

# **PROSECUTION UNDER INCOME TAX ACT**

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# PROSECUTION UNDER I.T ACT

- In the fight against tax evasion, the imposition of monetary penalty alone is not sufficient.
- A calculating tax evader finds it profitable to evade tax for years, if he knows that he may get away with it by paying penalty in the year in which he is caught.
- However, the prospect of landing in jail is a far more dreaded consequence and works as a deterrent.
- The Parliament has, therefore, been enacting deterrent laws for effective implementation of tax laws

# PROSECUTION UNDER I.T ACT

- Dealt with under  
Chapter XXII- of the I.T.Act,1961
- Relevant sections:-  
275A to 280 of Income tax Law  
&  
Secs. 3,4,61,79 to 90, 105,112 to 114  
of The Indian Evidence Act 1872.

# Conviction for different offences

SECTION	DESCRIPTION	MINIMUM	MAXIMUM	FINE
275A	Removing, parting with or otherwise dealing with books of accounts, documents, money, bullion, jewelry or other valuable article or thing put under restraint (P.O) during the search		2 Years	Yes
275B	Not allowing inspection of books u/s 132(1)(iib)		2 Years	Yes
276	Fraudulent removal, concealment, transfer or delivery of any property or any interest in the property to thwart tax recovery		2 Years	Yes
276A	<b>Non compliance with section 178(1) &amp; 178(3)</b> : Failure on the part of a liquidator / receiver of a company to give notice of his appointment to the A.O or failure to set apart amount notified by the A.O or parting away of company's properties.	6 months	2 years	

# Conviction for different offences

SECTION	DESCRIPTION	MINIMUM	MAXIMUM	FINE
276AB	Non compliance with section 269UC, 269UE & 269UL	6 months	2 years	Yes
276B	Failure to pay TDS	3 months	7 years	
276BB	Failure to pay TCS	3 months	7 years	
276C	Wilful attempt to evade tax	6 months	7 years	Yes
	If amount sought to be evaded < Rs.25 lakhs	3 months	2 years	Yes
276CC	Failure to Furnish R/I	6 months	7 years	Yes
	If amount sought to be evaded < Rs.25 lakhs	3 months	2 years	Yes
276D	Failure to comply with 142(1) & 142(2A)		Upto 1 year	Rs.4 to Rs.10 per day

# Conviction for different offences

SECTION	DESCRIPTION	MINIMUM	MAXIMUM	FINE
277	Making false statement in verification	6 months	7 years	Yes
	If amount sought to be evaded < Rs.25 lakhs	3 months	2 years	Yes
277A	Falsification of books to enable others to evade tax..	3 months	2 years	
278	Abetment of False Return	6 months	7 years	Yes
	If amount sought to be evaded < Rs.25 lakhs	3 months	2 years	Yes
278A	Second and subsequent offences u/s 276B, 276C(1), 276CC, 277 or 278	6 months	7 years	Yes
280	Violation of provisions of sec.138(2) – Eg. IDS 2016 (Only with previous sanction of the Central Govt.)		6 months	Yes

# Other provisions

- 278AA: No prosecution u/s 276A, 276AB or 276B, if a person proves that there was reasonable cause for such failure.
- 278AB: Empowers CIT to grant immunity from prosecution where application for settlement u/s 245C made and proceedings abated u/s 245HA – NO application after initiation of prosecution proceedings after abatement.
- 278B: Deals with offence committed by Companies
- 278C : Deals with offence committed by HUF

# Other provisions

- 279 : Prosecution, only with the previous sanction of the CIT
- 279A : Offences punishable u/s 276B, 276C, 276CC, 277 or 278 are non-cognizable – i.e., no arrest without order of court.
- 291: Central Govt is empowered to tender immunity from prosecution to any person with a view to obtain the evidence of that person.
- 292 : No court inferior to that of a presidency magistrate or a magistrate of the first class shall try any offence under this Act.
- 292A: Section 360 of the Code of Criminal Procedure 1973 or Probation of Offenders Act, 1958 shall not apply to a person convicted of an offence under I.T Act –

(reduction of imprisonment due to good conduct not allowed).



# Effect of the provisions of Sec.278E

- The culpable mental state includes
  - intention, motive or knowledge of a fact or
  - belief in, or reason to believe, a fact
- In any prosecution for any offence under this Act
  - if it requires a culpable mental state on the part of the accused,
    - the court shall presume the existence of such mental state
- It is upto the accused in his defence to prove the fact
  - that he had no such mental state with respect of the act charged as an offence in that prosecution.
- The fact of culpable mental state is said to be proved only
  - when the court believes it to exist beyond reasonable doubt
- It is not enough to conclude that it has been proved when
  - its existence is established by preponderance of probability.

# Prosecution under whose instance?

- CIT's sanction u/s 279 necessary for prosecution of offences
  - u/s 275A, 276, 276A, 276B, 276BB, 276C, 276CC, 276D, 277 & 278
- Here, CIT includes CIT(A), & Appropriate Authority
- CC/DG may also issue instructions/directions for
  - Launching prosecutions
  - Compounding of offences
- **No prosecution action u/s 276C (wilful attempt to evade tax) OR 277 (false statement in verification) in the case**  
**where penalty imposed or imposable u/s 271(1)(c) has been reduced or waived u/s 273A**

# JUDICIAL VIEWS

- The simultaneous presence of the following two elements constitute the validity of prosecution proceedings u/s 276CC
  - (1) Willful delay in furnishing return of income
  - (2) Intention of the assessee to evade tax
- While initiating the prosecution proceedings under this section, it is mandatory on the part of the Income Tax Department to pass a speaking order of prosecution clearly establishing the will / intention on part of the assessee to evade tax by way of non-filing of ITR.

# JUDICIAL VIEWS

- High Court of Madhya Pradesh in case of **Bhavecha Machinery v/s Union Of India [2010] 320 ITR 263 (MP)**, specifies the parameters for initiating prosecution proceedings under section 276CC:
- *“It is not merely failure to file the return in time, which constitutes the offence under section 276CC. The failure to file the return in time must be proved by clear, cogent and reliable evidence to be ‘willful’ and there should be no plausible doubt of its being ‘willful’. It must be intentional, deliberate, calculated and conscious with full knowledge of the legal consequences flowing from them”*

# JUDICIAL VIEWS

- High Court of Andhra Pradesh, in the case of **ITO v/s Autofil**, [1990] 52 TAXMAN 343 (AP) -

*In this case, Advance tax was paid and, thus, there was no evasion in payment of tax. Further, the assessee had paid penalty for delayed filing of return apart from penal interest on the differential amount between the tax assessed and the tax paid.*

*Conviction under section 276CC is an extreme and exceptional resort and gets warranted only when willfulness in failure to submit the return in time is established beyond all reasonable doubts and there should be present mens rea, a bad motive and guilty mind. In the absence of this, no conviction shall follow the prosecution under section 276CC.*

# Who are all responsible and liable to be prosecuted?

- Secs.278B and 278C deal with this aspect
- **Sec.278B:**
- In the case of Company
  - Company and every person who was in charge of and was responsible to the conduct of the business at the relevant time
- In the case of Firm-
  - Firm and every partner who was in charge of and was responsible to the conduct of the business at the relevant time
- In the case of AOP/BOI
  - AOP/BOI and every member controlling the affairs of AOP/BOI
- **Sec.278C:**
- In the case of HUF
  - Kartha of the family
- In the case of Individual-
  - Individual concerned

# Contd.

- Further, in the case of Company/Firm/ AOP/BOI/ HUF
  - if it is proved that the 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, partner of the firm , member of the AOP/BOI or any member of the HUF, then such person shall also be deemed to be guilty of that offence and is liable to be proceeded against.
- However, where such person proves that the offence was committed **without his knowledge or that he had exercised all due diligence to prevent the commission** of the offence, then he is not liable to be prosecuted.

# Time limit to launch prosecution

- Cr.PC provides for limitation for taking cognizance of certain offences,
- But, the said provisions do not apply to offences under the I.T.Act
  - in view of the provisions of the Economic Offences (Inapplicability of Limitation) Act,1974
- There is no time limit prescribed under the I.T.Act
- Delay in launching prosecution, by itself, cannot invalidate the prosecution
  - Nirmala Kapur 122 ITR 473 (P&H)
- However, it has been judicially held that the delay, if any, should not be inordinate
  - Srinivas Pal- 1988 AIR 1729 SC.
  - Natwarlal Damodardas Soni- 1980 AIR 593 SC.
- Hence, prosecution proceedings to be initiated within a reasonable time and not after a lapse of 10 to 16 years. as held in the cases of
  - Jai Narain -207 ITR 632 (Raj) and
  - Vinar and Co.,- 193 ITR 300 (Cal)



# Whether penalty and prosecution are maintainable simultaneously?

- Yes
- Penalty is not a condition precedent to the initiation of a complaint u/s 277
- Pendency of an appeal against penalty is no bar to launch prosecution
  - Shree Singhvi Brothers -187 ITR 219(Raj)
- They are distinct and independent proceedings
- There is no co-relation between them

# What is compounding of an offence?

- Compounding means the accused approaches the relevant authority for payment of a composition fee
  - in lieu of the punishment of imprisonment which would normally be attracted.
- But, the accused cannot claim, as of right, that his offence should be compounded
- The final composition fee payable is determined only after
  - offers and counter offers are made and
  - the relevant authority accepts it
- The compounding can be done any time either
  - before or after the limitation or
  - launch of the prosecution proceedings.
- The accused cannot claim the refund of composition fee on the ground of innocence

# Contd.

- Cases where chances of successful prosecution are good are **generally** not compounded
- Offences under direct tax laws may be compounded
- Offences under IPC are non-compoundable
  - They can however be withdrawn

# Are there any Guidelines for processing compounding petitions?

- Yes.
- Latest and revised guidelines are contained in
- **- Board's F.No.285/35/2013-IT(inv.)/108 dt. 23-12-2014**

It supersedes all earlier instructions dated 16.05.2008.

The offences under Chapter XXII of the Act are classified into two parts (category A and category B) for the limited purposes of compounding of the offences.

# Categorisation of offences for compounding

CATEGORY A	CATEGORY B
276 (Prior to 1.4.1976)	275A
276B	275B
276BB	276 (After 1.4.1976)
277 & 278 (With reference to Category A offences)	276A
	276AA (Prior to 1.10.1986)
	276AB
	276C(1), 276C(2)
	276CC, 276CCC
	276D
	277A
	277 & 278 (With reference to Category B offences)

# Contd.

- **Eligibility conditions for compounding.**
- The person makes an application to the CCIT/DGIT having jurisdiction over the case for compounding of the offence(s) in the prescribed format (Annexure-1 to CBDT Circular)
- The person has paid the outstanding tax, interest, penalty and any other sum due, relating to the offence for which compounding has been sought.
- The person undertakes 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.
- The person undertakes to withdraw appeal filed by him, if any, in case the same has a bearing on the offence sought to be compounded. In case such appeal has mixed grounds, some of which may not be related to the offence under consideration, the undertaking may be taken for appropriate modification in grounds of such appeal.

# COMPOUNDING CHARGES

S.NO	OFFENCE – SECTION	COMPOUNDING CHARGES
1	276B / 276BB (TDS / TCS Defaults)	3% for every month of default – from the date of deduction till date of payment - Similar to 201(1A) In case of <u>subsequent application for compounding</u> , <u>5% for every month of default</u>
2	276C(1) [Wilful attempt to evade tax]	100% of the amount sought to be evaded.
3	276C(2) [Wilful attempt to evade payment of any tax etc.]	3% per month or part thereof of the amount of tax, the payment of which was sought to be evaded for the period of default.
4	276CC [Failure to furnish R/I]	2% per month or part thereof of the tax & Interest determined on assessment – Similar to 234A
5	276CCC [Failure to furnish R/I as required u/s 158BC]	Same as above
6	277 [False statement of verification] 278 [Abatement of false Return]	Where other offence involved, e.g., 276C(1), no separate compounding for 277 or 278. Where only 277 or 278, competent authority to decide having regard to tax evaded.

# Compounding Charges

- Where no compounding fee has been prescribed, the competent authority may determine having regard to the nature and magnitude of the offence, subject to minimum of Rs.25,000.
- In addition to Compounding fees, Prosecution establishment expenses will be charged @ 10% of the compounding fees, subject to a minimum of Rs.25,000.
- Further, litigation expenses, including Counsels fee paid / payable by the Department to be recovered.
- In extreme and exceptional cases of genuine financial hardship, the compounding charges may be suitably reduced with approval of the Finance Minister.



# Authority Competent to Compound an Offence

- The CCIT/DGIT having jurisdiction over the person, seeking compounding of an offence, is the competent authority for compounding of all Category 'A' and Category 'B' offences.
- A order in case of an application for compounding of an offence appearing in Category 'B', involving compounding charges in excess of Rs.10,00,000 (Rs. ten lakhs) shall be passed by the CCIT/DGIT concerned only on the recommendation of a committee comprising of 3 officers of the region concerned, namely
  - (i) Principal CCIT,
  - (ii) DGIT (Inv.) and
  - (iii) CCIT/DGIT having jurisdiction over the case.
- In case such officers are not available within the region, the nearest DGIT or CCIT may be co-opted as Member.

# Offences generally not to be compounded

- A **Category 'A' offence** sought to be compounded by an applicant in whose case compounding was allowed in the past, in an offence under the same section for which the present compounding has been requested, on **3 occasions or more**.
- A **Category 'B, offence other than the first offence** as defined herein below:
- First offence means offence under any of the Direct Tax Laws committed prior to (a) the date of issue of any show-cause notice for prosecution or (b) any intimation relating to prosecution by the Department to the person concerned or (c) launching of any prosecution, whichever is earlier;
- OR
- Offence not detected by the department but voluntarily disclosed by a person prior to the filing of application for compounding of offence in the case under any Direct Tax Acts. For this purpose, offence is relevant if it is committed by the same entity. **The first offence is to be determined separately with reference to each section of the Act under which it is committed.**
- **Notwithstanding anything contained in these Guidelines, the Finance Minister may relax restrictions for compounding of an offence in a deserving case, on consideration of a report from the Board on the petition of an applicant.**

# Whether withdrawal of prosecution complaint is possible?

- Yes- Where the compounding is allowed
- Where the assessment on the basis of which complaint has been filed,
  - has been set-aside or
  - the additions deleted
- The Supreme Court has held that
  - in the case of P.Jayappan -149 ITR 696(SC)
    - The Criminal Court has to judge the case independently on the evidence placed before it
    - The result in the proceedings under the I.T.Act would not be binding on the Criminal Court
    - The Criminal Court no doubt has to give due regard to the result of any proceedings under the I.T.Act

# Thank You

