

#### **Prosecution under Tax Law**

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"We are ready to carry this commercial risk" is a statement we hear quite often from representatives of business houses. However, these words will not be common on going forward basis. One can afford to assume the monetary risk whether in form of tax, interest or penalty but certainly nobody would like to assume the exposure of prosecution.

The Income-tax Act, 1961 ("Act") is no exception and makes elaborate provisions for criminal prosecution. Chapter XXII of the Act provide for various offences which are liable for criminal prosecution. Many such offences carry rigorous imprisonment for a period of up to seven years (Please refer Table 1 for the summary of offences).

Unlike developed countries, the current state of criminal prosecution in tax matters in India is quite dismal. In last five decades, the tax authorities in India have filed very few complaints for initiation of prosecution under tax laws. Besides this, the percentile of actual prosecution in these cases is even gloomier. Such a sorry state is largely attributable to the fact that criminal trials in India are subject to cumbersome procedures and remain pending before courts for several years. Further, in the absence of any specialized cell to deal with matters of criminal prosecution, the tax authorities have over a period of time developed a sense of reluctance towards criminal prosecutions as it requires repeated personal appearance before the courts.

### **Corrective Measures**

In order to set right the current state of affairs, the first corrective step taken by the Government of India is the formulation of Directorate of Income Tax (Criminal Investigation) ("**DCI**"). DCI has been created to perform functions in relation to offences under Chapter XXII of the Act and will act as the specialized arm of the government dealing with criminal prosecution in fiscal matters. DCI will *inter alia* be required to perform the following functions:

- To seek and collect information about persons and transactions about persons and transactions;
- To cause issuance of a show cause notice for offences committed under any direct tax law;
- To hire the services of special prosecutors and other experts for pursuing a prosecution complaint filed in any court of competent jurisdiction;
- To enter into agreements for sharing of information and other cooperation with any central or state agency in India;

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 To enter into agreements for sharing of information and other cooperation with such agencies of foreign states as may be permissible under any international agreement or treaty.

The second corrective step has come in the form of amendments proposed under the Finance Bill, 2012 ("Bill"). The Bill proposes to amendment the Act to provide for constitution of special courts for trial of offences under the Act. The constitution of special courts is aimed at reducing the time taken in completion of trial. Special courts usually conduct trials in a time bound manner. Further, judges having specialized knowledge in a particular area of a law are usually appointed to preside over such special courts.

The Bill also proposes to decrease the maximum punishment prescribed under various offences from three years to two years. This amendment is aimed at simplifying the procedure of trial.

The Code of Criminal Procedure, 1973 ("CRPC") which lays the procedure regarding trial of criminal offences makes a distinction between offences carrying a maximum punishment of up to 2 years and those carrying more than 2 years. Offences carrying a maximum punishment of up to 2 years are subject to a relatively simplified procedure commonly known as the "Summons Case" procedure. Offences carrying maximum punishment of more than 2 years are subject to a procedure commonly known as "Warrant Case" procedure.

Further, the Bill also makes room for appointment of specialized public prosecutors for representing the case of the tax authorities before the courts. The amendment will allow appointment of people carrying specialized knowledge in the areas of tax laws as public prosecutors.

## **Enforcement of Chapter XXII against Foreign Nationals & Foreign Companies**

The provision of Chapter XXII of the Act does not make any distinction on the basis of nationality. People in India as well as those outside India can be prosecuted if they commit any of the offences as provided under Chapter XXII of the Act. Similarly, Indian companies as well as foreign companies are equally liable for prosecution. In fact the Act makes special provisions with respect to offences committed by a company. In case where an offence has been committed by a company, then every person who at the time of commission of such offence was in charge of and was responsible to the company for the conduct of its business is deemed to be guilty and is liable for prosecution[1]. Similarly, where the offence is committed with the consent or connivance or is attributable to the neglect on part of any director, manager, secretary or other officer, such person is deemed to be guilty and is liable for prosecution[2].

The common perception that it is not possible to prosecute people situated outside has no

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legal basis. Section 105A to 105L of CRPC provides for reciprocal arrangements for assistance in matters related to criminal investigation and trial.

# Mutual Legal Assistance Treaties

Apart from entering into a number of Double Tax Avoidance Agreements and Information Exchange Agreements, India has also entered into a number of Mutual Legal Assistance Treaties ("MLAT"). Till date India has entered into MLAT's with 30 countries and the list *inter alia* includes countries like Australia, Canada, Mauritius, Russia, Switzerland, UK and USA.

In terms of the MLAT between India and USA, both the countries are required to provide the widest measure of mutual assistance to each other, in connection with the investigation, prosecution, prevention and suppression of offenses, and in proceedings related to criminal matters. It is further provided that assistance shall *inter alia* include assistance in the form of: (i) taking the testimony and statements of persons; (ii) providing documents, records and items of evidence; (iii) locating or identifying persons or items; (iv) serving documents; (v) transferring persons in custody for testimony or other purposes; (vi) executing requests for searches and seizures; and (vii) assisting in proceedings related to seizure and forfeiture of assets, restitution, collection of fines.

Some of the MLAT's make specific reference to assistance in tax related matters. Article 2(1)(b) of MLAT between India and Canada specifically provides assistance in criminal matters shall also include assistance in investigations or proceedings relating to offences concerning taxation, duties, customs and international transfer of capital or payments.

Therefore, the tax authorities have an option to employ MLAT's to carry out its investigation related to fiscal matters.

# **Extradition Treaties and Reciprocal Arrangements**

The extradition process involves surrender of an alleged or convicted criminal by one state to another. India has also entered into a number of Extradition Treaties. Till date India has entered into extradition treaties with 28 countries and the list *inter alia* includes countries like Belgium, Canada, Hong Kong, Netherlands, Mauritius, Russia, Switzerland, UK, USA, France and Germany. Further, India has also entered into extradition arrangements with 10 countries and the list *inter alia* includes countries like Australia, Italy and Singapore.

In terms of the extradition treaties, an offence is regarded as an extraditable offence if it is punishable under the laws of both the countries, by deprivation of liberty including imprisonment for a period of more than one year[3] or by a more severe penalty. Furthermore, most of the extradition treaties make specific reference to fiscal offences. The

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extradition treaties entered by India with USA, UK, France, Hong Kong, Germany, etc. specifically treat tax related offences as extraditable offences.

Therefore, the tax authorities can invoke the extradition treaties to ensure surrender of an alleged or convicted criminal by other countries to India.

### Conclusion

In the current commercial scenario where monetary liabilities in the form of interest or penalty are no longer regarded as a real deterrent, prosecution in fiscal matters will assumes importance as it has the potential of acting as the ultimate deterrent against tax evasion/willful non-compliance. The formation of DCI and the amendments proposed by the Finance Bill are reflective of the revised government strategy towards prosecution under tax matters. In coming years, prosecution will form an integral part of the government's enforcements program to encourage compliance with its tax laws. Therefore, in this changed scenario it becomes necessary for business houses (especially the multinationals) to evaluate the potential prosecution risk before taking any commercial position on the likely commercial tax risk.

- [1] Section 278B of the Act.
- [2] Section 278 B of the Act.
- [3] Some extradition treaties provide for a high threshold of two years while some extradition treaties provide for a lower threshold of six months.

Table 1.

Sl.	Offence	Punishment	Proposals u
1		Rigorous imprisonment for a period upto 2 years and fine	Same
11	1	Rigorous imprisonment for a period upto 2 years and fine	Same



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3	Removal or transfer of property to thwart tax recovery (Section 276)	Rigorous imprisonment for a period upto 2 years and fine	Same.
4	Failure on part of liquidator to give notice of appointment or failure to set aside amounts for tax or transfer of assets without seeking permission from Commissioner (Section 276A)	Rigorous imprisonment for a period upto 2 years and fine. Special reasons to be recorded in case sentence is for less than six months. No punishment if there was a reasonable cause for such failure.	Same
5	Failure to pay withholding tax, dividend distribution tax, tax collection at source, etc. (Section 276B & 276BB)	Rigorous imprisonment for a period of three months to 7 years and fine. No punishment if there was a reasonable cause for such failure.	Same.
6	Willful attempt to evade any tax, penalty or interest (Section 276C)	Where amount exceeds INR 100,000 - Rigorous imprisonment for a period of six months to 7 years and fine  Where amount does not exceed INR 100,000 - Rigorous imprisonment for a period of three months to 3 years and fine	Where amou 2,500,000 - 1 of a period of and fine Where amou 25,00,000 - 1 for a period and fine.
7	Willful attempt to evade payment of any tax, penalty or interest (Section 276C)	Rigorous imprisonment for a period of three months to 3 years and fine.	Same
8	Willful failure to furnish return of income (Section 276CC)	Where amount exceeds INR 100,000 - Rigorous imprisonment for a period of six months to 7 years and fine. Where amount does not exceed INR 100,000 - Rigorous imprisonment for a period of three months to 3 years and fine.	Where amou 2,500,000 - I for a period and fine. W exceed INR imprisonment months to 2
9	Willful failure to furnish books of accounts (Section 276D)	Rigorous imprisonment for a period upto 1 years or fine.	Same
10	Making false statement or delivering false accounts (Section 277)	Where amount exceeds INR 100,000 - Rigorous imprisonment for a period of six months to 7 years and fine. Where amount does not exceed INR 100,000 - Rigorous imprisonment for a period of three months to 3 years and fine.	Where amou 2,500,000 - 1 for a period and fine. W exceed INR imprisonment months to 2



11		Rigorous imprisonment for a period of three months to 3 years and fine	Rigorous im of three mor
12	Abetment to furnish false return, books of accounts, etc (Section 278)	Rigorous imprisonment for a period of six months to 7 years and fine  Where amount does not exceed INR 100,000 - Rigorous imprisonment for a	Where amou 2,500,000 - I for a period and fine Where amou 25,00,000 - I for a period and fine

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(The view expressed in the article is personal in nature)