

## “Mensrea In Fiscal Offences”

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### ***Abstract***

For determining the instance whether any crime has been committed or not, is to be evaluated on certain parameters. The most important amongst them is the presence of mensrea or mental intention in the commission of a crime. In fiscal offences the general principles of criminal law are given a different perspective and are analyzed to determine in commission of an offence. As in any criminal offence it is presumed that the person is innocent until proven guilty but in fiscal offences the presumption of innocence is taken. Under the Income Tax Act, 1961 various offences have been defined and punishments regarding the same has been provided. But the scope of interpretation is still left with the courts to determine the culpability and penalty

### **INTRODUCTION**

Act and Intention are two wheels of the wrongdoing which when run together to establish wrongdoing. Actus Reus and Mensrea are two fundamentals of wrongdoing. One can't be rebuffed for a demonstration submitted without goal. In this examination we will manage Mensrea in financial offenses. Thus so as to hold individual obligated there must be simultaneousness of Act and intention. Mensrea is reference to mental component and its need in deciding the risk under the monetary or money related offenses will be examined. Mensrea has consistently been a significant in the English law and it will be seen whether it assumes comparative job in the personal assessment law of the India. Mensrea implies an unfair expectation. The adage implies that a demonstration doesn't itself make one blameworthy except if the psyche is additionally liable. The negligible commission of a criminal demonstration or infringement of law isn't sufficient to establish a wrongdoing. Mens Rea is a specialized term. It implies some accountable state of the mind, the non-appearance of which on a specific event negatives the state of wrongdoing. It is one of the fundamental elements of criminal obligation. A criminal offenses is said to have been carried out just when a demonstration, which is viewed as an offense in law, is done intentionally. Thus, a demonstration becomes criminal just when finished with a liable personality.

Monetary offenses might be characterized as any money related wrongdoing and it includes component of wrongdoing or not will be talked about further on.

### **ELEMENTS OF CRIME**

Crime is an act committed or omitted against the existing law and which is punishable. 'An intentional act in violation of the criminal law committed without defense or excuse, and penalized by the state'. A crime is an *act* in violation of a *criminal law* for which a *punishment* is prescribed; the person committing it must have *intended* to do so and must have done so without legally acceptable *defense* or *justification*

Crime has been defined in various manners by different philosophers and some are as follows:

Paul Tappan

"Crime is an intentional act in violation of the criminal law (statutory and case law), committed without defense or excuse, and penalized by the state as a felony or misdemeanor."

Donald Taft

"Crime is a social injury and an expression of subjective opinion varying in time and place. "

"Halsbury defines crime as an unlawful act which is an offence against the public and the perpetrator of that act is liable to legal punishment. "

Crime therefore basically is an offence against the society at large which is prohibited the law of the State and is therefore punishable. In order to constitute crime there must be *corpus delicti* which means that the crime must be proved prior to convicting the person for the act or omission. Crime comprises of two elements: *Actus Reus* and *Mens Rea*. Well these two elements have been derived from the maxim "*actus reus non facit reum nisi mens sit rea*" which carries the meaning that an act is not punishable unless done it is done with a guilty mind. This maxim carries a long history. It was scrapped out by Justice Coke from the sermons of Augustin which read as "*reum Linguae Non Facit Nisi Mens rea*".

**Actus Reus:** A guilty act or where a person must commit a forbidden act or neglect a mandatory act before he or she can be subjected to criminal sanctions. It is the literal doing of an action which would constitute the crime. Mere imagination of committing murder would not constitute act. Therefore the facts and circumstances are to be taken into consideration in order to determine whether any act or omission has been committed or not.

**Mens Rea:** A guilty mind or where the suspect had a wrongful purpose in mind while carrying out the act. The word guilty mind can be substituted with words like knowingly, negligently or purposely. The intention is stimulated due to motive and therefore the intention of committing crime is taken into consideration. *Mens Rea* in criminal cases are to be proven in order to hold person liable.

So as to comprise a wrongdoing both these components must agree or match. On account of **R v. Cooper**<sup>1</sup> the court held that distinguishing the beginning and completion purpose of the actus Reus of an offense is significant for at two reasons. The principal is the substantive prerequisite that sooner or later, the Actus Reus and Mensrea must harmonize.

On account of **B. Nathulal v. Territory of M.P**<sup>2</sup> the denounced who had applied for the permit and was informed that his permit was prepared yet it would be given to him in next barely any days. He in that conviction obtained nourishment grains which was in overabundance of amount allowed was indicted for the equivalent yet the respectable court cleared him as he had no blameworthy aim. In this way it very well may be induced that a act without a blameworthy mind isn't culpable.

### **IMPORTANCE OF MENSREA**

Well we have just examined with respect to the components of crime and among which we will concentrate on the psychological component or the Mens Rea, its significance in establishing a wrongdoing. Well every perspective or expectation matters while doing the act or its demonstration. The goal might be outcome of certain intention which might be fortunate or unfortunate. Well this idea basically expresses that when an act is accompanied with wretched thought, the act becomes contemptible and for that sole reason the law thinks about a blameworthy perspective. So as to hold an individual blameworthy of a demonstration or act, two significant focuses must be considered-(I) that the act so dedicated was denied by law and (ii) the individual knew about the its prohibition and outcomes. The liability can be depicted through different words, for example, thoughtlessness, carelessness, information, goal and so forth. Mens Rea or the psychological component of crime is a significant piece of criminal law in India just as different nations. Most laws in India contain the component of blameworthy personality or mental state of mind in order to make an act by an individual criminally at risk for discipline. Mens Rea is a quintessence of crime. Without having an intention to act in a way that would hurt the person or property, it would not amount to crime. The existence of Mens Rea infers that the person had the capacity to pick between what was right or wrong.

In Indian Penal Code (IPC), the noteworthiness of word 'Mens Rea' can be followed in two different ways:

1. Every one of the meanings of crime are painstakingly characterized with center around demonstrating the malevolent intention for doing the act. Use of words like – deliberately, deceitfully, intentionally, willfully and so on accentuation the nearness of Doctrine of Mens Rea.

2. In Chapter IV-'General Exceptions', which depends on that no activity would lie yet without blameworthy mental state of mind.

Offense can be characterized as the infringement of law. The word offense is commonly deciphered as a criminal wrong. There are sure offenses that are not made by criminal laws however by various resolutions like tax assessment, national security and so forth are

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<sup>1</sup> (1993) 1 S.C.R. 146.AIR 1966 SC 43

<sup>2</sup> AIR 1966 SC 43

Statutory Offences. The demonstrations those are innately off-base, for example, murder, assault or heinously harming somebody and so forth are offences however acts like driving on an inappropriate side of the street which isn't inalienably off-base but on the other hand is an offence. Such offenses are known as statutory offenses. A few instances of these offenses are:

- Adulteration of nourishment things and medications.
- Tax avoidance or shirking
- Black Marketing, bogus promoting, storing, profiteering and so forth.
- Misappropriation or robbery of open assets or property.
- Misuse of position by local officials in any field of work.

## **FISCAL OFFENCES**

Fiscal means financial and offences means an act prohibited by law which together mean financial offences or economic offences. This offence is one of the most common offences committed globally. It has been increasing day after day. Fiscal offences may involve offences such as fraud with regard to cheque, credit card, mortgage, market manipulation, scams or confidence tricks, tax related crimes etc. The criminal activities involve grabbing opportunities in order to have financial gain. Fiscal offences as defined under the **Article 305 of the criminal code**<sup>3</sup>

### **TYPE OF PEOPLE COMMITTING FISCAL OFFENCES**

1. The organised criminals: this group includes terrorists as well. They are involved in huge frauds in order to financially support their operations and plans
2. Corrupt official who misuse their position and powers to steal the wealth
3. Business Tycoons and executives who window dress their accounts in order to fake the financial position
4. Suppliers, sellers, contractors are also involved in committing fiscal offences.
5. Individuals commit financial offences in order to evade financial liabilities
6. Individual criminals, serials or opportunist fraudster in possession of their

### **LIST OF FISCAL OFFENCES**

1. Bribery and corruption: This involve government officials taking bribe in order to get the work done and also the citizens personally offering bribe to the officials to get certain prohibited work to be done.
2. Credit Card Fraud: This involves using a credit card which has already been revoked, cancelled, lost or stolen with the intention to defraud. It also includes using the credit card number, stealing a person's identity in order to get access to the card.

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<sup>3</sup> Criminal Code of the Kingdom of Spain(1995, as of 2013)

3. Money Laundering: also called the Hawala Transactions. It the process of converting illegitimate money into legitimate money or source.
4. Tax related offences: This offences include acts relating to evading tax liabilities
5. Terrorist financing: It includes using of funds in order to finance
6. Electronic crime

## **MENS REA IN FISCAL OFFENCES**

Offences are acts in violation of law. There are certain acts which are declared wrong or punishable by the different statutes such as taxation, national security etc. The interpretation of this statutes carry presumption that the criminal actions have the element of Mens Rea. It was also held that the court should not presume a person guilty of an act unless the statute states out it clearly. The cardinal principle of English Common law states that person neither be convicted nor punished unless guilty state of mind is proved. In the case of **Allrd v Selfridge**<sup>4</sup>, it was held that “the true translation of Mensrea is an intention to an act which is made penal by the statute or by common law.”

### **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, e.g., understatement of sale consideration with a view to avoid tax.

As of late there has been a recognizable move in the Income-charge Act towards the idea of severe obligation by the reception of different systems like restricting authoritative and legal watchfulness, evacuating words requiring evidence of thought process and throwing the weight of building up nonattendance of rationale on the citizen. Be that as it may, the move doesn't point to a complete inversion of the old thoughts of weight of verification which have kept on impacting even zones where the punitive risk isn't available to genuine contest.

In **Gujarat Travancore Agency versus CIT**<sup>5</sup>, the Supreme Court has thought about s. 276C of the IT Act and has held as under:

"4. There can be no debate that having respect to the arrangements of s. 276C, which talks about wilful disappointment with respect to the defaulter and thinking about the idea of the punishment, which is reformatory, no sentence can be forced under that arrangement except if the component of mensrea is built up."

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<sup>4</sup> [1925] 1 KB 129 at 137

<sup>5</sup>MANU/SC/0332/1989 : (1989) 77 CTR (SC) 174 : (1989) 3 SCC 52

The decision of Supreme Court in **Anwar Ali**<sup>6</sup> case is a milestone in the composition of law identifying with camouflage of salary before 1.4.1964. The accompanying significant focuses were set certain by the court; (I) Imposition of punishment associated with semi criminal procedures; (ii) The weight lies on the income to set up: (a) that the pay has been disguised and (b) that the assessee has intentionally hidden the points of interest of his salary or has purposely outfitted incorrect specifics (accentuation provided). Not many punishments forced under direct expense laws had been maintained by the courts even under the steady gaze of the Supreme Court managing in Anwar Ali's case. The vast majority of these were discovered illogical as the office neglected to demonstrate Mensrea. To beat this trouble the Finance Act, 1964, made two significant changes w. e. f. April 1, 1964. To begin with, from the articulation has disguised the specifics of his pay or intentionally outfitted mistaken points of interest in S.271 (1) (c) "purposely" was excluded. Be that as it may, much after 1.4.1964 different High Courts gave dissimilar perspectives on moving the weight of evidence. Some took the view that the decree in Anwar Ali, s case kept on being great law while the others held that the proportion of Anwar Ali's case was never again material as the weight of evidence had been statutorily moved to the assessee. In this manner even the new Explanation didn't prevail with regards to setting all questions very still.

The idea of Mensrea in monetary offenses have been bolstered just as negated in different decisions. On account of In **Director of Enforcement v. MCTM Corporation Pvt. Ltd**<sup>7</sup>. what's more, Ors , the Hon'ble Supreme Court considered as issue about whether elements of mensrea was vital if there should arise an occurrence of an individual who is found damaging the arrangements of the Foreign Exchange Regulations Act, 1947. The Court saw as under:-

"Mensrea' is a perspective. Under the criminal law, mensrea is considered as the 'liable aim' and except if it is discovered that the 'denounced' had the liable expectation to carry out' the 'wrongdoing', he can't be held 'blameworthy' of perpetrating the wrongdoing. An 'offense' under Criminal Procedure Code and the General Clauses Act, 1897 is characterized as 'any demonstration or exclusion 'made deserving of any law for now in power.

In **Commissioner of Sales Tax v. Rama and Sons, General Merchant, Ballia**<sup>8</sup>, the Allahabad High Court saw as under:- "The standard of mensrea originates from English Criminal Law from times when the law was not systematized. It was said that *actus non facit reum nisi mens sit rea* (the intention and act must both concur to comprise the wrongdoing). The idea of expectation or the elements of offenses are presently obviously expressed in the resolutions and nothing further is required to set up as offense then what the rule indicated. We have words like 'voluntarily', 'intentionally', 'negligently', 'knowingly', 'fraudulently', 'dishonestly', 'rashly', 'omits', 'without lawful authority' etc., 'omits', 'without lawful authority' etc., used in various sections of the Indian Penal Code defining various offence. Proof of the State of mind or of the conduct of the person as indicated by the aforesaid word establishes the offence and no further guilty intent or mensrea need be proved. In fact there are many acts which are offences and do not require proof any mensrea or guilty intention, for example possession of illicit fire arm."

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<sup>6</sup>Anwar Ali V Commissioner Of Income Tax And Another 29 Nov, 1989

<sup>7</sup>AIR 1996 SC 1100

<sup>8</sup>1999 UPTC 25

The Hon'ble Supreme Court in **Gujarat Travancore organization v. Chief of Income Tax**<sup>9</sup>, wherein the Court thought about the arrangement of Section 271(1) (an) of the Income Tax Act and held that the component of mensrea isn't included in light of the fact that the punishment forced in common matters is consistently of a common sort and it is misnomer to regard such procedures as semi criminal just on the grounds that punishment is forced, and saw as under:-

"Much of the time of criminal obligation, the aim of governing body is that punishment should fill in as an obstacle. The making of an offense by the resolution or statute continues with an assumption that society endures damage by the demonstration or exclusion of defaulter and that a hindrance sentence must be forced to dishearten the reiteration of the offense. For a situation of procedures under Section 271(1) (a), nonetheless, it appears that the expectation of the lawmaking body is to accentuation the reality of loss of income and to give a solution for such misfortune, albeit, most likely, a component of compulsion is available in the punishment. In this association, the term wherein punishment tumbles to be estimated, is huge. Except if there is something in the idea of resolution sign the need to build up the component of mensrea, it is commonly adequate to demonstrate that a default in consenting to the rule has happened. As we would see it, there is nothing in Section 271(1) (a) which necessitates that mensrea must be proved before punishment can be required under that arrangements. In like manner, we hold that the component of mensrea was not required to be proved in the procedures taken by the Income Tax Officer under Section 271(1) (an) of the Income Tax Act against the assessee.

In **Commissioner of Income Tax, Gujarat v. I.M. Patel and Co**,<sup>10</sup>, the Hon'ble Supreme Court thought about an enormous number of its previous decisions, including Gujarat Travancore Agency and Kalyan Das Rastogi and completely held that in a liability related to tax, the request of mensrea can't be taken. If there should be an occurrence of Cement Marketing Co. Ltd., the Hon'ble Supreme Court considered the arrangements accommodating punishment, for example Area 43 of the Madhya Pradesh General Sales Tax Act, 1958, which necessitated that the assessee ought to have recorded a bogus return and, consequently, mensrea was important fixing thereof.

In **Mahaveer Conductors v. Right hand Commercial Taxes Officer**<sup>11</sup>, this Court has deciphered the arrangements of Section 22-A (7) holding that mensrea was a fundamental fixing, seeing as under: - ".Any request forcing punishment for inability to complete statutory commitment is semi criminal in nature. The Statute has not given any assumption about the presence of mensrea against the defaulter, in this way, as an examiner, weight of proving is principally on the Revenue. The Revenue has neglected to release its weight because of the fact that it has simply arrived at an assumption of such intentional breach....."

In the renowned instance of **MuthaPremraj versus Asstt. Business Tax Officer and Ors**<sup>12</sup> considering the decisions of the Hon'ble Supreme Court in R.S. Joshi and M/s. D.P. Metal and M/s. D.P. Metals and so forth., has taken a view that it would not be right to ensure a liability dodger saying that there was nonappearance of mensrea. The submission of false of

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<sup>9</sup>Supra Note 7

<sup>10</sup>1993 (Supl) (1) SCC 621

<sup>11</sup>1997 (104) STC 65

<sup>12</sup>RLW 2003 (3) Raj 1428, 2002 (5) WLN 203

forged document of declaration at the check post or even thereafter, can safely be presumed to have been motivated by desire to mislead the authorities. Along these lines, it isn't constantly essential that the tenet of mensrea is pulled in each monetary rule in all circumstances. The Court additionally held as under:-

"The necessity of law is intended to be carefully translated, especially in regions of avoidance of assessment. We can't dismiss the way that there are endeavors to evade statutory commitment or prerequisite of angled explanation. An undue guilty pleasure and mercy for the assessment dodgers on specialized or lost thoughtful grounds prompts genuine result's influencing the income, and in that capacity, advancement and security of the State. We are not unaware of the way that the punishment arrangements can't be utilized as an income yielding arrangement. The object to the penalty provision is to ensure compliance in the larger public interest."

## **PENALTIES AND PROVISIONS IN INCOME TAX ACT**

A convenient and predictable making good on of regulatory obligations and documenting of profits guarantees the legislature has cash for open welfare anytime of time.

To ensure that citizen doesn't default in covering government obligations or unveiling the data, there are a few punishments endorsed under the Act. A punishment a discipline forced on the citizen for being rebellious. Recorded beneath is a rundown of a portion of the significant and most regular punishments.<sup>13</sup>

### **1. Default in making instalment of duty**

The measure of punishment leviable will be as controlled by the Assessing Officer. Be that as it may, the sum won't surpass the measure of expense financially past due

### **2. Under-revealing of pay**

- If the pay evaluated/re-surveyed surpasses the salary pronounced by the assessee, or in situations where return has not been recorded and pay surpasses the fundamental exclusion limit, punishment at half of expense payable on such under detailed pay will be required.
- 200% of the assessment is payable if under-announcing comes about because of distorting of salary

### **3. Inability to keep up books of records and different archives**

- Normally, the measure of punishment leviable is ₹25,000
- In case, the assessee is an individual who has gone into international transactions, the punishment will be 2% of the estimation of such international transaction or determined within the country transactions.

### **4. Undisclosed salary**

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<sup>13</sup><https://cleartax.in/s/income-tax-act-penalties> (last visited on 11-11-2019)

- Where the salary decided incorporates undisclosed pay, a punishment @10% is payable. Be that as it may, no such punishment will be leviable, if such salary was accepted for the arrival and assessment was paid before the finish of the significant earlier year.
- Where Search has been started on/after 1/7/2012 yet before 15/12/2016,
  - a. In the event that undisclosed pay is conceded over the span of search and assessee settles government expense and intrigue and documents return, a punishment @ 10% of such undisclosed pay is payable.
  - b. On the off chance that undisclosed salary isn't conceded yet the equivalent is outfitted in the arrival recorded after such search, 20% of such undisclosed pay is payable.
  - c. In every other case, punishment is leviable @ 60%
- Where Search has been started on/after 15/12/2016,
  - a. In the event that undisclosed pay is conceded over the span of Search and assessee makes good on government expense and intrigue and documents return, a punishment @ 30% of such undisclosed pay is payable.
  - b. In every single other case, punishment is leviable @ 60%

### **5. Review and Audit Report**

- If the assessee neglects to get his records inspected, acquire review report, or outfit report of such inspector, a punishment will be leviable at the ₹1, 50,000 or ½% of the all out deal/Turnover/net receipts whichever is lesser.
- Failure of assessee to outfit Audit report identified with outside exchange, a punishment @ ₹1,00,000 will be payable

### **6. TDS/TCS**

- Where an individual neglects to deduct charge at source, he will be obligated to pay a punishment equivalent to the measure of assessment which he has neglected to deduct/pay.
- Where an individual neglects to gather charge at source, he will be obligated to pay a punishment equivalent to the measure of assessment which he has neglected to gather.
- Failure to outfit TDS/TCS articulation or outfitting inaccurate explanations, will pull in a punishment going from ₹10,000 to ₹1,00,000
- Failure to outfit data/outfitting mistaken data identified with TDS reasoning related in regards to Non-inhabitants will pull in a punishment of ₹100,000

### **7. Punishment for utilizing modes other than Account payee check/draft/ECS**

- If an individual takes/acknowledges credit/deposit with the exception of by method for Account payee check/account payee draft/ECS, and if the total sum surpasses ₹20,000, he will be obligated to pay a punishment of a sum equivalent to such advance/store.

- If, a measure of ₹2,00,000 or more is gotten in total from an individual in a day/single transaction/identifying with one occasion, a punishment equivalent to such sum will be payable.
- On the off chance that an individual reimburses advance/deposits and such sum so reimbursed surpasses ₹20,000 and such sum has been reimbursed aside from by method for Account payee check/account payee draft/ECS, a sum equivalent to such credit/deposits will be payable.

### **CONCLUSION**

Therefore, in case of fiscal offences the basic principle of innocent until guilt is proven does not lie and the person is presumed to be guilty. The burden of proof lies on the accused person to establish that he was not guilty and if any error be there that was unintentional. But the principles of natural justice are supposed to be followed. This implies that opportunity of being heard and to represent his case must be given to the assessee. To avoid such manipulations rigorous prosecution policy must be followed. Under fiscal offences any act that is done against the statutes or the existing laws it is a presumption that he had a guilty mind and this presumption must be rebutted by the person on whom the blame has been put. Therefore actus rea and mens rea is already present, the burden of proof lies on the assessee.