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Section 132- Power Of Search And Seizure- Part I

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Section 132- Power Of Search And Seizure- Part I

Introduction

One of the most potent enforcement weapons possessed by the Income-tax department is the power of search and seizure u/s 132 of the Income tax Act. Since it directly impacts the right to privacy and other fundamental rights, it is used sparingly. Even so, every taxpayer should be familiar with the law on this subject, and his own rights and obligations, so that he can deal with a raid at his residential or office premises.

Scope of powers- Section 132(1)

An important part of the scope of this power is delineated u/s 132(1). The power to authorize a search under the current law is vested in officials of the rank of Principal Director General/ Director General/Principal Director/ Director/ Additional Director/ Joint Director of Income –tax; or Principal Chief Commissioner/ Chief Commissioner/ Principal Commissioner/ Commissioner/Additional Commissioner/ Joint Commissioner of Income-tax.

The condition precedent is that the Authorizing Officer should have reason to believe in consequence of information in his possession that the person concerned:

i. has not complied with a summons u/s 131 or a notice u/s 142(1) to produce books of accounts or documents already issued to him; or,
ii. would not comply with such notice or summons, in future; or,
iii. even if such summons or notice is issued in future, will not comply with the same; or
iv. is in possession of gold, bullion, jewellery or other valuable article or thing which represents his undisclosed income or wealth

The power under this provision granted to officials authorized to carry out the search extends from Additional Commissioners to Income-tax Officers. But where the Authorising

officer is himself an Additional Commissioner/ Joint Commisioner, he can only authorize officers subordinate to him to carry out the search.

The statutory powers granted to authorized officers extend *inter alia* to:

a. entering and searching any building, place, premises, vehicle, vessel, aircraft, where the authorized officer feels that the relevant books of accounts, documents, money, bullion, jewellery or any other valuable article or thing is kept.
b. Breaking open the lock of any door, almirah, receptacle, etc. as may be required to carry out the functions indicated a. above;
c. Searching any person on the location or entering or leaving the locations indicated at a. above, if the Authorised Officer suspects such person has secreted any such books of accounts, documents, money, bullion, jewellery or any other valuable article or thing
d. Seizing relevant books of accounts, documents, money, bullion, jewellery or any other valuable article or thing, but not the assessee's stock in trade, in respect of which Authorised officers may make an inventory or note; and,
e. Placing marks of identification on books of accounts or other documents not seized

Principles governing the exercise of power

Very broadly, the principles governing the exercise of power under this section are summed up in *Prabhbhai Vastabhai Patel v. Meena 226 ITR 781 (Guj*). These principles are discussed below.

In I.T.O. v.Seth Brothers 74 ITR 836 (SC), the Supreme Court held that the power of search and seizure is a serious invasion of the rights, privacy and freedom of the taxpayer. It must therefore be exercised strictly in accordance with the law and only for the purposes authorized by it. The proceedings are liable to be quashed if they are exercised for a malicious, extraneous or collateral purpose. The satisfaction note should show application

of mind by the Authorising Officer and formation of opinion by him on the material on record.

In *H.L. Sibal v. CIT 101 ITR 112 (P and H),* the Punjab and Haryana High Court held that the power under this section would attract intervention by the Court, if it is exercised for an extraneous or collateral purpose. Such action would be illegal if it is malafide or arbitrary; indicates lack of application of mind; fails to comply with statutory provisions; does not comply with requirements of natural justice; or is patently without jurisdiction or erroneous. The courts would intervene in all such circumstances [*Anand v.CIT 103 ITR 575 (P and H), N.K. Textile Mill and Another v. CIT 62 ITR 58 (P and H); Manmohan Krishan Mahajan v. CIT 107 ITR 420(P and H)*].

This section relates to the pre-assessment stage; and cannot be invoked after the conclusion of the relevant assessment in order to recover tax assessed [*Choyi v. Syed Abdulla Bafakky Thangal 123 ITR 435 (SC)*]. A mere survey u/s 133A can subsequently be converted into a search, if the conditions precedent for carrying out such a search operation are satisfied [*Vinod Goel v. UoI 252 ITR 29*(*P and H* These powers are available against non-residents as well [*Ram Kumar Dhanuka v. UoI 252 ITR 205* (*Raj*)].)]. But they do not go to the extent of permitting sealing of premises [*Shyam Jewellers v. CCIT 196 ITR 243* (All)], or arrest or detention [L.R. *Gupta and Ors v. UoI 194 ITR 32* (Delhi)] of persons. Under this provision, the AO does not have the power to set up camp office at the assessee's premises and ask the assessee to furnish books of accounts and documents [*Prakash V. Sanghvi v. Ramesh G. v. DDIT 356 ITR 426(Kar)*].

When the department has information of clandestine business activity, that would be good enough to establish the satisfaction of the condition laid down u/s 132(1)(b) [*Rich Udyog Network v.CCIT 386 ITR 136 (All)*].

Merely because the Authorised officer who carried out the search and Assessing officer are the same may not be enough to establish bias [*UoI v. Vipan Kumar Jain 260 ITR 1 (SC)*]. If at all it exists- whether personal, judicial or administrative - such bias would have to be established separately. The party alleging bias must separately lead evidence to establish

such bias and leave scope for no other finding. [*Takshila Educational Society v. DIT(Inv) 272 ITR 274 (Patna)]*

The search and seizure action carried under this section cannot be an inquisitorial search [*Anand Swaroop V. CIT 103 ITR 575* (P and H)]. The section does not permit exercise of sweeping powers of search and seizure irrespective of the relevance of the material to a proceeding under the Act [*Senairam Doongarmal Agency (P.) v. K.E. Johnson And Others 52 ITR 637 (Gau)].*

"Reason to believe"

Information with regard to i. to iv supra. should, according to the criteria laid down by the courts, provide the basis for "reasonable belief." This should be more than a mere suspicion or a hunch. The information should also be more than gossip or a rumour. There must be a rational connection between the information placed on file and the belief formed by the Authorising Officer about the undisclosed income [*Ajit Jain v.UoI 242 ITR 307 (Delhi); affirmed in 260 ITR80 (SC)*]. It follows *ipso facto* that a search cannot be authorized on the basis of mere conjecture or surmise [*Madhu Gupta v. DIT 350 ITR 598 (Del)*].

Importantly, therefore, reason to believe is much more than mere reason to suspect[*Mahesh Kumar Aggarwal v. DDIT 350 ITR 267 (Cal)*].The expression implies that the Authorising Officer should have information pointing to evasion of tax ; or actual or possible non-compliance with section 131 and 142(1). This satisfaction has to be recorded [*Hazarilal v. UoI 208 ITR 365 ( )*]. In the absence of such information, a search cannot be carried out [*Ajit Jain v. UoI 242 ITR302, affirmed in UoI v. Ajit Jain 260 ITR 80 (SC*)].

A police report about the existence of a hoard of cash in the possession of a particular individual, by itself, cannot lead to the belief that this cash amount has not been or would not be disclosed [*Kavita Aggarwal v. DIT 264 ITR 472 (All)].* A search cannot be ordered on the basis of a transaction recorded in the books of accounts, because the mere fact that it has been recorded and disclosed in the books of accounts would take it out of the purview of section 132[*Laljibhai Kanjibhai Mandalia v. PCIT 416 ITR 365 (Guj)*].

It has also been held that the Court cannot substitute its own opinion for that of the Authorising Officer, it can only examine whether the information on which the search was based was relevant or not [*Southern Herbals v. DIT 207 ITR 55 (Kar)*].

Before 1st April 2017, the reasons recorded by the Authorising Officer could be called for and examined by an appellate authority. With effect from 1st April 2017, an Explanation below section 132(1) has been inserted retrospectively from I st April 1962. This effectively takes away the right of an appellate authority or the ITAT to examine the reasons recorded for carrying out the search. For the removal of doubts, stipulates this Explanation, the reason to believe recorded by the income tax authority shall not be disclosed to any authority or person or the Income-Tax Appellate Tribunal. An important provision to ensure transparency and prevent roving inquiries has thus been done away with. Following this amendment, the Supreme Court in *N.K. Jewellers v.CIT 398 ITR 115(SC*) refused to look into reasons for authorizing the search, even though the new Explanation does not specifically bar the courts from doing so.

Statement u/s 132(4)

Section 132(4) empowers an authorized officer to record the statement on oath of any person found to be in possession or control of any document, books of account, money, bullion, jewellery or any other valuable article or thing. Further, any such evidence can be used against the assessee in proceedings under the Act.

A statement under this provision assumes significance in the light of current law stipulated u/s 271AAB; if, in respect of a search carried out on or after December 15,2016 the assessee admits in the statement taken under this provision that the amount of undisclosed income is his income, substantiates the manner in which it was earned, pays the tax and interest in respect thereof, and files the return for the specified previous year declaring such income, penalty will be computed at 30% of such undisclosed income. In all other cases, - where the search is carried out on or after December 15,2016 - penalty will be computed at 60% of such undisclosed income.

It is thus clear that in order to receive preferential treatment u/s 132(4) of penalty at the rate of 30% the assessee must declare the earning of the undisclosed income in the statement taken during the course of the search.

The right to remain silent or the right to the presence of a lawyer is not available at the time of recording of the statement [*Poolpandi v. Superintendent of Central Excise AIR 1992 SC 1795*]. The statement taken during interrogation can be used in evidence, but an addition made only on the basis of self incriminating statement is likely to be struck down[*Shree Ganesh Trading Co. v CIT 214 Taxman 262 (Jharkhand); CIT v. S. Jayalakshmi Ammal 390 ITR 189 (Mad); CIT v. Shankarlal Bhagwatiprasad Jalan 407 ITR 152 (Bom); for contrary view, see Classy Antique the Antique Designed Furniture v. DCIT387 ITR 212(Ker)*].

However in the absence of evidence contradicting it, an addition based on a statement on oath taken during the search, may very well stand if it can be justified [*Bhagirath Aggarwal v. CIT 351 ITR 143 ( )*]. Thus an admission made by a third party and jointly signed by him and the assessee was held to be a valid basis for making an addition. The assessee is normally expected to be given the opportunity to cross examine a party, but the AO cannot be faulted for not granting this right when there was no such request before him [*Bhageeratha Engineering v. ACIT 379 ITR 244 (Ker)*].

Retraction of statement

If a confession is retracted it must be corroborated by other independent evidence [*Vinod Solanki v. UoI (2008) 16 SCC 537*]. A statement made at odd hours cannot be regarded as voluntary and was therefore deleted. However, a candid statement, it was held, could not just be retracted and brushed aside after two years [*PCIT v. Om Prakash Jahkotia 414 ITR 176(Del)*]. A confession must thus be retracted at the earliest and be backed by credible evidence to show that the statement was not made voluntarily [*ACIT v. Hukamchand Jain 191 Taxman 319 ( )*]. Where the Assessing Officer has accepted the retraction after due verification of documents, it is not open to the CIT to revise the assessment u/s 263 [*CIT v. Om Prakash Jain 322 ITR 362*].

Conclusion

This concludes our discussion of section 132 for the time being. In the next issue of *Knowledgeware*, we shall take up issues related to warrants of authorization, legality of prohibitory orders u/s 132(3), retention of seized assets, consequences of an illegal search, release of seized assets, Rule 112 etc.

Can The Originally Assessed Income Be Recomputed And Reassessed At A Lower Amount In The Reopened Proceedings

Tenability of Fresh Claims in the reopened proceedings-

The plea of the assessee in the reopened proceedings for re-computation of the income or redoing of an assessment de novo to allow a claim which the assessee either failed to make in the original return or which was otherwise rejected in the original assessment has always remained a bone of contention.

Such a plea from assessee's side stems from the assumption that reopening gives opportunity to re agitate matters not only confined to 'escaped assessment' or 'under-assessment' but to the entire assessment of income for the year.

Useful reference can be made at this juncture to the provisions of Section 147 of the Income Tax Act 1961 (the Act). In the reassessment proceedings under section 147, the assessing officer is vested with the power to 'assess or reassess' the escaped income of an assessee. The use of the expression 'assess or reassess such income or recompute the loss or depreciation allowance' in section 147 after the conditions for reassessment are satisfied, is only relatable to the preceding expression 'escaped assessment'.

Honourable Supreme Court in the landmark decision in Sun Engineering Works P. Ltd. 198 ITR 297 observed as follows

- "The term 'escaped assessment' includes both 'non-assessment' as well as 'under assessment'. Income is said to have 'escaped assessment' within the meaning of this section when it has not been charged in the hands of an assessee in the relevant year of assessment. "
- The expression 'assess' (employed in Section 147) refers to a situation where the assessment of the assessee for a particular year is, for the first time, made by resorting to the provisions of section 147 because the assessment had not been made in the regular manner under the Act. The expression 'reassess' refers to a

situation where an assessment has already been made but the ITO has, on the basis of information in his possession, reason to believe that there has been under assessment....

Honourable Supreme Court went on to hold that

- claims which have been disallowed in original assessment proceeding cannot be permitted to be re-agitated on assessment being reopened and,
- a matter not agitated in concluded original assessment proceedings also cannot be permitted to be agitated in reassessment proceedings unless relatable to item sought to be taxed as 'escaped income'.
- it is only the under-assessment which is set aside and not the entire assessment when reassessment proceedings are initiated. The ITO cannot make an order of reassessment inconsistent with the original order of assessment in respect of matters which are not the subject-matter of proceedings under section 147.
- Keeping in view the object and purpose of the proceedings under section 147 which are for the benefit of the revenue and not an assessee, an assessee cannot be permitted to convert the reassessment proceedings into an appeal or revision, in disguise, and seek relief in respect of items earlier rejected or claim relief in respect of items not claimed in the original assessment proceedings, unless relatable to 'escaped income', or re agitate the concluded matters.

In rejecting the fresh claims of the assessee in the reopened proceedings the Honourable Apex Court distinguished its earlier decisions rendered in the case of V. Jaganmohan Rao case (75 ITR 373) and held that “it is only to the extent that once an assessment is validly reopened by issuance of notice under section 34 of the 1922 Act (corresponding to section 147 of the 1961 Act), the previous under-assessment is set aside and the ITO has the jurisdiction and duty to levy tax on the entire income that had escaped assessment during the previous year. What is set aside is, thus, only the previous under-assessment and not the original assessment proceedings. An order made in relation to the escaped income does not affect the operative force of the original assessment, particularly if it has

acquired finality." It was for this reason that it was held that no fresh claim could be made in relation to an assessment that had attained finality.

It was held by the Apex Court that the reopened proceedings are for the benefit of the Revenue and the originally assessed income cannot be reassessed at a lower figure consequent to the reopened proceedings.

The Apex Court also laid down the cardinal principle of interpreting judicial rulings in following words

"It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Court, divorced from the context of the question under consideration and treat it to be the complete 'law' declared by the Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. "

The decision of the Apex Court dealt with a situation where original assessment had taken place and thereafter been reopened u/s 147 for the benefit of the Revenue to capture escaped income. The decision of Apex Court holds good even today and has been followed in a catena of decisions.

Reopening in case where original assessment has not taken place

After having referred to the decisions dealing with situations of reassessment of previously under assessed income in the original assessment it becomes imperative to also analyse the situation where the return of income has been only processed u/s 143 (1) and assessment has not taken place.

In the reassessment proceedings under section 147, the assessing officer is vested with the power to 'assess or reassess' the escaped income of an assessee. The term 'assess' as employed in Section 147 bears vital notice and indicates a situation of reopening of a case where original assessment has not taken place.

At this juncture reference is called to the decision of the Honourable Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 291 ITR 500. The Apex Court in that case dealt with a situation of reopening u/s 147 where the return of income of the assessee

was only processed u/s 143 (1) of the Act and an intimation had been sent to the assessee under the said provisions.

Honourable Supreme Court held that the legislative intent was very clear from the use of the word "intimation" as substituted for "assessment" in Section 143 (1). Two different concepts emerged and intimation could not be said to be order of assessment as contemplated under the scheme of the Act.

The Apex Court held that

- Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right to proceed for assessment u/s 143 (2) was preserved and is not taken away.
- An intimation under section 143(1) where (*a*) either no sum is payable by the assessee, or (*b*) no refund is due to him is merely an acknowledgement of return submitted by the assessee. It is significant that the acknowledgement is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them ? The reply is an emphatic "no".
- Since the assessment had not taken place it cannot be said that there was any change of opinion on the part of the Assessing Officer and the reopening was valid.

The decision of Apex Court continues to hold good and has been followed in a catena of cases.

In the backdrop of the aforesaid decisions of the Apex Court and the ratios which have emerged therefrom it would be useful to refer to the recent decision of the Karnataka High Court on the issue of tenability of fresh claims in the reopened proceedings.

Karnataka High Court decision in Karnataka State Cooperative Apex Bank Ltd. I.T.A. NO.392 OF 2016

Brief facts of the case

The assessee an apex cooperative bank filed the return of income for the Assessment Year 2007-08 on 31st October, 2007 and declared total income of Rs.40,77,27,150/-. No order of

assessment was passed under Section 143(3) of the Act. The Assessing Officer issued a notice under Section 148 of the Act for reopening the case. The assessee filed the return of income in response to the aforesaid notice declaring total income of Rs.32,56,61,835/-

In the said return of income, the assessee made a fresh claim of loss on sale of securities to the extent of Rs.8,28,65,052/-. The AO did not allow the fresh claim of loss on sale of securities as the claim thereof was not made in the original assessment proceedings. The said claim was also not related to any item sought to be taxed as escaped income. The AO concluded that failure on the part of the assessee to claim the loss in the original return of income could not be allowed to be re agitated during the course of re-opened proceedings.

The assessee went in appeal against the denial of loss before the appellate authorities and both the first and second appellate authority confirmed the order of the AO and rejected claim of the assessee.

The assessee went in appeal before the Karnataka High Court.

Decision of the Honourable High Court

Honourable Karnataka High Court held that there was no original assessment in the case of the assessee and only an intimation under Section 143(1) of the Act was issued to the assessee. The said intimation under Section 143(1) of the Act was not an order of assessment in view of decision of the Supreme Court in Rajesh Jhaveri (supra) and therefore, the tribunal ought to have appreciated that the issue of loss on sale on government securities was not considered by the Assessing Officer and had not reached finality.

The question of re-assessment of the income of the assessee by the AO did not arise. In the proceeding under Section 148 of the Act, it was the first assessment and the same could have been done considering all the claims of the assessee.

The Court observed that even assuming for the sake of argument that an intimation under Section 143(1) of the Act was to be considered to be an order of assessment, in the subsequent re-assessment proceedings, the original assessment proceedings get effaced

and the Assessing Officer was required to consider the proceeding de novo and to consider the claim of the assessee.

Our Comments

The decision of the Karnataka High Court repays study. The decision has brought in a new dimension to the tenability of fresh claims in the reopened proceedings where the assessment is made for the first time. The Honourable High Court has adopted a pragmatic approach and rendered a decision which reckons the ppurpose of assessment as that of determining the true income fairly and in an equitable manner even in reopened proceedings and impliedly upheld the principle that when technicalities are pitted against the cause of substantial justice, the cause of substantial justice is preferred. It is interesting to note that the Karnataka High Court has duly considered the decision of the Supreme Court in the case of Sun Engineering (supra) and distinguished it for the aforesaid reasons. The Revenue may not accept the decision and may go in the Apex Court against the order. Curtains would be drawn finally when the Apex Court renders decision.