

Offences and Prosecutions

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Brief introduction

- Chapter XXII of the Income -tax Act, 1961 deals with Offences and prosecutions .
- The relevant provisions are contained in S. 275A, to S. 280D of the Act .
- Procedure regulating prosecution is governed by the Criminal Procedure Code , 1973 , unless contrary is provided eg. S. 292A of the Act provides that S. 360 of the Code of Criminal Procedure Code ,1973 (Order to release on probation of good conduct or after admonition) and the Probation of Offenders Act, 1958 would not apply to a person convicted of an offence under the Income -tax Act ,unless the accused is under eighteen years of age .

Important Provisions - Overview

Section	Offence	Punishment
275A	Contravention of order u/s 132(3)[Prohibitory orders]	RI 2 years + Fine
275B	Failure to comply with provisions of S 132(1)(iib) [inspection of records in electronic form]	RI 2 years + Fine
276	Removal, concealment, transfer or delivery of property to thwart tax recovery [execution of certificate under second schedule]	RI 2 years + Fine
276A	Failure to comply with provisions of S.178(1)& 178(3) [Prosecution of liquidator] [Covered by S 278AA]	RI 2 years. < 6 mts only if special and adequate reasons.
276B	Failure to pay tax to the credit of CG -TDS - DDT - Second proviso to S.194B [Covered by S 278AA]	3 months to 7 years + fine

Section	Offence	Punishment
276BB	Failure to pay tax collected at source [S.206C]	RI 3 mts to 7 years + fine
276C(1)	Wilful attempt to evade tax,penalty,interest chargeable or imposable	<ul style="list-style-type: none"> ➤ 2,50,000 – RI 6 mts to 7 years + fine ➤ Any other case-RI 3 mts to 2 years + fine
276C(2)	Wilful attempt to evade payment of tax,penalty,interest under the Act	RI 3 mts to 2 years + fine[discretion]
276CC	Wilful failure to file ROI u/s 139(1) or in response to 142(1),148,153A	<ul style="list-style-type: none"> ➤ Tax evaded>2.5L – RI 6 mts to 7 years + fine ➤ Any other case – SI 3 mts – 2 years with fine
276D	Wilfully fails to produce accounts and documents u/s 142(1)	RI upto 1 year + fine

Section	Offence	Punishment
277	Making a false statement in verification or delivering false account or statement	<ul style="list-style-type: none"> ➤ Tax evaded > 2.5L – RI 6 mts – 7 years + fine ➤ Any other case- RI 3 mts to 2 years + fine
277A	Falsification of books of accounts or documents.	RI 3 mts to 2 years + fine
278	Abetment to make false statement or declaration	<ul style="list-style-type: none"> ➤ Tax evaded > 2.5L – RI 6mts-7 yrs +fine ➤ Any other case -RI3 mts- 2 yrs + fine

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

- Court shall presume culpable mental state on the part of the accused.
- Circular No 469 dt. 23-09-1986 (1986) 162 ITR 21 (St)
[Scope and effect of S.278E]
- Constitutional validity is up held by the Apex Court in **Sasi Enterprises v.ACIT (2014) 361 ITR 163 (SC)**
- Presumption can be rebutted but burden is heavy on the accused.
Nath Khanna v.CIT (2004) 266 ITR 1 (SC) (Para 12)

Approach of Courts to Economic Offences

➤ **State of Gujarat v. Mohanlal Jitamali Porwal & Ors (1987) 2 SCC 364**

“ The entire Community is aggrieved if the economic offenders who ruin the economy of the State are brought to book .A murder may be committed in the heat of movement upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequences to the community”

➤ **Ram Narain Popli v CBI (2003) 3 SCC 641**

“ ... Unfortunately the last few years , the Country has seen an alarming rise in white -collar crimes which has affected the fibre of the Country’s economic structure . These cases are nothing but private gain at the cost of public , and lead to economic disaster .”

Prosecution proceedings under the CGST, Act

- S. 135 of the GST is identical to S 278E.
- S. 136 . GST- Relevancy of statement u/s 70 of the GST Act.
- S. 69 of the GST – Arrest power with the Officer of central tax and also grant bail. Under the provisions of Income tax Act , 1961 no such powers is given to the Assessing Officer .
- One may have to wait and watch that when new Income tax law will be introduced whether such power will be given to the Assessing Officer

Procedure governing the prosecution proceedings.

- 1) Procedure followed by the department while launching the prosecution
- 2) Procedure followed before the Court

Procedure followed by the department while launching the prosecution.

- Income tax manual prescribes the guidelines to be followed while launching the prosecution.
- The Assessing Officer on the basis of records of the assessee send the proposal to the respective Commissioner .
- The Commissioner issues the show cause notice to the assessee.
- If the Commissioner is satisfied with the reply of the assessee he may not grant the sanction to file the prosecution .If he grants the sanction the Officer concerned has to launch the prosecution before the Court by filing complaint before the Competent Court. In Mumbai the competent court is at Bellard Pier.

Aspects to be considered before giving sanction u/s 279 of the Act.


Opportunity of being heard.

- Act does not provide that the Commissioner has to necessarily afford opportunity of hearing before deciding to initiate proceedings

**CIT v. Vellippa Textiles Ltd (2003) 263 ITR 550
(SC) (567, 569)**

- Commissioner waiving or reducing the penalty u/s 273A
- Instruction no 5051 of 1991 dt. 7-2-1991. [Guidelines]
if the accused is 70 years of age when the offence was committed .

**Pradip Burma v.ITO(2016) 382 ITR 418 (Delhi)
(HC)**



There is no warrant for interpreting sub-section (2) to mean that before any prosecution is launched, either a show-cause notice should be given or an opportunity afforded to compound the matter.

Union of India v. Banwari Lal Agarwal [1998] 101 Taxman 508 (SC).

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

- P. Jayappan v. ITO (1984) 149 ITR 696 (SC)
- Kalluri Krishan Pushkar v. Dy.CIT (2016) 236 Taxman 27 (AP& T) (HC)
- Bhupen Champaklal Dalal v Sandep Kapoor & Anr (2001) 248 ITR 830(Bom)(HC) [SLP dismissed in CIT v Bhupen Champaklal Dala & Anr (2001) 248 ITR 830(SC)

Finding of the Appellate Tribunal

- When penalty is deleted on merits though the quantum is up held - Prosecution is liable to be quashed

K.C.Builder v. ACIT (2004) 265 ITR 562 (SC)

V.Gopal v.ACIT(2005) 279 ITR 510 (SC)

**ITO v. Nandlal and Co (2012) 341 ITR 646 (Bom)
(HC)**

- Guidelines F.No.285/160/90-IT(Inv)dt.14-5-1996
- Where Penalty was cancelled on technical grounds , such as limitation, non application of mind etc – Prosecution can be initiated

Penalty & Prosecution

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

Universal Supply Corporation v. State of Rajasthan (1994) 206 ITR 222(Raj) (HC)

A.Y. Prabakar (Karta) v. ACIT (2003) 262 ITR 287(Mad.) (HC) (288)

- Penalty initiated and dropped after considering the reply on merits – Prosecution proceedings may have to be quashed

- When quantum appeal is admitted before High Court on substantial question of law Penalty cannot be levied

CIT v.Nayan Builders and Developers (2014) 368 ITR 722 (Bom) (HC)

- **CIT v. Advaita Estate Development Pvt Ltd (ITANo. 1498 of 2014 dt. 17-2-2017(Bom) www.itatonline.org clarified CIT v Nayan Builders.(Supra)**
- On a harmonious reading of the ratio of above two decisions, it can be contended that when High Court admitted the appeal which gives rise to a pure substantial question of law, it cannot be a fit case for initiation of prosecution.

Compounding of offences – S. 279(2)

- Chief Commissioner or Director general can compound the offences under the Act , either before or after the initiation of proceedings.
- New guide lines F.No. 185/ 35/2013 IT (Inv.V)/108 dt.23-12-2014 (2015) 371 ITR 7 (st) www.itatonline.org
- Composition charges once paid cannot be refunded
Shamrao Bhagwantrao Deshmukh v The Dominion of India (1995) 27 ITR 30 (SC)

- 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 provides for withdrawal of such offences

V. A. Haseeb and Co (Firm) v CCIT (2017) 152 DTR 306 (Mad) (HC)

- Notwithstanding anything contained in the guidelines, the Finance Minister may relax restrictions for compounding of an offence in a deserving case on a consideration of a report from the board on the petition of an appellant .
- Court cannot compel the Commissioner to compound the offence .

Punjab Rice Mills v. CBDT (2011) 337 ITR 251 (P& H) (HC)

Procedure for compounding

- Make an application to CCIT/DGIT.
- Has paid O/s tax, interest and penalty.
- Undertakes to withdraw appeal filed on grounds which has bearing on charge being compounded.
- Offence for which complaint was filed with the competent court 12 months prior to receipt of application for compounding.
- Conduct of applicant, nature and magnitude of offence and facts and circumstances of case will be considered.

Power of the settlement Commission to grant immunity

S. 245H

- If prosecution is already initiated on the date of the receipt of the application u/s 245C the Settlement Commission cannot grant the immunity .
- If prosecution is already launched the Settlement Commission cannot grant the immunity


**Anil Kumar Sinha v.UOI (2013) 352 ITR 170
(Pat) (HC)**

Procedure before Court

- Section 279A – S.276B,276C,276CC,277 & 278 deemed to be non-cognisable offences.
- Section 280C – Offences punishable with imprisonment extending 2 years or fine or both will be tried as summons case and not warrant case.

Procedure before Court

- On the basis of complaint before a Court , the Court sends summons to the accused along with the copy of complainant to attend before the Court on a particular date and time.
- The Complaint being criminal complaint the accused must be present before the Court, unless the Court gives a specific exemption.

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- If the accused is not present on such particular date, the Court may issue a warrant against the accused , unless the accused secures bail , he may be arrested and produced before the Court
 - Timing of arrest and produced before the Court ladies can be arrested only by lady constable.

- On the day of first hearing itself the accused can ask for exemption till the hearing starts. The concerned magistrate may grant exemption till further hearing or till further order.
- The accused may not be allowed to travel outside the Country , without getting permission from the Court.
- Before the regular hearing starts the Court has to frame charge . Before framing the charge if the accused is able to prove prima facie that he was wrongly framed the Court may discharge the accused on the basis of preliminary hearing.

Quashing of proceedings

- The Criminal procedure Code does not specifically give any power to the Court to quash the proceedings as strictly construed in legal practice.
- S. 245 of the Criminal procedure Code deals with provision to discharge the accused-[Trial of warrant cases otherwise than on Police report]
- In **Abasaheb Yadav Hanmane and Ashwin Absaheb Hammane v. State of Maharashtra** 2008 (2) Mh LJ 856 (Bom) (FB) it was held that the Court has inherent power.

Indo Arya Central Transport Limited v. CIT (Delhi)(HC), (WP No. 3964/2017, dt. 12.03.2018)
www.itatonline.org

- If the assessee is 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 u/s 397 read with Section 401 of the Code of Criminal Procedure, 1973 or if permissible, by way of a petition under Section 482 of the Code.

Honourable Court referred the following case laws on the issue of sanction.

- In **The Director, CBI and Others. vs. Ashok Kumar Aswal and Others, (2015) 16 SCC 163** it was observed that once grant of Sanction by the competent Authority was accepted, the test would be whether prejudice was caused to the accused. This was to be left to be determined during the course of trial.
- This Judgment refers to **Prakash Singh Badal and Another vs. State of Punjab and Others, (2007) 1 SCC 1** and **Chairman, Airport Authority of India and Another, (2012) 1 SCC 532**. Legality or validity of order granting sanction would be the subject matter of the review before the Criminal Court, even if the order was silent and application of mind does not appear from sanction or extrinsic evidence may be placed before the Court. Evidence could be lead.


➤ **In State of Maharashtra Through C.B.I. Vs. Mahesh G. Jain, (2013) 8 SCC 119, it was held;-**

“11. In *R. Sundararajan v. State* [(2006) 12 SCC 749 : (2007) 2 SCC (Cri) 563] , while dealing with the validity of the order of sanction, the two learned Judges have expressed thus: (SCC p. 752, para 14)

“14. ... it may be mentioned that we cannot look into the adequacy or inadequacy of the material before the sanctioning authority and we cannot sit as a court of appeal over the sanction order. The order granting sanction shows that all the available materials were placed before the sanctioning authority who considered the same in great detail. Only because some of the said materials could not be proved, the same by itself, in our opinion, would not vitiate the order of sanction. In fact in this case there was abundant material before the sanctioning authority, and hence we do not agree that the sanction order was in any way vitiated.”

➤ In **State of Karnataka v. Ameerjan** [(2007) 11 SCC 273 : (2008) 1 SCC (Cri) 130] it has been opined that: (SCC p. 277, para 9)

“9. ... an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not.”

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- In **KoothaPerumal v. State [(2011) 1 SCC 491: (2011) 1 SCC (Cri) 418 : (2011) 2 SCC (L&S) 657]** it has been opined that the sanctioning authority when grants sanction on an examination of the statements of the witnesses as also the material on record, it can safely be concluded that the sanctioning authority has duly recorded its satisfaction and, therefore, the sanction order is valid.



➤ From the aforesaid authorities the following principles can be culled out:

(a) It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.

(b) The sanction order may expressly show that the sanctioning authority has perused the material placed before it and, after consideration of the circumstances, has granted sanction for prosecution.

(c) The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it.

(d) Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

(e) The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

(f) If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction.

(g) The order of sanction is a prerequisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hyper-technical approach to test its validity.” .


Contention of petitioners

- The Sanctioning Authority has failed to consider the requirements of Section 278AA.
- The Sanctioning Authority has failed to correctly apply the Press Note dated 6th August, 2013 and Standard Operating Procedure in the form of instruction F.No.285/90/2008-IT(Inv-I)/05 dated 24th April, 2008 modified by the Central Board of Direct Taxes (CBDT) vide instruction F.No. 285/90/2013-IT(Inv.) dated 7th February, 2013 on the ground that the delay in deposit of TDS did not exceed the prescribed period of twelve months.
- The petitioners had paid interest on late deposit of TDS prior to issuance of the notice.

Findings of the court

- The issues raised by the petitioners are ex-facie factual and could constitute defence of the petitioners, as constituting reasonable cause. Onus to prove reasonable cause under Section 278AA of the Act is on the person being prosecuted.
- Similarly, with regard to the Standard Operating Procedure, the contention that default had continued for less than twelve months and effect thereof are aspects which would be considered and decided in the course of criminal proceedings.

- Late deposit of TDS in gigantic proportions after the end of the financial year, as per the respondents, has huge ramifications and consequences not limited to non-payment of tax, but adverse consequences and sufferance of hundreds of deductee who did not get credit of the tax deducted and had to pay tax and interest.
- Subsequently, they would have filed revised returns for refund causing harassment and inconvenience. We would accept that grant of sanction could become subject matter of judicial review, albeit in a limited manner to ensure that the authority has acted fairly and reasonably and we do not act as an appellate forum that can substitute the opinion.

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- Necessity of sanction is to filter out frivolous, malafide and vindictive prosecution. It is given on prima facie reaching the result that relevant facts constitute an offence. Technicalities and hyper-technical approach should not be adopted when the sanction order indicates and reflects application of mind.

Further procedure before court.

- If Charge is framed the regular hearing will start, i.e. examination of witness , cross examination , production of evidence etc.
- After the completion of pleading the Court may acquit the accused
- On the day of pronouncement of the judgment the Court always insists that the accused must be present before the Court
- If the accused is found guilty he will be sent to jail unless the Court stays the proceedings for 15 days or get the bail by the Higher Court ie session Court.

- S. 397 of the Criminal Procedure Code provides the revision of orders by the High Court or session Court
- If session court refuses the bail then the appeal lie to the High Court
- If High Court also refuses the bail the accused may appeal to supreme Court
- The accused may also approach for compounding even after holding that the accused is found guilty
- S. 291 (1) of the Act confers on the Central Govt. a power under specified circumstances to grant immunity, to the assessee.

Offences by Companies

S.278B - Companies Firms , Association of person, and bodies of individuals

- **Dhrupadi Devi (Smt) v. State of Rajasthan (2001) 106 Comp.Cas 90 (Raj) (HC) (93)- Criminal liability of partner cannot be thrust upon his legal heirs**
- **ITO v. Karma Trading Co (2004) 267 ITR 170 (P&H) (HC)**

Launching of prosecution against sleeping partner was held to be bad in law

- In ***R. K. Khandelwal v. State [(1965) 2 Cri. L.J. 439 (AH)]*** while dealing with liability of non-working directors it has been very succinctly stated:

"In companies there can be directors who are not in charge of, and responsible to the company for the conduct of the business of the company. There can be directors who merely lay down the policy and are not concerned with the day-to-day working of the company. Consequently, the mere fact that the accused person is a director of the company, shall not make him criminally liable for the offences committed by the company unless the other ingredients are established which make him criminally liable. To put it differently, no director of a company can be convicted of the offence under section 27 of the Act [The Drugs Act, 1940] unless it is proved that the sub-standard drug was sold with his consent or connivance or was attributable to any neglect on his part, or it is proved that he was a person in-charge of, and responsible to the company for the conduct of the business of the company."

- In ***Mahalderam Team Estate Pvt. Ltd. v. D. N. Pradhan [(1979) 49 Comp. Cas. 529 (Cal.)]***, a case under the Employees' Provident Fund, Act, 1952, of which section 14A is *pari materia*, all the directors of a company were prosecuted for the offence of non-payment of provident fund contributions of the company's employees, the Calcutta High Court held that under the said section a company is made primarily liable for an offence committed under the Act. The liability may be extended to other persons vicariously only under the conditions laid down in the section. A director of a company may be concerned only with the policy to be followed and might not have any hand in the management of its day-to-day affairs. Such person must necessarily be immune from such prosecutions. Thus, it has to be established by placing before the Court necessary and sufficient material from which the Court can satisfy itself, that the accused directors took some part in the running of the business of the company and a mere bald statement that the accused persons are directors of the company and hence responsible for the conduct of the business and management of the company will not do.

- In the case of *Om Prakash v. Shree Keshariya Investments Ltd. [(1978) 48 Comp. Cas. 85 (Delhi)]*, had held that a distinction has to be made between directors who are on the board purely by virtue of their technical skill-or because they represented certain special interests and those who are in effective control of the management and affairs and it would be unreasonable to fasten liability on independent directors for defaults and breaches of the company where such directors were appointed by virtue of their special skill or expertise but did not participate in the management. This view has been followed by the Division Bench of the Bombay High Court in the case of *Tri-Sure India Ltd. [(1983) 54 Comp. Cas. 197 (Bom.)]*.

Offences by HUF

S. 278C

- **Roshan Lal v. Special Chief Magistrate
(2010) 322 ITR 353 (All) (HC)**

Member of HUF cannot be held liable for delay in filing of return of HUF , though he has participated in the assessment proceedings

False Evidence

- As per S. 136, proceedings before income - tax authorities to be judicial proceedings .If an assessee intentionally gives false evidence he may be held liable for prosecution under S. 193 of the Indian Penal Code

The Benami Transactions (Prohibition) Amendment Act, 2016

- If property is held to be Benami which is up held by the Court, can prosecution be launched for false verification in return



Court has no power to reduce punishment

**Modi Industries Ltd v. B.C. Goel (1983) 144 ITR
496 (All) (HC)**

Abetment -Liability of Chartered Accountant

- **Navrathna& Co v. State (1987) 168 ITR 788
(Mad) (HC) (790)**

Merely preparing returns and statement on the basis of the accounts placed before the Chartered Accountant, the question of abetment or conspiracy does not arise.

Limitation for initiation of proceedings

- Chapter XXXXVI of the code of Criminal Procedure Code, 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 .For economic Offences applicability of limitation Act 1974 is not applicable. Schedule include Income-tax Act , wealth tax Act etc .

- **Gajanand v. State (1986) 159 ITR 101(Pat) (HC)**
Criminal proceedings had proceeded for 12 years the Income tax department failed to produce evidence the prosecution was quashed.
- **State of Maharashtra v. Natwarlal Damodardas Soni AIR 1980) SC 593**, the Court held that a long delay along with other circumstances be taken in to consideration in the mitigation of the sentence.

Brief Check lists

- ❖ While giving reply to show cause notice , reply should be on facts , technical mistakes in the show cause notice need not be brought to the notice of the concerned authority .
- ❖ Professional as far as possible should not use their letter head or signature while giving reply to show cause notice , unless it is absolutely necessary.
- ❖ Whenever survey or search is conducted on assessee, huge unaccounted cash or incriminating documents are found it may be advisable to consider approaching settlement commission.

- ❖ In the course of assessment it may not be advisable to agree for additions .Once an assessee agrees the possibility of penalty and prosecution may have to be considered.
- ❖ When ever the additions are made one should consider contesting in appeal , if additions are huge If additions are not huge the assessee may write the Assessing Officer stating that , we are not filing an appeal considering the cost and time ,though we have fair chance of succeeding in appeal.
- ❖ If certain wrong facts are referred in the order , it may be advisable to file rectification applicable and in an appropriate case by filing an affidavit.

- ❖ It may not be advisable for professional directors to sign the balance sheet or accounts of the company.
- ❖ In a partnership firm it may be advisable to have a managing partner who can only sign the return of the firm.
- ❖ It may not be desirable to make the ladies who are not well conversant with the business of the firm as signatories to the return.
- ❖ While signing the tax deduction at source return due care must be taken before signing the return.
- ❖ While signing the certificate to the paper book also the professional must be very careful. If wrong certificate is given there could be prosecution for giving wrong statement



Thank You
Credits – Ms Neelam Jadhav, mr
Aditya ajgaokar, Mr Sashank
dundu, Advocates- Ksalegal.