



Prosecution for Income-tax offences

Steep rise in complaints and convictions

May 2018



Backdrop

Consequences for non-compliance prescribed under the act

The Income-tax Act, 1961 ("the Act") seeks to enforce tax compliance in a three fold manner:

Imposition of interests

[234 A,B,C 201(1A),
220(2)]

Imposition of penalties

[270A – 275]

Prosecutions

[275A – 280D]

The idea of undergoing imprisonment if convicted of offences can be a strong deterrent from brazen tax evasion and non-compliance

Statistics of the number of prosecution cases

Table below shows the status of prosecutions launched, cases decided viz. convicted, compounded and acquitted from Financial ("FY") 2010-11 to FY 2014-15.

FY	Prosecution Launched	Cases Decided	Convictions	Compounded	Acquitted (in percent)
2010-11	244	356	51	83	222 (62.4)
2011-12	209	593	14	397	182 (30.7)
2012-13	283	265	10	205	50 (18.9)
2013-14	641	664	41	561	62 (9.3)
2014-15	669	976	34	900	42 (4.3)

Source: CAG Report 2016

**In FY 2017-18 there were 2225 cases launched of which 50% preferred compounding.
The Department is using prosecution mechanism in higher number of cases and acquittals substantially are decreasing**

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Summary of the offences

Summary of the offences

1. Search Related

Section 275A & 275B

2. Transfer of property

Section 276 & 276A

3. Failure to pay the government and includes evasion of taxes

Section 276B, 276BB, 276C(1), and 276C(2)

4. Failure to furnish return of income/ documents

Section 276CC & 276D

5. False verification and falsification of documents

Sec 277, 277A

6. Abetment

Sec 278

7. Subsequent offences

Sec 278A

Punishment is imprisonment along with fine



Few important offences

Few important offences

Section 276B – Failure to pay TDS / DDT

Default of non-payment of 'Tax Deducted at Source' (TDS)

- Non-deduction of tax vs. deduction and non-payment
- Late payment
- Insignificant amount

Default of non-payment of 'Dividend distribution tax' (DDT) u/s 115-O

Term of punishment

Reasonable cause

Few important offences

Section 276C – Wilful attempt to evade tax



Elements of s.276C(1)

- wilfully attempts to
- evade tax, penalty or interest
- chargeable or imposable or under reports his income



Elements of s.276C(2)

- wilfully attempts to
- evade payment of tax, penalty or interest

Issues under section 276C(1)

- Inclusion of under reporting
- Reduction of loss: Whether prosecution can be initiated?
- Whether assessment is necessary for prosecution under section 276C(1) ?
- Reasonable cause not applicable

Few important offences

Section 276CC and Section 278



Section 276CC – Wilful failure to furnish return

- **Evasion of tax** is sine qua non for section 276CC
- **Delay in filing of Return**
- **Exceptions** are given in the Proviso, however the same is applicable only in case of failure under section 139(1) and not in case of section 142, section 148 and section 153A



Section 278 – Abetment of false returns, etc.

- Abetment **not defined in the Act** and hence IPC may be relied on.
- Includes **any person** including professionals
- Whether **commitment of offence** is necessary? - Faguna K Nath v. State of Assam (AIR 1959 SC 673)
- **Acquittal of person alleged to have committed the offence** – Jamuna Singh v. State of Bihar (AIR 1967 SC 553)



Offences by Companies - Persons responsible

Section 278B of the Act

Elements of s. 278B(1)

- Company along with
- every Person who
- Was in charge of and
- Was responsible to
- For the conduct of business
- No punishment if proved that offence was without his knowledge or he exercised due diligence

Elements of s. 278B(1)

- Director, Manager, Secretary or other officer
- If it is proved that
- Offence committed with their consent or connivance or neglect on their part

"company" means a body corporate, and includes —

- (i) a firm and
- (ii) an association of persons or a body of individuals whether incorporated or not

"director", in relation to —

- (i) a firm, means a partner in the firm
- (ii) any association of persons or a body of individuals, means any member controlling the affairs thereof.

Nature of liability

- The principal liability under section 278B of the Act is that of the company.

Can one argue that other persons mentioned in sub-section(1) and sub-section (2) are vicariously liable i.e., they could be held liable only if it is proved that the company is guilty of the offence alleged?

Anil Hada v. Indian Acrylic Ltd. A.I.R 2000 S.C. 145,

Sheoratan Agarwal v. State of Madhya Pradesh AIR 1984 S.C. 1824

- Important law laid down by Supreme Court in the case of SMS Pharmaceuticals v. Neeta Bhalla & Anr. [2005] 148 Taxman 128 (SC)
 - The person accused **should be in charge** of, and responsible for the conduct of business **at the time the offence was committed**.
 - Merely being a director of a company is not sufficient.
 - Managing and joint director would admittedly in charge.



Concept of Mens Rea

Introduction

- Integral to **criminal jurisprudence**.
- Section 278E places the **burden of proving** the absence of Mens rea upon the accused.
- **Constitutional validity** of the said provision was upheld:
 - *Selvi J. Jayalalitha v. UOI and Ors. (2007) 288 ITR 225 (Mad) (HC)*

Section 278AA – Reasonable cause

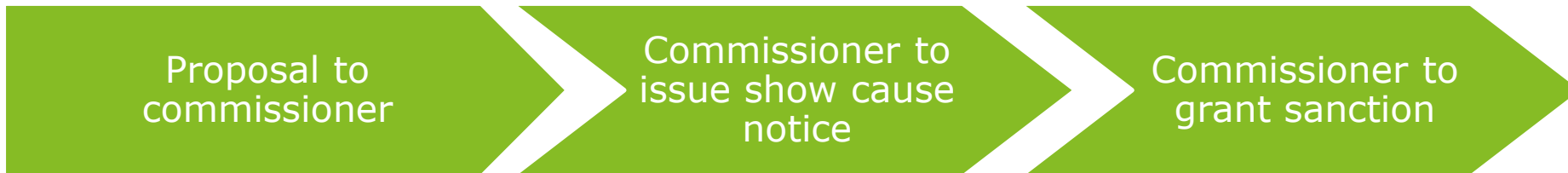
- a) No person shall be punishable for any failure if he proves that there was reasonable cause for such failure as given in section 276A, section 276AB and **section 276B**. Thus, the application of this section is restricted to certain offences.
- b) However, one has to consider the implication of section 273B of the Act, which requires one to give reasonable cause for deletion of penalty.



Procedure

Procedure governing prosecution proceedings

Procedure to be followed by the Department



Procedure before the Court





Common issues in respect of prosecution

Common issues (1/2)

No Limitation

- *K.M.A. Ltd. vs. ITO [(1996) Tax LR 248 (Bom.)]*
- *Vishnoo Kamat vs. First ITO [(1994) 207 ITR 1040 (Bom)]*
- *UOI vs. Gupta Builders P. Ltd. [297 ITR 310 (Bom)]*

Finding in assessment / penalty proceedings

- *K.C. Builders & Anr. vs. ACIT [(2004) 265 ITR 562 (SC)]*
- *Indian Plywood Manufacturing Co. Ltd. vs. Dave (PS) [(2007) 291 ITR 430 (Bom)]*
- *ITO vs. Nandlal and Co. [(2012) 341 ITR 646 (Bom)]*

Non-initiation of penalty

- *134 ITR 0397 (Del) Rajinder Nath vs. M.L. Khosla, Income-tax Officer & Anr*
- *Universal Supply Corporation vs. State of Rajasthan 206 ITR 222(Raj)*

Common issues (2/2)

Setting aside of assessment order

- *Thanjai Murasu & Ors. vs. ITO 247 ITR 0465(Mad)*
- *Kingfisher Airlines Ltd. vs. Income Tax Department, 265 ITR 240 (Kar)*

Pendency of appellate proceedings

- *Sasi Enterprises vs. ACIT – 361 ITR 163(SC)*

Other arguments available

- *322 ITR 158(SC) CIT vs. Reliance Petroproducts (P) Ltd.*
- *T. Ashok Pai vs. CIT – 292 ITR 11(SC)*

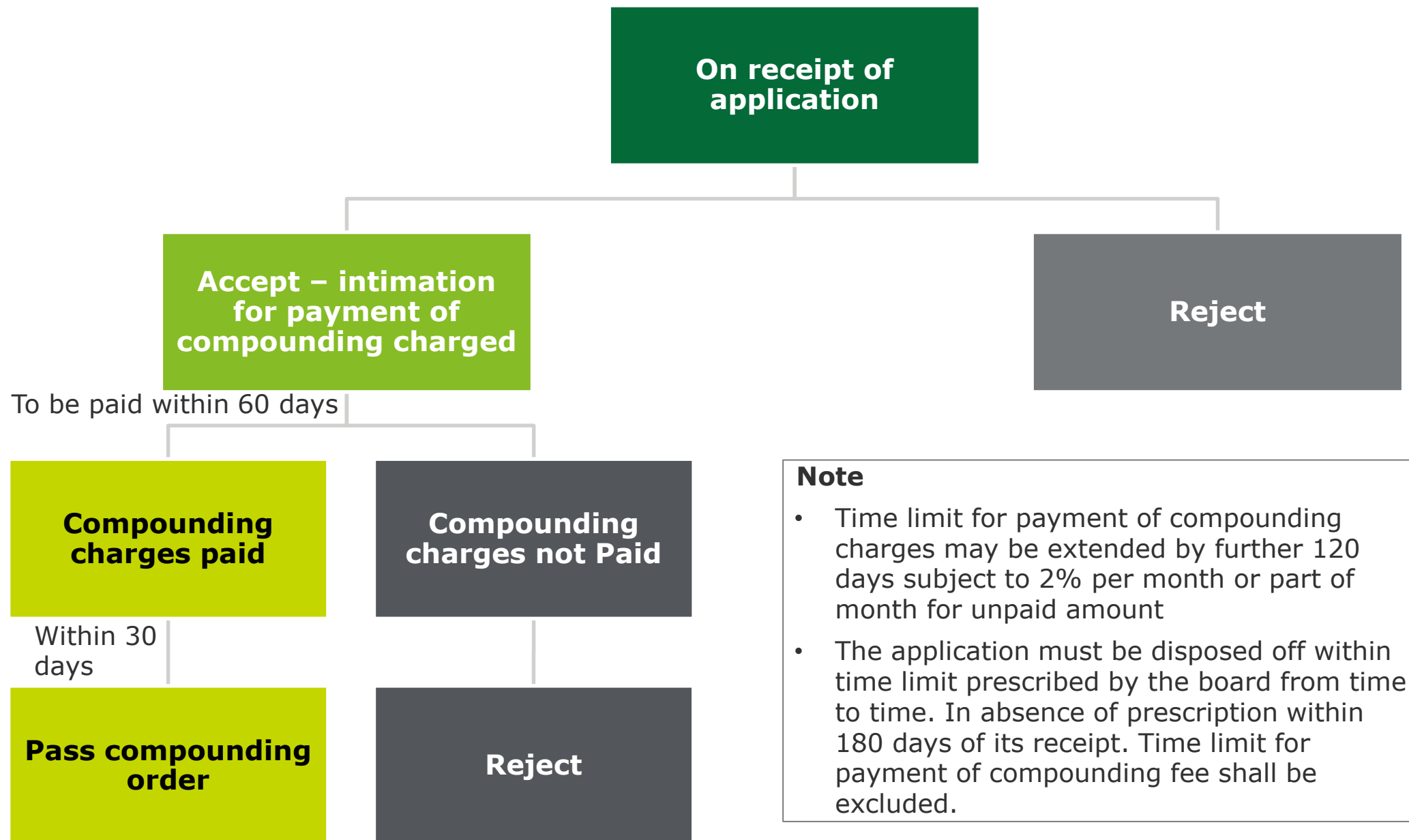


Compounding of offences

Introduction

- Sec 279(2) of the Act provides for compounding either **before or after the institution of proceedings.**
- **Guidelines have been issued by the CBDT** for compounding of offences dated 23-12-2014. Following are the important topics covered by the said guidelines
- **Eligibility conditions**
 1. Application to jurisdictional CCIT/DGIT in prescribed format
 2. Payment of outstanding tax, interest, penalty and any other sum due etc.
 3. Undertaking to pay compounding charges which includes compounding fee, prosecution establishment expense and litigation expense including counsel fees, if any. Which is communicated by the CCIT/DGIT
 4. Undertaking to withdraw appeal/ make appropriate modification of grounds in relation to offence under consideration.

Compounding procedure



Offences not compoundable (1/2)

1. Category A offence, wherein compounding has been requested in past under same section on 3 occasions or more.
2. Category B offence, other than the first offence.

First offence means

offence committed prior to (i) issue of SCN (ii) intimation (iii) launching, in relation to prosecution which ever is earlier. Or

Offence not detected but voluntarily disclosed before filing application.

(First offence is to be determined with reference to each section)

3. Involved in Anti-national/terrorist activity
4. Convicted by court for an offence under any other law, wherein punishment was imprisonment for 2 years or more, which has a bearing on the offence sought to be compounded
5. Offence having bearing on a case under investigation by ED,CBI, Lokpal, Lokayukta or other central or state agency.
6. Convicted by court of law under Direct Taxes Laws.

Offences not compoundable (2/2)

7. Offences for which complaint was filed with competent court 12 months prior to receipt of application for compounding.
8. Offences for which application for plea-bargaining is pending or did not work out.
9. Any other offence, considered not fit by CCIT/DGIT in view of its nature and magnitude.

Classification of Offences

The offences are classified under two categories as follows:

Category A –

Sec 276B, 276BB, Sec 277 & 278 in reference to category A offences.

Category B –

Sec 275A, 275B, 276, 276A, 276C(1), 276C(2), 276CC, 276CCC, 276D, 277A, Sec 277 & 278 in reference to category B offences.

Authority Competent of Compound an offence

Authority	Monetary Limit
CCIT/DGIT having Jurisdiction	Category A – no limit Category B – less than 10 lakhs
CCIT/DGIT with recommendation of committee comprising 3 officers	Category B – excess of 10 lakhs

Authority Competent of Compound an offence

Offence under section	Compounding fees
276B	1 st app - 3% per month of amount of tax Subsequent app – 5% per month
276C(1)	100% of the amount sought to be evaded
276C(2)	3% per month of the amount sought to be evaded
276CC/ 276CCC	2% per month of tax & interest determined
277 / 278	Same as for offence under respective section 10% of the compounding fee from the co-accused
Other offences	Competent authority may determine subject to minimum Rs. 25,000

Prosecution establishment charges will be charged at the rate of 10% of compounding fees subject to minimum of Rs. 25,000 in addition to litigation expenses



Key aspects / takeaways

Key aspects / takeaways

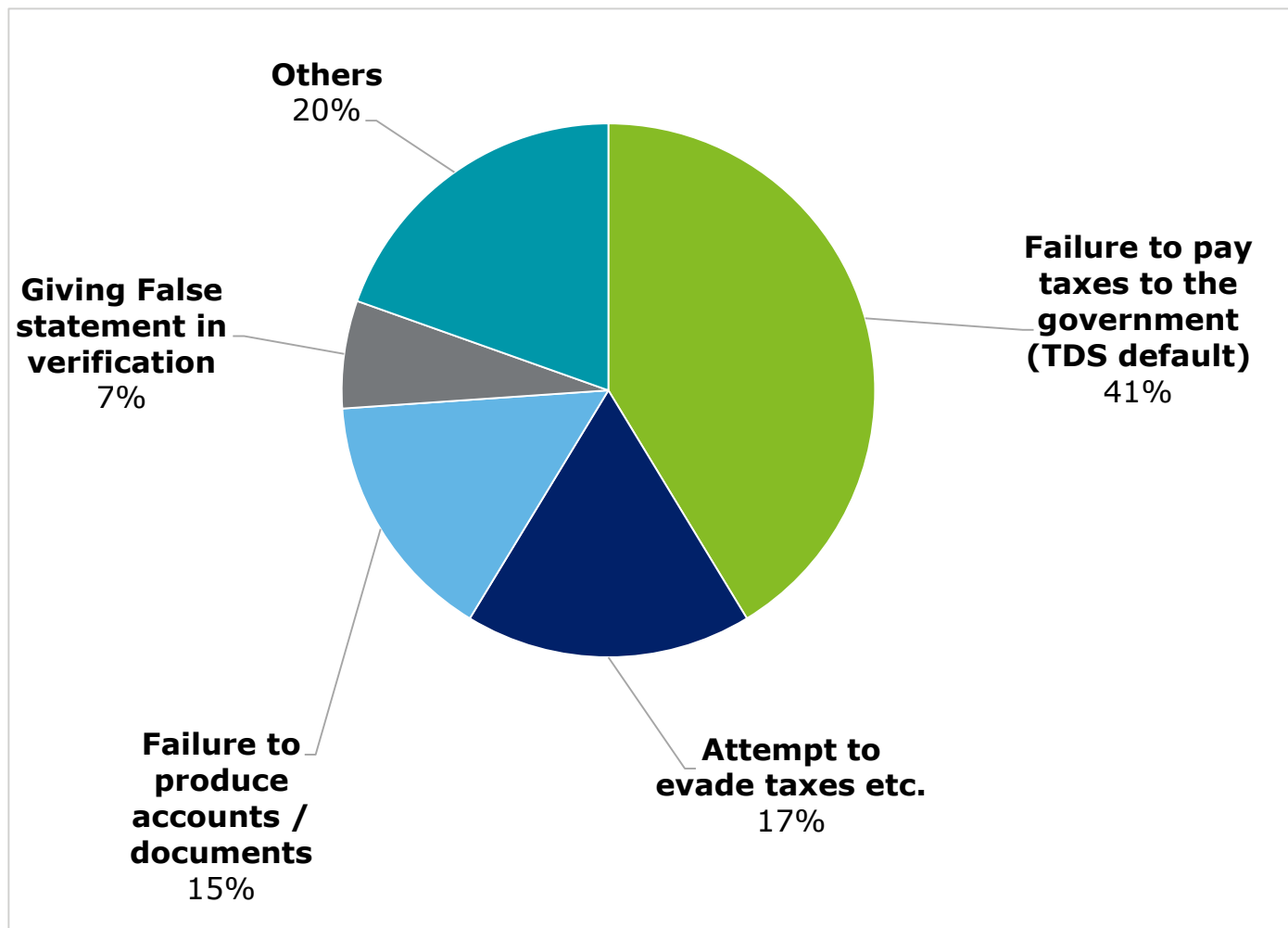
- 1 Consider provisions which may grant immunity (section 245H, section 270AA, section 291)
- 2 Valid sanction for launching prosecutions
- 3 Avail opportunity of being heard
- 4 Filing of writ if sanction not in order
- 5 Consider compounding of offences
- 6 Summons case and warrants case
- 7 Provisions of Indian Penal Code attracted in addition to offences committed under the Act



Poll Results

Poll 1:

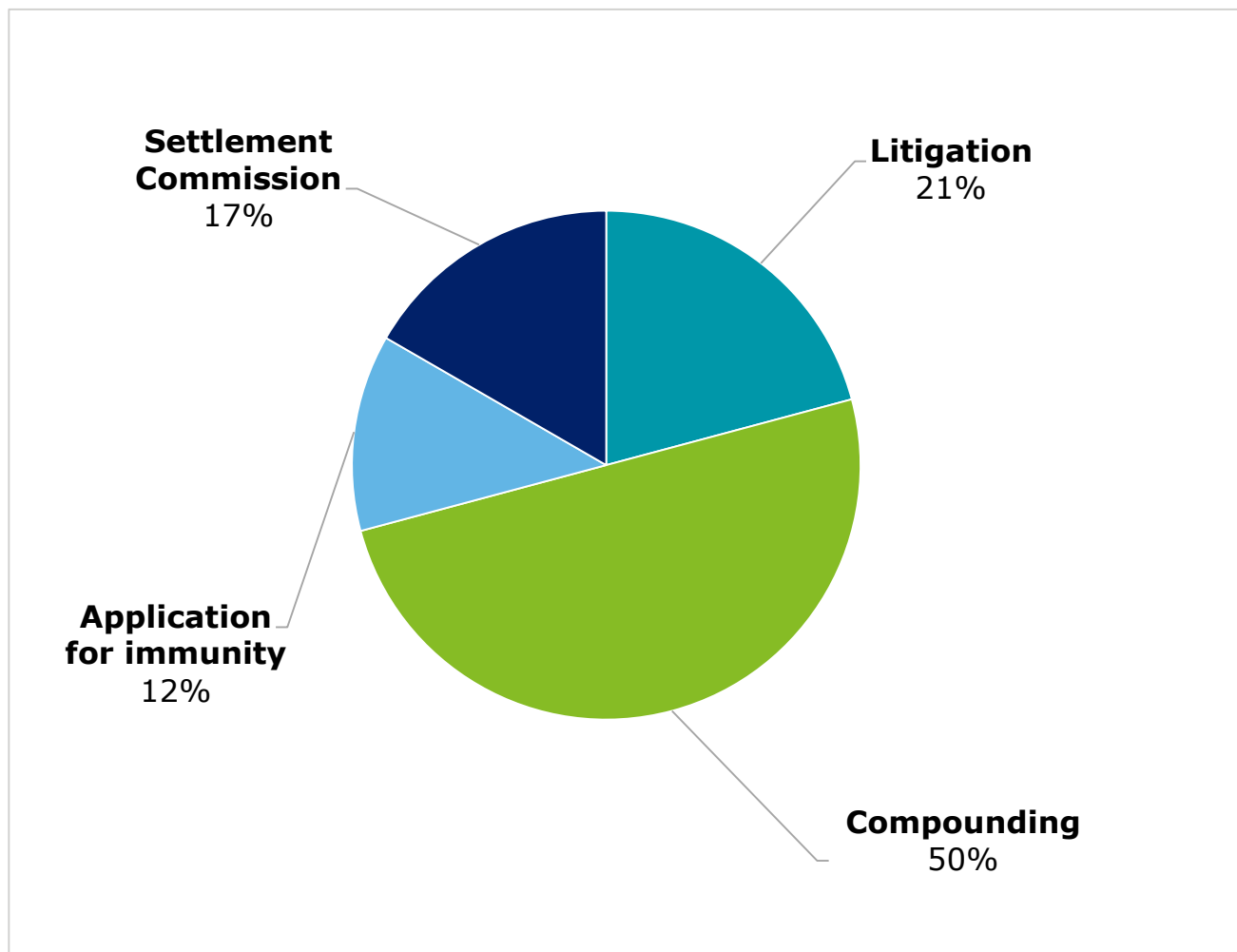
Which offence, according to you, is frequently faced by your organization ?



As per the responses shared during the poll, **most of the prosecution cases relate to TDS defaults**

Poll 2:

Which, in your opinion, is the best way forward in a prosecution case ?



According to the poll, most popular approach to mitigate prosecution cases is **compounding of offences.**

One declares so many things to be a crime that it becomes impossible for men to live without breaking laws

- Ayn Rand



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