








**Offences and Prosecutions under Income Tax Act, 1961
– Law and Procedures**

24 January 2019

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IT Prosecution in News

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Non-filers will have 21 days to file I-T returns, submit response: CBDT

PTI | Jan 22, 2019, 07:06 PM IST

New Delhi, Jan 22 (I) Individuals who have carried out high value transactions but have not filed their income tax returns for the assessment year 2018-19 would get 21 days time to submit their responses, the CBDT said Tuesday.

The 21-day time period would be from the date of receiving e-mail or SMS from the I-T Department regarding non-filing of tax returns.

In cases where no return is filed or no response is received for Assessment Year (AY) 2018-19 within the stipulated time, the department would consider initiating proceedings under the Income Tax Act 1961.

The Central Board of Direct Taxes (CBDT) said data analysis has identified "several potential non-filers" who have carried out high value transactions in 2017-18 but have still not filed returns for AY 2018-19.

CBDT, however, did not disclose the number of such non-filers.

"Non-filers are requested to assess their tax liability for AY 2018-19 and file the ITR or submit online response within 21 days. If the explanation offered is found satisfactory, matters will be closed online.

"However, in cases where no return is filed or no response is received, initiation of proceedings under I-T Act 1961 will be

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CBDT: Mumbai I-T TDS office issued prosecution show cause only in big default cases

BY ET BUREAU | JAN 21, 2019, 07:56 AM IST


NEW DELHI: The Central Board of Direct Taxes (CBDT) has said that the Mumbai Income-Tax TDS office issued prosecution show cause notices only in some big cases where more than Rs 5 lakh was collected as tax deducted at source (TDS) from employees, but not deposited with the I-T department in time.

CBDT said that some defaulter companies and vested interests were misleading to thwart action against themselves.

Having deducted tax from employees and other taxpayers and not depositing it in time in the government treasury is an offence punishable under law, the CBDT said, adding that it also affects the interest of the employees from whose salary the tax was deducted by unscrupulous employers but wasn't deposited in the government coffers.

"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," a CBDT statement issued late Sunday evening said.

The tax regulator said in the last one month, the Mumbai IT TDS office issued prosecution notices in only 50 big cases. In 80% of these cases, the tax default is above Rs 10 lakh and in 10% cases the default is Rs 5-10 lakh. In the remaining 10% cases, the default is above Rs 1 crore as detected in the survey, it said.



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Big Change:
The end of Five-Year Plans: All you need to know

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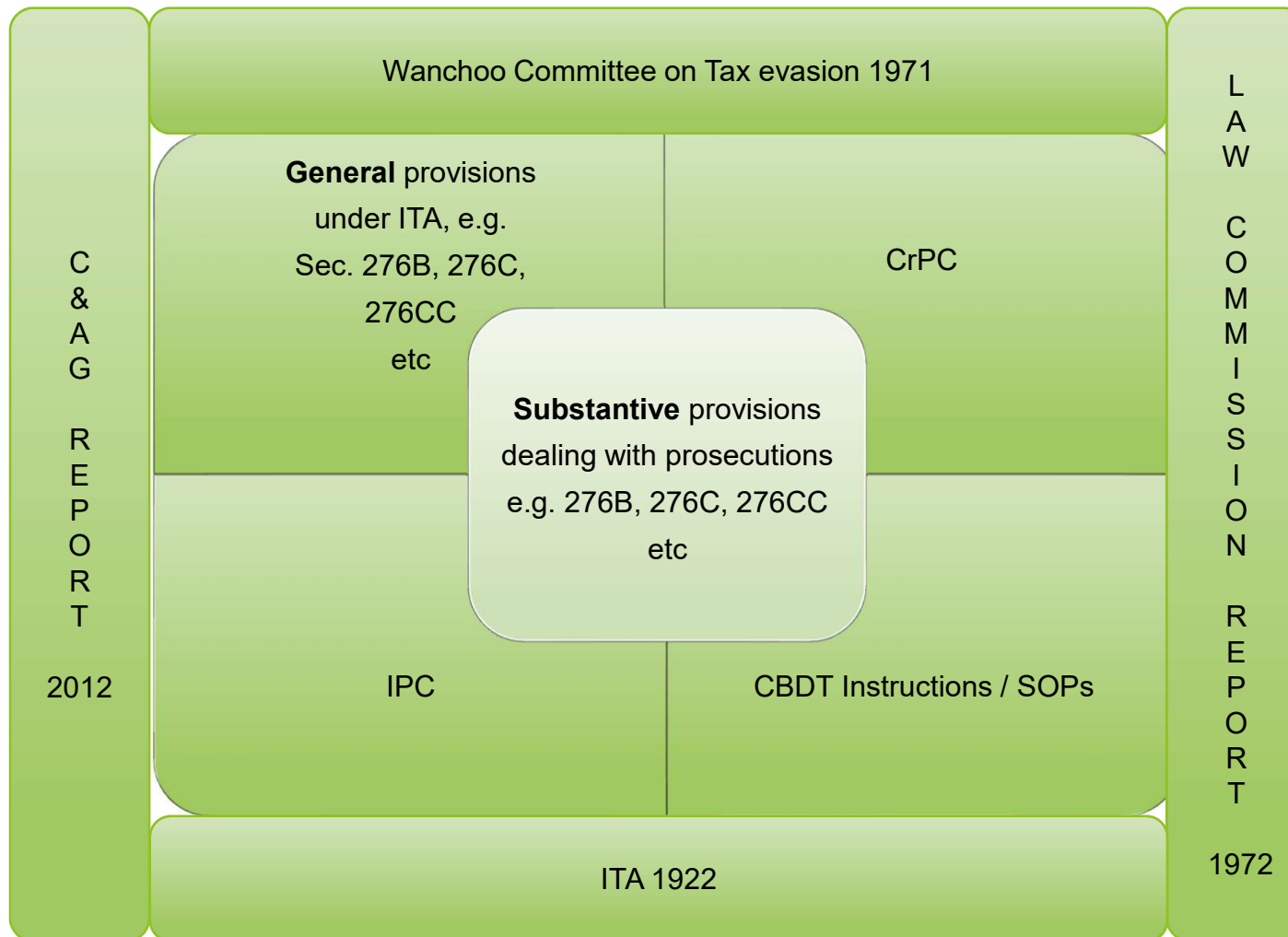
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IT Prosecution Framework at a Glance



Evolution of Law relating to Prosecutions



Offences Liable for Prosecutions under Income Tax Act, 1922

- Two sections dealt with the offences in the old Act
- Power of initiation and compounding procedures were with ACIT.

Section 51

- Failure to make payments or deliver returns or statements or allow inspection was liable for fine which may extend to ten rupees for every day during which the default continues.
- Offences inter-alia includes:
 - ✓ to deduct and pay any tax as required
 - ✓ to furnish in due time any of the returns
 - ✓ to produce, or cause to be produced such accounts and documents as are referred to in the notice U/s 22
 - ✓ to grant inspection or allow copies

Section 52

- False statement in declaration as per the specified sections shall be punishable, on conviction before a Magistrate, with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Wanchoo Committee on Tax evasion 1971

- The report stressed upon the need to dole out exemplary punishment in the form of prosecutions to instill fear in the mind of the assessee seeking to traverse that grey area

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

In the fight against tax evasion, monetary penalties are not enough. Many tax dodger finds it a profitable proposition to carry on evading taxes over the years, if the only risk to which he is exposed is a monetary penalty in the year in which he happens to be caught. The public in general also tends to lose faith and confidence in tax administration once it knows that even when a tax evader is caught, the administration lets him get away lightly after paying only a monetary penalty- when money is no longer a major consideration with him if it serves his business interests....”

Law Commission Report 1972

- The reports dealt with Trial and Punishment of social and economic offences.
- **The broad question that had been referred to the commission that the present trend of legislation and judicial approach to such offences are treated lightly and the punishments are not adequate having regard to the gravity of such offences.**
- The law commission in its earlier report (29th Report) had considered whether economic offences which also includes Evasion of Taxes should be transferred to Penal code.
- The law relating to granting of Bails in relation to economic offences should have stringent conditions. Presently Income Tax Act does not contain any provisions relating to grant of Bail. (Page 83 of the report).
- A cognisance of report by Working group on Central Direct Taxes Administration (January 1968) was also considered in the report which noted that Though direct tax law contains a provisions of prosecutions, **not a single person is convicted of evasion during the last 10 years .**

Law Commission Dated 28th February 1972

- *The commission was of the opinion that the most important feature of social and economic offences is the fact that ordinarily they do not involve an individual direct victim but are punished because they harm the whole society. This constitutes a primary reason why special efforts have to be made to enforce them. (Page 4 of the report)*

Comptroller & Auditor General (CAG) Report - 2012

- C & AG carried out performance audit of administration of Penalty and Prosecution in 2012.
- Some of the major findings are -
 - Tax Department has not given adequate priority in launching of prosecution as indicated by delay in initiation of cases and not launching the prosecution even in approved cases.
 - CBDT did not utilise prosecution mechanism to ensure tax compliance U/s 276 CC of ITA
 - Tax department has poor record maintenance, inadequate monitoring of cases pending before courts

Comptroller & Auditor General (CAG) Report - 2012

- The enforcement of CBDT's policy and procedures on prosecution counsels has not been effective and has impacted the pursuance of cases.
- **Tax department did not utilise the compounding of offences route to reduce litigation and realised due revenue.**
- Prosecution machinery was used to handle individual assessee with low money value cases and not against systematically organised crimes.
- **Tax department has not given adequate priority to the prosecution in tackling tax evasion and prosecution mechanism is not working effectively and efficiently.**

CrPC & IPC

Important provisions



Code of Criminal Procedure (CrPC) and Indian Penal Code (IPC) – Basics

Concept	Definitions
Cognizable v/s Non-cognizable offence	<ul style="list-style-type: none"> ➤ “cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under and other law for the time being in force, <u>arrest without warrant</u>. ➤ non-cognizable offence” means an offence for which, and “non-cognizable case” means a case in which, a police officer <u>has no authority to arrest without warrant</u>.
Bailable v/s Non-bailable offence	<ul style="list-style-type: none"> ➤ “bailable offence” means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force: and “non-bailable offence” means any other offence.
Complaint	<ul style="list-style-type: none"> ➤ “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Schedule of CrPC – II – Classification of Offences Against Other Laws

OFFENCE	COGNIZABLE OR NON-COGNIZABLE	BAILABLE OR NON-BAILABLE	BY WHAT COURT TRIABLE
If punishable with death, imprisonment for life, or imprisonment for more than 7 years.	Cognizable	Non - Bailable	Court of Session
if punishable with imprisonment for 3 years, and upwards but not more than 7 years	Cognizable	Non - Bailable	Magistrate of the first class
If punishable with imprisonment for less than 3 years or with fine only.	Non-Cognizable	Bailable	Any Magistrate

Code of Criminal Procedure (CrPC) and Indian Penal Code (IPC) – Basics

Pre-ponderance of probability v/s Beyond reasonable doubt

- Under the Evidence Act, section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.
- As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved.
 - The first step in this process is to fix the probabilities,
 - the second to weigh them though the two may often intermingle.
 - The impossible is weeded out at the first stage, the improbable at the second.
- The only way to overcome this presumption of innocence in a criminal trial is for the **prosecution** to prove **beyond a reasonable doubt** that the defendant committed the crime that he or she has been charged with.

Code of Criminal Procedure (CrPC) and Indian Penal Code (IPC) – Basics

Types of punishment – Sec. 53 of IPC 1860

- Death
- Imprisonment for life
- Imprisonment, which is of two descriptions, namely: -
(1) Rigorous, that is, with hard labour 2) Simple
- Forfeiture of property
- Fine

Trial of Summons case v/s Trial of Warrant case – Sec. 2(x) of CrPC

- A warrant-case is defined to mean a case relating to
 - an offence punishable with death,
 - imprisonment for life or
 - imprisonment for a term exceeding two years.
- A summons-case means a case relating to an offence, not being a warrant-case.

Quashing of proceedings by High Court

- Section 482 of CrPC

- Sec. 482 of the CRPC provides for saving of Inherent powers of the High Court “to make such orders as may be necessary to give effect to any order under this Code, or **to prevent abuse of the process of any Court or otherwise to secure the ends of justice**”.
- The said Section which provides the High Courts virtually unbridled power in order to make any orders necessary to prevent abuse of process of any court or to secure ends of justice is so expansive that it is used both with strict judicial restraint as well as very sparingly.
- The Hon’ble Supreme Court in State of Punjab v. Kasturi Lal and Ors. (2004) 12 SCC 195 has held that quashing of charge is an exception and not the rule. It observed “Exercise of power under Section 482 of the Code in a case of this nature is the exception and not the rule.
- In exercise of the powers court would be justified to quash any proceeding if it finds that;
 - initiation/continuance of it amounts to abuse of the process of court or
 - quashing of these proceedings would otherwise serve the ends of justice

Offences Punishable under IPC

- As per the decision of Delhi HC in Gulabchand Sharma (1974), though offences under Section 277 (Making False statement in verification or delivering false account/statement) is somewhat similar to Section 193 of IPC, they are not identical and there is no bar in launching prosecution both under the ITA as well as IPC.
- Prosecution instituted under the Indian Penal Code, if any, cannot be compounded U/s 279 of ITA. However, section 321 of Criminal Procedure Code, 1973 provides for withdrawal of such prosecutions.

Offences Punishable under IPC

- Relevant Sections of IPC which may be also be applicable at the time of launching of prosecution under ITA as given below -

Section	Punishment	Type	Bailable?
193 – Giving or fabricating false evidence in a judicial proceedings Giving or fabricating false evidence in any other case	Imprisonment for 7 years and fine. Imprisonment for three years and fine	Non cognisable	Yes
196 – Using in a judicial proceeding evidence known to be false or fabricated	Same as above	Non cognisable	Yes
197 – Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Same as above	Non cognisable	Yes
198 – Using as a true certificate one known to be false in a material point	Same as above	Non cognisable	Yes

Prosecutions under ITA – Chapter XXII



General provisions

- The sections dealing with offences and prosecution proceedings are included in Chapter XXII of the Income-tax Act, 1961 i.e. S. 275A to S. 280D of the Act (hereinafter referred as “ said Act”). Total number of sections dealing with offences and prosecutions - 32
- The provisions of CrPC are to be followed relating to all offences under the Income-tax Act, unless the contrary is specially provided for by the Act. E.g.S.292A of the Act that prescribes that S. 360 of the Code of Criminal Procedure, 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 of age.
- A First Class Magistrate or a Metropolitan Magistrate, should try the prosecution case under the direct taxes. If a Special Economic Offences Court with specified jurisdiction is notified, the complaint is to be filed before the respective court.
- 16 Offences are liable for prosecutions including payment of fine. Higher punishment in case of certain offences committed more than once [Sec 278A].
- Maximum punishment up to 7 years of imprisonment plus fine.
- Certain offence are not liable for prosecutions if Assessee proves reasonable cause.
- Certain offence are not liable for prosecution if willful default/ intention is absent.
- The Supreme Court has established that no opportunity of hearing is required to be given by the Commissioner of Income Tax before the grant of sanction by the by the Commissioner of Income tax.
- As per the instructions issued by CBDT, no prosecution is launched against a person whose age is 70 & more

Summary of offences and punishments

Section	Nature	Bailable or Non Bailable	Cognisable or not	Summons Case or Warrants Case	Reasonable cause argument	Maximum Imprisonment	RI or SI	Limit for fine	Compounding category
275A	132(1)/(2)	Bailable	Non Cognisable	Summons	NA	2 years	RI	No Limit	Category B
275B	132(1)(iib)	Bailable	Non Cognisable	Summons	NA	2 years	RI	No Limit	Category B
276	Tax recovery	Bailable	Non Cognisable	Summons	NA	2 years	RI	No Limit	Category B
276A	178(1)/(3)	Bailable	Non Cognisable	Summons	Available	2 years	RI	No Limit	Category B
276AB	269UC	Bailable	Non Cognisable	Summons	Available	2 years	RI	No Limit	Category B
276B	TDS	Bailable	Non Cognisable	Warrant	Available	7 years	RI	No Limit	Category A
276BB	TCS	Non Bailable	Cognisable	Warrant	NA	7 years	RI	No Limit	Category A
276C-1a	Tax evade	Non Bailable	Non Cognisable	Warrant	NA	7 years	RI	No Limit	Category B
276C-1b	Tax evade	Bailable	Non Cognisable	Summons	NA	2 years	RI	No Limit	Category B
276C-2	Tax evade	Bailable	Non Cognisable	Summons	NA	2 years	RI	No Limit	Category B
276CC1a	Tax return	Non Bailable	Non Cognisable	Warrant	NA	7 years	RI	No Limit	Category B

Summary of offences and punishments – contd...

Section	Nature	Bailable or Non Bailable	Cognisable or not	Summons Case or Warrants Case	Reasonable cause argument	Maximum Imprisonment	RI or SI	Limit for fine	Compounding category
276CC-1b	Tax return	Bailable	Non Cognisable	Summons	NA	2 years	SI	No Limit	Category B
276CCC	158BC	Bailable	Non Cognisable	Warrant	NA	3 years	RI	No Limit	Category B
276D	142(1) & 142(2A)	Bailable	Non Cognisable	Summons	NA	1 year	RI	No Limit	Category B
277-1a	False statement	Non Bailable	Non Cognisable	Warrant	NA	7 years	RI	No Limit	Category A
2771b	False statement	Bailable	Non Cognisable	Summons	NA	2 years	RI	No Limit	Category B
277A	Falsification of books	Bailable	Non Cognisable	Summons	NA	2 years	SI	No Limit	Category B
278- 1a	Abetment	Non Bailable	Non Cognisable	Warrant	NA	7 years	RI	No Limit	Category A
278-1b	Abetment	Bailable	Non Cognisable	Summons	NA	2 years	RI	No Limit	Category B

Reasonable Cause – Section 278AA

- As per Section 278AA, no person shall be punishable for any failure referred to in the said provisions if he proves that there was reasonable cause for such failure. The Offences should be in relation to;
 - Sec 276A – **Failure to comply with the provisions of sub-sections (1) and (3) of section 178**
 - Sec 276AB – **Failure to comply with the provisions of sections 269UC, 269UE and 269UL**
 - Sec 276B – **Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B**
- Before the amendment to S. 276A, 276B, 276B, 276D and 276E, the onus was on the prosecution to prove beyond a reasonable doubt that the accused had no reasonable cause or excuse to commit any of the offences as envisaged by the aforesaid sections.
- However, in the light of the amendment by the Taxation Laws (Amendment and Misc. Provisions) Act, 1986 to the aforesaid, sections wherein the word “without reasonable cause or excuse” have been deleted and with the insertion of S. 278AA, the onus of proving the existence of reasonable cause has shifted on to the accused.
- Calcutta HC in [2004] 136 TAXMAN 346 (CAL.) Shaw Wallace & Co Ltd. Held that it was for appellant to produce sufficient evidence for non-deposit of tax deducted at source during criminal trial to avail of benefit of section 278AA and since except for pleading financial hardship, there was no other reason provided by appellant for such default, Single Judge was justified in not entertaining writ petition of appellant.

Sec. 278E – Presumption of ‘Mens Rea’

- The rule in general criminal jurisprudence established over the years has evolved into the concept of ‘Innocent until proven guilty’ which effectively places the burden of proving the guilt of the accused beyond reasonable doubt squarely on the prosecution.
- However, The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, inserted S. 278E with effect from 10th September, 1986 has carved out an exception to this rule.
- As per Section 278E(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 defence 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.
- As per Section 278E(2), 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**.
- Section 278E of the Act, which is analogous to S. 138A of the Customs, Act, 1962, S.92C of the Central Excise and Salt Act, 1944, S.98B of the Gold (Control) Act, 1968 and S.59 of the Foreign Exchange Regulation Act, 1973 and other Acts relating to Economic Offences.
- The constitution validity of the above amendment has been upheld by the Supreme Court in various judgments.

Sec. 278E – Presumption of ‘Mens Rea’ – Contd...

- Supreme Court in *Sasi Enterprises vs. Assistant Commissioner of Income Tax (2014)* 5 SCC 139: 361 ITR 163 (SC), held that in case of a prosecution of an offence, the Court has to presume the existence of mens rea and it is for the accused to prove the contrary and that too beyond reasonable doubt. Similar observations noted by SC in *Prakash Nath Khanna v. CIT (2004)* 266 ITR 1 (SC) .
- 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.

Limitation of proceedings – Not applicable to ITA offences

- As per Chapter XXXVI of the Code of Criminal Procedure, 1973 specifies the period of limitation beyond which no Court can take cognisance of an offence which is punishable with fine only or with imprisonment not exceeding three years.
- For economic offences (in respect of applicability of Limitation Act, 1974) it is provided that nothing in the aforesaid chapter XXXVI of the Code of Criminal Procedure, 1973, shall apply to any offence punishable under any of the enactment specified in the Schedule.
- The Schedule referred to includes Income tax, Wealth tax, etc.
- In Friends Oil Mills & Ors. vs. ITO (1977) 106 ITR 571 (Ker.) (HC), dealing with Section 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.
- In Gajanand vs. State (1986) 159 ITR 101 (Pat.) (HC)), the Hon'ble High Court held that where the Criminal Proceedings had proceeded for 12 years and the Income tax department failed to produce the evidence, the prosecution was to be quashed. In State of Maharashtra vs. Natwarlal Damodardas Soni AIR 1980 SC 593, 1980 SCR (2) 340, the Court held that a long delay along with other circumstances be taken into consideration in the mitigation of the sentence

Steps in launching prosecutions proceedings

Steps to be followed by the Tax department for launching a prosecutions for the offences

1. The Assessing officer on the basis of the information available, sends a proposal to the CIT U/s 279 of ITA.
2. CIT Sends a show cause notice to the person against whom the proposal to launch prosecution is received.
3. The accused files a reply for his defence.
4. If the CIT is satisfied with a reply, he may not grant a permission to lodge a complaint. In case he is not satisfied with the reply, he accords his sanction to launch prosecution.

The SC in Prakash Singh Badal (2007) and few other case laws has held that legality or validity of order granting sanction would be subject matter of review before the Criminal Court.

Steps in launching prosecutions proceedings – Contd...

LAUNCH OF PROSECUTION MODULE (PHASE 1) IN INCOME TAX BUSINESS APPLICATION (ITBA)

**ITBA-PROSECUTION INSTRUCTION NO.1
[F.NO.SYSTEM/ITBA/INSTRUCTION/PROSECUTION/2016-17] DATED 8-3-2017**

- The Prosecution Module (Phase 1) provides the entire workflow for prosecution starting from initiation of prosecution proposal, issuing show-cause notice and authorisation u/s 279(1) of the I.T. Act, 1961 and recording details of proceedings in Court.
- Similar functionality is provided for offences under the W. T. Act, 1957. The process flow for compounding of offence and grant and withdrawal of immunity u/s 278AB of the I.T. Act, 1961 shall be provided in the next phase.
- The facility to initiate prosecution proposals relating to TDS provisions has not been provided in 1TBA and shall be provided in CPC – TDS
- Training material including user manual, help content and frequently asked questions (FAQs) are available on the Prosecution Module Home Page and on ITBA Portal → Online Training on ITBA.

Steps in launching prosecutions proceedings – Summons Case

Steps to be followed by in the court proceedings [Chapter XX - Sec 251 to 259 of CrPC]

1. In respect Summons case, Court is not required to frame charges.
2. The court gives substance of the accusation which is called” Notice”.
3. As per Section 251 of CrPC, Court explains the particulars of the offence to the accused.
4. The proceedings can be challenged U/s 482 of CrPC before the HC for quashing the proceeding.
5. In case the trial is not quashed by the HC, the accused to apply for a bail.(Bailable and Non Bailable offence)
6. As per Sec 252, if the accused pleads guilty, the Magistrate shall record his plea as nearly as possible in the words and may in his discretion , convict him thereon.
7. As per Section 254, if the matter is not decided as per Section 252 or 253, the court shall take all the evidence and hear the accused.
8. Section 255 deals with conviction or acquittal.
9. Section 259 empowers magistrate to convert the summons case to Warrant Case for the circumstances specified in that section.
10. Appeal against the same lies with the higher court

The accused has a right to go for compounding of offence U/s 279 of CrP

Steps in launching prosecutions proceedings – Warrants Case

Steps to be followed by in the court proceedings [case instituted other than on police report – Chapter XIX Sec 244 to 250 of CrPC]

On receipt of the complaint, the court issues summons the accused by sending a copy of the complaint.

If the accused is not present before the court on the designated date, a warrant can be issued against him and produced before the court by arresting him.

If, upon taking all the evidence referred to in section 244, the Magistrate considers, for reasons to be recorded, that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.[Section 245 of CrPC]

If the court feels otherwise, Courts frame the charges U/s 246 of CrPC. The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make

The proceedings can be challenged U/s 482 of CrPC before the HC for quashing the proceeding.

In case the trial is not quashed by the HC, the accused to apply for a bail.(Bailable and Non Bailable offence)

After the Trial, the accused can either the acquitted or convicted.[Sec 248]

Appeal against the same lies with the higher court.

As per Section 275, in all warrant case, evidence of each witness can be taken down in writing by the magistrate himself or by dictation on open court.

The accused has a right to go for compounding of offence U/s 279 of CrP

[2018] 99 taxmann.com 299 (Delhi) Rakshit Jain]

➤ Section 279, read with section 276CC, of the Income-tax Act, 1961 –

Offence and prosecution - Prosecution to be at instance of Chief Commissioner/Commissioner (Illustrations) - Assessment year 2011-12 –

Whether Commissioner is empowered to Suo moto initiate proceedings leading to criminal prosecution by issuing show cause notice under section 279 followed by grant of sanction for prosecution for offense under section 276CC even if assessing authority is Assistant Commissioner - Held, yes

Prosecution for matters pending in Appeals

- The provisions of the Law of evidence that do not bind assessment proceedings, are to be strictly followed in criminal proceedings.
- In *P. Jayappan v. ITO (1984) 149 ITR 696 (SC)*, the court held that the two types of proceedings could run simultaneously and that one need not wait for the other. However, a wholesome rule will have to be adopted in matters of this nature where courts have taken the view that when the conclusions arrived at by the Appellate Authorities have a relevance and bearing upon the conclusions to be reached in the case necessarily one authority will have to await the outcome of the other authority.
- In *Kalluri Krishan Pushkar v Dy. CIT(2016) 236 Taxman 27 (AP& T) (HC)*, the court held that, existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings.
- Hon'ble Madras High Court in the case of, *Mohammed I. Unjawala vs. CIT [(1995) 213 ITR 190 (Mad.)]* held that Criminal Court is bound to accept the findings of Tribunal on questions of fact more so when such findings are in favour of assessee.

Prosecution for matters pending in Appeals

- Delhi HC in Pradip Burman **[2016] 65 taxmann.com 138**, Section 276D of the Income-tax Act, 1961 - Offence and prosecution - Failure to produce accounts and documents (Stay of prosecution proceedings) - Whether pendency of appellate proceedings has no bearing on initiation of prosecution under Act - Held, yes - Assessee filed instant writ petition seeking staying of criminal proceedings against him on ground that against assessment order, he had already filed an appeal, which was pending for adjudication - It was noted that appeal had been filed challenging assessment order and consequential outcome of imposition of penalty under section 271(1) and thus, at any count, outcome of appeal filed on behalf of assessee will have no bearing on complaint at least in respect of offence under section 276D.

Penalty & Prosecution

- The Supreme Court, in *Uttam Chand v. ITO (1982) 133 ITR 909 (SC)*, while dealing with prosecution proceedings u/s. 277, held that the finding given by the Appellate Tribunal is binding on the criminal courts. Therefore, when there is a finding of the Appellate Tribunal leading to the conclusion that there is no *prima facie* case against the assessee for concealment, then that finding would be binding on the court and the court will have to acquit or discharge the assessee.
- In *K. C. Builder v. ACIT (2004) 265 ITR 562 (SC)*, the court held that when the penalty is cancelled, the prosecution for an offence u/s 276C for willful evasion of tax cannot be proceeded with thereafter.
- In *V. Gopal v. ACIT (2005) 279 ITR 510 (SC)*, the court held that when the penalty order was set-aside, the Magistrate should decide the matter accordingly and quash the prosecution.
- Non-initiation of penalty proceedings does not lead to a presumption that the prosecution cannot be initiated as held in *Universal Supply Corporation v. State of Rajasthan (1994) 206 ITR 222 (Raj) (HC) (235)*, *A. Y. Prabhakar (Karthi) HUF v. ACIT (2003) 262 ITR 287 (Mad.) (288)*.

Offence by Company– Sec. 278B

- Where an offence has been committed by a company, a firm, association of persons, or body of individuals, the person, who was in charge of and was responsible for the conduct of its business at the time when the offence was committed will be deemed to be guilty of the offence, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of the offence.
- The term Company includes Firm/BOI/AOP and director includes partners and members of AOP.
- When the offence is punishable is fine and imprisonment, then company will be liable for fine and person referred in Sub section 1 or director referred in sub section 2 shall be liable for prosecution.
- Where assessee had subscribed her signature in profit and loss account and balance sheet of company for relevant assessment year which were filed along with returns, Assessing Officer was justified in naming her as Principal Officer and accordingly she could not be exonerated for offence under section 277 [[2018] 96 taxmann.com 203 (Madras) HIGH COURT OF MADRAS Mrs. Sujatha Venkateshwaran]

Offence by Company– Sec. 278B

- Section 139, read with section 140, of the Income-tax Act, 1961 - Return of income (General) - Assessment year 2011-12 - Whether though prime responsibility of furnishing return of income of company is of managing director of such company, but then, it is not correct to read above provision so as to conclude that it is always or invariably responsibility of managing director alone and of no other - Held, yes - Whether thus, directors are also equally responsible for furnishing of return on behalf of company - Held, yes [2018] 99 taxmann.com 299 (Delhi) Rakshit Jain]

Other important Judicial decisions in the recent past

Year & Court and Subject matter	Court decision
2017 Madras	Section 276CC, read with section 277, of the Income-tax Act, 1961 - Offences and prosecutions - Failure to furnish returns of income (Show cause notice) - Whether where a show cause notice as to why prosecution under sections 277 and 276C(1) and under provisions of Indian Penal Code for concealment of income and filing of false statements in return should not be initiated against assessee was issued, assessee had to respond to it and same could not be questioned in a writ petition
2019 Madras	Where during pendency of assessee's appeal before Tribunal, his stay petition was dismissed and thereupon AO initiated prosecution proceedings under section 276C for non-payment of determined tax, in view of fact that assessee was agitating his case before Tribunal, which was final fact-finding body, there was no necessity to launch prosecution hurriedly because law of limitation under section 468 Cr. P.C. for criminal prosecution was excluded by Economic Offences (Inapplicability of Limitation) Act, 1974

Special Courts



Special Courts and related provisions

Section	Provision in brief
280A – Special court	The Central Government, in consultation with the Chief Justice of the High Court, may, for trial of offences punishable under this Chapter, by notification, designate one or more courts of Magistrate of the first class as Special Court for such area or areas or for such cases or class or group of cases.
280B – Offences Triable	Notwithstanding anything contained in the Code of Criminal Procedure, 1973 , the offences punishable under this Chapter shall be triable only by the Special Court, if so designated
280C – Summons case	Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court, shall try, an offence under this Chapter punishable with imprisonment not exceeding two years or with fine or with both, as a summons case, and the provisions of the Code of Criminal Procedure, 1973 as applicable in the case of trial of summons case, shall apply accordingly.
280D – Application of CrPC code	The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) (including the provisions as to bails or bonds), shall apply to the proceedings before a Special Court and the person conducting the prosecution before the Special Court, shall be deemed to be a Public Prosecutor.

Offences liable for Prosecution – Substantive Provisions



TDS Defaults – Section 276B

Failure to deduct TDS is liable for penalty U/s 271C of ITA and failure to pay TDS deducted to the credit of the government is liable for prosecution.

- After the amendment by the Taxation Laws (Amendment and Misc. Provisions) Act, 1986 wherein the word “without reasonable cause or excuse” have been deleted and with the insertion of S. 278AA, the onus of proving the existence of reasonable cause has shifted on to the accused. **Earlier the onus was on the department to prove beyond a reasonable doubt that the accused had no reasonable cause.**
- **Bombay HC in 2018 held that** Where assessee filed instant petition contending that Form No. 16 having not been issued by his employer in time, he was suffering at hands of department it was appropriate to issue direction to Commissioner (TDS) to file a comprehensive affidavit and Department of Revenue was also to be directed to penalise such defaulters and take other strict measures as contemplated by law against them.
- **PATNA HC in 2017 held that** where Assessee had properly deducted tax at source for relevant year but failed to deposit same with Central Government within specified time limit - Said amount was deposited along with interest subsequently when mistake was noticed by its Statutory Auditors - Prosecution proceedings was launched against assessee after three years of default - It was found that impugned tax could not be deposited within time due to oversight on part of assessee's accountant - Whether this could be presumed to be a reasonable cause for not depositing tax by assessee within time and, thus, initiation of proceedings after three years would be in contravention of CBDT instruction dated 28-5-1980 and, therefore, deserved to be quashed – HC ruled in favour of the assessee.

TDS Defaults – Section 276B – Contd...

- The selection of cases & their processing is further governed by Instruction F.No. 285/90/2008-IT(Inv-I)/05 dated 24.04.2008 which has been modified by the CBDT [vide F.No.285/90/2013-IT(Inv.)] dated 07.02.2013. The tax department has issued Standard Operating Procedure (SOP) for initiation of prosecution proceeding in this regard.

- The cases where TDS/TCS is not deposited within due date are bifurcated in two classes;
 - Cases where amount of TDS not deposited is more than INR 1,00,000 – mandatory prosecution
 - Cases where the amount of TDS not deposited is more than INR 25,000 but less than INR 1,00,000 - may be processed for prosecution depending upon the facts and circumstances of the case, like where there are instances of repeated defaults and/or tax has not been deposited till detection.

- CPC-TDS/TRACES will generate a list of prosecutable cases for mandatory processing for prosecution **(List-A)** in accordance with the criteria laid down by the CBDT vide it's instruction dated 07.02.2013 or any other modified criteria, if the same is done in view of suggestions made in this regard. Such identification shall be done within one month of the filing of the quarterly TDS statement.

TDS Defaults – Section 276B – Contd...

- CPC-TDS will generate another list of cases (**List-B**) involving defaults of delay in payment of Rs. 25,000 to Rs. 1,00,000/- to help AO(TDS) to identify cases fit for prosecution based on facts and circumstances of the case.
- Detailed procedure is given for selection of cases and filing complaint with the court in the said SOP.

Wilful Attempt to evade Tax – Sec. 276C(1) & 276C(2)

- Section 276C(1) states that if a person wilfully attempts in any manner to **evade** any tax, penalty or interest Chargeable or imposable under this Act and section 276(2) states that if a person wilfully attempts in any manner whatsoever to **evade the payment** of any tax, penalty or interest under this Act.
- The difference between the two sub-sections has been explained by the Hon'ble Gujarat High Court in case of Chandulal Shah vs. State of Gujarat & Anr. (213 ITR 307).
 - The Court held that sub-s. (1) contemplates evasion **before** charging or imposing tax, penalty, or interest as the section has used the term 'chargeable or imposable' whereas sub-s (2), penalises cases of tax evasion **after** charging or imposition, that is, evasion after completion of assessment comes within the purview of sub-section (2).

Wilful Attempt to evade Tax – Sec. 276C(1) & 276C(2)

- For the purposes of this section, a wilful attempt shall include a case where any person—
 - has in his possession or control any books of account or other documents (being books of account or other documents relevant to any proceeding under this Act) containing a false entry or statement; or
 - makes or causes to be made any false entry or statement in such books of account or other documents; or
 - wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or
 - causes any other circumstance to exist which will have the effect of enabling such person to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof.
- in the cases where the penalty is waived partly u/s. 273A, the Commissioner is precluded from granting sanction u/s. 279 of the Act.

Wilful Attempt to evade Tax – Sec. 276C(1) & 276C(2) – Contd...

Section 270A and Section 276C – Section 270AA

- An assessee may make an application to the Assessing Officer to grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, if he fulfils the following conditions, namely:—
 - the tax and interest payable as per the order of assessment or reassessment under sub-section (3) of section 143 or section 147, as the case may be, has been paid within the period specified in such notice of demand; and
 - no appeal against the order referred to in clause (a) has been filed.
- The Assessing Officer shall, within a period of one month from the end of the month in which the application under sub-section (1) is received, pass an order accepting or rejecting such application: **Provided** that no order rejecting the application shall be passed unless the assessee has been given an opportunity of being heard.

Wilful Attempt to evade Tax – Sec. 276C(1) & 276C(2) – Contd...

Section 270A and Section 276C – Section 270AA

- The Assessing Officer shall grant immunity from imposition of penalty under section 270A and initiation of proceedings under section 276C or section 276CC, where the proceedings for penalty under section 270A has not been initiated under the circumstances referred to in sub-section (9) of the said section 270A.
- Such immunity is not available where either
 - (i) penalty is initiated in respect of **misreporting of income**, or
 - (ii) tax and interest as per demand notice is not paid within the time specified in the demand notice,
 - (iii) application is not made in the prescribed form within one month from the end of the month in which order of assessment or reassessment is received by the assessee.

Non filing of return of income – Sec 276CC

- If a person **wilfully** fails to furnish in due date ;
 - the return of fringe benefits which he is required to furnish under sub-section (1) of section 115WD or by notice given under sub-section (2) of the said section or section 115WH or
 - the return of income which he is required to furnish under sub-section (1) of section 139 or
 - by notice given under clause (i) of sub-section (1) of section 142 or
 - section 148 or
 - section 153A,

- Severe punishment prescribed if the amount of tax evaded is more than INR 25 Lacs.

- No prosecutions if the return is filed before the end of Assessment year.

- For Assessee other than Companies, no prosecutions if the Total Tax as reduced by advance tax and TDS is less than INR 3,000/-.

Non filing of return of income – Sec 276CC

- Supreme Court in Sasi enterprises (2014) ruled that **Prosecution for offence u/s 276CC for failure to file ROI can be initiated during the pendency of assessment proceedings.** the contention that no prosecution could be initiated till the culmination of assessment proceedings, especially in a case where the appellant had not filed the return as per s. 139(1) of the Act or following the notices issued u/s 142 or s. 148 does not arise; The firm is independently required to file the return and merely because there has been a best judgment assessment u/s 144 would not nullify the liability of the firm to file the return as per s. 139(1) of the Act.

Abetment of False Returns- Sec 278

- If a person abets or induces in any manner another person
 - to make and deliver an account or
 - a statement or
 - declaration relating to any income or any fringe benefits chargeable to tax
 - which is false and which he either knows to be false or does not believe to be true or to commit an offence
- The provisions relating to abetment of an offence are dealt with in Chapter V of the Indian Penal Code. S. 107.
- It is seen that the offence of abetment is committed in three ways, namely –
 - (a) by instigation;
 - (b) by conspiracy; or
 - (c) by intentional aid.
- Severe punishment prescribed if the amount of tax evaded is more than INR 25 Lacs
- For an offence of abetment, it is not necessary that the offence should have been committed. A man may be guilty as an abettor, whether the offence is committed or not. (Faunga Kanata Nath v. State of Uttar Pradesh, AIR 1959 SC 673).
- Further, a person can be convicted of abetting an offence, even when the person alleged to have committed that offence in consequence of abetment, has been acquitted. (Jamuna Singh v. State of Bihar, AIR 1967 SC 553, 1967 SCR (1) 469.

Abetment of False Returns- Sec 278 – Liability of Professionals

- In P. D. Patel v. Emperor, (1933) 1 ITR 363 (Rangoon)(HC), an advocate deliberately omitted in a return submitted by him a certain amount of money and persisted in taking up false defenses. The Government lost a huge amount because of the exclusion of the said amount in the return filed by the advocate on behalf of his client. A fine for the said offence was levied by the trial court on an appeal, the High Court took a serious view, of the offence and **held that in a case like this, the punishment should be deterrent and exemplary and the assessee was ordered to be kept in simple imprisonment for one month.**
- In Navrathna & Co. v. State (1987) 168 ITR 788 (Mad.)(HC)(790). The court held that, merely preparing returns and statement on the basis of the accounts placed before the Chartered Accountant, the question of abetment or conspiracy cannot arise.
- The Supreme Court in the case of Jamuna Singh v. State of Bihar, AIR 1967 SC 553 (Supra), has held that a person can be convicted of abetting an offence even when the person alleged to have committed that offence in consequence of abetment has been acquitted.

Compounding of Offences



Compounding of Offences – Section 279

- The offences referred to in Chapter XXII are compoundable. The Principal Chief Commissioner or Chief Commissioner or a Principal Director General or Director General have been empowered by section 279(2) to compound any offence referred to in section 279(1). The offences can be compounded either before or after the institution of proceedings.

Guidelines of CBDT – F. No. 285/35/2013 IT(Inv.V)/108 dated 23rd December 2014

- Compounding of offences is not a matter of right. However, offences may be compounded by the competent authority on his satisfaction of the eligibility conditions prescribed in these guidelines keeping in view factors such as conduct of the person, nature and magnitude of the offence and facts and circumstances of each case [Para 4 of the guidelines]
- Prosecution instituted under the Indian Penal Code, if any, cannot be compounded as per these guidelines. However, section 321 of Criminal Procedure Code, 1973 provides for withdrawal of such prosecutions [Para 5 of the guidelines]

Compounding of Offences – Section 279

Eligibility conditions for compounding are – [Para 7 of the guidelines]

- i. Application to CCIT/DGIT in prescribed format;
- ii. Payment of outstanding tax, interest, penalty and any other sum due relating to the offence;
- iii. Undertaking to pay the compounding charges including compounding fees, prosecution establishment expenses and the litigation expenses including counsel's fee;
- iv. The assessee undertakes to withdraw appeal filed by him, if any, in case the same has a bearing on the offence sought to be compounded.

Compounding of Offences – Section 279

..Contd.

Prosecution proceedings are launched with the previous sanction of CIT or CIT(A); Therefore the compounding powers are given to the higher authorities like PCCIT, CCIT and DGIT

- Notwithstanding anything contained in the 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 appellant.
- These guidelines replace the existing guidelines issued vide F. No 285/90/2008, dated May 10 2008 with effect from January 1, 2015. The applications for compounding received before 01.01.2015 shall be dealt with as per the guidelines issued in 2008.
- Category A offences include 9 clauses and Category B office offences include 14 cases.
- Para 8 of the guidelines includes details of offences generally not to be compounded. It includes;(please refer guidelines for all exceptions)
 - Category A offences if compounding was allowed in the past for same section for 3 or more occasions
 - Category B offences other than the first offence (means first offence can be compounded) The term first offence is explained in the guidelines
 - Offences committed by the person for which he was convicted by the court under Direct tax Laws
 - offences committed by a person for which compliant was filed with the competent court 12 months prior to the receipt of the application for compounding.

Compounding of Offences – Section 279

..Contd.

- CCIT/DGIT having a jurisdiction over the person can pass an order for compounding. However in case of category B offence, if the compounding fees exceeds INR 10 lacs, then recommendation of committee comprising of PCCIT, DGIT(INV) and CCIT/DGIT having jurisdiction over assessee is required.
- Application for compounding to be disposed of within 180 days of the filing. Compounding order to be passed within 60 days of payment of compounding charges.

[2018] 89 taxmann.com 327 (Delhi)

Vikram Singh

Section 279 of the Income-tax Act, 1961 - Offence and prosecution –

- Prosecution to be at instance of Chief Commissioner/Commissioner (Compounding of offence) - Whether compounding fee is in nature of a payment made to avoid punishment for a criminal offence - Held, yes
- Whether amount of compounding charges is not to be merely compared with principal and interest charged but has to be adjudged from point of view of long duration during which there is wilful non-payment of taxes - Held, yes
- Whether only because in a particular case, due to delay attributable purely to petitioner, amount of compounding charges turn out to be much higher than principal and interest, it does not per se render compounding charges illegal or arbitrary - Held, yes
- Whether where petitioner voluntarily agrees for compounding of offence and undertakes to department to pay compounding charges and to withdraw his appeal, he is to be directed to be bound down by same - Held, yes [Paras 48, 49, 50 and 56]
- Prosecution to be at instance of Commissioner (Compounding of offence) - Whether Explanation to section 279 clearly vests CBDT with powers to issue circulars, orders, instructions or directions for proper composition of offences - Held, yes
- Whether CBDT Guidelines on Compounding of Offences, 2014, are exhaustive in nature and provide different compounding charges for different offences and guidelines do not reflect any exercise of power which is arbitrary or illegal - Held, yes [Para 32]

[2016] 75 taxmann.com 57 (Madras) V.A. Haseeb & Co. (Firm)

Where against conviction and sentence passed by Trial Court assessee had filed an appeal and same was pending, said appeal was also a 'proceeding' as contemplated under section 279(2); Revenue Authority, thus, for pending appeal, could compound offence

- ▶ The term 'proceedings' is not defined in the Income Tax Act, 1961. The term 'proceedings' is a term of wide amplitude and comprehensive and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning would be governed by statute.
- ▶ *Supreme Court - Babu Lal v. M/s. Hazari Lal Kishori Lal and others*, AIR 1982 SC 818, 824, it was held thus:-"17. The word 'proceeding' is not defined in the Act. Shorter Oxford Dictionary defines it as carrying of an action at law, a legal action or process; any act done by authority of a Court of law; any step taken in a cause by either party. The term 'proceeding' is a very comprehensive term and generally speaking means a prescribed course of action for enforcing a legal right. It is not a technical expression with a definite meaning attached to it, but one the ambit of whose meaning would be governed by statute. It indicates a prescribed mode in which judicial business is conducted. The word 'proceeding' in S.22 includes execution proceedings also".

Category of Offences for compounding – Category 'A'

Section	Nature of Default	Compounding fee
276B	(Prior to 01/04/1989) – Failure to deduct or pay tax	3% per month for first offence.
276B	(w.e.f 01/04/1989 and up to 30/05/1997) – Failure to pay tax deducted at source under chapter XVII-B	5% per month for subsequent offence.
276B	Failure to pay tax deducted at source under chapter XVII-B or tax payable under section 115-O or 2 nd proviso to section 194B to the credit of the Central Government (w.e.f 01/06/1997)	Period from TDS to be deducted till the date of actual payment.
276BB	Failure to pay the tax collected at source	Same as above
277	False statement in verification etc. with reference to Category 'A' offences	10% of compounding fee of main offence
278	Abetment of false return etc. with reference to Category 'A' offences	10% of compounding fee of main offence

Category of Offences for compounding – Category ‘B’

Section	Nature of Default	Compounding fee
275A	Contravention of order made u/s 132(3)	No specific fee, minimum Rs.25,000
275B	Failure to comply with the provisions of section 132(1)(iib)	No specific fee, minimum Rs.25,000
276	Removal, concealment, transfer or delivery of property to thwart tax recovery	No specific fee, minimum Rs.25,000
276A	Failure to comply with provisions of section 178(1) and (3) or fails to part with any assets of the company : company in liquidation	No specific fee, minimum Rs.25,000
276AB	Failure to comply with provisions of sections 269UC, 269UE and 269UL (restrictions on transfer of properties - purchase of properties by Government)	No specific fee, minimum Rs.25,000

Category of Offences for compounding – Category 'B'

Section	Nature of Default	Compounding fee
276C(1)	Willful attempt to evade tax etc.	100% of amount sought to be evaded
276C(2)	Willful attempt to evade payment of taxes etc.	3% per month of the amount sought to be evaded
276CC	Failure to furnish returns of Income	2% per month (calculation mechanism prescribed)
276CCC	Failure to furnish returns of Income in search cases in block assessment scheme	2% per month (calculation mechanism prescribed)
276D	Failure to produce accounts and documents	No specific fee, minimum Rs.25,000
277A	Falsification of books of accounts or documents etc.	No specific fee, minimum Rs.25,000
277	False statement in verification etc. with reference to Category 'B' offences	10% of compounding fee of main offence
278	Abetment of false return etc. with reference to Category 'B' offences	10% of compounding fee of main offence

Million Dollar Question ???

Whether to opt for

Compounding

Or

Continue with the Tax/Court proceedings ?

Key Takeaways

- Ensure to make proper submission to the CIT against the show case notice received U/s 279 of ITA.
- Even CIT(A) during appellate proceedings has a right of enhancement and initiate Prosecution proceedings.
- Avail option of Compounding judiciously.
- Pleading non guilty and face the trial before the court.
- Discharge the onus by proving “ NO MENS REA” or No Wilful intention or test of reasonableness as and when relevant.
- Demonstrate to the court that there is no against you and charges can not be framed.
- Use the remedy available U/s 482 of CrPC before the High Court to Quash the proceedings in the appropriate cases



THANK YOU!!!

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