

Offences under The Income Tax Act, 1961

SOME SALIENT ISSUES

By

Amit Khemka

Offences under Income-tax Act, 1961

Contained in Chapter XXII

S.No	Section Of the I.T. Act	Brief Description of Offence	Punishment	Cognizable/ or Non - Cognizable	Bailable/ or Non-Bailable	Summon's case/ Warrants case	Triable by
1.	275A	Dealing with seized assets in contravention of the order made u/s 132(3)	Upto 2 years with fine	Non-cognizable	Bailable	Summon's-case	Special court/ magistrate of first class
2.	275B (w.e.f. 1-6-02)	Failure to afford necessary facility to the Authorised Officer for inspection of books or other documents as required u/s 132(1)(iib)	Upto 2 years with fine	Non-cognizable	Bailable	Summon's-case	Special court/ magistrate of first class
3.	276	Removal, concealment, transfer or delivery of property to thwart tax recovery	Upto 2 years with fine	Non-cognizable	Bailable	Summon's-case	Special court/ magistrate of first class
4.	276A	Failure to comply with the provisions of Sec.178(1), and (3) by liquidator of a company	6 months to 2 years	Non-cognizable	Bailable	Summon's-case	Special court/ magistrate of first class
5.	276AB	Failure to comply with the provisions of sections 269UC, 269UE & 269UL relating to acquisition of immovable property	6 months to 2 years	Non-cognizable	Bailable	Summon's-case	Special court/ magistrate of first class
6.	276B	Failure to pay tax deducted at source under Chapter XVII-B or contravention of section 115-O	3 months to 7 years with fine	Non-cognizable	Bailable	Warrant case	Special court/ magistrate of first class

7.	276BB	Failure to pay the tax collected under the provisions of sec. 206C	3 months to 7 years with fine	Cognizable	Non - bailable	Warrant case	Special court/ magistrate of first class
8.	276C(1)	Willful attempt to evade tax, penalty or interest imposable under the Act a. where tax evaded exceeds Rs.1,00,000/- b. in other cases	a) 6 months to 7 years with fine. b) 3 months to 3 years with fine	Non-cognizable (sec 279A)	a) non-bailable b) bailable	a) Warrant case b) Summon's-case	Special court/ magistrate of first class
9.	276C(2)	Willful attempt to evade the payment of any tax, penalty or interest	3 months to 3 years with fine	Non-cognizable	Bailable	Summon's-case	Special court/ magistrate of first class
10.	276CC	Willful failure to file return of income u/s139(1), or in response to notice u/s 142(1) or 148 a) where tax evaded exceeds Rs.1,00,000/- b) in other cases Note: No prosecution if RI is filed before the expiry of the asst. year or if the tax payable on regular asst. as reduced by TDS & advance tax does not exceed Rs.3,000/-	a) 6 months to 7 years With fine. b) 3 months to 3 years with fine.	Non-cognizable	a) Non-bailable b) Bailable	a) Warrant case b) Summon's-case	Special court/ magistrate of first class

11.	276CCC	Failure to furnish return for block period	3 months to 3 years with fine	Non-cognizable	Bailable	Warrant case	Special court/ magistrate of first class
12.	276D	Willful failure to produce accounts and documents u/s142(1) or to get accounts audited u/s142(2A)	Upto 1 year and fine of Rs.4 to Rs.10 for every day of default	Non-cognizable	Bailable	Summon's-case	Special court/ magistrate of first class
13.	277	Making a false statement in verification or delivering a false account or statement a) where tax sought to be evaded exceeds Rs.1,00,000/- b) in other cases	a) 6 months to 7 years with fine. b) 3 months to 3 years with fine.	Non-cognizable	a) Non-bailable b) Bailable	a) Warrant case b) Summon's-case	Special court/ magistrate of first class
14.	277A	Falsification of books of accounts or documents, etc.	3 months to 2 years with fine.	Non-cognizable	Bailable	Summon's case	Special court/ magistrate of first class
15.	278	Abetment to make a false statement or declaration a) where tax, penalty or interest sought to be evaded exceeds Rs.1,00,000/- b) in other cases	a) 6 months to 7 years with fine. b) 3 months to 3 years with fine.	Non-cognizable	a) Non-bailable b) Bailable	a) Warrant case b) Summon's case	Special court/ magistrate of first class

16.	278A	Second and subsequent offences u/s 276B, 276C(1), 276CC, 277 or 278	6 months to 7 years with fine				Special court/ magistrate of first class
17.	278(1)	Disclosure of particulars by public servants in contravention of section 138(2). (Prosecution to be instituted with the previous approval of Central government)	Upto 6 months with fine				Special court/ magistrate of first class

Note:-

1. As per the provisions of section 279A, the offences punishable u/s 276B, 276C, 276CC, 277 or 278 are non-cognizable offences.

2. If the penalty imposed u/s 271(1)(c) has been reduced or waived u/s 273A, no prosecution lies u/s 276C or 277 [sec. 279(1A)]

3. If a person has reasonable cause for the failures u/s 276A, 276AB or 276B, then no punishment can be awarded.

Procedure

Section 280D :

Provisions of the Criminal Procedure Code, 1973 applicable to prosecution of these offences.

Section 279A :

Offences under Sections 276B, 276C, 276CC, 277 or Section 278 shall be deemed to be Non-Cognizable

Does that mean all other offences are ‘Cognizable’?

All these offences are punishable with imprisonment upto 7 years.

Most other offences are punishable with imprisonment upto 3 years except Sections 276BB & 278A

Code of Criminal Procedure First Schedule

Table II.—CLASSIFICATION OF OFFENCES AGAINST
OTHER LAWS

Offence	Cognizable or non-cognizable	Bailable or non-bailable	By what court triable
If punishable with death, imprisonment for life, or imprisonment for more than 7 years	Cognizable	Non-bailable	Court of Session
If punishable with imprisonment for 3 years and upwards but not more than 7 years	Ditto	Ditto	Magistrate of the first class
If punishable with imprisonment for less than 3 years or with fine only	Non-cognizable	Bailable	Any Magistrate.

Except 276BB & 278A all other offences
are Non-cognizable

“Non Cognizable Offences”?

- Police can't arrest without warrant

- Police can't lodge a FIR and investigate the matter without the order of the Magistrate

The Cognizance of such offences is directly taken by the Magistrate upon a “Complaint” made to the Magistrate having Jurisdiction

In Cognizable cases Police can register a FIR & arrest without warrant

Does that mean a FIR can be filed in respect of offences under Sections 276BB & 278A?

Section 280B:

All offences under IT Act are to be tried by Special Court on a Complaint by Authorised Authority

(No role of Police even in 276BB)

278A deals with repeat offences only so the law governing the substantive section

S. 280B(b)

Cognizance by Special Court on “Complaint” of the “Authority Authorised”

A “Complaint” is in case of IT Act offences is filed under Section 280B of IT Act read with Section 190 of Cr. P. C.

In the normal Course Complainant and his witnesses are required to be examined on oath by the Magistrate before the accused can be summoned under Section 200 of Cr.P.C.

But as the Complainant in the cases under Income Tax Act are “Public Servants” the Magistrate need not examine him on oath before summoning the accused

If in the opinion of the magistrate there is sufficient ground for proceeding:

If it is a ‘Summons Case’ – Issue summons

If its is a ‘Warrant Case – Issue summons or warrants

(Section 204(1) Cr.P.C.)

No summons or warrants shall be issued if a ‘List of prosecution witnesses’ not filed (Section 204(2) Cr.P.C.)

Every summons or warrants must be accompanied by copy of such complaint (Section 204(3) Cr.P.C.)

Must check for Annexure & Copy of Sanction under Section 279 of IT Act

Magistrate will require the accused to furnish
'Security Bond' (Section 88 Cr.P.C.)

Accused has to be present on every date of
hearing, however the Magistrate may dispense
with personal appearance of the accused (Section
205 Cr.P.C.)

It's a very important stage:

- *To decide whether complaint discloses a prima facie case;
- *Whether legal requirements such as Sanction (Section 279) were followed
- *Whether Sanction & the summoning order were passed:
 - by due application of mind to relevant material?
 - Was the material sufficient?
 - Are they impacted by extraneous considerations or material?
 - Are they perverse?
 - Whether due procedure & legal provisions were followed?

(If there is no sanction or defective sanction, the accused will be entitled to discharge)

*Whether grounds exist to challenge the summoning order by way of Revision under Section 397 Cr.P.C

*Or seek quashing of proceedings under Section 482 Cr.P.C.

*Or to wait for the stage of framing of charge (in warrant case) or Notice (in summons case) to raise all the pleas against summoning

*Examine whether a good case for seeking benefit of *Commissioner Of Income Tax, .vs Bhupen Champak Lal Dalal* for getting the proceedings stayed

**Relation between:
Prosecution
And
Assessment/ Penalty proceedings
(including appeals therefrom)**

*They are independent of each other

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

*Existence of other mode of recovery cannot act as a bar to the initiation of prosecution proceedings. (*Kalluri Krishan Pushkar v Dy. CIT(2016) 236 Taxman 27 (AP& T) (HC)*)

The Supreme Court, in *Uttam Chand v. ITO* (1982) 133 ITR 909 (SC),

Prosecution u/s. 277 was for filing of false returns because the registration of the firm was cancelled on the ground that it was not genuine

The Appellate Tribunal reversed the finding and held the registration of the firm to be genuine and consequently the returns as valid.

Supreme Court held that once the ITAT had held that the firm was genuine & returns valid, the prosecution under IT Act could not continue.

Similarly in **G.L. Didwania and anr. vs ITO** *(1995) 224 ITR 687 (SC)*

The Hon'ble Supreme Court laid down the principle that
“The Criminal Court no doubt has to give due regard to the result of any proceedings under the Act having bearing on the question in issue and in an appropriate case it may drop the proceedings in the light of an order passed under the Act.”

The assessee made false statement in respect of income of M/S Young India which finding was set aside by ITAT.

The prosecution was quashed by the Supreme Court

***In K. C. Builder v. ACIT (2004) 265 ITR 562
(SC),***

Once the finding of concealment and subsequent levy of penalties u/s 271(1)(c) of the Act has been struck down by ITAT

As such the order u/s 154 of the Act was to be corrected by the assessing officer.

Subject matter of the complaint was the concealment of income and the tribunal having already set aside the order of concealment and penalties, therefore, even if the charges had been framed in the trial, the criminal prosecution for an offence u/s 276C for wilful evasion of tax cannot be proceeded with thereafter.

Similarly, in *V. Gopal v. ACIT (2005) 279 ITR 510 (SC)*,

The Supreme Court held that when the penalty order was set-aside, the Magistrate should decide the matter accordingly and quash the prosecution.

*In ITO v. Nandlal and Co. (2012) 341 ITR 646
(Bom.)(HC),*

The Bombay High Court held that, when the order for levy of penalty is set aside, prosecution for wilful attempt to evade tax does not survive.

If the penalty is quashed on “technical grounds such as

“Limitation” or

“Violation of the due process of law”

Penalty not quashed on merits as such it does not impact the prosecution proceedings.

Upholding of imposition of penalty in assessment proceedings or in appeal,
The conviction is not automatic.
The special court must come to independent findings about the guilt.

In Radheshyam Kejriwal vs State of West Bengal - Supreme Court of India 18th February, 2011

The following principles were laid down by the Supreme Court:

- 1) Adjudication proceeding and criminal prosecution can be launched simultaneously;
- 2) Decision in adjudication proceeding is not necessary before initiating criminal prosecution;
- 3) Adjudication proceeding and criminal proceeding are independent in nature to each other;
- 4) The finding against the person facing prosecution in the adjudication proceeding is not binding on the proceeding for criminal prosecution;

5)The finding in the adjudication proceeding in favor of the person facing trial for identical violation will depend upon the nature of finding. If the exoneration in adjudication proceeding is on technical ground and not on merit, prosecution may continue; and

6)In case of exoneration, however, on merits where allegation is found to be not sustainable at all and person held innocent, criminal prosecution on the same set of facts and circumstances cannot be allowed to continue underlying principle being the higher standard of proof in criminal cases.

Income Tax Officer vs Rajan And Co. And Ors.
on 2 January, 2007
2007 291 ITR 345 Delhi

Question before Delhi High Court was where ITAT had quashed the penalty levied and confirmed by the lower authorities on the **ground that same was without recording satisfaction** as contemplated Under [Section 271\(1\)\(c\)](#).

Whether a prosecution under [Section 276C](#) of the said Act can be allowed to be continued in such a case holding that the penalty proceedings under [Section 271\(1\)\(c\)](#) of the said Act were terminated merely on the ground of some technicality and not on merits?

High Court said it was not a mere technicality and penalty was quashed on merits

P. Jayappan vs S.K. Perumal 1984 AIR 1693

There is no bar on continuation of prosecution just because a proceeding which may ultimately affect the prosecution or is likely to favour the assessee has been initiated or is pending. This can't be a ground for stay or adjournment of prosecution proceedings.

*Commissioner Of Income Tax, ... Vs Bhupen
Champak Lal Dalal & Anr*

*Supreme Court of India on 27 February, 2001(2001)
167 CTR (SC) 283*

This was a case where the assessee asked for stay of criminal proceedings in view of same question being pending before the ITAT.

All courts starting with Sessions, High Court & Supreme Court concurred with the order of the Magistrate staying the prosecution to await the decision of ITAT.

Supreme Court Held :

“The prosecution in criminal law and proceedings arising under the Act are undoubtedly independent proceedings and, therefore, there is no impediment in law for the criminal proceedings to proceed even during the pendency of the proceedings under the Act.

However, a wholesome rule will have to be adopted in matters of this nature where courts have taken the view that when the conclusions arrived at by the appellate authorities have a relevance and bearing upon the conclusions to be reached in the case necessarily one authority will have to await the outcome of the other authority.”

This judgment has been followed by many High Courts including
Delhi High Court in *Income Tax Officer vs Giggles (P) Ltd. And Ors.* (2007) 207 CTR Del 570, 2008 301 ITR 32 Delhi

When Tribunal decides against the assessee in quantum proceedings and if there is possibility of department launching prosecution proceedings, it may be advisable for the assessee to file an appeal before the High Court.

Various courts have held that, when the substantial question of law is admitted by a High Court, it is not a fit case for the levy of penalty for concealment of Income (*CIT v. Nayan Builders and Developers (2014) 368 ITR 722 (Bom.) (HC)*, *CIT v. Advaita Estate Development Pvt. Ltd. (ITA No. 1498 of 2014 dt. 17/2/2017) (Bom.)(HC)*,

A harmonious reading of the various ratios it can be contended that if penalty cannot be levied upon the admission of a substantial question of law by the Jurisdictional High Court, it cannot be a fit case for prosecution.

Non-initiation of penalty proceedings does not lead to a presumption that the prosecution cannot be initiated

(Universal Supply Corporation v. State of Rajasthan (1994) 206 ITR 222 (Raj) (HC),)
(A.Y. Prabhakar (Karthi) HUF v. ACIT (2003) 262 ITR 287 (Mad.).)

If penalty proceedings are initiated and are dropped on merits

-Not a fit case for initiating prosecution proceedings.

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

The End

THANKYOU

Amit Khemka, Advocate