the assessee in quantum proceedings and if there is possibility of department launching prosecution proceedings, it may be desirable for the assessee to file an appeal

before the High Court. 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.

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)

9. 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). 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 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.

10. 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. In this case, an advocate deliberately omitted in a return submitted by him a certain amount of money and persisted in taking up false defences. The Government lost a huge amount because of the exclusion of the said amount in the return filed by the advocate on behalf of his client. A fine for the said offence was levied by the trial court on an appeal, the High Court took a serious view, of the offence and held that in a case like this, the punishment should be deterrent and exemplary and the assessee was ordered to be kept in simple imprisonment for one month. 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.

14. 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.

15. 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.

16. 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. 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.

18. 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)

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)*). 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.

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.

21. 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.

22. 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".

23. 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.

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.

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.

PROSECUTION UNDER INCOME TAX ACT 1961

Annexure – "A"

Sr. No.	**Act or omission which constitutes an offence**	**Section under I.T. Act, 1961**	**Rigorous Maximum**	**Punishment Imprisonment Minimum**
(1)	**(2)**	**(3)**	**(4)**	**(5)**
1.	Contravention of an order u/s. 132(3) Contravention of the terms in a prohibitory order issued u/s. 132(3)	275A	Up to two years and fine	On the discretion of the Judge

2.	Failure to comply with provisions of S.132(1)(iib)	275B	Up to two years and fine	On the discretion of the Judge
3.	Removal, concealment, transfer or delivery of property to thwart tax recovery (w.e.f. 1-4-1989)	276	Up to two years and fine	
4.	Liquidator (a) Fails to give notice u/s. 178(1) (b) Fails to set aside the amount u/s. 178(3)	276A (i) 276A (ii) 276A (iii)	Up to two years	Not less than six months unless special and adequate reason given

	(c) Parts with assets of co.			
5.	Failure to pay tax to the credit of Central Government under Chapter XIID or XVIIB	276B	Up to seven years and fine	Three months and fine
6.	Failure to pay tax collected at source	276BB	Up to seven years and fine	Three months and fine
7.	a) Wilful attempt to evade tax, penalty, interest, etc. chargeable or imposable under the Act. b) Wilful attempt to	276C(1) 276(2)	If tax evaded is over ₹ 2,50,000 – Seven years and fine. In any other case two years and fine.	Six months and fine Three months and fine. Three months and fine

	evade payment of tax, penalty or interest		Two years and fine.	
8.	Wilful failure to file return of income u/s. 139(1) or return of fringe benefit u/s. 115WD(1) or in response to notice u/s. 115WD(2), 115WH, 142(1), 148 or 153A of the Act	276CC	If the amount of tax evaded is over ₹ 2,50,000/- up to seven years and fine In any other case, two years and fine	Six months and fine Three months and fine
9.	Wilful failure to furnish in due time return in response to notice under section	276CCC	Simple imprisonment for a term of three years nd fine	Three months and fine

	158BC.			
10.	Wilful failure to produce accounts and documents or non-compliance with an order u/s. 142(2A) to get accounts audited etc.	276D	Imprisonment up to one year with fine	
11.	Whenever verification is required under Law, making a false verification or delivery of a false account or statement.	277	If amount of tax evaded is more than ₹ 2,50,000/- – Rigorous imprisonment up to 7 years and fine In other cases, two	Six months and fine Three months and fine

			years and fine	
12.	Falsification of books of account or document, etc.	277A	Rigorous imprisonment for a term up to two years and with fine	Three months and fine
13.	Abetting or inducing another person to make deliver a false account, statement or declaration relating to chargeable income or to commit an offence u/s. 276C(1)	278	Amount of tax, penalty or interest evaded more than ₹ 2,50,000/- – up to seven years and fine Any other case two years and fine	Six months and fine Three months and fine.

14.	A person once convicted, under any of the sections 276B, 276(1), 276CC, 276DD, 276E, 277 or 278 is again convicted of an offence under any of the aforesaid sections.	278A	Up to 7 years and fine	Six Months and fine
15	A public servant furnishing any information or producing any document in contravention of s. 138	280	Imprisonment up to six months and fine	At the discretion of the Judge

OFFENCES UNDER THE INDIAN PENAL CODE – Annexure

– “B”				
Section	**Offence**	**Punishment**	**Cognizable or non-cognizable**	**Bailable or non bailable**
(1)	**(2)**	**(3)**	**(4)**	**(5)**
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment	Same as for offence abetted. [No limit to the number of years of imprisonment]	According as offence abetted is cognizable or non cognizsable	According as offence abetted is bailable or non bailable.
110.	Abetment of any offence, if the person abetted does the	– Do –	– Do –	– Do –

	act with a different intention from that of the abettor			
111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso	Same as for offence intended to be abetted.	– Do –	– Do –
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by	Same as for offence committed	– Do –	– Do –

	the abettor			
114	Abetment of any offence, if abettor is present when offence is committed	– Do –	– Do –	– Do –
Chapter X- contempts of the Lawful Authority of Public servants				
172	Absconding to avoid service of summons or other proceeding from a public servant If summons or notice require attendance	Simple imprisonment for one month, or fine of 500 rupees, or both Simple imprisonment for 6 months, or fine of 1000 rupees or both	Non cognisable	Bailable

	in person by agent etc. in a court of Justice			
173.	Preventing the service or the affixing of any summons of notice, or the removal of it when it has been affixed, or preventing a proclamation If summons, etc. require attendance in person by agent etc., in	Simple imprisonment for one month, or fine of 500 rupees, or both Simple imprisonment for 6 months, or fine of 1000 rupees or both	– Non cognisable	Bailable

	a court of justice			
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority If the order requires personal attendance by an agent, etc. in a	Simple imprisonment for one month, or fine of 500 rupees, or both Simple imprisonment for six months, or fine of 1000 rupees, or both.	Non cognisable	Bailable

	court of Justice			
175	Intentionally omitting to produce a document to a public servant by a personal legally bound to produce or believer such document If the document or electronic record is to be produced or delivered to a Court of	Simple imprisonment for one month, or fine of 500 rupees, or both. Simple imprisonment for six months, or fine of 1000 rupees, or both	Non cognisable	Bailable

	Justice			
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information If the notice or information required respects the commission of an offence, etc.	Simple imprisonment for one month, or fine of 500 rupees, or both. Simple imprisonment for six months, or fine of 1000 rupees, or both	Non cognisable	Bailable

	If the notice or information is required by an order passed u/s. sub section (1) of sec. 565 of this code			
177.	Knowingly furnishing false information to a public servant	Simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both;	Non cognisable	– Bailable

		Imprisonment for 2 years or fine or both.		
(1)	(2)	(3)	(4)	(5)
178	Refusing oath when duly required to take oath by public servant	Simple imprisonment for six months, or fine of 1000 rupees or both.	Non cognisable	Bailable
179	Being legally bound to state truth, and refusing to answer questions.	– Do –	Non cognisable	Bailable
180	Refusing to sign a statement made to a public	Simple imprisonment for three months, or	Non cognisable	Bailable

	servant when legally required to do so.	fine of 500 rupees, or both.		
181	Knowingly stating to a public servant on oath as true that which is false.	Imprsonment for three years and fine.	Non cognisable	Bailable
186	Obstructing public servant in discharge of his public functions	Imprisonment for three months, or fine upto 500 rupees or both.	Non cognisable	Bailable
Chapter XI – False Evidence and Offences against Public Justice.				
193	Giving or fabricating false evidence in a judicial proceedings	Imprisonment for 7 years and fine. Imprisonment for three years	Non cognisable – Do –	Bailable – Do –

	Giving or fabricating false evidence in any other case	and fine		
196.	Using in a judicial proceeding evidence known to be false or fabricated	The same as for giving or fabricating false evidence.	Non cognisable	According of giving such evidence is bailable or non bailable
197.	Knowingly issuing or signing a false certificate relating to any fact of which	– Do –	Non cognisable	Bailable

	such certificate is by law admissible in evidence.			
198.	Using as a true certificate one known to be false in a material point	– Do –	– Do –	– Do –