

PRACTICAL ISSUES IN SEARCH & SEIZURE
UNDER INCOME TAX ACT, 1961

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I. Back drop

- Privacy is a valuable right of a civilized society.
- 1922 Act originally, did not contain any provision
- Second World War brought within its wake certain category of persons known as ‘war-profiteers’
- So far the first time search & seizure provisions were introduced u/s. 37 of 1922 Act which received assets of President on April 27, 1956.
- These provisions are constitutionally valid – Pooran Mal Vs. Director of Inspection -93 ITR 505 (SC)]
- The in-built safe guards ensure that the privacy of the citizen is not impinged upon and its consequences may be serious to a sensitive man the in-built safeguards have to be satisfied before any order for any search and seizure can be passed - Janak Raj Sharma Vs. DI(Inv) 215 ITR 234 (P & H).

II. The three specified situations:

- The Designated authority in consequence of information in his possession, has reason to believe that one or more of these three conditions are satisfied may authorize search:
 - a) Where the person has actually failed to produce books of account and other document in response to
 - i) summons or notice issued u/s. 131(1) of the Act requiring the production of specified books of account/other documents, or
 - ii) notice u/s. 142(1), requiring the production of books of account and other documents

- b) any person to whom summons or notice as aforesaid has been or might be issued will not or would not produce or cause to be produced any books of account or other documents which will be useful for or relevant to any proceeding under this Act, or
- c) any person:
- i) is in possession of any money, bullion, jewellery or other valuable article or thing; represents either wholly or partly income or property,
 - ii) which has been or would not be disclosed for the purpose of Income tax i.e. undisclosed income or property.

Poser 1:

Can search warrant be issued in a single name or can it be issued in joint names, like 'S.C. & Family'

- Madhupuri Corporation Vs. DDIT [2001 TLR 784 (Guj)]
- Ashok kumar Soni Vs. DDIT [72 TTJ (Jodh) 323]

In such case can assessment be in single name or joint names?

[CIT Vs. Vandana Varma - 186 Taxman 88 (All)]

Poser 2:

If yes, then, can search warrant issue in the name of company be taken to be a warrant of search in the case of individual directors

- Narendra kumar Jain Vs. DCIT [119 Taxman 213 (Luck) (Mag)]

Poser 3:

Can Authorized Officer who is heading search party, act as Assessing Officer in determining the tax liability of the assessee? Can the assessee in such circumstances, challenge the assessment on the ground that it is bias and therefore it should be quashed?

- UOI Vs. Vipin Kumar Jain [260 ITR 1 (SC)]

IV. Meaning of Search & Seizure:

- ‘Search’ means a thorough inspection of the building, place, vehicle, vessel, aircraft etc.
- ‘seizure’ means taking possession under the authority of law.
- ITO Vs. Seth Brothers [74 ITR 836 (SC)] – that the authority to search has to be based on cogent information on the basis of which he has reason to believe that undisclosed income can be detected.
- Dr. Nand Lal Tahiliani Vs. CIT [170 ITR 592 (All)].
 “Privacy is a very valuable right of the civilized society and violation thereof is not permissible except by authority of law. Therefore, the department should not be slow, but slowest in acting upon the information given by an informer. Before acting on information source of knowledge of an informer should be fully tested and creditworthiness of the informer also be tested”.

Poser 4:

One suited – booted driver comes to the CIT’s office and informs the CIT that in his car Rs. 6/- lacs cash is lying. What CIT should do?

- UOI Vs. Ajit Jain & Ors [260 ITR 80(SC)]: That a valid search can not be initiated on the basis of a rumour. ‘Information’ is to be distinguished from rumour or gossip. Rumour is something vague and unverified. Information is something definite and verified.

V. Power in exercise of search

The authorized officer has the power to

- i) to enter and search any building, place vessel, vehicle or aircraft, where he has reason to suspect that such books of account, other documents, money, jewellery, bullion or other valuable article or things are kept.

- ii) Break open the lock of any door, box, locker, safe, almirah or other receptacle where keys are not available.
- iii) Search any person who has suspected to have secreted any such books, documents, money, bullion, jewellery, other valuable article or thing
- iv) Afford him the necessary facility to inspect the books of account or other documents maintained in the form of electronic record.
- v) Seize any books of account, other documents, money, bullion, jewellery or other valuable article or things found as a result of search. However if the aforesaid items (excluding money books. documents) are stock-in-trade of the business shall not be seized but only inventorised
- vi) Place marks of identification on . any books or documents or copies therefrom.
- vii) Make a note or any inventory of such money bullion, jewellery or other valuable article or things
- viii) If any bullion, jewelry or other valuable article or thing, being not stock-in-trade of business and it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume weight or other physical characteristic or due to its being of a dangerous nature, then, authorized officer may serve an order for not removing or parting or otherwise dealing such order shall be considered as deemed seizure. [Second proviso to S.132(1)].
- ix) The authorized officer has the right to demand the services of any police officer or any officer of the Cent. Govt.
- x) The authorized officer is also empowered to pass an order prohibiting the person in possession or control of any books, documents, money. Bullion,

jewellery or other valuable article or things without prior permission, other than deemed seizure mentioned above (S. 132(3)). The aforesaid order is valid for 60 days from the date of the order (S. 132 (8A)).

Poser 5:

So, prohibitory order could be issued for business stock. Can such prohibitory order be extended & thereby extending the time limit for forming the assessment?

- CIT Vs. Sandhya P. Naik [253 ITR 534 (Bom)]

- xi) He has power to examine on oath any person who is found to be in possession or control of any books, documents, money, bullion, jewellery or other valuable article or thing and record any statement made by such person during such examination. That statement may be used in evidence in any proceeding under the Act. [S. 132(4)]

VI. Evidentiary value of documents:

S. 132(4A) provides that any books, documents, money, bullion jewellery or other valuable article or things found in the course of search, it is presumed:

- a) that such books, documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;
- b) that contents of such books/documents are true; and
- c) that the signature and every other part of such books/documents are true and that the signature and every other part of such books/documents which purports to be in the handwriting of any particular person or which may reasonable be assumed to be in the handwriting of any particularly person are in that person's handwriting.

It is to be noted that the presumption is only with regard to the person from whose possession and control the books/documents are found. This is rebuttable presumption.

Poser 6:

A Diary was found in the premises of one of the actress. On diary neither name of the actress was appearing nor was in her own writing. However, the pictures in which she acted were appearing. In the said diary the cheque amount as well as cash amount was appearing. The Assessing Officer estimated the cash received and added the amount. The CIT(A) confirmed the addition. What arguments the actress should take before the Tribunal?

- Straptex (India) Pvt. Ltd. Vs. DCIT [84 ITD 320 (Mum)]
- Prabhudayal S. Agrawal Vs. ITO [2003 SOT 390 (Mum)]

VII. Retention of books/documents

- a) The books/documents shall not be retained by the authorized officer for a period exceeding 30 days from the date of order of assessment u/s. 153A; unless the reasons for retaining the same are recorded by him in writing and the approval of the Chief Commissioner, Commissioner, Director General or Director for such retention is obtained.

However, the Chief Commissioner, Commissioner Director General or Director shall not authorize such retention for a period exceeding 30 days after all the proceedings under the Act are completed.

- b) The person from whose custody any books/documents are seized is entitle to make copies thereof or take extracts therefrom in the presence of authorized officer or any other person at such place and time as the authorized officer may appoint on this behalf.

- c) If a person legally entitled to such books/documents seized objects for any reason to the approval given by the Chief Commissioner etc. may make application to the Board stating therein the reason for such objection and requesting for the return of the books/documents and Board may pass such order as it think fit after giving the applicant an opportunity of being heard.

VIII. Handing over to the Assessing Officer:

If the authorized officer has no jurisdiction over the person, who has been searched and any books/documents, money, bullion, jewellery or other valuable article or thing are seized shall be handed over to the AO having jurisdiction over such person, within 60 days from the date on which the last of the authorization for search was executed i.e. on the conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorization has been issued.

Poser 7:

Can the Authorized Officer who has seized the documents etc. retention such documents beyond the period of 60 days and moot a proposal under section 132(8)

for further retention of documents etc.?

- CIT Vs. K. V. Krishnaswamy Naidu & Co. [118 Taxman 889 (SC)]

Poser 8:

So if the seized documents etc not handed over to Assessing Officer within 60 days but handed over subsequently, can such documents be taken into account by the Assessing Officer?

- Digvijay Chemicals Ltd. Vs. ACIT [248 ITR 381 (All.)]
- Sambhu Prashad Agarwal Vs. DCIT [254 ITR 660 (Cal)]

IX. Rights of the person searched:

- (i) To see the warrant of authorization duly signed and sealed by the issuing authority.
- (ii) To verify the identity of each member of the search party.
- (iii) To make personal search of all members of the search party before the start of the search and on conclusion of the search.
- (iv) To insist on personal search of ladies being taken only by a lady, with strict regard to decency.
- (v) To have at least two respectable and independent residents of the locality as witnesses.
- (vi) A lady occupying an apartment being searched has a right to withdraw before the search party enters, if according to custom, she does not appear in public.
- (vii) To call a medical practitioner in case of emergency.
- (viii) To allow the children to go to school, after checking their bags.
- (ix) To have the facility of having meals, etc., at the normal time.
- (x) To inspect the seals placed on various receptacles, sealed in course of search and subsequently at the time of reopening of the seals.
- (xi) Every person who is examined under section 132(4) has a right to ensure that the facts so stated by him have been recorded correctly.
- (xii) To have a copy of the *panchanama* together with all the annexures.

- (xiii) To have a copy of any statement that is used against him by the Department.
- (xiv) To have inspection of the seized books of account, etc., or to take extracts therefrom in the presence of any of the authorized officers or any other person empowered by him.
- (xv) To make an application objecting to the approval given by the Commissioner of Income-tax for retention of books and documents beyond 30 days from the date of the order of assessment under section 153A

(X) **Duties of the person searched:**

- (i) To allow free and unhindered ingress into the premises.
- (ii) To see the warrant of authorization and put signature on the same.
- (iii) To identify all receptacles in which assets or books of account and documents are kept and to hand over keys to such receptacles to the authorized officer.
- (iv) To identify' and explain the ownership of the assets, books of account and documents found in the premises.
- (v) To identify every individual in the premises and to explain their relationship to the person being searched. He should not mislead by personation. If he cheats by pretending to be some other person or knowingly substitutes one person for another, it is an offence punishable under section 416 of the Indian Penal Code.
- (vi) Not to allow or encourage the entry of any unauthorized person into the premises.

- (vii) Not to remove any article from its place without notice or knowledge of the authorized officer. If he secretes or destroys any document with the intention of preventing the same from being produced or used as evidence before the Court or public servant, he shall be punishable with imprisonment or fine or both, in accordance with section 204 of the Indian Penal Code.

- (viii) To answer all queries truthfully and to the best of his knowledge. He should not allow any third party to either interfere or prompt while his statement is being recorded by the authorized officer. In doing so, he should keep in mind that—
 - (a) If he refuses to answer a question on a subject relevant to the search operation, he shall be punishable with imprisonment or fine or both, under section 179 of the Indian Penal Code.
 - (b) Being legally bound by an oath or affirmation to state the truth, if he makes a false statement, he shall be punishable with imprisonment or fine or both under section 181 of the Indian Penal Code.
 - (c) Similarly, if he provides evidence which is false and which he knows or believes to be false, he is liable to be punished under section 191 of the Indian Penal Code.

- (ix) To affix his signature on the recorded statement, inventories and the *panchanama*.

- (x) To ensure that peace is maintained throughout the duration of the search, and to cooperate with the search party in all respects so that the search action is concluded at the earliest and in a peaceful manner.

- (xi) Similar co-operation should be extended even after the search action is over, so as to enable the authorized officer to complete necessary follow-up investigations at the earliest.

(XI) Guidelines for seizure of jewellery and ornaments in course of search.

- (i) In the case of a wealth-tax assessee, gold jewellery and ornaments found in excess of the gross weight declared in the wealth-tax return only need be seized.
- (ii) In the case of a person not assessed to wealth-tax, gold jewellery and ornaments to the extent of 500 gms. per married lady, 250 gms. per unmarried lady and 100 gms. per male member of the family, need not be seized.
- (iii) The authorized officer may, having regard to the status of the family and the custom and practices of the community to which the family belongs and other circumstances of the case, decide to exclude a larger quantity of jewellery and ornaments from seizure. This should be reported to the Director of Income-tax/Commissioner authorizing the search at the time of furnishing the search report.
- (iv) In all cases, a detailed inventory of the jewellery and ornaments found must be prepared to be used for assessment purposes.

[Instruction No. 1916, dated 11th May, 1994: (1994) 120 Taxation (St.) 98].

Power to requisition of books of accounts (S. 132A)

Where the books of account and assets belonging to an assessee were in the custody of a department other than the Income tax department, like police, CBI,

Customs, Central Excise, FERA, Enforcement Directorate, etc. warrants of authorization under section 132 itself were used to be issued to the concerned departments during the early seventies, for handing over such books of account or assets. In the case of CIT Vs. Tarsem Kumar [161 ITR 505], the Supreme Court held that section 132 could not be invoked in such cases, since in the context in which the expression 'seizure' and 'search' were used in section 132, where the location of the property was known to the department, it could not be said that one Government department could 'search' any other Government Department and seized documents, money, etc. The Supreme Court however pointed out that the income-tax authorities could, in such cases, approach the appropriate authorities for realizing any money or for recovery only books of accounts or documents in accordance with law. To overcome the effect of this decision, section 132A was inserted by the Taxation Law (Amendment) Act, 1975 with effect from 1-10-1975, so as to provide for 'requisitioning' books of account documents and assets which were in the custody of other departments.

The language of section 132A is almost on the same pattern as the language of section 132(1), with some modifications to suit the concept of 'requisitioning' rather than the concept of 'search' and 'seizure'. Nevertheless, the situation in which the provision can be invoked and the basic conditions regarding possession of 'information' and formation of 'reasonable belief' must be satisfied in this case also, in the same manner in which these situations and conditions are relevant for the purpose of initiating search and seizure operations under section 132(1) of the Act.

Poser 9:

The Police Officer seized the cash. Thereafter, the Income tax Authorities requisitioned the above cash under section 132A of the Act. Can the Police Officer deliver the possession of the seized amount to the Income tax Authority without obtaining an order from the Magistrate u/s. 457 of Code of Criminal Procedure?

- Amardeep Singh Vs. DIT [252 ITR 139 (P & H)]

No confession or forced surrender of income at the time of search or survey

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. .

SURVEY**Additional Power**

The words ‘notwithstanding’ anything contained in any other provisions of this Act, signify that the power of survey can be exercised in addition to any other power contained in various provisions of the Act, e.g.

S.132	Power to search & seizure
S, 133	Power to call for information
S.133B	Power to collect certain information
S.134	Power to inspect registers of companies
S.135	Power of DG, Director, CCIT,CIT and DCIT to make any enquiry under the Act.
S. 142(1)	Enquiry before assessment.
S. 143(2)	Enquiry during the course of assessment proceedings etc.

Income tax authority:

- Explanation (a) to section 133A defines the Income tax authority who is competent to exercise the powers of survey. As per amended section, the following authorities can exercise powers of survey.
 - A Commissioner
 - A Joint Commissioner
 - A Director

- A Joint Director
 - A Assistant Director
 - A Deputy Director
 - An Assessing Officer
 - A Tax Recovery Officer
 - An Inspector of Income tax
- Powers on the Inspector of income tax have been conferred only in respect of the following matters:
 - (i) Entry into business or professional premises and to inspect books of account or other documents available at such place.
 - (ii) Placing marks of identification on the books of account or other documents inspected by him and make or cause to be made extracts or copies therefrom.
 - (iii) Calling for statements of expenditure in respect of function, ceremony or event, after the function, ceremony or event.
 - The proviso to section 133A provides from June 1,2003 that the following authorities cannot exercise powers of entry into business/professional premises under section 133A(1) without obtaining the approval of the Joint Director or the Joint Commissioner, as the case may be:
 - An Assistant Director
 - A Deputy Director
 - An Assessing Officer
 - A Tax Recovery Officer
 - An Inspector of Income tax

Poser 10:

The points for consideration are:

- Can Chief Commissioner and Director General be empowered to conduct a survey? Or can they authorize their subordinate to conduct a survey?
- Is Joint Director or Joint Commissioner who authorize survey, fully empowered under section 133A to remain present at spot of survey for supervising and doing all that was necessary for the purpose of Act?
[N. K. Mohnat Vs. CIT [240 ITR 562(Mad)]

Jurisdictional Limit

- Under section 133A(1)(a) the Income tax authority can enter into a place which falls within his territorial limits irrespective of whether the assessee to whom that place belongs is assessed by him or not.
- Clause (b) of section covers a place which may fall outside his jurisdiction provided it belongs to an assessee over whom he exercises jurisdiction specially assigned under section 127 of the Act.
- Accordingly to clause(c) of the section any income tax authority can be authorized to conduct the survey and to enter any place for that purpose. The authorization can be given by an income tax authority who has assigned the area within which such place is situated or who has specially assigned the jurisdiction in respect of any person. However, the newly inserted proviso, with effect from June 1,2003 provides, that no action shall be taken by an Assistant Director or a Deputy Director or an Assessing Officer or Tax Recovery Officer or an Inspector of Income tax without obtaining the approval of the Joint Director or the Joint Commissioner, as the case may be.
- Therefore, any entry by an officer who has no jurisdiction or no authorization would be invalid and would amount to a trespass.

Place of business or profession:

- An Income tax authority can conduct the survey operation only at a place at which a business or profession is carried on, though that place need not be the principal place of business or profession.
- Explanation below sub-section (i) of section 133A provides that a place where business or profession is carried on shall also include any other place, whether any business or profession is carried on therein or not, in which the person carrying on the business or profession states that any of his books of account or other documents or any part of cash or stock or any other valuable article or thing related to his business or profession are or is kept.

Poser 11:

So the point for consideration is:

Can the Income tax authority enter the office of a chartered accountant for the purpose of inspecting the books of accounts of his client?.

Poser 12:

Further the question is, if some premises is put to use for business as well as residential purposes, can an income tax authority, acting under section 133A be entitled to enter such premises?

Poser 13:

Many a times, assesseees are in habit of keeping jewellery or other valuable articles or things i.e. personal effects at the business premises. So, would it be open to them to claim that the income tax authority is not empowered to check or verify such items so long as they are found at the place of business under survey?

Duties of the proprietor and others

- Proprietor, employee or any other person attending to business is liable to co-operate in proceedings under section 133A. During the course of survey, the income tax authority may require any proprietor, employee or any other person who may at that time and place be attending in any manner to or helping in the carrying on business or profession:
 - (a) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place;
 - (b) to afford him the necessary facilities to check or verify the cash, stock or other valuable article or thing which may be found therein, and
 - (c) to furnish such information as he may require as to any matter which may be useful, for or relevant to, any proceedings under this Act,

Hours of survey:

- For determining the time of survey, the premises stand divided into two categories
 - (i) The first category includes the place where the business is carried on. At such a place, the survey can be conducted only during the normal hours when such place is open for the conduct of business or profession.

Poser 14:

- If the shop/office is open for any reason on a Sunday/holiday, this being not a normal business hours, can survey be conducted?
 - If the shop/office is closed during business hours, can it be forced opened or break open for conducting survey?
- (ii) The second category includes the place which has been given an extended meaning by the Explanation below sub section (1) of section 133A, which includes a place where the books of account or cash or stock etc. are stated

to have been kept. At such place, the survey can be conducted after sunrise and before sunset.

It must be noted that the time factor applies to the 'entry' into the premises by the income tax authority, and not for the 'exit' from the premises by the survey party on completion of survey operations. Once a survey is commenced by adhering to the time prescribed for entry, the operations can go on continuously round the clock. There is no question of suspending the operations at the closing time followed by the businessman or professional or on the onset of sunset, as the case may be, and then resuming the operations the next day. In a well reasoned judgment, the Madras High Court held so in the case of N. K. Mohnot Vs. Dy. CIT [215 ITR 275]. The High Court made the following significant observations justifying the necessity for carrying out the survey operations without interpretation:

“.....The object of conducting a survey is to secure information. The section does not require prior notice of the survey being given to the affected person, in order to prevent the possibility of relevant materials whether it be accounts, documents, negotiable instruments or cash or other valuables, being removed from the place at which the business or profession is carried on. The section, therefore, advisedly provides that the authority may 'enter' only during business hours. After such entry, no further limitation is imposed by the section regarding the period for which he may remain in that premises. If the volume of materials to be scrutinized in such as to require the survey being continued even after the business hours, the continued presence of the authority in that premises and the continuance of the survey can not be regarded as 'illegal'.

Poser No.15:

Mr. Husain is a proprietor of Chandani Night Club. The Club starts at 8.p.m. and closes at 4 a.m. The survey party visits the club at midnight. However, no books of account or documents were available. On enquiry Mr. Husain replied that his books of account are lying in his brother's Night Club, whose timing are also same.

So what survey party should do? Because, they cannot enter in that club after sunset and before sunrise that club is not open?

The alternative of survey party is to issue summons under section 131(1) of the Act to Mr. Husain for producing books of account of Chandani Night Club. If Mr. Husain does not comply with summons under section 131(1), then, he would have to face the consequence of section 132 of the Act.

Powers of Income tax authority:

- Before we discuss the powers of the income tax authority under section 133A of the Act, it is worthy to note the observations of the Calcutta High Court in Dr. Vijay Pahwa Vs. DCIT [129 CTR 64]. The Court observed as under:

“The Income- tax officers and authorities do not have any power to interrupt the ordinary peaceful citizens of the country in any manner they like by utilizing by large powers given to them, without keeping themselves strictly within the four corners of those large powers. Since the powers vested are large, even a millimeter of departure therefrom must be immediately shorn off by the impartial courts of law if this country is to continue to remain a free one”.

- Under sub-section (3) of section 133A, the powers of the income tax authority are
 - (i) To place marks of identification on the books of account or other documents
 - (ii) With effect from June 1,2002 to impound and retain in his custody for such period as he think fit any books of account or other documents inspected by him, subject to following conditions:
 - (a) The Income tax authority must record his reasons for impounding the books of account or other documents

- (b) The Income tax authority can not retain in his custody any such books of account for a period exceeding 10 days (exclusive of holidays) without obtaining the approval of the Chief Commissioner or the Director General, as the case may be.
- (iii) To check or verify the cash, stock or other valuable article or thing which may be found in the place. He can also make an inventory of cash, stock or other valuable article or thing checked or verified by him.
- (iv) To record the statement of any person which may be useful for or relevant to any proceedings under this Act.

- For this purpose, the term 'proceedings' has been defined in

Explanation (b) to section 133A as to mean:

- (a) any proceedings under the Act in respect of any year which may be pending on the date on which the powers under section 133A are exercised, OR
- (b) any proceedings under the Act which may have been completed on or before the aforesaid date and will also include:
- all proceedings under the Act which may be commenced after the aforesaid date in respect of any year.
 - In Rameshwar Lal Mali Vs. CIT [256 ITR 36], the Rajasthan High Court held that, it is well settled position of law that a competent income tax authority can inspect the business premises and record the statements under the provisions of section 133A. Such an authority can not demand collection

of tax on the alleged undisclosed income then and there. Such an authority is required to send the statement of the material collected to the Assessing Officer if he himself is not the income tax authority carrying out the survey operation. There is no provision for permitting cross examination of the person, whose statement is recorded during the survey.

Poser 16:

Now, can the Inspector of the Income-tax count the cash and take the stock at the time of survey u/s. 133A of the Act

Poser 17:

Can statement recorded under section 133A(3) be used against the person whose statement is recorded at time of assessment or any other proceedings?

The statement recorded under section 133A(3) is not on oath and the section does not provide that any statement recorded under this section may be used as evidence in any proceedings under this Act. [see Paul Methews & Sons Vs. CIT (263 ITR 101 (Ker.))]

Poser 18:

The assessee's statement was recorded during the survey u/s. 133A of the Income-tax Act, 1961, of one B. During the course of its deposition, the assessee declared Rs. 4/- lacs as his income and that the aforesaid income was with the assessee in the form of cash. Can the general rule of evidence, that no person can be forced to be a witness against himself be applicable?

- ACIT Vs. Satanaryan Agarwalla [255 ITR 69 (Kol – Tri)]

- Further, section 132(4A) provides that where any books of account, other documents, money, bullion, jewellery or other valuable article or thing is found in the possession or control of any person in the course of a search, it may be

presumed that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such persons and that their contents are true and that such books of account and other documents, which purport to be in the hand writing of any particular person or reasonable assumed to be in the hand writing of that particular person. There is similar presumption in the matter of signatures as well as attestation of documents. This presumption in law is drawn against the person in whose possession or control, the documents are found. Such presumption is not provided under section 133A(3) of the Act. Therefore, the following posers are to be considered:

Poser 19:

During the course of survey at the premises of an assessee's office, a diary was found from his personal drawer. The said diary is written in the handwriting of his accountant. The assessee and his accountant during the course of survey consistently claim that the said diary does not belong to the assessee. At the same time they also fail to give the information of person to whom it belongs. What could be the implication of the same?

Poser 20:

During the course of survey the assessee makes a disclosure of unaccounted investment in the stock of Rs. 20 lacs. On the said disclosure the survey party stops further verification and leaves. Therefore, except for the statement of the assessee there is no material with the department to prove that there is unaccounted income or investment of the assessee. In case if the assessee retracts from his statement, can the department still make addition on the ground that the survey party relied upon the statement of the assessee and therefore did not investigate further? Would the case be different if the assessee had made a disclosure of income only without stating that the same is invested in the stock etc.?

[Abdul Qayume Vs. CIT [184 ITR 404 (All)] and

[ACIT Vs. Satya Narayan Agarwalla [255 ITR 69 (Kol-Trib)]

Poser 21:

There is a survey in the business premises of an assessee. The survey party worked out the book stock on the basis of the GP Method (i.e. Opening Stock plus Purchases minus [sales less GP at estimated rate]. On verification of the Physical stock they found that there is excess of physical stock in the possession of the assessee. The assessee during the survey admits that concealment of income to the extent of excess of investment in the stocks over the above computed book stock and also admits to disclose the said income of the year in which the survey takes place. He further agrees to make the payment of taxes due thereon. However, later on he realizes that the difference in the stock arose as the department had committed the following errors in arriving at his stock by using the GP method:

- i) The rate of GP has been taken to be a lower figure than the one which can be proved from the records,.
- ii) Certain purchases for which the deliveries were received but since the bills were not received had not been debited in the books of accounts as purchases and therefore purchases were to that extent stated less during survey.
- iii) Certain sales have been made but the parties had not yet been taken delivery goods. Therefore these items were included in stock as well as sales;
- iv) Certain materials were received either for job work or on sale or return basis and therefore did not belong to the assessee;
- v) The physical stock taken by the department was not correct'

What would be the implication of the above explanation in the following two alternative situations? When the explanation is given immediately after the survey say within about seven days or so. When the explanation is given only at the time of assessment proceedings in reply to the show cause issued to the assessee. Would the situation be different if the person had executed an Affidavit immediately after the survey but not submitted the same to the assessing officer and the same is produced during the course of assessment?

Poser 22

A survey under section 133A was carried on February 28,2011 at the premises of the firm. One of the partner agreed to disclose Rs. 25/- lacs as shortage in stock. As on the date of survey the stock was Rs. 83/- lacs plus net purchases of March 2011 were (Rs. 62/- lacs minus closing stock of Rs. 22/- lacs of March) were Rs. 40/- lacs. So, the total stock should have been in the balance sheet as on March 31,2011 at Rs. 1.23 crores, but was shown as Rs. 1.48 crores i.e. including Rs. 25/-- lacs declared at the time of survey However, the Assessing Officer assessed the closing stock at Rs. 1.73 crores on the ground that the assessee has not included Rs. 25/- lacs declared at the time of survey and retracted from his own admission, whether the action of the Assessing Officer is correct? While the assessee claims that stock of Rs. 1.48 crores include Rs. 25/- lacs but not shown separately in accounts.

Restriction on removal of items:

- Section 133A(4) imposes a total ban on the income tax authority acting under this section, on removing or causing to be removed from the place surveyed, any cash , stock or other valuable article or thing.
- Thus the role of income tax authority is strictly confined to checking or verifying cash/stock/other valuable article or thing, and making an inventory of such thing, if he deems it necessary.
- It is to be noted that the inspector of income tax has no authority to check or verify the stock and the assessee has a right to take objection if inspector takes the inventory.
- The prohibition contained in section 133A(4) is absolute and unqualified as per CIT Vs. Mool Chand Salecha [256 ITR 730 (Raj)]

- As per sub section (3) of section 133A, books of account or other documents could be impounded for limited period. Now, as per Madras High Court, in N.K. Mohnot Vs. DCIT [240 ITR 562], 'promissory notes' are not documents, therefore, they cannot be impounded. So, promissory notes are valuable articles or things. [see Noor Aohd. Rahimatulla Gillani Vs. CIT (1976) Tax LR 688 (Bom)]. Therefore, as per sub section (4) of section 133A they cannot be removed from the place of survey, however, they can be inventorised.

Poser 23:

Whether loose papers and small chits can be treated as books of account or documents?

- CIT Vs. S.M.S. Investment Corp. Ltd. [207 ITR 364 (Guj)]
- Ashwani Kumar Vs. ITO [39 ITD 183 (Del)]

Powers to collect information in respect of ostentatious expenditure

Section 133A(5) of the Act empowers an income tax authority to take action on the following lines in cases where, having regard to the nature and scale of expenditure incurred by an assessee in connection with any function, ceremony or event, such authority is of the opinion that it is necessary and expedient to do so:

- The income tax authority can require the assessee by whom the expenditure has been incurred, or any person who, in his opinion, is likely to possess information regarding such expenditure, to furnish such information as he may require.
- The said information must relate to any matter which may be useful for, or relevant to, any proceeding under the Act.
- The income tax authority may have the statements of the assessee or any other person recorded.

- Any statement so recorded may thereafter be used in evidence in any proceeding under the Act.

One important aspect to be noted is that, action on the above lines is permissible to be taken by the income tax authority only after the function ceremony or event is over, and not during the course of such function, ceremony or event.

To cite a simple example, suppose the income tax authority comes to know of a lavish marriage celebrated by an assessee over whom he has jurisdiction. The income tax authority can, after the marriage is over, call for information from the assessee regarding the expenditure incurred by him on various categories connected with the marriage, like printing of invitation, decorations, catering etc. The income tax authority can simultaneously call for information from the printer, shamiana contractor and the caterer regarding payments received by them for services rendered by them. By comparison of the two sets of figures, the income tax authority can decide whether the assessee has understated the expenses, and to take necessary consequential action against the assessee during assessment.

Poser 24:

Shri Akash Pal, DDI, visited the reception hosted by Shri Ramesh Jain to mark the marriage of his son. He attended the function without invitation and recorded the proceedings on a Video Recorder. At the function, he met the Decorators and the caterers and inquired about the expenditure involved. Next day he summoned Mr. Ramesh Jain and asked him to declare as an unaccounted income an amount of Rs. 10 lakh. Whether the action of DDI is correct?

Other Issues:

Business premises cannot be sealed:

Section 133A does not permit the sealing of the business premises. In fact, there is no other provision in the Act under which sealing of business premises is permitted.[see Shyam Jewellers Vs. CCIT 196 ITR 243 (All)]

Re-assessment on the basis of survey report:

If survey report was submitted after the original assessment was completed and on the basis of survey report if the Assessing Officer finds that income has escaped the assessment, the re-assessment based on the survey report is valid. [See Badri Prashad Rameshwar Prashad Vs. CIT 219 ITR 441 (MP)]

Can survey be converted into a search:

In case the Income tax authority has come into the possession of information on the basis of its survey action, an authorizing authority can form a belief that any one or more of the three conditions as contained in clauses (a), (b) & (c) of sub section (1) of section 132 are satisfied, and it may be possible to convert a survey into search operation. The conditions are:

- (a) That any person to whom the summons under section 37 of the Income- tax Act 1922 or under sub- section (1) of section 131 of the Income- tax Act, 1961 or a notice under sub-section (4) of section 22 of the 1922 Act or under section 142(1) of the 1961 Act was issued to produce or cause to be produced any books of account or other documents and that the assessee has omitted or failed to do so.
- (b) Any person to whom summons or notice as aforesaid has been issued will not or would not produce or cause to be produced any books of account or other documents.
- (a) Any person is in possession of any money, bullion, jewellery or other valuable article or thing and such assets represent either wholly or partly income or profit which has not been or would not be disclosed.

Disallowance of Cash payment:**Poser 25:**

During the course of survey, the assessee declared an amount of Rs. 50 lakhs in aggregate on account of following discrepancies

Excess stock	Rs. 20.00 lakhs
Cash found short	Rs. 5.00 lakhs
Unaccounted purchases	Rs. 10,00 lakhs
Unaccounted sales	Rs. 10.00 lakhs
Unaccounted expenditure	RS. 5.00 lakhs

Whether in such case a question of disallowance in respect of cash payment under section 40A(3) would arise?

The Patna Tribunal (Third Member) in Sunil Grain Agency Vs. ITO [64 ITD 165] has observed that:

“ Keeping before the eyes the fact that by making disallowance under section 40A(3) what is sought to be attempted is bring it to the tax net, the amount which is not otherwise chargeable and, therefore, the provisions are required to be construed strictly

In view of the above, cash payment made by the assessee to the parties could not be disallowed under section 40A(3)”

Further the Pune Tribunal in Rajmal Lakhichand Vs. ACIT [79 ITD 84] has held that “ the provision of section 40A(3) are to be invoked when department has evidence with itself that the assessee has made payments in cash exceed prescribed limits and disallowance is impermissible mainly on a presumption that assessee must have made payments and that too, exceeding prescribed limits”.
