

# Survey, Search and Seizure

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## **1. Power of survey u/s 133A**

### **1.1 Introduction and Scope**

Section 133A was inserted in the Income Tax, 1961 in the year 1964, to supplement the powers of Search u/s.132. The powers under survey have been widened and broad based from time to time and by Finance Act, 2002 w. e. f. 1-6-2002, additional power to impound books, etc., has been granted.

The purpose and object of survey proceeding just like search and seizure proceedings is to detect all evasion of tax. A surprise check on the affairs of a taxpayer is a legitimate weapon of the State to detect and to prevent tax evasion. The main purpose and object of these special provisions is to unearth the hidden or undisclosed income or property and to bring it to tax. In case of search proceedings, unlike survey proceedings it is not just to get information of undisclosed income, but also to seize the money, bullion etc. representing the undisclosed income and to retain them for the purpose of proper realization of taxes, penalties etc. Compared to search proceedings survey proceedings have a limited objective of getting information relevant to assessable income of a person.

Though the object and purpose to certain extent of identifying the evasion of tax is common for both search and survey proceedings, from all standards, survey proceedings are much milder and minor proceedings compared to the drastic provisions of search and seizure. It may not be necessary or desirable in every case to take the drastic action of invading the privacy of the citizen and to search his residential premises in exercise of powers under section 132. It may also not be desirable in every case to seize the documents or the assets, which a citizen may be willing to produce or disclose. Organizing a major search and seizure involves high cost and elaborate preparation etc. As such, as against taking a drastic step of search and seizure to detect evasion to tax, one more usual remedy with the same purpose, is to provide the Officer with an authorization to conduct survey action. In many cases, search and seizure operations may not be suitable answer to all kinds of cases of tax evasion. For example, a person liable to pay taxes may not be filing his return of income or wealth at all. This may not be so much with the intention to conceal any income or wealth but due to negligence, or for want of proper knowledge and advice. Therefore, unlike search, survey may have also the object of detecting new cases. Another important object of survey is to verify as to whether or not the books of account are maintained by the tax-payers in the ordinary course of business and whether or not, all the transactions are regularly recorded. With a view to achieving these objects, which are not normally the objects of search the power of survey is given to the Lower Authority of the Income-tax. However, as it has also certain serious consequences the power to survey can be exercised only on authorization.

To augment the activity of survey throughout the country, administrative machinery has also been strengthened. The department has created separate

survey units. Separate posts of Directors, Deputy Directors and Assistant Directors exclusively in charge of survey have been created. A large contingent of officers, inspectors and staff has been placed under their charge with full time responsibility of conducting the survey operations.

Section 133A consists of seven sub-sections and powers there under can be divided into two broad categories. One category deals with provisions relating to carrying out of survey of business premises of any person including premises where an activity for charitable purpose is carried on and other category deals with enquiry regarding expense incurred on any function or event.

## **1.2 Approval for survey action**

Proviso to section 133A inserted by Finance Act, 2003 w. e. f. 01.06.2003 provides that survey action shall not be taken by Asst Director, or Deputy Director or Assessing Officer or Tax Recovery Officer without obtaining approval of Joint Commissioner or Joint Director. This is a welcome condition as earlier an Assessing Officer could carry out survey without any precondition.

## **1.3 The places which can be visited during survey**

Sub-section (1) of section 133A provides that survey can be conducted only at a place where business or profession is carried on, though it is not necessary that such place should be the principal place of business. Premises where other activities are carried on, like premises where goods are manufactured, processed or stored, factory, workshop or even godown, can also be surveyed. If a premise

has been put to use for business as well as residential purposes, like of artisans or small scale, cottage industry etc, an Income-Tax authority is entitled to enter such premises also for the purpose of survey.

Normally, in exercises of power u/s 133A, the Income-tax Authority is not entitled to enter a place, where the business or profession is not carried on or the residential premises of the assessee. However, explanation to sub-section (1) to Section 133A provides that a place where business or profession is carried on shall also include any other place, whether any business or profession is carried on therein or not, in which the person carrying on the business or profession states that any of his books of account or other documents or any part of cash or stock or any other valuable articles or thing related to his business or profession is kept.

Therefore, it is only if the assessee surveyed makes a statement to the effect that the books of account, documents or valuable articles relating to his business or profession are kept at some other place, then the survey can be conducted at such place. Such other place may include residential premises of the assessee, his employee, friend or even relatives. The Income-tax Authority can enter such other premises once the person on whom survey is carried out states that the books of account, cash etc., are kept at such other place.

Section 133A has been amended with effect from 01-4-2017 to provide as follows:

- An income –tax authority may now enter any place where an activity for charitable purpose is carried on, whether such place be the principal place of such activity for charitable purpose or not.

For the above purpose, a place where an activity for charitable purpose is carried on shall include any other place in which the person carrying on the activity for charitable purpose states that his books of account or other documents etc., relating to the activity for charitable purpose are kept (Explanation to section 133A) The income –tax authority may enter any place where an activity for charitable purpose is “ carried on”

- The income –tax authority may require any trustee, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on such activity for charitable purpose, to afford him the necessary facility to inspect books of account and to carry out other tasks as mentioned in section 133A(1).

Section 11 to 13 have at various places distinguished between charitable purpose and religious purpose. Hence , the amended power to survey does not extend to places where an activity for religious purpose is carried on. In other words, temples, mosques, churches, gurudwara, derasar, etc., cannot be surveyed even after the amendment.

If the books of account are lying at the residence or office of trustee or at the residence of the accountant, then even these places could be surveyed under section 133A.

#### **1.4 The extent of enquiry that can be carried out**

In exercise of powers under section 133A, the Income-tax Authority can enter into specified class of premises and may: -

- a) Inspect books of account and other documents.
- b) Place marks of identification on the books of account or other documents and make extracts or copies there from.
- c) Impound books or documents inspected.
- d) Check or verify cash, stock or other valuable articles or thing.
- e) Take inventory of cash, stock or other valuable articles or thing.
- f) Call upon the proprietor, trustee, employee or other person to furnish information as regards any matter, which may be useful for or relevant to any proceedings under the Income Tax Act, 1961. This provision empowers the Income Tax Authority to record the statement of any person, which may be useful for or relevant to any proceedings under this Act.

The scope of enquiry very wide and except for impounding or seizing valuables, the authority can exercise most of the other powers. However, the Income Tax authority cannot seal premises in any circumstances whatsoever. (Shyam Jewellers v. Chief Commissioner [1990] 196 ITR 243 (All.).

Finance (No. 2) Act, 2014 has amended section 133A so as to insert sub-section (2A) after sub-section (2). The new sub-section (2A) provides that an income-tax authority acting under this sub-section may for the purpose of verifying that tax has been deducted or collected at source, exercise the following powers:

- Enter, after sunrise and before sunset, any office , or any other place where business or profession is carried on, within the limits of the are assigned to him, or 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, where books of account or documents are kept and
- Require the deductor or the collector or any other person who may at that time and place be attending in any manner to such work-
  - 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 , and
  - ii) to furnish such information as he may require in relation to such matter.

### **1.5 Whether books, cash, valuables etc. can be removed, seized or impounded**

Prior to amendment by Finance Act, 2002 w. e. f. 1-6-2002, sub-section (4) of section 133A specifically provided that the authority shall not remove or cause to be remove books, valuables, etc. found at the premises during the course of survey.

Following are some of the important judgments wherein it has been held that impounding of books, etc during survey, prior to 1-6-2002, would be illegal:

- i) United Chemical Agency v. Income-tax Officer (1974) 97 ITR 14 (All).

- ii) Gheru Lal Bal Chand v. Income-tax Officer (1982) 137 ITR 190 (Punj.).
- iii) Ram Swaroop Pawan Kumar v. Income-tax Officer (1980) 125 ITR 603 (Pun.).
- iv) N.K.Mohnot v. Dy. CIT (1995) 215 ITR 275 (Mad).

Impounding of books and documents during course of survey had become a contentious issue and the legislature has inserted clause (ia) in sub section (3) of section 133A, by Finance Act, 2002, w. e. f. 1-6-2002, granting power to the authorised officer to impound books and documents inspected during survey. However, the power can be exercised only after recording reasons. Further, it can not be retained for a period exceeding ten days without approval of the Chief Commissioner, Commissioner, Director General or Director.

However, power is only to impound books and documents and even after amendment, cash, stock and valuables cannot be seized or impounded during the course of survey.

Finance (No.2) Act, 2014 has substituted the clause (b) of the proviso to clause (ia) in sub- section (3) of aforesaid section 133A so as to provide that an income-tax authority under the said section shall not retain in his custody any such books of account or other documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of the Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director General or Principal Commissioner or Commissioner or Principal Director or Director therefore, as the case may be.



It is also provided that an income-tax authority may place marks of identification on the books of account or other documents inspected by him and take extracts and copies thereof. He may also record the statement of any person which may be useful for, or relevant to, any proceeding under the Act. However, while acting under sub-section (2A) of section 133A he shall not impound and retain in his custody any books of account or documents inspected by him or make an inventory of any cash, stock or other valuables. These amendments are effective from 1-10-2014.

### **1.6 Exercise of powers under section 131 during the course of survey**

Sub-section (6) of section 133A provides that if an assessee evades or refuses to comply with his legal obligation u/s. 133A, then the Income-tax Authority can exercise the power u/s 131(1) for enforcing compliance.

### **1.7 Income Tax Authority who can carry out survey**

Explanation (a) to section 133A defines Income Tax Authority who can carry out survey. The same was amended by Finance Act, 2003 w. e. f. 01.06.2003 and the amended explanation (a) provides that an Income Tax Officer or any Income-Tax Authority senior to it as per section 116 can conduct survey. As per the amended provisions, even a Tax Recovery Officer can carry out survey.

The power of survey can be exercised by an Income Tax authority in respect of -

- a) An assessee, in respect of whom, the Income tax authority exercises the jurisdiction, or
- b) Any premises located in an area assigned to such Income Tax authority.

The Income tax Authorities' jurisdiction to carry out survey qua an assessee extends to all premises of such an assessee, from where business or profession is carried on, irrespective of whether such premises are in his territorial jurisdiction or not.

### **1.8 Inspector of Income Tax – whether can be authorised**

An Inspector of Income tax can carry out survey only if he is authorised by any Income Tax authority and the Inspector, on being so authorised, 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.

The Inspector, even if authorised, cannot exercise any other power u/s 133A and any act beyond the specified powers would be illegal. (Income-tax Officer v/s Jewels Emporium [1994 SOT 939 (Ind.)]).

### **1.9 Time during which survey can be commenced**

Sub-section (2)/ (2A) of Section 133A provides for the time for commencement of survey. It provides that at a place where the business or profession is carried on, the survey can be started any time during the hours when such place remains open for the conduct of business or profession. As long as such place remains open for business, irrespective of the hour of the day, the authority can enter such premises for survey. At 'any other places' as per Explanation to sub-section (1) to section 133A, i.e. a place where the books of account or cash or stock, etc., are stated, by the person concerned, to have been kept, the survey can be started at any time of the day after sunrise but before sunset.

Sub-section (2)/ (2A) merely restricts the hours when entry can be made for the purpose of survey, and it is not necessary that survey must be completed within the specified hours rather no time has been prescribed for completion of survey proceedings. [See N. K. Mohnot v. DCIT (1995) 215 ITR 275 (Mad)].

#### **1.10 Enquiry relating to expenditure incurred on function, ceremony or event etc.**

The section 133A (5) empowers the income tax authority to make enquiry in respect of any ceremony even before assessment proceedings have commenced.

Sub-section (5) of section 133A provides that an Income Tax Authority may make enquiries as regards expenditure incurred in a function, etc. organised by an assessee. The powers under sub-section (5) are different from other provisions of section 133A. It authorises an Income Tax authority to require the assessee,

who has incurred any expenditure on any function, ceremony, event or any other person, who in the opinion of the Income-tax Authority is likely to possess information in respect of such expenditure, to furnish information as to any matter which may be useful for and relevant to any proceedings under the Act and to record the statement of the assessee or any other person in this behalf.

Enquiry can be made and information sought not only from the person who has incurred the expense but also from any other person, who in the opinion of the Income-tax Authority, is likely to possess the information. For example, in the case of marriage, he may make enquiries from a hotel, a restaurant, caterer, decorators, printers of invitation cards, the jewellers etc., who may give the information with regard to the expenditure incurred at the time of marriage.

The power can be exercised only after the event and the officers cannot visit the event itself for survey. Basically, such an enquiry can also be made in exercise of powers of assessment of the assessee; however, in such an eventuality crucial time is lost as assessment would be at much later date. By enacting sub-section (5) power is now available to make enquiry immediately after the event.

The following CBDT circular explains the intent and purpose of introduction of sub section (5):

Relevant extract of Departmental Circular No. 179, dated 30<sup>th</sup> September, 1975:-

“The Income – tax authorities will also have the power to collect information and record statements of persons concerned at any time after any function, ceremony or event even before the stage of assessment proceedings for the following year for which the information may be relevant, if they are of the opinion, that having regard to the nature, scale or extent of the expenditure incurred, it is necessary to

do so. The object of this provision is to help collecting evidence about ostentatious expenditure immediately after the event to be used at the time of assessment.”

“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, authorises 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.”

#### **1.11 How the powers are exercised**

Normally on information being received of any lavish marriage or any other function, the department issues notices to persons who have organized the event as well as the contractors engaged like caterers, decorators, etc and calls for information and in appropriate cases also records their statements.

#### **1.12 Power to call for information by prescribed income-tax authority [Section 133C]**

Finance (No.2) Act, 2014 has inserted a new section 133C so as to provide that for the purposes of verification of information in its possession relating to any person, prescribed income-tax authority, may, issue a notice to such person requiring him, on or before a date to be specified, to furnish information or documents, verified in the manner specified therein which may be useful for, or relevant to, any enquiry or proceeding under this Act. Explanation to section 133C

clarifies that, in this section, the term “proceeding” shall have the meaning assigned to it in clause (b) of the Explanation to section 133A. This amendment will take effect from 1<sup>st</sup> October, 2014.

## **2. Powers in exercise of search u/s 132**

‘Search’ means a thorough inspection of the building, place, vehicle, vessel, aircraft, etc. ‘Seizure’ means taking possession under the authority of law.

### **2.1 Historic Background**

The officers under the Income-tax Act were not vested with the powers of search and seizure. They however had powers of discovery and inspection, enforcing attendance of witnesses, examination of witnesses on oath, compelling production of books of account and documents, issuing of commissions etc. under the civil law.

On the recommendations of the Taxation Enquiry Commission, 1956, section 37 was recasted in the 1922 Act to confer powers of search on Income Tax Officers specially authorised by Commissioners in that behalf. These powers were however limited to search and seizure of books of account and other documents which were in the opinion of the Officer useful for framing proper assessments under the Income-tax Act, 1922. Section 37(2) enabled the Income Tax Officer to enter and search any building or place, seize any books of account or documents and make an inventory of articles and things found.

The Income-tax Act of 1961 incorporated the provisions of section 37(2) under section 132. This section as originally enacted consisted of two sub-sections which were similar to section 37(2) of the 1922 Act.

Under the 1922 Act, the validity of a search conducted under section 37(2) was challenged on the ground that there was nothing to indicate the purpose and object for exercising the power and also that there was no indication as to when and in what circumstances the power of searches to be exercised etc.

The Finance Act, 1964 w.e.f. 1<sup>st</sup> April, 1964, with the intension of resolving the challenge under the 1922 Act, amended the above provision whereby a bigger and wider meaning and scope was given to search and seizure. After the amendment, the Commissioner could authorize any Inspecting Assistant Commissioner or Income Tax Officer to conduct a search of any premises, and seize books of account, documents, jewellery or any other valuables asset. The authorization could be issued if the commissioner had reason to believe in consequences of information in his possession that any person on whom summons or notice is issued to produce books of account or documents has failed or omitted to produce the same, or will not or would not produce the same or where any person is in possession of any money, article or thing disproportionate to his known source of income.

The Income Tax (Amendment) Act, 1965, further amended the provisions of search and seizure to validate the search of any building or place by an Inspecting Assistant Commissioner of Income Tax before the commencement of the amending Act came into effect from 6<sup>th</sup> January, 1965 such that the action prior thereto was to be deemed to have been made in accordance with the provisions

of that sub-section. It was provided that it would be presumed as if those provisions were in force on the day the search was made. The validity of this was challenged in the case of Hindustan Metal Works [68 ITR 798 [All.]] and in the case of Seth Brothers [80 ITR 693 (All.)] but the same was upheld.

In order to give effect to the report of the Wanchoo Committee, The Taxation Laws (Amendment) Act, 1975, substituted section 132 with sections 132 and 132A to increase and enlarge the scope of search and seizure action and to make them more effective in fighting the evasion of black money. Powers were given to Deputy Director of Inspection and Inspecting Assistant Commissioners in addition to Director of Inspection and Commissioners. In particular in sub-clause (C) of sub-section (1), the words 'which has not been disclosed' were substituted with 'which has not been, or would not be disclosed'. This gave greater power as where the authorised authority had even a reason to believe that there may be no disclosure in the future, he could issue a warrant authorizing a search. Similarly the words 'building or place' were substituted with 'building, place, vessel, vehicle or aircraft', thus expanding the locations where search could be carried out. The powers to search a person leaving or entering a building or a place, vessel, vehicle or aircraft was also given. Even a Commissioner who did not have jurisdiction over a person could authorize a search if the person was within his jurisdiction.

The most important change that was made was the addition of sub-section (4A) whereby, the concept of rebuttable presumption was made against the person searched to the effect that the books of account, other documents and assets found in possession or control of such a person would be presumed to belong to him and that the contents of such books or documents are true and the signature



and every part of the books or account or other documents are in the hands writing of the person. The presumption under section 132 (4A), is limited. It was held in the case of Pushkar Narain Sarraf [183 ITR 388 (All)], that the presumption u/s 132(4A) is available only in regard to the proceedings for search and seizure and for the purpose of retaining the assets u/s 132(5) and their application u/s 132B. the presumption is however rebuttable as held in the case of S.M.S. Investment Corporation (P.) Ltd. [207 ITR 364 (Raj)]

Several amendments have been made thereafter, by not only tinkering with the section itself to bring the electronic data also within the purview of seizure but also with the procedures of assessment.

The Finance Act, 1995 brought in a new era in respect of the procedure of assessment. The previous concepts of determining the undisclosed income by making an estimate in a summary manner were given a total go by the introduction of the scheme of block assessment. W.e.f. 1<sup>st</sup> July, 1995, the provisions of Chapter XIV-B of the Income-tax Act came into force.

Under this scheme of assessment, once a search took place, the assessee became liable to file a return for the block period which comprised of the previous years relevant to ten assessment years proceeding the previous year in which the search took place or a requisition was made u/s 132A. The period of ten years was reduced to six years w.e.f. 1<sup>st</sup> June, 2001. Thus, under this scheme whether or not any undisclosed income or assets were detected in the search, the assessee was liable to file a return for the block period. The law on this subject developed very well and the courts took the view that the scheme of block assessment was restricted only to undisclosed income computed on the basis of evidence found as

a result of search or requisition of books of account or other documents or such other material or information as was available to the Assessing Officer. No roving enquiries could be made. The Bombay High Court in the case of Dr. M. K. E. Memon [24 ITR 310 (Bom)] held that relying on the Supreme Court's decision in the case of H. M. Esufali H. M. Abdulali [90 ITR 271 (SC)] in assessment for the block period estimation of income based on the seized material could be made. However the Court ruled that the estimation must be based on material and could not be arbitrary. The Courts in a number of decisions also held that there was no scope to look into issues relating to regular assessment and no addition or disallowance which could be made in a regular assessment could be made in a block assessment.

Under the provisions of section 132(5), as it existed prior to 1<sup>st</sup> June, 2002, an order was required to be passed by the Assessing Officer within 120 days from the date of seizure estimating the undisclosed income in a summary manner on the basis of the material available with him. The tax thereon was to be calculated along with interest and penalty and an order specifying the existing liability was to be determined. The seized assets were to be retained to the extent of the liability only. No appeal was provided against this order, but such an order could be objected to by the assessee by filing an application to the Commissioner of Income-tax within 30 days. A regular assessment was to be made thereafter as per law within the specified time frame.

The Finance Act, 2002, omitted sub-sections (5), (6), (7), (11), (11A) and (12) of section 32, and time limits set out in the other provision of section 132 were streamlined.

The Finance Act, 2003, resolved one major grievance of the tax-payer and amended the law w.e.f. 1<sup>st</sup> June, 2003, to provide that any bullion, jewellery or other valuable article or thing being the stock-in-trade of the business, found as a result of search shall not be seized, but the authorised officer shall make a note or inventory of such stock-in-trade.

This scheme of block assessment was again abandoned and w.e.f. 1<sup>st</sup> June, 2003, a new scheme of assessment was introduced by the introduction of sections 153A, 153B and 153C. Under this new scheme, the assessee is now required to file a separate return in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which the search takes place, and all the previous assessments or reassessments pending on the date of search would abate. Thus though the period of six assessment years was maintained, the scope of assessment was enlarged to enable the Assessing Officer now probe into the already completed assessments and make additions and disallowances which he had previously failed to do. The Assessing officer is thus given a second inning to review completed assessments. However this bonanza for the department has been curtailed by a recent decision of the Kolkata Tribunal in the case of LML International Ltd. [119 TTJ 214 (Kol)], where the Tribunal has held that there is an apparent contradiction in the first and the second proviso of section 153A in as much as the first proviso provides that the assessment or reassessment shall be done by the Assessing Officer in respect of each assessment year falling within the six assessment years preceding the year of search, and the second proviso provides that the assessment or reassessment pending on the date of search shall abate. Thus the Tribunal has held that applying the rule of harmonious construction, the two provisos of

section 153A should be reconciled by restricting the meaning of “assess” and “reassess”, and hence where nothing incriminating is found in the course of search relating to any of these assessment years, the assessment for such years could not be disturbed. It was held that items of regular assessment could not be added back in the proceedings u/s 153C when no incriminating documents were found in respect of the disallowed amounts in the search.

## **2.2 Nature of provision**

Section 132 is essentially a procedural section. It is a comprehensive code in itself. The conditions under which, and the circumstances under which, warrants of authorization have to be issued have been set out in great detail in the section. Considered as a whole, it reveals its own procedure for the search and seizure, determination of the point in dispute, quantum to be retained and also the quantum of the tax and interest on the undisclosed income in respect of the amounts seized. It has its own procedure for an application under sub-section (11) in place of an appeal. It has all the fortifications of a code and the general provisions of the Act like the assessment u/s 139 can not be applied. However, with the changed scenario provisions of section 132(5) dealing with the summary assessment for retaining the ceased assets was dropped and the new procedure for assessing the undisclosed income was provided by way of block assessment procedure in the case of search and seizure are drawn by the new provisions under sections 153A, 153B and 153C.

## **2.3 Powers**

The Income Tax Act gives very wide powers to an authorised officer to carry out the search and also to seize documents and unaccounted assets.

The authorised officer has the power to:

- a) To enter and search any building, place, etc. where he has reason to suspect that books of accounts, other documents, money, bullion, jewellery or other valuable article or thing representing undisclosed income is kept;
- b) To break open the locks, where the keys thereof are not available;
- c) To carry out personal search of the person who is suspected to have secreted any item as mentioned in a) above;
- d) Seize the items as mentioned in a) above;
- e) Place marks of identification and take extracts or copies of the books of accounts and other documents; and
- f) Make a note or inventory of the valuables found during the search.

The authorised officer is also permitted to pass orders placing prohibition on the person in possession or control of the valuable article or thing from removing, parting with or otherwise dealing with such article or thing without prior permission. The authorised officer also has the right to demand the services of any Police officer or any officer of the Central Government.

With effect from 1<sup>st</sup> June, 2003, law has been amended by Finance Act, 2003, whereby the authorised officer cannot seize stock in trade of a business and he can only make a note or inventory of such stock in trade. Irrespective of nature of business and stock held for such business whether it is jewellery, bullion or any other valuable article or thing, if such material is held by person searched as stock in trade of his business, the same cannot be seized. Also, bar on seizure applies irrespective of whether the person searched is able to explain the source of acquisition of such stock; in common parlance, whether stock is disclosed or undisclosed is immaterial and the same cannot be seized in any circumstance.

#### **2.4 Circumstances in which search can be carried out**

The powers of search can be exercised when the authorising officer has reason to believe that:

- a)** any person has omitted or failed to produce books or accounts or documents as required by any summons or notice issued,
- b)** any person to whom, when so summoned to produce the documents, etc., will not or would not produce books of account or documents,
- c)** any person is in possession of money, bullion, jewellery or other valuable article or thing representing, income or property which

has not been disclosed or would not be disclosed for purposes of the Income Tax Act.

Law on the subject as to circumstances in which search can be carried out has been aptly summarized in Prabhubhai Vastabhai Patel v. R. P. Meena (1977) 226 ITR 781 (Guj) as follows:

“The Courts have held that the exercise of power of search and seizure infringes upon the privacy of a citizen and causes social stigma. It is, therefore, mandatory that the condition precedent must be satisfied. The condition precedent is the possession of information and the reason to believe that the bullion, jewellery or other valuable article or thing represents wholly or partly income or property which has not been or would not be disclosed for the purpose of the Act. On perusal of all the above referred judgments, the principles that emerge can be summarized as under:

(a) The authority must be in possession of the information and must form an opinion that there is reason to believe that the article or property has not been or would not be disclosed for the purposes of the Act.

(b) The information must be something more than mere rumour or gossip or hunch.

(c) The information must exist before the opinion is formed.

(d) The authorised person must actively apply his mind to the information in his possession and shall form opinion whether there is reason to believe or not. The opinion must be formed on the basis of the material available at that time.

(e) The opinion must be based on the material which is available and it should not be formed on the basis of extraneous or irrelevant material.

(f) That the formation of opinion shall have rational connection and bearing to the reasons for such opinion. The formation of opinion should be based on active application of mind and be bona fide and not be accentuated by mala fide, bias or based on extraneous or irrelevant material. The belief must be bona fide and cogently supported. The Courts have further held that the existence or otherwise of the condition precedent is open to the judicial scrutiny.

(g) The Courts would examine whether the authorised person had material before it on which he could form the opinion whether there is rational connection between the information possessed and the opinion formed. However, the Court would not sit in appeal over the opinion formed by the authorised person if the authorised person had information in his possession and the opinion formed is on the basis of such material. The Court would not examine whether the material possessed was sufficient to form an opinion.

(h) The Court cannot go into the question of aptness or sufficiency of the grounds upon which the subjective satisfaction is based.

(i) If the belief is bona fide and is cogently supported, the Court will not interfere with or sit in appeal over it.”

## **2.5 Search illegal – whether evidence found can be used**

If a search is held to be illegal on the ground that same was not authorized in accordance with law or for any other reason, issue arises as to whether material found during such illegal search action can be used as evidence. Contention has



been raised in various cases that once search is held to be illegal, assessee has to be restored to pre search position. The issue has been considered in various cases and it has been held that though material seized has to be returned to the person searched, the department is not barred from calling for such papers and documents and use it as evidence. Some of the landmark judgments on the issue are discussed hereinafter.

- i) In the case *Balwant Singh v. R. D. Shah* (1969) 71 ITR 550 (Del) it was contended that search without authority of law is in violation of fundamental rights of the citizen and therefore if evidence found in pursuance of illegal search is allowed to be used, it would amount violation of fundamental rights. Rejecting the argument, the hon'ble Court held that: "Though in Ohio's case the Supreme Court of the United States said that the rule which excludes unconstitutional evidence from being admitted is an essential part both of the Fourth and Fourteenth Amendments, Mr. Veda Vyasa suggested that the said rule as developed in the United States was not only a command of the Fourth Amendment but also a judicially created rule of evidence and there was no reason why the same rule of evidence should not be created by the courts in India because article 19 in our Constitution is intended also to serve the same purpose as the Fourth Amendment in the United States. There are two ways of looking at the American decisions. One way of looking at those decisions may be, as suggested by Mr. Veda Vyasa, that the exclusionary rule is a judicially created rule of evidence. If that be so, then it would be open to the Legislature to override that rule and permit use of evidence illegally

obtained. In that situation the matter will depend on the provisions of the Indian Evidence Act. Of course, it would be a different matter as to what value should be attached to an evidence illegally seized. No provision of the Evidence Act has been shown to us by Mr. Veda Vyasa which excluded such evidence. It is the other angle which creates difficulty. If it be held that the exclusionary rule is based on the Fourth Amendment, then an illegal seizure would be in as much violation of article 19 in India as it would be in violation of the Fourth Amendment in the United States. Even so, article 19 does not, in my opinion, forbid the use of evidence obtained as a result of an illegal search. It may be argued in support of the exclusionary rule that article 19 makes the right to acquire and hold completely restored. There is no restoration unless the parties are placed in a position in which they stood before the seizure and that, unless such evidence is completely excluded, there will not be any perfect restitution. It is true that in appropriate cases the court may order restoration of the property illegally seized, but, so far as the use of information gathered as a result of such seizure is concerned, the court, or the appropriate authority, has, in any case, acting within the law, the power to call for such information and property and use the same in evidence. If it is done in accordance with law, no violation of article 19 arises. The information gathered, therefore, can otherwise be reached by the courts or other concerned authorities. The information gathered serves as a check on the person subjected to search and seizure that he will not destroy the records or conceal the information. If he produces it in pursuance of summons or notice, it can undoubtedly be used. If, on the other hand, he withholds it, it cannot be said that article 19

will exclude such evidence because he has no fundamental right to withhold the records and information. My conclusion, therefore, is that information gathered as a result of illegal search and seizure can be used subject to the value to be attached to it or its admissibility in accordance with the law relating to evidence. I will take an extreme case where documents are illegally seized and not only is the information kept in the minds of the concerned authorities but complete copies thereof are kept. On the one hand, article 19 may be construed to mean that complete restitution of property would require restitution of those copies as well. On the other hand, it may be said that, since the court or the authority has still the power to call for the information, the authority may use those copies if the information or the documents are not produced. In that situation it cannot be argued that article 19 forbids the use of such copies completely. What will be the situation if there is no power in law in the authority concerned to call for such information or documents does not arise before us and I need not consider that. I would like to make it clear that I am expressing no opinion on the impact of article 20 on the use of such information.”

- ii) The above judgment was affirmed by hon’ble Supreme Court in *Pooran Mal v. Director of Inspection* (1974) 93 ITR 505 (SC) and it was held as follows:  
“It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to be shut out.”

The hon'ble Court referred to following passage in Babindra Kumar Ghose

v. Emperor:

"Mr. Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as IL hold there was, still the provisions of the Criminals Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For, without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded. As Jimutavahana with his shrewd common sense observes - a fact cannot be altered by 100 texts' and as his commentator quietly remarked: 'If a Brahmana be slain, the precept "Slay not a Brahamana" does not annul the murder.' But the absence of the precautions designed by the legislature lends support to the argument that the alleged discovery should be carefully scrutinized."

iii) However, in Dr. Pratap Singh v. Director of Enforcement, (1985) 155 ITR 166 (SC), the hon'ble Supreme Court held that though such evidence is not excluded, the same has to be carefully scrutinized:

"It has been often held that the illegality in the method, manner or initiation of a search does not necessarily mean that anything seized during the search has to be returned. After all, in the course of a search, things or documents are required to be seized and such things and documents when

seized may furnish evidence. Illegality of the search does not vitiate the evidence collected during such illegal search. The only requirement is that the court or the authority before which such material or evidence seized during the search shown to be illegal is placed has to be cautious and circumspect in dealing with such evidence or material. This is too well-established to necessitate its substantiation by a precedent. However, one can profitably refer to Radhakishan v. State of U.P. [1963] Supp 1 SCR 408; AIR 1963 SC 822, wherein the court held that assuming that the search was illegal, the seizure of the articles is not vitiated. It may be that because of the illegality of the search, the court may be inclined to examine carefully the evidence regarding seizure, but no other consequence ensues. (See State of Maharashtra v. Natwarlal Damodardas Soni [1980] 4 SCC 669; AIR 1980 SC 593.)”

- iv) In Ali Mustafa Abdul Rahman Moosa v. State of Kerala (1994) 6 SCC 569 (SC), a case relating to prosecution under Narcotic Drugs & Psychotropic Substances Act, 1985, after distinguishing Pooranmal’s case, it has been held that material found during illegal search cannot be used as evidence to prove possession. Under Narcotic Drugs & Psychotropic Substances Act, 1985, possession of prohibited substance has to be proved by prosecution beyond reasonable doubt and it was held that due to illegality possession cannot be proved in the instant case.
- v) The issue of admissibility of evidence seized during search has also been tested in terms of Article 20 of Constitution in Dwarka Prasad Agarwalla v.

Director of Inspection (1982) 137 ITR 456 (Cal) and it was held that: “In view of the decision of the Supreme Court in the case of Ramesh Chandra Mehta v. State of West Bengal, AIR 1970 SC 940, and the observations of the court at p. 946, it is clear that a person whose house is being searched for gathering the materials as contemplated under [sub-s. \(1\) of s. 132](#) is not an accused and, therefore, no question of testamentary compulsion arises.”

- vi) In *Thakursidas Banwarilal v. CIT* (1998) 232 ITR 846 (Gau) the above principles have been reiterated and it has been held that evidence seized in pursuance of illegal search cannot be excluded but it will be carefully scrutinized.