

## **Income Tax Prosecution: Independent director, non-promoters, non-KMP and non-executive directors**

1. Under section 276B of the Income Tax Act, a person, who is in charge of and is responsible to the company for the conduct of the business of the company, can be prosecuted.

2. It can be noted that legal preposition which emerges from judicial pronouncements is that before launching a prosecution under Section 276-B of the Act against the directors of a company, Assessing Officer has to issue notice under Section 2(35) of the Act expressing his intention to treat such directors of a company as “principal officers”.

3. Under section 2(35)(b) of the Income Tax Act, the Assessing Officer can serve notice only to persons who are connected with the management or administration of the company to treat them as Principal Officer and Section 278B of the Income Tax Act clearly states that it shall not render any such person liable to any punishment, if he proves that offence was committed without his knowledge.

4. It may not be necessary to issue a separate notice or communication to all the directors that they are to be treated as “principal officers”. It would be sufficient compliance if in the show cause notice issued to the company it is mentioned that the directors are to be considered as principal officers of the company under the Act; .

5. Prosecution u/s 278B without proof of service of notice u/s 2(35) expressing intention treating a person as Principal Officer of the Company is totally invalid.

6.To treat any person as a Principal Officer, such person should be connected with the management or administration of the local authority/company or association or body. Such connection with the management or administration is the basis for treating any person as a Principal Officer. Such connection has to be established or to be supported with substantial material to decide the connection of any person with the management/ administration.

7.CBDT by circular dated 09.09.2019 titled 'Procedure for identification and processing of cases for prosecution under direct tax laws', has eased norms for prosecution for TDS and defaults in filing IT returns. The circular lays down limits and time period for proceeding with prosecution in cases where norm – payment of TDS is rupees 25 lakhs or below and delay in deposit is less than 60 days.

8.MCA Circular dated 2 march 2020

The Ministry of Corporate Affairs (MCA) through its circular dated 2 March 2020 dealing with prosecution of independent directors, non-promoters, non-KMP and non-executive directors. It stipulates that no civil/criminal proceedings should be initiated against the independent/non-executive directors without adequate evidence in relation to the involvement of such independent/non-executive directors in any default committed by a company.

9. Independent directors, non-promoters, non-KMP and non-executive directors are no doubt a custodian of the governance of the Company but do not involve themselves in the day-to-day affairs of the running of its business and only monitors the executive activity. Without disclosing the basis, no person can be treated as a 'Principal Officer' of the company recognizing him as the Key Management Personnel of the company.(Harish Bhat Vs ACIT (Karnataka High Court) (17/10/2019)