PROSECUTION UNDER THE INCOME TAX ACT, 1961

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INTRODUCTION:

Chapter XXII of Income Tax Act, 1961 contains Sections 275A to Sections 280D relating to offences and prosecution since the commencement of the Act. But such provisions were not applied frequently by the Income Tax Department. Recently, the application of prosecution provisions have become more regular and this has led to a panic situation among the tax payers. Non-compliance, Evasion, Concealment of Income, Non-Payment of Tax, Non-Payment of Tax Deducted or Collected at Source Mis-statements etc. are main reasons for launching prosecution and therefore, large number of prosecution cases are being filed by the revenue against the tax payers.

TYPES OF OFFENCES -

There are mainly two types of offences namely cognizable offence and Non-Cognizable offence. Cognizable offence means an offence in which a police officer may arrest without warrant and non-cognizable offence means an offence in which police authority has no authority to arrest without warrant. Offences under section 275A, 275B, 276, 276A, 276AB, 276C(1), 276C(2), 276CC, 276D, 277 and 278 are bailable and offences under 276B, 276BB, 276C(1), 276CC, 276CCC, 277, 278 are non-bailable offences. However, offences u/s 276C(1), 276CC, 276CCC, 277 and 278 upto an amount of Rs 25,00,000/- and above are non-bailable and below Rs 25,00,000/- are bailable.

PERSON LIABLE FOR PROSECUTIONS –

If a person commits an offence, he will be liable for prosecution even if he is not an assessee under the Income Tax Act. If an offence is committed by an Entity, Association of Persons or Body of Individuals, every person related to the offence is liable for prosecution and in a case of H.U.F., the “Karta” of the family is to be prosecuted.

SECTIONS CONTAINED IN CHAPTER XXII –

Some of the important sections contained in chapter XXII are discussed in brief as under –

Section 275A - Second proviso to section 132(1) empowers the tax authorities to seize the asset by keeping the asset at the place of the taxpayer and many times during the course of search it may not be practicable to seize any books of account, other documents, money, bullion, jewellery or other valuable article or thing, for reasons other than those mentioned in the second proviso to section 132(1). In such a situation, the concerned tax authorities may serve an order on the owner or the person who is in immediate possession or control thereof, that he shall not remove, part with or otherwise deal with it, except with the

previous permission of such officer. Such person may be prosecuted for contravention of above order under this section.

Section 276B and 276BB - If any person fails to pay tax deducted or collected at source by him to the credit of the Central Government, he shall be prosecuted. Now a days such type of prosecution initiation has become more regular. The CBDT has issued guidelines for launching prosecution vide circular no. 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. Presently, the monetary limit specified for cases to be considered for prosecution is as under:

(i) Cases, where amount of tax deducted is Rs.1,00,000 or more and the same is not deposited by the due date prescribed under the Income Tax Act, 1961 read with the Income Tax Rules, 1962 shall mandatorily be processed for prosecution in addition to the recovery.

(ii) Cases, where the tax deducted is between Rs.25,000 and Rs.1,00,000 and the same is not deposited by the due date prescribed under the Income Tax Act, 1961 read with the Income Tax Rules, 1962 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.

In the case of ***KINGFISHER AIRLINES LTD. & ANR. vs. ASSISTANT COMMISSIONER OF INCOME TAX (2014) 265 CTR (Kar) 240*** it has been held that "*Wherever a company fails to deduct the tax at source and remit the same to the account of the Central Government, attracts criminal prosecution and also recovery proceedings. Quantification of amount for the purpose of initiation of criminal proceedings is not necessary. The proceedings initiated against the petitioners cannot be quashed on the ground that the proceedings under s. 201(1) and s. 201(1A) are pending.*"

Section 276C - The prosecution shall be launched in case of wilful evasion of tax, penalty or interest.

Section 277 - A person shall be punished if he makes or deliver a false or untrue statement in any verification under this Act or Rule.

Section 276D - Wilfully non-production of books of accounts is also a reason for prosecution under this section.

In the case of ***PRADIP BURMAN vs. INCOME TAX OFFICER (2016) 382 ITR 418 (Del)*** while dealing with section 276C, 276D & 277 it was held that *"Both the complaints have been filed under ss. 276C(1), 276D and 277. The grounds of appeal against the assessment order and statements of facts clearly establish that there was no ground in either of the appeal in respect of the offence under s. 276D. The appeal had been filed challenging the assessment order and consequential outcome of imposition of penalty*

under s. 271(1)(c). Thus, at any count, the outcome of the appeal filed on behalf of the assessee will have no bearing on the present complaint at least in respect of offence under s. 276D. Moreover, no prayer for quashing of the proceedings was made by the assessee in the application. In the proceedings once initiated in a warrant trial case, there is no provision under the CrPC, 1973, except under s. 258, Cr.PC, where the proceedings of the case can be stayed by the Magistrate suo motu or upon the application filed on behalf of the accused, however, s. 258, CrPC relates only to summons trial cases. Moreover, the application filed by the assessee did not mention under which provision of the Act it is filed. Thus, the trial Court has rightly dismissed the application filed by the assessee. From the noted facts, it is crystal clear that the assessee had admitted to have bank accounts outside India only after the investigation by the IT Department. The said foreign account was the undisclosed account and the deposits therein relate to his undisclosed income and the same needs to be examined. Therefore, there is no illegality, infirmity or perversity in the order passed by the trial Court."

Section 276CC - The prosecution may also be launched in case of non-furnishing of return of income in due time subject to certain monetary limit.

In the case of ***DEPUTY COMMISSIONER OF INCOME TAX vs. M. SUNDARAM (2010) 322 ITR 196 (Mad)*** it has been opined by the Hon'ble Court that *"the respondent-assessee-accused has not filed his returns in time, for the respective assessment years. So, he is liable to be prosecuted for the offence under s. 276CC of the Act. Since he has not filed the returns in time, mere payment of interest/penalty will not absolve his criminal liability. Hence, the trial Court has committed error in acquitting the respondent-accused. The appellant-Income-tax Department has proved that the respondent-accused is guilty of the offence under s. 276CC of the Income-tax Act, beyond reasonable doubt. The respondent-accused is guilty of the offence under s. 276CC of the Income-tax Act. Therefore, he is liable to be convicted for the offence under s. 276CC of the Income-tax Act."*

Section 277A - If any person either himself or with intent to enable any person to evade any tax, interest or penalty makes false entry in the books of accounts, both shall be punished. This section is also being applied very frequently now a days particularly by the officers of the investigation wing of Income tax department.

Section 278 - If a person abets or induces another person to make a false statement or declaration, he shall be punished as per provision of this section.

SECTION WISE CHART OF PROSECUTION AND FINE -

The chart shown below reflects above mentioned sections and quantum of fine and year of prosecution.

Section	Prosecution	Fine

	(Imprisonment)	
275A	Maximum 2 years	Indefinite
276B	3 months – 7 years	Indefinite
276BB	3 months – 7 years	Indefinite
276C(1)	6 months – 7 years 3 months – 2 years	Indefinite Indefinite
276C(2)	3 months – 2 years	Indefinite
276CC	6 months – 7 years 3 months – 2 years	Indefinite Indefinite
276D	Maximum 1 year	Rs. 4 to Rs.10 per day until payment
277	6 months – 7 years 3 months – 2 years	Indefinite Indefinite
277A	3 months – 2 years	Indefinite
278	6 months – 7 years 3 months – 2 years	Indefinite

APPROVAL FROM HIGHER AUTHORITY -

A person shall not be proceeded against for any offence under Sections 275A, 276, 276A, 276B, 276BB, 276C, 276CC, 276D, 277, 278 except with the previous sanction of the Commissioner or Commissioner (Appeals) or the appropriate authority. However, the Chief Commissioner or, as the case may be Director General, may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for the institution of proceeding under this sub-Section. Appropriate authority shall have the same meaning as in Section 269UA of the Income Tax Act, 1961.

SHOW CAUSE NOTICE -

It is not obligatory on part of an income tax authority to issue a show cause notice before initiation of prosecution proceedings for sake of natural justice. There were difference of opinion on this issue which has been settled by the decision of Supreme Court in the case of ***Union of India v Banwari Lal Agarwal (1999) 238 ITR 461***. The apex court has held that before launching of prosecution on a person, a show cause notice is not required to be served. Also in the case of ***CIT v. Velliappa Textiles Ltd. (2003) 263 ITR 550 (SC) (567 to***

569) it has been held that the absence of an opportunity to be heard will not make the order of sanction void or illegal.

PROSECUTION IN CASE OF COMPANIES –

Company is a juristic person, so it cannot be put behind the bar. However, a company may be punished by imposing fine. The five judge bench of the Supreme Court in ***STANDARD CHARTERED BANK V DIRECTOR OF ENFORCEMENT 275 ITR 81***, in a majority decision has held that there is no blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment and the court can impose the punishment of fine against the company. The decision in the case of ***Asst. Commissioner v Velliappa Textile (2003) 263 ITR 550 (SC)*** was re-examined by the apex court in the case of Standard chartered Bank (supra). Therefore, it is settled law that in case of companies the punishment by way of fine can be imposed on the companies. Company under this chapter means and includes a firm, AOP, or a BOI whether incorporated or not.

COMPOUNDING OF OFFENCES –

Compounding of an offence is done when the defaulter admits the offence and pays the compounding fee as per stipulated conditions.

As per section 279(2), of the Act, an offence under chapter XXII may either be compounded before or after institution of proceedings. The offence may be compounded either by Principal Chief Commissioner of Income Tax / Chief Commissioner of Income Tax or Principal Director General of Income tax/ Director General of Income Tax. The party cannot insist on compounding as section 278(2) only gives an opportunity for compounding of offence. In ***Union of India vs Banwari Lal Agarwal (Supra)*** it has been held party does not get a right to insist for compounding.

In the case of ***VINUBHAI MOHANLAL DOBARIA vs. CHIEF COMMISSIONER OF INCOME TAX & ANR. (2017) 247 Taxman 253 (Guj.)*** it has been held that *"On true interpretation of cl. 8(ii) of the Guidelines for Compounding of Offence under the Direct Tax Laws, 2014 it is clear that in case the offence is committed prior to date of issuance of any show-cause notice for prosecution, it can be said to be the "first offence"—For asst. yr. 2011-12, the show-cause notice was already issued under s. 276CC on 27th Oct., 2014 for non-filing of return before due date and despite the same for the subsequent year i.e. for asst. yr. 2013-14 the assessee did not file return of income before due date of filing of return—Therefore, again the assessee committed the offence for asst. yr. 2013-14—Thus, it cannot be said that in asst. yr. 2013-14 it can be said to be the "first offence" committed by the assessee—Under the circumstances, the respondent No. 1 has rightly rejected the compounding application submitted by the assessee."*

The CBDT has issued new set of guidelines for compounding of offences under direct taxes ***vide*** **notification F. No. 185/35/2013 IT (Inv.V)/108 dated December 23, 2014** which shall cover cases for compounding filed w.e.f. 01.01.2015 and cases of compounding filed prior to that date shall continue to be governed by earlier guidelines issued vide **F. No. 285/90/2008-IT(Inv.)/12, dated May 16, 2008**.

WRIT –

Another remedy that is available is writ petition under Article 226 of the Constitution which can be filed once prosecution is launched. In the case of **KRISHNASWAMI VIJAYAKUMAR vs. PRINCIPAL DIRECTOR OF INCOME TAX (INVESTIGATION) (2018) 404 ITR 442 (Mad)** it has been held by the Hon'ble Court that "*Writ petition is premature. Firstly, the impugned proceedings is only a show-cause notice and therefore, the petitioner has to respond to the same and it cannot be questioned in a writ petition. The sheet anchor of the submissions of the counsel for the petitioner is by referring to s. 279(1). However, the Proviso under s. 279(1) of the Act enumerates officers, who may issue such directions or instructions to the authorities, who have been enumerated under s. 279(1) of the Act. Therefore, to say that the Director of IT(Inv.) has no jurisdiction even to issue the show cause notice is a plea, which is stated to be rejected. Ultimately, the authorities are of the opinion that prosecution has to be launched, then, it is well open to the petitioner to raise all defences.*"

However, there is difficulty in approaching the high court through a writ petition, as in most cases dispute of question of fact is involved, which has to be determined by the lower court. Further, while filing a writ petition, the petitioner must approach the court with clean hands and bona fide interest. In the case of ***TAX RECOVERY OFFICER & ANR. vs. BHISHMA PITHAMAHA (2015) 377 ITR 584 (Kar)*** it was opined by the Hon'ble Court that *"It is well-settled law that while invoking equity jurisdiction of this Court, the bona fides of the petitioner approaching the Court is to be considered and even if the law may be, to some extent, in favour of the petitioner yet, if the bona fides of the petitioner himself is doubtful or the petitioner has not come with clean hands, meaning thereby, the equity is not in favour of the petitioner, this Court will always refuse to exercise its extraordinarily discretionary jurisdiction under Art. 226 of the Constitution of India in favour of such petitioner."*

APPELLATE TRIBUNAL AND PROSECUTION -

Since appellate tribunal is final facts finding authority so if the appellate tribunal finds that the assessee has not concealed any income and 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. 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.

CONCLUSION –

Recently, the courts have given various decisions in favour of the department and has convicted the assessee. The assessee and the tax consultants should change their attitude and should not take the prosecution proceeding lightly. The lady director of a Hyderabad company has been sentenced to rigorous imprisonment and also fined for evasion of tax. For non-deposit of TDS, the assessee of Bangalore and Mehrauli have been sentenced to jail by the respective courts. Even for non-furnishing of return of income by the assessee within the stipulated time, the Punjab and Haryana High Court has recently sentenced a person to jail.

Therefore, assesses and tax consultants should be very careful in handling the case of non-compliance, evasion, non-payment of taxes etc. with utmost care to avoid prosecution.