



प्रधान मुख्य आयकर आयुक्त का कार्यालय, कर्नाटक एवं गोवा क्षेत्र, बेंगलूरु.

OFFICE OF THE PRINCIPAL CHIEF COMMISSIONER OF INCOME TAX,  
KARNATAKA & GOA REGION, BENGALURU.

केंद्रीय राजस्व भवन, नं:1,क्वींस रोड, बेंगलूरु -560001.

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फा. सं. 43/प्र. मु. आ. आ./तक /बोर्ड का परिपत्र व अनु. /2019-20

F.No.43/ Pr.CC/Tech/Board's Cir. & Instrn./ 2019-20

दिनांक/Date: 02.08.2019

2019-20 के दिनांक 02.08.2019 के कार्यालय आदेश सं

OFFICE ORDER No. 0003 OF 2019-20 DATED 02.08.2019

विषय/Sub: आयकर अधिनियम 1961 के अंतर्गत अभियोजन संबंधी मामलों की पहचान एवं परीक्षण (टीडीएस एवं टीसीएस के अतिरिक्त ) तथा अभियोजन संबंधी मामलों की जाँच के लिए मानक संचालन प्रक्रिया (टीडीएस एवं टीसी एस के अतिरिक्त ) हेतु दिशा निर्देश।/Guidelines for identifying and examining Prosecution cases(Other than TDS/TCS related) and Standard Operating Procedure(SOP) for examining cases for Prosecution(Other than TDS/TCS related) under the Income Tax Act, 1961 -Reg.

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उपर्युक्त विषय पर निदेशक, अन्वेषण (पाँच) कें.प्र.क.बो. नई दिल्ली के फा.सं 285/08/2014-IT(Inv.V)/155 दिनांक 27.06.2019 का पत्र, निदेशानुसार आप के सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित है।

I am directed to forward herewith, letter dated 27.06.2019 received from Director, Inv.V, CBDT , New Delhi in F.No. 285/08/2014-IT(Inv.V)/155 on the above cited subject, for favour of information and necessary action, please.

(एस.एम.गड/S M GAD) 02 Aug 2019

आयकर अधिकारी (मुख्या.)(तक.-1)

Income-Tax Officer (HQ) (Tech-1)

कृते प्रधान मुख्य आयकर आयुक्त

for Pr. Chief Commissioner of Income-tax,

बेंगलूरु/Bengaluru.

संलग्न/Encl: उपर्युक्त/ as above

मानक सूची के अनुसार संवितरण

For Distribution as per Standard List

Prace/2480

Confidential

F.No.285/08/2014-IT(Inv. V)/155

Government of India

Ministry of Finance

Department of Revenue

(Central Board of Direct Taxes)

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*CIT Admn*  
*3/17*

ಪ್ರಧಾನ ಅಧ್ಯಯನ ಕಛೇರಿ ಮತ್ತು ಅಧ್ಯಯನ ಕಛೇರಿ  
ಕರ್ನಾಟಕ ಮತ್ತು ಗೋವಾ, ಬೆಂಗಳೂರು  
प्रधान मुख्य आयकर अधिकारी का कार्यालय  
कर्नाटक एवं गोवा, बंगलूर  
**18 JUL 2019**  
O/o. Principal Chief Commissioner of Income Tax  
Karnataka & Goa, Bengaluru

Room No.- 515, 5th Floor, C-Block,  
Dr. Shyama Prasad Mukherjee Civic Centre,  
Minto Road, New Delhi -110002.  
Dated: 27.06.2019

To,  
The Pr. CCsIT/ CCsIT/ Pr. DGsIT/DGsIT

Madam/Sir

प्रधान मुख्य आयकर आयुक्त का कार्यालय  
कर्नाटक / गोवा, बंगलूर  
लकनौ / अन्वधान  
**19 JUL 2019**  
O/o. Principal Chief Commissioner  
of Income Tax  
Karnataka & Goa, Bengaluru  
TECHNICAL

**Subject: Guidelines for identifying and examining Prosecution cases (Other than TDS/TCS related) and Standard Operating Procedure (SOP) for examining cases for Prosecution (Other than TDS/TCS related) under the Income-tax Act, 1961-reg.**

Kindly refer to the captioned subject.

2. In this regard, the undersigned is directed to enclose herewith the following documents:

- i. Guidelines for identifying and examining Prosecution cases (Other than TDS/TCS related) under the Income-tax Act, 1961 and
- ii. Standard Operating Procedure (SOP) for examining cases for Prosecution (Other than TDS/TCS related) under the Income-tax Act, 1961.

3. The undersigned is further directed to state that the aforesaid Prosecution Guidelines and SOP are meant **strictly for departmental use** and are to be circulated among all the officers of your charge for information and guidance.

Encl: As above

CIT (ADMN & TPS)	CIT (JUDL.)
CIT (AUDIT)	Addl/JCIT(TECH.)
Addl/JCIT(ADMN)	Addl/JCIT(VIG.)
Addl/JCIT(CO)	DCIT(HQ)(ADMN.)
ITO (F & W)	ITO (INFRA)
ITO (ESTT)	ITO (VIG.)
ITO (LITGN)	ITO (TECH)
ITO (PRO & GC)	ITO (PROTOCOL)

Yours faithfully,

*Mamta Bansal*  
27.06.19

(Mamta Bansal)  
Director, Inv. V  
CBDT, New Delhi

Copy for kind information to:

- 1. Chairman, CBDT
- 2. All Members, CBDT
- 3. All Officers of the rank of JS/CIT and above in CBDT

*P. circular*  
*Pr*  
*9/7/19*

*Tech*

*Ats*

*Steno. P. circular*  
*S*

## **Guidelines for identifying and examining Prosecution cases (other than TDS or TCS related) under Income-tax Act, 1961**

1. The Board has issued guidelines from time to time for streamlining the procedure of identifying & examining the cases for initiating prosecution for offences under Direct Taxes Laws. With a view to achieve the objective behind enactment of Chapter XXII of the Income-tax Act, 1961, (hereinafter referred to as "the Act") these comprehensive Guidelines are being issued in supersession of all existing guidelines (except the Guidelines issued vide F. No. 285/90/2013-IT(Inv-V)/384 dated 18.10.2016 in respect of identification of offenses relating to section 276B and 276BB) on the subject, in general and the following in particular in so far as non TDS/TCS cases are concerned:

- i. F.No.285/16/90-IT(Inv.)/43 dated 14.05.1996
- ii. F.No.285/90/2008-IT(Inv.-I)/05 dated 24.04.2008

2. These guidelines shall come into effect from 01.07.2019 in respect of all cases where sanction u/s 279(1) has not yet been granted. A Standard Operating Procedure (SOP) is being issued separately to outline the procedure (other than prosecution under sections 276B and 276BB of the Act, which is governed by separate SOP issued on 09.12.2016) to be followed for examining the prosecution cases.

### **3. General Guidelines for prosecution**

- i. Chapter XXII of the Act lays down provisions regarding offences and prosecutions. A summary of offences liable for prosecution under this Chapter is given in **Annexure-A** of the guidelines for ready reference.
- ii. The offences and punishment specified in Annexure-A are as per provisions existing on the date of issue of these Guidelines. However, the offences and quantum of punishment would be in accordance with the law as it stood at the time of commission of the offence.
- iii. Section 280D of the Act provides that the procedure for prosecution would be governed by the Criminal Procedure Code, 1973 (Cr.P.C. for short), save as otherwise provided in the Act. As per the provisions of Section 280A, offences under this chapter and other offences are to be tried by Special Courts so notified by the Central Government. Section 280B provides that Special Courts will take cognizance of the offence only when an authority authorized under the Act makes a complaint.
- iv. As prosecution is a criminal proceeding, the ingredients described for particular offence in the respective section, need to be proved beyond reasonable doubt based upon the evidence gathered by Income-tax authorities. Moreover, records and documents *in original* are required for presenting before the court.
- v. In the procedure for trial, a case is either 'summons case' or 'warrant case' as per the provisions of Cr.P.C. Section 280C defines what is a summons case, according to which an offence will be tried as a summons case if it is punishable with imprisonment not exceeding 2

years or with fine or with both. The main points of difference between the two types of cases are given in **Annexure-B** for basic understanding.

- vi. Offences under the Act are non-cognizable, irrespective of provisions of Cr.P.C. Some of the offences are expressly non-cognizable as per section 279A of the Act, and others are non-cognizable being summons cases. Therefore, prosecution is initiated by filing complaint in the competent court of law and procedural provisions of Cr.P.C. relating to "*Cases instituted otherwise than on police report*" are applicable. A cognizable offence as per section 2(c) of Cr.P.C. is the one where a police officer has the authority to make an arrest without a warrant and start investigation with or without permission of the court.
- vii. Although no time limit has been prescribed in the Act for initiation of prosecution, in order to make the tool of prosecution effective, it is desirable that the case should be examined and complaint should be filed at the earliest, once a prosecutable offence is detected. Unreasonable delay may weaken the case and the original and important records/evidences may get misplaced / lost with the passage of time.
- viii. The nature of offence in a particular section has to be clearly understood so that its commission can be proved. For instance, in order to invoke the provision under section 276C(1), "attempt to evade tax" in itself is sufficient for prosecution and establishing actual 'evasion of tax' is not necessary, if attempt can be proved.
- ix. In some sections, non-compliance of certain obligation within time prescribed constitutes a punishable offence. Subsequent compliance shall not obliterate the offence of not meeting the legal timeline, which once committed, is punishable.
- x. Wherever the punishment depends on amount of any tax, penalty or interest, as may be applicable, that would have been evaded, it is necessary to compute that amount before filing complaint on the basis of available facts, because the trial process (i.e. summons case or warrant case) depends on that quantum.
- xi. Commission or omission of certain acts constitute offence both under the Act as well as under the Indian Penal Code (IPC for short). However, under the Act '*culpable mental state on part of the accused*' can be presumed by the department as per section 278E thereof. Thus, onus gets shifted to the accused to prove that he did not have such mental state. Such presumption is not available under the IPC. Therefore, it is desirable that where specific provisions under the Act are available in respect of an offence, proceeding should preferably be initiated under those provisions of the Act.
- xii. When an offence punishable under the IPC has been committed by any person and there is no provision for prosecution of such offence available under the Act, the prosecution under the IPC may be considered. In such cases, administrative approval of the Principal Commissioner/Commissioner or Principal Director/Director shall be obtained before instituting complaint in the appropriate court. However, this clause shall not bar filing of an FIR in cases involving offences such as obstruction to duty or physical assault, where previous sanction may not be possible due to urgency of the matter. In such cases, an intimation should be given to the Commissioner at the earliest.

**4. Broad Heads of provisions of prosecution under Income-tax Act, 1961**

4.1 There are five broad heads under which prosecution provisions can be classified under the Act:

- (i) Provisions relating to Search and Seizure: Sections 275A, 275B, 276CCC & 278D
- (ii) Provisions relating to Evasion and payment of tax, false statement in verification, falsification of books of account: Sections 276C, 277 and 277A
- (iii) Provisions relating to failure to furnish returns of income: Section 276CC
- (iv) Provisions relating to Abetment: Section 278
- (v) Other provisions: Sections 276A, 276AB, 276B, and 276BB (Failure to discharge statutory obligations). Sections 276 (removal, concealment, transfer or delivery of property to thwart tax recovery), 276D (failure to produce accounts and documents), and 278A (punishment for second and subsequent offences), section 278B (offences by companies), section 278C (offences by Hindu Undivided Families).

4.2 Certain procedures for examining prosecution cases have been laid down in the Act such as: 278AA (punishment not to be imposed in certain cases), 279(1) (prosecution to be at the instance of Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner), 279(2) (compounding of offences).

4.3 There is a special provision u/s 136 of the Act for initiating prosecution u/s 193, 196 and 228 of I.P.C. r.w.s. 195 of the Cr.P.C.

**5. Provisions relating to Search and Seizure**

**5.1 Section 275A: Contravention of order made under section 132(3)**

This section provides that whoever contravenes any order referred to in the second proviso to sub-section (1) or sub-section (3) of section 132 shall be punishable with rigorous imprisonment and shall also be liable to fine. The orders referred to here are deemed seizure order and prohibitory order.

**5.2 Section 275B: Failure to comply with provisions of section 132(1)(iib)**

This section provides that if a person who is required to afford to the authorised officer necessary facility to inspect the books of account or other documents, as required under clause (iib) of sub-section (1) of section 132 and fails to afford such facility to the authorised officer then he/she shall be punishable with rigorous imprisonment and shall also be liable to fine.

**5.3 Section 278D: Presumption as to assets, books of account, etc., in certain cases**

This section creates a rebuttable presumption. It states that where during the course of any search made u/s 132, any money, bullion, jewellery or other valuable article or thing (hereafter referred to as the assets) or any books of account or other documents has or have been found in the possession or control of any person or requisitioned under section 132A and

such assets or books of account or other documents are tendered by the prosecution in evidence against such person or against such person and the person referred to in section 278 for an offence under this Act, the provisions of sub-section (4A) of section 132 shall, so far as may be, apply in relation to such assets or books of account or other documents. This means that such books of account, documents, money, bullion, jewellery or other valuable article or things would be deemed to be belonging to the person in whose possession or control these were found and that such books of account and documents are true and signed and so executed or attested.

**6. Provisions relating to Evasion and payment of tax, false statement in verification, falsification of books of account**

**6.1 Section 276C (1): Wilful attempt to evade tax, etc.**

- (a) Under this section ‘**attempt to evade tax, penalty or interest chargeable or imposable or under reporting of income**’ itself is a punishable offence with imprisonment and fine. Therefore, proving actual tax evasion is not necessary, if attempt (it can be an attempt which failed or partially succeeded) can be proved beyond reasonable doubt. Prosecution can be initiated even before completion of assessment in appropriate cases where attempt can be established, for example cases covered by Explanation below that section which is reproduced hereunder for ready reference.

*Explanation - For the purposes of this section, a wilful attempt to evade any tax, penalty or interest chargeable or imposable under this Act or the payment thereof shall include a case where any person—*

*(i) 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*

*(ii) makes or causes to be made any false entry or statement in such books of account or other documents; or*

*(iii) wilfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or*

*(iv) 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.*

- (b) The circumstances as mentioned in clause (i) to (iii) of the Explanation as above, will normally arise in search and survey cases. Therefore, wherever strong and irrefutable evidence to prove *attempt to evade tax*, as defined above, are found to exist, the case should be examined to initiate prosecution at the earliest.
- (c) In survey cases where evidence for tax evasion in current year is found but assessee declares such income in the return, normally penalty proceeding u/s 271(1)(c)/270A is not initiated as concealment of income is seen with respect to the return filed. However, in such cases, ‘attempt to evade tax’ can be proved. Hence such cases may be considered for prosecution under this section.

- (d) In cases where prosecution is considered after completion of assessment, the amount of evasion for which attempt was made may be higher than the amount of addition made, as part of income might be already declared in return or the attempt to evade might be successful partially only. In some cases, this may help in invoking clause (i) of section 276C(1).
- (e) In respect of applicants who approach Income-tax Settlement Commission (ITSC for short), the following cases are fit for prosecution under this section, namely:
  - (1) where the settlement application has been rejected or not admitted by ITSC, particularly on account of lack of true and full disclosure;
  - (2) where the ITSC has not granted immunity from prosecution;
  - (3) where immunity from prosecution stands withdrawn in terms of section 245H(1A);
  - (4) Where ITSC has withdrawn immunity from prosecution u/s 245H(2).
- (f) This provision also allows filing of prosecution where attempt to evade only penalty independent of tax is there as in the case of penalty u/s 271DA etc.

**6.2 Section 276C (2): Wilful attempt to evade payment of tax, etc.**

- (a) Under this section, any ‘**attempt to evade payment of tax, penalty or interest**’ has been made a punishable offence with imprisonment and fine. The provisions would be attracted, inter alia, in following circumstances:
  - i. Cases where self-assessment tax is shown as payable in return filed, but not paid.
  - ii. Cases where demand has attained finality after conclusion of appellate proceedings but is not paid.
  - iii. Any amount, as per demand notice under section 156 of the Act duly served, is not paid, unless the assessee is not treated as “assessee in default” or an application, not to treat him assessee in default, is pending before appropriate authority.
  - iv. Cases where tax deducted at source and tax collected at source has not been paid by deductor or collector after such deduction or collection. In other words, this section can be invoked in addition to section 276B and section 276BB.
- (b) Prosecution can also be filed in appropriate cases where after due service of demand notice full outstanding demand has not been paid, even if they are pending in appeal (including first appeal), provided that no stay or installments have been granted by any Authority, and no stay application is pending before any Authority.

**6.3 Section 277: False statement in verification, etc.**

This section applies in the following circumstances:

- (a) Making ‘false statement in verification’.
- (b) Since return of income has to be statutorily verified, for any falsity in the return filed.

- (c) If someone (including any person other than assessee) delivers an account or statement which he knows or believes to be false or does not believe to be true.
- (d) Filing of false Statement of Financial Transaction or Reportable Account u/s 285BA of Act.

**6.4 Section 277A: Falsification of books of account or document, etc.**

- (a) Where a person (first person) makes or causes to be made any entry or statement, which is false with intention to help some other person (second person), then such first person is liable for prosecution under this section.
- (b) Only making or causing to be made of false entry in books by first person with the intention to help second person is required to be proved. It is not necessary to prove that the second person has actually evaded tax.
- (c) This provision is inter alia applicable to persons indulging in the act of providing bogus or accommodation entry to others for tax evasion.
- (d) Prosecution under this section often involves criminal conspiracy with the beneficiary (second person) which is punishable under section 120B of the IPC. The same may be explored and if the ingredients are fulfilled, the beneficiary may be included along with the first person under section 120B of the IPC in the same complaint. For instance, in the case of an accommodation entry provider to a beneficiary through dummy concerns, the entry provider along with the dummy directors are prosecutable under this section as well as section 120B of IPC whereas the beneficiary is liable for prosecution under section 120B of IPC. The beneficiary in addition may also be liable under section 276C(1) and section 277 of the Act.

**7. Provisions relating to failure to furnish returns of income**

**7.1 Section 276 CC: Failure to furnish returns of income**

- (a) Under this section, failure to furnish return within time allowed is punishable with imprisonment and fine. This is applicable in following circumstances:
  - i. Cases where return u/s 139(1) has not been filed within due date or before the end of the assessment year voluntarily, except where the tax payable on regular assessment reduced by Advance tax and TDS is less than Rs.3,000/-.
  - ii. In case of companies w.e.f. 01.04.2018, where return u/s 139(1) has not been filed within due date or before the end of the assessment year voluntarily, irrespective of whether any tax was payable or not.
  - iii. Cases where return in response to notice u/s 142(1), 148 or 153A has not been filed within the time allowed by notice.
- (b) The Supreme Court in its judgment in *Sasi Enterprises Vs ACIT 361 ITR 163* has held that benefit of Proviso to section 276CC is available only to voluntary filing of return as required under section 139(1) of the Act, and said proviso would not apply after detection of failure to file return and after a notice under section 142(1) or section 148 is issued calling for filing of return of income.



(c) It may be noted that the punishment depends upon the amount of tax that would have been evaded, if failure was not discovered.

(d) Potential cases for prosecution under this section identified by the Systems Directorate must be examined for Prosecution by the Assessing Officer and if deemed fit, complaint may be filed in appropriate cases. Notwithstanding such identification by the Systems Directorate, the Assessing Officer may independently examine any case for Prosecution under this section in case of proven non-compliance.

(e) It is necessary to estimate the extent of tax evasion before filing prosecution under this section in order to determine whether the case falls under clause (i) or clause (ii) of the section. The Assessing Officer may determine the quantum keeping in view, the amount of tax paid in the last return filed, if any, or tax payable on income escaping assessment, if any, on the basis of information available with the Assessing Officer at the time of filing complaint etc. In case after filing prosecution complaint under clause (ii), on the basis of any information, it is found that the quantum of tax evasion exceeds the threshold provided under clause (i), the Assessing Officer/complainant may move the court for converting the summons case into a warrants case under section 259 of Cr.P.C.

## **8. Provisions relating to abetment**

### **8.1 Section 278: Abetment of false return, etc.**

(a) Where a person abets or induces another person to make and deliver a false account or statement or declaration relating to any income chargeable to tax, he is liable for prosecution as abettor.

(b) The quantum of punishment depends upon the tax that would have been evaded, if such declaration, account or statement were accepted as true.

(c) This provision is also applicable to professionals / persons rendering assistance to an assessee in evasion of tax.

## **9. Other Provisions**

### **9.1 Section 276: Removal, concealment, transfer or delivery of property to thwart tax recovery**

This section provides that whoever fraudulently removes, conceals, transfers or delivers to any person, any property or any interest therein, intending thereby to prevent that property or interest therein from being taken in execution of a certificate under the provisions of the Second Schedule shall be punishable with rigorous imprisonment and shall also be liable to fine.

### **9.2 Section 276A: Failure to comply with the provisions of sub-sections (1) and (3) of section 178**

This section provides that a person shall be punishable with rigorous imprisonment if he:

(a) fails to give the notice in accordance with sub-section (1) of that section; or

- (b) fails to set aside the amount as required by sub-section (3) of that section; or
- (c) parts with any of the assets of the company or the properties in his hands in contravention of the provisions of the aforesaid sub-section.

**9.3 Section 276D: Failure to produce accounts and documents**

- (a) Under this section, the following is punishable:
  - i. Failure to produce on or before due date, accounts or documents (and not failure to furnish merely some information called for) as specified in the notice u/s 142(1) of the Act.
  - ii. Failure to comply with direction issued u/s 142(2A) to get accounts audited.
- (b) Careful drafting of notice u/s 142(1) as to its requirements, will be helpful in invoking this provision.

**9.4 Section 278A: Punishment for second and subsequent offences**

This section makes the second and subsequent offence punishable much more severely. It provides that if any person convicted of any offence under section 276B or sub-section (1) of section 276C or section 276CC or section 276DD or section 276E or section 277 or section 278 is again convicted of an offence under any of the aforesaid provisions, he shall be punishable for the second and for every subsequent offence with rigorous imprisonment which may extend to seven years and with fine.

**9.5 Section 278B: Offences by companies, body corporates, firms, AOPs & BOI**

This section provides for punishing not only company but also every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company. Such co-accused person may not be prosecuted if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence. This section also provides for punishing any director, manager, secretary or other officer of the company, if it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any of them and they shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. In such cases the company is punished with fine but every person, referred to in sub-section (1), or the director, manager, secretary or other officer of the company referred to in sub-section (2), shall be liable to be proceeded against and punished in accordance with the provisions of this Act.

Explanation – For the purposes of this section, -

- (a) “company” means a body corporate, and includes –
  - (i) a firm; and
  - (ii) an association of persons or a body of individuals where incorporated or not;and
- (b) “director”, in relation to –
  - (i) a firm, means a partner in the firm;
  - (ii) any association of persons or a body of individuals, means any member

controlling the affairs thereof.

**9.6 Section 278C: Offences by Hindu undivided families**

This section provides that where an offence under this Act has been committed by a Hindu undivided family, the karta thereof shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However, if the Karta proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence then he shall not be liable to any punishment. It is further provided that if an offence under the Act, has been committed by a Hindu undivided family and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any member of the Hindu undivided family then such member shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

**10. Mandatory Cases to be examined for prosecution**

10.1 The following category of cases shall be mandatorily examined for prosecution at the earliest under relevant provisions, irrespective of monetary limit-

- (a) The offence that involves major fraud or scam or misappropriation of government funds or public property;
- (b) The cases where it is proved that a person has enabled others in large-scale tax evasion such as through shell companies or by providing accommodation entries in any other manner as mandated in section 277A;
- (c) Cases in which additions have been made on account of detection of undisclosed assets outside India including undisclosed foreign bank accounts; and
- (d) The cases where the accused is linked to any anti-national/terrorist activity and case is being investigated by CBI, Police, Enforcement Directorate or any other Law Enforcing Agency.

10.2 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 u/s 279(1) of the Act. *The terms "examined" and "examining" refer to and include all actions leading to either filing of prosecution complaint in the court, or compounding the offence u/s 279(2), or taking a decision that the case is not fit for prosecution.*

**11. Priority cases for prosecution**

The following cases may be examined on the priority basis depending on the facts and circumstances of such cases-

- (a) Cases where the assessee has filed Settlement application but is not eligible for immunity from prosecution under conditions as referred to in clause 6.1(e) above.

- (b) Cases where penalty under section 270A or 271(1)(c) or 271AAA or 271AAB of the Act has been confirmed by CIT(A) or ITAT, are fit for prosecution, as confirmation of penalty establishes tax evasion and consequently, the attempt thereof.
- (c) Cases where the amount sought to be evaded is more than the limit specified for stricter punishment in respect of offences in Chapter XXII of the Act, should be prioritized.
- (d) In respect of the following offences, the punishment does not depend on any tax amount evaded. Therefore, these may be examined irrespective of the tax effect, on a case to case basis:
  - i. Offence u/s 275A for contravention of order made u/s 132(3).
  - ii. Offence u/s 275B for failure to comply with the provisions of section 132(1)(iib).
  - iii. Offence u/s 276 for removal, concealment, transfer or delivery of property to thwart recovery of tax.
  - iv. Offence u/s 276A for failure to comply with the provisions of sub-section (1) and (3) of section 178 of the Act.
  - v. Offence u/s 277A for falsification of books of account or documents.
- (e) Cases of outstanding demand, confirmed at any appellate stage, with financial capacity to pay such demand; where no stay or installments have been granted by any Authority; and no stay application is pending before any Authority.
- (f) The cases which are identified from time to time as defaulters under different sections by the Directorate of Systems based on the criteria approved by CBDT.

## **12. Offences and Prosecutions under IPC**

The Income-tax authorities may come across circumstances where initiation of prosecution under various provisions of other statutes including those of IPC may be more appropriate. Details of some of the offences relevant to the department contained in Chapters X, XI, XVI and XVII of IPC are given in **Annexure – C**.

## **13. Special provisions relating to section 136 - Proceedings before income-tax authorities to be judicial proceedings.**

Any proceeding under the Act before an income-tax authority shall be deemed to be judicial proceeding within the meaning of sections 193 and 228 and for the purposes 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). Details are given in **Annexure-D**

## **14. Immunity from prosecution**

14.1 Certain provisions relating to immunity from prosecution are as under-

- (i) The Income-tax Settlement Commission (ITSC) has power to grant immunity from prosecution and penalty under the Act u/s 245H. These provisions are, however, subject to certain

conditions such as full and true disclosure of income by the assessee and also disclosure of the manner in which such income has been derived. The ITSC however cannot grant immunity in cases where prosecution proceedings have been instituted prior to the receipt of application u/s 245C.

Under sub-section 1 of section 245H, the ITSC earlier had the power to grant immunity "from prosecution for offence under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force". However, w.e.f. 1.6.2007, the Act has been amended whereby the ITSC can no more grant immunity for offences under the IPC, or any other Central Act except under Income-tax Act and Wealth tax Act.

(ii) Immunity from prosecution was also granted under VDIS 1997, KVSS and for Special Bearer Bond 1981, IDS-2016, PMGKY- 2016.

(iii) For obtaining the evidence of any person directly or indirectly concerned in or privy to the concealment of income/evasion of payment of tax, the Central Government has been vested with powers to tender immunity from prosecution under the Act or under IPC or under any other Central Act u/s 291(1) of the Act. Under sub-section (3) of section 291 the Central Government has also been given power to withdraw such immunity. For granting immunity and withdrawing the same some conditions have been prescribed in the said section.

14.2 Under section 292A of the Act, nothing contained in section 360 of the Code of Criminal Procedure, 1973 (2 of 1974), or in the Probation of Offenders Act, 1958 (20 of 1958), shall apply to a person convicted of an offence under the Act (Income-tax Act) unless that person is under eighteen years of age.

14.3 There is a bar u/s 293 of bringing any suit in any civil court against any order made under the Act. It has also been provided that "no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything in good faith done or intended to be done under this Act."

14.4 Under section 270AA of the Act, the AO may grant immunity from imposition of penalty u/s 270A and initiation of proceedings under section 276C or section 276CC in admitted cases subject to fulfillment of conditions specified u/s 270AA itself.

## **15. Withdrawal of prosecution complaints**

15.1 In a summons case, as per section 257 of Cr.P.C. the complainant may request the court's permission to withdraw the prosecution complaint on justified grounds, at any time before final order is passed by the court. However, no such withdrawal of complaint shall be requested without justified reasons and prior administrative approval of the CCIT or DGIT.

15.2 In a warrant case, where it is found that the prosecution instituted under the provisions of the Act and/or Indian Penal Code 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 u/s 321 of Cr.P.C.

15.3 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 u/s 279(2) shall be produced before the Trial Court through the Prosecution Counsel.

#### **16. Some General Principles**

- i. Prosecution under the Act cannot be initiated except with previous sanction of the Principal Commissioner or Commissioner which also means Principal Director or Director of Income-tax as per section 2(16) of the Act.
- ii. Although there is no statutory requirement for giving opportunity of being heard to the person against whom prosecution proceeding is contemplated, however, such an opportunity should be given by the Commissioner intimating him of the proposed action and calling for accused's version on facts in respect of offences mentioned in the notice and any other offences committed, which he may offer to disclose (in view of the fact that for second/subsequent offence, higher punishment is prescribed and compounding is prohibited). This will, inter alia, facilitate verification of correctness of facts as well as ascertaining intention of the accused to have the offence compounded.
- iii. There is no mandatory requirement of obtaining opinion of the counsel before granting sanction u/s 279(1). Only if there is any doubt as to whether facts of a case justify initiation of prosecution, the Commissioner may obtain opinion of a prosecution counsel considered appropriate by him. Such opinion is only for assisting the Commissioner and neither binding nor the sole deciding factor to grant sanction for prosecution.
- iv. In case a legal person i.e. Company, Firm, LLP, AOP, HUF etc. is to be prosecuted for an offence, every natural person, who was in-charge of or was responsible for the conduct of the affairs of that entity at the relevant time, shall be deemed to be guilty of the offence and be treated as co-accused in the complaint filed. The Income-tax Authority may carefully examine the facts and records (such as Financial Statements, Minutes of Board's meeting(s), Resolution(s) and other relevant documents etc.) to ascertain role of any Director, Partner, Member, Manager, Secretary or any other officer of the legal person; or Karta of HUF to apply provisions of section 278B or, as the case may be section 278C, for treating such person as co-accused. However, no such person can be punished, if he is able to prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence as provided in sections 278B & 278C.
- v. A case of an Individual shall not ordinarily be considered for initiating prosecution for any offence, if the individual concerned has attained the age of 70 years at the time of commission of the offence. However, if such individual has played active role in commission of offence, this clause shall not apply.
- vi. While proposing prosecution for any offence, care should be taken to include in the proposal, notice, sanction order and complaint, all the provisions of punishable offences that may apply in particular facts and circumstances. For example, along with section 276C (1), section 277 shall also apply, if return was filed; or for non-payment of TDS/TCS, section 276C (2) may also apply along with 276B or 276BB. In the case of Company or HUF, it is necessary to invariably invoke, section 278B or, as the case may be, section 278C.
- vii. Entries in records and documents in the custody of the Income-tax Department are admissible evidence in the prosecution proceedings.

- viii. For companies in liquidation (section 178 of the Act) there is a special provision under section 276A for prosecution of liquidator for failure to comply with section 178(1) and 178(3) etc.
- ix. Prosecution launched under IPC cannot be compounded. It can, however, be withdrawn.
- x. Non-filing of return itself is an offence, since the law has cast a duty to file voluntary return u/s 139(1) of the Act, where the assessee has taxable income. Where no such return was filed voluntarily within time, the argument that there was no wilful failure cannot be accepted unless the assessee is able to rebut the presumption of culpable state of mind.
- xi. The best-judgment assessment u/s 144 of the Act does not nullify the duty to file return u/s 139(1) of the Act. The legal obligation to file a return is not washed out by the assessment. The argument that no prosecution could be instituted till the culmination of assessment proceedings cannot be accepted, when no return is filed within the prescribed time limit for filing return.
- xii. Prosecution u/s 276CC of the Act is maintainable in the case of non-filing of voluntary return within time and non-compliance of statutory notices would further justify the proceedings. In the case of the firm, the argument that the firm's accounts were not finalised as an explanation for not having filed individual returns, is also not acceptable. The fact that the assessment was a best judgment one would also not make a difference.
- xiii. The mere fact that appeal proceedings against assessment were pending, need not await finality for purposes of prosecution. In fact, such a view has been taken in *P. R. Metrani v. CIT [2006] 287 ITR 209 (SC)* besides *Ravinder Singh v. State of Haryana [1975] 3 SCC 742* and *Standard Chartered Bank v. Directorate of Enforcement [2006] 130 Comp Cas 341 (SC)*. The argument for reconsidering the decision on the subject in *Prakash Nath Khanna v. CIT [2004] 266 ITR 1 (SC)* was not found acceptable. In fact, it was this decision, which was followed by the High Court for dismissal of the appeals by the accused.
- xiv. As regards the presumption of culpable mental state, it is merely a rule as regards burden of proof. Though the presumption would require existence of *mens rea* with burden on the accused to prove the absence of the same and that too beyond reasonable doubt, the accused would be satisfying the law, if he proves the circumstances which prevented him from filing returns as per section 139(1) or in response to notice under section 142 or 148 of the Act. This clarification, no doubt, lightens the burden of the assessee, since even in the absence of presumption; it is the explanation for not having complied with law that would decide the ultimate outcome of the prosecution.
- xv. Section 276CC mandates that an offence is committed on non-filing of the return of income in contravention to provisions of section 139(1) or in response to notice u/s 142(1) or 148 or 153A of the Act and it is totally unrelated to the pendency of the assessment proceedings except for the second part of offence where for determination of period of sentence of the offence is involved. Accordingly, the Revenue may resort to the best judgement assessment or otherwise rely upon past year income to determine the extent of the breach. In this context, reference may be made to the decision of Hon'ble Supreme Court in case of *Sasi Enterprises v. Asst. CIT [2014] 361 ITR 163*.

- xvi. If an assessee does not submit the return of income in time as stipulated u/s 139(1), he is liable to pay interest u/s 234A or fee u/s 234F of the Act. However, the Act also provides for prosecution proceedings u/s 276CC in case of non-filing or late filing of income tax return in addition to the levy of interest, fee etc. In other words, mere payment of interest, fee or penalty could not absolve criminal liability of the assessee as held by Hon'ble Apex Court and Madras High Court in cases of *N.A. Mulbary Bros. vs. CIT (1964) 51 ITR 295* and *DCIT vs. M. Sundaram (2010) 322 ITR 196* respectively. Hon'ble Supreme Court in case of *T.S. Balaiah vs. ITO (1969) 72 ITR 787* as held that prosecution itself could be both under the Income-tax Act and under the Indian Penal Code as the principle of double jeopardy was held inapplicable.
- xvii. Hon'ble Supreme Court in case of *K.C. Builders vs. ACIT (2004) 265 ITR 562* following its earlier decision in case of *G.L. Didwania vs ITO (1997) 224 ITR 687* has held that where penalty is found inexigible prosecution cannot survive and has also rejected the contention of the revenue that penalty and prosecution proceedings are independent of each other. However, Hon'ble Punjab and Haryana High Court in the case of *ITO vs. Mukesh Kumar (2002) 254 ITR 409* has pointed out that trial court is not bound by the penalty order. Keeping in view the above legal principle, the Assessing Officer and their supervisors must ensure proper drafting of legally sustainable penalty orders of the Act so that prosecution complaints filed by them survive before trial court. It is pertinent to mention here that prosecution complaint should not be solely based on penalty order but must contain all the ingredients as stipulated u/s 276CC of the Act.
- xviii. When a penalty is deleted on technical ground, the merit of evidence of concealment or evasion or under-reporting or mis-reporting is not examined, in such cases prosecution u/s 276C has to be examined on merits and prosecution should be initiated if the facts so warrant.
- xix. Notwithstanding anything contained hereinabove, the Commissioner of Income Tax may initiate proceedings for prosecution in any case deemed fit, keeping in view the nature and magnitude of the offence.

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Annexure – A

**Prosecutable offences under Income-tax Act, 1961**

Section	Nature of default	Punishment
275A	<b>Contravention of order made under section 132(1) (Second Proviso) or 132(3) in case of search and seizure</b>	Up to 2 years (rigorous imprisonment or RI)
275B	<b>Failure to afford necessary facility to authorized officer to inspect books of account or other documents as required under section 132(1)(iib)</b>	Up to 2 years (RI)
276	<b>Removal, concealment, transfer or delivery of property to thwart tax recovery</b>	Up to 2 years (RI)
276A	<b>Failure to comply with provisions of section 178(1) and (3) – reg. company in liquidation</b>	6 months to 2 years (RI)
276AB	<b>Failure to comply with provisions of sections 269UC, 269UE and 269UL reg. purchase of properties by Government</b>	6 months to 2 years (RI)
276B	<b>Failure to pay to credit of Central Government (i) tax deducted at source under Chapter XVII-B, or (ii) tax payable u/s 115-O(2) or second proviso to section 194B</b>	3 months to 7 years (RI)
276BB	<b>Failure to pay to the credit of Central Govt the tax collected a source under section 206C</b>	3 months to 7 years (RI)
276C(1)	<b>Wilful attempt to evade tax, penalty or interest or under-reporting of income -</b>	
	(a) where tax which would have been evaded exceeds Rs 25 lakh	6 months to 7 years (RI)
	(b) in other case	3 months to 2 years (RI)
276C(2)	<b>Wilful attempt to evade <u>payment</u> of any tax, penalty or interest</b>	3 months to 2 years (RI)
276CC	<b>Wilful failure to furnish returns of fringe benefits under section 115WD/115WH or return of income under section 139(1) or in response to notice under section 142(1)(i) or section 148 or section 153A -</b>	
	(a) where tax sought to be evaded exceeds Rs 25 lakh	6 months to 7 years (RI)
	(b) in other case	3 months to 2 years (RI)
276CCC	<b>Wilful failure to furnish in due time return of total income required to be furnished by notice u/s 158BC(a)</b>	3 months to 3 years
276D	<b>Wilful failure to produce accounts and documents under section 142(1) or to comply with a notice under section 142(2A)</b>	Up to 1 year (RI)
277	<b>False statement in verification or delivery of false account or statement etc -</b>	
	(a) where tax which would have been evaded exceeds Rs 25 lakh	6 months to 7 years (RI)
	(b) in other case	3 months to 2 years (RI)
277A	<b>Falsification of books of account or document, etc, to enable any other person to evade any tax, penalty or interest</b>	3 months to 2 years (RI)

	chargeable/leviable under the Act	
278	<b>Abetment of false return, account, statement or declaration relating to any income or fringe benefits chargeable to tax -</b>	
	(a) where tax, penalty or interest which would have been evaded exceeds Rs 25 lakh	6 months to 7 years (RI)
	(b) in other case	3 months to 2 years (RI)
278A	<b>Second and subsequent offences</b> under section 276B, 276C (1), 276CC, 277 or 278	6 months to 7 years (RI)

Annexure – B

**Difference between Summons case and Warrant case**

<b>Summons case</b>	<b>Warrant Case</b>
Offence punishable with imprisonment up to 2 years - Summons normally issued against accused	Offence punishable with imprisonment exceeding 2 years - Summons or Warrant may be issued against the accused
Trivial/minor offences – simple and speedy one stage procedure [Section 251 to 259 of Cr.P.C.]	Serious/grave offences – elaborate two stage (pre- and post-charge framing) procedure [Section 244 to 250 of Cr.P.C.]
Trial of a summons case as a warrant case is only a minor irregularity which is curable under section 465 of Cr.P.C.	The trial of a warrant case as a summons case is a serious irregularity, which would vitiate the trial if the accused has been prejudiced.
When the accused appears before the Magistrate, the particulars of the offence are stated to him and he is asked as to whether he pleads guilty. It is not necessary to frame formal charges [Section 251 of Cr.P.C.].	When, the accused appears or is brought before a Magistrate, the Magistrate shall hear the prosecution and take all such evidence as may be produced in support of the prosecution. If Magistrate is of the opinion that triable and punishable offence is made out, he shall frame in writing a charge against the accused which is read out and explained to the accused who is then asked whether he pleads guilty or has any defence to make. [Section 244 & 246 of Cr.P.C.]
The Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence. The accused can cross-examine any of the prosecution witnesses immediately after their examination-in-chief. (Section 254 of Cr.P.C.). The accused will be discharged only in a case instituted on complaint case and not in the case of Police Report.	During trial, evidence of all witnesses for the prosecution is first taken who can be cross-examined and re-examined. Then evidence of defence witness shall be taken who may be cross-examined and re-examined. Thus, in warrant case, the accused can cross-examine a witness twice, once before framing of charge and also during trial after charges are framed. [Sections 246 of Cr.P.C.]
If the complainant is absent on the date of hearing the accused <u>shall</u> be <u>acquitted</u> , unless for some reason Magistrate thinks it proper to adjourn the hearing of the case. Where complainant is represented by a pleader, personal attendance of complainant may be dispensed with. [Section 256 of Cr.P.C.].	If the complainant is absent on the day of hearing, the Magistrate may, in his discretion, at any time before the charge has been framed, <u>discharge</u> the accused if the offence is compoundable or non-cognizable. But if it is otherwise, he shall proceed with the trial and dispose of the case on merits [Section 249 of Cr.P.C.].
The accused may be convicted from the facts admitted or proved whatever may be the nature of the complaint or summons. [Section 255(3) of Cr.P.C.].	A specific charge must be framed, read and explained to the accused and he shall then be asked to enter upon his defence and produce his evidence. [Sections 246 and 247 of Cr.P.C.]
If there are sufficient grounds to justify, in a	In a warrant case, prosecution complaint can be

summons case, the complainant can withdraw the complaint with the permission of the court, at any time before the final order is passed. [Section 257 of Cr.P.C.]	withdrawn only with the prior approval of the Government [Section 321 of Cr.P.C.]
The Magistrate is empowered to convert a summons case into a warrant case under section 259 of Cr.P.C.	A warrant case cannot be converted into a summons case.

Annexure - C

**Offences under Indian Penal Code**

**Chapter X of IPC: Contempt of the lawful authority of public servants**

Prosecution can be initiated under various provisions of this chapter, under following circumstances:

- (i) When a person absconds to avoid service of summons, notice or order (S.172) [A.O./T.R.O./A.D.I.T/I.T.I.]
- (ii) When a person intentionally prevents service of summons etc.; prevents lawful affixing of notices etc.; intentionally removes any such summons etc. from any place where it was lawfully affixed; intentionally prevents the lawful making of any proclamation etc.; (S.173) [A.O./T.R.O./A.D.I.T/I.T.I.]
- (iii) When a person intentionally omits to attend at a certain place and time in response to summons or notice issued (S.174, S.174A r.w.s. 82(4) of the Cr.P.C.) [A.O./A.D.I.T/TRO]
- (iv) When a person legally bound to produce or deliver up any document or electronic record intentionally omits to do so, (S.175) [A.O./A.D.I.T/TRO]
- (v) When a person intentionally omits to give any notice or furnish information which he was legally bound to give or furnish on any subject to any public servant (S.176) [A.O./A.D.I.T/TRO]
- (vi) When a person intentionally furnishes false information (S.177) [A.O./A.D.I.T]
- (vii) When a person refuses to bind himself by an oath or affirmation (S.178); and refuses to answer any question when bound by oath to do so (S.179) [A.O./T.R.O./A.D.I.T]
- (viii) When a person refuses to sign any statement made by him when required to do so (S.180) [A.O./T.R.O./A.D.I.T]
- (ix) When a person intentionally makes a false statement under oath (S.181) [A.O./T.R.O./A.D.I.T]
- (x) When a person gives false information to any public servant (S.182). This is of special importance to information supplied by informants in the Investigation Wing- [A.D.I.T/A.O./T.R.O.]
- (xi) When a person offers resistance to taking of any property by the lawful authority of a public servant (S.183) [A.D.I.T/A.O./T.R.O./A.A.]; and sale of such property (S.184) [A.A./T.R.O.]
- (xii) When a person bids for or purchases property on behalf of legally incapacitated person (S.185) [T.R.O./A.A.]
- (xiii) When a person voluntarily obstructs any public servant in discharge of public functions (S.186) [A.D.I.T/T.R.O./A.O./I.T.I. etc.]
- (xiv) When a person bound by law to render or furnish assistance to any public servant in execution of any public duty intentionally omits to do so (S.187). This may be of special importance to the Investigation Wing in case of witnesses. [A.D.I.T/Authorized Officer]
- (xv) When a person, knowing that, by an order promulgated by a public servant, is directed to abstain from a certain act or take certain property in his possession or management, disobeys such order (S.188). This may be of special importance in cases of attachment orders by the Assessing Officers and prohibitory orders by the

authorized officers. For the latter purpose Section 275A of the Income-tax Act is also applicable [A.D.I.T/A.O./T.R.O.]

- (xvi) When a person holds out any threat of injury to any public servant or his agent (S.189 & 190). [All officers and officials]

### **Chapter XI of IPC: False evidence and offences against public justice**

Prosecution can be initiated under various provisions of this chapter, under following circumstances:

- (i) When a person legally bound by oath or by an express provision of law to state the truth fails to do so (S.191) [A.D.I.T/A.O./T.R.O.]
- (ii) When one causes any circumstance to exist or [makes any false entry in any book or record or electronic record, or makes any document or electronic record containing a false statement], intending that such circumstance, false entry or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement so appearing in evidence, may cause any person who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence." (S.192)  
Similar provisions are also there from Section 193 to Section 196 covering different situations of giving or fabricating false evidences. Sections 193 and 196 of IPC have been referred to in section 136 of the Act. [Authorities before whom such offences take place.]
- (iii) When a person who issues, signs or uses any false certificate making it out to be a true and genuine certificate (S.197 and 198). (For example, any certificate issued by any person/authority in relation to say claim of deduction under Chapter VIA etc.) [A.D.I.T/A.O./T.R.O.]
- (iv) When a person makes a false statement, which is receivable by law as evidence and using as true such statement knowing it to be false (S.199 and 200). (For example, false affidavits, false declaration or false statement made by assessee/related persons or witness.) [A.D.I.T/A.O./T.R.O.]
- (v) When a person causes disappearance of any evidence or gives false information to screen offender (S.201); intentional omission to give information of offence by person bound to inform (S.202), for example, false tax audit report; giving false information in respect of offence committed (S.203); destruction of document or electronic record to prevent its production as evidence (S.204); false personation (S.205); fraudulent removal or concealment or transfer of property/acceptance, receipt or claim to prevent its seizure (S.206 and 207); [A.O./A.D.I.T/T.R.O./I.T.I.]
- (vi) When a person intentionally insults or interrupts to public servant sitting in judicial proceeding (S.228). This section has been referred to in section 136 of the Act. [Authorities before whom such offence take place.]

**Chapter XVI of IPC: Offences Affecting the Human Body**

- (i) When a person voluntarily causes hurt or grievous hurt or deters/prevents any public servant from discharging his duties (S.333). [All officers and officials.]

**Chapter XVII of IPC: Offences against Property**

- (i) When a person entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust" (S.405). [Authorities before whom such offence take place.]

Annexure-D

**Special provisions relating to Section 136**

**Section 136: Proceedings before income-tax authorities to be Judicial Proceedings**

Any proceeding under this Act before an income-tax authority shall be deemed to be judicial proceeding within the meaning of sections 193 and 228 and for the purposes 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).

Broadly it means that:

- i. Proceedings before Income-tax authorities are deemed to be 'judicial proceedings';
- ii. Commission of offences u/s 193, 228 and 196 IPC before Income-tax authorities tantamount to commission of offences in a judicial proceeding;
- iii. In this regard, Income-tax authorities are deemed to be 'civil courts' for the purpose of section 195 of Cr.P.C. but not for the purpose of Chapter XXVI of Cr.P.C. That is to say, if such offences are committed before Income-tax authorities in judicial proceedings, they are Civil Courts for the purpose of launching prosecution u/s 195 Cr.P.C.
- iv. Section 195 of Cr.P.C. deals with 'Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.' Chapter XXVI of Cr.P.C., comprising sections 340 to 351, deals with 'Provisions as to offences affecting the administration of justice' and is applicable for Criminal Courts.
- v. The relevant provisions for section 136 of the Act are section 195(1)(b)(i) and section 195(3) of the Cr.P.C. for 'civil courts';
- vi. Hence, Income-tax authorities, acting under these sections, 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.
- vii. In case of such offences committed before C.I.T./C.I.T.(A), the complaint has to be filed by the C.I.T./C.I.T.(A) concerned or by 'some other public servant to whom he is administratively sub-ordinate' [section 195(1)(a) of Cr.P.C.]
- viii. In the absence of this section, the Departmental Authorities would have had to (a) file a police complaint, or (b) file a complaint in the Appropriate Court like any other complainant in which case the complainant is to be examined on oath by the Magistrate before admission of the complaint.

Similar provisions occur u/s 245L for Income-tax Settlement Commission, u/s 245U (2) for Authority for Advance Ruling and u/s 255(6) for ITAT.



## Standard Operating Procedure for examining cases for Prosecution (other than TDS/TCS related) under the Income-tax Act, 1961

1. Prosecution under Income-tax Act, 1961 (hereinafter referred to as 'the Act') is an important tool to be used as deterrence against tax evasion. Recently revised Guidelines for identifying and examining cases for initiating prosecution for offences have been issued on 27.06.2019 vide F. No. 285/08/2014-IT (Inv. V)/155. These guidelines should be studied along with this Standard Operating Procedure (SOP) which dwells more on procedural part.

1.2 The procedure for examining of cases for prosecution needs to be uniform and streamlined. This SOP lays down a detailed stage wise procedure along with roles of various authorities in handling prosecution matters (other than TDS/TCS related prosecution u/s 276B and 276BB of the Act). The SOP should be followed as far as possible and shall apply prospectively to all prosecution proceedings (except prosecution proceedings u/s 276B & 276BB of the Act) w.e.f. 01.07.2019 in respect of all cases where sanction u/s 279(1) has not yet been granted. In all such cases the proposals should, henceforth, be submitted in the new prescribed proforma (Form A) enclosed as **Annexure-1** with this SOP. However, prosecution proposals which have already been submitted by the Assessing Officer (AO for short) to the Commissioner, need not be revised but rest of the procedures should be as per this SOP.

### 2. General

- i. 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.
- ii. Even though presumption of culpable state of mind is available u/s 278E, the offence under relevant provision has to be made out against the accused on facts of the case.
- iii. Where offence is by a legal person i.e. Company, Firm, LLP, AOP, HUF etc, natural persons who are in-charge of affairs of that entity are also to be proceeded against as co-accused in accordance with the provisions of section 278B and 278C. The necessary information and evidence with regard to roles of such persons shall be brought on record to derive a well-reasoned satisfaction. For detailed guidance in this regard **Annexure-2** should be referred to.
- iv. In criminal proceedings, all documentary evidence has to be proved before the court, therefore, records and documents *in original* are required to be preserved for production before the court.
- v. As far as practicable, it may be ensured that all pages in a multi-page document like submissions, statement etc are signed by the person duly authorized to do so. If the case has potential of prosecution, it is even better if the papers are signed by the assessee and not the Authorized Representative.
- vi. Although no time limit has been prescribed in the Act for initiation of prosecution, it is desirable that proceeding is initiated and complaint filed at the earliest once a prosecutable offence is detected. Unreasonable delay may weaken the case and the

- original and important records, evidences may get misplaced/lost with passage of time.
- vii. The entire work relating to prosecution should be done through the Prosecution Module in ITBA, once it is fully functional. This module provides facility for all actions like submission of proposal, issue of notice, sanction order u/s 279(1), uploading of complaint filed and tracking of subsequent actions.
  - viii. In respect of existing prosecution cases, the necessary particulars are to be filled up and scanned documents should be uploaded in the Module.
  - ix. If the defaulter is a public servant referred to in Section 197 of the Code of Criminal Procedure, 1973 (Cr.P.C.) and the default is related to discharge of his official duties, then as required under that section, the AO should seek approval of State Government or Central Government as the case may be. The AO should follow up for expediting the required sanction of the Central Government or the State Government, as the case may be.

**2.1** 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 u/s 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 u/s 279(2) before or after filing of the complaint with court, or
- c) taking a decision that the case is not fit for prosecution.

### **3. Identification of cases & institution of proceedings**

**3.1** Para 11 of Guidelines for identifying and examining the Prosecution cases (other than TDS/TCS related) issued vide F. No. 285/08/2014-IT (Inv. V)/155 dated 27.06.2019 provides for certain categories of cases which should be examined for prosecution on priority. As per clause (f) of Para 11, the Directorate of Systems based on the criteria approved by the CBDT may also identify defaulters under different sections from time to time, which also need to be examined on priority. Other cases for examining for prosecution under various sections may be selected by the field, based on the above-mentioned Guidelines.

#### **3.2 Field Authorities responsible for identification and institution of prosecution proceedings**

##### **3.2.1 Investigation Directorates**

- i. The Officers of Investigation Directorate (i.e. DDIT/ADIT/ITO(Inv.)in-charge) conducting search shall be responsible for examining cases for prosecution and initiating proceedings under sections 275A (Contravention of order made under sub section 3 of section 132) and 275B (Failure to comply with provisions of clause (iib) of sub section (1) of section 132) of the Act.

- ii. Based upon the evidence collected during Search/Survey, he/she shall also be responsible for identification of potential cases as well as for filing complaints for offences under sections 276C(1) [particularly cases covered by the *Explanation* to the said section], 277, 277A, 278 etc. wherever ingredients of those sections are duly satisfied. In other cases, they should pass on specific information along-with the evidences for necessary action by the Central/Assessment Charges.

### **3.2.2 Directorate of Intelligence & Criminal Investigation**

The Officers of Directorate of Intelligence & Criminal Investigation (i.e. DDIT/ADIT/ITO) shall be responsible for examining of cases for prosecution under sections 277, 277A and 278 of the Act for furnishing false statement of financial transaction or reportable account u/s 285BA of the Act. Further during survey operations, cases may come to light where offences u/s 276C (1) or any other provision of the Act have been committed.

### **3.2.3 Assessment including Central Charges & CIT(A)**

- i. The Assessing Officer concerned shall primarily be the authority responsible for identification of all potential cases for prosecution under various provisions of Chapter XXII of the Act including sections 276A, 276C(1), 276C(2), 276CC, 276D, 277, 277A and 278.
- ii. There is greater scope of identifying potential cases for prosecution u/s 276C(1), 276C(2), 276CC, 276D, 277, 277A, 278 etc. in Central Charges having jurisdiction over search and seizure cases.
- iii. Even though, the responsibility for identification of potential cases u/s 276B & 276BB rests with TDS/International Taxation charges, other AOs may also come across such defaults. Upon such identification, they shall intimate the jurisdictional TDS charges at the earliest.
- iv. Investigation in potential cases shall be taken to logical conclusion with a view to institute prosecution proceedings at the earliest.
- v. Where completion of assessment is considered necessary to strengthen the evidence etc, for initiating prosecution proceedings, assessment proceedings shall be completed expeditiously.
- vi. If any offence is noticed by the CIT(A) during the appellate proceedings or by the Pr. Chief Commissioner, Chief Commissioner, Pr. Director General, Director General, Commissioner during the revision or any other proceeding, the concerned CIT(A) or the Commissioner or any other Income-tax authority, as the case may be, may direct the jurisdictional AO to examine the case for prosecution under the appropriate sections.
- vii. If any Income-tax authority, during any proceeding before him/her, notices that an offence under chapter XXII of the Act has been committed by a person on whom he/she does not have jurisdiction, he/she will pass on the information, through his/her Controlling Officer, in the form of a self-contained report to the Commissioner having jurisdiction over the case immediately upon noticing such offence.

- viii. There is no bar on initiating prosecution proceedings by the AO either before the commencement of assessment proceedings or during the pendency of assessment proceedings or after the completion of assessment proceedings.

**4. Proposal for seeking previous sanction**

- i. No prosecution complaint under the Act can be filed without previous sanction from Commissioner u/s 279(1) of the Act. The authority proposing the prosecution (such officer referred to as Complainant Officer or CO for short) should examine the records to bring the facts in a self-contained proposal for sanction u/s 279(1) of the Act. The proposal may be prepared in the format as per **Form A** enclosed as **Annexure-1** to this SOP so that all required particulars are included.
- ii. As far as possible, the proposal should be submitted on ITBA Module, so that notice u/s 279(1), order etc may be generated through ITBA Module.
- iii. The CO should submit the proposal for each assessment year and each offence separately. However, one proposal may include more than one offence for the same assessment year in case the facts are inextricably linked. For example, if attempt to evade tax u/s 276C(1) is detected based on the return of income filed and duly verified as per section 140 of the Act, then offence u/s 277 of the Act is also invariably committed and in such cases the proposal for prosecution may include both the sections.
- iv. For preparing the proposals of prosecution in the cases of Company/Firm/LLP/AOP/HUF etc. natural persons who are in-charge of affairs of those entities can also be proceeded against in accordance with provisions of section 278B and 278C. For careful selection of co-accused certain basic details about roles of various persons in conducting affairs of legal persons are required. Therefore, such details as discussed in Annexure-2, may be collected by the AO from assessee or other sources, while examining prosecution complaint in such cases.
- v. For each proposal entered in ITBA, a unique prosecution ID shall be generated for identification of case. The same ID shall continue for entire period till the case is closed by way of dropping, compounding before filing complaint or on disposal by court.
- vi. The Range/Unit Head on receipt of Form A in ITBA shall examine the proposal received offline also. It is the responsibility of Range/Unit Head to ensure that the prosecution proposal is proper and complete in all respects. If there is any deficiency, he/she should send it back to the AO for removing the deficiency and re-submit the proposal at the earliest. He/she shall forward the complete proposal after duly checking the same to the Commissioner on ITBA as well as in the offline mode.

**5. Sanction u/s 279(1)**

- i. The Commissioner shall examine the proposal received and if prima facie case for prosecution is made out, he/she should issue show cause notice to all proposed accused and co-accused to ascertain the facts contained in the proposal from all proposed accused and co-accused within a reasonable time. The Commissioner may also seek any additional facts/documents/information as he/she deems fit. The show

- cause notice should be drafted in such a manner that it enables him to take a fair and judicious decision for granting sanction u/s 279(1) in the case of accused as well as each of the proposed co-accused, if any.
- ii. If there are more than one accused or co-accused in case of company, firm, HUF etc, the show cause notice seeking above clarification should be sent to all the accused or co-accused. The Commissioner shall examine the proposal received and if prima facie case for prosecution is made out, he may seek clarification with regard to the facts contained in the proposal from all proposed accused and co-accused within a reasonable time. He may also seek any additional facts/documents/information as he deems fit.
  - iii. After receiving reply or expiry of time granted, the Commissioner may consider whether prosecutable offence on part of accused/co-accused is made out on facts gathered.
  - iv. If Commissioner is satisfied of ingredients of the offence, he may grant previous sanction u/s 279(1) of the Act through a speaking order duly recording facts of the case and evidences relevant thereto. The application of mind and fairness of decision should reflect in the order. If applicable, the provisions of section 278AA should be kept in mind before giving any sanction u/s 279(1).
  - v. If on consideration of facts and reply of accused or co-accused, the Commissioner is in doubt whether prosecutable offence is made out, he may seek opinion of Special Public Prosecutor regarding fitness of case for prosecution. Such opinion is only for assisting the Commissioner and is neither binding nor the sole deciding factor to grant sanction for prosecution.
  - vi. It shall be ensured that sanction order contains names of all accused and co-accused, Assessment year and correct sections under which offences were committed, role(s) of each co-accused, reasons for sanction of prosecution under relevant provisions for which sanction is granted, keeping in view the provisions of section 278B/278C of the Act in case of Company, Firm, HUF etc.
  - vii. Separate sanction order should be passed for each complaint.
  - viii. While considering a case of second and subsequent offence as mentioned u/s 278A of the Act, the Commissioner should incorporate particulars of earlier offence while according sanction u/s 279(1).
  - ix. Where the Commissioner, after considering reply of accused or otherwise, is of the opinion that the case is not fit for prosecution, he may record the reasons for his conclusion and communicate the decision not granting sanction to the authority who submitted proposal for prosecution.
  - x. The activity of generation of show cause letter and passing the order u/s 279(1) of the Act should be done on ITBA as far as possible. In case the Commissioner has issued the show cause notice/sanction order offline the same should be uploaded on ITBA for proper tracking and record of prosecution proceedings.
  - xi. Prosecution should not ordinarily be initiated against a person who has attained the age of 70 years at the time the offence was committed. However, if such individual has played active role in commission of offence, this clause shall not apply.

## **6. Preparation of complaint**

- i. The Commissioner shall forward copy of sanction order to the CO for record and as many additional copies as are required to be filed in the court with complaint as per rules of the court. One copy of the order u/s 279(1) shall also be sent to the Nodal Officer in Prosecution Cell, responsible for monitoring of prosecution matters, if the prosecution cell is functional.
- ii. On receipt of previous sanction u/s 279(1), the CO shall send all relevant documents to Special Public Prosecutor (SPP for short) for drafting of the complaint. The CO shall vet the draft prepared by SPP and correctness of facts and figures in the complaint shall be the responsibility of CO. In complex cases, the CO may involve Unit/Range Head in vetting the draft complaint.
- iii. Complaint should bring out clearly the facts regarding commission of the alleged offence and fulfillment of ingredients as provided in the Act, chronology of events leading to the commission of offence(s), evidence collected during investigation etc. The correct names and complete addresses of the accused and co-accused person(s), if any, should be mentioned to prevent delay in service of summons/warrant etc, by the court.
- iv. The complaint should incorporate the reasons recorded in the sanction u/s 279(1) and the section(s) under which the prosecution proceedings are initiated. The provisions of section 278E may suitably be incorporated in the complaint to strengthen the case.
- v. If the offence is committed by a company/Firm etc or HUF, role(s) of persons as mentioned in section 278B or 278C of the Act has to be discussed in the complaint and the name of such persons, against whom sanction has been accorded under section 279(1), should be included as co-accused (Annexure-2).
- vi. In case the offence is second or subsequent (in terms of section 278A), this fact should be incorporated in the complaint.
- vii. In case, any prosecution proceeding is pending for similar offence or it has been compounded, these facts may also be incorporated in the complaint.
- viii. The complaint should be duly signed and verified by the CO.
- ix. The following documents are normally required to be annexed to the complaint:
  - (a) Sanction order u/s 279(1) in original.
  - (b) List of documentary evidences including depositions, submissions etc to prove the offence.
  - (c) List of witnesses on which departmental case depends.
  - (d) Any other documents required as per procedure of the court.

## **7. Filing of Complaint**

The CO should ensure that:

- i. The complaint is filed in the court of jurisdiction
- ii. The relevant documents are attached
- iii. The complaint is signed by CO concerned
- iv. The particulars of complaint number and date of filing are intimated to the sanctioning authority and the Nodal Officer in Prosecution cell.

- v. As soon as the complaint is filed the complaint number should be entered on the ITBA. Office copy of complaint (with complaint number) duly signed by the CO should be scanned and uploaded on the ITBA.

**8. Safe Custody of Documents**

- i. The original documents and other evidence, based on which the offence is sought to be proved, should be kept in the personal safe custody of the CO. In the case of transfer/decentralization of case, the documents should be duly handed over and mentioned in the handing over note. It would be desirable to keep scanned images in soft form and print out may be used for day to day work.
- ii. In order to ensure evidentiary value of document, it is necessary that the relevant documents are identified and maintained, inter alia, as per the requirements of provisions of Indian Evidence Act.
- iii. In case of digital evidence, necessary precautions are to be taken as per the provisions of the Information Technology Act, 2000 and Indian Evidence Act, 1872 along with the detailed guidelines provided in Digital Evidence Investigation Manual, 2014.

**9. Compounding application before filing of complaint**

- i. Where the person(s) proposed to be proceeded against submits that he/she would opt for compounding of the offence, the Commissioner may ask such person to submit evidence of filing the compounding application within reasonable time. The filing of complaint should not be delayed beyond a reasonable period on such grounds.
- ii. In a case where the compounding application has been filed, the Commissioner should keep the proposal for prosecution pending till a decision is taken on the compounding application. In such cases, the Competent Authority should dispose of the compounding application expeditiously.
- iii. Where the compounding of offence is rejected by the Competent Authority during the pendency of proposal for sanction u/s 279(1), the Commissioner should proceed with the proposal for sanction u/s 279(1) without any delay.
- iv. Where sanction u/s 279(1) is given before receipt of the compounding application, the filing of the complaint should not be delayed.

**10. Procedure after filing complaint**

- i. The filing of complaint in court is merely the beginning of the prosecution process. The ultimate objective is to secure conviction of the accused. Therefore, regular follow up of complaint cases in court and coordination with Prosecution Counsel to ensure timely attendance of witness(es) and production of evidences is key to achieve the objective.
- ii. For this purpose, a "Prosecution Cell" (PC) may be created in the office of Pr. CCIT with an officer of the rank not less than Addl. CIT working as Nodal Officer under the overall supervision of CIT (Judicial). For other stations, the work of PC can be assigned to officers/officials as deemed appropriate by respective CCIT having jurisdiction over the station. The PC will monitor the progress of prosecution cases

- and co-ordinate with Prosecution Counsel, field officers and the Court for ensuring proper representation before the Court.
- iii. The Prosecution Cell shall keep track of prosecution proceedings in the court. They should collect the cause list showing fixation of date for hearing and take necessary steps to ensure proper and timely representation before the court.
  - iv. The Inspector(s) shall remain present through the hearings and note down the requirements of each case in consultation with the Prosecution Counsel representing the case.
  - v. Timely intimation to the CO and witnesses for ensuring evidence in the court to preclude unnecessary adjournments is necessary.
  - vi. The record of the specific reasons for adjournments such as non-availability of officers on the day fixed for trial, non-availability of witness, non-availability of prosecution counsel or adjournment sought by the accused should be maintained. This record will also be helpful at the time of sanctioning bills of prosecution counsels vis-a-vis effective hearings. Record of proceedings may also be available online and in such cases the same may be downloaded from the court website for record.
  - vii. The Prosecution Cell/CO/AO should keep in touch with the prosecution counsel.
  - viii. The Prosecution Cell should keep track of the stay granted by the Higher Courts, if any, and advise the field authorities to take necessary steps to get the same vacated.

## **11. Timelines for institution of proceedings**

**11.1** Section 468 of Criminal Procedure Code specifically excludes offences committed under various provisions of the Act from the purview of limitation. The Act also does not provide any time limit for instituting prosecution for any offence under Chapter XXII. It is, however, desirable that the prosecution in deserving cases is instituted at the earliest once the offence is detected. The efforts should be made to complete the entire process beginning from the submission of proposal by the CO up to the grant of sanction u/s 279(1) of the Act within three months. Once the sanction u/s 279(1) has been accorded, the institution of complaint should be done as soon as possible.

**11.2** In the case of offence u/s 275A and u/s 275B, the investigating authority concerned should submit the proposal for sanction u/s 279(1) of the Act before the Pr. Director of Income-tax (Inv.) incorporating the facts, chronology of events, the list of evidences and witnesses in a self-explanatory form as soon as the offence comes to his notice. In such cases, the decision regarding sanction u/s 279(1) is to be conveyed by the Pr. Director concerned, as far as possible, within 15 days from receipt of the proposal from investigating authority and wherever such sanction has been accorded, prosecution should be instituted as soon as possible.

**11.3** Wherever the Department is not satisfied with the order of the Trial Court, appeal in the deserving cases is required to be filed by the CO in Sessions Court within 60 days with the approval of Commissioner.



**11.4** Thereafter, if the Department is not satisfied with the order of the Sessions Court, appeal in the deserving cases is required to be filed by the incumbent officer holding the office of the CO, in the High Court within 90 days with approval of Pr. CCIT/CCIT/Pr. DGIT/DGIT.

**11.5** For any appeal against any order of High Court, the existing timeline and procedure for filing Appeal/SLP in the Supreme Court should be followed.

**12. Prosecution Provisions under the Income-tax Act, 1961 & Indian Penal Code, 1860**

**12.1** There are offences for which specific prosecution provisions exist under the Income-tax Act, 1961. Some of such offences may also constitute an offence under the Indian Penal Code, 1860 (IPC for short). As mentioned in para 3(xi) of Guidelines dated 27.06.2019, commission or omission of certain acts, constitute offence both under the Act as well as under the IPC. However, under the Act '*culpable mental state on part of the accused*' can be presumed by the department as per section 278E thereof. Thus, onus gets shifted to the accused to prove that he/she had no such mental state. Such presumption is not available under the IPC. Therefore, it is desirable that where specific provisions under the Act are available in respect of an offence, proceedings are preferably initiated under those provisions of the Act. However, if the same set of acts/omissions also amount to an offence under IPC, the same can also be invoked in suitable cases in the same complaint. A list of prosecution provisions under the Income-tax Act, 1961 is given in Annexure-A & under the IPC is given in Annexure-C of the Guidelines dated 27.06.2019.

**12.2** When an offence punishable under the IPC has been committed by any person and there is no provision for prosecution of such offence available under the Act, the prosecution under the IPC may be considered. In such cases, administrative approval of the Principal Commissioner/Commissioner or Principal Director/Director shall be obtained before instituting complaint in the appropriate court. However, this clause shall not bar filing of an FIR in cases involving offences such as obstruction to duty or physical assault, where previous sanction may not be possible due to urgency of the matter. In such cases, intimation should be given to the Commissioner at the earliest after filing the FIR. Appropriate entries of such FIR and subsequent proceedings should be made in the prosecution module of ITBA.

**13. Provisions relating to procedure for initiating prosecution under Income-tax Act, 1961**

Certain important provisions have been laid down in the Act, which relate to procedure for initiating prosecution, which are as under:

**13.1 Section 279(1): Prosecution to be at instance of Pr. Chief Commissioner or Chief Commissioner or Pr. Commissioner or Commissioner.**

The Act provides that a person shall not be proceeded against for an offence under section 275A, section 275B, section 276, section 276A, section 276B, section 276BB, section 276C, section 276CC, section 276D, section 277 or section 278 except with the previous sanction of the Principal Commissioner or Commissioner or Commissioner (Appeals) or the appropriate authority under section 269UA(c). However, the Principal Chief Commissioner or Chief Commissioner or, as the case may be, Principal Director General or Director General may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of proceedings under this sub-section.

**13.2 Section 279(2): Prosecution can be compounded by the Pr. Chief Commissioner or Chief Commissioner or Pr. Director General or Director General.**

Any offence under this Chapter may, either before or after the institution of proceedings, be compounded by the Pr. Chief Commissioner or Chief Commissioner or Pr. Director General or Director General.

**13.3 Section 278AA: Punishment not to be imposed in certain cases.**

Notwithstanding anything contained in the provisions of section 276A, section 276AB, or section 276B, 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.

**13.4 Section 292C: Presumption as to assets, books of account, etc. in search and survey cases.**

Though this provision is not in the "Chapter XXII Offences and Prosecutions" and appears in the "Chapter XXIII Miscellaneous" it may be invoked in the cases of search u/s 132 or survey u/s 133A and may be used in the complaints filed in the courts. It provides that where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search u/s 132 or survey u/s 133A, it may, in any proceeding under this Act, be presumed-

- (i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;
- (ii) that the contents of such books of account and other documents are true; and
- (iii) that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

**13.5 Section 278E: Presumption as to culpable mental state.**

This is a very useful provision and, as stated earlier, must be invariably used wherever the facts so warrant. It provides that 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 defense 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. For the purposes of this section, 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. However, in this section, "culpable mental state" includes intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

This provision is to be read in the context of provisions u/s 101 and 103 of the Evidence Act which stipulate that the burden of proof lies with the person who wishes the Court to believe in the existence of a particular fact "unless it is provided by any law that the proof of that fact shall lie on any particular person". The Income-tax Act is one such "any law", within the meaning of section 103 of the Evidence Act, which provides for presumption of culpable mental state of the assessee/witness. The burden of proof to that extent shifts to the accused in relation to prosecutions filed under Income-tax provisions. But this benefit is not available if prosecution is initiated under IPC.

**14. Withdrawal of prosecutions**

14.1 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.P.C., 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 Pr. CCIT/CCIT/Pr. DGIT/DGIT concerned, who after recording reasons for doing so, may approve withdrawal of the complaint.

14.2 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 u/s 321 of Cr.P.C.

14.3 In either case, after receiving approval of Pr. CCIT/CCIT/Pr. DGIT/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.

14.4 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 u/s 279(2) shall be produced before the Trial Court through the Prosecution Counsel seeking courts permission for withdrawal of the complaint.

#### **15. Reporting Mechanism**

The management of all tasks relating to prosecution on ITBA is mandatory. The present system of monthly and quarterly progress reports on prosecution will continue till such time an alternative online system of reporting is prescribed by the Board. The Pr. CCIT, through the Prosecution Cell, if functional, or otherwise will be the repository of all data regarding prosecution in his charge.

16. The timelines given in this SOP do not provide limitation period, but they serve the purpose of expediting the prosecution proposals.

ANNEXURE - 1

FORM A

Proforma for submitting Prosecution Proposal u/s 279(1) of Income-tax Act, 1961

1. Section(s) under which prosecution is proposed:
2. Details of Accused:
  - i) Name :
  - ii) Address :
  - iii) PAN :
  - iv) Status :
  - v) Date of Birth/Incorporation :
3. Details of proposed co-accused (if any) u/s 278B/278C of the Income-tax Act, 1961 i.e. partners, directors, karta, principal officer, DDO etc who are proposed to be prosecuted, in the case of firm, company, HUF, AOP or BOI etc.

Name of the Director/ Partner/ Principal Officer, etc. (i)	Position Held (ii)	Date of Birth (iii)	PAN (iv)	Residential address of the person (v)

4. Assessment Year
5. Date of filing of return
6. Name & designation of the person who verified the return
7. Total income declared as per the return
8. Date of assessment order, if assessment completed
9. Section under which assessment made
10. Assessed income

11. Sections of other laws such as IPC which are also proposed for simultaneous prosecution
12. Status of proceedings of appeal of order, if any, relating to offence
13. Status of penalty proceedings, if any, relating to offence
14. The date of sanction order u/s 197 of Cr.P.C. from Government, in the case of a public servant
15. Details of evidence required to prove the offence
  - i) Return of income/Revised return of income
  - ii) Admission
  - iii) Oral evidence of third party
  - iv) Other Documentary evidence
  - v) Any other evidence (Please specify)
16. Name and address of witnesses required to prove prosecution case
17. Name of the Approver in the case, if any
18.
  - i) Whether any prosecution proceedings for offence under same provision instituted earlier?
  - ii) If yes, Complaint Number and date of filing, status of prosecution
19. If the provisions of section 278A are attracted, following details;
  - i) Complaint Number and date of filing of earlier complaint.
  - ii) Sections under which conviction has taken place.
  - iii) Date and other details of conviction order.
  - iv) Enclose the copy of conviction order.
20. A note containing chronology of events with detailed facts indicating offence as defined in the relevant section (use annexure, if needed). See Appendix to this form for suggestive contents of the note.

21. Compounding Status:

- i) Whether compounding petition for this year or any other year was filed?  
 ii) If yes:

Sr. No.	The year(s) for which compounding application(s) were filed	Chargeable section(s) of offence under Income-tax Act, 1961 against which compounding application(s) filed	Status of the application

22. Details of the Income-tax Authority(ies) passing relevant order/recording statement etc.

- (i) Name (s) :  
 (ii) Present designation :  
 (iii) Present posting :  
 (iv) Employee code, if available :  
 (v) Permanent address, if available :

Date: \_\_\_\_\_

**Signature** : \_\_\_\_\_  
**Name** : \_\_\_\_\_  
**Employee Code** : \_\_\_\_\_  
**Designation** : \_\_\_\_\_  
**Permanent address** : \_\_\_\_\_

**Instructions for filling up this Form-**

- i) No column of the Form should be left blank. If the column is not applicable, the same shall be clearly mentioned.
- ii) At Sr. No. 3, the details of the co-accused to be filled-in on the basis of details gathered as per procedure laid down in Annexure-2 of SOP.
- iii) The original copies of prosecution documents mentioned in Sr. No. 15 should be kept safely in personal custody of the CO and a proper handing over of such documents should be done at the time of change of incumbent.
- iv) Following facts may be incorporated in Sr. No. 20 –  
 Specific defaults constituting offence under relevant section
- Facts which prima facie lead to conclusion (for guidance, see appendix) about commission of the offence

- Brief explanation for the default, if any, submitted by the accused and observation of the CO on factual accuracy of the same
  - The relevance of various evidence in proving the offence
  - The role of each proposed witness in proving the offence
  - The reasons for proposing names of different co-accused at Sr.No.3, if any, for Prosecution.
- v) Income-tax Authorities to be mentioned in Sr. No. 22 would include those who have signed important documents or passed the relevant order which are required for proving the offence such as officers passing assessment orders; recording statements; signing notices u/s 142(1), 148, 153A for prosecution u/s 276B etc.
- vi) In Sr. No. 1 & 11 include all the sections for which sanction u/s 279(1) is being sought.

## **Appendix**

### **Note: Suggestive contents in respect of some provisions**

#### **Section 275A Contravention of order made under sub section (3) of section 132.**

- i. Offence u/s 132(3) or second proviso to 132(1)
- ii. Date of Warrant u/s 132
- iii. Name of the Person in whose case search was conducted
- iv. Address of the premises searched
- v. Date of Prohibitory Order (PO)
- vi. Name & Designation of the Officer issuing the PO
- vii. Particulars of the place put under prohibition
- viii. Contents placed in the PO
- ix. Name and other details of the persons on whom the PO order was served and date of service
- x. Date on which the contravention of PO was detected
- xi. Nature of contravention
- xii. Name & Designation of the Officer who detected contravention

#### **Section 275B Failure to comply with the provisions of Clause (iib) of sub-section (1) of section 132.**

- i. Date of Warrant u/s 132
- ii. Name of the Person in whose case search was conducted
- iii. Address of the premises searched
- iv. Date of Search



- v. Particulars of the person found to be in possession or control of books of accounts maintained in form of electronic records (including name, address, designation/relation to searched person)
- vi. Description of offence (how the person at (v) above restricted access/denied facility to inspect such books of accounts)
- vii. Documentary Proof relied upon in this regard (statements/*panchnama*) (upload PDF)
- viii. Name & Designation of the Authorised Officer at the premises

**Section 276 Removal, concealment, transfer or delivery of property to thwart tax recovery.**

- i. Name of the assessee/defaulters
- ii. Name & Designation of the TRO
- iii. Section under which Certificate has been drawn by TRO
- iv. Date of issue of Certificate
- v. Date of Service on the defaulter/assessee
- vi. Mode of service
- vii. Details of the property w.r.t which certificate has been issued by TRO and has been alienated to thwart recovery
- viii. Nature of offence (brief description)
- ix. Documentary Proof w.r.t. alienation of property involved, if any. (upload PDF)

**Section 276A Failure to comply with the provisions of sub-sections (1) and (3) of section 178.**

- i. Contravention of section involved
  - a. 178(1)
  - b. 178 (3)
- ii. Name/PAN of the Company in liquidation
- iii. Name, Address & PAN of the liquidator
- iv. Date of appointment of liquidator

In case, section 178(1) is involved

- v. Last date for notifying the Assessing Officer of his appointment as the liquidator.
- vi. Document or order w.r.t. appointment of liquidator containing date of appointment

In case, section 178(3) is involved

- vii. Date of notice of appointment given by Liquidator to the Assessing Officer
- viii. Date of Notification by the Assessing Officer to the Liquidator of the amount to be set aside on account of taxes due or likely to be due.

- ix. Amount notified by the Assessing Officer
- x. Details of the failure on part of the Liquidator to set aside the assets of the company in liquidation equivalent to the amount notified by the Assessing Officer.

**Section 276C (1) Wilful attempt to evade tax, penalty and interest**

- i. Whether it is a case of attempt to evade any tax, penalty or interest.
- ii. Whether it is a case of evading only penalty independent of tax for example section 271DA.
- iii. Whether the assessee has already evaded the tax, penalty or interest or it is an attempt.
- iv. What is the amount of tax, penalty or interest sought to be evaded or under-reported or mis-reported.
- v. Whether it is case covered in any one of the clauses of explanation to Section 276C.
- vi. Whether it is a case of search or survey or otherwise.
- vii. Whether the assessment is completed or not, if so, under which section
- viii. Whether any penalty has been levied or pending to be levied under any section
- ix. Whether it is a case in which assessee has approached Settlement Commission and if so, whether the application has been rejected or not admitted or immunity from prosecution not granted or immunity withdrawn u/s 245H(1A)/245H(2)

**Section 276C (2) Wilful attempt to evade of the payment of tax, interest or penalty**

- i. Whether it is a case of Self-assessment tax shown as payable in return but not paid.
- ii. Whether it is a case where demand has been confirmed in any appellate proceedings and the same has not been paid even though there is no stay order.
- iii. Whether it is a case where assessee has not paid any demand and the assessee has been declared as "assessee in default" and no stay application is pending.
- iv. Whether it is a case where TDS/TCS has not been paid by the deductor/collector after such deduction/collection. This section can be invoked in addition to Section 276B/276BB.

**Section 276 CC Failure to furnish return of Income**

- i. Section under which return was required to be filed [section 139(1); 148; 153A or 142(1)(i)]
- ii. Date of notice, if any
- iii. Amount of tax which would have been evaded if the failure of furnish return would not have been detected (the amount is to be computed after giving credit of the pre-paid taxes and TDS)

- iv. Whether any reasons for non-furnishing of return have been submitted by the assessee.
- v. Brief reasons for non-acceptance of the reasons submitted as reasonable cause.

**Section 276 D Failure to produce accounts and Documents**

In case of non-compliance to section 142(1)

- i. Date of issue of notice u/s 142(1)
- ii. Date of service of notice and mode of service
- iii. Date specified in the notice for furnishing accounts and documents
- iv. Nature of books and documents sought by the AO, in brief
- v. Reasons in brief, if any, submitted by the assessee for non-compliance
- vi. Brief reasons by the AO for non-acceptance of the reasons submitted by the assessee to be reasonable cause for non-compliance

In case of non-compliance to section 142(2A)

- vii. Date of issue of notice to assessee for invoking provisions of section 142(2A)
- viii. Date of approval of the Principal Chief Commissioner/ Principal Commissioner/Commissioner
- ix. Date of order issuing directions to assessee to get its books of accounts audited.
- x. Date of service of such order
- xi. Name & Particulars of the accountant selected for the Audit
- xii. Date for the submission of the Audit Report (including extension, if any)
- xiii. Brief details of the failure on part of the assessee to comply with the directions under section 142(2A)
- xiv. Brief description of the failure of the assessee to comply, as reported by the accountant appointed for the special audit.

**Section 277 False statement in verification, etc.**

- i. Particulars of the (a) statement made under verification which has been found to be false; (b) account or statement delivered which has been found to be false
- ii. Section under which statement recorded under verification, if applicable
- iii. Nature of the income/investment/expenses etc. w.r.t which false statement has been made under verification
- iv. Amount of income sought to be evaded by making such false statement or furnishing false documents/accounts.
- v. Amount of taxes sought to be evaded by making false statement

**Section 277A Falsification of books of account or document**

- i. Name, Address, PAN of the person (first person) who has enabled the second person to evade taxes.

- ii. Name, Address, PAN of the assessee who has been enabled to evade taxes (second person)
- iii. Assessment Year(s) involved
- iv. Nature of the false entry or statement made/caused to be made by the first person with the intention to enable the second person to evade taxes.
- v. Documentary evidence relied upon as evidence to establish that the entry/statement/account under examination is false/not true.
- vi. Whether second person has actually evaded any tax, penalty or interest chargeable or leviable under the Act, if yes, amount thereof.

**Section 278 Abetment of False Return**

- i. Name, Address, PAN of the accused/person involved in abetment
- ii. Name, Address, PAN of the assessee who has been induced to make and deliver a false account or statement or declaration relating to any income chargeable under the Act.
- iii. Assessment Year(s) involved
- iv. Nature of the false declaration or statement or account made/caused to be made by the accused relating to the income of the assessee.
- v. Amount of tax, penalty and interest that would be evaded if false account or statement or declaration relating to any income chargeable under the Act was accepted to be true.
- vi. Documentary evidence relied upon as evidence to establish that the declaration/statement/account under examination is false/not true.

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ANNEXURE-2

Procedure for initiating prosecution in the case of Company/Firm/LLP/AOP/BOI/HUF

1. Companies/Firm/LLP/AOP/BOI, etc. are legal entities. Though such entities can also be convicted, but they cannot be imprisoned. Moreover, it is always the persons in control of the business who are responsible for commission and omission of various acts. It is, therefore, necessary to carefully identify the persons who are responsible for offence committed by the Company/Firm/LLP/AOP/BOI etc. so that they also can be prosecuted.
2. In the case of Company/Firm/LLP/AOP/BOI, provisions of Section 278B are relevant in deciding the accused and co-accused. As per Section 278B(1) of the Act, *“where any offence is committed by a Company/Firm/LLP/AOP/BOI, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company/Firm/LLP/AOP/BOI for the conduct of the business of the company/Firm/LLP/AOP/BOI as well as the Company/Firm/LLP/AOP/BOI shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly, unless he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence”*. Company includes Firm/LLP/BOI/AOP for the purpose of this section.
3. Further, u/s 278B(2) of the Act, when an offence is committed by a Company/Firm/LLP/AOP/BOI and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company/Firm/LLP/AOP/BOI, such director, partner, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
4. For the purposes of section 278B —
  - (a) "company" means a body corporate, and includes—
    - (i) a firm; and
    - (ii) an association of persons or a body of individuals whether incorporated or not; and
  - (b) "director", in relation to—
    - (i) a firm, means a partner in the firm;
    - (ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.
5. In this regard, it is important to mention that Hon'ble Supreme Court in the case of *Madhumilan Syntex Ltd. vs. Union of India (2007), 290 ITR 199 (SC)* has held that from the

statutory provisions, it is clear that to hold a person responsible under the Act, it must be shown that he/she is a 'principal officer' under section 2(35) of the Act or is 'in charge of' and 'responsible for' the business of the company or firm.

Thus, the persons who are held Principal Officer u/s 2(35) of the Act, or the persons "in charge of" and "responsible for" business of the Company or the Firm are liable to prosecution besides the person(s) with whose consent, connivance or because of whose neglect the offence has been committed. The AO, therefore, should keep these provisions in mind while collecting the details and evidences and preparation of prosecution proposals while proposing the names of the accused and co-accused.

6. The following details may, therefore, be collected in the case of Companies while examining prosecution complaint by the AO/CO from assessee or other sources:

(i) Details of the Company:

Registered address	Other address(s), if any	PAN	Date of incorporation	Contact numbers
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(ii) Details of All Directors (From 1<sup>st</sup> April of relevant F.Y. till date):

Name	Date of Birth	PAN	Residential address	Mobile Number	Whether Active or not	Responsibilities handled *	Date of appointment
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(\*) In support, copies of relevant resolution or other relevant documents may be submitted.

(iii) Details of person responsible for finalization of accounts, filing of Returns and verification and submission of details before Income-tax authorities, for relevant Assessment Year:

Name	Date of Birth	PAN	Residential address	Mobile Number	Designation	Other Responsibilities handled **	Date of appointment
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(\*\*) In support, copies of relevant resolution or other relevant documents can be sought. These persons are prima facie covered under section 278B of the Act. These persons are also prima facie responsible and liable for prosecution under section 278B of the Act, unless they prove that the offence was committed without their knowledge or that they exercised all due diligence to prevent commission of such offence.

- (iv) Details of every person (including Directors) who was in charge of and was responsible for conduct of business of the company (From 1<sup>st</sup> April of relevant F.Y. till date):

Name	Date of Birth	PAN	Residential address	Mobile Number	Designation	Responsibilities handled ***	Date of appointment
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(\*\*\*) In support, copies of relevant resolution or other relevant documents can be sought.

- (v) Duly certified copy of Minutes book showing minutes of the meeting of the Board of Directors. From these details the facts about the role of various persons in conduct of business and their control can be gathered. The minutes will also be helpful in verification of details provided at Sr. No. (iii) & (iv) above along with audit reports and annual reports.

7. Appropriate changes in above the format can be made to collect information in respect of Firm/AOP/BOI, etc.

8. Similarly, appropriate changes in above format can be made to collect information in respect of HUF keeping in mind the provisions of section 278C (1) and 278C (2).

9. The Principal Commissioner or Commissioner, before according sanction u/s 279(1), should carefully ascertain that no person should be made co-accused unless he fulfils the ingredients of the sub section (1) or (2) of section 278 whichever is applicable.

10. The Principal Commissioner or Commissioner shall examine the proposal received and if prima facie case for prosecution is made out, he may seek clarification with regard to the facts contained in the proposal from all proposed accused and co-accused within a reasonable time. He may also seek any additional facts/documents/information as he deems fit. The letter seeking clarification/information from the assessee should be drafted in such a manner that it enables him to take a fair and judicious decision for granting sanction u/s 279(1) in the case of accused as well as each of the proposed co-accused, if any.

11. If there are more than one accused or co-accused in case of company, firm, HUF etc, letter seeking such clarification should be sent to all the accused or co-accused.

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