

## **AMENDED PROVISIONS OF ASSESSMENT RELATING SERVEY TO SEARCH & SEIZURE**

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### **SEARCH**

#### **HISTORY AND INTRODUCTION**

"Search and Seizure", the origin of these provisions will in a few years celebrate its golden jubilee. It was since 1956 that the provisions of search and seizure made its first entry into the Income Tax Act. Section 132 was totally substituted by the Finance Act, 1964. After section 132 underwent a through overhaul in the year 1976, to committees had made certain recommendations on search and seizure provisions (i) The Raja Chellaiah Committee and, (ii) The Kelkar Committee. It is seen that the recommendations affecting the substantive law have been given effect to in respect of majority of such recommendations; the assessee friendly measures recommended by these committees have not been given any serious considerations.

#### **CURRENT POSITION :**

The Finance Act, 2003 has changed the method of assessment of income in respect of search & requisition cases, & the new method of assessment is made applicable to searches initiated, or requisitions made after 31/5/03. The new procedure for assessment is laid down in the three sections, viz. Sections 153A, 153B, and 153C, inserted by the Finance Act, 2003 with effect from 1.6.03.

The Amended provisions in details of the newly inserted sections are as follows :

Sections 153A, 153B and 153C deal with search and seizure they can be explained as under:

**"SECTION : 153 A"**

- ③ The Assessing Officer under section 153A (a) would issue a notice to furnish returns of income for each of immediately six proceeding years within specified time limit. Therefore, if the search is initiated on 1/12/2007, the assessee can be called upto to file returns for the A. Y 2002-03 to 2007-2008. (i.e previous years 1/4/2001 to 31/3/2007). Thereby the assessee will have to file separate returns for each of the years in the prescribed form within the time limit specified in the notice. Further there is no provision for giving any maximum time limit for filing the returns.
- ③ The notice issued under provision 153A can be issued even if the conditions laid down in sections 147 to 149,151 and 153 are not satisfied. We can interpret then ,that even if 4 years from the end of the assessment year, for which sections 143(3) has been made, had expired and the assessee had disclosed all material facts at the original assessment for the year, notice u/s 153A can be issued for that year. In normal circumstances such notice for reassessment cannot be issued u/s 148 in view of the provision to section 147.
- ③ With regards to the year(s) in respect of which the assessment or re-assessment is pending, as per the second proviso to section 153A (b), the same shall abate. In other words, the assessment or re-assessment shall not be made by regular assessment under section 143(3) or re-assessment under section 143, but it shall be under section 153A(b). If the returns are filled, the Assessing Officer shall re-assess the income under section 153A (b) in respect of the year(s) in respect of which the assessment is complete. Thus, the assessee will have to include the income already assessed earlier or income declared in the returns for which assessments are pending in the respective years while filing returns for the above 6 years for which notice u/s 153A is issued. If no returns are filed, the Assessing Officer shall proceed to make assessment under section 144.

### **"SECTION : 153 B"**

- ③ Under section 153B the assessment proceeding shall be completed within a period of two years from end of the financial year in which last of the authorization of the search was executed. Provisions have been made for extending this time limit where special tax audit u/s 142(2A) has been ordered or where stay order by court has been issued or in similar circumstances.

### **"SECTION : 153 C"**

- ③ Sections 153C states that, if during the course of the search it is noticed that any books of accounts, documents, assets etc: are found or seized belonging to any other person, the Assessing Officer shall transfer the same to the officer who has jurisdiction over that other person and then officer shall proceed against that other person as provided in section 153A and 153B.

### **"SECTION : 234 A AND 234 B"**

- ③ The provisions of section 234A and 234B for levy of interest on the demand raised under the above proceedings will apply. Therefore, the assessee who is subjected to assessment or reassessment u/s 153A, 153B and 153C will have to pay interest for the delay in filing the return of income and short fall in payment of advance tax at the applicable rates for each of the above six years.

### **"SECTION : 271"**

- ③ With regards to the provisions of section 271 for the levy of penalty for concealment of income will also apply and penalty will range between 100% to 300% of tax which can also be levied.

### **"SECTION : 276 CC"**

- ③ It should be noted here that the provisions for prosecution u/s 276CC will be applicable when the assessments are made u/s 153A, 153B and 153C.

### **"SECTION : 246A"**

- ③ The Finance Act, 2003 has amended section 246A so that the assessee can file an appeal to the CIT (A) against the order of assessment or re-assessment under the above section. Further an appeal to the ITA Tribunal can also be filed against the order of CIT (A). Also appeals to High Court on substantial question of law can also be filed.

**"RIGHTS OF ASSESSEE DURING CONDUCT OF SEARCH :"**

**Q. 1** What remedy does the assessee have in case of misbehaviour of the officers?

**Ans.** Misbehaviour may lead to some injury, damage or harm to the interest of the assessee or his reputation or it may only hurt his feelings and sentiments, religious or otherwise, Depending on facts, the action will lie by way of challenge of the proceedings under article 226 if the search is done in an irregular and illegal manner. If it is a case of misbehaviour leading to hurt of sentiments and feelings, the best course would be to lodge a complaint with the Director or Commissioner concerned or with the Director General or Chief Commissioner concerned or with the Member (Investigation), In extreme cases, the action may lie in TORTS. There, of course, it will have to be established that it was covered by the immunity of sovereign act.

**Q. 2** What remedies' does the assessee have where during search the assets are destroyed like sofas and beds' are torn, floor is dug and walls are broken?

**Ans.** No remedy lies against such actions if they are done bona fide and in good faith in carrying out the object of the search. Action may lie only if these acts are done mala fide and there was no reason to suspect that items broken or destroyed contained any concealed income or assets hidden therein. Neither on the basis of information received from the informer, nor from any other source.

**Q. 3** Can the assessee contract superior officer when search is in progress to explain the difficulties being faced?

**Ans.** Yes, but the superior may not interfere with the judicial discretion of the authorised officer, He may take administrative action and such corrective measures as may relieve the assessee of avoidable harassment and to make the search operation less painful.

**Q. 4** Whether can a legal advisor be present? if, yes, he do when search is in progress?

**Ans.** Yes, he can be present. :

**Q. 5** What remedy is available to a person whose cash has been seized from the possession of his employee who was carrying it in connection with business?

**Ans.** Such a person should immediately lodge his claim before the authorised officer who has seized the cash and produce necessary evidence to explain the source. If the proceedings under section 132(5) have already been commenced, he should lodge his claim under section 132(7). In case he does not succeed there also, he may file an appeal under section 132(11) before the Commissioner.

**Q. 6** What remedy lies with regard to seizure of cash whose sources are also explained?

**Ans.** Efforts should first be made to prevent the seizure because once the seizure is made, Department may like to pass an order. If the cash is wrongly seized, or for that matter, any asset is wrongly seized, the authorised officer should pass an order under section 154 to release such an asset. Provisions of section 132(i) empower seizure of only such assets, which represent fully or partly undisclosed income. Therefore, seizure of any assets, which does not satisfy the basic condition, involves an illegality in the act of seizure, which should be corrected by the officer as if he has committed mistake of fact and/or of law apparent from record. Since this kind of seizure would be without jurisdiction, it will be a fit case for filing a writ petition under article 226 of the Constitution.

**Q. 7** Can assessee ask for identity card of officers?

**Ans.** Yes. Sometimes the authorised officers or the person accompanying them do not possess the identity card. As an alternative, they should carry and produce some other documents to prove their identity, e.g, a certificate attesting their signatures, The certificate should be issued by a senior officer in charge of the search or by an immediate superior. In a case where there is no proof of identity, the assessee would be within his right to refuse the ingress.

**Q. 8** Can assessee ask for a copy of warrant?

**Ans.** No. Warrant of authorisation is meant and addressed to the authorised officer and it has to be executed by him. It is an instrument to arm him with the authority to search. After execution of the warrant, it is to be returned to the issuing authority. The assessee is, however, entitled to go through the warrant. In fact, the authorised officer is duty bound to produce it and in evidence of production thereof, he may obtain the signatures of the assessee or his representative along with the signatures of two witnesses.

The assessee should inspect it carefully to see that: (a) it is not blank; (b) irrelevant portions are struck off, etc. If these defects are found, he should bring them on record by filing a letter before the authorised officer. If the warrant is blank and the name and address is not correctly recorded, he may as well not allow the ingress. In case of other defects, question of challenging the validity under article 226 may be considered.

**Q. 9** Can the authorised officer refuse permission to the assessee or any other person to be present on his behalf during search?

**Ans.** No. Sub-rule (8) of rule 112 provides that the occupant of the building, place, vessel, vehicle or aircraft which is searched, as also the person in charge of such vessel, etc., or any other person on his behalf, shall be pen-nitted to attend during the search and a copy of seizure memo prepared under sub rule (7) shall be delivered to the occupant or to such other person.

**Q. 10** Can the authorised officer enter and search any building belonging to the assessee once the warrant of authorisation is issued against him?

**Ans.** No, he can enter and search only such building in relation to which the warrant of authorisation is specifically issued.

**Q. 11** Can the assessee call his relatives to assist him during the course of search?

**Ans.** Yes, he can do so but the authorised officer may carry out their personal search before allowing them entry. However, he may order such persons who may be creating obstruction in the proper and smooth conduct of the search, to leave the premises or he may not grant the permission if he apprehends any obstruction in the smooth conduct of the search proceedings.

**Q. 12** Can an authorised officer prevent the assessee from receiving or making telephone calls and telex messages?

**Ans.** No, unless he believes that such permission will defeat the very object of the search and that the assessee may use his messages to fabricate false evidence, remove the assets, or make other manipulation.

**Q. 13** Is it advisable to give answer to every question by saying, 'I do not remember because of the confused state of my mind created due to the sudden raid'?

**Ans.** It is neither advisable nor in the interest of the assessee to deliberately answer every question by repeating "I do not remember" or "I do not know". He may lose the opportunity of explaining several items of assets, which he can otherwise do. Besides, he may run the risk of prosecution in case on the basis of contemporaneous evidence recovered subsequently during the search it appears that the facts were within the knowledge of the assessee, which he declined to disclose. It would be on the other hand, advisable to take the help of the books of account and other documents and give all possible information, which is readily available. However, in genuine cases where it is not practicable to remember certain facts with certainty or minute details of transactions particularly those of several past years, the assessee may only explain their nature, if possible and add that he would be able to furnish the details and explanations after

looking into record. A statement made on the spot in support of his explanation has greater evidentiary value.

**Q. 14** What remedy is available to a genuine depositor of the money when the search takes place against a person with whom the deposit is made, e.g., with a car dealer with whom initial deposit of money is made for booking the car or with a moneylender with whom the ornament or jewellery may be pawned as security for loan?

**Ans.** Proceedings with the presumption that the deposit is genuine and the assessee against whom the search proceedings are taken, is able to establish its genuineness during the course of the search itself, any seizure or restraint of the deposit would be ab initio void, It is also well settled that even the restraint under section 132(3) can be made only after the authorised officer is satisfied that the asset, in question, wholly or partly, is concealed income or wealth.

Therefore, any seizure of a genuine or disclosed amount will be 'without jurisdiction and, in any case, illegal. Therefore, the assessee and/or the depositor can always approach the authorised officer either during the course of search itself with the necessary evidence and claim that no seizure is called for or they can approach the authorised officer even after seizure; but within 15 days of the time limit prescribed under section 132(9A) to release the amount wrongly seized by rectifying the order of seizure under section 154. Release should be made in the presence of two witnesses.

If the time limit of 15 days has expired and the seized assets have been handed over to the Assessing Officer, the assessee and/or the depositor can file writ under Article 226 on the ground that the seizure was without jurisdiction or, in any case, illegal, and that no further proceedings under section 132(5) can be taken in respect of such assets. The depositor can also approach the Assessing Officer during the course of proceedings under section 132(5) as a "concerned person", and put his claim for release of the amount or at best, to proceed against him under section 132(7). If he does not succeed there, he can file an appeal before the Commissioner, where he will be entitled to raise all the grounds, including



the question of validity of the search and seizure and claim the release of the assets.

Answer to present question should not be mixed with the answer to the earlier question wherein it is said that no disclosure can be made by a third party during the course of search. The distinguishing factor is that while in the present question, the seizure being of disclosed asset itself is illegal and without jurisdiction, in the earlier question the seizure is valid and the question is as to who can make the disclosure and in which proceedings?

**Q. 15** Can the assessee be arrested during the course of search?

**Ans.** No, the authorised officer does not have the power to arrest an assessee for an offence under the Income-tax Act or other Direct Tax Laws while acting under section 132. However, in case of offences like destruction of documents, attack on the search party, an authorised officer can lodge a complaint with the police and the appropriate police authority may take cognizance of the offence and order an arrest.

## **DUTIES OF ASSESSEE**

**QH. 1** Is the assessee expected to retain his bills for each item purchased?

**Ans.** No, neither that is required nor practicable, particularly in relation to items of smaller value. It is, however, essential that there should be adequate withdrawal to cover the acquisition of the articles during the year or over the years as the case may be. Even under the CCS (CCA) Rules, a Government servant is supposed to intimate acquisition of movable assets only if the value exceeds Rs. 5,000. However, in case of valuable articles and things, it is advisable to keep the bills.

**QH. 2** What documents are necessary to be maintained in relation to the imported items?

**Ans.** If the imported items are brought by the assessee from abroad, he should maintain its purchase voucher as well as the customs receipt. In case of smaller items which are covered by the exemption limit or as may be prevalent at the relevant time, no such formality is necessary. However, if

these items are gifted by the friends visiting from abroad, it may be necessary to keep the details of their visiting from abroad, it may be necessary to keep the details of their visits and a letter from them evidencing the fact of gift as well as the payment of the customs duty supported by the customs receipt unless they were minor items covered under exemption limit. In case the imported items are purchased from some other persons in India, it may be necessary to keep the customs duty receipt evidencing the payment made by the original purchaser and also in a letter or a sale memo evidencing the sale.

**QH. 3** What evidence is needed to prove the wedding gifts?

**Ans.** Now under the Dowry Act, it is essential to prepare a list of gifts of various articles received at the time of marriage. This is to be signed by both the sides and copies are to be exchanged. If this is done, it would be an useful evidence in favour of the assessee. In other cases, one may follow the routine of maintaining a list, to the extent possible, showing names of donors, amounts or articles gifted. In the case of costly gifts, the donors may be examined as to their source, etc.

### **"POINTS TO REMEMBER"**

- ③ The assessment officer is bound to issue notice for all the assessment years including the assessment years for which nothing is found and nothing is likely to be assessed as additional income over and above the income already disclosed by the assessee. Thus, in this case, even though there cannot be any assessment, the Assessing officer is bound to pass an order of assessment or reassessment as the case may be.
- ③ The assessing officer would be in a position to make a fresh assessment even though an assessment or reassessment has been made and which is not likely to be disturbed on account of the search.
- ③ Section 132 has been amended with effect from 1/6/03 to provide that any bullion, jewellery, or other valuable article or thing being stock in trade shall not be seized or put under prohibitory orders in search proceedings.

The assessing officer would be in a position to make an assessment even in respect of time-barred assessment. In other words, he would get fresh limitation period in respect of those assessment years.

- ③ It is to be noted that any income of any assessment year can be assessed only once. This principle being accepted and disputed has to be kept in mind for common assessment years. For Instance a search is carried on March 15, 2007 and concluded, lets assume on July 10, 2007. In that case, the specified period would be assessment years 2002-03 to 2007-08 and 1-4-2007 to 8-7-2007. Thus, the common assessment years are 2002-03 to 2005-06.

### **JUDICIAL POSITION IN OUR COURTS"**

Search does not get invalidated on allegation of bribery as affirmed in Kamal Khosla v Director of Income Tax (Investigation) 258 ITR 43

- > In case where the search officers dump documents and articles in particular place and seal it, so that they could examine whether they could seize it or not at their leisure, they may not be within their rights as held in Dr. C. Balakrishnan Nair v CIT 237 ITR 70
- > Where the CIT had authorised a search merely on an intimation from CBI without any effort to ascertain the correctness of the allegation of money or other assets or primary verification the court held the search was invalid,  
Ajit Jain Vs Union of India 242 ITR 302
- > In Ram Kumar Dhanuka v Union of India 252 ITR 205, the court has held that non-residents are not immune from the reach of powers of search and seizure.
- > Constitutional validity affirmed in Pooran Mal v. Director of Inspection 93 ITR 505, C. Venkata Reddy VITO 66 ITR 212
- > Power to arrest denied in L.R.Gupta v Union of India 194 ITR 32

- > Interpretative clause cannot be invoked for the purposes of authorization of search held in Dr. Nalini Mahajan v Director of Income Tax 2571TR 123
- > Just because cash was initially seized by the police, there could not be action under section 482 of the Criminal Procedure Code, 1973, when the cash seized had meanwhile become the subject matter of an other search. Kushi Ram v Hashim, AIR 1959 SC 542.
- > It would not be correct for the search officers to seize assets not belonging to the assessee where there was explanation as to the ownership of such assessee as held in Alleppey Financial Services V ADIT 236 ITR 562.

Immovable property cannot be seized held in Bapurao v ADI 247 ITR 98, followed Sardar Parduman Singh v Union of India 166 ITR 115.

### **COMPARATIVE ANALYSIS OF NEW PROVISIONS OF ASSESSMENT OF SEARCH CASE WITH OLD PROVISIONS**

Old provisions under Chapter XIV –B	New provision U/S 153 A, 153B & 153 C
158B-Definitions i) Block Period ii) Undisclosed Income	The concept of undisclosed income and block period has been done away
158 BLOCK ASSESSMENT – This section provides for applicability of chapter XIV-B for assessment of undisclosed income.  This section also specifies the rates of tax chargeable on undisclosed income. Which has been specified U/S 133 at 60%	Section 153A provides for assessment of income incase of search or requisition after 31.05.2003.  The explanation (ii) to section 153A clarifies that tax will be chargeable at the rates as applied in the relevant assessment.
158BB- This section provides for the computation of the undisclosed income.  The unabsorbed depreciation and brought forward losses cannot be set off against the undisclosed income.	The concept of undisclosed income has been done away under the new scheme the unabsorbed depreciation and the brought forwarded losses can be set off against the income.
158BC- This section provides for the procedure of block assessment.	The provision for assessment under the new scheme has been provided

<p>Notice for filing of return of undisclosed income is issued under this section. The time allowed in the notice should not be less than 15 days and more than 45 days.</p> <p>The return filed under this section cannot be revised</p> <p>The form of return was 2B</p>	<p>under section 153A.</p> <p>The time limit for filing of the return is not specified. The return has to be filed with the time specified by the assessing officer in the notice for filling the return.</p> <p>There is no specified restriction put on revising return. Therefore. The return filed under the new scheme can be revised.</p> <p>The return under the new scheme will be required to be filled in the form as regularly applicable.</p>
<p>158BD-This section provided for undisclosed income of any other person.</p>	<p>Section 153C contains similar provisions in case of book of account document or assets seized which belong to any other person.</p>
<p>158BD- this section provided that the block assessment has to be completed with into two years from the end of the month in which the last of the authorization was executed.</p>	<p>Section 153B contains the provision of completion of assessment under new scheme. In the new scheme the assessment has to be completed within two years from the end of the financial year in which the last of the authorization was executed.</p>
<p>153BF- This section provide immunity from applicability of the provision of section 234A, 234B,234C 271(1)(c), 271 A and 271 B.</p>	<p>Explanation (i) to section 153 A provides that all other provision of the Act will be applicable: therefore there is no immunity form the provision of penal interest and penalty.</p>
<p>158BFA-The interest and penalty provision has been separately provided</p>	<p>The provisions of all the section are applicable so the interest and penalty</p>

under the section.	as applicable in normal course will be applicable under scheme.
158G- This section provided that authority the order of assessment for the block period shall be passed by an assessing officer not below the rank of an Asst. Commissioner of income tax or Deputy Commissioner of Income tax and Asst. Director or Deputy Director.	No such restriction has been kept under the new scheme which means that the Income Tax Officer can also make assessment under the new scheme.
158H- This section provides for applicability of all other provision of the Act.	Explanation (i) to section 153 provides for applicability of all other provision of the Act.

## **A BRIEF NOTE ON CONCEPTS RELATED TO SEARCH & SEIZURE**

### **I. ON MONEY**

**Q.1** Whether book result can be disturbed in case of Assessment relating to search & seizure?

**Ans.** Book result cannot be disturbed except to the extent that some document are found showing that entries in books are wrong or 'ON MONEY' found to be received by the assessee on the basis of seized material.

Reliance can be placed on the following cases :

- a) Udhiram v/s. ITO-88 Taxman 191 (Asr.)
- b) Jaya Shetty v/s. ACIT-69 ITD 336 (Bom)
- c) ITO v/s Jayant Saree House, 82 Taxmann 191 (Ass.)

**Q. 2** Whether the entire On Money received would be taxed as Income or not? If not, what is the basis for taxing the On Money?

**Ans.** No, the entire On money received / found would not be subject to tax. The only method to work out the correct element of profit from the 'On Money' receipts would be to take a percentage thereof at the rate of gross profit / net profit annually disclosed by the assessee or by other similarly placed businessman. In the case of assessee's engaged in construction business, only 6% to 15% (Depending upon case to case) of the 'On

Money' receipts would be brought to tax as income from on money receipts.

Reliance can be placed in the following case decided by the Mumbai ITAT :

- i) Mrs. Mehroo N. Irani v/s. ACIT.  
ITA No. 1180 (Bom) of 1989, 26.2.91 (75 Taxman).
- ii) Wall Street Construction Ltd. v/s ACIT  
ITA No. 1759/Bom/1995 dt. 7.8.95
- iii) M/s. Kanakia Builders & Ors. v/s ACIT  
ITA (SS) No. 14 to 31/Mum/96 dt. 21.11.97

**Q. 3** Whether the judgement passed in the case of Commr. of Sales Tax v/s. H. M. Esufalli's, H. M. Abdulali reported in 90 ITR 271 (SC.) relating to Estimation of profit in case of search cases is a good law and whether the decision in the said case is binding on all assessees?

**Ans.** No, in the said case the Apex Court had upheld the estimation of sale out side books of Accounts. This decision cannot be applied universally as the facts of the said case were that no material was furnished before officer and it was an Exparte assessment and further this was the case of sales tax. Reliance can be placed on the following judgements :

- (i) 60 ITR 239 (SC) State of Kerala v/s Vellukutty.
- (ii) 49 ITR 95 (Pat) Chetandas Gulabchand v/s CIT
- (iii) 207 ITR 979 (Cal) CIT v/s Ranicherra Tea Co. Ltd.
- (iv) 37 ITR 1(SC) Calcuta Co. Ltd. v/s CIT.

#### **BUSINESS EXPENDITURE :**

**Q.4** What would be the tax treatment in the case of On money received by a Builder, following Project completion method of accounting?

**Ans.** In the case of Builder following Project completion method of accounting, the On money component would be taxed as his business income in the year when the Project is completed. If the Assessee is liable to tax in the year of handing over possession then the On money component would

also be taxed as his business in the year when the possession is handed over.

**Q.5** Whether the expenditure incurred On payments made to Government Officials is an allowable expenditure?

**Ans.** Upto 31.3.2000 any expenditure incurred towards payments to Government Officials were treated as allowable expenditure. However the law is amended from 1.4.2000 and now the same are treated as not an allowable expenditure. However routine expenses at Govt. offices to get the legal work done can be treated as speed money and may be allowed as exp. of routine nature.

**Q.6** Whether amount paid for security charges are allowed , as deduction?

**Ans.** Yes, Amount paid as security charges are distinguishable from amount paid as protection money to extortionists. Therefore legal and genuine business expenditures are allowed whereas illegal, unlawful and expenditures incurred against public policy are not allowed in view of the amended provisions of section 37(1) of Income-tax Act from 1.4.2000.

**Q.7** Expenditure incurred in business outside books of accounts can be added as undisclosed income.

**Ans.** Yes, expenditure incurred outside books of Accounts can be added as undisclosed income but again deduction of expenditure will be allowed hence finally taxable income will be NIL.

Reliance can be placed on the following judgements :

- (i) 19 ITD 306 (Ahd.) S.F. Wadia v/s. ITO
- (ii) 31 ITD 114 (Mad) M.K. Mathivathanam v/s ITO
- (iii) 52 ITD 103 (Pat) Nishat Housing Dev. (P) Ltd. v/s. ACVT
- (iv) 127 ITR 90 (SC) CIT v/s. Piard Singh
- (v) 50 ITR 233 (Bom) CIT v/s R. B. Rungta & Co.
- (vi) 49 ITR 31 (Bom) CIT v/s Pranlal Kesurdas.



**Q.8** Assessee owning vast Agricultural Lands and same reflected in accounts and regular assessment completed. Whether roving enquiries be made questioning the details of Agricultural land and income thereof?

**Ans.** Under search assessment roving enquiries can be made in respect of completed assessments, which is likely to be disturbed on account of search , if some false documents are found during the course of search.

**IV.** Addition on surmises & presumptions :

**Q.9** Whether additions under search assessment can be made on the basis of presumptions, Assumptions, Surmises and conjectures etc.?

**Ans.** No. Additions under search assessment can be made only with regard to as such as cash, jewellery unexplained investments valuable and no additions can be made on the basis of presumptions, assumptions, surmises and conjectures etc.

"Reliance can be placed on the following decided case laws :

- a) 71 ITD 128  
131 ITR 597 (SC) - K. P. Varghese.  
held when there is no material found addition on surmises is unjustified in a search assessment.
- b) 66 ITD 510 (Pune) Kasat Textiles Pvt. Ltd. v/s ACIT -  
Information in a persons books of accounts unless proved wrong should be accepted.
- c) 63 ITD 153 (Bom) ACIT v/s Shailesh Shah  
Held addition based on suspicion cannot be sustained.
- d) IT (SS) A No. 118/Mum/96 - Shri R. M. Bhagwandas Raheja v/s.  
ACIT.  
held vague information found in search cannot be used against the Assessee.

**Q.10** During the course of search valuable documents / Agreements standing in the names of children, who are major and assessed to tax are found whether, addtions can be made in the hands of Assessee?

**Ans.** No

**Q. 11** If during the course of search some papers are found describing household expenditure for 2 months. Based on the said loose paper whether the A.O. can make addition for the entire year?

**Ans.** No. Assessing Officer cannot read something extra and on presumptions make addition. If the papers are found for two months, then additions at the most can be made for 2 months and not for the entire year.

**Q. 12** If an assessee has many group concerns and bank account and the cash credits are rotated by the assessee through his different bank accounts. Whether the addition can be made of the all the credits appearing in different bank accounts?

**Ans.** No. In such a case the Peak Theory should be followed by the department, by calculating the Peak credit available to assessee on a particular date and only addition of the Peak credit can be made.

**Q. 13** In case of search conducted at the site office of the Builder and the supervisor gives a statement that the rate of flat per sq. ft. is Rs. 4,500/- and the Builder gives the statement that the rate of flat per sq. ft. is Rs. 1,500/-. Then whether the statement given by the Supervisor supercedes the statement of the Builder and whether the same can be relied upon?

**Ans.** No. In case of search no third party statement can be relied upon unless there is corroborative evidence.

## **V. MISCELLANEOUS :**

**Q 14.** On whom search notice can be served?

**Ans.** If during the course of search the search authorities find valuables such as jewellery, investments, cash of a third person, then search warrant can be taken out at the said third party too.

**Q. 15** An assessee had offered for tax undisclosed income of say Rs. 50 lacs and unexplained valuable to the extent of say Rs. 25 lacs are found from his premises. The Assessing Officer made addition of both undisclosed

income and unexplained investment to the income of Assessee. Whether he is correct in doing so?

**Ans.** No. Assessing Officer cannot make addition of both source of earning income as well as the investment thereof. In the given case since the investments are less than income, only addition on account of income and not investment would be sustained.

**Q. 16** If the premises of an assessee is searched and till date of search he has not filed any return of income. Whether such an assessee can file his return of income thereafter?

**Ans.** Yes. Once an assessee is searched and it is found that no return of income is filed by him before search. His income for the past 06 years would be treated as part of search assessment and tax on the same would be charged at the rates as applied in the relevant assessment.

**Q. 17** At the time of search if the books of account of the assessee are not complete. Whether the same can be completed?

**Ans.** Yes. During the course of search an assessee can complete his incomplete books of account and explain to the search authorities in respect of any discrepancies found.

**Q. 18** During the course of search if an assessee makes a voluntary declaration in order to put an end to seamless litigation and to buy peace and if the Assessing Officer does not accept the same in its totality. Whether the declaration is binding on the assessee?

**Ans.** No. The declaration made by assessee amounts to an offer and if the same is not accepted in its true spirit and in its totality the same is not binding on the Assessee. Reliance in this regard can be placed in the following case laws :

- i) Kishore Meswani Vs. 3rd Additional ITO, BSD(S) Wd ITA No. 7162/Bom/90.
- ii) Puspa Vihar, Bombay Vs. ACIT, Circle 36(2) Mumbai ITA No. 1822/Bom/90.

**Q. 19** If the case of Assessee is complicated and the Assessing Officer lacks understanding. In such situations what is the remedy available to an assessee?

**Ans.** If the case of assessee is complicated and Assessing Officer lacks understanding, assessee can request Assessing Officer to appoint a neutral Chartered Account, u/s 142(2A) for special audit who will audit the books of the assessee and the income of the assessee can be justly and easily quantified.

**Q. 20** During the course of search assessment whether an assessee can make a waiver petition to the Commissioner of Income-tax u/s 273 A or 273 A (4) of the Income Tax Act, 1961?

**Ans.** Yes.

**Q. 21** During the course of pendency of search assessment whether an assessee can approach settlement commission for settlement of his case which involves complexities?

**Ans.** Yes. But one has to wait for 120 days to complete from the date of search or receipt of Assessment order, but after 31-5-2007 it will not be possible to go to settlement Commission in case of Search cases.

**Q. 22** Jewellery belonging to woman found at the time of search for which there is no documentary proofs of purchase. Whether the same would be treated for the purpose of search Assessment?

**Ans.** Income Tax Department has come out with number of circulars that a married woman should not be questioned on jewellery acquisition upto 500 grams and an unmarried Lady upto 250 gms. male members upto 100 gms. Therefore if jewellery found to this extent then Authorised officers can not seize that Jewellery and no addition can be made in Search Assessment. This view is confirmed by ITAT in number of cases.

**Q. 23** if an assessee has jewellery or other valuables which was purchased 06 years prior to the date of search and has proof of purchase of the same, or holding the same then, whether the Income-tax Department can make

addition in respect of the said jewellery or other valuables to the total income of the appellant?

**Ans.** No. Income-tax Department cannot question the Assessee in respect of transactions prior to 06 Assessment years.

**Q. 24** Pass book maintained by an assessee, whether constitutes books of Account?

**Ans.** Yes.

**Q. 25** What are the precautions to be taken by an Assessee to avoid complications during search?

**Ans.** The following are few suggestions / tips :

- a) Regularise the books.
- b) Regularise the jewellery held i.e. physical quantity of jewellery should tally with the jewellery declared. Particularly of diamond jewellery and weight of gold & silver ornaments or articles.
- c) Since the tax rates are very low, it is advisable to pay tax and keep white money instead of holding black money in tension.

Such precautions would help an assessee in a great way. Presently an assessee is required to pay maximum Income tax @ 33%, Wealth tax @ 1% only on few items, Gift tax, Estate duty are abolished and expenditure tax is not applicable to individuals. Therefore with such great reliefs it is advisable that an assessee complies with the provisions of law and pays proper tax regularly to lead carefree life and particularly when cases are selected under scrutiny by computer only @ 2% of returns filed.

It is worthwhile to mention that in earlier years Income tax was @ 97.75%, wealth tax as @ 13%, Estate duty was @ 85%, Gift tax was @ 85%, Expenditure tax was @ 30% and many many other taxes at very high rates and over and above that there was 100% scrutiny of returns filed.

**Q. 26** Assessee is Builder/ Developer / Contractor and following project completion basis of accounting whether after search department can

change his system of accounting, particularly in view of AS7 and power of AO u/s 145(2).

**Ans.** No. If assessee is following particular system of accounting which is recognised by law and accepted by department then assessing officer cannot change that system.

Reliance can be placed on the following judgements :

- (i) 37 ITR 37 (SC) Calcutta Co. Ltd. v/s CIT.
- (ii) 193 ITR 694 (Bom) Shree Nirmal Commercial v/s CIT.
- (iii) 171 CTR 203 (Bom) CIT v/s Dempo Ltd.
- (iv) 107 ITR 119 (Bom) CIT v/s Kay Arts.
- (v) 49 ITD 479 (Bom) Shapoorji Pallonji & Co. v/s CTO.
- (vi) 17 TTJ 125 (Bom) Malad Shopping Centre v/s ITO.
- (vii) AIR 2000 SC 94 (SC) United Com. Bank v/s CIT
- (viii) (1956) A. C 85 (P.C.)

**Q. 27** Assessee have filed return showing profit and accepted by Department, after search action Assessee filed returns in response to notice by AO declaring losses while completing Assessment AO compute losses but refused to allowed to be c/f in view of the fact that search & seizure provisions are for the benefit of Revenue and not for Assessee.

**Ans.** In view of the provisions of Chapter VI of IT Act, if returns are filed in accordance with law and Assessed by AO then loss has to be allowed to be c/f. Reliance can be placed on the following judgement :

- (i) 36 ITD 625 (Del) Vinod Tayal v/s ITO
- (ii) 37 ITR 1 (SC) Calcutta Co. Ltd. v/s CIT
- (iii) 226 ITR 62 (SC) Clt v/s Poddar Cement (P) Ltd.
- (iv) 191 ITR 570 (Cal) Burdwan Wholesale consumers Co-op. Soc. Ltd. v/s CIT
- (v) 181 ITR 22 (Bom) Clt v/s Indian Rare Earth.
- (vi) 200 ITR 749 (Cal) Himmatsingka Motor Works Ltd. v/s CIT
- (vii) 22 TTJ 82 Smt. Margaret Rose Rendem v/s ITO
- (viii) 142 ITR 877 (Mad) CIT v/s Standard Motor Products of India Ltd.

- (ix) 171 ITR 232 (AP) State Bank of Hyderabad v/s CIT
- (x) 149 ITR 487 (Raj) Clt v/s Rangnath Bangur.

**Q. 28** During the course of search it was found that Assessee has received certain amounts due to Arbitration Award for earlier years but Assessee have shown as income in the year when received and accepted by Department. if Assessee follow mercantile system of accounting whether while completing the search assessment AO can take that amount in earlier years for which it pertains.

**Ans.** No. A.O. cannot take that amount in earlier years because amount is due to Assessee only due to Arbitration Award and that is the subsequent event ie after date of search.

Reliance can be placed on the following judgements :

- (i) 193 ITR 496. G. Gopinathan v/s CIT
- (ii) 192 ITR 534 (Ori.) BPR Construction v/s CIT
- (iii) 53 ITR 114 (SC) CIT v/s Gajapathy Naidu.
- (iv) 144 ITR 270 K. Sadashiva Krishnarao v/s CIT
- (v) 232 ITR 2 (SC) P. Mariappa Coundet v/s CIT.

**Q. 29** Can the matter be referred to the valuation officer for valuation of property etc by assessing officer in search cases?

**Ans.** By, virtue of Amendment by Finance Act No.2, 2004 a new section is inserted which is sec. 142A, wherein the assessing officer is given powers to refer the matter in Search cases to the Valuation Officer hence after 8-7-2004 AO can refer matter to valuation officer to value property etc.

### **MODEL QUESTIONS AND ANSWERS WHICH MAY BE ASKED DURING THE COURSE OF SEARCH OPERATIONS**

**QV. 1** What are the sources of your income?

**Ans.** The sources of income should be stated irrespective of whether the income there from is taxable or not.

The answer be given with regard to the sources as exist on the date of recording of the statement including the source which might have come

into existence after the last return was filed. If any such source is not disclosed and evidence is gathered during the search about its existence, it may lead to an allegation of attempt to evade taxes.

However, one is not obliged to disclose sources of income not belonging to him, i.e., those belonging to the members of his family members. But the answer should be comprehensive enough so as to cover income earned in different capacities, e.g., as a proprietor of a concern, partner of a firm, member of an association of persons, member of a HUF or a director of a company and so on.

**QV. 2** Are you assessed to Income-tax and/or Wealth-tax?

**Ans.** If one is assessed to tax, he should straightway give his Permanent Account Number. Where one is not assessed to tax, he may state so. If the return of income has already been filed but the assessment has not been made, the fact may be stated accordingly.

Every person who is 'liable to tax is supposed to apply for and obtain a Permanent Account Number. This is obligatory. Any breach of this action is liable to penalty. Therefore, if a person has not done so, he may do so forthwith.

**QV. 3** What are the properties owned by you?

**Ans.** This is a factual information which has to be given with regard to the immovable properties owned by the assessee himself. Certain properties may be in the name of his wife or children or other relatives. If he himself is not the owner of such properties and does not have any interest in them, ..he need not mention the same. Properties owned by his wife may be her *Stridhan* and may have nothing to do with the ownership of the assessee. Such properties need not be disclosed in reply to this question, unless specifically asked for about them.

**QV. 4** What are the properties owned by your wife and children?

**Ans.** In reply to this question the assessee may give the particulars of the properties owned by his wife and children to the extent the same are within his knowledge. Normally, one is supposed to know the particulars of



such properties but the possibility to the contrary cannot be ruled out specially when they may be living separately.

**QV. 5** (In case of ownership of property) What are particulars of purchaser acquisition and sources of investment therein?

**Ans.** The assessee may state the date and mode of acquisition and sources of payment which may include payments made by him by cheques or cash out of his savings or any other source which may be stated. New property might have been acquired out of sale of an existing one, it may be an ancestral property or one received on partition or by way of gift. As to the sources, the answer would vary from case to case. While giving these answers, one should always anticipate further enquiries for adducing necessary evidence in support of his explanation. Sometimes, it may be possible to produce evidence on the spot, sometimes it may not be possible to do so. In the latter case, one may always state that he would produce necessary evidence subsequently. Law does not provide for seizure of any immovable property.

**QV. 6** (Where cash is found) What is the source of money recovered from your possession / custody during search?

**Ans.** The assessee should state the sources of amounts recovered from his possession and custody and not those recovered from the possession or custody of different persons. From example, he may say "out of total amount of Rs. 1 lakh, Rs. 50,000 is recovered from my possession, or from my bedroom and the balance of Rs. 25,000 is recovered from the possession of my wife or from her suitcase or almirah as the case may be and Rs. 25,000 from the saving books of my children. He should then explain the source of Rs. 50,000 and add that the balance is Stridhan of his wife. In case, the money recovered from his possession belongs to the shop/office, he may state the fact. If the money recovered represents the sale proceeds of any property or realisation of LIC policy or recovery of a debt advanced to some other person or advance received in connection with some business transaction or if it is withdrawal from the bank or if it is sale proceeds of any ornaments or if it is a temporary loan from any friend or relation or business associate, the fact may be stated accordingly.

Where the assessee does not remember the exact amount, with regard to the different sources, he may state the sources and add that necessary particulars and evidence will be furnished in due course..

In case, the money represents deposit made by any other person for the safe custody of the assessee, the assessee may state so and if then evidence is available on the spot by way of correspondence or an envelope or box bearing the name of the depositor in which the money was kept separately, this evidence may be brought on record in the assessee's reply.

If the money represents sale proceeds of agricultural produce, the fact may be stated along with the particulars regarding the agricultural holdings.

There is a possibility that the money represents savings of the ladies and children who might have received cash gifts on various ceremonial occasions, festivals or from foreign friends which is exempt from gift tax. If gift is received outside India, these facts may be stated.

**QV. 7** What are the sources for the acquisition of the jewellery recovered during the course of search?

**Ans.** As in the case of cash, so in the case of jewellery, the assessee must bring out the particulars of the quantum recovered from the custody of different persons. He may also state separately as to what extent the jewellery is owned and declared in wealth-tax assessment by each member of the family. If it is not possible to give the exact particulars of quantum on the spot, the names of the owners may be given with the promise that further particulars will be supplied. The other owners who are present may also make a similar statement, if they are also not aware of the exact particulars.

In case of wealth-tax assesseees, the wealth-tax returns may be produced along with the valuer's report. In other cases, the date of marriage, status of the parents and parents-in-law who might have gifted the jewellery and ornaments at the time of their marriage, may be stated. Similarly, if the

jewellery is received by way of gift on other ceremonial occasions or otherwise, the relevant facts may also be stated.

If the jewellery belonging to somebody else is deposited with the assessee for the safe custody, the fact may be stated and necessary evidence which may be available on the spot, should be produced. If not, it may be promised to be produced in due course.

**Note:** In case of unaccounted cash as well as jewellery which the assessee may not be in a position to explain, the safest course of action is to avail the benefit of sub-section (5) of section 132.

In the case of cash and jewellery, normally, it is difficult to establish the year of acquisition. Therefore, it is always possible to declare the same under section 132(5) as income of the current year and Interest and penalty etc can be avoided.

**QV 8.** Do you own any locker, separately or jointly with others?

**Ans.** The information has to be given about the ownership of the lockers as on the date of search. It is not advisable to state that one does not remember personal ownership of lockers as there is always a possibility of tracing the locker keys or receipts showing payment of locker fees or the entries of payment of such fees in the books of account, during the course of search or post-search investigation.

**QV. 9** What are the contents of the locker?

**Ans.** One is not supposed to remember all the items lying in locker. Therefore, it would be plausible to give broad description of the contents and add that the full particulars may be ascertained only after opening the locker. Where, however, one can possibly remember, it is always advisable to give the exact particulars in advance as it would inspire confidence about his credibility and may be treated as a gesture of co-operation. At the same time one has to be ready to answer further questions regarding the nature and source of acquisition.

**QV. 10** How much is the cash kept at home? [It was not possible to ask this question prior to the amendment of section 132(4) by the Direct Tax Laws

(Amendment) Act, 1987 with effect from 1-4-1989 but now it may be possible to ask this question after commencement of the search but even before any recovery is made.)

**Ans.** One may give exact or estimated amount if one so remembers. Otherwise, it will be safe to suggest that he is not in a position to do so. Whatever, the amount of recovery, one has to be ready to explain the source.

**QV. 11** In case of recovery of share certificate on blank transfers who is the owner of the shares and what is the source of investment thereof?

**Ans.** If the investment in the shares by the assessee is not out of unaccounted sources, there would be no difficulty in answering the question. However, the difficulty would arise if the situation is otherwise.

In such circumstances it is always better to make a clean breast and declare the amount under sub-section (5) of section 132. However, this can be done only in respect of current year's acquisition or in respect of those for which it is not possible to pin-point the year of acquisition.

**QV. 12** Do you maintain regular books of account?

**Ans.** There may be numerous answers to this question depending on the facts and circumstances of each case. The individual assessee may not be maintaining books of account for their personal cases. However, the position may be different in case of professionals as it is mandatory to do so under section 44AA according to which every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or any other profession as notified by the Board shall keep and maintain such books of account if his income exceeds Rs. 25,000 or if his total sales turnover or gross receipts as the case may be exceed Rs. 2,50,000 in anyone of the three years immediately preceding the previous year, and in the case of a newly set up business if the income is likely to exceed Rs. 25,000 or his total sales turnover or gross profit is likely to exceed Rs. 2,50,000 during the previous year.

Under rule 6F of Income-tax Rules, 1962, it is prescribed that every person carrying on legal, medical, engineering or architectural profession or the profession of accountancy or technical consultancy or interior decoration or after notified professionals (including film artists) should keep and maintain the following books of account and other documents:

1. Cash book
2. Journal, if the accounts are made according to the mercantile system of accounting.
3. Ledger.
4. Carbon copies of bills, whether numbered or otherwise serially numbered, wherever such bills are issued by the person and carbon copies or counterfoils of machine numbered, or otherwise serially numbered receipts issued by him.

Bills and receipts need not be kept for sums not exceeding Rs. 25.

5. Original bills wherever issued to the person and receipts in respect of expenditure incurred by the person or, where such bills and receipts are not issued and the expenditure incurred does not exceed Rs. 50, payment vouchers prepared and signed by the person :

Provided that the requirement as to preparation and signing of payment vouchers shall not apply in a case where the cash book maintained by the person contains adequate particulars in respect of expenditure incurred by him.

**QV. 13** (In case where the books are not maintained) Why do you not maintain regular books of account?

**Ans.** Considering the magnitude of income and turnover, it may not be economical to maintain the books of account or considering the nature of business or profession, it may not be practicable to keep all sorts of vouchers or receipts or registers.

Non-maintenance of regular books may also be due to the fact that even though the prescribed books are not maintained, there is a reliable

contemporaneous record maintained for the income and expenditure wherefrom the taxable income can be properly ascertained.

Non-maintenance may also be due to the nature of the profession being such which involves numerous items of receipts and expenditure that it may not be practicable to keep record of each and every transaction but in overall account is contemporaneously maintained during ordinary course of business which may be reliable enough.

Non-maintenance can also be for the reason that all the transactions of receipts as well as payment are routed through the bank account and up-to-date bank record is available on the basis of which income can be properly deduced at any point of time.

Non-maintenance can also be partial, viz., the accounts had been written up to certain date only in a regular manner but due to the leaving of the employment by the accountant or due to his sickness or due to his absence otherwise, it could not be possible to keep them up-to-date, yet necessary particulars are available along with the subsidiary record on the basis of which it may be possible to bring the regular books of account up-to-date.

There may be several other situations and answer to the query, therefore, has to be given in a manner which inspires the confidence and all the available material should be produced to establish the credibility and to efface possible allegation, if any, of deliberately not maintaining the books with the intention to conceal the income.

**QV. 14** Give the particulars of your bank account, bank deposits and other investments made in your own name, in the names of your wife, children, other members of family and benamidars?

**Ans.** This answer has to be given with regard to the assets belonging to the assessee himself as on the date of recording of the statement unless the information is asked for as on any particular date. Here again, the assessee has to make distinction between the assets belonging to himself and those belonging to others. Where the assessee has made investments out of his own sources in the names of his wife and children,

he may be better advised to give the particulars of all such assets and state that though they are in the names of wife and children, they, in fact, belong to him. But, in respect of the assets which are stridhan of his wife or belong to other lady members of his family, one is not supposed to know all the particulars or obliged to make a statement in relation thereto.

**QV.15** What is the extent of your monthly or annual personal expenditure and the source of meeting them?

**Ans.** Answer to this question will depend on the facts and circumstances of each case. In any case the personal expenditure should be sufficiently backed by the previous withdrawals and should be suffice to maintain the standard of living of the assessee. In the case of a joint living, the withdrawals made by different assessees may be pooled together. The authorised officer may question about details of expenditure head wise, e.g., on education of children, marriages, pay of servants, drivers, gardeners, expenditure on petrol, acquisition of jewellery and ornaments, gifts made if any., payment of life insurance premium on self and others, deposits under various saving schemes and so on. Therefore one has to be ready to cover and correlate to the extent possible all such expenses and outgoings with the withdrawals made during the year from his own account or that of his wife, children, etc.

Withdrawals may, be from his account with the bank or firm, companies, etc. While showing the withdrawals from the companies, one has to take care of the provisions of section 2(22) (e) of the Income-tax Act.

**QV. 16** (At the office, shop or godown) What is the cash balance as per cash book?

**Ans.** Wherever cash book is written up-to-date, there would be no difficulty but, where it is otherwise, vouchers may be produced on the basis of which it may be possible to work out the latest cash balance.

**QV. 17** What is the stock in hand as per stock register or as per books of account?.

**Ans.** If the balances are struck up-to-date in the stock register, the answer may be given without any difficulty. In a case where no up-to-date stock register is maintained, it may be updated with the help of vouchers but where no stock register is kept at all, stock may have to be worked out with the help of inventory which may have been filed with the Assessing Officer along with the earlier return, and by adding purchases and subtracting sales and making further Adjustment on the basis of the gross profit earned during previous year or on the basis of the rate of gross profit applied in the assessment as the case may be.

**QV. 18** (Where duplicate sets of books of account are found) State the circumstances in which you have maintained duplicate sets of account books?

**Ans.** Normally, maintenance of duplicate sets of books of account gives rise to a suspicion for an attempt to evade taxes. This may also lead to prosecution under Explanation to section 276C(1) of the Income-tax Act, 1961. Therefore, in all those cases where there is any difference in the income likely to be worked out on the basis of duplicate set, it would always be advisable to make a clean breast of the facts and declare the income under sub-section (5) of section 132.

**QV. 19** (Where certain loose slips, note book, diaries are found containing transactions not recorded in the regular books of account) Please explain the nature of transactions recorded in the said documents and state whether they are accounted for in the regular books of account?

**Ans.** In this case also the answer would be on the same lines as is suggested in a case where duplicate set of books of account are found and one may avail of the facility provided in section 132 (5). However, it may be possible for the assessee to get away with it where he is in a position to explain satisfactorily that the so-called entries in the loose papers, diaries, or note books have no connection with and cannot be related to the business of the assessee and that the books of account regularly maintained by him reflected the correct state of affairs and that no concealment of income or evasion of tax can be proved on the basis of the said documents.



**Note:** In case the duplicate books of account or the loose papers, diaries and notebooks containing the unaccounted transactions relate to earlier previous years for which the returns have already been filed, or have become due, it may not be possible to make declaration under sub-section (5) of section 132. In respect of such documents, the assessee may have to undergo the usual process of interrogation. To the extent possible, attempt should be made to explain the correctness of his books of account maintained in the ordinary course of business. Department would try to establish the concealment on the basis of such documents. Therefore, one has to be more careful in such circumstances.

**QV. 20** (Where foreign exchange is recovered) Please state the circumstances which you came to possess the foreign exchange and explain the source of its acquisition?

**Ans.** Answer to this may depend upon whether the assessee has himself visited foreign country and declared the foreign exchange. It might have been required from others who might have recently visited a foreign country. In case, no one can possess any foreign exchange as discussed earlier and must be surrendered to the authorised dealer i.e. to the scheduled banks, within specified time. There may be circumstances where the assessee has had genuine intention of making such a surrender but he could not do so to some reasonable cause which may be stated?

**QV. 21** (Where imported articles are found) Please state the nature and source of acquisition of imported articles?

**Ans.** One may produce the voucher and receipt showing payment of customs duty. Difficulty may arise where assessee is not in possession of evidence for payment of price or the customs duty and where the goods have been acquired or the customs duty has been paid out of unaccounted money. So long as there are adequate withdrawals from bank the acquisition and payment of customs duty, there may be no liability under the act but the problem may arise where the authorised officer might intimate the customs authorities who may come on the scene.

There may be several situations. The assessee or his friends and relations might have brought the imported goods from a foreign country during their foreign visits and may be covered by exemption limits. If the assessee acquired them out of money received as loan or a gift outside India, it may be possible for him to get that way with this transaction by producing the necessary evidence on the spot or by a promise to do so on a future date. However, he should take care of the provisions of section 8 of the FERA.

There may be another situation where the assessee has acquired imported items from some other person in this country and made the payment to the other person for the price of the article as well as the amount of import duty contained therein. If the assessee is able to produce the evidence to this effect, he may be found technically guilty of possession of an article on which the import/customs duty is not paid (if that be the case) but he may get away with the liability under the Income-tax Act?

**QV. 22** In case of unaccounted machinery being found either in the assessee doctor's dispensary or in the factory premises or where unaccounted assets like air-conditioners, etc. are found at the shop or residence). What are the particulars of the acquisition of asset & and source of investment therein?

**Ans.** There may be many situations: the assets might belong to some other concern, they might have been taken on lease from leasing company or from some other concern who may not have been in a position to exploit them commercially. In these circumstances, there will be no difficulty in giving the necessary particulars. However, there may be a situation where though the delivery has been taken, the payment is yet to be made as the bill is yet to be received. It may be possible to give the necessary particulars with a promise to produce the evidence on a future date. However, in all those cases where it is not possible to explain the source of acquisition it may be advisable to resort to the benefit under sub-section (5) of section 132 till acquisition is shown in current year.

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# **SURVEY**

## **Provisions relating to Section 133A.**

### **1. Power Of Survey.**

Survey means to inspect or in a wider sense to scrutinize. The object of a survey is to find out, gather information, verify and collate information so as to apprehend a tax dodger or a tax evader. Survey is basically a surprise inspection carried out by the officers of the Income-tax department to verify co-related information, check the cash balance with the books, verify the position of stocks as compared to the position thereof in the books etc.

The Power of Survey emerge from the provision of S. 133A of the Income-tax Act, and the sections starts with the words “ Notwithstanding anything contained in any other provision of this Act”. Accordingly the provisions are independent and to the exclusion of the other provision of the Income-tax Act.

### **2. Who can Survey ?**

The powers of survey can be exercised by an Income-tax authority – meaning

- i. a Commissioner,
- ii. a Joint Commissioner,
- iii. a Director,
- iv. a Joint Director,
- v. an Assistant Director
- vi. a Deputy Director
- vii. an Assessing Officer,
- viii. a Tax Recovery Officer
- ix. an Inspector of Income-tax.

### **3. What are the powers of the Income-tax authority ?**

An income-tax authority may enter:-

- (a) any place within the limits of the area assigned to him, or
- (b) any place occupied by any person in respect of whom he exercises jurisdiction, 1or
- (c) any place in respect of which he is authorised 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,

### **4. Where can a survey be conducted ?**

The powers of the income-tax authority extend only to an entry to a business premises or place of profession. It is not necessary that the place which the survey is carried on is a principal place of business.

Business premises would also include a place where from business need not be carried on by the assessee if books of account, documents, cash stock, valuable article or thing is kept.

The survey action has to be initiated during the business or working hours i.e. say after the sunrise and before the sunset, but once properly initiated, it can carry on through the night. There is no time limit provided for concluding or exit from the business premises  
**215 ITR 275 (Mad) N. K. Mohnot v. CIT**

Since survey is restricted to business premises, a survey cannot be conducted on days when the business is closed e.g. festive occasion, Sundays etc.

#### **5. Residential premises.**

It may be noted that a survey can also be carried out at a residential premises in case the same is shown as the business address. If the books of account, stock or cash of business is stated to be kept at the residence, or the business address for Sales tax purpose is shown as the residence, an income-tax authority can conduct a survey at such a residential premises.

#### **6. Powers of Officers during survey.**

An income-tax authority can require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession to:-

(i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place,

(ii) to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein, and

(iii) to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act.

#### **7. Scope of powers.**

The scope of the survey action includes the following functions

- a) To **inspect** books of account and other documents.
- b) To place **marks of identification** on the books of account or other documents and make extracts or copies there from.
- c) To make inventory, check or verify cash, stock or other valuable articles or thing.
- d) To call upon the proprietor, employee or other person to **furnish information** relevant to any proceedings under the Act.
- e) To record the statement of **any person**, which may be useful for or relevant to any proceedings under the Act.
- f) Apparently, No powers seems to have been granted to an income-tax authority cannot take a **personal search of a person** during survey.
- g) **W.e.f 1-6-2002**, however an income-tax authority **can impound** books or documents inspected by him **after recoding reasons for the same**. Such

- impounded books can be retained in his custody for 10 days after which he is required to take the approval of the Chief Commissioner of Director General.
- h) Where accounts are maintained on a **computer**, the income-tax authority would be within his powers to take a backup of the same on a CD, floppy etc. Besides this copies of incriminating ledger accounts are also printed out and the assessee is asked to put marks of identification under his signature so that later on the evidence can be used against him.
  - i) **No power has been granted for seizure of cash, stock or other valuable article or thing during survey.**

The scope of the enquiry is very wide. However, it does not give the authority to seize any valuables (**Shyam Jewellers Vs. Chief Commissioner [1990] 196 ITR 243 (All.)**)

#### **8. Survey by TDS Officers.**

In recent times the TDS Officers have also embarked upon the survey trail in as much as they verify the details of payments made and check whether tax has been properly deducted and paid by the assessee.

#### **9. Powers of an Inspector of Income-tax .**

A question arises whether the inspector of the Income Tax can be authorized to carry on a survey action. In the case of **Income-tax Officer Vs. Jewels Emporium [1974 SOT 939 (Ind.)** it was held that the Inspector, even if authorized, cannot exercise any other power u/s. 133A and any act beyond the specified powers would be illegal.

Thus, an inspector of Income tax can carry out survey only if he is authorized by any Income Tax authority and the Inspector, on being so authorized, can exercise only following powers:

- a) To inspect books of accounts and other documents,
- b) To place marks of identification on books of accounts or documents examined,
- c) To make extracts or copies of books of accounts or documents,
- d) To seek information regarding expenses as specified in sub-section (5) of section 133A.

#### **10. Enquiry relating to expenditure.**

An income-tax authority under 133A(5) is empowered to record a statement of any person who in his opinion is likely to possess information relating to the nature and scale of expenditure incurred by an assessee in connection with a function, ceremony or event. The term "incurred" shows that such an inquiry can be conducted only after the function, ceremony or event is over. However spot enquiries are often undertaken after the function though it is not unknown that very many times Inspectors of the Income-tax department are present during weddings. They are authorized to record the statement of any person such as the manager of the hotel, the caterer, the card printer etc. and such statement may be used in evidence in any proceeding under the Act. The powers u/s 133A(5) are different from the powers u/s 133B.

### **11. Failure to co-operate.**

If any person fails to co-operate with the income-tax authority or does not afford facility to inspect the books of account or other documents, or to check or verify the cash, stock, etc, then such income-tax authority can invoke the powers u/s 131(1) of the Act and enforce compliance.

### **12. Presence of an Advocate, Chartered Accountant or an Authorized Representative.**

An Advocate, Chartered Accountant or an Authorised Representative can be permitted to be present during a survey. In fact his presence can be of great assistance to the income-tax authority since he is in the full knowledge of most of the affairs of the assessee. However this does not constitute a right because except for affording assistance, the authorized representative has no role to play. He is in reality a silent spectator to the process and in case of any interference by him could make him leave the premises.

### **13. Can an Advocate or a Chartered Accountant be surveyed ?**

Tax professional stand in a fiduciary capacity vis-à-vis their clients and as such he is not to be visited by an income-tax authority. This stood clarified by the CBDT vide Circular dated 3/5/1967. 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.

### **14. Statement recorded in survey.**

It is frequently seen that the income-tax authority conducting a survey normally does not leave unless a confessional statement is recorded. Such statement is given by the assessee many a times to get rid of the officer and to bring an end to the proceedings. Later on the assessee files a declaration that the statement is taken under undue pressure and the facts stated therein are incorrect. As such the statement is retracted.

A statement recorded under section 133A(3)(iii) is not a statement on oath and hence does not have evidentiary value.

The Kerala High Court in 263 ITR 101 (Ker) in the case of Paul Mathew & sons has held that the Assessing Officer has no jurisdiction to record a statement on oath u/s 133A during the course of survey and such a statement has no evidentiary value since the Officer is not empowered u/s 133A to administer oath.

A similar view has been taken by the Cochin Tribunal in 2 SOT 402 in the case of Kurrunen Vehil Financiers P. Ltd.

Accordingly, when ever there is some incriminating material found during a survey, the income-tax authority immediately issue a summons under section 131 of the Act and

records a statement since a statement recorded by this process is on oath and has the force of law. However for the exercise of a power under section 131(1), the Assistant Director, Deputy Director, Assessing Officer, Tax recovery Officer or the Inspector of Income-tax needs to take the approval of the Director or Joint Commissioner as the case may be.

In order to avoid such embarrassments, the CBDT vide instruction dated 10<sup>th</sup> March 2003, has instructed the subordinate officers to focus and concentrate on collecting evidence of income which is not disclosed or is not likely to be disclosed rather than record an unsubstantiated statement. The instruction is reproduced hereunder:-

Instruction dated 10<sup>th</sup> March, 2003 vide No. F No. 286/2/2003/IT (Inv):

“To  
All Chief Commissioner of Income Tax (Cadre Contra)  
&  
All Directors General of Income Tax Inc.

Subject: Confession of additional Income during the course of search & seizure and survey operation regarding.

Instances have come to the notice of the Board where assessee have claimed what they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assessee while filing returns of income. In these circumstances, on confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. Similarly, while recording statement during the course of search & seizure survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidence/materials gathered during the course of search/seizure operations or thereafter while framing the relevant assessment orders.

Yours Faithfully,  
Sd/-  
(S. R. Mahapatra)  
Under Secretary (Inv. II)

#### **15. Copies of statements recorded during survey.**

It is settled law that copy of only that material which is being used against the assessee is to be provided. Accordingly even though the statement of the assessee is recorded during the course of survey, no copy is provided to him and it is for the assessee to then

apply to this concerned officer for the same who would provide the copy in case he intends to use it against the assessee.

### **16. Conversion to Search.**

There are times when the income-tax authority may during the course of a survey find huge unaccounted cash or stocks. There may be sufficient material which would warrant seizure. Since he does not have the power to seize, the income-tax authority then informs his counterpart being the Investigation wing who come with a search warrant and take over the proceedings from there. The survey then ends and search begins.

### **17. Consequences of a confessional statement.**

Very often it is seen that in a survey, the income-tax authority determine the closing stock by estimating gross profit. The normal practice is to take the Opening stock, add to it the purchases up to the date of survey, deduct sales as recorded in the books of account and the average estimated gross profit. This working generally leads to an incorrect result and thus excess stock is worked out as compared to what is physically found. The assessee makes a declaration and then afterwards realizes the folly and files a retraction. The reasons for the difference could be many such as:-

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

### **18. Precaution to be taken before making a statement.**

Before making a confessional statement or any declaration, the assessee should keep the following issues in mind:-

- i. Whether any evidence has been found which would lead to an inference of concealment of income.
- ii. Whether there is in fact any discrepancies between the stock as per books.
- iii. In case of disclosure of excess stock it may be advisable to admit discrepancies in the stock rather than unaccounted purchases.
- iv. The provisions of sales tax and excise duty besides provisions like disallowance u/s. 40-A(3), 269-SS, 269-T etc should be kept in mind before making any confession ?
- v. Whether it would be safer to disclose income under the head "other sources" or "business".



- vi. Would it be desirable to declare the entire amount as current year's income or spread over income for many years since any spread over may result in liability to interest and penalty for concealment.
- vii. Whether it is possible to capitalise the disclosed amount.
- viii. 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.

### **19. Presumptive taxation.**

There are some provisions of the Act which permit some types of assessee having a restrictive turnover to pay tax on an assumed income. If during the course of a survey of such an assessee it is found that books of account are maintained, the income-tax authority would be very much within his powers to impound such books and thus make the assessee liable to income based on the entries in such books of account.

### **20. Interest and Penalty.**

It is very important to consider the consequences of a disclosure made during the course of the survey.

If the income detected during the course of survey relates to the current year, then the assessee would be liable only to interest under section 234C if any and there would be no reason to levy a penalty since the return of income was not yet due and hence concealment is not established.

However where the income detected during the course of survey relates to any assessment year for which the return of income has already been filed, it is presumed that the intention of the assessee was to conceal such income and as such the assessee will not be spared from the liability of interest and penalty as per law.

**Santram Parmanad Vs. ACIT [2004] (1 SOT 312) (Del.)**

### **21. Some caselaws of interest.**

#### **POWERS OF INSPECTOR OF INCOME-TAX**

[2005] 3 SOT 277 (MUM.)

Harshad L. Thakker v. Assistant Commissioner of Income-tax, Circle-18(2)

It was held that an Income-tax Inspector is not an income-tax authority for purpose of recording statement of any person in course of survey proceedings under section 133A of the Act. However the assessee would still be liable to explain discrepancy in stock inventory prepared in course of survey even though statement recorded was non est because incriminating material found in course of illegal search is an admissible evidence.

[1998] 62 TTJ (JP.) 527/[1999] 104 TAXMAN 79 (JP.) (MAG.)

Kamal & Co. v. Assistant Commissioner of Income-tax

It was held that an Inspector is not empowered to record statement or to prepare stock inventory at time of survey and, therefore, additions made on basis of survey made by Inspector must be deleted

[1994] 48 ITD 164 (Indore)

Income-tax Officer v. Jewels Emporium

It was held that by recording of a statement of firm's partner on oath and preparing inventory of stock during survey operations under section 133A, the Inspector of Income-tax has acted beyond the purview of his powers which was illegal

### **RETRACTION OF A STATEMENT GIVEN DURING SURVEY.**

[2005] 3 SOT 277 (MUM.)

Harshad L. Thakker v. Assistant Commissioner of Income-tax, Circle-18(2)

It was held that if assessee can demonstrate that valuation of stock adopted by survey party during survey proceedings under section 133A was wrong with reference to material on record, then addition under section 69 on account of unexplained investment in excess stock could not be justified merely on ground that said addition was offered by assessee during survey proceedings

[1992] 40 ITD 180 (Jp.)

Income-tax Officer v. B.D. Dal & Oil Ind.

Where during a survey an assessee himself concedes that the stocks are short and agrees to the extent of shortage, it was held that unless it can be established that such consent or agreement was given or arrived at under threat coercion, undue influence, misrepresentation or wrong understanding of facts or law, the assessee cannot be allowed to retract from whatever it had stated or agreed to at time of survey.

### **Provisions relating to Section 133B.**

#### **POWER TO COLLECT INFORMATION.**

##### **1. Who can survey ?**

The provisions of section 133B relate to the powers granted to an income-tax authority being a Joint Commissioner, an Assistant Director, a Deputy Director or an Assessing Officer, and including an Inspector of Income-tax who has been authorised by the Assessing Officer to exercise the powers of gathering information.

##### **2. What are the powers of the Income-tax authority ?**

An income-tax authority can for the purpose of gathering information, enter –  
(a) any building or place within the limits of the area assigned to such authority, or  
(b) any building or place occupied by any person in respect of whom he exercises jurisdiction,

##### **3. Where can a survey be conducted ?**

A survey u/s 133B can be at a place from where business or profession is carried on, whether such place be the principal place or not. Accordingly residential premises do not fall within the purview unless the place of business or profession is shown to be the residential premises.

#### **4. Powers of Officers during survey.**

An income-tax authority can require any proprietor, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession to furnish information. He can enter such a place only during office hours and obtain information but he does not have the power to remove or cause from the building or place wherein he has entered, any books of account or other documents or any cash, stock or other valuable article or thing.

The information is to be collected in form No. 45D and the same can be taken as material for assessment proceedings.

#### **When income declared in survey on advice of survey officers that no penalty would be levied, - No case for penalty.**

68 ITD 550 (Pune) Silver Palace  
94 TTJ 156 (Jd) – Narendra Kumar

#### **Discrepancy found in stock in survey. Held only GP is to be added And not entire discrepancy in stock**

34 BCAJ Sept 2002 Roop Niketan 3196/Mum/1993 29-11-2001.

#### **No presumption of concealment - No penalty u/s. 271(1)(c) for declaration in survey proceedings**

49 ITD 606 (Dli) - Amirchand.

#### **Revised return filed after Survey – ITAT Held no concealment**

250 ITR 852 (Karn) – V Narashima Prasad see 250 ITR 528 (Bom) Sudhir Kumar Chottubhai

#### **Declaration in survey is not a case of penalty as no concealment is detected and adv. Tax is paid as per return filed.**

2996/M/01 Sushil H Gupta 'A' 23-12-2004 copy in file

#### **Assessing Officer cannot remove books from Premises**

77 Taxman 278 (Del) - Hans Raj Chhabra

#### **Inspector is not authorised to record statement in survey**

104 TM 79 (Jp-T) - Kamal & Co.

#### **Mere declaration in survey - no discrepancy found - no material on record to prove addition is income of year - No penalty**

68 ITD 550 (Pune) - Silver Palace

#### **Information gathered in Survey cannot be made basis for Block Asst.**

83 TTJ 473 (All) Fertilizer Traders  
94 TTJ 885 (Vis) – Smt. Bommana Swarna Rekha  
95 TTJ 288 (Bang) Gauthamchand Bhandari

#### **Shortage of stock found in survey cannot be assessed in Block**

73 ITD 444 (Nag) - Prakash Tulsidas

93 TTJ 218 (Del) GMS Technologies Ltd.