



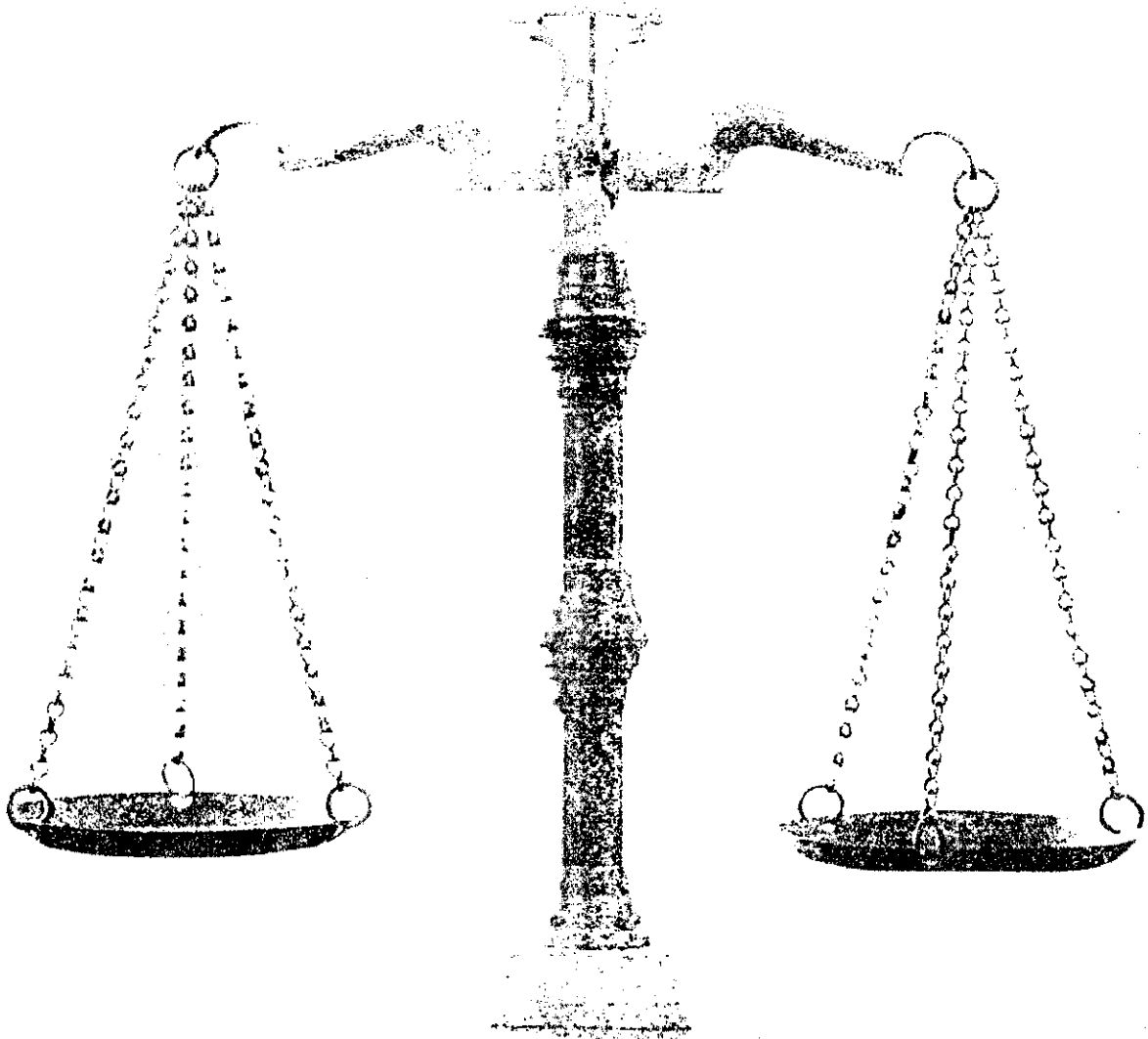
सत्यमेव जयते

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PROSECUTION

— M A N U A L —

2009



Directorate of Income Tax (PR PP & OL)

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I

Introduction

The prosecution provisions contained in Chapter XXII of the Income-tax Act, 1961 declaring certain acts of omission and/or commission as punishable offences are most potent weapons in the armoury of the Income-tax department to tackle tax evasion. The objective of these provisions is to punish the offenders found guilty of tax evasion and other tax related offences and to instil fear of law in the minds of those who may even contemplate evading payment of legitimate taxes.

The rationale for launching prosecution under the I.T. Act has been well described in the Wanchoo Committee report, which recommended the need for a vigorous prosecution policy. The committee made the following observations in the report:

“ In the fight against tax evasion, monetary penalties are not enough. Many a calculating tax dodger finds it a profitable proposition to carry on evading taxes over the years, if the only risk to which he is exposed is a monetary penalty in the year in which he happens to be caught. The public in general also tends to lose faith and confidence in the tax administration once it knows that even when a tax evader is caught, the administration lets him get away lightly after paying only a monetary penalty when money is no longer a major consideration with him if it serves his business interests. Unfortunately, in the present social milieu, such penalties carry no stigma either. In these circumstances, the provisions for imposition of penalty fail to instil adequate fear of the law in the minds of tax evaders. Prospect of landing in jail, on the other hand, is a far more dreaded consequence to operate in terrorem upon the erring taxpayers. Besides, a conviction in a court of law is attended with several legal and social disqualifications as well. In order, therefore, to make enforcement of tax laws very effective, we consider it necessary for the Department to evolve a vigorous prosecution policy and to pursue it unsparingly.

For a successful enforcement programme, it is not enough that adequate number of cases is taken to courts every year.

In selecting cases for prosecution, the Department should ensure that these represent a cross-section of the society and are picked up from different regions and all walks of life, viz. persons in employment, profession, trade, industry etc. While the power to compound offences presently available to the Department under sub-section (2) of Section 279 of the Income-tax Act, 1961, may continue, we recommend that it should be used very sparingly. We also wish to emphasize that flagrant cases of tax evasion, particularly of persons in the high income brackets, should be pursued relentlessly.”

In this back ground, the existing laws were examined and certain provisions were introduced, treating tax offences as serious crimes as in Section 276C. Moreover, abetment was also incorporated as an offence u/s 278 of the I.T.Act.

Chapter XXII of the Income-tax Act, 1961 contains provisions relating to prosecution. Prosecution provisions to curb tax evasion are contained in sections 276C, 276CC, 276CCC, 276D, 277 and 278. Prosecution is also provided, inter-alia, for contravention of order under section 132(3) (section 275A) and failure to comply with the provisions of sub-sections (1) and (3) of section 178 (section 276A). Similarly, prosecution has been provided for failure to pay tax collected or deducted at source to the credit of Central Government in sections 276B & 276BB. Falsification of books of account or documents has also been made an offence u/s 277A of the I.T.Act w.e.f. 1.10.2004 to curb the menace of accommodation entries by persons known as hawala operators / bill providers.

The basic laws of criminal justice are administered under the provisions of Indian Penal Code and Criminal Procedure Code. The same are also applicable to offences under Direct Tax laws, where the prosecution has to discharge the burden of proof in terms of Indian Evidence Act. An attempt was, however, made to strength the provisions of prosecution under the Direct Tax laws by insertion of provisions of Section 278D & 278E which provide for some presumptions w.r.t culpable mental state, assets and books of account and documents found and seized during the course of search. The period of limitation for taking cognizance of an offence has also been done away with by including the Income-tax & wealth Tax Acts in the exclusion category of section 468 of Cr.P.C.

Certain acts of omission and commission are offences punishable not only under I.T. Act, but also under Indian Penal Code. The Income-tax authorities may come across certain offences, which can be dealt with only under IPC. It may be highlighted that there is no bar on prosecution of an offender under the Income-tax Act and under the Indian Penal Code. However, there is a bar on the punishment of the offender twice for the same offence.

While preparing this manual, efforts have been made to bring the following aspects relating to offences and prosecution at one place:

- (a) The provisions relating to offences and prosecution under Income-tax Law.
- (b) The relevant provisions of other laws such as IPC, Cr.PC and Indian Evidence Act keeping in view their applicability.
- (c) Brief reference to offences under other laws such as Benami Transaction Prohibition Act, 1988, Arms Act 1959, Antiquities and Art Act 1972, Prevention of Corruption Act 1988, Wild Life Protection Act 1972, Information & Technology Act, 2000, Customs Act 1962, Central Excise Act 1944, Foreign Exchange Management Act 1999 and Prevention of Money Laundering Act 2002, which are incidental to various field actions of I.T. Authorities.
- (d) The procedure for filing prosecution, which includes identification of cases, roles of various authorities, various steps involved in filing of complaint and maintenance of records etc.
- (e) Model proformas & Registers
- (f) Some of the relevant case laws and
- (g) Various instructions relating to prosecution.

In the Income-tax Law, there is a provision for compounding of offences also. The relevant laws, procedure and various instructions relating thereto have also been provided in the manual.

II Legal base

1. Introduction

Launching of prosecution in relation to various offences under the Income-tax Act is intended to make enforcement of direct tax laws more effective. Imposition of penalty has not been found to be adequate deterrent to check tax evasion and in enforcing tax laws. Further, there are certain offences where imposition of penalty is not possible. In such cases prosecution is an available option. Besides offences punishable under Income-tax Act 1961, there may be occasion to launch prosecution proceedings under various sections of I.P.C.

Offences and prosecution under the Income-tax Act need to be read in conjunction with other laws such as the Indian Penal Code (IPC), Code of Criminal Procedure (Cr.P.C) and the Indian Evidence Act. Relevant constitutional provisions also need to be borne in mind.

2. Definitions

This paragraph deals with the meaning of words & phrases generally used in proceedings relating to offences and prosecution. These terms are not defined in the Income-tax Act. It is, therefore, necessary to refer to other laws and the dictionary meaning for such purpose.

2.1 Dictionary meaning (Concise Oxford dictionary 10th edition):

- Offence: - an act or instance of offending.
- Offend:- commit an illegal act. - break a commonly accepted rule or principle.
- Prosecution: (n.) the prosecuting of someone in respect of a criminal charge.
- Prosecute: (v.) institute legal proceedings against. institute legal proceedings in respect of ... (an) offence.

2.2 Definition under Cr.P.C:

Section 2(n): "offence" means any act or omission made punishable by any law for the time being in force ...".

2.3 Provisions under IPC:

- (i) Section 40:

Except in the chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this

Code.

In Chapter IV, Chapter VA and in the following sections, namely, sections 64, 65, 66, 67, 71, 109, 110, 112, 114, 115, 116, 117, 187, 194, 195, 203, 211, 213, 214, 221, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word “offence” denotes a thing punishable under this Code, or under any special or local law as hereinafter defined.

- (ii) Sec. 41. A : “special law” is a law applicable to a particular subject. (Income-tax Act, 1961 is a special law under the above provision.)

2.4 Constitutional provision:

- Article 20(1) : No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.
- (2) No person shall be prosecuted and punished for the same offence more than once.
- (3) No person accused of any offence shall be compelled to be a witness against himself.

Thus, it can be seen that there is symmetry in the provisions under IPC and Cr.P.C with those in the Constitution.

2.5 Some other important definitions under section 2 of Cr.P.C.

- (i) “Complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. [clause (d)]
- (ii) “Warrant-case” means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years [clause (x)]
- (iii) “Summons-case” means a case relating to an offence, and not being a warrant-case [clause (w)].
- (iv) “Cognizable offence” means an offence for which, and “cognizable case” means a case in which, a police officer may, in accordance with the First Schedule or under any law for the time being in force, arrest without warrant [clause (c)]

- (v) "Non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant [clause (l)]

3. Limitation

- 3.1 There is a law of limitation under the Cr.P.C. which sets time limits on the Courts taking cognizance of offences. The relevant sections are s. 468, s.469 and s. 470 of the Cr.P.C. (See Annexure III).
- 3.2 The law of limitation is, however, subject to The Economic Offences (Inapplicability of Limitation) Act, 1974. (Act No. 12 Of 1974)
- 3.3 This Act provides that the law of limitation would not apply to offences punishable under those laws, which have been specified in the schedule below section 468. The schedule is as under:

The Schedule

(See Section 2)

1. The Indian Income-Tax Act, 1922 (11 of 1922)
2. The Income-Tax Act, 1961 (43 of 1961)
- 2A. The Interest-tax Act, 1974 (45 of 1974)....
3. The Companies (Profits) Surtax Act, 1964 (7 of 1964),
4. The Wealth-tax Act, 1957 (27 of 1957)
5. The Gift-tax Act, 1958 (18 of 1958).....

The law of limitation as embodied in Sections 468, 469 & 470 of the Cr.P.C. would not apply for launching prosecutions under Direct Tax Laws as enumerated above by virtue of this provision. However, the newly introduced legislations on Security Transaction Tax, Banking Cash Transaction Tax have not yet been notified under this provision.

4. Relevance of Indian Evidence Act

The provisions under Indian Evidence Act are crucial for launching prosecution. The relevant chapters and sections of the said Act are discussed in this paragraph:

- 4.1 Chapter V (Sections 61 to 65B; 73, 74, 78, 80, 81, 81A, 84, 86 and 90):

Section 61 states that the contents of documents may be proved either by primary or by secondary evidence. Primary evidence is oral ~~account of the original evidence i.e. of a person who saw what happened and~~ gives an account of it recorded by the Court, or the original document itself or the original thing when produced in Court. Secondary evidence is a report or an oral account of the original evidence or a copy of a document or a model of the original thing.

- Primary evidence is defined in section 62 and the secondary evidence in section 63.
- Section 64 states that documents must be proved by primary evidence except in cases mentioned after that section.
- Section 65 enumerates the condition or contents of a document where secondary evidence may be given. 7 conditions are mentioned from (a) to (g). It has also been stated that in cases of (a), (c) and (d), secondary evidence is admissible. In case of (b) written admission is admissible. In (e) or (f) certified copy of the document but no other kind of secondary evidence is admissible. In case of (g) evidence may be given as to the general result of the collection of all documents by any person who has examined them, and who is skilled in examination of such documents. Sections 65A and 65B are special provisions relating to evidentiary value of electronic record. [these sections are reproduced in annexure IV]
- The following sections deal with presumptions by Courts under certain facts and circumstances:
 - (i) Section 73 deals with comparison of signature, writing or seal with those admitted or proved in order to ascertain whether a signature, writing or seal is that of a person by whom it purports to have been written or made. The Court may also direct a person present in the Court to write any word or figure so as to compare them with those already on record.
 - (ii) Section 74 deals with public documents.
 - (iii) Section 78 deals with proof of other official records.
 - (iv) Section 80 deals with presumption as to the documents produced as to the records of evidence. Under this

provision whenever any document is produced before any Court under conditions mentioned therein, the Court shall presume that the documents are genuine and the statements as to the circumstances under which it was taken, purporting to be made by the person signing it are true.

- (v) Section 81 deals with presumption as to gazettes, newspapers, private Acts of Parliament and other documents and section 81A relates to presumption as to gazettes in electronic forms.
- (vi) Section 84 deals with presumption as to collection of law and reports of decision. Section 86 speaks of presumption as to certified copies of foreign judicial records.
- (vii) Section 90 deals with presumption as to documents 30 years old.

4.2 Chapter VII (Sections 101, 103, 110 and 114):

- (i) Section 101 sets out a general principle of burden of proof to be on the person who makes the allegation. Section 103 provides for burden of proof as to a particular fact. It is stated that the burden of proof would lie on the person who makes the allegation unless it is provided by any law that the proof of that fact shall lie on any particular person. Under the I.T. Act, the culpable state of mind of the assessee is presumed u/s 278E. Thus, when a prosecution is filed under the I.T. Act, unlike in section 101 of the Evidence Act, the Department is not required to establish the culpable state of mind of the assessee. In fact, it is the other way round. That is to say, in terms of section 103 of the Evidence Act r.w.s. 278E of the I.T. Act, the culpable state of mind of the assessee is presumed.
- (ii) Section 110 of the Evidence Act states that when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.
- (iii) Section 114 states that the Court may presume the existence

of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case.

Of special interest are illustrations below the substantive provision. Two of such illustrations are of great necessity for Income-tax purposes such as:

- (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;
- (h) that, if a man refuses to answer questions which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

(The above two illustrations may be useful in cases

- (i) before the Assessing officer /ADIT when the assessee/witness does not furnish the documents requisitioned, and
- (ii) before ADIT/ Assessing officer when the assessee/witness refuses to answer questions or gives negative/evasive replies.)

5. Offences and prosecutions under IPC:

The Income tax authorities may come across circumstances where launching of prosecution under various provisions of IPC may be more appropriate. The relevant provisions are discussed in this paragraph. The Income tax authorities who can launch prosecution under various provisions are also specified against each provision.

5.1 Contempt of the lawful authority of public servants (Chapter X):

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

- (i) When a person absconds to avoid service of summons, notice or order (S.172) [Assessing officer/ TRO/ ADIT/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) [Assessing officer/TRO/ ADIT/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.) [Assessing officer /ADIT/TRO]
- (iv) When a person legally bound to produce or deliver up any document or electronic record intentionally omits to do so, (s.175) [Assessing officer /ADIT/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) [Assessing officer /ADIT/TRO]
- (vi) When a person intentionally furnishes false information (s.177) [Assessing officer /ADIT]
- (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) [Assessing officer /TRO/ADIT]
- (viii) When a person refuses to sign any statement made by him when required to do so (s.180); [Assessing officer /TRO/ADIT]
- (ix) When a person intentionally makes a false statement under oath (s.181) [Assessing officer /TRO/ADIT]
- (x) When a person gives false information to a public servant (s.182). This is of special importance to information supplied by informants in the Investigation Wing. [ADIT/ Assessing officer /TRO]
- (xi) When a person offers resistance to taking of any property by the lawful authority of a public servant (s.183) [ADIT/ Assessing officer/TRO/A.A.]; and sale of such property (s.184) [A.A./TRO]
- (xii) When a person bids for or purchases property on behalf of legally incapacitated person (s.185) [TRO/A.A.]
- (xiii) When a person voluntarily obstructs any public servant in discharge of public service (s.186) [ADIT/TRO/ Assessing officer/ 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. [ADIT/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 [ADIT/ Assessing officer /TRO]
- (xvi) When a person holds out any threat of any injury to a public servant or his agent (s.189 & 190). [All officers and officials]

5.2 False evidence and offences against public justice (Chapter XI):

Prosecution can be launched 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) [ADIT/ Assessing officer /TRO]
- (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 sec.193 to sec.196 covering different situations of giving or fabricating false evidences. Sections 193 and 196 of IPC have been referred to in section 136 of I.T. Act, 1961. (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.) [ADIT/ Assessing officer/TRO]
- (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). Example false affidavits, false declaration or false statement made by assessee/related persons or witness. [ADIT/ Assessing officer /TRO]
- (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); [Assessing officer /ADIT/TRO/I.T.I.]
- (vi) When a person intentionally insults or interrupts public servant sitting in judicial proceeding (s.228). This section has been referred to in section 136 of the I.T. Act, 1961. [Authorities before whom such offence take place.]

5.3 Misc. provisions:

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).

6. Offences and prosecution under Income-tax Act, 1961:

The provisions relevant to offences & prosecution under I.T. Act are as under:

6.1 Provisions relating to Search and Seizure:

- (i) Contravention of order made under sub-section (3) of section 132 (Section 275A):

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 which may extend to two years and shall also be liable to fine.

{Second proviso to section 132(1)}:

[Provided further that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorized officer may serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it, except with the previous permission of such authorized officer and such action of the authorized officer shall be deemed to be seizure of such valuable article or thing under clause (iii).]

[Section 132(3): The authorised officer may, where it is not practicable to seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing, [for reasons other than those mentioned in the second proviso to sub-section (1)] serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with sub-section].

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

If a person who is required to afford the authorised officer the necessary facility to inspect the books of account or other documents, as required under [clause (iib) of sub-section (1) of section 132] fails to afford such facility to the authorised officer, he shall be punishable with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine.

[Section 132(1)(iib) requires any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorized officer the necessary facility to inspect such books of account or other documents].

(iii) Failure to furnish return of income in search cases (Section 276CCC):

If a person willfully fails to furnish in due time the return of total income which he is required to furnish by notice given under clause (a) of section 158BC, he shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to three years and with fine:

Provided that no person shall be punishable for any failure under this section in respect of search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, after the 30th day of June, 1995 but before the 1st day of January, 1997.

(iv) Presumptions as to assets, books of account etc. in certain cases (Section 278D):

Where during the course of any search made under section 132, any money, bullion, jewellery or other valuable article or thing (hereafter in this section 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 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.

Where any assets or books of account or other documents taken into custody, from the possession or control of any person, by the officer or authority referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub-section (1) of section 132A are delivered to the requisitioning officer under sub-section (2) of that section and such assets, 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.

6.2 Provisions relating to Evasion of tax, false statement in verification, falsification of books of account.

(i) Wilful attempt to evade tax, etc. (Sec. 276C) :

- (1) If a person willfully attempts in any manner to evade any tax, penalty or interest chargeable or imposable under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable, -

In a case where the amount sought to be evaded exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

In any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

- (2) If a person willfully attempts in any manner whatsoever to evade the payment of any tax, penalty or interest under this Act, he shall, without prejudice to any penalty that may be imposable on him under any other provision of this Act, be punishable with rigorous Imprisonment for a term which shall not be less than three months but which may extend to three years and shall, in the discretion of the court, also be liable to fine.

Explanation - For the purposes of this section, a willful 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) willfully omits or causes to be omitted any relevant entry or statement in such books of account or other documents; or
- (iv) causes any other circumstances 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.

(ii) False statement in verification, etc. (Sec. 277):

If a person makes a statement in any verification under this Act or under any rule made there under, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable, -

- (i) in a case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, exceeds one hundred thousand rupees, with rigorous imprisonment for a term

which shall not be less than six months but which may extend to seven years and with fine;

- (ii) in any case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.
- (iii) **Falsification of books of account or documents, etc. (Sec.277A):**

If any person (hereafter in this section referred to as the first person) willfully and with intent to enable any other person (hereafter in this section referred to as the second person) to evade any tax or interest or penalty chargeable and imposable under this Act, makes or causes to be made any entry or statement which is false and which the first person either knows to be false or does not believe to be true, in any books of account or other document relevant to or useful in any proceedings against the first person or the second person, under this Act, the first person shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

Explanation- For the purposes of establishing the charge under this section, it shall not be necessary to prove that the second person has actually evaded any tax, penalty or interest chargeable or imposable under this Act.

6.3 Abetment of false return, etc. (Section 278):

If a person abets or induces in any manner another person to make and deliver an account or a statement or declaration relating to any income {or any fringe benefits} chargeable to tax which is false and which he either knows to be false or does not believe to be true or to commit an offence under sub-section (1) of section 276C, he shall be punishable, -

- (i) in a case where the amount of tax, penalty or interest which would have been evaded, if the declaration, account or statement had been accepted as true, or which is willfully attempted to be evaded, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;
- (ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

6.4 Miscellaneous:

(i) Removal, concealment, transfer or delivery of property to thwart tax recovery (Section 276):

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 for a term which may extend to two years and shall also be liable to fine.

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

If a person

- (i) fails to give the notice in accordance with sub-section (3) of that section; or
- (ii) fails to set aside the amount as required by sub-section (3) of that section; or
- (iii) 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, he shall be punishable with rigorous imprisonment for a term which may extend to two years.

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than six months.

(iii) Failure to comply with the provisions of sections 269UC, 269UE and 269UL (Section 276AB):

Whoever fails to comply with the provisions of section 269UC or fails to surrender or deliver possession of the property under sub-section (2) of section 269UE or contravenes the provisions of sub-section (2) of section 269UL shall be punishable with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine.

Provided that in the absence of special and adequate reasons to the contrary to be recorded in the judgment of the court, such imprisonment shall not be for less than six months.

(iv) Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B (Section 276B):

If a person fails to pay to the credit of the Central Government, -

- (a) the tax deduction at source by him as required by or under the provisions of Chapter XVII-B; or
- (b) the tax payable by him, as required by or under
 - (i) sub-section (2) of section 115-O; or
 - (ii) the second proviso to section 194B

he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine.

(v) Failure to pay the tax collected at source (Section 276BB):

If a person fails to pay to the credit of the Central Government, the tax collected by him as required under the provisions of section 206C, he shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to seven years and with fine.

(vi) Failure to furnish returns of income (Section 276CC):

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

- (i) In a case where the amount of tax, which would have been evaded if the failure had not been discovered, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;
- (ii) In any other case, with imprisonment for a term which shall not be less than three months but which may extend to three years and with fine

Provided that a person shall not be proceeded against under this section for failure to furnish in due time the return of fringe benefits under sub-section (1) of section 115WD or return of income under sub-section (1) of section 139 -

- (i) for any assessment year commencing on or after the 1st day of April 1975, or
- (ii) for any assessment year commencing on or after the 1st day of April 1975, if

- (a) the return is furnished by him before the expiry of the assessment year; or
- (b) the tax payable by him on the total income determined on regular assessment, as reduced by the advance tax, if any, paid, and any tax deducted at source, does not exceed three thousand rupees.

(vii) Failure to produce accounts and documents (Section 276D):

If a person willfully fails to produce, or cause to be produced, on or before the date specified in any notice served on him under sub-section (1) of section 142, such accounts and documents as are referred to in the notice or willfully fails to comply with a direction issued to him under sub-section (2A) of that section, he shall be punishable with rigorous imprisonment for a term which may extend to one year or with fine equal to a sum calculated at a rate which shall not be less than four rupees or more than ten rupees for every day during which the default continues, or with both.

(viii) Punishment for second and subsequent offences (Section 278A):

If any person convicted of any offence under section 276B or sub-section (1) of section 266C 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 for a term which shall not be less than six months but which may extend to seven years and with fine.

(ix) Offences by companies (Section 278B):

- (1) Where an offence under this Act has been committed by a company 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 as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment 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.

- (2) Notwithstanding anything contained in sub-section (1),

where an offence under this Act has been committed by a company 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, such director, 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.

- (3) Where an offence under this Act has been committed by a person, being a company, and the punishment for such offence is imprisonment and fine, then, without prejudice to the provisions contained in sub-section (1) or sub-section (2), such company shall be punished with fine and 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 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.
- (x) **Offences by Hindu undivided families (Section 278C):**
- (1) 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;

Provided that nothing contained in this sub-section shall render the karta liable to any punishment 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.

- (2) Notwithstanding anything contained in sub-section (1), where an offence under this 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, such member shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

6.5 Provisions relating to procedure of launching prosecution:

Certain provisions have been laid down in the I.T. Act which relate to procedure of launching prosecution, which are as under:

(i) Punishment not to be imposed in certain cases (Section 278AA):

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.

(ii) Presumption as to assets, books of account, etc., in certain cases (Section 278D):

- (1) Where during the course of any search made under section 132, any money, bullion, jewellery or other valuable article or thing (hereafter in this section 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 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.
- (2) Where any assets or books of account or other documents taken into custody, from the possession or control of any person, by the officer or authority referred to in clause (a) or clause (b) or clause (c), as the case may be, of sub-section (1) of section 132A are delivered to the requisitioning officer under sub-section (2) of that section and such assets, 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.

(iii) **Presumption as to culpable mental state (Section 278E):**

- (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

Explanation:- In this sub-section, "culpable mental state" include intention, motive or knowledge of a fact or belief in, or reason to believe, a fact.

- (2) 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.

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

- (1) 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 Commissioner or Commissioner (Appeals) or the appropriate authority:

Provided that the Chief Commissioner or, as the case may be, Director General may issue such instructions or directions to the aforesaid income-tax authorities as he may deem fit for institution of proceedings under this sub-section.

Explanation - For the purposes of this section, "appropriate authority" shall have the same meaning as in clause (c) of section 269UA.

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

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

6.6 Proceedings before income-tax authorities to be judicial proceedings (Special provisions relating to section 136, Section 136):

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).

7. Some general principles:

- 7.1 There is presumption as to culpable mental state of the assessee (section 278E). 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 I.T. provisions. But this benefit is not available if prosecution is launched under I.P.C.
- 7.2 Provisions of section 278D make presumptions contemplated u/s. 132(4A) of the I.T. Act in relation to assets/books of account etc. applicable in prosecution proceedings.
- 7.3 Entries in records and documents in the custody of the Income tax Department are admissible evidence in the prosecution proceedings.
- 7.4 Certain offences have been declared to be non-cognizable (section 279A). Such offences relate to sections 276B, 276C, 276CC, 277 and 278 of the I.T. Act, 1961. They have been declared non-cognizable within the meaning of Cr.P.C. meaning thereby that in such cases the Police Officer has no authority to arrest without warrant.
- 7.5 For companies in liquidation (section 178 of the I.T. 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.
- 7.6 Compounding of offences under I.T. Act can be done by the C.C.I.T or D.G.I.T {Sec. 279(2)}

Prosecution launched under IPC cannot be compounded. They can, however, be withdrawn.

- 7.7 There are special provisions in the case of offences by companies (section 278B), and by HUF (278C) besides prosecution in the case of individual person(s).
- 7.8 Proceedings before I.T. Authorities to be judicial proceedings (section 136)

Any proceeding under this Act before an income-tax authority shall be deemed to be a 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 I.T. authorities are deemed to be 'judicial proceedings';
- ii) Commission of offences u/s 193, 228 and 196 IPC before I. T. authorities is tantamount to commission of offences in a judicial proceeding;
- iii) In this regard, I.T. 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 I.T. authorities in judicial proceedings, they are Civil Courts for the purpose of launching prosecution u/s 195 CrPC
- 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 I.T. Act are section 195(1)(b)(i) and section 195(3) of the Cr.P.C. for 'civil courts';
- vi) Hence, I.T. 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.

* ix) The C.B.D.T. has issued Circular No. 421 dated 12/6/1985 in this regard. (See part-3 of Chapter-VII i.e. Instructions / Circulars).

7.9 Similar provisions occur u/s. 245L for Settlement Commission, section 245U(2) for authority for Advance Ruling and section 255(6) for ITAT.

7.10 Immunity from prosecution:

Certain provisions relating to immunity for prosecution are as under:

- (i) The Settlement Commission has power to grant immunity from prosecution and penalty u/s. 245H. Under sub-section 1 of section 245H, the commission had power to grant immunity "from prosecution for offence under this (I.T.) Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force." These provisions were, 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.

However, w.e.f. 1/6/2007 the Act has been amended whereby the commission can no more grant immunity for offences under I.P.C., 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.

- (iii) For obtaining the evidence of any person directly or indirectly concerned in or privy to the concealment of income / evasion of tax, the Central Government has been vested with powers to tender immunity from prosecution under I.T.Act, I.P.C or any other Central Act u/s 291(1) of the I.T.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 said section.

- 7.11 Under section 292 of the I.T.Act no court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence committed under I.T.Act.
- 7.12 Under section 292A of the I.T.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 this Act unless that person is under eighteen years of age.
- 7.13 There is a bar u/s 293 of any suit in any civil court against any order made under I.T.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."
- 7.14 Provisions of the Evidence Act apply in the case of prosecution proceedings under the I.T.Act.
8. **Provisions of prosecution under other direct tax laws:**
- 8.1 There are specific provisions for prosecution under the Wealth-tax Act, Interest Tax Act, Fringe Benefit Tax (FBT), Security Transaction Tax (STT) and Banking Cash Transaction Tax (BCTT) also.
- 8.2 The various offences under the Wealth Tax Act (Chapter-VIII) are as under:
- 35A - Wilful attempt to evade tax, etc. (Corresponding to section 276C under I.T. Act)
 - 35B - Failure to furnish returns of net wealth (Corresponding to section 276CC under I.T. Act)
 - 35C - Failure to produce accounts, records, etc. (Corresponding to section 276D under I.T. Act)

- 35D - False statement in verification, etc., made under certain provisions of the Act. (Corresponding to section 277 under I.T. Act)
- 35E - False statement in verification mentioned in Section 34AB (There is no corresponding I.T. provision as it relates to verification made by the valuers).
- 35EE - Failure to furnish particulars under section 34ACC (There is no corresponding I.T. provision as it relates to the conduct of valuers).
- 35EEE - Contravention of order made under section proviso to sub-section (1) or sub-section (3A) of section 37A (Corresponding to section 275A under I.T. Act)
- 35F - Abetment of false return, etc. (Corresponding to sec. 278 under I.T. Act)

8.3 Some general proposals governing offences & prosecution under W.T. Act are as under:

- (i) There are special provisions for artificial juridical persons such as section 35H for HUF and section 35HA for Companies. (corresponding to section 278 and 278B of I.T. Act.)
- (ii) Offences under 35A, 35B, 35D and 35F have been declared to be non-cognizable notwithstanding anything contained in Cr.P.C (Section 35J), (corresponding to section 279A of I.T. Act)
- (iii) Prosecution proceedings have to be launched with the previous sanction of the CWT or CWT(A) (Section 35I). (corresponding to section 279 of I.T. Act)
- (iv) The CCWT or DGWT may issue instructions or directions in this regard. (corresponding to section 279 of the I.T. Act.)
- (v) The power of compounding is vested with the CCWT or DGWT {Section 35I(2)}. [corresponding to section 279(2) of I.T. Act]
- (vi) There is a bar on prosecution and on admissibility of evidence in certain cases (Section 35K). (There is no

corresponding provision in the I.T Act).

- (vii) Only Metropolitan Magistrates and Magistrates of first class can try offences under this Act (Section 35L). (corresponding to section 292 of I.T.Act)
- (viii) Section 360 of Cr.P.C. and probation of offence Act 58 do not apply (Section 35M). (corresponding to section 292A of I.T.Act)
- (ix) There are presumptions under this Act such as: Culpable state of mind Section 35 O. (corresponding to section 278E of I.T.Act).

Presumption as to books of account in relation to search and seizure action Section 35 N. (corresponding to section 278D of I.T.Act.)

Proof of entries in records or documents in the custody of WT Authorities Section 36. (corresponding to section 279B of I.T.Act.)

- (x) Power to tender immunity from prosecution vests with the Central Government Section 36A. (corresponding to section 291 of I.T.Act.)

8.4 The provisions under Interest Tax Act for initiation of prosecution proceedings are as follows:

- Section 24 False statement in verification
- Section 25 Wilful attempt to evade Interest Tax etc.
- Section 26 Abetments of false returns of Interest tax
- Section 26A Offences by credit institutions
- Section 26B - Sanction/institution and compounding of prosecution proceedings.

8.5 Under Fringe Benefit Tax (FBT), launching of prosecution proceedings is covered u/s. 276CC of I.T. Act, 1961.

8.6 Under Security Transaction Tax (STT), prosecution can be launched for false statement in verification u/s. 112.

Sanction of the prosecution has to be at the instance of the Chief Commissioner Section 113.

8.7 Under Banking Cash Transaction Tax (BCTT), prosecution can be launched for false statement in verification u/s. 109.

Sanction of the prosecution has to be at the instance of the Chief Commissioner Section 110.

III

Procedure for launching prosecution

1. General issues relevant to procedure for launching prosecution

1.1. Prosecution under Income-tax Law vis-a-vis IPC:

There is no bar on prosecution of an offender under the Income-tax Act and under the Indian Penal Code simultaneously. However, there is a bar on the punishment for the same offence twice. Prosecution under the Income-tax Act has some specific features like:

- (i) A complaint under the Income-tax Act is usually more specific to the department's requirements.
- (ii) Section 278A provides for more rigorous punishment for second and subsequent offences. The subsequent offence need not be under the same section as the first.
- (iii) Section 278AA has put the onus of proving reasonable cause on the accused in respect of offences under Sections 276A, 276AB, 276B.
- (iv) Section 278B, after its insertion, sets the controversy regarding liability of the company to prosecution at rest. It lays down that the company as well as any person incharge of and responsible for the conduct of the business of the company, would be liable to prosecution for the offence committed under the Act. Such a person shall be guilty unless he proves that the offence was committed without his knowledge and even after exercising due diligence.
- (v) Section 278E incorporates an important presumption of culpable mental state, which is very helpful to the department. Though the court shall presume such a state, the accused would be allowed to prove the fact that he had no such mental state.
- (vi) Section 279(2) provides for compounding of offence under the Income-tax Act. An offence under the IPC cannot be compounded. It can only be withdrawn with the leave of the Court.

1.2 Non-cognizable offences under I.T. Act (section 279A):

As per section 279A of the I.T. Act, offences punishable under sections 276B, 276C, 276CC, 277 and 278 are non-cognizable.

1.3 No Limitation of time for launching prosecution:

Section 468 of Criminal Procedure Code imposes limitation of three years for launching prosecution. However, offences under the Income-tax Act & wealth-tax Act are excluded from the purview of the limitation provided in Section 468 of the Criminal Procedure Code. But, the prosecution provisions relating to newly introduced Securities Transaction Tax and Banking Cash Transaction Tax have not been excluded from the purview of limitation prescribed u/s 468 of Cr.PC. It may however be mentioned that though law does not provide any limitation of time for launching prosecution, Hon'ble Bombay High Court has quashed the prosecution on the ground of unreasonable delay which remains unexplained when the complaint was filed nearly 14 years after the date of alleged offence u/s 278B. [KMA Ltd vs Sundararajan ITO (1996) Tax LR 248 (Bom)].

1.4 When can prosecution be initiated?

A case should be processed for launching prosecution immediately after the commission of offence comes to the notice of the authority concerned. However, if some more evidences can be gathered during any proceedings, it would be advisable to complete such proceedings to gather all relevant evidences before initiating the prosecution. [The Apex Court has laid down that if penalty for concealment fails then the prosecution initiated on same material/basis must also fail (M/s K.C. Builders Ltd Vs CIT [265 ITR 344]). Therefore, it is advisable to initiate prosecution under section 276C(1) only after confirmation of concealment penalty by the ITAT. However, the prosecution for the following offences is not dependant on completion of assessment.

- contravention of order made u/s 132(3)
.....Section 275A.
- failure to comply the provision of section 178(1) & 178(3)
.....Section 276A.
- ✓ failure to pay tax deducted or payable by him
.....Section 276B.
- ✓ failure to pay the tax collected at source
.....Section 276BB.
- failure to furnish return in search cases u/s 158BC(a)
.....Section 276CCC.

- failure to produce accounts and documents u/s 142(2A)
.....Section 276D.
- making false statement in verification
.....Section 277.
- falsification of books of account or documents
.....Section 277A

For offence u/s 276CC also, the prosecution can be initiated without waiting for completing of assessment, under certain circumstances.

The Board has laid down guidelines dated 24.04.2008 issued under F.No. 285/90/2008-IT(Inv.I)/05, prescribing a time frame to initiate processing of cases for prosecution, in case of offences under Direct Tax Laws. The officers in the field formations are required to strictly abide by these guidelines.

1.5 Restrictions of age for initiating prosecution proceedings:

In view of guidelines dated 24.04.2008 for identification of cases for launching of prosecution under Direct Taxes Laws issued under file no. No.285/90/2008-IT(Inv.I)/05, a case of an individual shall not ordinarily be processed for launching prosecution for any offence, if the individual concerned had attained the age of 70 years at the time of commission of offence.

1.6 Place of prosecution:

Section 177 of Cr.P.C. provides that every offence shall ordinarily be tried by the Court in whose jurisdiction the offence is committed. The provision of this section is also applicable to offences under the Direct tax laws.

1.7 Authority competent to launch prosecution:

- (a) Authority under whose jurisdiction offence was committed
The assessing officer, having jurisdiction over assessment, is the appropriate person to launch prosecution with the previous sanction of CIT having jurisdiction over the case. It is not material whether the assessing officer himself made the assessment or not. Similarly in case of TDS default, prosecution can be launched by the assessing officer having jurisdiction over TDS matter.
- (b) Prosecution by Authority before whom false evidence is given

It may be mentioned that the authority, before which false evidence is tendered, can also launch prosecution. For example, if a statement on oath recorded by an ADIT/DDIT/authorized officer is found to be false, then the ADIT/DDIT/Assessing officer concerned can file prosecution with the previous sanction of the CIT, having jurisdiction over such person.

- (c) The prosecution u/s 193 and 196 of IPC can be launched only by the officer before whom the offence is committed. Such officer may be revisional authority or the first appellate authority or assessing officer/ADIT/DDIT. However, section 195(1) (a) of Cr.P.C. provides that the authority, superior to the officer before whom offence is committed, can also launch prosecution.
- (d) The authorities competent to launch prosecution, under various provisions of IPC, have been discussed in chapter-2 on legal base. (Para No.4)

1.8 Authority competent to grant sanction:

- (a) The Commissioner of Income Tax or Commissioner (Appeals) or the Appropriate Authority as defined in section 269UA(c) is vested with the authority u/s 279(1) of the IT Act to accord previous sanction for launching of prosecution under various provisions of the IT Act.
- (b) Under the proviso to Section 279(1), the Chief Commissioner of Income Tax or the Director General of Income Tax can also give direction for institution of prosecution proceedings to aforesaid Income-tax authorities.
- (c) Similar authority is vested in CWT /CWT (Appeals) and CCWT/DGWT u/s 35 I of the Wealth tax Act.
- (d) For launching prosecution under different sections of IPC, there is no statutory requirement to obtain previous sanction of any authority. However, the authority competent to grant previous sanction for prosecution under the Income-tax Act shall also accord administrative sanction to launch prosecution under IPC.

2. Features of offences under Income-tax Act:

Guidelines dated 24.04.2008 issued under File No.285/90/2008-IT(Inv.I)/05 deal with some basic criteria for identification of potential cases for prosecution. They specify certain categories of cases, which are necessarily required to be processed for prosecution. However, if the facts and circumstances warrant, other types of cases may also be processed for prosecution. Important features of offences under various provisions of I.T.Act are as follows:

2.1 Contravention of order under sub-section (1) or (3) of Section 132 (Section 275A):

- (a) Whenever violation of any order served under second proviso to sub section (1) or sub section (3) of section 132 of the Act is noticed, the Authorized Officer should inform the processing ADIT/DDIT to examine such violation from the angle of launching prosecution. In case such violation is noticed by the processing ADIT/DDIT, he shall suo-motto start prosecution proceedings.
- (b) The processing ADIT/DDIT shall take possession of all documents evidencing the commission of offence forthwith on receipt of intimation and process the case for prosecution and forward the prosecution proposal to the CIT, having jurisdiction over the accused, for previous sanction.
- (c) For making a successful case, under this section, the Authorized Officer would be required to prove that a proper restraint order was passed by him and was duly served on the person concerned (accused).
- (d) The DDIT/ADIT/Authorised officer would have to bring evidence on record to establish that the accused removed or parted with or otherwise dealt with the valuable articles or things (as contemplated in second proviso to sub-section 1 of section 132) or books of account, other documents, money, bullion, jewellery or other valuable articles or things (as contemplated in sub-section 3 of section 132) either deliberately or did not take reasonable steps to discharge the obligations cast upon him by virtue of the restraint orders, thus contravening the order. It would also be imperative that

the Authorized Officer or processing ADIT/DDIT examine persons or witnesses concerned. The evidence regarding the presence of Panchas and their statement as witnesses, recorded contemporaneously, would be important to establish the commission of offence under this section.

- (e) It may be mentioned that if a person who is in control / possession of books of account / documents etc., destroys the same, it will constitute an offence u/s 204 of IPC.

2.2 Failure to comply with the provisions of clause (iib) of sub-section (1) of section 132 (Section 275B):

- (a) A person, who during a search operation is found to be in control / possession of books / documents in electronic media, fails to afford the authorized officer/DDIT/ADIT necessary facilities to inspect the same as per provisions of section 132(1)(iib), would render himself liable for prosecution, as such failure amounts to commission of an offence under this section.
- (b) If the authorized officer/DDIT/ADIT is unable to open or have access to files containing books of account or documents maintained on electronic media such as computers and the person in charge of the premises does not make available such computer codes or passwords, this act will constitute an offence u/s 275B [Explanatory note 55 to Finance Act 2002]. The authorized officers are advised to ask the passwords / secret codes specifically in the statement recorded on oath and the denial or deliberate non-furnishing of such passwords/ secret codes shall be brought out in the statement recorded by the authorized officer. The evidence regarding the presence of Panchas, and their statements as witnesses, recorded contemporaneously, would be important to establish the commission of offence under this section.
- (c) Whenever any violation of provisions of section 132(1)(iib) of the Act is noticed, by the DDIT/ADIT/Authorised officer, the processing DDIT/ADIT himself shall process the case for prosecution. If it is noticed by the Assessing

Officer then the assessing officer concerned shall process the case for prosecution. After processing the case, he shall forward the proposal to CIT, having jurisdiction over the accused for prior sanction. For a successful prosecution under this provision, the processing ADIT/DDIT/ Assessing officer would have to bring evidence on record to prove deliberate failure of the accused to afford necessary facilities.

- (d) It may be mentioned that if a person who is in control / possession of books of account / documents in electronic media, destroys the same to prevent their access by the authorized officer, it will constitute an offence u/s 204 of IPC.

2.3 **Removal, Concealment, transfer or delivery of property to thwart tax recovery (Section 276):**

- (a) This provision is in the statute w.e.f 1/04/1989 as a deterrent to tax defaulters attempting to remove, conceal, transfer or deliver the property to thwart recovery proceedings by the TRO u/s. 222 of the Income-tax Act, 1961.
- (b) The prosecution has to establish that the act of thwarting recovery on the part of the accused was with the intention to defeat taking over of the assets towards the satisfaction of outstanding demand as drawn up in the certificate. It is important to establish correlation between determination of demand / steps taken for recovery of demand and transfer of asset to prove the intention to defeat the recovery of taxes as this would help in conducting a successful trial.

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

- (a) This section is a safeguard against fraudulent or even careless evasion of tax by the liquidator of a company, who is bound to act as per the provisions of section 178(1) & (3).
- (b) A liquidator of a company (being wound up under the orders of the court or otherwise) appointed as receiver of any assets of a company, renders himself liable for prosecution if he fails to inform the Assessing Officer having jurisdiction over the company, of his appointment [u/s.178(1)]. He also

renders himself liable for prosecution, if he parts with any of the assets of the liquidated company without setting aside the amount notified by the Assessing Officer [section 178(3)], without the leave of the CCIT or the CIT.

- (c) Under Section 178, the Assessing Officer, within three months of receipt of the intimation from the liquidator, has to notify the amount sufficient to pay the company's tax dues. The liquidator can part with the assets only after setting aside such amount.

However, such liquidator can part with the assets for the purpose of paying off the secured creditors, who have a priority over Government dues & for meeting the cost of liquidation as are in the opinion of the CCIT or CIT, reasonable.

- (d) The liquidator is personally liable [section 178(4)] for the company dues. He invites conviction in case of contravention of duties required as above. The prosecution is not required to prove that there was any fraudulent intention on the part of the liquidator. It has to only prove that the liquidator has acted without reasonable cause.
- (e) However, if the liquidator has given intimation to the A.O, then the evidence of service of notification of demand to the liquidator would be crucial to the success of prosecution.

2.5 Failure to pay tax to the credit of Central Government under Chapter XII-D or XVII-B (Section 276 B):

- (a) A person may be prosecuted if he fails to pay to the credit of the Govt., the tax deducted at source, under provisions of Chapter XVII-B or on distributed profits of a domestic company (115-0) or from winnings from lottery or crossword puzzle [section 194 B].
- (b) Cases of such default should necessarily be processed for prosecution when the amount involved exceeds Rs.25,000 and the period of default exceeds 12 months in view of the guidelines dated 24th April, 2008. The prosecution shall preferably be launched within 60 days of date of detection of such default.
- (c) Violation of provisions of Section 194B was made an offence by way of amendment to section 276B, to cover

cases, where such winning was payable partly in cash and partly in kind and the cash component of the winning was not sufficient to pay entire TDS liability. Duty is then cast on the payer of such winnings to ensure that before releasing the winning in kind, the taxes are paid. The payer has to deposit full TDS by collecting the same from the winner at the existing rates. Such a situation may arise when a lottery ticket provides for a car or plot of land, etc.

2.6 Failure to pay the tax collected at source (Section 276BB): \\\

The propositions, as applicable to section 276 B, would also be applicable vis-à-vis section 276BB, if a person fails to pay the tax collected at source u/s. 206 C.

2.7 Wilful attempt to evade tax, etc. (Section 276C):

- (a) A person, who wilfully attempts to evade tax, penalty or interest imposable [section 276C (1)] or already imposed [section 276C (2)], will be punishable under section 276C of I.T.Act 1961.
- (b) The word 'wilful' imports the concept of 'mens-rea' in the section. If 'mens-rea' is absent, no case of offence under this section can be made out.
- (c) As per CBDT Instruction No.1100, dated 23.9.77, a wilful attempt also includes the following:
 - possessing of books / documents containing false entry or statement.
 - making / causing to make false entry in such books of accounts/documents.
 - omitting / causing to omit any relevant entry in such books of accounts / documents.
 - causing any other circumstances to exist, which will have the effect of enabling the person to evade tax, penalty or interest chargeable or imposable.
- (d) When duplicate sets of books of accounts or documents containing false entries are found in proceedings u/s 132 or 133A of the Act or statement recorded u/s 132(4) in a search operation proves an attempt to evade tax, Assessing Officer should be careful from the beginning to identify crucial

- evidences to be used for launching a good and sustainable prosecution against the assessee indulging in such practices.
- (e) Instruction No.1618 dated 03.06.85 (Please see Chapter-7) specifies certain parameters for spotting prosecution potential. It also deals with certain precautions, which shall be taken during scrutiny assessment for developing prosecution potential of such cases.
 - (f) If additions based on the facts are confirmed at first appellate stage, it will be advisable to conduct pending penalty proceedings carefully to plug the loopholes keeping prosecution angle in mind.
 - (g) When a penalty levied for concealment of income is deleted on the ground that there is no concealment, the prosecution under section 276C(1) will not stand. [K.C.Builders 265 ITR (SC) 562]
 - (h) In view of guidelines dated 24.04.2008, a case needs necessarily to be processed for prosecution under section 276C(1) of the I.T.Act, 1961, if the penalty exceeding Rs.50,000/- imposed under section 271(1)(c) of the I.T.Act, 1961 has been confirmed by the ITAT (whenever second appeal is filed). The case should preferably be processed by the Assessing Officer within 60 days from receipt of such appellate order.
 - (i) The guidelines further stipulates that if an assessee willfully evades payment of outstanding tax, interest, penalty or any other sum amounting to more than Rs.1 lac for 180 days or more after its final determination i.e. after giving effect to appellate orders, if any, the case should be processed by Assessing Officer / TRO preferably within 60 days of expiry of the said period.

2.8 Failure to furnish returns of income (Section 276CC):

- (a) If a person wilfully fails to furnish return of income under section 139(1) or in response to notices under sections 142(1) (i), 148, 153A , 115WD (1), 115 WH (2), he makes himself liable for prosecution under this section.
- (b) The wilful failure of the person has to be proved by the

prosecution. The accused will endeavour to demonstrate that there was a reasonable cause for his failure to file his return of income. The Assessing Officer has to gather evidence to prove otherwise before proceeding to launch prosecution under this section.

- (c) As a deterrent against non filing of returns of income, the Board has laid down vide guidelines dated 24.04.2008 that all cases , where search or survey action is conducted under I.T.Act, 1961 and the person covered is found not to have filed return of income u/s 139(1) or in response to notice u/s 142(1) / 148 of the I.T.Act, 1961 in respect of any previous year, should be processed for launching prosecution u/s 276CC of I.T.Act 1961 or corresponding provisions of other direct tax laws.

2.9 Failure to produce accounts and documents (Section 276D):

- (a) ~~If a person wilfully fails to produce~~ such accounts and/or documents as referred to in the notice u/s. 142(1) on or before the date fixed therein or fails to comply with the direction issued to him under section 142(2A), he shall be liable to be proceeded against punishment under section 276D.
- (b) The Assessing Officer has to prove that notice u/s 142(1) of the I.T.Act or the order directing him to get the accounts audited u/s 142(2A) was properly served on him. Proof of service & intimation from the nominated Auditor, regarding failure of the assessee to comply with such a direction, should be carefully preserved to prove the charge in the court.
- (c) Adjournments, if any sought by the assessee should be properly dealt with, to make out a successful case under this section.
- (d) Further, the confirmation of penalty, if imposed under u/s 271(1) (b) of I.T.Act, by the appellate authority will be very useful.
- (e) The Guidelines dated 24.04.2008 prescribe that all such cases shall necessarily be processed for filing prosecution complaint:-

- (i) Where an assessee wilfully fails to produce any books of accounts and/or documents involving transaction of Rs. five lakhs or more and penalty u/s 271(1) (b) has been confirmed upto second appeal (if any),
- (ii) Where an assessee wilfully fails to comply with the directions issued u/s 142(2A) of the I.T. Act, 1961 to get the accounts audited and the accounts involve turnover of Rs. 40 lakhs or more in case of business income or Rs. 10 lakhs or more in case of professional income and penalty u/s 271(1)(b) has been confirmed upto second appeal (if any).

The Assessing Officer shall process the case for prosecution preferably within 60 days of receipt of appeal order of ITAT (if any), against the penalty levied.

2.10 False statement in verification etc. (Section 277):

- (a) A person who knows or believes that the statement or account he has given or delivered is false, becomes liable for prosecution under this section.
- (b) 'Person' used in Section 277 refers not only to an assessee but also to a person who has made verification on behalf of the assessee. It will include in the case of a company, the Managing Director who signed the return of income. [M R Pratap V. Muthukrishna 62 Taxman 49 (SC)].
- (c) The Assessing Officer shall keep in mind the elements of mens-rea while processing cases for prosecution under this section.

2.11 Falsification of books of account, document etc. (Section 277A):

- (a) This provision has been inserted by the Finance Act, 2004 with effect from 01.10.2004. One of the main objectives of this provision is to counter the menace of hawala or accommodation bills by making such action punishable and persons, indulging in such activities, liable for prosecution.
- (b) It may be noted that:
 - the element of falsity may be in the form of any entry or statement and

- it is not necessary to prove that the other person has actually evaded tax.
- (c) It may be highlighted that the conviction can also be based on an admission by the accused before any tax authority (ITO Vs Shrilal Dulichand Aggarwal-184 ITR 414,424-(AP). There is an emerging trend these days that hawala operators or entry providers candidly admit their modus operandi before Authorized officers as such admissions lead to assessment of income only attributable to earning of commission, which is a small fraction of the amount given undercover of loans/accommodation entries. Tax evasion by resort to this practice is becoming rampant. The remedy lies in curbing this increasing trend by promptly launching prosecution against such persons. Therefore, such admissions should be carefully and properly recorded with prosecution angle in mind.
- (d) To curb the menace of hawala and accommodation entries, it has been laid down in Guidelines dated 24.04.2008 that a case shall necessarily be processed for prosecution where any person found to have indulged in falsification of books of account or documents etc, irrespective of the amount of evasion by the person concerned.

The processing ADIT/DDIT or the assessing officer shall process the case for prosecution preferably within 180 days of its detection during ~~the course of search or survey or any other proceeding.~~ The prosecution in the case of any person, who has provided hawala entries to any other person, shall not preclude the Assessing Officer concerned from launching prosecution against the beneficiary on receipt of information from the ADIT/DDIT/ Assessing Officer processing the main case.

2.12 Abetment of false return etc. (Section 278):

- (a) This section provides for punishing any person who induces another person to commit an offence or abets in commission of offence like filing of false return of income or making a false statement which he either knows to be false or does not believe to be true.
- (b) The prosecution has to establish that the abettor knew the act to be offence when he induced the other person to do so

or he knew the statement to be false or did not believe to be true while making it. The role of the person being accused of abetment, therefore, needs to be examined carefully.

- (c) In view of guidelines dated 24.04.2008, the Prosecution shall be launched by Assessing Officer depending on the facts and circumstances of each case. However, if the abetment is for any offence against which prosecution has been initiated, then the officer initiating prosecution in the main case, shall preferably initiate prosecution under this section simultaneously

3. Offences committed by artificial juridical persons

3.1 Offences by companies (Section 278 B):

- (a) If an offence is committed by a company, then the company and every person [director, manager, secretary, other officer of the company] who was/were in charge of the affairs of the company or responsible for them, at the time of commission of the offence, will be deemed guilty of the offence and liable to be proceeded against and punished.
- (b) For the above
- (i) the Company is defined as a body corporate and also includes
- A firm
 - an AOP, BOI - incorporated or not
- (ii) A director in relation to
- a firm, means a partner of the firm
 - an AOP or BOI - a member controlling the affairs thereof
- (c) Each of the offenders may be separately prosecuted or along with the company [Sheoratan Agarwal vs. State of MP, AIR 1984 SC 1824, 1825].
- (d) If the above persons are able to prove that the offence was committed without his/ their knowledge or that due diligence was exercised to prevent commission of the offence, provisions of this section will not apply to them.

Therefore, the burden of proof is on such officers of the company / partners of the firm/ members of the AOP to prove his/their innocence.

- (e) The Assessing Officer should identify the directors on the board of the Company, who were responsible for conduct of the affairs of the company, at the time when such offence was committed. In case of partnership firms, section 25 of Partnership Act provides that all the partners are jointly and severally responsible for acts of the firm. Section 2(23) of the I.T. Act imports the meaning of Firm, partners & Partnership from Indian Partnership Act 1932. However, in the course of assessment proceedings, Assessing Officer must identify the partner(s) in control of the affairs of the Firm, during the relevant period when offence was committed. The consent or connivance or neglect on the part of these persons, resulting in commission of offences by the company or firm or AOP etc, also bring them within the purview of the provisions of this section.
- (f) The Supreme Court in *MV Javali vs. Mahajan Borewell & Co.* & Ors 230 ITR 1 (SC) held that a company or firm can be prosecuted and fined but not imprisoned being artificially juristic in nature. However, the directors etc. can be both imprisoned and fined.

3.2 Offences by Hindu undivided families (Section 278C):

In case of an offence by HUF, the Karta and also if proved that the offence had been committed with the consent or connivance of a member of the HUF, such member too will be deemed guilty and punishable.

4. Procedure for launching of prosecution

4.1 Steps for launching prosecution :

- (a) The ADIT/DDIT/ Authorised officer/ Assessing officer/TRO should initiate the process by identifying the case if the case is covered by the guidelines on launching of prosecution and/or he finds it is a fit case for prosecution on the basis of evidence available. Once the case is identified, he shall send a proposal containing the brief facts of the case and identify the offences committed along with the case records to the CIT, having jurisdiction over the case, for his approval.
- (b) The CIT shall examine the feasibility of prosecution potential in the given facts and circumstances of the case. If

the CIT finds the proposal prima facie fit to be proceeded with, he shall issue a show-cause notice u/s 279(1) of the I.T. Act or otherwise (for offences under I.P.C.) to the assessee intimating him of the proposed action and call for his version on the facts and events. The assessee should be required to file his reply to the show cause notice within 30 days of receipt of notice.

- (c) On expiry of 30 days of service of show cause to the assessee, the CIT shall:

if no reply is received from assessee, proceed further to decide the issue on the basis of facts available on record as per (f) to (j) below;

Or

if the assessee furnishes his response/version/reply, then take further action as per (d) to (j) below.

- (d) If the assessee prays for compounding of offence, then he should be advised to submit his prayer in the prescribed proforma of application for compounding to the concerned CCIT. The application for compounding would be regulated by the procedure laid down in Guidelines on compounding of offences prescribed in instruction issued under File No. 285/90/2008-IT(Inv.)/12, dated 16.05.2008. If the CCIT/ DGIT compounds the offence, the proposal for prosecution need not be further processed.

- (e) If in assessee's reply, no request for compounding is made and on consideration of its reply it is not found to be a fit case for launching of prosecution, the prosecution may not be launched after recording reasons for the same in the file. This process should, as far as possible, be completed within 30 days of receipt of the assessee's reply. af

- (f) If no reply is received or on consideration of reply, it is found to be a fit case to proceed further, then CIT shall seek opinion of the Prosecution Counsel. 29

- (g) The CIT shall take the facts & circumstances and opinion of the Counsel, into consideration and if he concludes that it is a fit case for launching of prosecution and accord his sanction u/s 279 (1) of I.T. Act.

- (h) The Assessing Officer shall forward the proposal, sanction

sanction

order and the case records & evidences relied upon to the Prosecution Counsel for drafting the complaint. The draft complaint shall be vetted by the CIT. Thereafter, the Assessing Officer shall file the complaint in the appropriate jurisdictional court with the help of the Prosecution Counsel.

- (i) The nodal officer, if any, in charge of prosecution shall be informed about launching of such prosecution.
- (j) Once prosecution proceedings are contemplated or initiated, name of the case shall be entered in the prosecution register by the Assessing Officer/TRO/ADIT. At various stages, the register of prosecution maintained in the office of Assessing Officer/TRO/ADIT and CIT shall be updated on regular basis.

4.2 ✓ Important aspects regarding preparation of the proposal for prosecution:

For preparation of proposal following aspects should be kept in mind.

- (a) The Assessing Officer/ DDIT/ADIT /TRO is required to study the entire records of a delinquent assessee with special reference to the following:-
 - (i) Background of the case with particular attention to past lapses
 - (ii) Stages of the relevant proceedings from the issue of the notice requiring submission of return to the completion of assessment and finalisation of penalty proceedings.
 - (iii) Appellate Proceedings.
 - (iv) Identification of documentary evidence like notices, return, statement of accounts etc.
 - (v) Identification of other documentary evidences
 - (vi) Identification of departmental witnesses
 - (vii) Identification of outside witnesses
 - (viii) Expert testimony, if any and
 - (ix) Identification of corroborative evidence
- (b) After the study of the records, the assessing Officer should gather further facts from the witnesses if possible. Thereafter, the matter may be discussed with his immediate superiors / the Departmental Counsel to ascertain the

following relevant aspects of the case:-

- (i) Nature of offences under the I.T. Act.
- (ii) Offence under the Indian Penal Code and sections thereof.
- (iii) Weak links relating to the evidence collected.
- (c) After study of records & discussion with immediate superiors / Prosecution Counsel, a proposal in the prescribed proforma shall be drafted incorporating the following issues:-
 - (i) Chronological arrangement of facts and circumstances of the case with special emphasis on the nature of offence.
 - (ii) Specific offences quoting the relevant section of the I.T. Act and Indian Penal Code supported by evidence.
 - (iii) Conclusion.

4.3. Safeguards in granting sanction for prosecution u/s 279(1) of the IT Act:

- (a) It is important to remember that it should be discernible from the sanction order u/s 279(1) [para 4.1(g) above] that it was issued by the authority after due application of mind on the materials available with him. The application of mind must be substantive, real and honest.
- (b) The provision for sanction is intended to be a safeguard against frivolous prosecutions and also to give an opportunity to the authority concerned to decide whether prosecution is necessary and desirable in the facts & circumstances of a particular case. It should be apparent from the sanction itself that the sanctioning authority has applied its mind to the facts of the case.
- (c) There are several decided cases wherein complaints were dismissed, at the threshold itself, for want of a proper & valid sanction. The sanction order should demonstrate application of mind so that the sanction accorded by CIT/CCIT is not found to be defective or deficient, in a court of law.
- (d) Importantly, the sanction must be given separately for each

& every offence. If the sanction is, say, for an offence u/s 276C, and proceedings are taken u/s 277, the proceedings may be declared invalid and are likely to be quashed.

- (e) Similarly, the prior sanction u/s 279(1) of I.T. Act should be separate for each assessment year specifying each and every offence separately.
- (f) As an illustration, if Assessing Officer has proposed prosecution u/s. 276C(1) & 277 of I.T. Act for three A.Y.s, then the prior sanction should be granted separately for each assessment year mentioning both the offences (sections).

5. **Important aspects in the preparation of complaint:**

5.1 **The complaint:**

- (a) A complaint is the foundation of a prosecution proceeding. It should be written in such a manner that a person with a reasonable intelligence should be convinced about the commission of the offence by the accused.
- (b) Another important feature relates to the mention of appropriate charging section of the Act as well as the Indian Penal Code so that at the time of framing of the charge, the Magistrate would have necessary assistance.
- (c) The complaint should be signed by the competent officer.
- (d) Chapter XVII of Cr.PC (Section 211 to Section 224) is relevant for drafting complaint.
- (e) Section 218 of Cr.PC provides for separate charge for every distinct offence and separate trial for each of them. However, section 219 provides that three offences of same kind (punishable with the same amount of punishment under same section of IPC or any special law which include I.T. Act) committed within the space of 12 month from the first to the last of such offence may be charged with and tried in one trial.

5.2 **Brief guidelines for proper drafting of complaints:**

- (a) Before prosecution is launched, it is imperative that there must be a sanction for such prosecution and that it should be at the instance of the authority enumerated in section 279(1) of the Act. Otherwise prosecution is likely to be quashed.
- (b) The place of commission of the offence shall specifically be

discussed with the Prosecution Counsel and accordingly the jurisdiction of the court should be mentioned.

- (c) The correct names and complete addresses of the accused should be specifically mentioned. This prevents delay in service of summons etc., by the court.
- (d) The following should be annexed to the complaint:
 - (i) Sanction order for prosecution.
 - (ii) List of important documents / exhibits.
 - (iii) List of prosecution witnesses.
- (e) It may be however noted, that prosecution can also furnish additional list of witnesses during trial [Section 204(2) of Cr.PC]
- (f) Chronological events leading to commission of offence should be spelt out. The evidence collected during the investigation should be set out precisely so that the Magistrate is able to appreciate the grounds to proceed with the case.

Care, therefore, needs to be taken to establish clearly the ingredients of the offence in the complaint.

5.3 Selection of evidence as exhibits:

Almost every prosecution trial will involve the use of evidence in some books of account and documents maintained in the regular course of business. The documentary evidence can come to the possession of authorities during Income tax proceedings, as documents submitted by assessee or gathered from third parties. They may also come to the possession as a result of impounding u/s 131(3) or 133A or as a result of seizure u/s 132(1) or u/s 132A of I.T.Act. Such records and documents are admissible evidences. The original return and the amended return if any, statement of accounts whenever required and deposition of the assessee admitting an offence or contradicting his earlier stand should specifically be listed as exhibits to the complaint. It is important that the books of account and documents that are to be relied upon as evidence are kept safely. More reliance should be placed on the documents of government evidence / bank / other authorities.

5.4 Selection of witness:

At the time of preparation of a complaint, witnesses should be selected carefully.

- (a) In the matter of selection of prosecution witnesses, it should be borne in mind that to prove a particular point, there might be several witnesses. It is advisable not to list all the witnesses for eliciting evidence on identical facts and circumstances. Those witnesses, who can easily be produced before the court, should be preferred.
- (b) A scene or event comprises several stages. Accordingly, the witnesses' evidence should be so phased as to account for a particular stage of the event.
- (c) Preference should be given to independent witnesses, such as officers of banks, government employees, assessee's business constituents etc., as the circumstances of the particular case warrant.
- (d) In selecting witnesses, it is advisable not to depend upon the delinquent assessee's witnesses or those upon whom he is depending for his defense. The defense should be forced to lead his own witnesses to prove his contentions.
- (e) Proper coordination is to be ensured with retired officers, who are required to appear as witness or as a complainant. They should be informed well in advance about the date of hearing and should be briefed properly before the date of hearing. The relevant records may also be made available to them before the date of hearing. They may also be provided logistical support as may be required.

6. Reporting Mechanism:

- 6.1 Each CCIT(CCA) shall have a post of DCIT(Pros.) who will be the Nodal Officer for all prosecution cases/matters being dealt in the region falling under the CCA Charge.
- 6.2 The DCIT(Pros.) shall be under the administrative control of the CCIT(CCA) concerned. However, for the purpose of compilation of report and maintenance of records etc., the Zonal CIT(Judicial) shall have functional control over the said Nodal Officer.
- 6.3 The Nodal Officer shall be responsible for coordination of prosecution case between the assessing officer and the Prosecution Counsel. He shall also monitor disposal of all petitions, relating to compounding, filed/pending in all charges under the CCIT(CCA).
- 6.4 The Nodal Officer shall prepare the Monthly Progress Report of

Prosecution work as per the revised Format (Form A-Chapter 5) in respect of the CCA Charge and send the same to the ADIT/DDIT(Prosecution), CBDT by 7th of the succeeding month with a copy to the CIT(Judicial) of the Zonal. The Zonal CIT(Judicial) will keep a watch on the timely submission of the report.

6.5 The Nodal Officer will compile a newly prescribed Quarterly Progress Report of Prosecution work (Form B -Chapter 5) for the region and forward the same to the ACIT/DCIT(Pros.), CBDT by 15th of the month succeeding the quarter. The Quarterly report shall be prepared after verification of pending prosecution cases and a list of cases in support of the figures reported in each column of the report shall be enclosed with the Quarterly Report.

6.6 The Nodal Officer shall maintain the statistics/list of pending prosecution cases/Potential prosecution cases in respect of each CIT charge of the region.

7. Custody of records and evidence relating to Prosecution:

The department may lose a prosecution case on the ground that lead evidence was not produced before the court. Therefore, the material evidence sought to be utilized in prosecution proceedings should be painstakingly identified and the originals need to be kept in safe custody, for prosecution before the Court.

7.1 If any authority during any proceeding comes across any fraud or serious tax evasion, he should conduct further proceedings keeping prosecution angle in mind. Such cases shall be treated as "potential prosecution cases". In such cases, the evidences should be collected carefully. The Assessing Officers should ensure that returns are filed in proper proforma and are signed by the competent person. Special care shall be taken to ensure that the documents filed by assessee during the various proceedings are duly signed and verified. Whenever statement of assessee or any witness is recorded it should be ensured that oath is properly administered and statement is properly concluded. All original documents including Return of Income, documents obtained during assessment proceedings, documents impounded u/s 131 or u/s 133A or seized u/s 132(1) of I.T. Act should be kept in personal custody. It should be ensured that timely extension for retention of impounded / seized records is