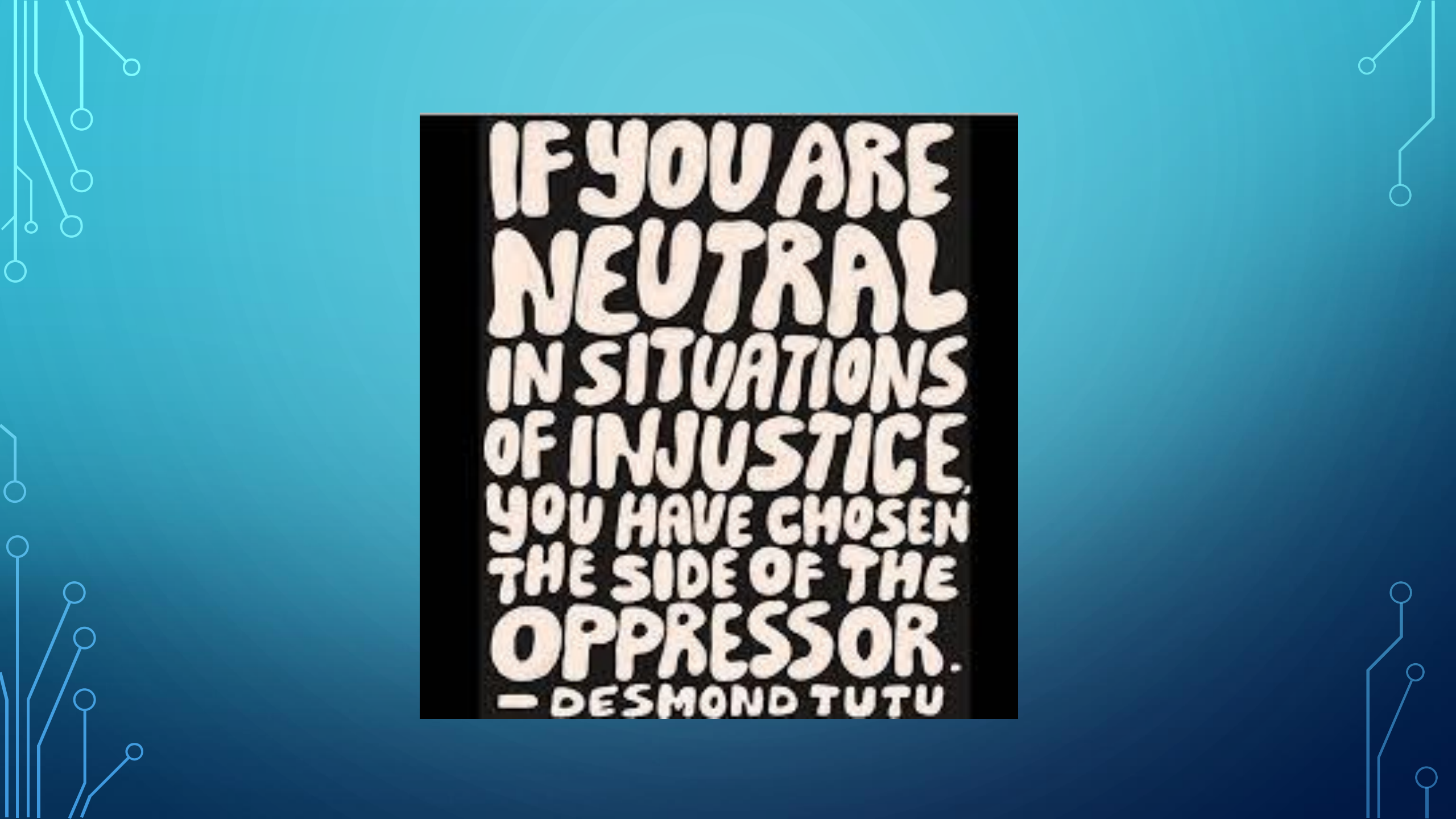




-PAVAN VED

# REMEDIES AGAINST ABUSE OF POWER BY INCOME TAX AUTHORITIES



**IF YOU ARE  
NEUTRAL  
IN SITUATIONS  
OF INJUSTICE,  
YOU HAVE CHOSEN  
THE SIDE OF THE  
OPPRESSOR.  
— DESMOND TUTU**




## DISCRETION - MEANING

- All statutory authorities have been vested with discretion in order to carry out the functions assigned to them under the Act. This discretion has to be exercised reasonably and for the purpose for which they have been conferred.
- The discretion is not to be exercised arbitrarily and capriciously and must be backed by cogent reasons based on objective materials.



# ABUSE OF POWER


- A wrongful exercise of discretionary power can be categorized as an “Abuse of power” by the authority. This abuse of power can broadly be classified in following types:
  - A) exercising the jurisdiction where there is none
  - B) refusing to exercise the jurisdiction in the place and manner where it ought to have been exercised.
  - C) Violation of the principles of natural justice
  - D) Exercise of the power in wrongful manner.
- Broadly speaking, in cases A, B and C above apart from the remedies of regular appeal, the assessee can challenge the action of the authorities in writ petitions before the High Court.
- In case D above, apart from challenging the merits of the decision made by the authority in regular appeal, the assessee can seek to make complaints regarding the conduct of the officer where the conduct is driven by personal vendetta or malice. The complaints can be made to Superior authorities/Vigilance department/criminal complaints under IPC as the case may be. It is however to be borne in mind that these complaints by themselves will not be redressal for the wrongful order made by the officer. The order being a judicial/quasi judicial order will have to be set aside in appropriate proceedings which will have to be separately initiated by the assessee in appropriate appellate fora.



## INSTANCES OF ABUSE OF POWER AT THE LEVEL OF ASSESSMENT AND APPEAL


Most often than not we find that the assessing officers do not exercise the discretion vested in them in the rational and objective manner i.e. by taking a view which a reasonable person would take in the circumstances. This can result in high pitched assessments because the assessing officer has wrongfully/wilfully

- Ignored binding decisions / instructions / circulars cited before him
- Failed to give benefit of the decisions/circulars in his knowledge particularly those in favour of the assessee which are applicable to the facts of the case
- Failed to consider the replies and arguments submitted by the assessee and meeting them with requisite reasons.
- Failed to record the inquiry results which are in favour of the assessee or could give benefit to him.
- Distinguished decisions of higher courts on frivolous and untenable grounds
- Placed the onus of proof on the assessee when in fact it lies on the department.
- Denied proper opportunity of hearing to the assessee or failed to confront the assessee with the material gathered behind his back thereby violating the principles of natural justice.



## INSTANCES OF ABUSE OF POWER AT THE LEVEL OF ASSESSMENT AND APPEAL

- It is settled law that refusing to exercise the power where it ought to be exercised is also an abuse of power. Some examples of culpable omissions are:
  1. Not deciding stay petition
  2. Making recovery of whole or part of demand without deciding stay petition by Assessing Officer or by CIT (A) or by PCIT.
  3. Levying penalty even before appeal decisions because facts would become final after appeal.
  4. Withholding refund without any reason or with frivolous reason particularly when the amounts are large.
  5. Not giving appeal effect in time and withholding refund.
  6. Not releasing seized material in time.
  7. Retaining seized materials / assets not used in assessment
  8. Browbeating the assessee to give in to unnecessary demands by threatening to issue notices under 147 or attachment of bank accounts or threatening with prosecution



## INSTANCES OF ABUSE OF POWER BY THE SEARCH TEAM

- Abuse of powers by search team:
  1. Forcible disclosure
  2. Continuing search till midnight or overnight
  3. Compelling searched party to create incriminating evidence.
  4. Threatening the searched party and misleading the party by suggesting disclosure to save penalty and reduced rate of taxation.
  5. Collecting tax and penalty then and there or by post dated cheques.



- The authorized officer in search has the power to examine a person on oath and record his statement. But they often abuse this power to extract and record statements of undisclosed income. This forcible disclosure has been frowned upon by the Courts and law makers alike. The Finance Minister had made a statement in the Parliament that no forced surrender will be obtained at the time of search or survey. The CBDT has issued circular dt March 10,2003 whereby it has been clarified that no confessional statement for surrender of additional income will be forcibly obtained at the time of search and survey. The assessee can refuse to make a disclosure citing the aforesaid circular. Such forcible disclosures are void ab initio.
- In case the disclosure has been made under duress the assessee can promptly retract it after the search particularly when there is no corresponding evidence to match the disclosure. The assessee should also refuse to pay tax on the disclosed amount thus furthering his stand that the disclosure was obtained under duress. However, if there is corresponding evidence of undisclosed income then the disclosure could be tricky to retract. Since the assessee has a right to revise his returned income, he also has a right to retract his disclosure.
- It is also to be noted that the authorized officers in a survey under section 133A have no power to extract a disclosure and any such disclosure extracted will be without the authority of law and therefore will have no evidentiary value.

## SOME TIPS AND REMEDIES FOR ASSEESSEES UNDER SEARCH



- The assessee should firmly and calmly handle the pressure during the search proceedings keeping in mind his legal rights and should actively see that no false evidence are material are planted or created by the search team.
- The assessee can approach the human rights commission for violation of his rights if need be. In the case of Rajendra Singh Vs. Income tax Officer, Hon'ble Bihar HRC observed that taking statement in midnight is violation of Human Rights. Hon'ble Commission awarded compensation to the assessee.
- Collecting post dated cheques for taxes and penalties is a practice which has been deprecated by the High Court of Delhi in Digipro Import & Export Pvt. Ltd vs. UOI (Delhi High Court) 82 taxmann.com 206

## SOME TIPS AND REMEDIES FOR ASSEESSEES UNDER SEARCH

- In cases of high pitched assessments, always file the stay application before the CIT(A) for stay of demand under the inherent powers that are vested in them to give interim relief during the pendency of appeal. The AO can be then requested to refrain from recovery proceedings till the stay petition is decided by the CIT (A). If the stay petition is not decided or decided adversely then the order can be challenged in higher fora. This is a better option than requesting the AO to stay the recovery who will almost never do it because of pressure on him for recovery of demand. **KEC international ltd. vs. Balakrishnan 251 ITR 158 Bombay HC**
- In cases of withholding of refunds or refusing to defreeze the bank accounts, it is always a good idea to send a notice to the assessing officer appraising him of the financial difficulty faced by the assessee alongwith a rough estimate of financial loss caused to the assessee due to such inaction. This notice/letter/intimation can later serve as a base to pitch a claim for compensation for wrongful withholding in writ petitions or proceedings before appropriate courts. In this way the assessee can claim more than 9% interest which is given in case of delayed appeal effect refunds.

## SOME TIPS AND REMEDIES FOR ASSEESSEE FACING HIGH PITCHED ASSESSMENTS AND RECOVERIES

- Assessee should always give a Written submission with respect to the replies given by them thereby bringing on record all the relevant material before the assessing officer.
- The officer can be and should be apprised of the fact that the issue in hand is covered by decision of any higher forum and he is bound by the rule of precedents and judicial discipline to follow them.
- The issue can be tackled in appeal or revision or rectification if the need so arises.
- If there is patent violation of natural justice then writ jurisdiction of the High Court can be invoked.
- In cases of personal malice and bias complaints can be made to superior officers, vigilance departments and criminal complaints under the IPC and Prevention of corruption Act.

## SOME TIPS AND REMEDIES FOR ASSESSEE FACING HIGH PITCHED ASSESSMENTS AND RECOVERIES

# REMEDIES FOR ASSESSEES FACING INTENTIONAL MALICE OF THE OFFICERS



PROCEEDINGS UNDER THE  
CONTEMPT OF COURT ACT.



PROCEEDINGS UNDER THE  
IPC FOR MALAFIDE ACTIONS.



FILING COMPLAINTS ON THE  
ADMINISTRATIVE SIDE.

# CONTEMPT PROCEEDINGS

- In case the assessing officer refuses to follow the specific decision of the court on the issue in hand then his conduct can amount to contempt of court and a contempt petition can be filed in the concerned court.
- It is to be noted that the assessing officer can refuse to follow the decision of the higher court only when the operation of the decision has been stayed in further proceedings and not otherwise. A mere pendency of appeal against the decision does not entitle the officer to refuse to abide by the decision.
- In case the assessing officer refuses to follow the binding precedents then he should be appraised of the fact that his conduct is violative of judicial discipline for which there can be adverse consequences.

## RULE OF PRECEDENTS AND JUDICIAL DISCIPLINE

**In Baradakanta Mishra v. Bhimsen Dixit 1973 SCR (2) 495 the Hon'ble Supreme Court elaborated the scope of contempt and held that not following the binding precedent of the Higher courts would amount to contempt. The Hon'ble supreme court held**

“The conduct of the appellant in not following the previous, decision of the High Court is calculated to create confusion in the administration of law. It will undermine respect for law laid down by the High Court and impair the constitutional authority of the High Court. Ms conduct is therefore comprehended by the principles underlying the law of Contempt. The analogy of the inferior court's disobedience to the specific order of a superior court also suggests that his conduct falls within the purview of the law of Contempt. Just as the disobedience to a specific order of the Court undermines the authority and dignity of the court in a particular case, similarly the deliberate and malafide conduct of not following the law laid down in the previous decision undermines the constitutional authority and respect of the High Court. Indeed, while the former conduct has repercussions on an individual case and on a limited number of persons, the latter conduct has a much wider and more disastrous impact. It is calculated not only to undermine the constitutional authority and respect of the High Court, generally, but is also likely to subvert the Rule of Law 'and engender harassing uncertainty and confusion in the administration of law. Our view that deliberate and malafide conduct of not following the binding precedent of the High Court is contumacious does not unduly enlarge the domain of contempt. It would not stifle a bona fide act of distinguishing the binding precedent, even though it may take out to be mistaken. As a result of the foregoing discussion, we think that the High Court has rightly found the appellant guilty of contempt.”

## RULE OF PRECEDENTS AND JUDICIAL DISCIPLINE

**In Subramanian, ITO v. Siemens India Ltd. [1985] 156 ITR 11. The Bombay high court held as under:**

"So far as the legal position is concerned, the ITO would be bound by a decision of the Supreme Court as also by a decision of the High Court of the State within whose jurisdiction he is (functioning), irrespective of the pendency of any appeal or special leave application against that judgment. He would equally be bound by a decision of another High Court on the point, because not to follow that decision would be to cause grave prejudice to the assessee. Where there is a conflict between different High Courts, he must follow the decision of the High Court within whose jurisdiction he is (functioning), but if the conflict is between decisions of other High Courts, he must take the view which is in favour of the assessee and not against him. Similarly, if the Income-tax Appellate Tribunal has decided a point in favour of the assessee, he cannot ignore that decision and take a contrary view, because that would equally prejudice the assessee."



# PROCEEDINGS UNDER SECTION 166 IPC READ WITH SECTION 293 INCOME TAX ACT

- All officers under the Income tax Act being public servants are obligated to carry out their functions and duties as prescribed. We often come across instances where they fail to do so for ulterior motives some examples being: Withholding of refund, failure to pass orders giving appeal effect, delaying to decide the stay petitions and refusing to return the seized assets etc. In cases these actions are laced with malice and ulterior motives apart from the civil remedies, a criminal action can also be initiated against the officer personally. In this regard, section 166 IPC comes into play

## SECTION 166 IPC

- “166. Public servant disobeying law, with intent to cause injury to any person. – Whoever, being a public servant, knowingly disobeys any direction of the law as to the way in which he is to conduct himself as such public servant, **intending to cause**, or knowing it to be likely that he will, by such disobedience, cause **injury to any person**, shall be punished with simple imprisonment for a term which may extend to one year, or with fine , or with both”.

Thus if the officer refuses to pass orders within the time frame prescribed under the Act, rules, circulars or judicial decisions, then a complaint can be filed under section 166 IPC provided it can be shown that actions of the officer were willful, or with both”

# SECTION 293 INCOME TAX ACT

- It is pertinent to note that section 293 of the Income Tax Act protects the officers from acts done in good faith.

The said section reads as under:

“No prosecution suit or other proceedings lies against the government or any officer of government for anything in good faith done or intended to be done under this Act”

A malafide action or a willful disobedience of the statutory dictats cannot be said to be an acts done in good faith under the Act and therefore the protection will not be available to the officer. Some instances are as follows:

1. Taking absurd view of law and Making recovery even when a stay is operative. *Jwala Prasad Vs. Verma* 78 ITR 352
2. Not following binding decisions- No protection. *Pragdas Vs. ITO* 18 ITR 757

Therefore the officer cannot take benefit of the protection available under the section if his guilty of any willful default or omission towards his duty.

- complaints can be filed in the jurisdiction where the offence is committed i.e. the place where the officer hold the office
- Care may be taken to ensure that the prosecution is filed within the limitation period if any applicable to the case. Waiting till the decision of appeal against the order may time bar the remedy of prosecution in some cases.
- Sanction of the authority prescribed under section 197 CRPC is necessary before the cognizance is taken by the Magistrate which many a times is tricky to obtain.

SOME TIPS FOR  
FILING  
COMPLAINTS  
U/S 166 IPC

- There is a presumption of good faith in favour of the officer. Therefore the assessee will have to rebut the presumption and prove that the officer was guilty of a willful default. It may be noted that proof of actual bias is not necessary. A willful and deliberate refusal to do a statutory duty without any reasonable cause despite being requested to do so, ipso facto amounts to “malice in law” and may render the officer liable for prosecution In Ravi Yashwant Bhoir versus District Collector Raigarh & Others [2012 (4) SCC 407] Supreme Court while describing “malice in law” held that

“It is a deliberate act in disregard to the rights of others. It is an act which is taken with an oblique or indirect object. It is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite.”

- The above remedy, it is to be noted is in addition to the civil remedies for the issues at hand and the criminal prosecution of the officer will not result in automatic setting aside of the offending orders

## SOME TIPS FOR FILING COMPLAINTS U/S 166 IPC



## COMPLAINTS ON ADMINISTRATIVE SIDE

The contumacious conduct of the offending officer can also be complained to the superior officers in the department. Supreme court has held in **Krishna Prasad Verma (D) Thr. Lrs. vs State Of Bihar** that

(a) if there are extraneous considerations for contumacious conduct then disciplinary enquiry should be initiated and

(b) even in cases where there is no extraneous influence then such matters ought to be considered while framing the service record of the officer.

The court held that

- “In case a judicial officer passes orders which are against settled legal norms but there is no allegation of any extraneous influences leading to the passing of such orders then the appropriate action which the High Court should take is to record such material on the administrative side and place it on the service record of the judicial officer concerned. These matters can be taken into consideration while considering career progression of the concerned judicial officer. Once note of the wrong order is taken and they form part of the service record these can be taken into consideration to deny selection grade, promotion etc., and in case there is a continuous flow of wrong or illegal orders then the proper action would be to compulsorily retire the judicial officer, in accordance with the Rules. We again reiterate that unless there are clear-cut allegations of misconduct, extraneous influences, gratification of any kind etc., disciplinary proceedings should not be initiated merely on the basis that a wrong order has been passed by the judicial officer or merely on the ground that the judicial order is incorrect.



- Investigation wing should be decentralised to avoid congregation of power in hand of a few officers only.
- Power to award costs should also be given to CIT(A) and should be awarded in deserving cases particularly where the AO has made additions without giving opportunity and in violation of binding decisions.
- The association should create a forum where the tax practitioners can report their problems and collective action can be taken against offending practices of particular officers.
- CIT (A) are subordinates to the CCIT who has target for tax collection. These CIT(A) many a times refrain from deleting high pitched additions lest it would disrupt the tax collection target of their superior CCIT. This is an impingment on the independence of CIT (A). Therefore the CIT(A) when he is acting as one, should be independent under law ministry like ITAT and should not be under any subordination of the CCIT

SOME ISSUES WHICH  
SHOULD BE TAKEN  
UP BY THE  
ASSOCIATIONS OF  
TAX PRACTITIONERS

$$(1.00)^{365} = 1.00$$

$$(1.01)^{365} = 37.7$$

Doing nothing at all

Vs.

Small consistent effort