

# **Search and Seizure – Legal Overview and Constitutional Remedies**

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On 11<sup>th</sup> August, 2014

## Article 265 - “No tax shall be levied or collected except authority of law”

**1. R. K. Garg v. UOI (1981) 133 ITR 239 (SC) (255)**

“Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc.”.

**2. Ram Kumar Dhanuka v. UOI (2001) 252 ITR 205 (Raj)(HC)  
Prabhubhai Vastabhai Patel v. R. P. Meena (1997) 226 ITR 781 (Guj.)(HC)**

Non-resident Indian is amenable to search and seizure under the Income-tax Act, 1961

**3. K. Choyi v. Syed Abdulla Bafakky Thangal & Ors. (1980) 123 ITR 435 (SC)(437)**

Section 132 cannot be invoked after an assessment is made to recover the tax due.

**4. L. R. Gupta & Ors. v. UOI (1992) 194 ITR 32 (Delhi)(HC)(55)**

No arrest or detention can be made by deriving the power under section 132.

Search and seizures – New ground rules (1986) 159 ITR (Journal) 1-4

## *Can survey be converted in to search?*

**5. Vinod Goel v. UOI (2001) 252 ITR 29 (P&H) (HC)(40)**  
Held - Yes

**6. Dr. Nalini Mahajan and Others v. DIT (Inv.) (2002) 257 ITR 123 (Delhi)(HC)**  
Held - No

**7. Jinesh Farshubhai Kakad v. DIT (Inv.)(2003) 264 ITR 87 (Gau.)(HC)**  
Held - No

# *Legality of search*

**8. ITO v. Seth Brothers & Ors. (1969) 74 ITR 836 (SC)**

**Pooran Mal v.DIT (1974) 93 ITR 505 (SC)**

**Dr. Pratap Singh and Anr. v. Director of Enforcement and Ors. (1985) 155 ITR 166 (SC)**

Power is exercised bonafide, and in furtherance of the statutory duties of the tax officer, any error of judgement on the part of the officers will not vitiate the exercise of the power. Illegality of a search does not vitiate the evidence collected during such illegal search.

**9. Prakash V. Sanghvi v. Ramesh G., Major, DDIT (Inv.) (2013) 356 ITR 426 (Karn) (HC)**

Officer can be held liable

**10. DCIT v Mahesh Kumar Agrawal (2003) 262 ITR 338 (Cal.)(HC)**

Recording of satisfaction is must

# *Legality of search*

## **11. (1986) 159 ITR 1-4 (Journal)**

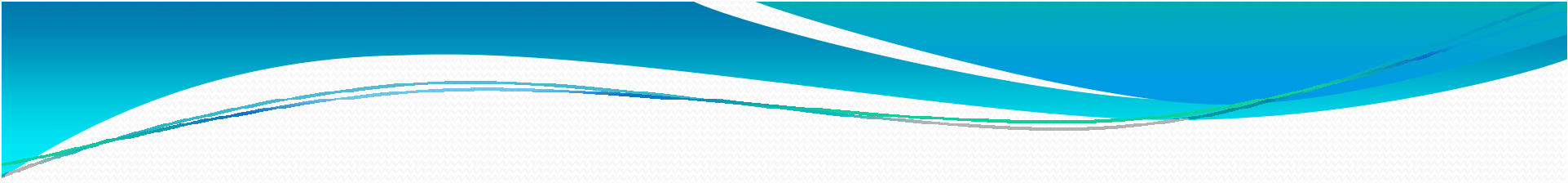
Search and seizures: New ground rules

## **12.(1994) 208 ITR 5 (St)**

Tax payer's Charter indicating rights and duties of the persons searched

## **13.Sunil Batra v. Delhi Administration and others AIR 1978 SC 1675 (1731)**

Solitary confinement violates the fundamental right guaranteed by Article 21, unless it is awarded as imposing punishment

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- Remedies available to an Assessee
    - A. Challenge search in writ
    - B. File application before Settlement Commission
    - C. Go for regular Assessment.

# *Jurisdiction – Stock in trade*

## **14. Rajendran Chingaravlelu (Mr.) v. R. K. Mishra, Addl. CIT (2010) 320 ITR 1 (SC)**

Genesis for the entire episode of search and seizure and detention having been taken place at Hyderabad airport, cause of action arose at Hyderabad and therefore writ petition was maintainable at Andhra Pradesh High Court.

## **15. Puspa Ranjan Sahoo v. ACIT (2012) 252 CTR 113 / 75 DTR 341 (Orissa)(HC)**

If it is stock-in-trade – On writ petition court directed the authorities to release the same and return to the party, in view of specific provision contained in proviso to section 132(1)(iii) and third proviso to section 132(1)(v).

## **16. Kerala VAT Act – The Kerala Value Added Tax Rules, 2005 - Under the Chapter–VI-AP VAT-UP VAT**

## *Writ petitions before HIGH COURT-Validity of search*

**17. Vindhya Metal Corporation and Ors. v. CIT (1985) 156 ITR 233 (All)(HC)**

No rational nexus between the information on record and reason to believe Plea of alternative remedy is of no avail where action is wholly without jurisdiction and results in infringement of fundamental right

**18. H. L. Sibal v. CIT (1975) 101 ITR 112 (P&H)(HC)**

For collateral purposes or as a matter of policy decision

**19. Anand Swaroop v. CIT (1976) 103 ITR 575 (P&H)(HC)**

Probe into the wealth of assessee – Non application of mind

**20. Dwaraka Prasad Agrwalla v. DIT (1982) 137 ITR 456 (Cal.)(HC)**

No application of mind by the Officers of the department who authorised the search



## *Writ petitions before HIGH COURT-Validity of search*

### **21. Dr. Nand Lal Tahiliani v. CIT (1988) 170 ITR 592 (All.)(HC)**

Mere rumour that Doctor was charging high fees and living in posh house.

Affirmed by Supreme Court in **CIT v. Dr. Nand Lal Tahiliani (1988) 172 ITR 627 (SC)**

### **22. Jagmohan Mahajan v. CIT (1976) 103 ITR 579 (P&H)(HC)**

Warrant of authorisation is blank or proper name and address is not recorded

## *Writ petitions before HIGH COURT-Validity of search*

### **23. Shyam Jewellers and another v. CCIT (1992) 196 ITR 243 (All)(HC)**

Sealing of business premises- cannot be done-Alternative remedy –Not an absolute bar to the issue of Writ

### **24. CIT v. Vijaybhai N. Chandrani (2013) 357 ITR 713 (SC)**

Writ petition not maintainable when assessee could have addressed his grievances and explained his stand to the AO by filing appropriate replies to the said notices, instead of filing the writ petition.

### **CIT v. A. K. Bansal (Dr.) (Individual) (2013) 355 ITR 513 (All)(HC)**

Tribunal cannot consider validity of search



# SECTION 153A

1. Where search is initiated or requisition is made after **31.5.2003** the provision 153A to 153D are applicable.

These provisions have the **overriding effect** over the provisions of sections 139,147,148,149,151 and 153 of the Act since these provisions are non obstante provisions.

2. The assessment proceedings are **initiated for six assessment years** immediately preceding the year in which search u/s 132 is initiated or requisition is made u/s 132A.

The returns filed u/s 153A are to be dealt with in the same manner as if such returns were filed u/s 139 and therefore all consequences would follow i.e. notice u/s 143(2) will have to be issued by AO within the prescribed time as held by the Apex court in the case of **Hotel Blue Moon (322 ITR 158 SC)** while interpreting the similar provisions u/s 158BC.



## SECTION 153A

3. The assessment is to be made in respect of *total income* of the assessee of said six years.
4. The *assessment* is to be made in respect *of each assessment year*.
5. If assessment/reassessment in respect of any of the said six years is **pending** on the date of initiation of search/requisition then, **such assessment or reassessment shall abate**.




## SECTION 153A

6. If any *assessment/reassessment* made under these provisions is *annulled* in appeal/any legal proceeding then assessment proceedings abated shall *revive* from the date of receipt of order of such annulment by the CIT. If such order of annulment is set aside then such revival shall cease to have effect.
7. Save as otherwise provided in sec 153B/153C, all other provisions of the Act would apply e.g provisions relating to levy of interest / penalty or provisions relating to deductions/exemptions/appeals etc.
8. The tax chargeable would be rate applicable to the concerned assessment year.
9. The assessment shall not be made by an officer below the rank of ACIT except with prior approval of JCIT.



## THE CONTROVERSIAL ISSUES WHICH ARE EMERGING RELATING TO FILING OF RETURN AND ASSESSMENT

- *All Cargo Global Logistics Ltd. & Ors. vs. Dy. CIT (2012) 137 ITD 287 (Mum) (SB)*
  - i. *With this, we proceed to literally interpret the provision in s. 153A as it exists and read it alongside the provision contained in s. 132(1).*
  - ii. *The word used is “shall” and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years.*
  - iii. *We may add that we have not held that the assessment can be made only for those years in respect of which books or assets etc. are found. We have come to the clear finding that assessment / Reassessment for all six years will have to be made. The real*



*question is the scope of reassessment which is not pending, for which we have read provisions of s.132(1) and s. 153A together. Thus the total income under reassessment may be the same as in the original assessment or may be higher than that, depending upon the materials which are uncovered in the course of search. We are also of the view that issue of notice for six years and computing a reassessment for these years even if no material is found in the course of search for some years does not amount to harassment etc. and even if it does so, the same has to be ignored in view of the clear statutory provision.*

*iv. We find that second proviso to s. 153A uses the words “pending on the date of initiation of search” and provides that assessment so pending shall abate. The provision does not use the words “completed assessment”.*

*v. “Thus, analysis of various scenarios regarding completed assessments does not fall within the ambit of the question posed to us. Therefore, this question may have to be decided by the Division Benches in the respective cases depending on the facts of the case”.*



vi. The final conclusion of the Mumbai ITAT Special Bench in case of ***ALL CARGO GLOBAL LOGISTICS LTD Vs. DCIT*** (Supra)

*In assessments that are abated, the AO retains the original jurisdiction as well as jurisdiction conferred on him u/s 153A for which assessments shall be made for each of the six assessment years separately;*

*In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material, which in the context of relevant provisions means*

- 1. books of account, other documents, found in the course of search but not produced in the course of original assessment, and*
- 2. undisclosed income or property discovered in the course of search.*



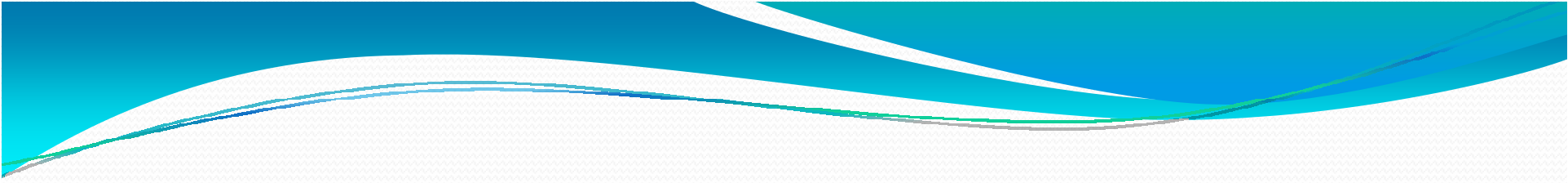



- *CIT vs. Anil Kumar Bhatia (Delhi)(High Court)*

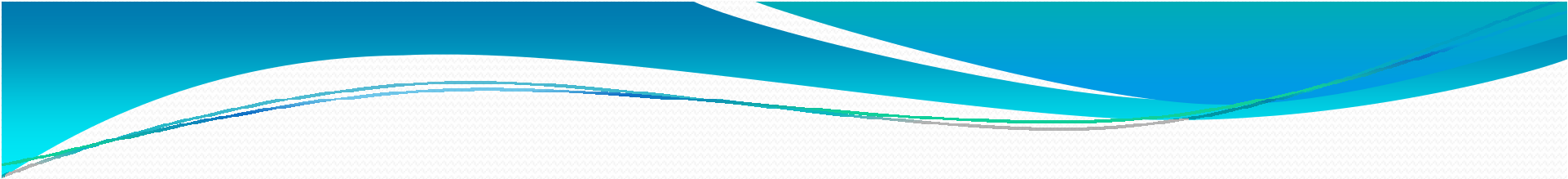
- “1. Whether the Income Tax Appellate Tribunal was right in holding that the Assessing officer had wrongly invoked Section 153A of the Income Tax Act, 1961?

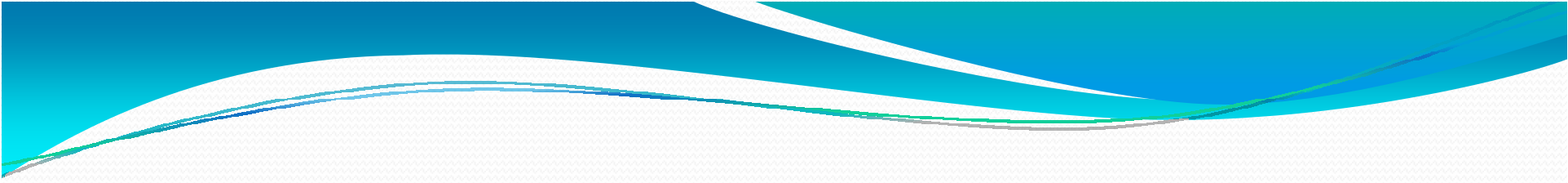
- The first question which we have to consider is whether the Tribunal was right in holding that no addition can be made for agricultural income, gifts received and unexplained deposits as stated in the chart set out in Para 10 (supra) on the ground that in respect of these additions, no material was found during the search carried out under Section 132 and also on the ground that for all the years under consideration, the returns filed by the assessee before the search had been processed under Section 143(1)(a) of the Act.


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- *Under the provisions of Section 153A, as we have already noticed, the Assessing Office is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessment Officer is empowered to assess or reassess the “total income” of the aforesaid years.*
  - *Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the ‘total income’ of the six assessment years in question in separate assessment orders. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.*
  - *If such an order is already in existence, having obviously been passed prior to the initiation of the search / requisition, the Assessing Officer is empowered to reopen those proceeding sand reassess the total income, taking note of the undisclosed income, if any, unearthed during the search.*

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- *The position thus emerging is that where assessment or reassessment or reassessment proceedings are pending completion when the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee's total income and such orders are subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. Such determination in the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income.*

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- *If it is not in dispute that the document was found in the course of the search of the assessee, then Section 153A is triggered. Once the Section is triggered, it appears mandatory for the Assessing Officer to issue notices under Section 153A calling upon the assessee to file returns for the six assessment years prior to the year in which the search took place.*
  - *“We are not concerned with a case where no incriminating material was found during the search conducted under Section 132 of the Act. We, therefore, express no opinion as to whether Section 153A can be invoked even in such a situation. That question is therefore left open.*

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- ***ACIT vs. M/s. Pratibha Industries Ltd. (Mum.)(Trib.)***
  - Three possible circumstances emerge on the date of initiation of search u/s 132(1): (a) proceedings are pending; (b) proceedings are not pending but some incriminating material is found in the course of search, indicating undisclosed income and/or assets and (c) proceedings are not pending and no incriminating material has been found. Circumstance (a) is answered by the Act itself, that is, since the proceedings are still pending, all those pending proceedings are abated and the AO gets a free hand to make the assessment. Circumstance (b) has been answered in **Anil Bhatia** to hold that while there is no question of any abatement since no proceedings are pending, the AO is entitled to reopen the assessment (*without having to comply with the strict conditions of s. 147, 148 and 151*) and bring the undisclosed income to tax. Also, in **All Cargo Global**

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- **Logistics Ltd** 137 ITD 287 (Mum)(SB) it was held that in the case of a non-abated assessment, an assessment u/s 153A has to be made on the basis of incriminating material. Circumstance (c) has been kept open and left unanswered. Circumstance (c) has to be answered to say that even where there is/are no pending proceedings and no incriminating material has to be found, the AO is still required to pass an order u/s 153A though the assessed income will have to be the same as the originally assessed income as there was no incriminating material. Accordingly, the assessee's argument that when there is no incriminating material or assets, then there is no jurisdiction to proceed u/s 153A is not acceptable. S. 153A contains a non-obstante clause and is triggered automatically whenever a search is undertaken. The fact that no incriminating material was found has no bearing on the applicability of s. 153A;

# Assumption of jurisdiction u/s

## 153C

- The precondition for invoking jurisdiction for issue of notice u/s. 153C is that the AO must “*record of satisfaction*” as to the seized material belongs the assessee
  - *Manish Maheshwari (2007) 289 ITR 341 (SC),*
  - *Lal Balwant Rai (2007) 17 SOT 380( Chand.)*
  - *Manoj Aggarwal vs. Dy. CIT ,(2008) 113 ITD 377 (Del.) (SB)*
  - *Jindal stainless Ltd 120 ITD301[Del.]*

## Time limit for issuance of notice u/s. 153C

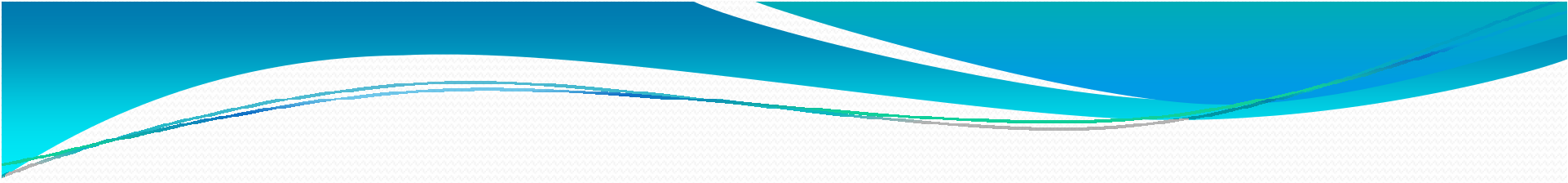
- There is no time limit for issuance of notice u/s. 153C
- **Limitation**
  - the first proviso to section 153B
  - the Third proviso to section 153B
  - Panchanama
  - Nandlal Gandhi 115 ITD 1 (Mum)(TM)
  - CIT-vs- Sandhya P Naik 253 ITR 534 (Bom)
  - *DCIT vs. Adolf Patric Pinto 100 ITD 191 (Mum) (para 15-19)*
    - *Approved by Bom H.C. in ITA No. 856 of 2008 dt. 5/9/2008*
    - *Dept. SLP dismissed SLP (C) No. 26625 of 2009 (2010) 322 ITR 3 (St) (SC)*



# Time limit for issuance of notice u/s. 153C

- Limitation

- *Mr. Shahrukh Khan vs. ACIT* 104 ITD 221 (Mum)
- *CIT vs. S.K. Katyal (2009)* 308 ITR 168 (Del.)

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- **SETTLEMENT COMMISSION:** As per Finance Act, 2010 doors of Settlement Commission in search cases have been re-opened. Normally approaching to the settlement commission is advised when the facts are very complicated and more than two views are possible on the factual matrix of the case. The Settlement Commission has power to grant immunity from prosecution and to waive penalties. In appropriate cases it may be desirable to approach the Settlement Commission.

# *Suit for damages*

**25. Sardar Parduman Singh v. UOI (1987) 166 ITR 115 (Delhi)(HC); SLP rejected (1987) 168 ITR 3 (ST)**

Search u/s.132 was held to be illegal and with-cost orders had been passed against the officer.

**26. DGIT v. Diamondstar Exports Ltd. (2007) 293 ITR 438 (SC)**

Return of items seized and interest levied.

**27. Chronjilal Sharma HUF v. UOI SLP NO. 20381 of 2012 dt. 26-09 2013.**

Interest under section 132B(4)(b), 240, 244A: Assessee is entitled to interest on cash appropriated during search even if refund is directed in appeal proceedings. Within two months to day.

# *Suit for damages*

**28. CCIT v. State of Bihar, Through Chief Secretary (Rajendra Singh) (2012) 205 Taxman 232 / 71 DTR 268 / 250 CTR 304 (Patna)(HC) / [www.itatonline.org](http://www.itatonline.org)**

Though search led to unearthing of undisclosed income, show cause notice issued to search team as to why monetary compensation be not awarded from their salary for human rights violation and torture.

**29. Rajendran Chingaravlelu (Mr.) v. R. K. Mishra, Addl. CIT (2010) 320 ITR 1 (SC) (10) - Trail by media**

“There is a growing tendency among investigating officers (either police or other departments) to inform the media, when before the completion of investigation, that they have caught a criminal or an offender. Such crude attempts to claim credit for imaginary investigational breakthrough should be curbed.”

# RTI

**30. Shri Jagdish Singh Saini v. Directorate General of Income Tax CIC/AT/A/2008/00324 dt. 16-07-2008**

Right of information Act, 2005 – Copy of warrant can be furnished

**31. Information Technology Act, 2000 – Assent 9<sup>th</sup> June 2000**

Penalty for damage to computer, computer system etc. S. 43. S. 81. Overriding effect.

**32. Prosecution**

**33. Recording of entire search or survey be permitted-Modern technology-Sting operation**

# *Recording*

- 34. S. Pratap Singh v. The State of Punjab AIR 1964 SC 72**  
Telephone conversation.
- 35. Yusufalli Esmail Nagree v. The State of Maharashtra 1968 AIR 147(SC)**  
Tape recorded conversation
- 36. Ram Singh v. Col Ram Singh AIR 1986 SC 3**  
Tape recorded statement
- 37. Rama Reddy v. V. V. Giri AIR 1971 SC 1162**  
Tape recorded statement

# Recording

**38. R. M. Malkani v. State of Maharashtra AIR 1973 SC 157**

Tape recorded conversation

**39. Z. B. Bukhari v. B. R. Mehra AIR 1975 SC 1788**

Tape recorded speeches are documents as defined in section 3 of the Evidence Act

**40. Naroda Patiya cases dt. 29-08 2012 (Special Court)**

Electronic magnetic tape devices can be termed as valid documentary evidence.

**41. CIT v. East Coat Commercial Company Ltd. (1967) 63 ITR 449 (SC)(457)**

Income tax authorities are not strictly bound by the rules of evidence.

# Retraction

**42. DIT (Inv.) v. S. R. Batliboi & Co. & Ors. (2009) 31 DTR 187 / 227 CTR 238 / (2010) 186 Taxman 350 (SC)**

Laptops seized from auditor

**43. Sidharth Shankar Roy v. Commissioner of Customs, Mumbai 2013 (291) ELT 244 (Mum.)(Trib.)**

Retraction – recent trend

Instruction No. F. No. 286/2/2003 – IT(Inv) dated 10-3-2003 – Sub-Confession of additional income during the course of Search and seizure and survey operation (AIFTP Journal Vol. 5 April 2003 P. 25)



# *Natural justice*

**44. Natural Justice**

**45. Right of cross examination – is integral part of natural justice**

**46. Ayaanhan Noorkhan v. State of Maharashtra & Ors.  
AIR 2013 SC 58**

**47. Settlement commission – Advantages**

# *Transfer of cases*

S. 127 - Transfer of cases for better co-ordination – What circumstances can be challenged

**48. Shree Ram Vessel Scrap (P.) Ltd. v. CIT (2013) 91 DTR 235 (Guj.)(HC)**

Effective and coordinated investigation – Held valid

**49. CIT v. UOI (Maa Mahamaya Group and others) (2013) 216 Taxman 135 / 358 ITR 341 (Chhattisgarh)(HC)**

Coordinated investigation – Transfer case was held to be valid

**50. Arrow Alloys Pvt. Ltd. v. UOI (2013) 351 ITR 259 / 215 Taxman 141 (Mag.) (Gauhati)(HC.)**

Once nexus is established transfer cannot be interfere with

# *Transfer of cases*

**51. Ram Gopal Agrawal v. UOI (2013) 216 Taxman 154 (Mag.) (Chhattisgarh)(HC)**

Reasons for transfer cannot be vague –Specific reasons-General reasons

**52. Global Energy (P) Ltd. v. CIT (2013) 215 Taxman 224 / 89 DTR 194 / 356 ITR 502 (Bom.)(HC)**

Merely mentioning that it is necessary to transfer the case for coordinated investigation is not sufficient

**53. Shikshana Prasaraka Mandali v. CIT (2013) 352 ITR 53 / 258 CTR 289 / 85 DTR 345 / 215 Taxman 191 (Bom.)(HC)**

Failure to inform assessee of reasons for transfer - Objections of assessee to be considered.

# *Representation and Check lists*

Representation should be on facts

## **Practical guide or check list after search and seizure and survey**

### ***Do's***

1. Panchanama - Copy must be obtained immediately.
2. Inventory - Copy must be obtained.
3. Copies of documents seized - Make application to furnish the copies seized.
4. Copies of statements - Make application to furnish copies.
5. Factual error - Valuing stock - Inventory etc. - Write immediately to the concerned Officials who have conducted the search or seizure.
6. Goods of Perishable in nature if kept under prohibitory order - Ask to release or sell - If loss is occurred the department is responsible.
7. Adjustment of cash-Ask adjust against tax liability.

# *Representation and Check lists*

8. Disposal of assets seized-Release of assets or sell by the tax department.
9. Damages - File petition for loss due to action of the tax Officials.
10. Retraction - Within reasonable time before the same Officials who have taken the statement. If required copy to higher authorities.
11. If any valuable or documents of third party is seized - Ask the party concerned to make an application for release and claiming the ownership.
12. If any documents or statement is proposed to be used against me, ask for the copies and opportunity for cross examination of the parties who have given statements.
13. In response to summons, attend and answer the questions – If you don't know the answer, verify and reply.
14. Discuss with consultant possibility of approaching Settlement Commission advantages and disadvantages.
15. Co-operate with proceedings.

# *Representation and Check lists*

## ***Don't's***

1. Removing goods put under prohibitory order.
2. Mislead on facts.
3. Try to destroy the documents or books.



***Thank You***