

Survey and
Search & Seizure
under Income Tax Act, 1961
(including assessment of survey cases)

Presented by : CA Sanjay 'Voice of CA' Agarwal
(assisted by CA Monika Jain)

Mb: 9811080342

Email id: agarwal.s.ca@gmail.com

Amendements vide Finance Bill *2012*

- Third proviso to sub-section (1) of section 153A - [Newly Inserted w.e.f. 1st July, 2012] &
- After Proviso to sub-section (1) of section 153C - [Newly Inserted w.e.f. 1st July, 2012]
- Consequential Amendment in section 296 - [Amended w.e.f. 1st July, 2012]

Explanation to Amendment u/s 153A, 153C & 296.

- Central Government empowered to notify cases or class of cases of persons where in AO shall not be required to issue notice for initiation of proceedings for preceding 6 assessment years
- Under the existing provisions it is mandatory to issue a notice for filing of tax returns for 6 assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A.
- This Amendments would result in initiating assessment proceedings only for the assessment year relevant to the previous year in which search or requisition has been made.
- Consequential amendments made under section 296 of the Act.

Amendment in section 245C

- **Amendment made to Clause (b) of Explanation of proviso of sub-section (1) of section 245C - [Amended w.e.f. 1st July, 2012]**
- For filling application before the Settlement Commission u /s 245C The current definition of related person holds that “...the substantial interest is found to exist, where a person holds more than 20% shares or 20% share in profits, **at any time during the previous year**”.
- It is amended to provide that the substantial interest should exist as on the “**date of the search**” in place of “at any time during the previous year” as the proceedings before the Commission are filed for many previous years.

Authorization or requisition by Common order – *S. 292 CC - Newly Inserted w.e.f. 1st April, 1976*

- (1) *Notwithstanding anything contained in this Act,—*
 - (i) *it shall not be necessary to issue an authorization under section 132 or make a requisition under section 132A separately in the name of each person;*
 - (ii) *where an authorization under section 132 has been issued or requisition under section 132A has been made mentioning therein the name of more than one person, the mention of such names of more than one person on such authorization or requisition shall not be deemed to construe that it was issued in the name of an association of persons or body of individuals consisting of such persons.*
- (2) *Notwithstanding that an authorization under section 132 has been issued or requisition under section 132A has been made mentioning therein the name of more than one person, the assessment or reassessment shall be made separately in the name of each of the persons mentioned in such authorization or requisition*

Explanation

- In a recent Allahabad High Court decision Commissioner of Income-tax (Central) v. Smt. Vandana Verma, INCOME-TAX APPEAL NO. 21 OF 2009, it has been held that in search cases arising on the basis of warrant of authorization under section 132 of the Act, warrant of authorization must be issued individually and if it is not issued individually, assessment cannot be made in an individual capacity. It was also held that if the authorization was issued jointly, the assessment will have to be made collectively in the name of all the persons in the status of association of persons/body of individuals.
 - In order to curtail and nullify various judicial pronouncements lying that joint panchnamas or search authorization in joint names are invalid, it has been provided by way of clarificatory retrospective amendment that
 - Joint panchnama does not refer that it has been issued in the name of AOP or BOI consisting such persons
 - Notwithstanding Authorization or Requisition u/s 132 or 132A in more than one name, assessment shall be made separately in name each of such persons.
 - Therefore the scope of authorization has been widened by proposing the retrospective amendment w.e.f. 01/04/1976 by inserting a new section 292CC in the Income-tax Act.

Explanation Contd.....

It is now provided that –

- It shall not be necessary to issue an authorization under section 132 or make a requisition under section 132A separately in the name of each person;
- where an authorization under section 132 has been issued or a requisition under section 132A has been made mentioning therein the name of more than one person, the mention of such names of more than one person on such authorization or requisition shall not be deemed to construe that it was issued in the name of an association of persons or body of individuals consisting of such persons;
- notwithstanding that an authorization under section 132 has been issued or requisition under section 132A has been made mentioning therein the name of more than one person, the assessment or reassessment shall be made separately in the name of each of the persons mentioned in such authorization or requisition.

New Section 271AAB shall be inserted - Amended w.e.f. 1st July, 2012. – Brief Background.

- Under the existing provisions of section 271AAA, no penalty is levied if the assessee
 - admits the undisclosed income in a statement u/ s 132(4) recorded in the course of search
 - specifies the manner in which such income has been derived
 - pays the tax together with interest, if any, in respect of such income.
- As a result, undisclosed income (for the current year in which search takes place or the previous year which has ended before the search and for which return is not yet due) found during the course of search attracts a tax at the rate of 30% and no penalty is leviable.
- In order to strengthen the penal provisions, it is proposed to provide that the provisions of section 271AAA will not be applicable for searches conducted on or after 1st July, 2012.
- It is also proposed to insert a new provision in the Act (section 271AAB) for levy of penalty in a case where search has been initiated on or after 1st July, 2012.

Provisions of S. 272 AAB

S.no.	Particular	Quantum of penalty
1.	If additional income is admitted during course of search	Penalty would be 10% of Undisclosed Income.
2.	If additional income is not admitted during course of search but is disclosed in return of income filed after search	Penalty would be 20% of Undisclosed Income.
3.	Other cases (i.e. where the additional income is not admitted during course of search nor is disclosed in return of income filed after search)	Penalty would vary between 30% to 90% of undisclosed income.

Topics for Discussion

- Pre Survey & Search precautions.
- Salient features of survey proceedings.
- Salient features of Search & Seizure proceedings

Pre Survey &
Search precautions

Pre Survey & Search Precautions

Avoid :

- To keep Books of accounts at any place other than Registered Office.
- To share common premises, however if assesses share common premises then the MAP should be affixed at some common visible place identifying the assignment of particular area to particular assessee, since it could lead to Multiple Operations.
- To Keep Personal documents of workers and employees in business premises.
- To do Backdating and editing in books of Accounts. In case practices like backdating or editing are followed then confirm from computer software vendor that such practices are not detectible.

Pre Survey & Search Precautions

Ensure

- Computer hard disk does not contain any irrelevant data.
- That Books of accounts are properly updated.
- That person in-charge of business have proper acquaintance of business affairs.
- That stock register are maintained and kept updated.
- That if no stock registers are maintained then inventory verification list is prepared at regular dates.

Pre Survey & Search Precautions

Ensure

- That physical cash available and cash in books of account matches.
- Registered value of property in name of every relevant person should be known.
- Where records are maintained at various levels for cross verification, they should be in reconciliation up to date e.g. records maintained at Gate, Security Guard, Stores Keeper etc.
- Assessment particulars of Directors in case of company, partners in case of firms ,members in case of AOP and trustees in case of trust should be readily available.

Salient features
of
Survey Proceedings

Topics for discussions

- Authorized Officers/ Authorizations.
- Jurisdiction of the Survey Authority.
- Restriction of entry into the place of business or profession/other places.
- Powers of Survey Team vis a vis Obligations of tax payer during survey.
- Other Powers of survey team.
- Impounding and retention of Books of Accounts.
- Recording of Statements – some checks.
- Invocation of S.131(1).
- Presumption.
- Conversion of survey in to search.
- Issues- survey / survey assessment.

WHO CAN CONDUCT SURVEY – Authorised/ Authorising Officer (Expln.to sec.133A)

I. Authorized / Authorizing Officers:

- Director /Commissioner (authorised/ authorising)
- Joint Director/ Joint commissioner (authorised/ authorising)
- Additional director/ Addl. Commissioner (authorised/ authorising) [as per meaning of Joint Director in s.2(28D) & Joint Commissioner in s.2(28C)]
- Deputy Director / Deputy Commissioner. (authorised)
- Assistant Director / Assistant Commissioner (authorised)
- Assessing officer (authorised)
- Tax Recovery Officer (authorised)
- Inspector of Income Tax (authorised) (For certain Specific cases only i.e for purposes of s.133A(1)(i), 133A(3)(i) & 133A(5)- as per Explanation (a) to sec.133A)

Amendment by Finance Act, 2011

- s.s (7) of sec. 92CA amended so as to provide the additional power of survey u/s 133A to the TPO, for the purpose of determining the Arm's Length Price.

TPO defined in Explanation to s.92CA

Note: Earlier TPO had the power u/s 131, sec. 133(6) but not the power u/s 133A.

Authorizations in some cases (Proviso to S.133A(6)

- No action u/s 133A(1) can be conducted, Without the Prior approval of the Joint Director or Joint Commissioner [**including Additional director/ Addl. Commissioner [as per meaning of Joint Director in s.2(28D) & Joint Commissioner in s.2(28C)]**], by any of the following authority:
 - ❑ Deputy Director / Deputy Commissioner of Income Tax
 - ❑ Assistant Director / Assistant Commissioner of Income Tax
 - ❑ Assessing Officer
 - ❑ Tax Recovery Officer
 - ❑ **Inspector of Income Tax, to a limited extent**

Note : No prior notice is required to be effected for survey. ***N.K. Mohanty vs. DCIT [1995] 215 ITR 275 (Mad.)***

N.K Mohnat v. CIT [1999] 104 Taxman 64/240 ITR 562 (Mad.) Joint Commissioner, is fully empowered u/s 133A to remain present at the spot of survey for supervising and doing all that is necessary for the purpose of the Act.

Judicial Pronouncements

Commissioner of Income-tax Vs. Kamal and Company [2009] 308 ITR 129 (Raj.)

illegality does not vitiate evidence collected during survey

The action of the Inspector to conduct survey under section 133A was not legal under section 133A of the Act. Though no prohibition had been imposed on the Inspector to conduct such a survey, unless an authority was given under the provisions of section 133A, the survey conducted by the Inspector could not be held to be legal. The inventory stock was prepared by the Inspector during the course of an illegal survey and material was then used by the Assessing Officer for making additions. **The Revenue was entitled to use the material collected during the course of illegal survey.**

Jurisdiction for conducting Survey S. 133A (1)

An Income Tax Authority may enter :

- a) Any **place** falling in his jurisdictional area.
- b) Any **place** occupied by any assessee falling in his jurisdiction.
- c) Any **place** in respect of which he is authorized for the purpose of this section by such income tax authority, who is assigned the area within which such place is situated or who exercises jurisdiction in respect of any person occupying such place.

at which a business or profession is carried on, not necessarily be the principal place of business

Note: Residential premises can also be covered if some business/professional work/document is being done / kept there.

*Circular no. 7- D dt 3/5/1967 vis a vis Expl.
to S. 133A(1),*

- **Business or residential premises of third parties**, including a Chartered Accountant, a pleader, or Income Tax Practitioner, of whom the assessee may be a client, **are not places which could be entered into for the purpose of section 133A**. However the above restrictions do not apply to cases of search and seizure specifically authorized u/s 132
- **However in view of Explanation to S. 133A(1), w.e.f. 1-7-1995**, if the books of account, documents, or any part of the cash or stock or any other valuable article or thing of an assessee is stated by be kept in any place other than the place of business or profession, **the income-tax authority can survey such a place, but same may be for a limited purpose** for obtaining information relating only in respect of that assessee.

Judicial Pronouncements

- Survey is possible even to enquire about tax deducted at source : **Reckitt and Colman of India Ltd. vs. ACIT [2001] 251 ITR 306 (Cal).**
- Survey team has **no power to break open any locked premises** as power to break open any lock is not conferred u/s 133A as against specific provisions contained u/s 132. please see **196 ITR 243 (All)**

Judicial Pronouncements

U K MAHAPATRA AND CO AND OTHERS Vs. INCOME TAX OFFICER AND OTHERS [2009] 308 ITR 0133 (Ori.)

Revenue conducts survey u/s 133A in the premises of Petitioner, a Chartered Accountant Firm which was the auditor of the assessee, and impounded certain files –

Held that although Explanation to Sec 133A allows survey of any other place where the books of accounts of assessee are kept but the precondition for conducting survey u/s 133A, is that the client in course of survey must state that his books of accountant/documents and records are kept in the office of his chartered accountant/lawyer/tax practitioner.

Restriction of entry S. 133A(2)..

- ❑ An Income tax authority **may enter** any place of business or profession ref. in s.s(1) **only during the hours at which such place is open** for the conduct of business or profession and , **in case of any other place, only after sunrise and before sunset.**
Mohnot (N.K.) vs. DCIT, [1995] 215 ITR 0275 (Mad)
- ❑ In respect of **other place**, wherein the books of accounts, other documents, cash etc. **has been stated to be kept** the survey party can enter **only after sunrise and before sunset.**
- ❑ The restriction is only in respect of entry in to the place of business or profession and not related to the exit, **survey may continue after office hours and even after sun set.**

Power of Survey team, vis a vis, Obligations of tax payer, S.133A(1)

The ITA may require any proprietor, employee or any other person attending or helping in carrying on such business or profession- to afford him necessary facility

- (i) to inspect books of accounts or other documents available at such place. (**Power is also available with Inspector of Income Tax in view of Explanation (a) to s.133A**)
- (ii) Check or verify the cash, stock or other valuable or thing found therein **[However, An income tax authority acting under this section shall, on no account, remove or caused to be removed from the place wherein he has entered, any cash, stock or any other valuable article or thing. [s.133A(4)]**
- (iii) May require to furnish any information as may be useful for any proceedings under the Act

Other Powers of Survey Team S.133A(3)

- i. To place marks of identification on the books of account & can make extracts & copies there from. (**This power is also available with Inspector of Income Tax also in view of Explanation (a) to s.133A**)
- ii. To make an inventory of cash, stock or other valuable article or thing verified by him (Section 133A(4) specially prohibits the removal of cash, stock other valuable article or thing w.e.f. 01/06/2002).
- iii. Record statement - Not on oath U/s 133A [**Paul Mathews & Sons vs. CIT, [2003] 263 ITR 101(Ker)**], however statement can be recorded on Oath, only under circumstances where S. 133A(6) is invoked : **United Chemical Agency vs. R.K. Singh, ITO [1974] 097 ITR 0014 (All)**

Note : There is no provision of sealing for business premises either u/s 133A or sec. 132 or any other section of the IT Act.

Shyam Jewellers & Anr. Vs Chief Commissioner (Administration) U.P & others (1992)196 ITR 243(All)

Impounding and retention of Books of Accounts

S.133A(3)-Im133A(3)(ia)

- Impound and retain books of accounts only after recording reasons in writing **[s.s(3)(ia) inserted by Finance Act, 2002,w.e.f. 01/06/2002]** please see **Mrs. Rumena Rahman vs. Union of India [2004] 265 ITR 0016- (Gau.)**
- Permission from CCIT/DGIT is required in case Period of retention of books or documents exceeds 10 days, exclusive of holidays (w.e.f. 01-06-2003), where permission for retention should be granted judiciously, there should be justification as to non cooperation by the assessee: **Raj and Raj Investments vs. Income-tax Officer [2007] 293 ITR 0057- (Kar)**

Note: The Law is silent as to allowing any opportunity to the assessee to object the impounding of books of accounts.

[2011] 12 taxmann.com 91 (Punj. & Har.) Bawa Gurmukh Singh & Co. v. ITO

Books or other documents and retain the same beyond 10 days after that even though the officer conducting survey could impound the books of account approval of the Chief Commissioner, the said power is not an absolute power. It is subject to judicial review like any other discretionary power of an administrative authority.

Recording of Statements – Some checks

U/s 133A(3)(iii)

- As per latest circular of **CBDT No. 286/2/03- IT (Inv) dt. 10/3/03-** no Confessional statement to be elicited.
- No provision under the Law to seek copy of statement from revenue at the time of recording the same, however in case of statement being used against assessee, he may ask for its copy by relying on principles of natural justice and equity.
- Other Provisions of CPC applicable, in case, the officers invoke section 131.
- Statement recorded during survey do not have any evidentiary value.

[CIT vs. Dhingra Metal Works (Delhi High Court) [2011] 196 Taxman 488/ [2010] 328 ITR 384]

- Statement recorded during survey have corroboratory value.

Commissioner of Income-tax v. Hotel Samrat [2010] 323 ITR 353 (KER.)

Note : If the assessee is able to explain the discrepancy in the stock found during the course of survey by production of relevant record, the AO can not make the addition solely on the basis of statement made by the assessee during survey. **CIT Vs. S. Khader Khan Son [2008] 300 ITR 157 (Mad.), see also DCIT vs M/s Premsons (ITAT Mumbai)**

Judicial Pronouncements

- ❑ Under survey the AO is not authorised to record a statement on oath, though he can record the statement of any person which may be useful for or relevant to any proceedings under the Act. Thus the said statement is only an information and has no evidentiary value - The information so obtained can be used only for corroboration purposes for taking a decision on an issue either in favour or against an assessee.

Case Law : Unitex Products Ltd. vs ITO - 2008 22 SOT 429 [ITAT – Mumbai see also (2010) 323 ITR 353 (Ker.), CIT v. Hotel Samrat]

- ❑ No addition to income on the basis of disclosure could be made where the assessee had retracted certain income after disclosing it and no material had been found to prove this income during the survey.

Case Law : Ashok Manilal Thakkar vs ACIT – 279 ITR 143 [ITAT–AHM]

- ❑ No reliance could be placed upon a statement regarding surrender of loss by the assessee, which was retracted soon after a survey under s.133A of the Income Tax Act 1961 was carried out. Further, the statements recorded by the Inspector and the ITO, without reading and explaining them to the assessee before obtaining his signature, were invalid.

Case Law : ITO vs Vardhman Industries - 99 TTJ 509 [ITAT - Jodhpur] / Kailash Chand L/H of Late Mangilal vs ITO - 113 TTJ 488 [ITAT-Jodhpur]

Judicial Pronouncements

- The statement recorded during the survey was not signed either by the AO or by the Inspector. No addition to income could be made on the basis of the said statement.

Case Law : Kailash Chand L/H of Late Mangilal vs ITO - 113 TTJ 488 [ITAT-Jodhpur]

Precaution while making any statement.

- ❑ Is there any evidence found during survey that could lead to an inference of concealment?
- ❑ Is there any discrepancy between the stock in hand and the stock as per books?
- ❑ Is it advisable to admit discrepancies in the stock?
- ❑ Are the provisions of sales tax and excise duty along with provisions like dis-allowance u/s. 40-A(3), 269-SS, 269-T etc have been kept in mind before making any confession statement?

Precaution while making any statement.

- ❑ Is it safer to disclose income under the head "other sources" or "business" ?
- ❑ Would it be desirable to declare the entire amount as current year's income or spread over income for many years as any spread over may result in liability to interest and penalty for concealment ?
- ❑ Is it possible to capitalize the disclosed amount ?
- ❑ Whether a survey would result in reopening of assessment of earlier years?

Precaution while making any statement.

- ❑ Care should be taken to ensure that the disclosure takes care to covers the discrepancies found during the survey and also those that may be unearthed at a later stage.
- ❑ Before making retraction the assessee must prove beyond doubt the circumstances for such retraction are bonafide & are not after thoughts.
Case: DCIT vs. Bhogilal Moolchand (2005) 3 SOT 211 (Ahd.)

Judicial Pronouncement

Dr. S.S. Gulati. v DCIT I.T.A. No.671 of 2009 [P&H HC]

- Where the appellant had himself surrendered the amount voluntarily, paid the taxes in advance on the surrendered amount ;the allegation of coercion and duress is baseless and it is an after thought , (since it could have stopped the payment of cheques given in advance to the Department, had it been convinced that the statement has been given under coercion and duress).
- The statement given in a spontaneous and natural manner, cannot be ignored keeping in view the facts and circumstances of the case where there does not appear to be any reason for the appellant for retracting from the surrender, which it has already made during survey and on which it has already paid advance tax voluntarily

Lavish and ostensible spending -Sec. 133A(5)

- If the income tax authority is of view, of any lavish expending on any function or ceremony.
- It can call for the information from the assessee or from any other person who is likely to be in possession of the information with respect to the expenditure incurred.
- However, cannot call for such information before or at the time of such function, ceremony or event
- Power prescribed be exercised only when the said function, ceremony or event is over.

Note: All the powers given in this section are available with Inspector also.[Explanation (a) to s.133A]

Press Release Note dated 03/06/1989

- The Government will launch a drive against ostentatious wedding ceremonies and other social functions which often involve blatant use of tax-evaded money. According to Revenue Secretary, Dr.Nitish Sengupta, such ostentation is inconsistent with the egalitarian values of Indian society.
- Section 133A of the Income-tax Act, 1961, authorizes Income-tax Officers to make surveys of marriage ceremonies and other ostentatious social functions and to detect use of unaccounted money. So far, this provision has not been sufficiently used to make a visible impact on the curbing of wasteful expenditure.

Powers of Income Tax Authority In case of non-cooperation by assessee- Sec. 133A(6)

- Where during the course of survey assessee does not-
 - Afford the facility to inspect books of accounts
 - Afford facility to check or verify cash, stock etc.
 - Furnish any information or to have his statement recorded.

The Income tax authority shall have all powers u/s 131(1) to enforce compliance with the requirement made.

- For the purpose of this sub-section, the Income Tax Authority has been empowered to record the statement of the assessee or such other person. It is to be specifically noted that the statement thus recorded may be used as evidence in any proceedings under the Act.

Presumption as to ownership. S. 292 C

Section 292C of the Income Tax Act, 1961 states the presumption regarding the assets, documents and books found in possession or control of any person in the course of a search **or survey operation* [**Inserted by Finance Act, 2008, w.r.e.f. 1/06/2002**] that:

- ❑ Such book of account, other documents, money, bullion, jewellery, other valuable article or thing belong or belongs to such person.
- ❑ The contents of such books of account and other documents are true.

Presumption as to ownership. S. 292 C

- ❑ The signature and every other part of such books of account and other documents which purports to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.
- ❑ *Surendra M. Khandhar vs ACIT & Ors. (2009) 224 CTR (Bom.) 409* Assessee having failed to rebut the presumption u/s 292C , addition u/s 69 on the basis of documents seized from the possession of the assessee was rightly made by AO & sustained by the tribunal.

Whether a survey can be converted into search?

- Law prescribes no bar on initiating search proceedings during the course of survey but will depend upon the facts and circumstances prevailing at the time of survey
- The survey ordered at the premises of the petitioners u/s 133A of the Act and conversion of the said operation on the basis of the authority given by the Additional Director are legal : *Vinod Goel & Others vs Union of India and others [2001]252 ITR 029 (P&H)*
- Survey authorisation in the name of doctor, then search operation at the residence of doctor and hospital premises belonging to trust is not valid, where no reasons for conversion of survey operation into search operation were given. *Dr. Nalini Mahajan v. Director of Income Tax (Inv.) [2002] 257 ITR 123 (Del.) SLP Dismissed by Hon'ble SC*

Issues – Assessment vis a vis Material collected during Survey.

- *CIT vs Diplast Plastics Limited*[2010] 186 Taxman 317 / 327 ITR 399 (P & H)/Related to section 133A]

It has been held that loose sheets found during survey has no evidently value unless and until proved by some cogent material and the books of account of the assessee, which are audited, are of great evidentiary value

- [2011] 43 SOT 651 (Mum .) Chawla Brothers (P.) Ltd. v. Asstt. CIT

Merely on the basis that at the time of survey, some differences were found in stock did not mean that there would be an automatic addition on account of differences. Such differences are always subject to explanation and reconciliation. Where, the assessee had reconciled the differences with reasons and the revenue authorities did not point out anything contrary that how the reconciliation done by the assessee was incorrect. no addition was warranted.

Issues – Assessment vis a vis Material collected during Survey.

- ❑ Addition made to assessee's income on basis of admission during survey without any supportive material is not sustainable [2010] 39 SOT 379 (HYD.) B. Ramakrishnaiah vs. ITO/ Ashok Manilal Thakkar vs ACIT –[2005] 97 ITD 361(AHD.)
- ❑ CIT vs UTTAMCHAND JAIN (BHC) -182 Taxman 243(2009)/[2010] 320 ITR 554(Bom)

As the VDIS 1997 certificate issued by the department is valid and subsisting, it is not open to the revenue to contend that there was no jewellery which could be sold by the assessee on 20/1/1999.

Reference of material collected during survey while search proceedings.

- Can materials found in course of survey can be used in block assessment ?

GMS Technologies Ltd v Dy. CIT. (2005) 93 TTJ 218 (Del 'F')). In block assessment, material found during survey u/s 133A can be used **only if it has some relation with the material seized during search**, otherwise not.

- where during continuance of survey proceeding, search proceedings under section 132 are initiated on basis of information obtained in survey, it can be said that survey proceeding has lost its identity and in fact, has merged with search proceedings and, in such a case, unaccounted income is liable to be assessed in block assessment proceedings only

ACIT v Mangaram Chaudhary (HUF) [2010] 123 ITD 359 (HYD.)

No penalty on income surrendered during survey.

Commissioner of Income Tax vs. Bedi Karyana Store [1999] 235 ITR 0351 (P&H) .

Assessee surrendered Rs. 2 lakhs and applied under section 273A for spread over of the surrendered amount. Penalty was imposed on the grounds that firstly, the assessee-firm had surrendered the amount when stock taking was in progress; secondly there was no evidence that the firm had surrendered the sum on condition that no penalty would be levied and, thirdly, the assessee-firm had surrendered the amount on account of excess stock found. The assessee-firm did not offer any explanation for introducing cash instead of surrender of excess stock. The Income-tax Officer held that all this showed that the assessee had not strictly adhered to voluntary disclosure already made and introduced cash in its account books out of its concealed income. However, the Commissioner of Income-tax (Appeals) accepted the plea of the assessee that the assessing authority could not have enhanced the liability of the assessee after partially accepting the assessee's request for spread over of the surrender. On that premise, the Commissioner of Income-tax (Appeals) cancelled the penalties. The Tribunal dismissed the appeal filed by the Revenue, High Court referred to the decision of CIT(A)..

More cases : Orient Press Ltd. V. Jt. CIT [2008] 21 SOT 25 (Mum), ITO vs. C.

Chhotalal Textiles (P.) Ltd. [2006] 150 Taxmann 33 (Mum.), Bhagat & Co. .vs.⁴⁵ ACIT [2006] 10 SOT 37 (Mum.).

contd...

❑ **Commissioner of Income Tax vs. SAS Pharmaceuticals [2011] 11 taxmann.com 207 (Delhi)**

Whether where income surrendered by assessee during survey had been shown by it in its regular income-tax return filed within prescribed time, penalty could be imposed upon it under section 271(1)(c) - **Held, no** see also **In Jt CIT vs Signature.[2004] 85 TTJ 117 (Del 'C'),**

❑ **In SILVER PALACE V. ITO[1999] 68 ITD (PUNE) 550**

Subsequent to survey proceedings, declaration of additional income was made by assessee, though no discrepancy was found, allegedly on advice and assurance of officers conducting survey, that no penalty would be imposed . Circumstantial evidence showed tacit agreement between assessee and survey party, that no penalty be levied if return was revised. Moreover there was no material on record to prove addition made by Assessing Officer represented income of assessee for assessment year in question. On these facts it was held that penalty proceedings were wrongly initiated.

Salient features
of
Search and Seizure proceedings

SEARCH - WHEN POSSIBLE

Situation u/s 132(1)

- a) Non-compliance to summon u/s 131(1) or notice u/s 142(1) as to production of certain Books of Account or other documents.
[Even a slightest non compliance may lead to formation of belief]
- b) Notice has been / would be issued, but such person has not or might not produce Books of account in respect of any proceeding under IT Act.
[Proceeding may be assessment, appellate, revision, penalty, rectification, etc.]
- c) Possession of undisclosed money, bullion, jewellery or other valuable article or thing whether wholly or partly
(Search Warrant in such case can be issued in Form No.45)

Note : For valid search, any of the situation as enumerated above should persist other wise the entire action could vitiate. Case : CIT vs. Smt. Chitra Devi Soni [2008] 170 Taxmann 164 (Raj.) also see L.R. Gupta vs. Union of India [1992] 194 ITR 32 (Del), SLP Dismissed.

Certain aspects of search

- In Consequence of Information.
- Mandatory requirement.
 - Reason to believe.
 - Satisfaction to be recorded.

Case Law

Kalpana bazar v. CIT (1990) 186 ITR 617 (Ker)

*It is not the mandate of section 132 or any other provision in the Act that the reasonable belief recorded by the designated authority before issuing the warrant of authorization must be disclosed to the assessee.
[now distinguished]*

M/s M D Overseas Ltd. v DGIT & Others, [2011] 198 TAXMAN 136(All.)

(Writ Tax No. 75 of 2010)

Whether when assessee makes a prima facie case against validity of search, Revenue is obliged to share information relating to 'reasons to believe' for authorizing search except the source of information.

Held Yes

Space wood Furnishers Pvt. Ltd. Director General of Income Tax (Investigations) [2012] 340 ITR 0393 (Bom) / 2011-TIOL-837-HC-MUM-IT.

- Whether satisfaction note in search matters plays vital role in establishing that the search was in accordance with the provisions of Income Tax;

The satisfaction note contemplated therein must be based upon contemporaneous material, information becoming available to the competent authorities prescribed in that Section. Its availability and nature as also time factor must also be ascertainable from relevant records containing such satisfaction note. Loose satisfaction notes cannot meet these requirements & said provision. The necessary live link and availability of relevant material for considering it, has not been brought before this Court.

High growth and high profit margins, which are the matter of record cannot be the basis for issuing search warrant.

Notice issued u/s 131(1A) and 133(6) subsequent to search would not invalidate search.

- There is no substance in the submission that the notice u/s 131(1A) subsequent to search proceedings shows that the department did not have sufficient material with regard to reason to believe as the department based on the records of the year 2002 and the report of the Additional Director after visiting the clinic in 2005 on four occasions along with decoy patients, and having examined the income tax returns and balance-sheets in which negligible income was returned, authorized the search. Notice under section 131(1A) confers power on the authorities as mentioned in section 131(1), if he has reason to suspect that any income has been concealed or is likely to be concealed. It is only an enabling power and does not in any way affect the search and seizure operations carried out under section 132. Section 132 is an independent code in itself.

Dr. Roop v. Commissioner of Income-tax, Meerut [2012] 20 taxmann.com 205 (All.) see also Neesa Leisure Ltd. V Union of India through Secretary. [2011] 338 ITR 0460 (Guj).

AUTHORIZING OFFICER [U/s 132(1)]

- (1) Director General of Income Tax
- (2) Director of Income Tax
- (3) Chief Commissioner of Income Tax
- (4) Commissioner of Income Tax
- (5) Additional Director / Addl. Commissioner of Income-tax (inserted by Finance(No. 2) Act,2009, w.r.e.f 1-6-1994)
- (6) Joint Director / Joint Commissioner of Income Tax(by Finance No. 2 Act, 2009, w.r.e.f 1-10-1998)

Note:

- On or after October 1,2009,Authorization shall not be issued by the Addl. Director or Addl. Commissioner or Joint Director or Joint Commissioner unless empowered by the Board to do so. The amendment has been inserted to supersede the Delhi High Court judgment in CIT v Pawan Kumar Garg(2009) 178 Taxman 491 [2011] 334 ITR 240and Sunil Dua v CIT (2008) 170 Taxman 401.
- [2011] 334 ITR 349 (DEL), CIT v. Capital Power Systems Limited
A specific notification under section 132(1) of the Act would necessarily have to be issued by the Board if it wishes to empower any Joint Director to authorize action to be taken under section 132(1) of the Act. In the absence of any such specific empowerment by the Board, the Joint Director is not empowered to issue any authorisation.

AUTHORISED OFFICERS

- Additional Director of Income-tax(inserted by Finance(No. 2) Act,2009, w.r.e.f 1-6-1994)
- Additional Commissioner of Income-tax(inserted by Finance(No. 2) Act,2009, w.r.e.f 1-6-1994)
- Joint Commissioner of Income Tax
- Joint Director of Income Tax
- Deputy Director of Income Tax
- Deputy Commissioner of Income Tax
- Assistant Director of Income Tax
- Assistant Commissioner of Income Tax
- Income Tax Officer

Executions Of Authorisations

<u>S.NO.</u>	<u>PARTICULARS</u>	<u>FORM NO.</u>
1.	Authorizations under S. 132(1) other than proviso thereto by DGIT, DIT, CCIT, CIT, DDIT, DCIT.	45
2.	Authorization under proviso to Section – 132(1) by CCIT or CIT. (<i>will discuss later</i>)	45 A
3.	Authorization under sub – section (1A) of S. 132 by CCIT or CIT. (<i>will discuss later</i>)	45 B
4.	Authorisation under sub section (1) of section 132 A of the Income Tax Act, 1961 for requisitioning books of accounts etc.	45C

Note: Every authorization shall be in writing under the signature of the officer issuing the authorization and shall bear his seal.

1st Proviso to sub-section (1) of Section 132

This proviso empowers any Chief CIT or CIT who has jurisdiction over the area in which the search premises are situated but having no jurisdiction over the person to be searched for authorizing the search where he has reason to believe that any delay in getting the authorization from the Chief CIT or CIT having jurisdiction over such person may be prejudicial to the interests of the Revenue (Warrant of Authorization in such case can be issued in Form No.45A).

Sub-section (1A) of section 132

This sub-section empowers the Chief CIT or CIT to authorize an Authorized Officer to exercise the powers as contained in clauses (i) to (v) to Sec. 132(1) also in respect of any such premises which are not covered by the Authorization given under sub-section (1) of section 132 (Such warrant of authorization can be given in Form No.45B).

contd.....

- Non-issuance of warrant of authorisation to assessee and absence of its service upon him shall not vitiate search [Rule 112 s.rule (3) requires only production of warrant not its service]
- That search in a bank cannot be made by pouncing upon ledgers and books of account, bank records or FDRs; only way to make search in bank is to ask officer-in-charge of bank to give details of such accounts, FDRs, etc., which action is nothing but a search under relevant provisions of Act and Rules and cannot be termed as mere collection of information from bank.

Ground Rules for Search.

The union finance minister, Mr. Vishwanath Pratap Singh announced these ground rules for searches and seizure carried out under the Income Tax Act, The Customs Act, Excise Act, and the Foreign Exchange Regulations Act (FERA).

- ❑ **Competent Authority** :Before execution of search, a search warrant (formal order) is required to be passed by the competent authority.

Information from external sources.

- Informers (Prosecution u/s 182 of the IPC if allegation proved false.)
- Newspaper.
- Magazines.
- Publication

Internal sources.

Suo-moto on the basis of records and investigation.

Ground Rules for Search.

- ❑ Objectives of the Search : Search & Seizure operation is only possible when there is evidence of undisclosed documents or assets which have not been and would not be disclosed in ordinary course.
- ❑ Search Party : Search party should be constituted of officer of a certain rank at least of ACIT or equivalent. The team should also include two respectable witness of the locality and technical persons like valuer.

Ground Rules for Search.

- ❑ Right of the person searched : discussed later
- ❑ Examination : Tax authorities examine the person searched on Oath, the statement is liable to be used against him. This statement is admissible as evidence. The purpose is to secure an explanation regarding the documents and evidence before he has an opportunity to concoct an explanation and fabricate evidence. He is not allowed the service of a lawyer at this stage.
- ❑ Report to the Senior authority : After the search, the search party has to submit a report to the senior authority like Collector, Comm., so that senior officials could judge the bona fide of the search and to exercise control over searches carried out.

Ground Rules for Search.

- ❑ Safeguards : Section 136(2) of the Customs ACT provides for deterrent punishment including imprisonment of the customs officer held responsible for vexatious searches. In excise and FERA such searches are punished by fine.
- ❑ Arrests : Income Tax officers have no power to arrests.
- ❑ Departmental Proceedings : Income Tax Officers has to make a summary assessment within 120 days of the seizure and has to calculate the tax, interest and penalty.

Ground Rules for Search.

- ❑ Prosecution : the complaint made by the tax department is treated as a personal criminal complaint as these offences under the Acts are treated as non cognizable.
- ❑ Publicity : the raiding party will not make any statement to the press. If any, will be made by the head of the department and will be factual in nature.

Rights and Duties

- ❑ Income Tax Department.
- ❑ Assesses
- ❑ Chartered Accountants

Income Tax Department - Rights

- ❑ **Enter and search** any building, place, vehicle, or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery and other valuable articles are kept. [S.132(1)(i).]
- ❑ **Break open** the lock of any door, locker, safe, Almirah or other receptacle for exercising the powers conferred under clause (i) where the keys thereof are not available. [Section 132(1)(ii)]
- ❑ **Search any person** who has got out of, or is about to get into, or is in, the building, place, vessel, vehicle or aircraft, if the authorized officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing. [Section 132(1)(ia)]

Income Tax Department - Rights

□ Require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in section 2(1)(t) of the Information Technology Act, 2000 to afford the authorized officer the necessary facility to inspect such books of account or other documents. [Section 132(1)(iib)]

Note: Person defaulting u/s 132(1)(iib) shall be liable to rigorous imprisonment for a term which may extend to two years and shall also be liable to fine. [S. 275B].

Income Tax Department - Rights

- Seize any such books of account, other documents, money, bullion, jewellery, or other valuable article or thing found as a result of such search (however, from June 1, 2003, any bullion, Jewellery or other valuable article or thing being stock - in – trade of the business found as a result of search shall not be seized but the authorized officer shall make a note or inventory of such stock in trade of the business. [Section 132(1)(iii)]

In Director General of Income Tax and Anr. vs Diamondstar Exports Ltd and Ors. [2006] 293 ITR 438, Hon'ble SC has held that Jewellery and ornaments seized during an illegal search were to be returned to the owners as soon as possible, along with the interest at the rate of 8 per cent on the value of the seized items.

Income Tax Department - Rights

- ❑ *Place marks of identification* on any books of account or other documents or make or cause to be made extracts or copies there from. [**Section 132 (1)(iv)**].
- ❑ *Make a note or an inventory* of such money, bullion, jewellery or other valuable article or thing. [**Section 132 (1)(v)**].

Income Tax Department - Rights

□ DEEMED SEIZURE second proviso to sec (1) of section 132.

Where 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 characteristics or due to its being of dangerous nature**, the authorized officer may serve an order on the owner (or the person who is in immediate possession thereof) that he shall not remove, part with or otherwise deal with it, except with the previous permission of the authorized officer.

Note : (a) Provision of deemed seizure shall not apply in case of stock in trade.

(b) Person defaulting in second proviso to sec (1) of section 132. shall be punishable with rigorous imprisonment which may extend to two years and shall also be liable to fine. [S.275A]

Income Tax Department - Rights

□ Police Assistance [Section 132(2)]

The Authorized officer may requisition the services of any police officer or any officer of the Central Government or both to assist him for the purposes of s.sec (1) and s.sec(1A) of section 132 and it shall be the duty of every such officer to comply with such requisition.

Income Tax Department - Rights

- Restraint order, Section 132(3) : Where it is not practicable to seize any material for any reason other than those specified in second proviso to S. 132(1) then in such a case the Authorized officer may serve an order on the specified person, that such person shall not remove, part with or otherwise deal with it except with the prior permission of such officer.

However serving of an order under s.s(3) shall not be deemed to be seizure under clause (iii) of s.sec.(1)

Income Tax Department - Rights

- Limitation of Section 132(3), Section 132(8A) : An order u/s 132(3) shall be valid up to sixty days from the date of the order.

Note : (a) Person defaulting in section 132(3). shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine also. [S.275A]

Judicial Pronouncement

- The issuance of prohibitory orders u/s 132(3) in respect of current bank accounts, savings bank accounts, cash credit accounts, loan accounts, overdraft accounts, recurring deposit accounts, personal accounts or any other accounts **duly passed through regular books of accounts are not valid.**

MAA VAISHNAVI SPONGE LTD. V. DGIT (INVESTIGATION) [2011] 339 ITR 0413 (ORI).

- Prohibitory order issued under subsection (3) of Section 132 of the Act in respect of Current Account in question **without forming any belief and/or without any material to conclude that the amount deposited in the said Current Account is either wholly or partly undisclosed income** of the petitioner is unsustainable in law.

M/s VISA COMTRADE LIMITED Vs UNION OF INDIA AND OTHERS, 2011-TIOL-546-HC-ORISSA-IT

Judicial Pronouncement

- Lifting prohibitory order after 60 days does not amount to continuation of search and therefore date of such order should not be taken in to accounts for ascertaining date of execution of last warrant of authorization.

Rakesh Sarin V. DCIT [2011] 333 ITR 0451 [Mad] see also CIT v. White & White Mineral P. Ltd. SLP dismissed filed by the department [2010] 322 ITR (St) 4.

Income Tax Department - Rights

- ❑ Examination on Oath, Section 132(4) : The Authorized officer may, during the course of the search or seizure, examine on oath any person who is found to be in possession or control of any books of account, documents, money, bullion, jewellery or other valuable article or thing and any statement made by such person during such examination may thereafter be used in evidence in any proceeding under the Indian Income Tax Act, 1922 (11 of 1922), or under this Act.

Judicial Pronouncements

- Hon'ble Gujarat High Court in *Kailashben Manharlal Choshi v. CIT* [2008] 14 DTR 257

has held that statement recorded at odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission.

- A self-serving retraction, without anything more cannot dispel statement made under oath under section 132(4).

CIT v. O. Abdul Razak 2012] 20 taxmann.com 48 (Ker.)

Judicial Pronouncements

- **S K Bahadur v. Union of India through CIT, 2011-TIOL-104-HC-Del-IT**: – Whether where the assessee's wife had given a statement on oath and submitted the evidence in the form of wealth tax return filed before the date of search that she owned the properties mentioned in the documents seized, the AO wrongly made addition in the hands of the assessee on the basis of surmises and presumptions – whether when the evidences substantiated that the money belonged to the wife, especially when these were reflected in the wealth tax return, no addition is warranted in the hands of husband.
- **Remedy even if surrender made**:- Additions on the basis of statement made u/s 132(4), nothing on records to show that there exist positive evidence found during search in support of such an statement . Addition not justified till there exists any conclusive evidence on records in support of statement.
[Case: Asstt. CIT Janak Raj Chauhan [2006] 102 TTJ (Asr.) 316]

Income Tax Department - Rights

Presumptions regarding ownership and control, Section 132(4A) :

- ❑ May presume that any books of account, other documents or valuable article or thing shall be presumed to be belonging to the person in whose possession or control these are found during the course of search. And the contents of such books of accounts and documents shall also be presumed to be true.
- ❑ May presume that the signature and every other part of such books and other documents which purports to be in the handwriting of any particular person are in that person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped, executed or attested by the person by whom it purports to have been so executed or attested.

Note : However such presumption is rebuttable and not a conclusive one, thus have limited application.

Judicial Pronouncements

- The presumption with regard to the contents of the seized dairy is valid one and it is available to be raised u/s 132(4).

Commissioner of Income Tax V. Ambika Appalam Depot. [2012] 340 ITR 0497 (Mad).

Judicial Pronouncements

- ❑ The presumption u/s 132(4A) is not available to authorities while framing the regular assessment yet material seized can be used as a piece of evidence in any other proceedings under the Act, all contentions are left open—

[Case : P.R. Metrani V. CIT[2006] 157 Taxman 325\287 ITR 209(SC)]

- ❑ Both assessee and alleged payees having denied to have advanced or received any amount as shown to have changed hands as per the MOU found during search, no addition could be made in block assessment in the absence of any further corroborative facts, the presumptions u/s. 132(4A) being a rebuttable one ; no substantial question of Law arose out of order of Tribunal Deleting the addition.

Case Law : Commissioner of Income Tax vs. Ved Prakash Choudhary [2008] 218 CTR (Del.) 99

Income Tax Department - Duties

- ❑ To allow the school going children to attend the school after checking their school bags for any incriminating material etc.
- ❑ To allow the assessee and other occupants of the premises to take their meals and medicines at the normal time and also allowing the old members of the family to take rest at their normal hours.
- ❑ Not to threaten, abuse or use any indecent language against the person searched.
- ❑ Not to get provoked and maintain a cool and calm temperament and to be alert.

Income Tax Department - Duties

- ❑ To avoid using the items of personal use of the assessee like Bed, TV etc. and also avoiding making the private calls from the assessee's telephone.
- ❑ Leave the premises only after informing the assessee.
- ❑ Decline the assessee's offer of food or refreshment politely in order to avoid any possible drugging.

Income Tax Officials – Post Search Duties

Time limit for retention of seized books of accounts, Section 132(8)

- ❑ That the books of account or other documents found during search shall be retained by the authorized officer only up to 30 days from the completion of assessment under section 153A, however retention for a period exceeding 30 days can be made only if reasons are recorded in writing and the approval of the CCIT, CIT, DGIT, DIT is obtained.
- ❑ Moreover, retention beyond 30 days will not be approved in cases where all the proceedings under the Income Tax Act in respect of years for which the BOA are relevant are completed.
- ❑ However assessee on legal entitlement may make application to board objecting the approval for retention granted by CCIT, CIT, DGIT, DIT along with the reasons for such objections [Section 132(10)] .

Income Tax Officials – Post Search Duties

- ❑ Where the Authorised officer is not the assessing officer, S132(9A).

The Authorised officer shall handover all material found as result of search to the Assessing officer having jurisdiction over the person searched within a period of 60 days from the date on which last of authorizations of search was executed.

Explanation 1 to section 132(14) : that for the purpose of section 9A “ execution of authorization for search shall have the same meaning as assigned in Expl. 2 to S. 158 BE” which is as under “ that in the case of search : on the conclusion of the search as recorded in last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued”.

- ❑ Not to retain seized assets in absence of liability. [*Asha Devi and Another v. CIT and Another, (2007) 291 ITR 496 (Delhi)*]

Assesseees - Rights

- ❑ To see the warrant of authorisation duly signed and sealed by the issuing authority.
- ❑ To verify the identity of each member of the search party.
- ❑ To insist on personal search of ladies being taken only by a lady, with strict regard to decency.
- ❑ To have atleast two respectable and independent residents of the locali
- ❑ 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.
- ❑ To call a medical practitioner in case of emergency.

Contd.....

- ❑ To inspect the seals placed on various receptacles, sealed in course of search and subsequently at the time of reopening of the seals.
- ❑ Every person who is examined u/s 132(4) has a right to ensure that the facts so stated by him have been recorded correctly.
- ❑ To have a copy of the panchanama together with all the annexure.
- ❑ To have a copy of any statement that is used against him by the Department.

Assesseees – Post Search Rights

- The person from whose custody any books of account or other document are seized may make copies thereof, or take extracts there from in the presence of any of the authorized officers or any other person empowered by him. [S. 132(9)]

Assesseees - Duties

- ❑ To allow free and unhindered ingress into the premises.
- ❑ To see the warrant of authorization and put signature on the same.
- ❑ 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.
- ❑ To identify and explain the ownership of the assets, books of account and documents found in the premises.
- ❑ 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.

Assesseees - Duties

- ❑ To affix his signature on the recorded statement, inventories and the panchanama.
- ❑ To ensure that peace is maintained throughout the duration of the search, and to cooperation with the search party in all respects so that the search action is concluded at the earliest and in a peaceful manner.
- ❑ 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.

Assesseees - Duties

- ❑ 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.
- ❑ Not to allow or encourage the entry of any unauthorized person into the premises.

Assesseees - Duties

- ❑ 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.
- ❑ 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.

Presence of Counsel

- ❑ The Counsel is entitled to advise and discuss the matter with client.
- ❑ The Counsel cannot obstruct the conduct of proceedings in any manner.
- ❑ Counsel cannot interfere in the recording of the statement.
- ❑ The counsel cannot suggest any answer.
- ❑ A person has a right of a counsel to appear in an enquiry or investigation.

Case : K.T. Advani v. State [1986] 60 Comp Cas. 603(Delhi.).

- ❑ In central Excise and customs matters, Court has held that it is advisable to permit presence of lawyers during interrogation, though they cannot be allowed active participation. Case : Abdul Razak Haji Mohd. V. UOI [1986] 26 Taxmann 234 (Bom.), Anil G. Merchant v. Director of Revenue Intelligence [1987] 12 ECR 183 (Mad.)

Suggestions to Chartered Accountants

- ❑ There is no prohibition in or immunity from covering a CA / AR along with his client at the time of search. The suggested course of action which a CA/AR should preferably recourse in such a situation is as under: -
- ❑ To keep all the files / documents related to such client separately at one place and never keep such documents which are known to the CA / AR as being of undisclosed nature.
- ❑ To store the Computer Data related to such client in a separate and identifiable Computer/folders.

contd.....

- ❑ To ensure that the files / documents / data related to such clients are not found at a place other than as stated to the search party.
- ❑ To make a request to the Authorized Officer for allowing him to contact the Authorizing Authority for explaining his position and make a request for not to carry out search but to carry out survey only.

Other
Miscellaneous Sections

A new “Miscellaneous” Section 292C Inserted by Finance Act, 2007 w.r.e.f. 01/10/1975 in chapter XXIII.

Presumptions :-

- Any books of accounts, other documents, money, bullion, jewellery or other valuable article or thing are or is found shall be presumed to be belong or belongs to Such person in whose possession or control these are found during the course of search.
- The contents of the books of accounts or other documents so found shall be presumed to be correct and true.

contd.....

- That the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person's handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

Section 132(4A) allowed to continue on the Statute books even after insertion of new sec. 292C.

*Sections 132 (5), (6) & (7) have
been deleted from 1st-June,2002*

*Sub-Section 11, 11A & 12 of
Section 132 deleted w.e.f. 1st
June, 2002*

CRPC shall apply - Sec 132(13)

- ❑ *The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section(1) or Sub-Section (1A)*

Board Can Frame Rules (Sec 132(14))

- ❑ The Board may make rules in relation to any search or seizure under this section; in particular, and without prejudice to the generality of the foregoing power, such rules may provide for the procedure to be followed by the authorized officer-
- ❑ (i) for obtaining ingress into (any building, place, vessel, vehicle or aircraft) to be searched where free ingress thereto is not available;
- ❑ (ii) for ensuring safe custody of any books of account or other documents or assets seized.

Analysis of Rule 112

Procedure for Search and Seizure

S.NO.	Rule	Brief
1.	Sub rule (3) & (4A)	Power of the officer to ingress and duty of the person incharge of the place qua ingress by officer
2.	Sub rule (4) & (4A)	Use of Police.
3.	Sub Rule 4(B)	Power of the Officer to break open any box, locker, safe etc.
4.	Sub rule (6) & (7)	Power of calling witness for search and preparation of list of things seized.

Procedure for Search and Seizure

S.NO.	Rule	Brief
5.	Sub rule (8)	Permission to an occupant or any other person on his behalf to attend search.
6.	Sub rule (9)	Delivery of list of things seized to occupant.
7.	Sub rules (10) to (12)	Custody of seized articles.
8.	Sub rule (13)	Opening of Seal.

**Section applicable of Code of
Criminal Procedure, 1973.**

Code of Criminal Procedure, 1973.

S.No.	Sec.	Brief
1.	S. 37	Public when to assist magistrate and police.
2.	S.38	Aid to person, other than police officer executing warrant.
3.	S.93	When search warrant may be issued.
4.	S.100	Regarding person in charge of closed place to allow search.

Code of Criminal Procedure, 1973.

S.No.	Sec.	Brief
5	S. 102	Power of police officer to seize certain property.
6.	S. 165	Search by Police Officer.
7.	S. 166	When officer in charge of police station may require another to issue search warrant.

Important Instructions &
Circulars.

Instruction No.11 of 2006, DT. Ist Dec., 2006

Instruction regarding release of cash deposit in the PD Account :-

- a) That where application filed u/s 132 B(1)(I) for release of seized cash, the cash seized should be released with in time limit provided after adjustment against existing liability.
- b) If the cash is not released under first proviso of S. 132B(1)(I), the amount should be released with in one month of passing the search & seizure order after.
 - adjustment of existing liability determined.
 - if penalty initiated, balance to meet the penalty amount imposable.
- c) If the assessment order passed is a subject matter of appeal before CIT(A) the amount should be released with in one month of passing the order u/s 250 after.
 - adjustment of liability determined at that time.
 - balance to meet the expected amount of penalty imposable

contd.....

- d) The amount retained to meet out the penalty imposable should be released with in one month of passing the penalty order.
- e) If any cash is seized before issue of this instruction and cash in PD account has not been dealt with or partly dealt, such cash should be released with in one month of this Instruction following the manner indicated there in.

Case Law : Assessee is entitled to interest on deposit with Revenue from end of 120 days from date of last of authorizations for search or from date when sum is transferred into AO's account from PD Account simple interest @ 1 ½ % for every month such interest shall run from the date immediately following the expiry of the period of 120 days from the date on which the last of the authorizations for search under Section 132 or requisition under Section 132A was executed to the date of completion of the assessment

***VISHWANATH KHANNA Vs UNION OF INDIA & OTHERS, W.P.
(C) No.21428 of 2005, Delhi High Court.***

Instruction No. – 7 dated 30-07-2003

Matters related to Search & Seizure

- Board has directed to follow guidelines to the officers deployed in the investigation with a view to focus on high revenue yield.
- i. Searches should be carried only in cases where there is credible evidence to indicate substantial unaccounted income/assets ie expected concealment is more than Rs. 1 crore.
- ii. Search operation will also be mounted in case of hidden unaccounted assets because of public harm terrorism smuggling narcotics fraud fake currency and such other manifestation.
- iii. Professional taxpayers should not be searched until compelling evidence exist.

Instruction No. – 7 dated 30-07-2003

- iv. Search operation shall be authorized only by the concerned DGIT (Inv.). He shall ensure that work related to search & Seizure should be completed within a period of sixty days.
- v. DGs IT (Inv.) are requested to ensure that officers of competence and proven integrity are taken in the investigation.
- vi. DGs IT (Inv.) are required to ensure strict compliance of the above guidelines/instruction.

**Instruction no. 286/247/98 IT(Inv. –
II)2nd Feb., 1999**

Release of assets disclosed in regular books of accounts maintained by assessee.

1. Such Seized assets could be released subject of course to recovery action by the department against existing arrears.
2. In case of seizure of perishable goods and jewellery could be use for personal use – If unconditional irrevocable bank guarantee to the full extent of the value of the seized assets is given, the assets could be released to that extent. The valuation shall be done by the Income Tax Department and the guarantee should be clear and unequivocal.

**Instruction no. 286/247/98 IT(Inv. –
II)2nd Feb., 1999**

3. The bank guarantee should be valid till the relevant assessment proceedings are complete and taxes are collected.
4. If the seized assets have specific evidentiary value in prosecution the assets will not be released till the completion of prosecution proceedings.

Instruction No. 1916, dated 11/05/1994, Guidelines for seizure of jewellery and ornaments in the course of search.

- a) In the case of wealth tax assessee, gold jewellery and ornaments found in excess of gross weight declared in the wealth tax return only need be seized.
- b) In the of person not assessed to wealth tax gold jewellery and ornaments to the extent of 500gms per married lady, 250 gm per unmarried lady, and 100gms per male member of the family need not be seized.
- c) That the authorized officer may having regard to the status of the family and the customs and the 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.
- d) In all cases, a detailed inventory of the jewellery and ornaments found must be prepared to be used for assessment purposes.

INSTRUCTION NO.1497 DT.13TH JANUARY, 1983, SEARCH AND SEIZURE-OPENING OF LOCKERS

- To ensure that the information about lockers is available early, the authorized officers should soon after entering the premises, record the parties' statement and get him/her committed about the number of lockers, contents thereof and source of acquisition. The lockers would be opened as early as possible, but in any case within a week.
- It has been decided that where the lockers sealed cannot be opened within the period of 7 days, the reasons for the delay should be intimated to the Director General (Investigation). The information about the lockers which remained sealed for more than a week as on 30th Nov.,1982 should be sent to the Director General (Investigation)/Board so as to reach not later than 31st Janl,1983. The report for subsequent months should reach the Director General (Investigation) by the 15th of the following months. These instructions may please be brought to the notice of all concerned.

Circular F.No.7/16/69-IT(Inv.), dated 4-6-1970

- How to deal Promissory notes found during search.

Photostat copy of the promissory note should be retained or a copy certified by the assessee to be a true copy, in addition to obtaining a Photostat or certified copy of the promissory notes an order under section 132(3) should be passed directing the person in possession of the promissory notes not to part with the said notes unless an equivalent amount is deposited with the Income-tax Officer.

Contd.....

Circular F.No.7/16/69-IT(Inv.), dated 4-6-1970

- However through Circular No.226-CBDT'S letter F.No. 7/16//69-I.T. (Inv.), dated 6-10-1970, board has stated that merely restraining the lender from parting with the promissory notes would be ineffective as the lender can realize the debts by issuing a receipt discharging the debtor from any further liability. The best way to pass the order would be to qualify the order with the proviso that the lender may part with the promissory notes only on the condition that the borrower pays the money to the Income-tax Department and not to the lender, he can also issue an order to the borrower not to pay the amounts under the pronote to the lender but to the Income-tax Department.

Contd.....

Circular F.No.7/16/69-IT(Inv.), dated 4-6-1970

- In suitable cases, promissory notes themselves can be seized, order under section 132(3) passed and the provision to second proviso to section 132(5) invoked to get a replacement in terms of money for the promissory notes before returning these to the assessee.

Instruction No.994-CBDT F.No. 286 /37 /76-IT

(Inv.), dated 31-7-1976

- An article is placed under a prohibitory order/seized, which, prima facie, appears to be an antiquity or of such an artistic or aesthetic value as worthy of being declared an “art treasure” in terms of section 2 of the Antiquities and Art Treasures Act, 1972, it should be immediately brought to the notice of the Superintending Archaeologist of the area (list of Superintending Archaeologists annexed) and his advice sought whether the article is an antiquity or worthy of declaration as an art treasure. Thereafter, a report should be made (in duplicate) as early as possible to the Director of Inspection (Inv.) giving full particulars of the article, the advice received from the Superintending Archaeologist, along with its approximate market value as given by the latter and/or a valuer. The article should not be released to the assessee or otherwise disposed of till the receipt of the Director of Inspection’s instruction

contd.....

- It may be carefully noted that in view of the provisions of the Antiquities and Art Treasures Act, the Income-tax Authorities cannot undertake any sale / auction of antiquities. When an antiquity or art treasure is compulsorily acquired by the Government, the compensation amount will be dealt with in accordance with the provisions of section 132 / 132B of the Income-tax Act. If the Director General, Archaeological Survey of India advises that the Government are not interested in acquiring an antiquity, it will have to be sold, where necessary, through a licensed dealer.

Instruction No: 1180 Date of Issue: 1/6/1978

1)Release of assets held as disclosed - order u/s.132(5):

Assets seized at the time of search as being undisclosed, are sufficiently explained as are duly disclosed for the purposes of the I.T. Act. Such seized assets may be retained and adjusted against the existing tax liabilities and the balance should be released to the person from whom the seizure was made, unless he gives his consent in writing to its retention for adjustment against the liability which may be determined on completion of the regular assessment or reassessment. It is clarified that the assets held as disclosed should not be retained against the liabilities determined under clauses (ii) and (ia) of section 132(5).

Instruction No: 1180 Date of Issue: 1/6/1978

2) Title deeds of immovable properties.

A title deed of immovable property can be retained under sub-section(8), but its retention itself will not confer any special right on the Department unless simultaneous action is taken by exercising the powers of provisional attachment of the property in question u/s.281 B of the I.T.Act. The ITOs may therefore have to take appropriate action for protecting the interests of the revenue in such cases on the basis of the seized documents, with the prior approval of the Commissioner.

Instruction No: 1180 Date of Issue: 1/6/1978

3) Tax liabilities in a firms case.

In the case of a registered firm, taxes are charged not only in the hands of the firm but also in the hands of the partners. The amount of tax on the estimated undisclosed income of the firm will, therefore be borne in the case of a registered firm, by the firm as also by its partners. Hence while calculating the tax on the amount of undisclosed income u/s.132(5)(ii), besides the tax if any on the undisclosed income in the hands of the firm proportionate tax on the share of undisclosed income in the hands of the partners should also be taken into account. The existing liability as per section 132(5)(iii) will be that of the firm alone and not of the partners.

Instruction No: 1180 Date of Issue: 1/6/1978

4. Release of seized valuable assets under second proviso to section 132(5)

- Under the second proviso to sec.132(5) the ITO may with the previous approval of the CIT release seized assets, if the assessee has paid or made satisfactory arrangements for payment of tax, interest, and penalty liabilities referred to in clauses (ii) & (iia) and (iii) of sec.132(5). A question has been raised as to whether an offer of security of immovable property by way of deposit of title deeds constitutes satisfactory arrangements for payment of the amount due under the Act. The Ministry of law have advised that by merely offering immovable property as security for payment, it cannot be said that satisfactory arrangements for the payment of the amount are made by the person concerned under the second proviso to sec.132(5).

Circular No. 1590, dated 21-12-1984 F.No. 287 / 25 / 83-IT (Inv. II)

Treatment of unaccounted stocks restrained / seized in benami / fictitious names.

Where assets in the form of unaccounted stocks have been restrained / seized by the Department apparently held in the benami names. and, the bank accounts might have also been discovered which were operated in the names of fictitious persons. It has been decided that the following course of action should be adopted in all such cases:-

1. The Income-tax Officer having territorial jurisdiction at the address declared should issue a notice under section 139(2) in the name of a person who is declared as an owner of the said assets.

contd....

- 2 As the said person is not likely to be available at this address, the notice should be served by affixing a copy of the notice on the Notice Board of the Income-tax Officer and a copy of the banker as also to the person, such as Port Trust authorities, customs authorities, warehouse-keepers, etc., in whose custody the assets are lying at present.
- 3 In such cases, only the value of the investments should be taken as the income of the assessee by invoking the provisions of section 68,69, etc., and no ad hoc addition should be made.

It may also be noted that assessments in the hands of benamies are of protective nature and appropriate action may continue to be taken.

Option of protective assessment is available to assessing officer even in block assessment cases.

CIT Vs MAHINDRA FINLEASE PVT LTD, 2011-TIOL-71-HC-DEL-IT

Gems of Judiciary

ISSUE

VISA Comtrade Limited v. Union of India [2011] 338 ITR 343 *(Ori)*

- In order to justify the action the authority must have relevant materials on the basis of which he can form an opinion that he has reason to believe that action against a person under section 132 of the Act is needed. The belief should not be based on some suspicion or doubt. Section 132 speaks of reason to believe and not reason to suspect or reason to doubt.
- Therefore, section 132(1) has to be strictly construed and the information of the person or reason to believe by the authorizing officer must be apparent from the note recorded by him.

- Where the Department had not cross verified the entries in the current account in question with the regular books of account maintained by the assessee and investigation on whether the money lying with the current account represented disclosed income or undisclosed income was going on. In such a situation, the contention of the Department that the warrant of authorization had been issued and the current account in question had been seized on the subjective satisfaction of the income-tax authorities was untenable.

Gems of Judiciary

[2010] 186 TAXMAN 480 (ALL.) Doctors XRay & Pathology Institute (P.) Ltd. VS. Director of Investigation, Kanpur

Section 132 of the Income-tax Act, 1961 - Search and seizure - General - Block period ending on 14-9-2002 - Whether at stage of authorization for search and seizure under section 132, consideration is as to whether there is some relevant material so as to warrant proceeding under section 132; question of sufficiency cannot be gone into at time of initiation of proceeding under section 132 - Held, yes -

Gems of Judiciary

Genom Biotech.) Ltd vs. DIT(Invs.)/[2009]180Taxman 395(Bom.)

- Held that where information received is that tax due to revenue has been evaded by making fake or exaggerated bills, it will be reasonable to believe that assessee will not disclose actual modus operandi adopted for such tax evasion and, thus, conditions set out in clause (b) of section 132(1) are satisfied
- similarly, if information received is that assessee has received undisclosed income, then it will be reasonable to believe that assessee will not disclose details of undisclosed income received and, thus, conditions set out in clause (c) of section 132(1) are satisfied

Gems of Judiciary

- *DIT vs. Dr. Nalini Mahajan [2009] 181 TAXMAN 24 (SC)*
(sustained the order of Hon'ble High Court of Delhi in Dr. Nalini Mahajan v. DIT [2002] 122 Taxman 897 (Del.))

Whether since Commissioner had released cash, jewellery and books of account seized during search, in such circumstances, question whether Additional Director (Inv.) had requisite jurisdiction to authorize any officer to effect search and seizure in purported exercise of his power conferred upon him under section 132(1), had become infructuous and, therefore, could not be examined - Held, yes

Gems of Judiciary

Commissioner of Income-tax Vs. S. K. Katyal [2009] 308 ITR 0168 (Del).

Normally, a search must be continuous. If it cannot be continuous for some plausible reason, the hiatus in the search must be explained. If no cogent or plausible reason is shown for the hiatus in the search, the second or resumed search would be illegal. Merely mentioning in the panchnama that a search has been temporarily suspended does not ipso facto continue the search. It would have to be seen as a fact as to whether the search continued or had concluded. Merely because a panchnama is drawn up on a particular date, it does not mean that a search was conducted and/or concluded on that date. The panchnama must be a record of a search or seizure for it to qualify as the panchnama.

Gems of Judiciary

Raghu Raj Pratap Singh v. ACIT, [2009] 179 TAXMAN 73 (ALL.)

- Banks can be searched in relation to a person against whom, on entertaining reasonable belief as per provisions of section 132(1)(a), (b) or (c), as case may be, that he is possessed of undisclosed income and/or property,
- That Taxpayers' Charter says that person, who is to be searched, has a right to see warrant of authorization duly signed and sealed by issuing authority and to verify identity of each member of search party and is entitled to exercise any other right mentioned therein, it only relates to person who is in charge of building, place, vessel, vehicle or aircraft, which have been specified for being searched
- That it is not right to say that no search can be conducted upon any place, building, vessel, vehicle or aircraft if person, whose concealed income and properties are to be traced out and detected, is not himself present at place where search

Gems of Judiciary

□ 320 ITR 461(Guj) 2010- Suvidha Association v. Additional Director of Income-tax (Investigation)

Warrant of authorisation for search under name of assessee-corporation and its president--No information in possession of officer issuing warrant--Proceedings invalid--Block assessment cannot be continued--Transfer order not operative

Gems of Judiciary

- ❑ Any Search warrant issued under section 132 in name of a dead person is invalid and void ab initio and no valid assessment can be made on strength of such an invalid search warrant.

CIT Karnal vs. Rakesh Kumar, Mukesh Kumar [2009] 178 Taxman 224 (Punj. & Har)/ [2009] 313 ITR 305(P & H)

- ❑ Mere mentioning of name in panchnama does not lead to conclusion that a valid search was conducted against assessee. Further mere search of premises owned by assessee but rented to another concern does not by any implication prove conduct of search as enumerated u/s 132 against assessee.

J.M. Trading Corp. V. ACIT, [2008] 20 SOT 489 (Mum.)

Gems of Judiciary

- ACIT vs P. Srinivas Naik (2008) 114 TTJ 0856/(2009) 117 ITD 0201 (Bang.)

Tribunal has no jurisdiction to adjudicate upon the legality of search ; assessee has no reason to challenge the search for the reason that the impugned search was carried out on the business / residential premises of a third party and not on the premises of the assessee.

Gems of Judiciary

- The requirement of law to serve the order on the person either the owner or the person who was in immediate possession or control of the relevant material found during the course of search, and therefore the order issued in the name of person in possession of goods and copy to assessee there of is valid in view of provisions of section 132(3) of Income Tax Act, 1961.

Mahaan Foods Ltd. Vs. Deputy Commissioner of Income-tax [2009] 312 ITR (A.T.) 0075 (ITAT – Del).

Gems of Judiciary

Income Tax Department - Rights

- Letter written by partner of assessee firm to department admitting undisclosed income higher than that disclosed in statement under S. 132(4) with certain conditions and further stating that a revised return shall be filed accordingly is not a statement under S. 132(4) nor a revised return and cannot be used as a basis for making assessment.

CCIT & ANR. Vs. Pampapathi [2009] 310 ITR 0064 (Kar.)

- **Hon'ble Gujarat High Court in Kailashben Manharlal Choshi v. CIT [2008] 14 DTR 257** has held that statement recorded at odd hours cannot be considered to be a voluntary statement, if it is subsequently retracted and necessary evidence is led contrary to such admission.

contd...

- A statement was made by the assessee, voluntarily under s. 132(4), that 'on-money' was paid out of the firms suppressed profits. The statement, being clear and unambiguous, and made in the absence of any coercion, threat or force, was binding on the assessee even though he subsequently retracted it.

Case Law : Hotel Kiran vs ACIT, 82 ITD 453 [ITAT - Pune]

[2011] 12 taxmann.com 257 (Jharkhand) CIT v. Ravindra Kumar Jain

Whether when amount, which assessee stated to have been deposited in bank, was not found in any bank and, thus, part of alleged admission of assessee was not found correct, Assessing Officer was duty bound to collect more evidence in respect of undisclosed income of assessee - Held, yes - Whether, therefore, Tribunal was justified in deleting addition - Held, yes

Gems of Judiciary

- ❑ Search warrant is issued in the name of a person, place to be searched is to be mentioned therein, but it is not necessary that such place or building must belong to that person in whose name search warrant is issued; such place or building may belong to some other person who not covered in search warrant, any books or documents belonging to other person not covered under search warrant are found, would neither invalidate or vitiate search proceeding nor it absolve person not searched from proceeding against him.

Case law : ACIT vs. Vinod Goel [2008] 111 ITD 70 (ASR)

Gems of Judiciary

- ❑ If competent authority has reason to believe that a number of persons are involved in interconnected transactions as reflected in prima facie material available with such authority, there is no prohibition against issuance of common search warrant to those persons.

Anjuga Chit Funds P. Ltd. Vs. DCIT [2008] 304 ITR (A.T.)0374 (ITAT – Chen.

- ❑ Search should be a continuous process, unless there is a valid explanation for the time gap.

Commissioner of Income-tax Vs. Sarb Consulate Marine Products P. Ltd. [2007] 294 ITR 0444 (Del.)

Gems of Judiciary

- ❑ Whether for issuing notice under section 158BC, revenue has to show in first instance that entity, to whom a notice under section 158BC is sought to be issued, is an entity or person in whose case search proceedings under section 132 have been conducted - Held, yes
[Jayantilal Damjibhai Soni & Directors of (Invs.). [2008] 219 CTR (Guj) 26.]
- ❑ The search proceedings while appeals from assessments were pending were legal.
Smt. Nandita Acharjee Vs. Union of India [2008] 302 ITR 0075 (Gau.)
- ❑ Mere information from CBI that cash was found from in possession of an individual cannot justify a search. *Union of India v. Ajit Jain (2003) 260 ITR 80 (SC)*

Gems of Judiciary

- The search at premises of the group concerns was conducted under s.132. In all five search warrants were issued giving correct addresses. The warrants for search were issued in the names of PPJ and PPJ (Pvt.) Ltd. The assessee were carrying business as PPJ (Delhi), PPJ (India) and PPJ (Pvt.) Ltd. The omission of (D) or (India) was only a technical mistake curable under s.292B. The search was valid.

Case Law : P.P. Jewellers (P) Ltd. and Ors. vs ACIT – [2006] 111 TTJ 187
[ITAT – Delhi]

Gems of Judiciary

- ❑ There should be nexus between information and person searched.

[Case: Harilal Shah V. CIT (2006) 281 ITR 199 (Gau.)]

- ❑ Where the Jurisdiction for block assessment is questioned on grounds of validity of a search, The Income Tax Appellate Tribunal is not competent to go into the question of validity of search.

[Case: Promain Ltd. V. DCIT (2006) 281 ITR (AT) 107 (Del.) SB]

Gems of Judiciary

- ❑ Allegation that Income Tax Authorities had taken a bribe would not invalidate the search.

Case : Kamal Khosla vs. Director of Income Tax: SLP (c.) Nos. 12242-43: [2003] 264 ITR 140 (St.) SLP rejected, (2003) 264 ITR 140 (St.)

- ❑ If there is no search warrant in the name of the firm, no search can be conducted on the firm on the basis of search warrant in the name of partner.

Case : K.R. Modi & Co. Vs. DDIT (Inv.) (2005) 272 ITR 587 (Cal.)

Gems of Judiciary

□ Alleppey Financial Enterprises vs ADIT (Inv.) & Anr. ,(1999) 236 ITR 562 (Ker.)

Gold ornaments pledged by the customer with the assessee as security for loan amount sanctioned by him cannot be seized u.s 132, respondent directed to return the gold ornaments together with the pledged forms.

Gems of Judiciary

- ❑ Disclosure of the material or the information to the person against whom the action is taken u/s 132(1) is not mandatory, because such disclosure might affect or hamper the investigation.

[Southern Herbals Ltd. v DIT(Investigations)(1994) 207 ITR 55(Karn).]

- ❑ Only the High Courts and the Supreme Court have the jurisdiction to call for and look into the reasons recorded to decide whether the issue of the search warrant was called for. *[Dr. Pratap Singh v Dir. Of Enforcement(1985) 155 ITR 166(SC)]*

Gems of Judiciary

- Ramesh Chander & Ors. Vs. CIT & Ors. (1974) 93 ITR 244 (P & H)

No warrant of authorization u.s 132 could be issued where money and documents were taken possession of by a police inspector and the CIT could have no reason to believe within the meaning of sec. 132 when he did not know anything about the person concerned and made no enquiry from the ITO concerned as regards evasion of tax. Further approved by Hon'ble SC in (1986) 58 CTR 129(SC) CIT vs Tarsem Kumar & Anr.

Gems of Judiciary

- ❑ The presumption u/s 132(4A) is not available to authorities while framing the regular assessment yet material seized can be used as a piece of evidence in any other proceedings under the Act, all contentions are left open– [Case : P.R. Metrani V. CIT[2006] 157 Taxman 325\287 ITR 209(SC)]
- ❑ Presumption about noting and jotting in documents is not available u/s 132 (4A), Assessee liable to tax only on receipts proved to be income of assessee. [case Commissioner of Income Tax Vs. D. K. Gupta – [2009] 308 ITR 230 Del.]

Gems of Judiciary

□ *Straptex (I) (P) Ltd. vs DCIT, [2003] 79 TTJ 228 (ITAT Mumbai)*

The presumption u/s. 132(4A) was against a person in whose possession the document had been found and not against any other person. As the presumption u/s. 132(4A) was a rebuttable one and not a conclusive one it could not be applied in the absence of corroborative evidence.

□ *Commissioner of Income Tax vs. Ved Prakash Choudhary [2008] 218 CTR 99 (Del.)*

Both assessee and alleged payees having denied to have advanced or received any amount as shown to have changed hands as per the MOU found during search, no addition could be made in block assessment in the absence of any further corroborative facts, the presumptions u/s. 132(4A) being a rebuttable one ; no substantial question of Law arose out of order of Tribunal Deleting the addition.

Gems of Judiciary

- ❑ The requirement of proving the genuineness of the cash credits appearing in the seized books of accounts cannot be set aside by the provisions of section 132(4A)

Case Law : Biru Mal Pyare Lal vs ACIT - 74 TTJ 150 | ITAT – Chandigarh]

- ❑ Presumption u/s 132(4A) is available only in regard to proceedings for search and seizure and for purpose of retaining assets u/s 132(5) and their application u/s 132 B, and it is not available for any other proceeding except where it is provided that presumption u/s 132 (4A) would be available.

Case law: P.R. Metrani v. CIT – [2006] 157 Taxmann 325 (SC)

Gems of Judiciary

Shardadevi P. Jhunjhunwala v CIT W. P. No. 428 of 1996 -[2010] 1 taxmann.com 92 (Bom.)

- ❑ Any disclosure made subsequent to seizure of incriminating material cannot be called voluntary
- ❑ Merely because assessee cooperated in deciphering the seized documents would not mean that the revenue authorities could not have deciphered the same without voluntary assistance of assessee.

Gems of Judiciary

[2010] 186 TAXMAN 305 (SC) Rajendran

Chingaravelu v ACIT

Section 132 of the Income-tax Act, 1961 - Search and seizure

- ❑ Whether any bona fide measures taken in public interest and to provide public safety or to prevent circulation of black money can be objected to as an interference with personal liberty or freedom of a citizen - Held, no
- ❑ Whether when a bona fide passenger is carrying an unusually large sum, and his claims regarding source and legitimacy have to be verified, some delay and inconvenience is inevitable and, in such a situation, rights of passenger will have to yield to public interest - Held, yes

contd....

- Whether intelligence officers are entitled to satisfy themselves not only that money is from a legitimate source, but also that such a large amount is being carried for a legitimate purpose and, therefore, even if carrier is not guilty of any offence in carrying money, verification or seizure may be warranted to ensure that money is not intended for commission of a crime or an offence - Held, yes

Can the Auditors be forced to part with information of clients not related to search found in their laptops ?

The Apex Court in DIT(Investigation) vs S.R. Batliboi & Co. [2010] 186 Taxman 350(SC) superseded the judgment of H'nble DHC in S R Batliboi & Co Vs DIT (Investigation), (2009) 315 ITR 137(Delhi).

- ❑ Laptops of Auditors seized during search of an assessee - Income Tax Department can inspect the data contained in files/folders in said laptops relating to clients for proper assessment
- ❑ Assessee can give its consent to the claim of the department or alternatively challenge it by adopting appropriate proceedings
- ❑ Assessee would make available a hard copy of the contents of said connected files/ folders in case gives its consent or fail in its challenge to said claim by deptt.

Documentary evidence prevail over Oral Evidence.

CIT vs Omprakash K. Jain [2009] 178 Taxman 179 (HC – Bombay)

- The Assessing Officer while considering whether the retraction was under duress or coercion had also to consider the genuineness of the documents which were produced as this is documentary evidence. The test of evidentiary value of the oral evidence and the documentary evidence has to be borne in mind. The Assessing Officer will have to comply with the settled principle of law. Documentary evidence if genuine must prevail over the oral statement. The assessee produced evidence to show that surrender under s.132(4) was contrary to facts. The case remanded to the AO to consider the genuineness of documentary evidence filed and decide the case afresh.

Other case law : First Global Stock broking (P) Ltd. vs ACIT 15 TTJ 173 (ITAT-Mum.)

Remedy even if surrender made

- Additions on the basis of statement made u/s 132(4), nothing on records to show that there exist positive evidence found during search in support of such an statement . Addition not justified till there exists any conclusive evidence on records in support of statement.

[Case: ACIT vs Janak Raj Chauhan [2006] 102 TTJ 316 ASR]

- Whether when assessee had explained his statement as not correct in context of materials produced, no addition could be made to his income on basis of his statement .

[2011] 13 taxmann.com 49 (Mad.) M. Narayanan & Bros. v. Asstt. CIT

Gems of Judiciary

- Assessee is entitle to interest on refund of excess sum , when Revenue seizes cash in a search from assessee premises, which turns out to be more than tax liability.

SITARAM Vs CIT 2012-TIOL-259-HC-MUM-IT

Practical Tips for handling
Search, Seizure and Post
Search proceedings

Tips

- ❑ Systematically arrange and make analysis of all the seized documents.
- ❑ Sort the documents assessee wise, assessment year wise and premises wise.
- ❑ Sort the documents having financial relevance and financially irrelevant.
- ❑ If the documents are financially relevant, ascertain how they are explainable vis a vis books of accounts or other details available with the Income Tax Department or are found / seized from the premises searched or surveyed.

Tips

- ❑ See if the explanation is available about all the records available with the Income tax department.
- ❑ Offer Peak Credits as undisclosed income,if any.
- ❑ Return of income u/s 153A should be filed judiciously after consideration of records and material lying with income tax department.
- ❑ Where any undisclosed income is offered in the return filed u/s 153A then the expenditure incurred to earn that income may also be claimed.
- ❑ File returns under protest if required notices are not properly issued & challenge the validity of proceedings at the time of Assessments itself.

THANK YOU