

Offences and Prosecutions

Some Key Points

Power of Commissioner to grant immunity from prosecution [Section 278AB]

Commissioner is empowered to grant immunity from prosecution.

- (1) The application for immunity must be made by the assessee before institution of the prosecution proceedings after the case has been abated under section 245HA.
- (2) The assessee can approach the Commissioner for immunity any time if prosecution proceedings were instituted before or during the pendency of settlement proceedings. However, if the assessee has received any notice etc from the Income-tax authority for institution of prosecution, then he must apply to the Commissioner for immunity, before actual institution of prosecution.
- (3) The Commissioner can grant immunity, subject to such conditions as he may think fit, to impose, on being satisfied that the assessee has –
 - (a) co-operated in the proceedings after abatement; and
 - (b) made a full and true disclose of his income and the manner in which such income has been derived.
- (4) Where application for settlement under section 245C has been made before 01.06.2007 the Commissioner can also grant immunity from prosecution for any offence under this Act or under the Indian Penal Code or under any other Central Act. This power cannot be exercised where the application for settlement is made on or after 01.06.2007.
- (5) If the assessee fails to comply with any condition subject to which the immunity was granted, the same would be withdrawn.
- (6) The immunity granted to a person may, at any time, be withdrawn by the Commissioner, if he is satisfied that such person had, in the course of any proceedings, after abatement, -
 - (a) concealed any particulars material to the assessment from the income-tax authority; or
 - (b) gives false evidence.

Consequently, the person may be tried for the offence with respect to which the immunity was granted or for any other offence of which he appears to have been guilty in connection with the proceedings.

Prosecution launched after accepting revised return

In *K.E.Sunil Babu, Asst. CIT v. Steel Processors and Others* (2006) 286 ITR 315 (Karn) the High court observed that the Department has accepted the revised returns filed under

section 139(5) which means that there was a bona fide mistake in the original return and there was no element of mens rea. Accordingly, the court held that the Department cannot launch prosecution under sections 276C, 277 and 278.

Question 1

Can prosecution be launched for each of the following actions or defaults committed? If yes, then explain the relevant provisions of the Act and the quantum of prescribed punishment.

- (i) *The assessee had restrained and not allowed the officer authorized as per section 132(1)(iib) of the Act to inspect the documents maintained in the form of electronic record and the books of accounts.*
- (ii) *The assessee deliberately has failed to comply with the requirement of section 142(1) and/or 142(2A).*
- (iii) *The assessee deliberately has failed to make the payment of the tax collected under section 206C.*

Answer

- (i) Failure to afford facility to the officer authorized as per section 132(1)(iib) is a case for which **prosecution can be launched under section 275B** and such person shall be punishable with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine.
- (ii) Willful failure to produce books of account and documents as required under section 142(1) or willful failure to comply with a direction to get the accounts audited under section 142(2A) is a case for which **prosecution can be launched under section 276D** and such person shall be punishable with rigorous imprisonment for a term which may extend to one year or with a fine of ₹4 to ₹10 for every day during which the default continues or with both.
- (iii) Deliberate failure to deposit the tax collected under section 206C to the credit of the Central Government is a case for which **prosecution can be launched under section 276BB** and such person 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.

Question 2

The Assessing Officer lodged a complaint against M/s. KLM, a firm, under section 276CC of the Income-tax Act, 1961 for failure to furnish its return of income for the assessment year 2009-10 within the prescribed time. The tax payable on the assessed income, as reduced by the advance tax paid and tax deducted at source, was ₹60,000. The appeal filed by the firm against the order of assessment was allowed by the Commissioner (Appeals). The Assessing Officer passed an order giving effect to the order of the Commissioner (Appeals). The tax payable by the firm as per the said order of the Assessing Officer was ₹1,000. The Assessing

Officer has accepted the order of the Commissioner (Appeals) and has not preferred an appeal against it to the Income Tax Appellate Tribunal. The firm desires to know of the maintainability of the prosecution proceedings in the facts and circumstances of the case.

Answer

Section 276CC provides for prosecution for willful failure to furnish a return of income within the prescribed time. However, prosecution proceedings will not be attracted if the tax payable by the assessee 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 ₹3,000. Even though the tax liability of the firm as per the original order of assessment exceeded ₹3,000, however, as a result of the order of the Commissioner (Appeals), it got reduced to ₹1,000, which is, less than ₹3,000. Therefore, since the tax liability of the firm on final assessment was determined at ₹1,000, the prosecution proceedings are not maintainable.

In *Guru Nanak Enterprises v. ITO (2005) 279 ITR 30*, where the facts were similar, the Supreme Court held that prosecution as unwarranted.

Self-examination Questions

1. Is prosecution attracted in respect of the following offences? If so, what is the period of imprisonment?
 - (a) Removal, concealment, transfer or delivery of property to thwart tax recovery;
 - (b) Failure to pay to the Central Government, tax collected under section 206C;
 - (c) Wilful attempt to evade tax, penalty or interest;
 - (d) Wilful failure to produce accounts and documents under section 142(1);
 - (e) Abetment of false return of income.
2. Write short notes on the following -
 - (a) Offences by companies
 - (b) Presumption as to culpable mental state
3. Enlist the offences which are deemed to be non-cognizable offences.
4. Discuss the correctness or otherwise of the following statement – “Prosecution proceedings can be initiated only after the previous sanction of the Chief Commissioner or Commissioner”.
5. Discuss the power of the Commissioner to grant immunity from prosecution.
6. Can the Department launch prosecution in a case where they have accepted the revised return filed by the assessee, rectifying a mistake in the original return of income?

Answer

6. This question came up before the Karnataka High Court in *K.E. Sunil Babu, Asst. CIT v. Steel Processors and Others* (2006) 286 ITR 315. The High Court observed that since the Department had accepted the revised returns filed under section 139(5), it was clear that there was a bona fide mistake in the original return and there was no element of *mens rea*. Therefore, the High Court held that the Department cannot launch prosecution under sections 276C, 277 and 278.