THE CHAMBER OF TAX CONSULTANTS

PROSECUTION, COMPOUNDING AND CHARGE OF ABETMENT AGAINST PROFESSIONALS UNDER THE INCOME TAX ACT

- ADVOCATE ADITYA AJGAONKAR

PROSECUTION

- "… The provisions for imposition of penalty fail to instill adequate fear in the minds of tax evaders. Prospect of landing in jail on the other hand, is a far more dreaded consequence – to operate in *terorem* upon the erring taxpayers. Besides, a conviction in. court of law is attended with several legal and social disqualifications as well. In order, therefore to make enforcement of tax laws really effective, we consider it necessary for the Department to evolve a vigorous prosecution policy and to pursue it unsparingly."

– Wanchoo Committee report

PROSECUTION – CHAPTER XXII

- Sections – Offenses under the Act – Sec. 275A , 275B , 276 , 276A , 276AB , 276B, 276BB , 276C , 276CC , 276CCC , 276D , 277 , 277A , 278 , 278A , 278AA , 278 AB , 278B , 278C , 278D , 278E , 279 , 279A , 279B , 280 , 280A , 280B , 280C , 280D
- Exhaustive list regarding offenses and their nature in tabular format has been given by Adv. Vijay Pal Dalmia available at http://www.mondaq.com/india/x/373388/Income+Tax/Offences+and+Prosecutions+Under+Chapter+XXII+of+the+Indian+IncomeTax+Act+1961
- Video Webinar organized by CTC on similar subject available on CTC website / Youtube
- Video by Adv. Sashank Dundu on ITATONLINE.COM
- Recommended reading available on ITATONLINE.COM

- Guide To Offenses And Prosecutions Under The Income-tax Act, 1961 (Sr. Adv. Dr. K Shivram)

- Law On Offenses By Companies And Prosecution Of Directors (Adv. Rahul Hakani)

- Law on Bail , Anticipatory Bail, Discharge and Quashing of Proceedings under Direct Taxes (Adv. A. R. Ajgaonkar)

SUMMONS CASE / WARRANT CASE

- All cases not punishable by death, imprisonment for life or for more than two years are summons cases while those so punishable are warrant cases.
- Procedure in case of summons cases is faster than that in the case and warrant cases.
- Framing of charges is not mandatory in summons cases.
- The Accused may not necessarily have to remain present in the case of a summons case, he may plead guilty even by post or through a pleader while the presence of the accused in case of a warrant case is mandatory. If an accused does not remain present in the case of a warrant case, in the absence of an exemption application, a 'warrant' may be issued against him to compel his appearance.
- A Summons case can be converted into a warrant case if the cases relates to an offense that entails more than 6 months of imprisonment as punishment at the discretion of the Judge in the interest of justice.
- Most offenses triable as summons cases under the Income Tax Act are bailable while the few triable as warrant cases are by and large non-bailable.

DISCHARGE – SEC. 227 CRPC

- Sec. 227 – "If upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for doing so"
- Only prima facie case is to be seen, whether case is beyond reasonable doubt is not to be seen at this stage. [1992 CrLJ 2635 (Ori) ; 1996 CriLJ 1610 (P&H)]
- The 'sufficient ground' refers to ground for putting the accused on trial and not ground for conviction. [(1989) 1 SCC 715 (721)]
- No provision for discharge in summons case (Chapter XX of CRPC)

REVISION – SEC. 397 CRPC

- "The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order,- recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."
- Sec. 397 to 405 CRPC

REVISION – SESSIONS / HIGH COURT

- "All Magistrates whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398". "If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them." – Sec. 397 CRPC
- Powers of revision are exercised in case of orders against which no appeal lies.
- Revisional jurisdiction of High Court can be moved directly. [(2007) 6 SCC 156]
- Propriety demands that the party should first approach the Court of sessions. [2008 CriLJ 3579]

QUASHING / STAY – HIGH COURT INHERENT POWERS

- Sec. 482 of the CRPC provides for saving of Inherent powers of the High Court "to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".
- Cannot be used invoked when there is another remedy available [(1969 CriLJ 1501)]
- Inherent jurisdiction under the section though wide has to be exercised sparingly, carefully and with caution and only when such exercise is justified by the tests specifically laid down in the section itself. [2006 (4) SCC 359]
- Quashing of charge is exception and not the rule. [(2004) 12 SCC 195]
- The Criminal Procedure Code does not specifically give any power to the Court to quash proceedings as strictly construed in legal parlance. This power is derived from the inherent powers contemplated under Section 482 of the Code. [2008 (2) MhLJ 856 (Bom-FB)]

BAIL – CHAPTER XXXIII CRPC

- Bails fall under two wide categories – (i) Bailable (ii) Non – bailable
- Bailable cases, grant of bail is a matter of course.
- Non Bailable cases, subject to the discretion of the Courts.
- Bail refers to process of procuring the release of an accused by ensuring his attendance.
- Bail is the rule, Jail is the exception (Right to liberty) [(1978) 1 SCC 240]
- The court can can refuse bail even if offense is bailable if conditions imposed while granting bails are violated. [(1982) GLH 778]

ANTICIPATORY BAILS – SEC. 438 CRPC*

- "Where any person has any reason to belive that he may be arrested on accusation of having committed a non-bailable offense, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail"
- "The Court may, after taking into consideration, inter alia the following factors, namely:- (i) the nature and gravity of the accusation ; (ii) the antecedants of the applicant … (iii) the possibility of the applicant to flee from justice (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested; either reject the application forthwith or issue an interim order for grant of anticipatory bail."
- *There are various state wise amendments that need to be considered.

ANTICIPATORY BAIL

- If interim protection is not granted, the concerned officer may arrest the applicant on basis of accusation apprehended in such application.
- Only in exceptional cases shall an 'ABA' application be moved directly before the High Court before first approaching the Court of Session. [1988 CriLJ 210 (Guj)]
- The Rejection of anticipatory bail by court of session does not disentitle the High Court from entertaining it (original jurisdiction). [1986 CriLJ 1742 (Ker)]
- When an 'ABA' is rejected by sessions court, fresh application on same ground cannot be made before the High Court. [1979 CriLJ 288 (Cal-DB)]
- A revision is maintainable from order granting / refusing 'ABA' in the High Court. [1988 CriLJ 210 (Guj)]

ANTICIPATORY BAIL OR BAIL?

- Anticipatory bail application can be moved before Court of Sessions / High Court when a person anticipated being arrested.
- Bail (also called regular bail) is a matter of course in 'Bailable cases' and a matter of Judicial discretion in 'Non bailable cases'.
- The distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest. [(1980) 2 SCC 565]
- 'ABA' the applicant must make out a prima facie case that he has apprehensions that he may be arrested.
- Anticipatory bail does not mean that the accused cannot be arrested at all, it simply means that in the event of arrest, the accused shall be released on bail as per the conditions of the anticipatory bail.

CONSIDERATION FOR GRANT OF BAIL

- At the time of granting bail the Court shall only look at the prima facie material and should not go into merits of the case by appreciating evidence.
- In granting or not granting of bail in a non-bailable offense, the primary consideration is the nature and gravity of the offense.
- At the time of granting bail in cases involving non-bailable offences particularly where the trial has not yet commenced, the court should take into consideration various matters such as the nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State and similar other considerations. [(1984) 3 SCC 555]

ECONOMIC OFFENSE? DIFFERENT YARDSTICK?

- "The entire Community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the Community. A disregard for the interest of the Community can be manifested only at the cost of forfeiting the trust and faith of the Community in the system to administer justice in an even handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National Interest" [(1987) 2 SCC 364]
- "The entire community is aggrieved if economic offenders who ruin the economy of the State are not brought to book." [(2003) 3 SCC 641]

BAILS FOR ECONOMIC OFFENSES?

- "Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country." [(2013) 7 SCC 439]
- Rajasthan High Court in the case of ITO v. Gopal Dhamani [1988] 172 ITR 462 (Raj) laid down the proposition :- *"jail and not bail in serious economic, anti-social, white-collar crimes."*
- Subsequently in J.P. Singh v. IACIT [1990] 185 ITR 659 (Rajasthan) the Hon'ble Court held that *"There is no force in the contention of learned counsel for the Department that anticipatory bail cannot be granted in cases involving economic offences."*
- In Rajvir Singh v. State of Rajasthan [1990] 186 ITR 144 (Rajasthan) the Hon'ble Court held that *"a general principle cannot be laid down that in all cases involving commission of economic offences anticipatory bail is to be refused. What is to be seen is whether in the facts and circumstances of the case, anticipatory bail should be granted or not..*

ABETMENT - SEC. 107 OF THE INDIAN PENAL CODE

- A person abets the doing of a thing, who–
- First - Instigates any person to do that thing; or
- Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing; or
- Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing. Explanation - A person who by willful misrepresentation or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
- Three situations one can be said to have abetted the offence.(i) By instigating a person to commit offence or(ii) By engaging in conspiracy to commit or(iii) By intentionally aiding a person to commit it. [MANU/JH/0288/2009]

ABETMENT

- As per wordings of the statute, the offense of abetment largely goes hand in hand with Sec. 276C(1), Sec. 277 or Sec. 271A. ,
- "The allegations in the complaint would go to show that the partners had full knowledge of all the acts and manipulations .. Regarding the employees of the firm, also there are sufficient allegations in the complaint and prima facie evidence to suggest their complicity in the offences alleged against them .. The request for discharge of the accused was rightly declined by the Magistrate." [(1995) 214 ITR 635 (Kerela)]
- The complaint u/s 276C, 277, 278 & 278B cannot be quashed merely because the accused is a nominee director and not expected to participate in day to day conduct of business as the difference between nominee director and any other director would be a matter of evidence. [(1992) 196 ITR 335 (Madras)]
- Firm / Company being an artificial juristic person was not liable to be prosecuted for offenses u/s 277 / 278 (powers used for quashing)[(1987) 168 ITR 332 (Kerala), (1983) 144 ITR 496 (Allahabad)]
- Whether a company can have mens rea and where no individual acts against other accused have been indicated or not and whether or not they are roped in by virtue of group liability is a matter of evidence. [(1982) 134 ITR 573 (Kerala)(App.)]
- Charges of abetment can continue even where charges for evasion or making false statement may be shown to be wrong [(1992) 194 ITR 462 (Madras)]

ABETMENT BY PROFESSIONALS

- Unless there was evidence to indicate that the additional materials, which had been unearthed during the seizure, had also been placed before the auditor and despite the same, the latter prepared false returns made the first accused sign the same and delivered it to the Department, the auditor will not become liable under any one of the above provisions of law [(1987) 168 ITR 788 (Mad)]
- Averments made are matters of evidence. Whether there was inducement, if so what was the part played are all matters of fact to be decided in trial [(1996) 217 ITR 269 (Mad)]
- Mere giving of an aid will not make the act an abetment of an offence, if the person who gave the aid did not know that an offence was being committed or contemplated; But where according to the case, forged documents being procured by the accused was annexed in the return to claim refund, the said prosecution cannot be quashed [MANU/JH/0288/2009]
- Where an assessee wrongly claimed deduction u/s 80DDB based on certificate issued by doctor, where there were specific allegations against the Doctor, the complaint against the doctor would be maintainable. [(2002) 253 ITR 626 (Madras)]

SEC. 277 – FALSE STATEMENT IN VERIFICATION

- "If a person makes a statement in any verification under this Act or under any rule made thereunder or delivers an account or statement which is false and which he either knows or belives to be false or does not belive to be true.."
- Can be used against tax practitioner [(1992) 195 ITR 71 (Madras)]

COMPOUNDING OF OFFENSES

- Compounding of offenses u/s 320(8) of IPC, have the effect of an acquittal of an accused with whom the offence has been compounded.
- Income tax Act Sec. 279(2) provides for 'any offense' under Chapter XXII to be compounded by the appropriate authority.
- Compounding can be done before or after institution of proceedings for any offense under Chapter XXII of the Income tax Act.
- A case can be compounded at anytime before sentence is pronounced even while the Magistrate is writing the Judgement [2005 CriLJ 2352 (Karnataka)].
- The power to compound can be exercised at the trial stage or even at the appellate stage subject to satisfaction of the conditions postulated by the legislature [2008 (2) MhLJ 856 (Bom-FB), (2017) 245 Taxman 139 (Madras), (2009) 313 ITR 59 (Madras)]
- Technical offenses under the Income Tax Act can not be compounded after filing of complaint. [(2011) 337 ITR 251 (Delhi)]
- Even though after conviction, power can be exercised to compound an offence, but this by itself cannot be a ground for issue of mandamus sought in the petition. Power of compounding is discreationary [(2012) 211 Taxman 203 (P&H)(MAG.)]
- Where offer to compound was made by the department but refused, there was no defect in the Department refusing compounding after conviction. [(2011) 334 ITR 265 (P&H)]

COMPOUNDING U/S 279 INCOME TAX ACT

- Various board circulars have been issued by the CBDT, the one holding field is Circular No. 285/35/2013-IT dated 23-12-2004
- Power to compound offense is discretionary. [(2005) 267 ITR 383 (Madras), (2009) 311 ITR 258 (Delhi)
- Sec. 279(2) cannot give right to party to insist that an offer of compounding must be made before prosecution is launched. [(1999) 238 ITR 461(SC)]

DELHI HIGH COURT ON COMPOUNDING – VIKRAM SINGH V. UOI [2017] 394 ITR 746 (DELHI)

The Delhi High Court had an opportunity to consider certain aspects of the board circular of 23rd December 2014. A few key takeaways are: -

- The circular dated 23rd December, 2014 does not stipulate a limitation period for filing the application for compounding. Para 8 subclause (vii) does not mean that every application, which involves an offence committed by a person, for which the complaint was filed to the competent court 12 months prior to the receipt of the application for compounding, will without anything further, be rejected.
- The CBDT cannot arrogate to itself, on the strength of Section 279 of the Act or the Explanation thereunder, the power to insist on a 'pre-deposit' of sorts of the compounding fee even without considering the application for compounding.
- The Department cannot on the strength of para 11(v) of the Circular dated 23rd December 2014 of the CBDT reject an application for compounding either on the ground of limitation or on the ground that such application was not accompanied by the compounding fee or that the compounding fee was not paid prior to the application being considered on merits.
- The Hon'ble Court left the question of 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 open.

GUIDELINES FOR COMPOUNDING OF OFFENCES UNDER DIRECT TAX LAWS, 2014 - CIRCULAR NO. 285/35/2013-IT DATED 23-12-2004

- Chapter XXII offenses are classified into two parts – Part 'A' & Part 'B'
- Conditions prescribed for compounding – Application made for compounding in preribed form, whether person has paid o/s tax, interest penalty or other sums due, if Appellant agrees to pay expenses and compounding fees, if appellant undertakes to withdraw appeal filed by him.
- Category 'A' offenses under the same section should not be compounded if they have been compounded on three occasions or more; Category 'B' offenses except first offense as defined by the circular. (Offenses 'generally' not to be compounded)
- The Finance Minister may relax restrictions above for compounding of an offence in a deserving case, on consideration of a report from the Board on the petition of an applicant.
- The compounding charges shall include compounding fee, prosecution establishment expenses and litigation expenses including Counsel's fee. Prosecution establishment expenses will be charged at the rate 10% of the compounding fees subject to a minimum of **Rs.25,000/-** in addition to litigation expenses including Counsel's fees paid/payable by the Department in connection with offence(s) compounded by a single order. In a case where the litigation expenses are not readily ascertainable, the competent authority may arrive at litigation expenses, inter alia, on the basis of rates prescribed by the Government and on the basis of available records with the government and the counsels.

GENERAL PRINCIPALS REGARDING PROSECUTION

- No opportunity of being heard is required to be afforded to the assesse before grant of sanction by Commissioner for prosecution. [(2003) 263 ITR 550 (SC)]
- Mere expectation of success in some proceeding under the Income Tax Act cannot come in the way of institution of criminal proceedings u/s 276C & 277. There is no provision in law which provides that a prosecution for the offences in question cannot be launched until reassessment proceedings initiated against the assessee are completed. [(1984) 149 ITR 696 (SC)]
- Finding of fact of the Tribunal in favour of the Appellant is relevant in the prosecution proceedings [(1982) 133 ITR 909 (SC)]
- Where penalty order was set aside holding that there was no case for concealment made out, pending prosecution u/s 276C & 277 were liable to be quashed [(1999) 236 ITR 683 (SC), (2004) 265 ITR 562 (SC), (2007) 291 ITR 430 (BOM)]
- The question whether the complaints had been lodged at the instance of the Commissioner or at the instance of the Deputy Commissioner with the sanction of the Commissioner was a question of fact to be considered by the Trial Magistrate and the writ Court could not go into that question at this stage when especially there was nothing to show that there was a patent error leading to manifest injustice. [(1998) 114 CTR 183 (Madras)]
- Prosecution proceedings cannot be quashed merely because appellate proceedings are pending, however it is open to the accused can make an application to the magistrate not to pronounce judgement until departmental proceedings are over [(1990) 185 ITR 412 (Madras)]

REASONABLE CAUSE – SEC. 278AA INCOME TAX ACT

- ".. No person shall be punishable for any failure referred to in the said provisions if he proves that there was a reasonable cause for such failure"
- 'Reasonable cause' as per Section 278AA can be decided based on the evidence adduced by parties before competent court [(2007) 11 SCC 297]
- "The provisions of section 278AA of the Income-tax Act, 1961, will no doubt be available to the appellant to its benefit if it is able to prove that it had sufficient and good reasons for committing the default" – Quashing denied , matter of evidence [(2003) 264 ITR 243 (Calcutta)]
- When the penalty is dropped, the criminal court cannot in spite of a finding by the statutory authority under the Act that 'the assessee furnished good and sufficient reasons for not deducting and paying the tax within time', take a different view and hold that the failure on the part of the assessee was without reasonable cause or excuse. [(1989) 179 ITR 387 (Patna)]

‘MENS REA’ – PRESUMPTION 278E INCOME TAX ACT

- ‘Innocent until proven guilty’ has essentially been eroded over time for certain statutes qua presumptions
- Sec. 278E of the Income Tax Act presumes the existence of a guilty mental state of mind. The Court has to presume the existence of culpable mental state, and absence of such mental state can be pleaded by an accused as a defence in respect to the act charged as an offence in the prosecution. [(2004) 9 SCC 686]
- Court in a prosecution of offence, like Section 276CC has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt. [(2014) 5 SCC 139]
- The impugned provision has been introduced to remove the weaknesses in the provisions in the direct tax laws in respect of penalties and prosecutions so as to shift the burden of proof on the assessee and to provide that once the evasion of tax is proved, the intention to evade need not be proved. [(2007) 288 ITR 225 (Madras)]
- In case of ACIT v. Nilofer Currimbhoy [2015] 228 Taxman 57 (SC) the leave granted along with continuation of stay against order of Delhi HC in [2013] 219 Taxman 102 (Delhi)(Mag) which held that the lower courts were wrong in granting discharge to the accused based on whether the explaination given by the assesse in the reply to show cause was rightly rejected or not.

S 278E – REBUTTAL BEYOND REASONABLE DOUBT

- The presumption raised by Sec. 278E (1) is not absolute but a rebuttable presumption.
- The burden of proof may be shifted by presumptions of law or fact, and presumptions of law or presumptions of fact may be rebutted not only by direct or circumstantial evidence but also by presumptions of law or fact. (Negotiable instruments Act) [AIR 1961 SC 1316]
- The presumption is only of mens rea.
- Beyond all reasonable doubt does not translate to beyond all doubt. [Yogesh Singh v. Mahabeer Singh & Ors. Cri. A. 1482 of 2013]
- A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case.[(1988) 4 SCC 302]

GENERAL CHECK LIST ON RECEIPT OF SHOW CAUSE

- Upon receipt of show cause from the Department for initiation of prosecution, it is imperative to provide a written reply and / or appear in person or through representative at the time as provided for in the notice. If the said appearance is not done in time, second opportunity may not be granted as show cause notice is not mandatory before grant of sanction.
- If summons to appear before court are served upon you, it is important to engage an advocate to represent you regardless of the nature of the offense as most of the provisions of prosecution under the Act envisage compulsory jail sentences which cannot be waived.
- The Advocate shall make a bail application and try for obtaining exemption u/s 205 of the CRPC and allow appearance by pleader. The terms of bail need to be strictly complied with. Magistrate retains power to order personal appearance when required.
- If the case of the department is strong, option of compounding must be excercised. Pleasing guilty may not be of avail due to the compulsory minimum jail sentences that are in the scheme of the Act.
- If case is strong, discharge application may be filed. If the case against the accused can be shown to be abuse of process, then Inherent powers of High Court for quashing may be used, if the order of issue of process can be shown to be wrong, the revision application may be filed before the Sessions Court. Revisional procedure before the Sessions Court is preferable to directly going to the High Court in revision.
- The Accused may consider standing trial if the case is strong and personal appearance is done away with for a majority of the trial.