MENS REA AND ONUS OF PROOF OF MENS REA UNDER INCOME-TAX ACT, 1961

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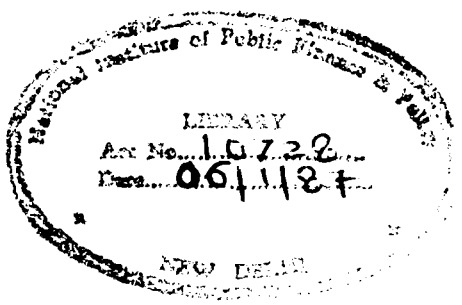

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1. Introduction

In any suit or other proceedings in which a court or any other body or person exercising authority under the law has to pass a decree, judgement or order casting an obligation or liability on or affecting the rights or interest of any party to the proceedings. the important questions that arise are:

i. What are the essential elements of the statutory provision, under consideration in the suit?

ii. On what party does the burden of proof of various elements of the provision lie?

iii. What degree or quantum of proof is needed: is it mere likelihood, or certainty or something in between these two extremes?

Under penalty and prosecution provisions of any statute the first two questions can be reframed as follows:

i. Are actus reus and mens rea both essential ingredients of penalty and prosecution provisions?

ii. On whom does the burden of proving these elements lie?

These two questions gained importance in the recent past with the announcement of Long Term Fiscal Policy (LTFP) (1985) followed by Discussion Paper (1986).[1] Both these

documents contain important proposals regarding the casting of burden of proof of relevant facts including culpable mental state on the taxpayer instead of the prosecution as at present. These important proposals, which seek to deviate from the traditional penal policy do not seem to have received the attention they deserve.

> Para 5.31 (ii) of the LTFP statement states:
> " It is intended to incorporate certain provisions in the Direct Tax Laws similar to those which already exist in the Customs Act and the Gold Control Act. For example, under section 123 of the Customs Act, 1962, when any goods are seized on the reasonable belief that they are smuggled goods, the burden of proving that they are not smuggled goods shall be on the person from whose possession the goods were seized or/and any person who claims to be the owner of such seized goods. Similarly, under Section 98B of the Gold Control Act, 1968, in any prosecution or an offence under that 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 open to the accused to prove the fact that he had no such mental state with respect to the offence. It is proposed to amend the direct tax laws also to provide similar provisions so that, once evasion is proved, the intention to evade need not be proved by the Department."

The Discussion paper (1986) while proposing to make the provisions regarding penalties and prosecutions more effective stated, inter alia, that:

i. "The onus of proving all the elements of the offence, except culpable mental state, will remain with the Income Tax Department. The onus of proving the absence of the existence of culpable mental state will now be with the assessee.

ii. Where penalty is leviable for a default committed without reasonable cause, the onus of establishing the existence of reasonable cause is also being shifted to the assessee."

Amendments have been accordingly made in the Income tax Act, 1961 through the Taxation Laws (Amendment and Miscellaneous Provisions)Act, 1986.

This paper examines how far the recent amendment of the Income-tax Act is justifiable and to what extent it may serve its purpose.

2. Whether Mens Rea is an Essential Element in Penal Provisions

It is a general principle of law, based on the maxim "Actus non facit reum mens sit rea" that an act does not make a man guilty, unless it can also be shown that he was aware that he was doing wrong. Thus, both action and intent constitute an offence. The essential elements of crime would accordingly be:

i. the actus reus i.e., the physical wrong-doing.

ii. the mens rea i.e., being aware of the wrongness of the action.

"Mens rea" has always been recognised as an essential ingredient of an offence in English criminal jurisprudence. Though this broadly forms the basis of the law in India also, there is some uncertainty in regard to what the courts in practice accept as evidence of a guilty mind, i.e., the nature and extent of the burden required for the purpose.[2] Moreover, since the turn of the last century the principle that every crime needs mens rea has been persistently assailed, and this development has caused considerable concern. Therefore, the legislative attitude towards the concept of mens rea and the judicial practice in emphasising its importance in Indian penal laws deserve careful consideration.

3. Classification of Offences

Offences can be classified under the following three groups:

i. where a statute expressly provides for mens rea;

ii. where the statutory provision is silent about mens rea (there is a controversy whether mens rea forms an essential element of such provisions or not); and

iii. where mens rea is expressly excluded (referred to as strict liability offences).

i. Where Statute Expressly Provides for Mens Rea

According to Glanville Williams[3], mens rea "refers to the mental element necessary for the particular crime and this mental element may be either intention to do the immediate act or bring about consequences or (in some crimes) recklessness to such act or consequences."

Often the statute itself incorporates the need to establish mens rea in proving an offence, by using words like 'knowingly', 'fraudulently', 'intentionally', 'wilfully' and so on. An attempt has been made to explain these words as follows:

> Intention: The dictionary[4] meaning of the word 'intentional' is 'done on purpose'. For an offence to be commited, the offender can either intend to commit a particular actus reus or intend certain consequences to take place as a result of this actus reus. There are two types of 'intention' with regard to prohibited consequences, 'direct intention' and 'oblique intention'. According to Jeremy Bentham[5], "A consequence may be said to be directly intentional, when the prospect of producing it constituted one of the links in the chain of causes by which the person was determined to do the act. It may be said to be obliquely intentional when, although the consequence was in contemplation,..... yet the prospect of producing such consequence did not constitute a link in the aforesaid chain".
>
> Knowledge: The Indian Penal Code, which is the general criminal law of the country, and many other Acts dealing with special offences use the word 'knowingly'. Knowledge is the awareness, foresight or even the expectation of the consequences of an act. When the knowledge is so strong that any person with common sense would consider the result to be inevitable consequence of the act of the wrongdoer, the law implies desire, and such mental condition will be considered by law to be constructive intention.

Fraudulently: A person is said to do a thing 'fraudulently' if he does it with intent to defraud; but not otherwise[6].

The treatment of the concept of mens rea under the Indian Penal Code is best stated in the words of M. C. Setalvad[7] "What the Indian Code seems to have done is to incorporate into the common Law crime the mens rea needed for that particular crime so that the guilty intention is generally to be gathered not from the common Law but from the statute itself. This may be regarded as a modification of the common Law worked into the code of Macaulay." Not only have the framers of the code incorporated into the definition of a crime the mens rea required, they have further given effect to the doctrine by providing in Chapter IV of the Code for exemption from liability in certain circumstances which are incompatible with the existence of a guilty mind. According to Mayne[8], the doctrine of mens rea in the abstract is wholly out of place for offences in the Indian Penal Code. Every offence is defined, and the definition covers not only what the accused must have done, but the state of his mind with regard to the act when he was doing it.

Recent criticism of the mens rea rule in relation to criminal trials, advances two kinds of arguments[9]: (i) It is not reasonable in principle, to expect anyone to make judgements about another's state of mind; and (ii) it is very difficult in practice to make such judgements. The second argument is concerned with the burden of proof on the prosecution and it is this aspect which is of greater relevance here. Rules regarding burden of proof will be discussed a little later.

ii. Where Statute is Silent about Mens Rea

The Supreme Court in Nathulal's case[10] and thereafter in several other cases has held that "there is a presumption of mens rea. It is of utmost importance for the protection of liberty of the subject that a court should always bear in mind that, unless the statute either expressly or by necessary implication rules out 'mens rea' as a constituent part of crime, a defedant should not be guilty of an offence against the criminal law unless he has got a guilty mind. The mere fact that the object of a statute is to promote welfare activities is by itself not decisive of the question whether the element of guilty mind is excluded from the ingredient of the offence. Mens rea by implication may be excluded by the statute only where it is absolutely clear that the implementation of the object of the statute would otherwise be defeated."

The above observations summarise the position of mens rea as accepted by the Indian Courts which are prepared to dispense with mens rea if legislative enactment has so expressed or intended. The legislatures must, therefore, expecially exclude the ingredient of mens rea wherever, in their wisdom, they consider it unnecessary[11]. We may now examine situations where mens rea is so excluded expressly.

iii. Strict Liability

Several laws have come into force since the enactment of the Indian Penal Code a century ago. Many of them have provided for the punishment of various offences specified by them. In a few cases the legislature has dispensed with mens rea, so much so that offences automatically entail strict liability. This discarding of mens rea in statutory offences

is a departure from the common law doctrine of actus non facit reum mens sit rea. How far this is desirable has been a matter of controversy among jurists.

The following main grounds have been given for recognising offences of strict liability.[12/]

i. For certain offences, it will be difficult to prove mens rea.

ii. It is of paramount importance to take into account the social purpose of a statute, which should be so framed and interpreted as to give effect to the intention of the legislature.

iii. In most strict liability offences the punishment is a light one, usually a fine.

iv. Strict liability offences are mala prohibitia and not mala in se.

According to Section 2(n) of the Code of Criminal Procedure, 1973,"an offence means any act or omission made punishment by any law for the time being in force...."(emphasis ours). The competence of the legislature to make laws creating offences of strict liability is beyond question. Whether it is desirable and, if so, to what extent would be a matter for consideration.

4. Burden of Proof

The term 'burden of proof' or onus probandi connotes the obligation to prove a fact or facts, by adducing the necessary evidence. The rule relating to burden of proof, as laid down

in S-101 of the Evidence Act, is as follows: "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that these facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." The rule that the burden of proof lies on the person who asserts a fact in the affirmative is derived from the ancient maxim of Roman Law, ei qui affirmat, non ei qui negat, incumbit probatio, and has been adopted on two considerations: (i) In the nature of things a negative is more difficult to establish than the affirmative; and (ii) Where a person has invoked the process of law to establish a case which is based on the facts asserted by him, it is but reasonable that the obligation to prove such facts should rest on him.[13]

The burden of proof does not lie on the person who affirms certain facts when such facts are especially within the knowledge of the other party (S-106, Evidence Act). Thus, where a question arises about sale of goods consigned to commission agents and the particulars of these sales, the burden of proof will lie on the commission agent as such sales are matters which are especially within his knowledge. This rule has an important bearing on Income tax proceedings where questions may arise regarding the genuiness of transactions recorded, or the nature or source of amounts credited, in the books of account of the assessee. In such a case, the onus of proof lies on the assessee as the subject matter of the transactions recorded in his books of accounts is exclusively within his knowledge.

A fundamental rule in English Law is that burden of proving the guilt of the accused is on the prosecution.

But even in the U.K., there is a trend towards shifting the onus to the accused, as Glanvlla Williams[14] deplores: "unhappily, Parliament regards the principle with indifference - one might almost say with contempt. The statute book contains many offences in which the burden of proving his innocence is cast on the accused. In addition, the courts have enunciated principles that have the effect of shifting the burden in particular classes of cases.

The sad thing is that there has never been any reason of expediency for these departures from the cherished principles; it has been done through carelessness and lack of subtlety. What lies at the bottom of the various rules shifting the burden of proof is the idea that it is impossible for the prosecution to give wholly convincing evidence on certain issues from its own hand, and it is therefore for the accused to give evidence on them if he wishes to escape."

5. Mens Rea and Burden of Proof in Income Tax Proceedings in India

The Indian Income-tax Act provides for the following adverse or penal consequences for some acts or omissions:

i. additions to income leading to larger tax burden;

ii. enhancement of income by disallowance of claims for expenditure and losses;

iii. charge of interest;

iv. monetary penalties;

v. prosecution leading to monetary fines and/or imprisonment on conviction; and

vi. acquisition by the Government, of property involved in shady transactions, eg., understatement of sale consideration with a view to avoid tax.

Even where the delinquency is clear and proved, the adverse or penal consequences are often avoided or mitigated by the escape routes or the exacting requirements of evidence in the law. The tax administration has often been heard to complain of the difficulties stemming from the following in particular:

i. The wide range of discretion vested in the appellate authorities and the courts.

ii. The requirement that the Revenue should establish not only concealment of income but the taxpayer's intention to conceal the income, for purposes of prosecution (and even penalty, till the recent amendment of the Act).

iii. The use of words like 'without reasonable cause', 'wilfully' and 'negligently' in the provisions spelling out the consequences of default or delinquency so as to place the burden of showing the existence of the intent to violate the law on the Revenue.

In recent years there has been a perceptible shift in the Income-tax Act towards the concept of 'strict liability' by the adoption of various strategies like limiting administrative and judicial discretion, removing words requiring proof of motive and casting the burden of establishing absence of motive on the taxpayer. But the shift does not point to a

total reversal of the old ideas of burden of proof which have continued to influence even areas where the penal liability is not open to serious dispute.

The provisions for charge of interest are an example of this influence. The Income-tax Act provides for a mandatory[15] charge of interest for several defaults.[16] The measure is apparently conceived by the legislature as a compensation to the government for denying it the use of funds.[17] Thus the rate of interest under these provisions has never taken the character of penalty; it has always remained below the market rate though it has been stepped up from 2 per cent to 15 per cent over the last three decades. Its mandatory nature has however been upset, first, by judicial interference[18] and, second, by the exercise of discretionary powers by the administration to reduce or waive the interest.[19] Vesting of discretion in administrative authrities under such mandatory provisions allows arbitrariness to creep in and makes the charge of interest justiciable. The law itself provides for no appeal against the charge of interest under Sections 215 and 217 but in actual practice courts have been entertaining appeals. In any case, the conferment of discretion on the administrative authorities implies that despite the fact that the consequence of interest automatically flows from the default the concerned authority has to take into account the circumstances in which the default has occurred, the mental framework of the taxpayer as evident from his conduct/cooperation, etc. Thus, the principle of mens rea has prevailed in relation to the levy of interest which, ordinarily, ought to have been a strict unavoidable liability on the taxpayer.

a. Monetary Penalties

Courts in India have held time and again that penalty proceedings are quasi-criminal in nature. The relevance of the mens rea rule to some of the statutory penal laws is, however, not quite clear. For instance several provisions in chapter XXI of the I.T. Act provide for a monetary penalty if the taxpayer's omission in compliance with the requirements of the law is 'without reasonable cause'. The implications of the expression 'without reasonable cause' in S271(1)(a) are not free from controversy, the core question always being: Should mens rea be read as an ingredient of all the penalty provisions, and in particular, of the provisions under S-271(1)(a) relating to the late filing of a return of income?

This controversy has now been resolved by taxation laws (Amendment and Miscellaneous Provisions) Act, 1986. The Act has omitted the words 'without reasonable cause' from all the sections[20] in chapter XXI. Therefore, the penalty will now be imposed once the default or delay or omission is established. However, a new Section 273B has been inserted, according to which no penalty shall be imposable on the taxpayer in such cases if he proves that there was reasonable cause for the said failure or default. The amendment which has given effect to the proposal in the Discussion Paper, is not unrealistic or inequitable as an objective analysis of the amended provision makes it clear.

Penalty under Section 271(1)(a) was leviable only after an opportunity to be heard was given to the taxpayer and after the ITO recorded a finding that the delay in filing the return was without reasonable cause. A view[21] was taken, that it was for the department initially to establish the absence of

a reasonable cause though, generally speaking, the circumstances causing the delay must be within the knowledge of the assessee. However, very slight evidence would suffice to discharge this initial burden. The department could only prove this inferentially by showing that there was no ostensible reason or explanation for the delay or that no application for extension was made, or that the cause attributed by the assessee was inconsistent with the books and records or did not accord with normal human conduct and so on. Once the initial burden was discharged, it was for the assessee to establish, as in a civil case, on the balance of probabilities, that he had reasonable cause for the delay or failure. Some Courts, however, went a little further and insisted upon a proof by the I.T. department of some 'mens rea' on the part of the assessee before a penalty could be imposed. This was a somewhat stringent requirement. Hence, a contrary view was also taken.[22] It was held that the penalty provisions under the Act were not of a nature which would warrant the requirement of 'mens rea' in the same manner or to the same extent as an offence under the criminal law. The view to be taken was that the mere use of the expression 'without reasonable cause' could not justify the import of the doctrine of 'mens rea'. All that had to be considered was the presence or absence of a reasonable cause for the tax delinquency. Therefore, inducting the requirement of a deliberate defiance of law, or contumacious conduct, or dishonest intention or acting in conscious disregard of the statutory obligation, was unwarranted under Section 271(1)(a) of the Act.

The latter view, appears more reasonable and practical. The law specifies a date for filing of return, which gives ample time to a taxpayer to be ready with the material necessary for the purpose. There is also a provision for making an application for extension of time when there are genuine difficulties

in complying with the requirement of the law. The taxpayer alone is in the full know of all facts and circumstances which prevent or prevented him from filing the return. The responsibility for proving that there was a 'reasonable cause' should, therefore, be placed on the assessee. The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 raises a rebuttable presumption of the absence of a reasonable cause. Far from being a deviation from the traditional rules of evidence, this amendment is in conformity with Section 106 of the Indian Evidence Act.

Other sections of chapter XXI which had the expression 'without reasonable cause' have also been amended by omitting these words. Various defaults under these provisions are:

i. Failure to furnish information regarding securities, etc. (S.270).

ii. Failure to comply with notices (S.271(1)(b)).

iii. Failure to keep, maintain or retain books of account, documents, etc. (S.271A).

iv. Failure to get accounts audited (S.271B).

v. Failure to furnish some statements, allow inspection, etc. (S.272A).

vi. Failure to comply with provisions of section 139A (w.r.t. PAN)(S.272B).

vii. Failure to furnish statement of advance tax (S.273(1)(b)).

There can hardly be any doubt that it is only the taxpayer who can throw light on the circumstances which led him to his default and clear himself of the adverse presumption that he was not unaware of his statutory obligations and of the consequences of his failure to discharge them in the above cases.

S.271(1)(c) provides for penalty for concealment of income or furnishing of inaccurate particulars of income. This provision has remained a matter of judicial controversy since its inception, and has been amended a number of times.

The decision of Supreme Court in Anwar Ali's case[23] is a landmark in the exposition of law relating to concealment pf income prior to 1.4.1964. The following important points were placed beyond doubt by the court: (i) Imposition of penalty involved in quasi-criminal proceedings; (ii) The burden lies on the revenue to establish: (a) that the income has been concealed and (b) that the assessee has consciously concealed the particulars of his income or has deliberately furnished inaccurate particulars (emphasis supplied).

Few penalties imposed under direct tax laws had been upheld by the courts even before the Supreme Court ruling in Anwar Ali's case. Most of these were found untenable as the department failed to prove 'mens rea'. To overcome this difficulty the Finance Act, 1964, made two important changes w.e.f. April 1,1964. First, from the expression 'has concealed the particulars of his income or deliberately furnished inaccurate particulars' in S.271(1)(c) the word "deliberately" was omitted. The effect of the amendment was that it was no longer necessary for the revenue to establish that the assessee had concealed the particulars of his income or had

furnished inaccurate particulars of such income deliberately[24]. It might be sufficient to show that the furnishing of inaccurate particulars was the result of gross or wilful neglect.[25] The element of mens rea was excluded. Second, an Explanation was inserted as a yardstick for determining whether or not there has been concealment in a particular case. The Explanation created a legal fiction that if the conditions of its applicability were satisfied, concealment of income would be deemed to have been committed. The Explanation postulated a rule of evidence raising a rebuttable presumption in certain circumstances. It was not a rule which created or negated any substantial right.[26] The rule of evidence might be regarded as an inversion of the initial burden of proof from the department to the assessee under a rebuttable presumption.[27] This intent of the legislature has been made clearer by the Amendment Act 1986.

However, even after 1.4.1964 various High Courts gave divergent views on shifting the burden of proof. Some took the view that the dictum in Anwar Ali's case continued to be good law[28] while the others held that the ratio of Anwar Ali's case was no longer applicable as the burden of proof had been statutorily shifted to the assessee.[29] Thus even the new Explanation did not succeed in setting all doubts at rest.

The Discussion Paper tries to skirt the issue by proposing an additional tax on the difference between the declared income and the income actually assessed in lieu of a penalty based on the tax on the income found to be concealed. It is stated that the intention is "to substitute the present penal provisions under Section 271(1)(c) prescribing penalties for concealment of income by a simple system of charge of additional tax equal to 30 per cent of the amount by which the

returned income falls short of the assessed income. The Commissioner will be empowered to waive this additional tax where there is room for genuine difference of opinion of interpretation of law." The Finance Minister has also stated in para 8.2 of the Discussion Paper that "the existing provisions which give the assessing authorities discretionary powers to levy penalties as well as powers to charge interest for the same default are proposed to be substituted by a simple system of mandatory interest which is intended to take care of not merely the compensating element for loss of interest to the Government but also the punitive aspect of deterring the assessee from repeating the defaults."

The objectives, inter alia, of these reforms as stated by the Finance Minister are:

i. Simplifying the law and procedure relating to Direct Taxes in keeping with the policy of reposing trust in the taxpayers so as to encourage voluntary compliance;

ii. Increasing cost of evasion and providing effective deterrence against evasion.

In other words, once the assessee betrays the trust reposed by the Government in him, the Revenue will come down heavily on him. The Government's penal policy is being so framed that levy of penalty becomes automatic. But a new provision, viz., S.273B helps to avert the penalty where the assessee is able to prove that there was a reasonable cause for his lapse or error. Significantly the provision lets Section 271(1)(c) alone: Concealment of income will be covered by the additional tax, which will replace the existing penalty proceedings.

b. Prosecutions Resulting in Imprisonment/Monetary Fine

The Supreme Court has recognised that even penalty, as it is imposed, is only an additional tax and not a punishment for a criminal offence,[30] though penalty proceedings are quasi-criminal in character and they are not eventually a continuation of the assessment proceedings.[31] It is for this reason that rule of double jeopardy (Article 20(2) of the Constitution) which applies to criminal cases, cannot be invoked in respect of penalties for various omissions and commissions under the taxable statutes.[32] Prosecution of a delinquent taxpayer under chapter XXII of the Income-tax Act can therefore be initiated before a criminal court without prejudice to the levy of penalty by the Income tax authorities under chapter XXI of the Act. Imposition of penalty is basically an administrative action which does not preclude the criminal's liability to a fine or imprisonment either under the Income-tax Act or Indian Penal Code or under both together.

The offences covered by chapter XXII of the Act fall into the following three broad categories:

i. Where there is failure to follow any legal requirement "without reasonable cause";

ii. "Wilful" failure to comply with the law;

iii. Contravention of any provisions.

The above distinction will be evident from the following brief description of the various offences which may lead to prosecution:

Section providing for prosecution	Offence calling for prosecution	Punishment
S.276A	Failure to comply with provisions of S-178(1) & (3) - without reasonable cause.	R.I. which may extend to two years.
S.276AB	Failure to comply with S.269UC, 269UE(2), 269UL(2) - without reasonable cause.	R.I. which may extend to two years and also fine.
S.276AA	Failure to comply with S.269AB or 269I - without reasonable cause.	R.I. which may extend to two years and also fine.
S.276B	Failure to deduct or pay tax u/s 80E(9) - without reasonable cause.	R.I. and fine depending upon the amount of tax.
S.276DD	Failure to comply with S.269SS- without reasonable cause.	R.I. and fine.
S.276E	Failure to comply with provisions of S.269T - without reasonable cause.	R.I. and fine.
S.276C	Wilful attempt to evade tax, penalty or interest.	R.I. and fine depending upon amount sought to be evaded.
S.276CC	Wilful failure to furnish return of income.	R.I. which may extend to 7 years and fine.
S.276D	Wilful failure to produce accounts and documents.	R.I. for one year or fine.
S.277	If a person makes a false statement in verification or delivers a false account or statement - which he either knows or believes to be false.	R.I. which may extend to seven years and fine.
S.278	Abetment of false return - which abetor knows to be false or does not believe to be true.	R.I. which may extend to 7 years and fine.
S.275A	Contravention of order made under S.132(2).	R.I. which may extend to two years and fine.

The above list might give the impression that those who commit any offences under the Income-tax Act are severely punished in India. In truth, while the law looks fierce and deterrent, action in pursuance of it appears lukewarm or ineffective. Few prosecutions are launched and those that are launched do not seem to result in convictions, as is apparent from the following[33] data relating to the financial year 1984-85:

a.	Number of prosecutions pending before the courts on 1.4.1984.	1213
b.	Number of prosecution complaints filed during 1984-85.	783
c.	Number of prosecutions decided during 1983-84.	84
d.	Number of convictions obtained in (c) above.	13
e.	Number of cases which were compounded before launching prosecutions.	60
f.	Composition money levied in (e) above.	Rs. 1.49 lakh

The possibility of courts hesitating to convict a taxpayer if there is scope for drawing any inference in his favour cannot be ruled out, in view of the minimum term of imprisonment prescribed for the offence in the law itself. At the same time, it is obvious from the court orders that the evidence adduced for the prosecution is often half-baked. If the alleged offence is grave and the punishment it entails is disastrous for the taxpayer, the revenue authorities should

prepare their case thoroughly on the basis of cast-iron evidence and not on conjectures and surmises. The formulation for the prosecution must be laid in the very order of assessment of income, though it does not dispense with the need for marshalling all the materials pointing to the criminal offence and presenting them before the court cogently and objectively.

Article 21 of the Constitution says, "No person shall be deprived of his life or personal liberty except according to procedure established by law." In Maneka Gandhi V. Union of India,[34] the Supreme Court held that mere prescription of some kind of procedure is not enough to comply with the mandate of A.21. The procedure prescribed by law has to be fair, just and reasonable and not fanciful, oppressive or arbitrary; otherwise it should be no procedure at all and all the requirements of Article 21 would not be satisfied. A procedure to be fair or just must embody the principles of natural justice. And the law would rather permit a dishonest man to escape than convict an innocent person where there are doubts in any case.

The Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 has inserted a new S.278E which reads as under:

> "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" includes 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."

The question for consideration is whether this above provision is irrational or inequitable.

The Long Term Fiscal Policy statement mentions the fact that a similar provision already exists in the FERA, Customs Act and the Gold Control Act. But what it does not add is the fact that these provisions were made in these Acts on the recommendation of the Law Commission in their Forty-seventh Report in 1972 and that the Law Commission specifically excluded tax laws from the formula as to onus which they suggested "for the period."

How far any comparisons of the Income tax law with the provisions under the FERA or Customs Act or Gold Control Act will be appropriate is debatable. The cause of action under the FERA, Customs Act or Gold Control Act is the coming into light of an illegitimate foreign currency transaction, contraband goods, etc. Computation of income and net wealth under the direct tax laws are sometimes dependent on subjective estimates and inferences. It may not be fair to launch prosecutions in cases where any income has not been wilfully concealed, i.e., definite evidence of such concealment is not available.

There is a view that the legislature should transfer sections 275A, 276A, 276AB, 276B, 276DD and 276E to chapter XXI since monetary penalties/fines should serve the purpose in cases of default. According to this view prosecution should be resorted to only where there is wilful default/ failure, and the burden of proof should be squarely placed on the Revenue. Sections 276C, 276D, 277 and 278 should alone be retained under chapter XXII on this basis.

In the United States, Rule 32 of the Rules of Practice, Tax Court, places the burden of proof on the taxpayer. The Internal Revenue Code provides an exception to this rule by placing the burden of proof on the Commissioner where fraud is alleged.

In the UK the burden of proving fraud or wilful default under Taxes Management Act, 1970, S.36 rests with the revenue.[35] If the Revenue succeeds in establishing fraud or wilful default, the burden of proof shifts to the taxpayer to displace the assessment.

6. Conclusion

From the foregoing discussions it would be seen that the doctrine of '*mens rea*' has been frequently invoked by the courts not only in the context of prosecution of tax offences but also in relation to the levy of monetary penalties. Courts have considered it necessary to read the requirement of *mens rea* as an essential ingredient of the legal provisions even where the law itself has been silent on the subject. Courts have also been placing the burden of showing that the conditions for invoking certain special provisions of the law existed in a particular case on the revenue. In many cases

the revenue was hardly in a position to discharge this heavy burden when the facts necessary for that were mostly within the special knowledge of the taxpayer.

Recently there seems to have been a distinct shift in the approach of the judiciary in the interpretation of tax laws. The Supreme Court's decision in McDowell's case[36] is a landmark in the development of fiscal jurisprudence in India. The doctrine that the taxpayer is free to circumvent tax laws and it is for the revenue to bring him squarely within its net seems to have at long last been laid to rest. This doctrine, known commonly as the Westminster doctrine, was enumerated by Lord Tomlin half a century ago in the following terms:

"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his inguenuity, he cannot be compelled to pay an increased tax." (IRC V. Duke of Westminster, 1936, A.C.1).

This ancient doctrine which had been given up even in the land of its origin, continued to have respectability in India long after India attained independence.

In McDowell's case Chinnappa Reddy speaking for himself and for the Supreme Court exorcised the ghost of Westminster in the following words:

"We think that time has come for us to depart from the Westminster principle as emphatically as the British Courts have done. The evil consequences of tax avoidance are manifold. First, there is substantial loss of much needed public revenue, particularly in a welfare state like ours. Next there is the serious disturbance caused to the economy of the country by the piling up of mountains ot black money, directly causing inflation. Then there is 'the large hidden loss' to the community (as pointed out by Master Wheatcroft in 18 Modern Law Review 209) by some of the best brains in the country being involved in the perpetual war waged between the tax avoider and his expert team of advisers, lawyers, and accountants on one side and the tax-gatherer and his, perhaps not so skilful, advisers on the other side. Then again there is the 'sense of injustice and inequality which tax avoidance arouses in the breasts of those who are unwilling or unable to profit by it.' Last but not the least is the ethics (to be precise, the lack of it) of transferring the burden of tax liability to the shoulders of the guileless, good citizens from those of the 'artful dodgers'. It may, indeed, be difficult for lessor mortals to attain the state of mind of Mr. Justice Holmes, who said, 'Taxes are what we pay for civilized society. I like to pay taxes. With them I buy civilization.' But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance, We now live in a welfare

> state whose financial needs, if backed by the law, have to be respected and met. We must recognise that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is pretense to say that avoidance of taxation is not unethical and that it stands on no less moral plane then honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord its approval to it.'

The law reflects social needs and developments. Tax avoidance, as the Supreme Court has pointed out, cannot be considered a matter of right for a taxpayer. It is the same trend in thinking that led to the removal of the bar of limitation for economic offences under the law ten years ago. It is in keeping with this trend that the burden of proving a 'reasonable cause' for his error of commission or omission has been placed on the assessee in levying a penalty. Has the State gone too far in shifting the onus of establishing mens rea in prosecution provisions also? The Revenue authorities have still to prove that the income has been concealed or that there has been a contravention of specific provisions of the law. The problem is whether the state should go further and prove that the concealment was done deliberately by the assessee or that the transgressing of the law was

wilful and not inadvertent. One view is that once an offence is established, the responsibility of showing that the offence was inadvertent and not planned would rest on the person who had committed the offence. In this view the punishment meted out for the offence eventually has no relevance for or bearing on the purpose of onus in fixing the responsibility for the offence. It makes no difference to an objective consideration of the problem whether the state action results in penalty or fine or a term of imprisonment. The person who has committed the actus reus and who gains by it knows best whether he had recourse to it knowingly or whether it was a sheer mistake or misunderstanding or that he was driven to it in circumstances beyond his control. He can absolve himself easily through explanation or evidene, if he was innocent. The offence in which the offender stands to gain implies a culpable state of mind on part of the offender. If this natural presumption is not warranted on the facts of the case, the offender who is in possession of the relevant facts and materials to exonerate or absolve himself can rebut it without difficulty. But to expect the Revenue to read his mind and conclude that he had resorted to tax evasion or that he had contravened any requirement of the law deliberately, would be unrealistic. It will be a mockery of common sense and the rules of evidence.

While the logic of the above argument is irresistible, the more human approach is that deprivation of personal liberty should not be put at par with administrative remedies like penalty. Even penalty or forfecture of wealth can hurt grievously. As Shylock[37] puts it:

'One's life is taken when he is deprived of means whereby he lives'. It may not always be possible to prove that an act is not preplanned or that what is found in one's possession is not really his income or wealth, e.g., an unopened box with which one is entrusted by a friend or relative, containing the latter's ill-gotten wealth but which is disclaimed by its owner on its discovery by the Revenue authorities. The State can never afford to be vindictive in a real-life situation. If mens rea has not been removed for purposes of sections 193, 196, 177,193 and 196 of Indian Penal Code for which chapter XXII of the Income-tax Act provides and if the charge is criminal, can there be two different standards for taking a decision? Does the fraud in Income tax need to be treated more strictly than a fraud elsewhere? This is not merely a matter of harmonious construction of laws. This is a matter where zeal is allowed to outstrip long-established fundamental principles of fair play on which a citizen's right to liberty depends.

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11. Mahesh Chandra (1983), Socio-economic Crimes, N.M. Tripathi Pvt. Ltd. Bombay, p. 120.

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13. Harihar Lal (1974), "Burden of Proof in Income-tax Proceedings", Taxation, Sec. II, p. 52.

14. See, Note 3.

15. The Income-tax Act, (1961), Sections 139(8) 201(1A), 213, 215, 216, 217, 220 provide for charge of interest. The word qualifying charge of interest is "shall", In State of U.P. Vs. Manbodhan Lal (AIR 1957 S.C. 912), State of U.P. Vs. Babu Ram (AIR 1961 S.C. 951) it was held that the use of the word "shall" raises a presumption that the particular provision is imperative, but this prima facie inference may be rebutted by other considerations such as "object and scope of the enactment." Once the charge of interest is conceived as compensatory and not penal, it's mandatory nature should not be doubted.

16. The Income tax Act (1961), Sections 139(8), 201(1A), 213, 215, 216, 217 and 220.

17. Poorna Buscuit Factory Vs. CIT (1975) 99 ITR 41 (A.P); Nagappa M. Vs. I.T.O. (1975) 99 ITR 32 (Kar); CIT (Addl.) Vs. Santosh Industries (1974) 93 ITR 563 (Gujarat).

18. Govindarajee S. Vs. CIT (1982) 138 ITR 495 (Kar), CIT Vs. Himalaya Drug Co. (1982) 135 ITR 368 (Allahabad.)

19. The Income-tax Act (1961), Proviso to Section 139(8)(a), S.215 (ii) etc.

20. The Income tax Act (1961), Sections 270, 271, 271(1A), 271B, 272A, 272B, 273.

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30. C.A. Abraham Vs. ITO, Kottayam (1961) 41 ITR 425 (S.C.); CIT Vs. Bhikaji Dadabhai & Co. (1961) 42 ITR 123 (S.C.).

31. John Bros. Vs. Union of India (1970) 77 ITR 107 (S.C.), p. 116.

32. CIT Vs. Ramchandra Singh (1976) Tax L.R. 151, p. 152.

33. Report of the Comptroller and Auditor General of India (1984-85), Union Government (Civil), Revenue Receipts, Volume II, Direct Taxes.

34. AIR 1978 S.C. 597.

35. Hillenbrand Vs. IRC (1966), 42 T.C. 617; Amis Vs. Colls (1960), 39. TC 148, cited in Pritchard W.E., Ian J. Jones, Back Duty (1976), Butterworths, London, p. 95.

36. McDowell & Company Ltd. Vs. CTO (1985) Taxation 77(3)-150 (S.C.).

37. Shakespeare Act IV, Scene I, Merchant of Venice: You take my house when you do take the property that doth sustain my house; You take my life when you do take the means whereby I live.