

Chapter 1

INTRODUCTION



No law will be respected or obeyed unless sanction accompanies such law. Tax law is not an exception to this rule. For the effective and satisfactory implementation of a fiscal legislature it is necessary to provide for the consequences of non-compliance of the law. The prosecution provisions are deterrent not only to the assessee himself but also to all the other assessees.

The Government of India is empowered under the Constitution of India to collect revenue from different sources to meet its administrative expenses and financial support to carry out various objectives to establish a 'welfare state' by carrying out various social schemes, for this purpose various statutes have been framed and some of the Acts like Income-tax Act, 1961, Goods and Services Tax Act, 2017, Customs Act, 1962 are enacted by the Parliament to empower the Govt. of India to collect tax from the public. These are the Direct and Indirect taxes.

The Income-tax Act, 1961 (hereinafter referred as "the Act"), though provides the procedure for the assessment proceedings it does not provide any special procedure for prosecution proceedings. Therefore, once the complaint is filed before a Magistrate the procedure to be followed is the general procedure followed by the Criminal Courts, which is laid down by the Code of Criminal Procedure, 1973.

In *State v. Awtar Krishna*, the Allahabad High Court has held that the relevant provisions of the Code of Criminal Procedure are applicable to the trial of an accused for an offence under the Revenue Acts and they have to be given effect to. Section 292 of the Income-tax Act, 1961, provides that only the Metropolitan (formerly Presidency) Magistrate or a Magistrate of the First Class has jurisdiction to try and convict a person of an offence under the Act. Therefore, the department has to file a complaint before a Metropolitan Magistrate or a Magistrate of the First Class and such court is the first authority to try the offences under the Act. – [*State v. Awtar Krishna* (1957) 8 STC 244 (All)]

The sections under the Income-tax Act, 1961 dealing with offences and prosecution proceedings are included in Chapter XXII of the Income-tax Act, 1961 i.e. Section 275A to Section 280D of the Act.

Methods of Maintaining Tax Compliance

There are three modes built in the fiscal legislation for encouraging tax compliance. These methods are:

- (i) Interest

- (ii) Penalties
- (iii) Prosecution

While charging of interest is compensatory on character, the imposition of penalty and institution of prosecution proceedings act as strong deterrents against potential tax delinquents.

Consequences for non-compliance prescribed under the Act

The Income-tax Act, 1961 seeks to enforce tax compliance in a three fold manner for non-performance of the obligations imposed on an assessee, viz. (i) interest, (ii) penalty and (iii) prosecution:

Imposition of interests	Imposition of penalties	Prosecutions
Section : 234A, 234B, 234C, 201(1A), 220(2)	Section : 270A – 275	Section : 275A – 280D

In this book an effort has been made that since there is natural tendency of some tax evaders/unscrupulous elements to evade tax payable under these Acts. These Acts were supposed to act as deterrent and provide for the certain penal provisions which act as the deterrent/lesson for such type of persons. Broadly, there are two types of parallel provisions under these Acts as under:

- (i) Penalty by the departmental adjudication.
- (ii) Launching of prosecution in the court of law.

Provisions of prosecutions under the Income-tax Laws are hereinafter discussed in detail separately. The purpose of both these provisions is to prevent the evasion of taxes. Broadly, penalty is imposed by the departmental authorities but punishment is given only in court of law. However, penalty and punishment can be provided simultaneously. The Hon'ble Supreme Court of India in the case of *Director of Enforcement v. MCT M Corporation (P) Ltd.*, 1996, RLT, p 365 (SC) has held that a person can be prosecuted in criminal court and at the same time penalty can be imposed by departmental authorities. The Hon'ble Supreme Court has held that major difference in both these provisions of penalty and punishment is with regard to scope of *mens rea*, which is essential ingredient of any criminal offence (*Kalpnaath Rai v. State*, AIR, 1998 SC, p 201.) but it has also been held that the same is not essential in penalty provisions unless statute specifically provides so.

Article 20 in The Constitution of India 1950

20. PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES

- (1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

- (2) No person shall be prosecuted and punished for the same offence more than once.
- (3) No person accused of any offence shall be compelled to be a witness against himself.

Offences and prosecutions under Income-tax Act, 1961

The sections dealing with offences and prosecution proceedings are included in Chapter XXII of the Income-tax Act, 1961 i.e. Section 275A to Section 280D of the Act. However, the provisions contained in said Chapter XXII of the Act do not *inter se* deal with the procedures regulating the prosecution itself, which is governed by the provisions of the Criminal Procedure Code, 1973. The provisions of the said Code are to be followed relating to all offences under the Income-tax Act, unless the contrary is specially provided for by the Act. An appropriate example would be Section 292A of the Act that prescribes that Section 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 years of age.

The Finance Act, 2012, with effect from 01.07.2012 has inserted Sections 280A to 280D, wherein the Central Government has been given the power to constitute Special Courts in consultation with the Chief Justices of the respective jurisdictional High Courts. Normally, the Magistrate Court in whose territorial jurisdiction an offence is committed tries the offence. For direct tax cases, the offence is said to be committed at the place where a false return of income is submitted, even though it is completely possible that the return has been prepared elsewhere or that accounts have been fabricated at some other place.

General Guidelines

Prosecution is a criminal proceeding. Therefore, based upon evidence gathered, offence or crime, as defined in the relevant provision, has to be proved beyond reasonable doubt by the complainant.

CBDT guidelines instruct that where quantum additions or penalty have been deleted by the departmental appellate authorities, then steps must be taken to withdraw prosecution

CBDT guidelines had instructed that where quantum additions or penalty have been deleted by the departmental appellate authorities, then steps must be taken to withdraw prosecution (*Guidelines F. No. 285/16/90-IT (Inv) 43, dated 14.05.1996*)

Examining of a case for prosecution does not necessarily mean filing of Prosecution complaint in the court

The examining of a case for prosecution does not necessarily mean filing of Prosecution complaint in the court, the decision regarding which needs to

be taken by the Commissioner, after considering entire facts and circumstances of the case, during proceedings under Section 279(1) of the Act. The term “examining/examined” refers to and includes all actions leading to:

- (a) filing of prosecution complaint in the court, or
- (b) compounding the offence under Section 279(2) before or after filing of the complaint with court,
- or
- (c) taking a decision that the case is not fit for prosecution.

Procedure for prosecution

Governed by provisions of the Criminal Procedure Code, 1973 unless specifically provided by the Income Tax Act, 1961

Income-tax Authorities have to file a complaint before the competent judicial authority

Income-tax Authorities have to file a complaint before the competent judicial authority. It is not necessary to file a police complaint. Since they are not declared to be ‘criminal courts’, they cannot punish the persons accused of such offences, but have to file complaint in a court of law.

Existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings

In a case relating to the mode of recovery of tax demand where the prosecution was initiated under Section 276C of Income-tax Act, 1961, for non-payment of admitted tax and interest thereon, the A.P. & T. High Court in the decision of *Kalluri Krishna Pushkar v. DCIT* held that the existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings. – [*Kalluri Krishan Pushkar v DCIT* (2016) 236 *Taxman* 27 (AP& T)]

Who is liable to be prosecuted?

Any person, committing the offence is liable to be prosecuted. In this connection it is not necessary that the person should be an assessee under the Income-tax Act. In the case of an offence committed by a Company, Firm, Association of Persons or Body of Individuals, every person in charge of or responsible for the conduct of the business of the concern as well as the concern are deemed to be guilty. Similarly, in the case of an offence by a Hindu Undivided Family, the karta thereof is deemed to be guilty of the offence.

Trial by court [Section 292]

A court not inferior to a Presidency Magistrate or a Magistrate of the First Class can try any offence under the Income Tax Act (Section 292). Each State must have a Court of Session, Judicial Magistrate of First Class (or metropolitan magistrates), Judicial Magistrates of Second Class, and Executive Magistrates. A person convicted by a Presidency Magistrate can appeal to the Court of Session.

When public servant liable to be prosecuted?

If a public servant furnishes any information in contravention of the provisions of Section 138(2), prosecution may be instituted against him with the previous sanction of the Central Government. (Section 280).

Proceedings before income-tax authorities to be judicial proceedings [Section 136]

Section 136 provides that any proceedings under the Act shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 and for the purpose of Section 196 of the Indian Penal Code (45 of 1860) and every Income-tax Authority shall be deemed to be a Civil Court for the purposes of Section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974). However, all proceedings under the Act do not fall under the definition of judicial proceedings for all purposes, eg., penalty proceedings under section 271(1)(c) do not fall within the ambit of Section 136 of the Act and therefore cannot be said to be judicial proceedings.

Offence can be compounded

Section 279(2) of Income-tax Act empowers a Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General to compound an offence either before or after the institution of prosecution proceeding.

Is *mens rea* or culpable mental state or guilty intention necessary?

In case of willful act of omission or commission, the court shall presume the existence of culpable mental state. However, the accused can rebut this presumption by producing necessary evidence before the court. (Section 278E).

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

The assessment proceedings and criminal proceedings are independent proceedings. The assessment proceedings are conducted by the Income Tax Authorities and are civil proceedings in nature, whereas prosecution for offences committed are tried before a competent court. The provisions of the Law of evidence that do not bind assessment proceedings, are to be strictly followed in criminal proceedings.

It was held that, existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings. In that particular case the prosecution was initiated under section 276C, for non-payment of admitted tax and interest. – [Kalluri Krishan Pushkar v. DCIT (2016) 236 Taxman 27 (AP& T)]

It was held that when the penalty order was set aside, the Magistrate should decide the matter accordingly and quash the prosecution. – [V. Gopal v. ACIT (2005) 279 ITR 510 (SC)]

If appeal is pending against assessment order, prosecution proceedings should not be launched

The petitioner had preferred an appeal against the order of assessment which is pending before the statutory appellate authority. Learned counsel for the petitioner has submitted that in view of the direction of this court in certain matters during the pendency of the statutory appeal filing of complaint case is not justified. In such matters this court has consistently taken the view that soon after the passing of the assessment order the prosecution should not be launched if the matter is pending in appeal. Further action may be taken only if the appeal is dismissed in whole or in part. If the appeal is allowed and the findings of the Assessing Officer are set aside there can be no justification for the initiation of criminal proceedings.

Since in the instant case a complaint has already been filed this application is disposed of with a direction to the trial court not to proceed; with the complaint case bearing No. 184(C)/2001 pending in the court of the Special Judge, Economic Offences, Patna, till the disposal of the appeal by the appellate authority. After the disposal of the appeal the opposite party will proceed in accordance with law, and keep in view the order that may be passed in the appeal with liberty to the parties to move the trial court after the disposal of the appeal. – [*Naresh Prasad v. UOI* (2005) 276 ITR 633 (Pat)]

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), *Prabhakar (Karthi) HUF v. ACIT* (2003) 262 ITR 287 (Mad.).

It was held that two types of proceedings could run simultaneously and that one need not wait for the other. – [*P. Jayappan v. ITO* (1984) 149 ITR 696(SC)]

It was held that during pendency of appeal before Commissioner (Appeals), interim stay of criminal proceedings is to be granted. – [*Gauri Shankar Prasad v. UOI* (2003) 261 ITR 522 (Pat)]

Where quantum additions or penalty have been deleted by the departmental appellate authorities

CBDT Guidelines vide notification F. No. 285/16 90-IT (Inv.), dated 14.05.1996, wherein it has been mentioned that where quantum additions or penalty have been deleted by the departmental appellate authorities, then steps must be taken to withdraw prosecution. If the appellate order is against the assessee, then the matter has to be argued on merits.

Where Addition made in assessment having been deleted

The addition made in assessment having been deleted by the Tribunal the court held following Supreme Court's decision in *KTMS Mohammed v. UOI* (1992) 197 ITR 196 (SC), that the very basis of prosecution was nullified and no offence under sections 276C and 277 was made out. – [*ACIT v. Poorna Cine Theatre (P) Ltd & Ors.* 126 Taxation 337 (AP)]

Pendency of appeal before Tribunal – Stay of prosecution proceedings under the Income-tax Act, 1961 during the pendency of assessment proceedings before authorities was held to be justified

Dismissing the petitions of the revenue department, the Hon'ble Supreme Court held that in the event that the ultimate result of the proceedings before the appellate authorities had a definite bearing on the cases alleged against the Respondents, the High Court would be justified in granting interim stay when the quantum appeals were pending before the appellate authorities under the Act. The Hon'ble Supreme Court held that despite the stay on criminal prosecution, the work of recording of evidence would proceed during the pendency of the appeals. Therefore, it was held that there was no reason for interference in the interim order passed by the High Court and the appeals were dismissed. – [*CIT v. Bhupen Champak Lal Dalal* (2001) 248 ITR 830 : 167 CTR 283 : 116 Taxman 746 (SC)]

Two types of proceedings could run simultaneously and that one need not wait for the other - institution of the criminal proceedings cannot in the circumstances also amount to an abuse of the process of the court

The only point which arises for consideration in this case is whether prosecutions for offences punishable under section 276C and section 277 of the Act and under sections 193 and 196 of the Indian Penal Code instituted by the Department while the reassessment proceedings under the Act are pending are liable to be quashed on the ground that they were not maintainable.

On a careful consideration of the relevant provisions of the Act, we are of the view that the pendency of the reassessment proceedings cannot act as a bar to the institution of the criminal prosecution for offences punishable under section 276C or section 277 of the Act. The institution of the criminal proceedings cannot in the circumstances also amount to an abuse of the process of the court. The High Court was, therefore, right in refusing to quash the prosecution proceedings in the four cases instituted against the petitioner under section 482 of the Code of Criminal Procedure. – [*P. Jayappan v. ITO* (1984) 149 ITR 696 (SC)]

In *Modi Industries Ltd v. B.C. Goel*, has taken the view that Courts have no power to reduce the punishment prescribed by the statute. – [*Modi Industries Ltd v. B.C. Goel* (1983) 144 ITR 496 (1981) 7 TAXMAN 213 (All.)]

Findings of the Tribunal would be binding on the Magistrate Court

It was held that the finding given by the Appellate Tribunal is binding on criminal Courts. The accused must be discharged if the conclusion is that there is no *prima facie* case against the assessee. – [*Uttam Chand v. ITO* (1982) 133 ITR 909 (SC)]

Old age 70 Years

CBDT instruction No. 5051 of 1991 dated 07/02/1991 para 4 states

“Prosecution need not normally be initiated against a person who has attained the age of 70 years at the time of commission of the offence”.

In *Pradip Burman S. v. ITO 382 ITR 418 (Delhi)*, the Court laid down that the person should have reached the age of 70 at the time of commission of the offence. The case of the petitioner was that the complaint filed is liable to be quashed on the ground that at the time of filing of the criminal complaint, the petitioner had attained the age of 70 years and thus no prosecution can be initiated against him. Instruction number 5051 of 1991 dated February 7, 1991 mandated that no prosecution could be initiated against a person who is above 70 years, “at the time of commission of offence”.

Further the said instructions do not mandate or make it compulsory since the words “need not normally” used in para 4 do not provide an absolute bar on initiation of prosecution. Thus the emphasis is on time of commission of the offence.

Withdrawal of Prosecutions

There is no specific provision under the Act regarding withdrawal of prosecution proceedings already instituted. However, in a summons case, as per Section 257 of Cr.PC, complainant may request the court’s permission to withdraw the prosecution complaint on justified grounds, at any time before the final order is passed by the court. Such withdrawal of complaint shall not be requested without prior administrative approval of the CCIT or DGIT. The Commissioner shall submit proposal to the CCIT/DGIT concerned, who after recording reasons for doing so, may approve withdrawal of the complaint.

In a warrant case, where it is found that the prosecution instituted under the provisions of Act and/or IPC needs to be withdrawn in view of the change in circumstances (due to appellate orders or otherwise), the proposal for withdrawal shall be submitted to the Board for seeking the approval of the Central Government as required under Section 321 of Cr.PC.

In either case, after receiving approval of CCIT/DGIT/Central Government, the Commissioner shall authorize the CO to approach the court through the prosecution counsel to withdraw the prosecution complaint. A report of all such cases where withdrawal of prosecution has been approved shall be sent to the Board on monthly basis.

Section 279(2) of the Act confers the power of compounding the offence even after institution of complaint in court. In case an offence has been compounded after filing of the complaint, a copy of the compounding order under Section 279(2) shall be produced before the Trial Court through the Prosecution Counsel seeking courts permission for withdrawal of the complaint.

Statistics of the number of prosecution cases

Table below shows the status of prosecutions launched, cases decided viz. convicted, compounded and acquitted

Financial Year	Prosecution Launched	Cases Decided	Convictions	Compound- ed	Acquitted (in percent)
2007-08	263	280	11	13	256(91.4)
2008-09	162	146	14	13	119(81.5)
2009-10	312	599	32	291	276(46.1)
2010-11	244	356	51	83	222 (62.4)
2011-11	209	593	14	397	182 (30.7)
2012-13	283	265	10	205	50 (18.9)
2013-14	641	664	41	561	62 (9.3)
2014-15	669	976	34	900	42 (4.3)
2016-17	784		48	575	
2017-18	2225		13	1052	

Source: CAG Report