

TDS – OFFENCES, PROSECUTION & COMPOUNDING

Statistics for the no of Prosecution cases

F.Y.	Prosecution Launched	Cases decided	Convictions	Compounded	Acquitted (in percent)
2010-11	244	356	51	83	222 (62.4)
2011-12	209	593	14	397	182 (30.7)
2012-13	283	265	10	205	50 (18.9)
2013-14	641	664	41	561	62 (9.3)
2014-15	669	976	34	900	42 (4.3)
2016-17	784		48	575	
2017-18	2225		13	1052	

Note:

- In FY 2017-18 in 2225 cases prosecution launched as compared to 784 in preceding previous year as such **incremental launching in prosecution is 283%**
- The cases of compounding raised from 575 in FY 2016-2017 to 1052 in FY 2017-2018.
- **That the percentage of incremental compounding is 182% as compared to preceding previous year.**
- **On a contrary Conviction fallen to as low as 13 from 48 in preceding financial year.**

***Above Statistics show that increased prosecution is merely used as mechanism to garner more revenue.**

Economic Times

Taxman issues prosecution notices to MNCs to meet steep revenue targets

Experts say mechanical approach led to slapping of notices even for small tax issues.

By Sachin Dave, ET Bureau | Updated: Jan 16, 2019, 08:36 AM IST



7 Comments

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According to previous statements by senior officials, tax officers have been asked to issue around 200,000 notices during the fiscal year.

have got such notices, according to the people cited above. The companies didn't respond to queries from ET. Industry has complained to the government about the sudden spurt in prosecution notices.

Tax officials have issued prosecution notices to directors of several multinationals, intensifying their pursuit of collections with a view to meeting steep revenue targets, said people with direct knowledge of the matter. Prosecution notices make such cases equivalent to criminal offences and give **income tax** officers additional powers, akin to those of the police, said experts, adding that taxpayers can only seek relief from a magistrate's court in such instances.

Google, Facebook, Samsonite and KraftHeinz are said to be among those that

“These notices project a wrong image of the Indian government,” the Indian Merchants’ Chamber (IMC) told the Central Board of Direct Taxes (CBDT). “It is driving them (multinationals) away by initiating criminal proceedings on a mechanical basis, without undertaking any qualitative analysis of the offences.”

Such notices have only been used previously when concealment of black money or similar wrongdoing was suspected, experts said.

However, the current spate of prosecution notices has been issued even for cases involving small amounts, they said. Such notices have been sent to two directors in each multinational, they said. In some cases, prosecution notices have been issued to directors not based in India and to companies that had failed to deduct tax of around Rs 1,000 on an employee’s salary.

“Prosecution should only be triggered in rare situations and in cases where some serious or large amounts or repetitive violations are involved,” said Ketan Dalal, managing partner, Katalyst Advisors.

“Many multinationals which have been served with the notices will now have to tackle this situation on a priority basis as even some of the non-Indian directors have been served with these prosecution notices.”



Taxpayers Beware! 6 transactions which may invite penalty, prosecution under Income Tax Act



By: Sanjeev Sinha | Updated: February 1, 2019 10:38 AM

The Income Tax Department has stepped up its efforts and action in recent months in a bid to curb black money and tax evasion.

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- **Taking or giving a loan or deposit in excess of Rs 20,000 in cash** - Contravention of the provisions of Section 269SS will attract penalty under Section 271D.
- **Paying more than Rs 10,000 in cash relating to expenditure of business/profession** -
- **Donating more than Rs 2,000 in cash to a political party or registered trust**
- **Not depositing TDS with the government**
- **Transaction in excess of Rs 2,00,000 in cash — for buying of a flat, jewellery etc — even if you have withdrawn cash from a bank.**
- **Filing tax return without payment of due tax**

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Business Standard

JUST IN

Frequent large cash deposits, withdrawals can lead to tax scrutiny



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CELEBRATING 25 YEARS OF BANKING

Not filing your income tax returns on time? You could be prosecuted

If you have not filed your returns, and there's a notice, ensure that you respond to the notice in time. Failure to respond to the notice can have consequences.

Tinash Bhasin | Mumbai
Last Updated at October 23, 2018 00:58 IST

STAND OF REVENUE

CLARIFICATION BY CBDT – Press Release dated 20.02.2019

- CBDT clarified that Mumbai Income Tax TDS office has issued prosecution show cause notices only in a limited number of big cases where more than Rs. 5 lakh of tax was collected as TDS from employees etc and yet the same was not deposited with the Income Tax Department in time.
- CBDT said that some defaulter companies and vested interests are deliberately misleading the media to thwart action against themselves.
- Having deducted tax from employees and other taxpayers and not depositing the same in time in the government treasury is an offence punishable under the law.
- If the TDS is not deposited in time, the employee would be ineligible for claiming credit of the tax deducted when he files his own return.
- CBDT stated that in last one month only in 50 big cases prosecution notices have been issued by Mumbai IT TDS office. Out of these, in 80% of the cases the TDS tax default is above Rs. 10 lakh and in 10 % cases TDS default is between Rs. 5 to 10 lakh. In the remaining 10% cases, TDS default is of more than Rs. 1 crore as detected in the survey.
- Prosecutions have also recently been launched against 4 big business houses where more than Rs 50 Crore of tax was collected by them from the tax payers and yet not deposited with the Government in time.

**The provisions of Offences and
Prosecution are provided under chapter -
XXII of the Act comprising of 29 Sections**

Matrices

S.No.	No. of Sections	Particulars
1	15	Charging Section
2	7	Relevant Concepts – Responsible person, Presumption, Reasonable Cause, & Sanction
3	1	Compounding
4	2	Setting up of Courts
5	2	Application of Code of Criminal Procedure 1973.
6	1	Offences by public servant
7	1	Non Cognizable Offence
	29	Total

CHARGING SECTIONS

S.NO.	No. of Sections	Particulars	Sub-particulars	No. of sections	Relevant Section
1	8	Failure to comply with statutory obligations	Non Compliance of TDS Provisions.	2	276B, 276BB
			Failure to Furnish ROI.	2	276CC, 276CCC
			Failure to Produce Books of Accounts.	1	276 D
			Failure to comply to 132(1)(iib).	1	275B
			Failure to comply to 178.	1	276A
			Failure to comply to S. 269UC, 269UE and 269UL.	1	276AB
2	3	False Verification & Abetment	—	3	277, 277A, 278
3	1	Evasion of Taxes	—	1	276C
4	1	Subsequent Offence	—	1	278A
5	2	Others	—	2	275A, 276

Relevant Concepts

S.No	No. of sections	Particulars	Section
1	3	Presumption	278D, 278E & 279B
2	1	Reasonable Cause	278AA
3	1	Sanction	279
4	2	Responsible Person	278B & 278C

RELEVANT CHARGING SECTION

***Section 276B - Failure to pay tax to the credit of Central Government.**

- If a person fails to pay to the credit of the Central Government
 - (a) **TDS** under the provisions of Chapter XVII- B; or
 - (b) the tax payable by him, as required by or under
 - (i) **Section 115-0 (2)** (tax on distributed profits of domestic companies)
 - (ii) **Second proviso to 194B** (Winnings from lottery or crossword puzzle partly or wholly in kind)

Punishable with rigorous imprisonment - Minimum three months and maximum up to seven years and with fine.

Note:

****Section 276BB – Failure to pay Tax collected at source***

***** No prosecution on failure to deduct [Kaushal Kishore Biyani vs UOI [2002] 256 ITR 679 (Madhya Pradesh)]***

TDS Default Amount and period is small – No Prosecution

- CBDT has issued instruction no. 1335 of CBDT, dated 28-5-1980 to the effect that prosecution should not normally be proposed when the amounts involved are not substantial and the amount in default has also been deposited in the meantime to the credit of the Government.
- Vijay Singh Vs Union of India & Anr (2005) 199 CTR (MP) 653 the Hon High - Court gave its judgment in favour of assessee for a TDS default of 28,776/- for a period of 5 months and some days.
- Also see BEE GEE MOTORS & TRACTORS & ANR. vs. INCOME TAX OFFICER reported in (1995) 127 CTR (P&H) 224 : (1996) 218 ITR 155 (P&H) : (1995) 82 TAXMAN 493
- **298 CTR 227 (SC) (ITD vs Suresh Sholapurmath)** - Section 276C of the Income-tax Act, 1961 - Offence and prosecution - Willful attempt to evade tax, etc. – Where assessee tampered return of income by showing that he had paid tax correctly while he actually paid lesser amount, in view of fact that amount involved was below Rs. 25,000 and same had already been paid with interest long ago, proceeding under section 276C/277 initiated against assessee were quashed.

Relevant Concepts

1. Person Responsible

S.No.	Section	Particulars
1	278B	Offences by Companies
2	278C	Offences by Hindu undivided families.

Section 278B - Offences by Companies

- In case of Offence by company
 - Every person incharge at the time of commissioning of offence.
 - Responsible for conduct of business of company
 - as well as company

Shall be guilty and liable to be proceeded and punished.

No prosecution - provided if it is proved that the offence was committed without knowledge of such person or that he had exercised all due diligence to prevent the commission of such offence.

If it is proved - Offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of,

- any director,
- manager,
- secretary or
- other officer of the company,

such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Offence committed by company and the punishment for such offence is imprisonment and fine in such a case company shall be punished with fine and every person involved shall be punished in accordance with law

No Prosecution if it is a Company assessee:

- **[2007] 290 ITR 199 (SC) Madhumilan Syntex Ltd. v. Union of India**

"(35) 'principal officer' used with reference to a local authority or a company or any other public body or any association of persons or any body of individuals, means—

(a) the secretary, treasurer, manager or agent of the authority, company, association or body; or

(b) any person connected with the management or administration of the local authority, company, association or body upon whom the Assessing Officer has served a notice of his intention of treating him as the principal officer thereof."

- 23. It is no doubt true that Company is not a natural person but 'legal' or 'juristic' person. That, however, does not mean that Company is not liable to prosecution under the Act. 'Corporate criminal liability' is not unknown to law. The law is well settled on the point and it is not necessary to discuss it in detail. We may only refer to a recent decision of the Constitution Bench of this Court in *Standard Chartered Bank v. Directorate of Enforcement* [\[2005\] 275 ITR 81](#). In *Standard Chartered Bank's* case (*supra*), it was contended on behalf of the Company that when a statute fixes criminal liability on corporate bodies and also provides for imposition of substantive sentence, it could not apply to persons other than natural persons and Companies and Corporations cannot be covered by the Act. The majority, however, repelled the contention holding that juristic person is also subject to criminal liability under the relevant law. Only thing is that in case of substantive sentence, the order is not enforceable and juristic person cannot be ordered to suffer imprisonment. Other consequences, however, would ensue, *e.g.*, payment of fine, etc

No Prosecution if it is a Company assessee:

- From the statutory provisions, it is clear that to hold a person responsible under the Act, it must be shown that he/she is a 'principal officer' under [Section 2\(35\)](#) of the Act or is 'in charge of' and 'responsible for' the business of the Company or Firm. It is also clear from the cases referred to above that where necessary averments have been made in the complaint, initiation of criminal proceedings, issuance of summons or framing of charge, cannot be held illegal and the Court would not inquire into or decide correctness or otherwise of the allegations levelled or averments made by the complainant. It is a matter of evidence and an appropriate order can be passed at the trial. In the case on hand, in the show cause notice dated March 11, 1991 issued under [Section 276B](#) read with [Section 278B](#) of the Act, it was expressly stated by the Income Tax Officer, TDS, Bhopal that the Directors were considered to be Principal Officers under [Section 2\(35\)](#) of the Act. **In the complaint dated February 26, 1992 filed by respondent No.2-Commissioner also, it was stated that appellants were considered as Principal Officers. In the above view of the matter, in our opinion, contention of the learned counsel for the appellants cannot be accepted that the complaint filed against the appellants, particularly against appellant Nos. 2-4 is ill-founded or not maintainable.**

No Prosecution if it is a Company assessee:

- **(COMMISSIONER OF INCOME TAX vs. DELHI IRON WORKS (P) LTD. & ORS (2011) 331 ITR 5 (Del) : (2010) 195 TAXMAN 372 (Del)**
- Prosecution can't be initiated against the company. It has to be initiated in the name of Director or Principal Officer responsible for TDS compliances. For initiating prosecution proceedings against the director of the company, the assessee officer has to give notice u/s 2(35) expressing his intention to treat such directors of a company as "principal officers". **however, it would be sufficient compliance if in the show-cause notice issued to the company it is mentioned that the directors are to be considered as principal officers of the company.**
- ***A company is not a natural person but legal or juristic person. That would not mean that it is not liable to prosecution under the Act. In Standard Chartered Bank v. Directorate of Enforcement [2005] 145 Taxman 154, the Supreme Court held that juristic person is also subject to criminal liability under the relevant law. Only thing is that in case of substantive sentence, the order is not enforceable and juristic person cannot be ordered to suffer imprisonment. Other consequences, however, would ensue, that is, payment of fine, etc.***

Note:

In absence of notice u/s 2(35) no person can be treated as 'Principal Officer' - ITO vs Shiv Sewak Cotton Co. [2006] 153 TAXMAN 509 (PUNJ. & HAR.)

Directors cannot be acquitted merely on ground that no separate notices were issued to them

- Where both directors of company had signed Company's balance sheets, their defense that they were not in charge of affairs of company was untenable and they could not be acquitted merely on ground that no separate notices were issued to them **ITO vs Anil Batra [2018] 409 ITR 428 (Delhi)**
- Where assessee had subscribed her signature in profit and loss account and balance sheet of company for relevant assessment year which were filed alongwith returns, Assessing Officer was justified in naming her as Principal Officer and accordingly she could not be exonerated for offence under section 277 **Mrs. Sujatha Venkateshwaran v. ACIT [2018] 96 taxmann.com 203 (Madras)**

In charge at the time of Offence - Responsible

- **SMS Pharmaceuticals v. Neeta Bhalla & Anr. [2005] 148 Taxman 128 (SC)**
 - The person accused should be in charge of, and responsible for the conduct of business at the time the offence was committed.
 - Merely being a director of a company is not sufficient.
 - Managing and joint director would admittedly be in charge.
- **Kalanithi Maran v. Union of India [2018] 405 ITR 356 (Madras)** - No material to establish that assessee was in-charge of day-to-day affairs, management, and administration of company - could not be prosecuted under section 276B for TDS default committed by his company **see also Homi Phiroze Ranina v. State of Maharashtra [2003] 131 Taxmann 100 (Bom).**
- **In the case of a continuing offence** - it can, at best, apply to the company in respect of which the offence is continuing one and not to its directors who may have come on its board subsequent to the commission of the offence by the company. **K.C. Palaniswamy v. Income-tax Officer [2008] 174 Taxman 259 (Delhi)**

In charge at the time of Offence - Responsible

- The petitioners were directors of the company but the company had appointed competent officers and consultant to deal with the company's account. It was therefore, submitted that petitioners were not responsible for every act and day-to-day conduct of the business of the company. **They could not be prosecuted for company's failure to deposit tax deducted at source Om Prakash Katyal v. Union of India [2009] 310 ITR 174 (Patna)**

278C -Offences by Hindu undivided families

- Where an offence under this Act has been committed by HUF then the Karta thereof shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

2. Concept of Mens Rea – S. 278E

S. 278E - Presumption as to culpable mental state.

1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defense for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation.—In this sub-section, **"culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.**

(2) For the purposes of this section, a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Concept of Mens Rea – S. 278E

- Section 278E places the **burden of proving** the absence of Mens rea upon the accused.
- **Constitutional validity** of the said provision was upheld: –*Selvi J. Jayalalitha v. UOI and Ors. (2007) 288 ITR 225 (Mad) (HC)*
- **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 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.

Unintentional Default - not punishable

- **In UNION OF INDIA vs. PYARELAL TARACHAND & ANR. (2003) 180 CTR (MP) 551: (2003) 264 ITR 525 (MP): (2004) 135 TAXMAN 97.**
- The Hon High Court declined to interfere in the judgment where trial court acquitted the assessee because it was not proved that the assessee has deliberately or intentionally committed the default.
- Hon'ble Punjab & Haryana High Court in the case of **ITO Vs. Shiv Kumar reported in 282 ITR 406(P&H)**, held that when there is no wilful attempt to evade tax, prosecution was not valid

‘Mens rea’ must be established

- The Andhra Pradesh High Court in the case of **Krishna Medical Stores vs. ITO** reported in **206 ITR 76 at page 81** held that “mere possession or control of books and documents containing false entries is not punishable under section 276C, **unless the prosecution establishes a willful attempt on the part of the accused to evade tax and that it is essential that mens rea must be established.**
- Supreme Court in the case of **Prem Dass vs. ITO** reported in **103 Taxman 65** has held that “**by applying the presumption under section 132(4A) the ingredients of offence under section 276C and 277 cannot be held to have been established**”.

Presumptions of culpability applies to both a natural person and a juristic person

- **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.

3. Reasonable Cause - 278AA

Reasonable Cause – 278AA

- No prosecution for any failure as referred in
 - section 276A (Failure to comply with the provision of sections 178(1) and 178(3))
 - section 276AB (Failure to comply with the provisions of sections 269UC, 269UE and 269UL)
 - section 276B (Failure to pay TDS or tax payable under section 115 -0 or 2nd proviso to section 194B)

if existence of **reasonable cause** for such failure proved.

• **Financial Hardship – No reasonable cause**

Shaw Wallace & Co. Ltd. vs CIT [2004] 136 TAXMAN 346 (CAL.)

Oversight on part of its accountant – No prosecution - 396 ITR 636 (Patna)/2017 (State of Bihar vs Sonali Autos (P) Ltd)

- If assessee deducted TDS but same was not deposited within specified time due to oversight on part of its accountant, and subsequently the petitioner immediately after noticing the aforesaid defects by the Statutory Auditors of the petitioner-company deposited the amount deposited with Interest - **Prosecution proceedings against assessee after three years would be contrary to CBDT instruction and, thus, deserved to be quashed.**

4. Prosecution only after proper

“SANCTION”

Prosecution to be at instance of Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner - 279

- No person can be proceeded for an offence:

Section	Particulars	Section	Particulars
275A	Contravention of order made u/s 132(3)	276C	Wilful attempt to evade tax, penalty and interest.
275B	Failure to comply with the provisions of Section 132 (1) (iib)	276D	Failure to produce accounts and documents
276	Removal, concealment, transfer or delivery of property to thwart tax recovery	277	False statement in verification
276A	Failure to comply with the provision of sections 178 (1) and 178(3)	277A	Falsification of books of account or documents etc.
276B	Failure to pay tax deducted at source under chapter XVII-B or tax payable under section 115 -0 or 2 nd proviso to section 194B to the credit of the Central Government (w.e.f. 01/06/1997)	278	Abetement of False Retuns
276BB	Failure to pay the tax collected at source		

No prosecution u/s section 276C or section 277 if penalty imposed or imposable u/s 270A or 271(1)(iii) has been reduced or waived by an order under section 273A.

Prosecution to be at instance of Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner - 279

- except with the previous sanction
 - The Principal Commissioner
 - or Commissioner
 - or Commissioner (Appeals)
 - or the appropriate authority as defined u/s 269UA(c) of the Act.
("appropriate authority" means an authority constituted under section 269UB to perform the functions of an appropriate authority under this Chapter ;)

Provided

- Principal Chief Commissioner
- or Chief Commissioner or, as the case may be,
- Principal Director General
- or Director General

may issue such instructions or directions to the aforesaid income-tax authorities for institution of proceedings.

Contd.....

Valid Sanction is a Precondition

- No valid sanction as required under section 279 of the Act has been obtained. In the petition of complaint it has been mentioned that the sanction has been accorded by the Commissioner of Income-tax, Ranchi, and a copy thereof was enclosed with the petition of complaint. The said enclosure is annexure 2 to this application. **From annexure 2 it appears that the same is a show-cause notice given to the assessee requiring him to show cause why a criminal prosecution be not launched against him. This notice obviously cannot be treated as an order according sanction.** 229 ITR 626 RAJ KUMAR SODERA vs CCIT

Writ can be validly filed to challenge the sanction, however in the instant case since Additional Chief Metropolitan Magistrate had already taken cognizance and issued summon, writ petition against Sanction was held to be not proper.

- **The question of validity of Sanction Order on merits of reasonable cause amount to a pre trial adjudication. Questions and issues relating to grant and issue of sanction could be raised and decided during trial. - In case the petitioners are able to make out that cognizance was not justified and as per law they can challenge and question the summoning order by way of petition under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (Code) or if permissible, by way of a petition under Section 482 of the Code – Indo Arya Central Transport Limited & Ors vs CIT (TDS), WPC No. 3964/2017 dated 12.03.2018**

The sanction must be in respect of each of the offences

- Where Assistant Commissioner sanctioned prosecution of applicant under section 52 of 1922 Act for fake return but Additional Sessions Judge held that applicant could only be prosecuted under section 51 of 1922 Act for failing to furnish return and not under section 52 of 1922 Act, applicant would be prejudiced by being found guilty on a charge which he was not called upon to meet and, therefore, applicant could not be convicted under section 51 of 1922 Act when sanction granted by Assistant Commissioner was for prosecution under section 52 of 1922 Act (**Champalal Girdharlal v. Emperor (1933) 1 ITR 384 (Nag) (HC)**)

The sanction must be in respect of each of the offences

- Hon'ble Supreme Court in **CCE vs. HMM Ltd, 1995(76) E.L.T 497(SC)** has held that unless the assessee is put to notice as to what is the nature of the default, he would have no opportunity to meet the case of the department.
- **Amrit Foods v Commissioner of Central Excise reported in 190 ELT 433**, it has been held by Their Lordships of the Apex Court in the aforesaid judgement that, a notice must be specific and, must clearly bring out the exact default and, nature thereof, by referring to clause or sub-clause of provision and, in absence thereof, any penalty levied is vitiated in law

Sanction Order Quashed - No offence u/s 50 of Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 if foreign assets declared in Revised return u/s 139(5)

- **Srinidhi Karti Chidambaram vs Pr CCIT W . A . Nos . 1125 to 1128, 1130 & 1131 of 2018, Madras High Court**
- If a person holds certain foreign assets which are fully explained and acquired out of tax paid income but the assessee did not report said assets in Schedule FA of the ITR in the past. CBDT in letter dated 06.07.2015 has opined that if the assets are not reported in schedule FA of the ITR for AY 2016-17, then he shall be liable for penalty of Rs. 10Lacs u/s 43 of the Act.
- In the instant case assessee have furnished the details of the assets in schedule FA of ITR u/s 139(5), thus even taking it for granted that assessee have omitted to furnish the details in return u/s 139(1), in the light of decision of CBDT prosecution cannot be launched but at best there could only be penal proceedings.
- When language of scheme 2016 is referable to the whole of section 139 of the Act, it is not open to the respondents to restrict only to the return filed u/s 139(1) of the Act.
- In view of above there was no failure to furnish any information relating to any foreign asset or investment. Revised return of income obliterates or effaces any earlier return of income. **Offence under Section 50 is made out only if, in the return of income u/s 139(1) or 139(5) there has been a wilful failure to disclose any information relating to foreign asset.**
- **The Sanctioning authority has failed to consider the above and has come to an erroneous conclusion that the case deserve prosecution. Sanction Order deserves to be set-aside**

S. 279(1A) has provided for the exception to the Power of Commissioner to initiate proceedings.

Where the penalty is waived u/s. 273A, the Commissioner is precluded from granting sanction u/s. 279 of the Act.

Once Commissioner exercises his discretionary power of waiver or reduction of penalty imposed or imposable on assessee under clause 271(1)(c) (iii), assessee shall not be proceeded against for an offence under section 276C or section 277 - **Umayal Ramanathan v. Income-tax Officer [1992] 65 TAXMAN 547 (MAD)**

COMPOUNDING

Compounding of Offence

- Section 279(2) of the Act provides that any offence under chapter XXII of the Act may, either before or after the institution of proceedings, be compounded by
 - Principal Chief Commissioner
 - or Chief Commissioner or
 - a Principal Director General
 - or Director General.
- As per section 2(15A) of the Act Chief Commissioner of Income Tax includes Principal CCIT
- *As per section 2(21) of the Act Director General of Income tax includes Principal DGIT.*

Authority Competent for Compounding of offence

Authority	Monetary Limit
CGIT/DGIT having Jurisdiction	Category A – No Limit Category B – Less than 10 Lacs
CCIT/DGIT with recommendation of Committee comprising of 3 officers	Category B – Excess of 10 Lacs

**Offences under
'Category – A' - Sec
276B, 276BB, Sec 277 &
278 in reference to
Category A offence**

**Offences under Category
B - 276A, 276C(1),
276C(2), 276CC, 276CCC,
276D, 277A, Sec 277 &
278 in reference to
category B offences.**

'Eligibility Conditions for compounding'

Guidelines for Compounding of Offences under Direct Tax Laws, 2014 vide F.No. 285/35/2013 IT(Inv.V)/108, dated 23rd, Dec, 2014 w.e.f 01.01.2015

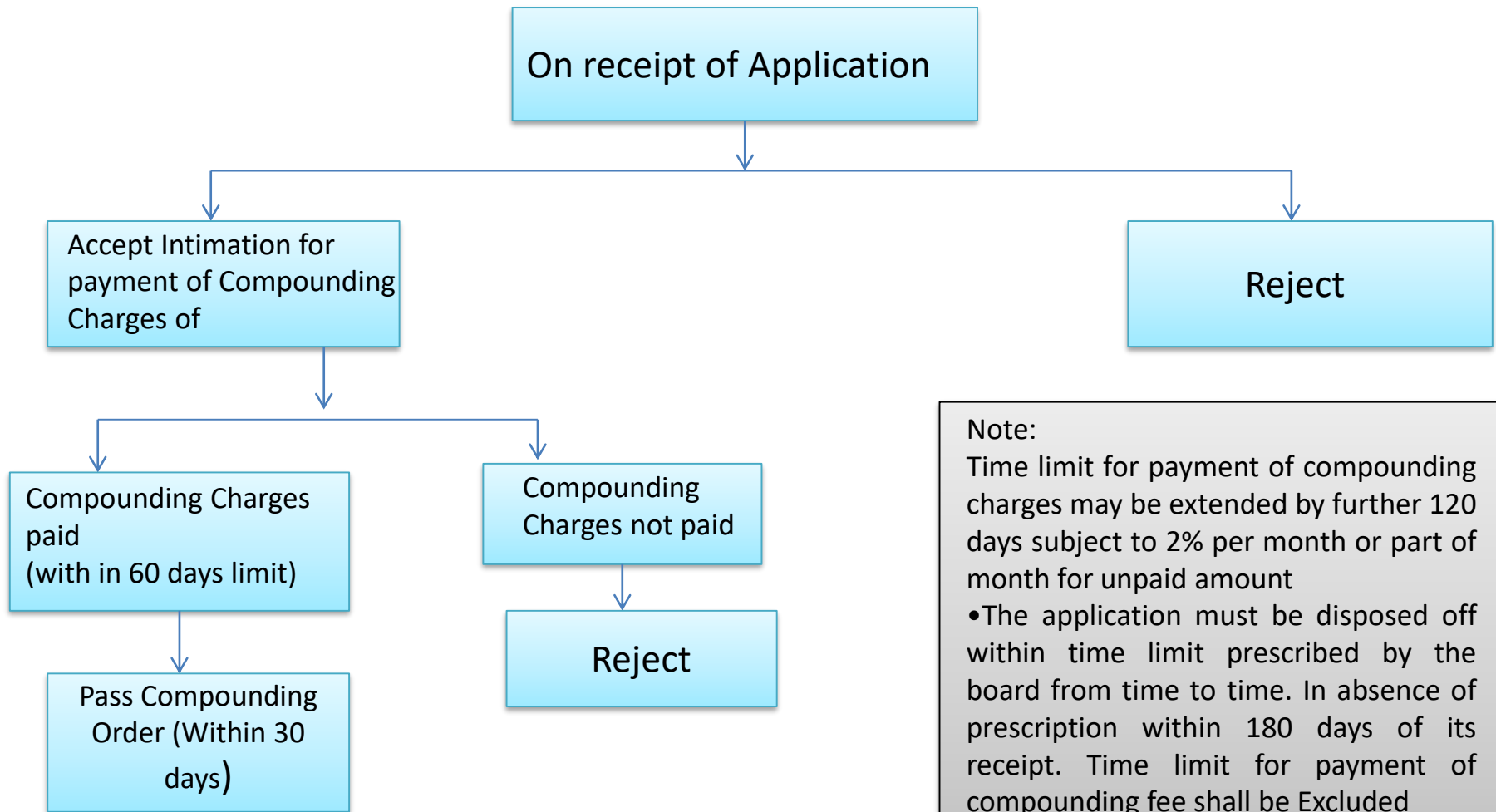
- Application to the CCIT/DGIT having jurisdiction over the case for compounding of the offence(s).
- The outstanding tax, interest, penalty and any other sum due, relating to the offence for which compounding has been sought has been paid.
- Undertaking to pay the compounding charges including the compounding fee, the prosecution establishment expenses and the litigation expenses including counsel's fee, if any, determined and communicated by the CCIT/DGIT concerned.
- Undertaking to withdraw appeal filed, if any, in case the same has a bearing on the offence sought to be compounded.

Note: Compounding is not a matter of right:

Contd.....

'Procedure for compounding'

Guidelines for Compounding of Offences under Direct Tax Laws, 2014 vide F.No. 285/35/2013 IT(Inv.V)/108, dated 23rd, Dec, 2014 w.e.f 01.01.2015



Note:

Time limit for payment of compounding charges may be extended by further 120 days subject to 2% per month or part of month for unpaid amount

- The application must be disposed off within time limit prescribed by the board from time to time. In absence of prescription within 180 days of its receipt. Time limit for payment of compounding fee shall be Excluded

Fees for Compounding

Guidelines for Compounding of Offences under Direct Tax Laws, 2014 vide F.No. 285/35/2013 IT(Inv.V)/108, dated 23rd, Dec, 2014 w.e.f 01.01.2015

276B	1 st application -3%per month of amount of tax Subsequent application – 5% per month
276C(1)	100% of the amount sought to be evaded
276C(2)	3% per month of the amount sought to be evaded
276CC/276CCC	2% per month of tax & interest determind
277/278	Same as for offence under respective section 10% of the compounding fee from the co-accused.
Other offences	Competent authority may determine subject to minimum of Rs. 25,000/-

Compounding charges will be charged at the rate of 10% of the compounding fees subject to a minimum of **Rs.25,000/-** in addition to litigation expenses.

Offences Not Compoundable

1. Category A offence, wherein compounding has been requested in past under same section on 3 occasions or more.
2. Category B offence, other than the first offence.
(First offence means offence committed prior to (i) issue of SCN (ii) intimation (iii) launching, in relation to prosecution which ever is earlier. Or Offence not detected but voluntarily disclosed before filing application. (First offence is to be determined with reference to each section)
3. Involved in Anti-national/terrorist activity
4. Convicted by court for an offence under any other law, wherein punishment was imprisonment for 2 years or more, which has a bearing on the offence sought to be compounded
5. Offence having bearing on a case under investigation by ED,CBI, Lokpal, Lokayukta or other central or state agency.
6. Convicted by court of law under Direct Taxes Laws.
7. Offences for which complaint was filed with competent court 12 months prior to receipt of application for compounding.
8. Offences for which application for plea-bargaining is pending or did not work out.
9. Any other offence, considered not fit by CCIT/DGIT in view of its nature and magnitude.

Judicial Pronouncement

- S. 276C(1), compounding fee has to be computed on basis of 100 per cent of tax sought to be evaded by assessee and not amount of income sought to be evaded - **Supernova System (P.) Ltd. v. CCIT [2019] 260 Taxman 345 (Gujarat)**
- The department cannot on the strength of the Circular dated 23-12-2014 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. **Vikaram Singh vs Union of India [2017] 394 ITR 746 (Delhi)**

Pending Appeal for Conviction appellants could very well compound offence.

- That u/s 279(2) any offence may either before or after the institution of proceedings, be compounded by the Chief Commissioner or a Director General. The term 'proceedings' is not defined in the Income-tax Act, 1961.
- Where against the conviction and sentence passed by the trial court, on the compliant preferred by the appellants, the respondent had filed an appeal and the same was pending, the said appeal was a 'proceeding' as contemplated under section 279(2) and pending appeal, the appellants could very well compound the offence.

Chairman CBDT vs Smt. Umayal Ramanathan [2009] 313 ITR 59 (Madras) see also GOI vs R. Inbavalli [2018] 400 ITR 352 (Madras), V.A. Haseeb & Co. (Firm) v. CIT., VA Haseeb and Co. (Firm) vs CCIT (Madras) in WP No. 32731 of 2015 dated 02.09.2016.

Where petitioner was convicted, power can be exercised to compound offence, but this by itself, cannot be a ground for issue of mandamus to compound offence – Punjab Rice Mills vs CBDT [2012] 211 Taxman 203 (Punjab & Haryana)(MAG.

Guidelines issued by CBDT do not constitute a bar for consideration of application seeking compounding of offence.

- **Sports Infratech (P.) Ltd. vs DCIT [2017] 391 ITR 98 (Delhi)**
- In the present case petitioner's failure to deposit the amount collected was beyond its control and was on account of seizure of books of accounts and documents etc. But for such seizure, the petitioner would quite reasonably be expected to deposit the amount within the time prescribed or at least within the reasonable time. Instead of considering these factors on their merits and examining whether indeed they were true or not, **the Chief Commissioner felt compelled by the text of para 8(v). That condition, no doubt is important and has to be kept in mind, cannot be only determining.**

Other Miscellaneous Defenses

Power of Principal Commissioner or Commissioner to grant immunity from prosecution – 278AB

- Application to be made to Pr CIT or CIT by a person who has made an application for settlement u/s 245C provided proceedings for settlement have abated u/s 245HA.
- Such application should not be made after institution of the prosecution proceedings after abatement.
- Immunity may be granted on the grounds that such person has cooperated with department and made a full and true disclosure of his income.

Immunity granted under this section can be withdrawn if such person fails to comply the conditions subject to which immunity is granted or subsequently in the course of proceedings, after abatement concealed any material particulars of income or had given false evidence.

If Penalty is canceled prosecution cannot be proceeded with

- **In *K. C. Builder v. ACIT (2004) 265 ITR 562 (SC)***, the court held that when the penalty is canceled, 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)*
- *V. Gopal v. ACIT (2005) 279 ITR 510 (SC)*
- *ITO v. Nandlal and Co. (2012) 341 ITR 646 (Bom.)(HC)*,
- *Indian Plywood Manufacturing Co. Ltd. vs. Dave (PS) [(2007) 291 ITR 430 (Bom)]*
- **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](#)).**

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

- **Scope and purport of interest/penalty proceedings and prosecution under Income-tax Act are separate and independent and therefore existence or absence of one or other is no bar to any one of them.**
 - Universal Supply Corporation v. State of Rajasthan (1994) 206 ITR 222 (Raj) (HC) (235),*
 - 134 ITR 0397 (Del) Rajinder Nath vs. M.L. Khosla, Income-tax Officer & Anr*
 - A.Y. Prabhakar (Kantha) HUF v. ACIT (2003) 262 ITR 287 (Mad.) (288).*

Note: If penalty proceedings are initiated and after considering the reply, the proceedings are dropped – No prosecution proceedings can be initiated.

****If penalty deleted on technical grounds***

Prosecution can still be proceeded

- ***ITO vs M/S Style Syntex Pvt. Ltd, CC No.295277/2016, dated 05.04.2018 Delhi District Court.***
- *The tax tribunal quashed the penalty order on the technical ground that notice for penalty did not specify whether the penalty was for concealment of income or for furnishing of inaccurate particulars of income. In view of the ITAT this was fatal for the penalty proceeding and hence the penalty order was quashed. However, IRA continued the prosecution proceedings.*

Criminal action has no independent existence - it would flow only from result of assessment or reassessment

- Since very basis for assessment had been knocked out, prosecution which is child of such assessment, was allowed to die a natural death. **Thanjai Murasu v. Income-tax Officer [2001] 247 ITR 465 (Madras)**
- Where in appeal of assessee against assessment order extra income as per diary seized during search had been deleted, which was sole ground for prosecution, criminal prosecution was to be quashed - **Ashok Kumar Jhunjhunwala v. State of Bihar [2009] 310 ITR 160 (Patna)**

Note: Mere expectation of success in some proceeding in appeal or reference under Act cannot come in way of institution of criminal proceeding against him under section 276C and section 277 - PSJ Finance & Investment Ltd vs CIT [2010] 2 taxmann.com 118 (Delhi)

No hurry for initiating prosecution proceedings – Law of limitation does not apply.

- Prosecution should not be launched hurriedly by the Dept during the pendency of case before the ITAT. The law of limitation u/s 468 Cr.P.C. for criminal prosecution has been excluded by the Economic Offences (Inapplicability of Limitation) Act, 1974 & so there is no need for hasty action. **Sayarmull Surana vs. ITO (Madras High Court) Crl. R.C .N o. 111 of 2011 & Crl. M.P. No. 1 o f 2011 dated 14.12.2018**
- **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.
- **Nirmal Kapur v. CIT (1980) 122 ITR 473 (P&H) (HC)**
- **K.M.A. Ltd. vs. ITO [(1996) Tax LR 248 (Bom.)]**
- **Vishnoo Kamat vs. First ITO [(1994) 207 ITR 1040 (Bom)]**
- **UOI vs. Gupta Builders P. Ltd. [297 ITR 310 (Bom)]**

Prolong prosecution proceedings may cause injustice to assessee.

- 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.
- 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.
- **Rakoor Industries (P.) Ltd. v. ITO [2011] 203 Taxman 107 (Delhi)(MAG.) - Immense delay caused in prosecution of case vitiated trial** - Fit case to exercise jurisdiction under article 227 of Constitution of India and section 482 of Criminal Procedure Code in order to quash complaint case filed by Department

Proceedings initiated are vague, vexatious and unreasonable and the result of non-application of mind

- **Yeshvir Goyal vs Union of India reported in 199 ITR 119(Kar)**, wherein proceedings initiated as the result of vague and baseless allegations in the complaint coupled with non-application of mind to the provisions of the Act, were quashed by the Hon'ble High Court

No prosecution if age of 70 attained

- 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.

No proceedings against a Legal practitioner who filed return on basis of TDS certificates provided

- Where respondent, a tax practitioner, filed a return on behalf of assessee claiming refund, in view of fact that respondent had no role in preparing TDS certificates, complainant-ITO could not initiate criminal proceedings against him on ground that refund was wrongly claimed on basis of genuine TDS certificates. **ITO vs Sudesh Sharma [2015] 230 Taxman 572 (Punjab & Haryana) see also ITO vs R. Soundararajan [2012] 20 taxmann.com 734 (Madras).**

Judicial Pronouncements

- As the system is not working and is required to be corrected, taxpayers who are unable to log-in should inform the concerned officials. **No coercive action (penal interest, late fees and prosecution) shall be levied against the clients of the Petitioners' members referred in the petition and those who inform by email.** The composition Scheme is extended upto 30.9.2017 and desirous assessee can apply.
- **Rajasthan Tax Consultants Association vs. UOI D.B. Civil Writ Petition No. 15239 / 2017 dated 20.09.2017**

Judicial Pronouncements

•395 ITR 45 (Punjab & HR) (ITO vs Satwant Singh Mehta)

Section 276C of the Income-tax Act, 1961 - Offence and prosecution - Wilful attempt to evade tax, etc. – Where assessee was convicted under sections 276C and 277 and sentenced to undergo rigorous imprisonment for a period of two years and to pay a fine, in view of fact that assessee was already undergoing sentence in other case and sentence imposed upon in instant case had been ordered to run concurrently with that case, sentence of assessee in instant case was reduced to sentence already undergone by him..

Alternative Defense Mechanism

Power of Settlement Commission to grant immunity from prosecution and penalty – 245H

- Application for immunity to be made to Settlement Commission by person who made the application for settlement u/s 245C
 - Full and true disclosure of income and the manner in which such income has been derived.
 - Extended complete cooperation during proceedings before Settlement Commission.
- No immunity where the proceedings for the prosecution have already been instituted before the date of receipt of the application under section 245C.
- No immunity from prosecution for any offence under any other Act such as the Indian Penal Code or any Central Act other than this Act and the Wealth-tax Act, 1957 (27 of 1957) if application u/s 245C is made on or after the 1st day of June, 2007.
- **Immunity shall stand withdrawn :**
 - On failure of payment of sum as specified u/s 245(D)(4)
 - Or on failure to comply with conditions subject to which immunity granted.
 - Or concealed particulars material to the settlement or have given false evidence.

Judicial Pronouncements

- Where application for settlement is filed before prosecution is launched before Special Court and, subsequently, immunity is granted by Settlement Commission from penalty and prosecution, Subsequent prosecution proceedings initiated before Special Court are to be quashed - **Ashirvad Enterprises v. State of Bihar [2004] 137 Taxman 455 (SC)**
- If income-tax authorities want to prosecute person concerned for his lapse committed after order of Settlement Commission, they have to get immunity granted by Settlement Commission cancelled under section 245H(2); they cannot straightaway go for prosecution. **Ram Nath vs Special Chief Judicial Magistrate. [2009] 185 Taxman 381 (Allahabad)**

Judicial Pronouncements

- From a reading of the provisions of section 245H(1A), it is apparent that in case the payments are not made within the time granted by the Settlement Commission or in case the person fails to comply with any other conditions, subject to which the immunity was granted, the immunity shall stand withdrawn. **However, the Settlement Commissioner is free to grant further time for payment under section 245H(1A). Sandeep Singh vs UOI [2017] 393 ITR 77 (SC)**
- Settlement Commission can proceed and pass an order granting immunity to applicant from prosecution only after it records satisfaction that applicant before it: (i) has co-operated with the Income tax Settlement Commission in proceedings before it, (ii) has made a full and true disclosure of (a) its income, and (b) the manner in which such income has been derived. **CIT vs BDR Builders & Developers Ltd [2016] 385 ITR 111 (Delhi) see also CIT vs Vysya Bank Ltd. [2012] 344 ITR 658 (Karnataka)**

Judicial Pronouncements

- **Commissioner of Income-tax could not direct or authorize the filing of the complaint against the petitioners during the course of the pendency of the proceedings before the Settlement Commission.** Section 245F of the Act, the Settlement Commission alone had the exclusive jurisdiction to launch or not to launch any prosecution of the petitioners. If the Income-tax Commissioner is also held entitled to initiate these criminal proceedings in exercise of his jurisdiction under section 279 of the Act, then the " exclusive jurisdiction " of the Settlement Commission hardly has any meaning. To permit the Income-tax Commissioner to do so would be a complete negation of sub-section (2) of section 245F. **168 ITR 591 R.I. CHADHA & ORS. Vs ITO**

Power of Assessing Officer to grant immunity from prosecution – 270AA.

- Application can be made to grant immunity from imposition of penalty under section 270A **and immunity from initiation of proceedings u/s**
 - 276C (Wilful attempt to evade tax or payment of tax)
 - 276CC (Failure to furnish returns of Income)
- Tax and interest payable as per order passed u/s 143(2) and 147 has been paid within the time specified in demand notice.
- No appeal filed against the order passed u/s 143(3) or 147.
- Application for immunity should be made within one month of receipt of order.
- Upon fulfillment of conditions as specified above immunity to be mandatorily granted.
- Order accepting or rejecting application to be passed within one month from the end of month in which application is received.
- No order rejecting application can be passed without granting opportunity of being heard.
- No application for revision or appeal shall be admissible against the order of assessment once application for immunity is accepted.

Under-reporting as per Section 270A

A person shall be considered to have under-reported his income, if—

- a. Income assessed is more than income determined u/s 143(1);
- b. Income assessed to more than maximum amount not chargeable to tax in case no return of income has been furnished;
- c. The income reassessed is more than the income assessed or reassessed immediately before such reassessment;
- d. The amount of deemed total income assessed or reassessed as per the provisions of section 115JB or section 115JC is greater than the deemed total income determined u/s 143(1)(a);
- e. The amount of deemed total income assessed as per the provisions of section 115JB or section 115JC is more than the maximum amount not chargeable to tax, where no return of income has been filed;
- f. The amount of deemed total income reassessed as per the provisions of section 115JB or section 115JC, as the case may be, is greater than the deemed total income assessed or reassessed immediately before such reassessment;
- g. The income assessed or reassessed has the effect of reducing the loss or converting such loss into income.

Misreporting of income as per section 270A

The cases of misreporting of income referred to in subsection (8) shall be the following, namely:—

- (a) misrepresentation or suppression of facts;
- (b) failure to record investments in the books of account;
- (c) claim of expenditure not substantiated by any evidence;
- (d) recording of any false entry in the books of account;
- (e) failure to record any receipt in books of account having a bearing on total income; and
- (f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction, to which the provisions of Chapter X apply.

Power to tender immunity from prosecution - S. 291

- Central Government for reasons in writing may tender immunity from prosecution on condition of his making a full and true disclosure of the whole circumstances relating to the concealment of income or evasion of payment of tax on income.
- Immunity can be withdrawn if it appears to the Central Government conditions subject to which the immunity is tendered is not complied or the person is willfully concealing anything or is giving false evidence.

Latest Judicial Pronouncements (Adverse)

Delhi High Court in CRL.M.C. 3385/2016 & CrI.M.A. 14338/2016, 1336/2017, 11516/2017 dated 14 September, 2018 in Karan Luthra vs ITO

- Delhi High Court (HC) held that the prosecution proceeding stands committed upon non-filing of income tax return within the prescribed due date under section 139(1) of the Income-tax Act, 1961 (Act). By upholding the Trial Magistrate's order of framing prosecution charges under section 276CC of the Act, the HC rejected taxpayer's reference of the proviso to section 276CC of the Act, and the contention that there was no tax payable but rather the taxpayer was entitled to a refund.

High Court relied on Sasi Enterprises v ACIT [2014] 361 ITR 163 (SC) - prosecution proceedings u/s 276CC stands committed upon failure to file Income-tax return and the proviso to section 276CC of the Act, does not state that an offence has not been committed by the categories of taxpayers who fall within the proviso. **The proviso cannot control the main section but only provides some benefit to certain categories of taxpayers**

Bombay High Court in WPNO.2537 OF 2018 dated 15.10.2018
Ramprakash Biswanath Shroff vs
The Commissioner of Income Tax (TDS) and Ors

- Default by employers in not issuing Form 16 TDS certificates to employees prima facie makes employers liable to prosecution u/s 405 of the Indian Penal Code (IPC). Dept should provide information of such defaulters so that those seeking employment etc would know in advance as to how the employers are complying with law

Jammu & Kashmir High Court in CRMC No. 205/2015, IA No. 01/2015 in Arun Arya vs ITO

- The Taxation Laws S. 278E 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“.
- **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. No doubt, this presumption is a rebuttable one.**
- **The ground taken that there was no wilful default on behalf of petitioner in concealing the income is not tenable, because it is factual defence, which is to be proved during course of trial. The criminal court has to judge the case independently on the evidence placed before it.**

THANK YOU

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