

KOTTAYAM BRANCH OF SIRC OF ICAI

SEARCH AND SEIZURE, SURVEY AND SETTLEMENT OF CASES – LEGAL ISSUES ARISING

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SEARCH AND SEIZURE

Powers of Search and Seizure (Section 132)

A search can be authorised by a Principal Director General / Director General / Principal Director / Director / Principal Chief Commissioner / Chief Commissioner / Principal Commissioner / Commissioner / Additional Director / Additional Commissioner / Joint Director / Joint Commissioner. A search can be authorised by these authorities if they have reason to believe based on information in their possession that:

- ✓ any person to whom a summon u/s.131 or a notice u/s.142(1) has been issued requiring production of books of accounts and documents has failed to produce the same.
- ✓ any person to whom a summon u/s.131 or a notice u/s.142(1) has been issued requiring production of books of accounts and documents will not or would not produce the same.
- ✓ any person is in possession of any money, bullion, jewellery or other valuable article or thing where these represent wholly or partly income or property which has not been or would not be disclosed for the purposes of this Act

The authorities mentioned above can authorise a subordinate authority not being an authority below the rank of an Income Tax Officer to conduct the search. The powers exercisable by these authorities in the course of a search are as follows:

- Enter and search any building, place etc where he has reasons to suspect that money, bullion, jewellery or other valuable article or thing or books of account and documents are kept
- Break open the lock of any door, box, locker etc for exercising the power mentioned above
- Search any person who has got out of or is about to get in or get out or is in the place etc being searched
- Require any person in possession of books of account and documents in electronic form to afford the necessary facility to inspect the same
- Seize any money, bullion, jewellery, valuable article or thing or books of account and documents other than stock in trade found in the searched premises etc. This power can also be constructively exercised (constructive seizure). The books of account and other documents seized can be retained by the authorised officer only for a period of 30 days from the date of completion of assessment u/s 153A or 158BC(c). If however the authorised officer has no jurisdiction over the person searched he may retain the money,

bullion, jewellery, valuable article or thing only for a period of 60 days from the date of execution of the last warrant and thereafter hand them over to the Assessing Officer having jurisdiction over the person searched. If the authorised authority / assessing officer wants to retain the books of account or other documents for a period exceeding 30 days after the completion of assessment he can do so after recording in writing the reasons for retaining the same and after obtaining the approval of the Principal Chief Commissioner / Chief Commissioner / Principal Commissioner / Commissioner / Principal Director General / Director General / Principal Director / Director who may authorise such retention for a period not exceeding 30 days after the completion of all proceedings under this Act.

- Place marks of identification on books of account and documents found or otherwise to make extracts or copies therefrom
- Make an inventory or note, of money, bullion, jewellery or other valuable article or thing found
- To place under prohibitory order any money, bullion, jewellery, valuable article or thing or books of account or documents found in the possession of any person if it is not practicable to seize the same. Such prohibitory order cannot be in force for a period exceeding 60 days from the date of such order
- To examine on oath any person found in possession or control of any money, bullion, jewellery, valuable article or thing or books of account or documents

Presumptions in a Search (Section 132(4A))

The following are the presumptions in a search proceeding:

1. That the books of account or other documents, money, bullion, jewellery or other valuable article or thing belong to the person in whose possession or control they are found
2. That the contents of such books of account or other documents are true
3. The handwriting is that of the person who can reasonably be assumed to have written the same
4. The signature is that of the person who can reasonably be assumed to have signed the same
5. That all stamped and executed or attested documents have been duly stamped and executed or attested by the person purported to have done the same

The Supreme Court in *P.R.Metrani v CIT [2007] 287 ITR 209 (SC)* had held that the presumptions u/s.132(4A) will not extend to a regular assessment. Subsequently Section 292C has been inserted by the Finance Act 2007 so as to clarify that presumptions provided in section 132(4A) can be made in any proceedings under this Act.

Seizure of Books of Account and Documents

Where any books of account or other documents are seized,:

- The person from whose custody these have been seized may make copies or extracts of the same in the presence of the authorised officer or any other

person empowered by him to be present and at such time and place as may be fixed by the authorised officer.

- A person legally entitled to the books of account or other documents seized and retained with the approval of the Principal CCIT / CCIT, Principal CIT / CIT, Principal DGIT / DGIT or Principal DIT / DIT may make an application to the Board stating the reasons for objection to the aforementioned approval and requesting for the return of the books of account and other documents. The Board may after giving an opportunity of being heard, pass such order as it may deem fit

Seizure of Money etc. (Section 132B)

Section 132B talks of application of seized assets. Under this section, the same may be dealt with in the following manner.

- (1) Where the nature and source for acquisition of the asset is explained to the satisfaction of the Assessing Officer, the same may be released with the prior approval of the CIT / CCIT after recovering any direct tax liability due from such person
- (2) Any assets seized and in respect of which the nature and source for acquisition is explained shall be released within 120 days from the date of the last authorization of search or the execution of a requisition
- (3) Assets seized and retained may be used to discharge any liability arising as a result of assessment consequent to the search or any other direct tax liability
- (4) The assets and proceeds remaining after discharge are to be made over forthwith to the person from whom it has been seized
- (5) Interest is payable by the Central Government on such amounts retained at the rate of 1/2% per month or part of a month starting from the 121st day, from the date of the last authorization of search or the execution of a requisition and ending on the date of completion of assessment arising as a result of the search.

Reference shall be drawn to the following decisions where it has been held as to when the retention by Department can be held to be without jurisdiction:

Shreemati Devi v CIT [2016] 97 CCH 0049 AllHC

Rajiv Rai v ACIT [2016] 97 CCH 0051 ChenHC

Reference is also drawn to the decision of the Delhi High Court where the refusal of revenue to release jewellery was held to constitute deprivation of property without lawful authority and contrary to Article 300-A of Constitution of India in *Sushila Devi v CIT [2016] 97 CCH 0032 DelHC*

Rights and Duties of Persons Searched

Rights of the person searched

- ❖ To see the warrant of authorisation duly signed and sealed by the issuing authority
- ❖ To verify the identity of each member of the search party
- ❖ To make personal search of all members of the search party before the start of the search and on conclusion of the search
- ❖ To insist on personal search of ladies being taken only by a lady, with strict regard to decency
- ❖ To have at least two respectable and independent residents of the locality as witnesses
- ❖ A lady occupying an apartment being searched has a right to withdraw before the search party enters, if, according to custom, she does not appear in public.
- ❖ To call a medical practitioner in case of emergency
- ❖ To allow the children to go to school, after checking their bags
- ❖ To have the facility to having meals, etc., at the normal time
- ❖ To inspect the seals placed on various receptacles, sealed in course of search and subsequently at the time of reopening of the seals
- ❖ To ensure that the facts stated by him have been so recorded correctly, as per section 132(4)
- ❖ To have a copy of the panchnama together with all the annexures
- ❖ To have a copy of any statement that are used against him by the Department
- ❖ To have inspection of the seized books of account, etc., or to take extracts therefrom in the presence of any of the authorised officers or any other person empowered by him.
- ❖ To see the warrant of authorisation and put signature on the same

Duties of the person searched

- ❖ To identify all receptacles in which assets or books of account and documents are kept and to hand over keys to such receptacles to the authorised officer
- ❖ To identify and explain the ownership of the assets, books of account and documents found in the premises
- ❖ To identify every individual in the premises and to explain their relationship to the person being searched. He should not mislead by personation. If he cheats by pretending to be some other person or knowingly substitutes one person for another, it is an offence punishable u/s.416 of the Indian Penal Code.
- ❖ Not to remove any article from its place without notice or knowledge of the authorised officer. If he secrets or destroys any document with the intention of preventing the same from being produced or used as evidence before the Court or public servant, he shall be punishable with imprisonment or fine or both, in accordance with section 204 of the Indian Penal Code
- ❖ To answer all queries truthfully and to the best of his knowledge. He should not allow any third party to either interfere or prompt, while his statement is being recorded by the authorised officer. In doing so, he should keep in mind that

- (i) If he refuses to answer a question on a subject relevant to the search operation, he shall be punishable with imprisonment or fine or both, u/s.179 of the Indian Penal Code
 - (ii) Being legally bound by an oath or affirmation to state the truth, if he makes a false statement, he shall be punishable with imprisonment or fine or both u/s.181 of the Indian Penal Code.
 - (iii) Similarly, if he provides evidence which is false and which he knows or believes to be false, he is liable to be punished u/s.191 of the Indian Penal Code
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- ❖ To affix his signature on the recorded statement, inventories and the panchnama
 - ❖ To ensure that peace is maintained throughout the duration of the search, and to co-operate with the search party in all respects so that the search action is concluded at the earliest and in a peaceful manner
 - ❖ Similar co-operation should be extended even after the search action is over, so as to enable the authorised officer to complete necessary follow-up investigation at the earliest

Post Search Investigation

Post-search investigation will be undertaken by the authorised officer before he finalises his report on the search. This report becomes the basis for further action to be taken by the Assessing Officer.

The statements made may have to be carefully analysed and retraction where justified has to be made at the earliest opportunity by writing to the search officers, the Assessing Officer and the Commissioner, who has authorised the search. Allegation of compulsion or any explanation for the statement at too late a stage may not carry conviction.

At the same time where admission is corroborated or is otherwise proved, allegation of compulsion or coercion could hardly serve any purpose. There is usually indiscriminate seizure of all materials, letters, papers, etc. Every document found would require explanation as it is usually examined with a high degree of suspicion that it may relate to unrecorded transactions.

Data may have to be classified and reconciled with extreme care. Even where concealment is found, such reconciliation will help to reduce liability to a large extent, because on any lack of correlation, the tax department is likely to make an estimate of the income where the precise concealment cannot be quantified. Preparation of a cash flow statement would be of great help.

SPECIAL PROCEDURE FOR ASSESSMENT OF SEARCH CASES

Introduction

The Finance Act, 1995 introduced the provisions relating to block assessment in Chapter XIV-B, in respect of searches initiated or requisitions made on or after 01.07.1995. Major amendments were made by the Finance Act 1997, some of the amendments with retrospective effect. A few amendments were made by the Finance Act, 2002 as well to this Chapter again many with retrospective effect. The Chapter which provided for a flat rate of tax at 60% on the undisclosed income found as a result of search or requisition and also for the non levy of interest under sections 234A, 234B and 234C and also the non imposition of penalty under sections 271(1)(c), 271A and 271B. The task force headed by Dr.VijayKelkar constituted to submit recommendations for fiscal reforms had recommended that the scheme of block assessment be abolished. The task force had taken a view that as a result of search, as and when concealment is detected and established, it should suffer full penal consequences of interest, penalty and prosecution. The Finance Act, 2003 has made Chapter XIV-B ineffective in respect of searches initiated on or after 01.06.2003 and at the same time has introduced three new sections 153A, 153B and 153C in Chapter XIV dealing with the procedure for assessment.

The Finance Act, 2007 with effect from 01.06.2007 has also inserted a new section 153D which provides that an assessment or reassessment made under section 153A and for the year of search should be passed only with the prior approval of the Joint Commissioner of Income Tax if the assessment is framed by an Officer below the rank of Joint Commissioner.

Issue of Notices in Case of Search or Requisition

Section 153A has been introduced by the Finance Act, 2003 in respect of searches or requisitions initiated after 31.05.2003 to provide that an assessment as a result of a search or requisition has to be made only in accordance with this provision. This provision contemplates

- ❖ The issue of a notice for furnishing of a return for each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted or a requisition is made and for the relevant assessment year or years.

The Finance Act, 2017 has expanded the number of years for which notices can be issued in a case of search in certain instances vide insertion of fourth proviso and Explanations 1 and 2 to section 153A(1).

If the books of account or documents or evidence reveal that the income, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more in the relevant year or in aggregate in the relevant assessment years, then notice shall be issued for such assessment years even if the same falls beyond the six assessment

years but not later than ten assessment years, preceding the assessment year relevant to the previous year of search.

- ❖ The assessee would be required to file a return in the prescribed form verified in a prescribed manner setting forth such particulars as may be prescribed.
- ❖ Such returns filed shall be treated as filed u/s.139 and all the provisions of the Act shall apply accordingly.
- ❖ The Assessing Officer shall thereupon proceed to assess or reassess the total income of each of the six or ten assessment years as the case may be, separately.
- ❖ All assessments and reassessments in relation to the six or ten assessment years as the case may be, pending on the date of initiation of the search or requisition shall abate.
- ❖ All the provisions of this Act shall apply to an assessment made under this section except to the extent provided for under this section, section 153B and section 153C.
- ❖ The tax on such income assessed or reassessed shall be chargeable at the rate or rates applicable to each such assessment year.

The section starts with a non obstante clause and overrides the provisions of sections 139, 147, 148, 149, 151 and 153.

Issue of Notice – Mandatory

An assessment u/s.153A commences on the issue of a notice. The notice is a condition precedent for making a valid assessment. This notice is not merely a procedural requirement. Section 153A requires that the Assessing Officer shall issue to the assessee a notice requiring the assessee to furnish a return for six or ten assessment years, as the case may be. The fact that the section uses the word “shall” by itself makes it clear that an assessment after a search or requisition cannot be made under this section without the issue of a notice. The right to receive a notice u/s.153A cannot be relinquished or abandoned. The concept of waiver or the right to receive a notice can be applied only where such a notice or the waiver of any act required to be done is not a prerequisite for conferring jurisdiction. This will be the position even where the waiver has explicitly been given in writing by the assessee. A notice u/s.153A is one that vests on the Assessing Officer the right to complete an assessment under that section. Since such a notice is one that vests with an Assessing Officer jurisdiction, the requirement for service of such a notice cannot be waived. It has been held in the case of *Karam Chand Thapar & Bros. (Coal Sales) Ltd. v DCIT (1997) 228 ITR 317(Cal)* that mere compliance with an invalid notice will not take away a right subsisting in an assessee to challenge the assessment on the ground of invalidity of the notice. The Court further held that where the validity of a notice has not been questioned at the time of assessment, it can be questioned at the appellate forum and where the non service or the service beyond the time stipulated is proved, the order would be void. In this connection reference may also be made to the decision in *CIT v Mint Kaila [2001] 117 Taxman 388 (Gauhati)* rendered in the context of section 147 where the Court held that where no notice was served u/s.148, the appearance of a person in response to an notice u/s.142(1) would not be deemed to be the knowledge of proceedings u/s.147. If no notice is

issued or the notice is shown to be invalid, the proceeding taken by the Assessing Officer would be illegal and void. [*Y.NarayanaChetty v ITO (1959) 35 ITR 388 (SC)*]

Service Of Notice – Whether Mandatory For Assessment

Though section 153A refers only to the issue of notice, it cannot be said that a valid assessment can be made under this section without serving the notice on the assessee. The notice must be served in a manner known to law. In this connection reference may be made to the decision in *Mahendra Kumar Agarwala v ITO [1976] 103 ITR 688 (Patna)* rendered in the context of reassessments where the Court held that even though the notice was valid the reassessment cannot be made as the same was not served validly.

No Notice for Year of Search

Section 153A contemplates the issue of a notice, the furnishing of a return for the six or ten assessment years preceding the assessment year relevant to the previous year of search or requisition and an assessment or reassessment for these six or ten years. It is therefore obvious that no notice can be issued for the year of search or requisition, no return need be filed for that year and no assessment or reassessment can be made for that year under this new procedure. This would mean that any income that can be related to the year of search or requisition should be assessed only u/s.143(3) or u/s.144 and not under section 153A. This would also mean that if there were any income that can be related to the year of search or requisition which is found in the course of the search or requisition but is returned by the assessee in the return filed for that year u/s.139 the same will not suffer the penal consequences u/s.271(1)(c) though may suffer the penal consequences u/s.271AAA / 271AAB.

Time Limit for Issue of Notice

Section 153A does not stipulate any time limit for the issue of notice by the Assessing Officer. It only requires that on the issue of the notice, the assessee must furnish the return within such period as may be specified in the notice. The Assessing Officer may therefore issue the notice at any time provided there is time available to him to complete an assessment as contemplated by section 153B.

Returns Filed Deemed to be Filed U/S.139

Section 153A provides that all the provisions of this Act shall so far as may be apply as if such returns filed under this section were returns required to be furnished u/s.139. This would mean that the Assessing Officer would necessarily have to issue a notice u/s.143(2) before proceeding with completing an assessment u/s.153A. In this connection one may also notice the decision of the Supreme Court in *ACIT v Hotel Blue Moon [2010] 321 ITR 362 (SC)* held in the context of 158BC where it has been held that where a return filed in response to a notice u/s.158BC, no assessment can be completed without service of a notice u/s.143(2) where the return filed is not accepted. It is also felt that a revised return can be filed if any

omission or wrong statement is found in any return filed in response to a notice u/s.153A. It may also be remembered that an assessment u/s.153A can be made only read with section 143(3) or section 144 and cannot be made independently u/s.153A.

Assessment in Case of Search or Requisition

Once there is a search or requisition it is apparent that an Assessing Officer has to make an assessment or reassessment only under this section and cannot proceed to reopen an assessment, which has been completed for this section clearly overrides the provisions of section 147, 148, 149 and 151 dealing with reassessments. Section 153A also provides that any assessment or reassessment pending on the date of search or requisition shall abate. This makes it further clear that once there is a search or requisition, an assessment has to be made by an Assessing Officer only under this section.

Furnishing of Return in Response to Notice

Where a notice is served on an assessee it would be for the assessee to furnish a return in response to such notice. The return should be furnished within such time as may be allowed by the Assessing Officer. This return needs to be filed notwithstanding that a return may already have been filed under some other provision of the Act. It is not however necessary that a return as such needs to be filed. Even if a letter is filed stating that an earlier return filed may be treated as filed in response to the notice, it would suffice. The Calcutta High Court in *Iqbal Singh Atwal v CIT (1984) 147 ITR 599 (Cal)* has held that even where an assessee has filed a return of income outside the dates prescribed u/s.139(4) and where a notice u/s.148 is served on the assessee, it would be sufficient if the assessee wrote a letter to the Assessing Officer stating that the return already filed may be treated as the return in response to the notice. In such a case the Assessing Officer is justified in completing the reassessment based on the return already filed. That the Assessing Officer may complete a reassessment based on the original return where the assessee informs the Assessing Officer that the original return may be treated as filed in response to notice u/s.148 is a view which has also been taken in *Tiwari Kanhaiya Lal v CIT (1985) 154 ITR 109 (Raj)*. This view that a letter may be filed requiring that the earlier return be treated as the return in response to the notice, it is felt will apply to an assessment made under section 153A as well.

Time Limit for Filing Returns

In response to the notice issued, section 153A makes it clear that the returns need to be filed within such time as may be allowed by the Assessing Officer in such notice. It may be noted that the law does not prescribe a minimum time to be allowed by the Assessing Officer but one will have to remember that the Assessing Officer will have to allow reasonable time to an assessee to file the returns. What will be reasonable time will depend on the facts and circumstances of the case but going by several other provisions including the provisions of section 158BC, it is felt that a period of at least 15 days should be allowed to the assessee from the date of service of the notice to furnish the returns.

Can the Time Allowed to File Returns be Extended

Section 153A requires that the assessee should file the returns in response to a notice within such time as may be allowed by an Assessing Officer in such notice. The question for consideration is whether the time allowed by the Assessing Officer in the notice can be extended. There is no express prohibition in the section on the Assessing Officer from extending the time allowed in the original notice. Therefore it is felt that at the request of the assessee the Assessing Officer may extend the time allowed to the assessee to furnish the returns.

Merger with Appellate Order

It has been held in the context of reassessments that where an order of assessment has been made the subject matter of appeal and an appellate order has been made the Assessing Officer is clearly prohibited from reopening an assessment in respect of the matters covered by the appellate order.

Manoo Lal Kedarnath v UOI [1978] 114 ITR 884 (All)
Raibahadur Chowdhury v ITO [1971] 79 ITR 274 (Cal)
CIT v G. Venkataraman [1978] 111 ITR 444 (Mad)
Sheth Bros V JCIT [2001] 251 ITR 270 (Guj)

This view will hold good even where the order of the appellate authority is patently erroneous.

CIT v Rao Thakur Narayan Singh [1965] 56 ITR 234 (SC)

In the same light it is felt that an Assessing Officer cannot in the course of an assessment made u/s.153A deal with issues which have already been covered by an Appellate order even where the order of the Appellate Authority is patently erroneous.

Assessment Under this Section Only for the Benefit of Revenue

It has been held that in the context of reassessment that the proceedings u/s.147 are for the benefit of the revenue and not for the assessee. It is aimed at gathering the income of an assessee and the same cannot be allowed to be converted as revisional or review proceedings at the instance of the assessee. This would make the machinery unworkable.

CIT v Sun Engineering Works (P) Ltd [1992] 198 ITR 297 (SC)
Chettinad Corporation Pvt Ltd v CIT [1993] 200 ITR 320 (SC)

It has also been held in *Phool Chand Bajrang Lal v ITO (1993) 203 ITR 456 (SC)* that a party cannot willfully make a false or untrue statement at the time of original assessment and when that falsity comes to notice, turn around and say "you accepted my lie, now your hands are tied and you can do nothing". They further observed that it is travesty of justice to allow the assessee that latitude.

The same view would obviously have to be taken even in the context of section 153A for this section is also one, which is for the benefit of the revenue and not for the assessee.

Effect of Assessments Under Section 153A

Does an assessment u/s.153A mean that the original assessment stands cancelled or is the original order of assessment still valid? Does the Assessing Officer have the power to assess all items of income which have escaped assessment and that come to his knowledge during the course of an assessment under this section or is it only in respect of items found as a result of search or requisition? The earlier procedure namely block assessment procedure in section 158BB specifically provided that only undisclosed income found as a result of search or requisition or such other income based on material in the possession of the Assessing Officer and relatable to such evidence can be assessed in a block assessment. There is no corresponding provision in section 153A and therefore it may be possible to take a view that all items that have escaped assessment whether found as a result of search or otherwise can be assessed under this section. However in the following decisions rendered in the context of reassessments will be relevant even in the context of an assessment under section 153A.

The Supreme Court in *V.Jaganmohan Rao v CIT (1970) 75 ITR 373 (SC)* had held that once an assessment is reopened, the previous assessment is set aside and that the old assessment starts afresh. It was further held that once proceedings of reassessment are validly initiated, the jurisdiction of the Assessing Officer is not restricted to the portion of income that has escaped assessment but it is his duty to levy tax on the entire income that has escaped assessment. The Full Bench of the Bombay High Court in *CIT v Indian Rare Earth Ltd (1990) 181 ITR 22 (Bom) (FB)* held that once valid proceedings under section 147 are started, the Income-tax Officer has not only the jurisdiction but it is his duty to complete the whole assessment *de novo*. What is true of assessment must also be true of a reassessment because a reassessment is nothing but a fresh assessment.

However subsequently the Supreme Court in *CIT v Sun Engineering Works (P) Ltd (1992) 198 ITR 297 (SC)* has explained the decision of the Supreme Court in *Jaganmohan Rao's case* as that the reassessment wipes out the original assessment and the reassessment is not only confined to escaped income would mean that the entire proceedings would start *de novo*. They explained that the words "such income" in section 147 clearly refers to the income chargeable but which has escaped assessment but that the Assessing Officer has jurisdiction only over such income, which has escaped assessment. While this confusion prevailed in the law, section 147 has been amended deleting the words "such income". With the deletion of these words the confusion no longer subsists. The Bombay High Court in *Smt.VasantibaiN.Shah v CIT (1995) 213 ITR 805 (Bom)* has held that once the Income-tax Officer has validly initiated proceedings for reassessment, it is open to him to consider items other than those contained in notice under section 148. A similar view has been taken in *D.P.Byrne v CIT [2001] 249 ITR 311 (Delhi)*. The Punjab and Haryana High Court in *Vipan Khanna v CIT 2001 Tax LR 592 (P&H)* has however held that after initiating proceedings under section 147 on the ground that the petitioner had claimed depreciation at a higher rate, the assessing officer would

not be justified in launching inquiry into the issues which were not connected with the claim of depreciation.

A reassessment is to be made of the entire income of the assessee. On the reopening of the original assessment order and making of a fresh order, of the entire assessed income, the earlier assessment was effaced by the fresh order.

ITO & Another v K.L.Srihari (HUF) &Others (2001) 250 ITR 193 (SC)

The original order of assessment remains good, valid and effective till it is substituted by the reassessment order. The original assessment order does not become void *ab initio* on the issue of the notice u/s.148.

Nawab Mir Barkat Ali Khan Bahadur v ITO (1988) 172 ITR 13 (AP)

Effect of Applicability of Sections 143(3) and 144

Section 153A provides that returns filed under this section are to be treated as filed u/s.139. As has already been discussed this will automatically mean that an assessment u/s.153A has to be completed read with section 143(3) or section 144. In making the assessment, provisions of section 143(3) are available to the Assessing Officer. Section 143(3) empowers the Assessing Officer to make an assessment of income on the basis of the material, which has been gathered by him. Similarly, section 144 is also applicable to an assessment u/s.153A.

The Assessing Officer has all the powers of making an assessment u/s.153A as are available to him in making the regular assessment u/s.143(3). In these circumstances, the word 'assessment' assumes importance. The process of assessment u/s.153A is not merely computation of income but a process of evaluation of evidence and material found during the course of the search and derived from the books of account, documents and other information. There is no doubt that the Assessing Officer does not have the power to make an arbitrary assessment. He cannot base his assessment merely on suspicion, conjectures or guesswork or on irrelevant or inadmissible material. The language of section 143(3) makes it abundantly clear that the assessment to be made by the Assessing Officer should be based on evidence before the Officer. The word 'evidence' has to be construed in a comprehensive sense and it includes circumstantial evidence. It is well settled principle of law that the material or evidence on which the taxing authorities may base the assessment is not confined to direct testimony by witnesses. It may be reiterated that the word used in section 143 is 'evidence' However, in making assessment the Assessing Officer does not act merely on what is technically described as evidence in the Indian Evidence Act. It is observed from section 143(3) that the Assessing Officer can base his assessment not only on the evidence found during the course of the search but also on the material gathered by him. It is now well settled that the Assessing Officer is not fettered by technical rules of evidence and the like and that he may act on a material, which may not strictly speaking be accepted as evidence in a Court of law. Such evidence need not necessarily be direct evidence. It may be circumstantial evidence or assessment based on preponderance of probabilities judged by human conduct. For instance, the

past history of the case, living style of the assessee and general conditions of the market in the particular trade will constitute relevant material for the purposes of assessment. The Assessing Officer will be entitled to conclude that the assessee is carrying on some undisclosed business on the basis of the factors like unexplained bank deposits or the assessee's failure to prove the source from which certain investments have been made or meagre drawings of an assessee for household expenses. Similarly, the profits of a business may be estimated by disallowing excessive claims for deduction such as wastage, etc. The Assessing Officer, as already pointed out, may base his assessment on the past history of the case. He is also entitled to rely upon comparable cases. The books of account maintained in the regular course of business are relevant and constitute a very good piece evidence of their contents. Their probative value would further depend on the manner of their maintenance. For example, a regular bound and serially page numbered account book will inspire greater confidence than a loose-leaf account book. The maintenance of books of account in a chronological order will also inspire greater confidence. On the other hand, if the books of account are not regularly maintained or not maintained in chronological order, such books of account cannot be taken as authentic piece of evidence. In the evaluation of books of account the provisions of section 145 may become relevant. If the books of account are maintained in the regular course and the Assessing Officer is satisfied that all the transactions relating to the income are recorded in the books of account in a chronological manner, then the Assessing Officer may compute the income in accordance with such books of account. However, as provided u/s.145, if the books of account are not correct and complete, then the Assessing Officer has the power to make an assessment to the best of his judgment.

Quantification of income and tax

When an assessment is made u/s.153A read with section 143(3) or section 144, the assessing officer has to pass an order in writing computing the total income or loss and determine the sum payable by the assessee on the basis of such assessment. In determining the income, Officers of the Department must not take advantage of the ignorance of the assessee as to his rights. Although the responsibility for claiming refunds or reliefs rests with the assessee on whom it is imposed by law, Officers should

- (a) draw the attention of assesseees to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or the other
- (b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs.

Circular No.14(XL-35), dated 11.04.1955

As it is required that total income or loss and the sum payable be determined, it is apparent that the Assessing Officer in a scrutiny assessment has a responsibility of not only computing the income or loss but also the tax payable by the assessee. This requirement being mandatory, the Assessing Officer will have to make the calculation of tax payable also, before the time limit stipulated u/s.153. If an order is

made within the time stipulated u/s.153 determining the income or loss while the tax payable is computed after the time stipulated u/s.153, such an order would be one that should be treated as bad in law.

CIT v Purshottamdas T. Patel [1994] 209 ITR 52 (Guj)

Peeru Lal, Mohan Lal v CIT [2002] 257 ITR 198 (Raj)

It may be noted that in case of an assessment made u/s.153A the time limit would not be governed by section 153 but by section 153B and the income or loss and the tax payable would have to be computed within the time set out in section 153B.

Interest and Penalty Leviable

The provisions relating to block assessment in Chapter XIV-B provided that interest under sections 234A, 234B and 234C are not leviable and also that penalty under sections 271(1)(c), 271A and 271B are not imposable. With such a provision not being present in sections 153A to 153C, it is clear that interest may be levied and penalty may be imposed under these sections after an assessment is made under section 153A. It may be noted at this stage that unless the order states that penalty proceedings arising as a result of such an order such as a penalty under section 271(1)(c) are initiated separately, no penalty under those sections can be levied. This would be so for section 271(1)(c) requires that the Assessing Officer or the Commissioner (Appeals) must be satisfied that penalty needs to be imposed in the course of proceedings under this Act. It may be noted that for the year of search the provisions of Sections 271AAA / 271AAB are applicable.

Assessment Proceedings to Abate on Search or Requisition

The second proviso to section 153A provides that all proceedings of assessment and reassessment pending as on the date of search or requisition shall abate. It is clear that only proceedings of assessment or reassessment shall abate. All proceedings of rectification, revision and appeal pending on the date of search or requisition, however, it appears will not abate.

Income of Any Other Person Found in Search or Requisition

Where a search has taken place u/s.132 or where the books of accounts or other documents or any asset has been requisitioned u/s.132A, of any person and if the Assessing Officer is satisfied that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person searched or requisitioned, then the books of account or documents or assets seized or requisitioned shall be handed over by the Assessing Officer having jurisdiction over such other person and such other Assessing Officer shall proceed against such other person by issuing a notice and assessing or reassessing the income of such other person in accordance with section 153A.

Section 153C through this process permits an assessment or reassessment u/s.153A being made on any person other the person searched or requisitioned. The component parts of section 153C are as follows:

- ✓ A search or requisition has taken place on one person
- ✓ The Assessing Officer having jurisdiction over such person records satisfaction that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs to another person (hereinafter referred to as “connected person”)
- ✓ The Assessing Officer having jurisdiction over such person transfers the books of accounts or other documents or assets seized or requisitioned to the Assessing Officer having jurisdiction over the connected person
- ✓ The Assessing Officer having jurisdiction over the connected person shall then proceed under section 153A against the connected person

The law lays down a proposition that the Department can make an assessment or reassessment u/s.153A on a person other than a person searched or requisitioned if on a perusal of the evidence found or collected pursuant to a search or requisition in respect of one person, it comes to surface that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned undisclosed income belongs to some other person or persons. However the conditions mentioned in section 153C must be fulfilled before proceeding to make an assessment or reassessment of a person other than the person subject to operations under sections 132 or 132A. It is section 153C that gives a mandate to an Assessing Officer to proceed to do an assessment or reassessment u/s.153A on a person other than a person searched or requisitioned. But for this provision, an assessment or reassessment u/s.153A can be made only on such persons who have been searched or whose books of accounts or documents or assets have been requisitioned. Though for the purpose of section 153C to be invoked, it is not required that there should have been a search or requisition on the connected person, it is still essential that a search or requisition should have taken place and that the Assessing Officer having jurisdiction over the person searched or requisitioned transfers the books of accounts, documents and assets seized to the Assessing Officer having jurisdiction over the connected person.

Section 153C Mandatory in Cases Other than Search & Requisition

A search was conducted in the premises of one person under a warrant of authorisation issued on that person alone and during the course of the search, books of account and records belonging to other assessee-appellants were found in the premises of search and were seized. In this case though the appellants submitted returns for the block period, participated in assessment proceedings and thus subjected themselves to the jurisdiction of the Assessing Officer u/s.158BD, such consent could not confer jurisdiction on an authority to do or not do an act. [*L.Saroja v ACIT [2001] 76 ITD 344 (Mad)*]

If there is no search at the premises of the assessee, no notice could be issued to the assessee u/s.158BC. Even if there was no search against the assessee but the Assessing Officer was satisfied that any undisclosed income belonged to any other

person other than the person with respect to whom search was held u/s.132, then he could proceed against that other person and the provisions of Chapter XIV-B would have been attracted. Such satisfaction however, must be reached by the Assessing Officer before proceeding under the said Chapter. The department had not brought on record any evidence to show that there was any satisfaction by the Assessing Officer, much less positive satisfaction, according to which it could be held that there was any undisclosed income of the assessee. [*Smt. Jatan Bai Baid v ACIT [1988] 96 Taxman 24 (Nag) (Mag)*]. A plain reading of section 158BD clearly shows that the said section can be invoked only if the Assessing Officer is satisfied that any undisclosed income belongs to a person other than the person searched or requisitioned. The satisfaction required u/s.158BD must necessarily precede the issue of notice on such other person. In other words the Assessing Officer should reach a clear conclusion that the assets and income in question really belong to such other person. Such satisfaction should not be embedded with an element of doubt or uncertainty or any kind of conclusion about the ownership of such other person over the assets and income in question. Before assuming jurisdiction u/s.158BD the Assessing Officer should be satisfied that some of the undisclosed assets or income found during the course of the search or as a result of post search investigation do not belong to the raidee but to some other person. Reference in this connection may be made to the decision in *Manish Maheshwari v ACIT [2007] 289 ITR 341 (SC)* rendered in the context of section 158BD.

It may be noted that all these decisions rendered in the context of section 158BD will apply with equal force to section 153C with the difference that for the purpose of section 153C, the satisfaction of the assessing officer should be that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned belongs to a person other than the raidee.

Satisfaction Before Proceeding

The satisfaction envisaged at the threshold of section 153C should be on the basis of the materials gathered as a result of search or requisition. It may be legally permissible for the Assessing Officer to make further enquiries and use the information gathered in framing the assessment or reassessment against any person envisaged u/s.153C.

The information gathered subsequently cannot be availed of to justify the initiation of action under the impugned section. Similarly, the additions made subsequently in the assessment or reassessment u/s.153A cannot be construed as providing the basis for action under that section. The applicability of sections 68 to 69C arises only in the course of assessment, when the assessee is called upon to explain the credits or investments or expenditure but not before. In point of law it may be said that the Assessing Officer may reach satisfaction to invoke section 153C but subsequently in the assessment proceedings he may drop the entire matter based on the evidence adduced. Therefore, the factum of satisfaction at the threshold of section 153C could not be verified with or supported by what happened subsequently in the assessment proceedings. In other words, the doctrine of relate-back could not be invoked. [*L. Saroja v ACIT [2001] 76 ITD 344 (Mad)*]

Further according to section 153C(1), originally, the notice u/s.153C could be issued only when the Assessing Officer was satisfied that any money, bullion, jewellery or other valuable article or things or books of account or documents seized or requisitioned belonged to a person other than the person referred to in section 153A and such books or accounts or documents or assets seized had a bearing on the determination on total income of the person other than the person referred to in section 153A.

In this connection, it is to be noted that section 153C(1) has been amended by Finance Act, 2015, w.e.f. 01.06.2015 to include that the notice u/s.153C can be issued even when **any information contained in the books of account or documents seized or requisitioned pertain or pertains to a person** other than the person referred to in section 153A.

Time Limit for Issue Of Notice

In connected cases, a notice is to be issued on the connected person by the Assessing Officer having jurisdiction over that person. What is the time within which this notice must be issued on the connected person? Section 153C offers no answer to this question. The section however requires that the Assessing Officer having jurisdiction over the person searched or requisitioned satisfies himself that any undisclosed income belongs to any other person. This act of arriving at a satisfaction by the officer having jurisdiction over the person searched or requisitioned it is felt should take place during the course of the assessment or reassessment u/s.153A of the person searched or requisitioned. Thereafter it is felt that there is no time limit for the officer having jurisdiction over the connected person for the issue of the notice.

Time Limit for Completing Assessment

Section 153B sets out the time limit for completion of assessment or reassessment u/s.153A as well as the time limit for assessment u/s.143(3) / 144 for the year of search.

The provisions as it stood prior to amendment w.e.f.1.06.2016 was as follows:

The time limit set out by this section in case of search or requisition is normally two years from the end of the financial year in which the last of the authorisations for search was executed and in the case of requisition two years from the end of the financial year in which the requisition was executed.

For completion of assessment in the case of other person referred to in section 153C, the period shall be two years from the end of the financial year in which the last of the authorisations for search was executed and in the case of requisition two years from the end of the financial year in which the requisition was executed or one year from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over u/s.153C to the Assessing Officer having jurisdiction over such other person, whichever is later.

A search is deemed to have been executed when the last panchnama is drawn up and a requisition when the books of accounts or documents or assets are handed over to the authorised authority.

The time limit for completion of assessment under specified situations was as follows:

<p>Where the last of the authorisations for search u/s.132 or for requisition u/s.132A was executed during the financial year commencing on or after 01.04.2004 but before 01.04.2010</p>	<p>21 months from the end of the financial year in which the last of the authorisations for search was executed or as the case may be in which the requisition was executed.</p>
<p>Where the last of the authorisations for search u/s.132 or for requisition u/s.132A was executed during the financial year commencing on or after 01.04.2005 but before 01.04.2009 and where during the course of assessment or reassessment of total income a reference under section 92CA(1)</p> <ul style="list-style-type: none"> • Was made before 01.06.2007 but an order u/s.92CA(3) has not been made before such date or • Is made on or after 01.06.2007 	<p>33 months from the end of the financial year in which the last of the authorisations for search was executed or as the case may be in which the requisition was executed.</p>
<p>Where the last of the authorisations for search u/s.132 or for requisition u/s.132A was executed during the financial year commencing on the 01.04.2009 or any subsequent financial year and where during the course of assessment or reassessment of total income a reference under section 92CA(1) is made</p>	<p>Three years from the end of the financial year in which the last of the authorisations for search was executed or as the case may be in which the requisition was executed.</p>

The time limit set out by this section as amended w.e.f 1.06.2016 is as follows:

In respect of each assessment year falling within six or ten assessment years referred in clause (b) of section 153A(1)	21 months from the end of the financial year in which the last of the authorisations for search was executed or as the case may be in which the requisition was executed.
In respect of assessment year relevant to the previous year in which search is conducted u/s.132 or requisition made u/s.132A	21 months from the end of the financial year in which the last of the authorisations for search was executed or as the case may be in which the requisition was executed.
For completion of assessment in the case of other person referred to in section 153C,	the period shall be 21 months from the end of the financial year in which the last of the authorisations for search was executed or, as the case may be, in which the requisition was executed or or nine months from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over u/s.153C to the Assessing Officer having jurisdiction over such other person, whichever is later
Where the last of the authorisations for search u/s.132 or for requisition u/s.132A was executed and where during the course of assessment or reassessment of total income a reference under section 92CA(1) is made	33 months from the end of the financial year in which the last of the authorisations for search was executed or as the case may be in which the requisition was executed.
Where the last of the authorisations for search u/s.132 or for requisition u/s.132A was executed and where during the course of assessment or reassessment of total income in the case of other person referred to in section 153C, a reference under section 92CA(1) is made	the period shall be 33 months from the end of the financial year in which the last of the authorisations for search was executed or as the case may be in which the requisition was executed or or 21 months from the end of the financial year in which books of account or documents or assets seized or requisitioned are handed over u/s.153C to the Assessing Officer having jurisdiction over such other person, whichever is later

As per subsection (3) of Section 153B as amended, the provisions as they stood immediately before commencement of Finance Act 2016 shall apply to and in

relation to any order of assessment or reassessment made before the 1st day of June 2016.

Service may be Beyond Time Limit

What is required by the section is only the completion of the assessment, which includes the determination of tax liability and not the service of the same within the period of limitation.

RamanandAgarwalla v CIT (1985) 151 ITR 216 (Gauhati)
KodidasuAppalaswamy and Suryanarayana v CIT (1962) 46 ITR 735 (AP)s
India Ferro Alloy Industry (Pvt) Ltd v CIT (1993) 202 ITR 671 (Cal)
EsthuriAswathiah v CIT (1963) 50 ITR 764 (Mys)

Execution of Authorisation of Search / Requisition

The time limit for completing the assessment is clearly dependent on the date of execution of a search or requisition. It therefore becomes necessary to understand the meaning of the term execution.

Sub section (2) of section 153B provides that an authorisation for search is deemed to be executed when the conclusion of a search is recorded in the last panchnama drawn in relation to any person in whose case the warrant of authorisation has been issued and that an authorisation for a requisition is deemed to be executed when the books of account, or other documents or assets are received from the authority or officer constituted under other law by the Income Tax Authority authorised in this behalf to requisition.

In terms of section 153B, as already discussed, the assessment or reassessment u/s.153A is required to be completed within 21 months from the end of the financial year in which the last of the authorisations of search / requisition was executed. The last date of execution of the search would be reckoned from the date of the last of the panchnamas drawn up in execution of such search. The search comes to an end when the search party leaves the premises after fully implementing the search. *[AnantaN.Naik v DCIT [2000] 66 TTJ (Pune) 533, affirmed [2002] 253 ITR 534 (Bom)]*

In *T.S.Chandrashekar v ACIT [2000] 66 TTJ (Bang) 360* it was held that the second explanation to section 158BE as inserted with retrospective effect should be considered to be applicable to cases where a number of warrants of authorisation have been issued simultaneously and the reference to recording conclusion of search in the last panchnama drawn must refer to the search continued in a valid manner. The Bench further held that otherwise, if the searches continue under the whims of the searching party without any real purpose or for a collateral purpose and if the searching party goes on visiting the premises off and on and there is a panchnama on each day without carrying any search operation, explanation 2 to section 158BE cannot validate such invalid panchnama. Reference may also be made to the decision in *Madhavana House Building Co-operative Society v ACIT*

[2002] 76 TTJ (Bang) 948. This would apply to an assessment or reassessment to be made u/s.153A as well.

Time Limit for Completing Set Aside Assessment

Where an order of block assessment is set aside by an Appellate Authority, or revisionary authority there is no provision under this Chapter specifying the time limit for passing an order of fresh assessment in pursuance of such order of set aside. It must therefore follow that an order to be made in pursuance of an order of set aside must be within the time limit stipulated. The time limit set out is as follows:

Subsection (2A) to section 153 prior to amendment of section 153 w.e.f.01.06.2016:

Where an order u/s.250 or u/s.254 or u/s.263 or u/s.264 set aside or cancelling an assessment is passed in relation to assessment year commencing on 01.04.1971 and any subsequent assessment year	Fresh assessment may be made at any time before the expiry of one year from the end of the financial year in which the order u/s.250 or u/s.254 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT
Where an order u/s.250 or u/s.254 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT on or after 01.04.1999 but before 01.04.2000	Fresh assessment may be made at any time upto the 31 st day of March, 2002
Where an order u/s.254 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT on or after 01.04.2005 but before 01.04.2011	Fresh assessment may be made before the expiry of nine months from the end of the financial year in which the order u/s.254 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT
Where the order u/s.254 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT on or after 01.04.2006 but before 01.04.2010 and where during the course of fresh assessment proceedings a reference under section 92CA(1) <ul style="list-style-type: none"> • Was made before 01.06.2007 but an order u/s.92CA(3) has not been made before such date or • Is made on or after 01.06.2007 	Fresh assessment may be made before the expiry of twenty one months from the end of the financial year in which the order u/s.254 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT
Where the order u/s.254 is received by	Fresh assessment may be made before

the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT on or after 01.04.2010 and where during the course of fresh assessment proceedings a reference under section 92CA(1) is made	the expiry of two years from the end of the financial year in which the order u/s.254 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT
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Though section 153(2A) uses the language “may be made at any time before the expiry of” it has been held in *CIT v Smt.Kamla Devi (1995) 83 Taxman 575 (All)* that there is no merit in the contention that since the word used is “may”, it is not mandatory on the part of the Assessing Officer to complete the proceedings within the time prescribed u/s.153(2A). The Assessing Officer, it was held has to pass an order of assessment within the said time.

Section 153 was amended w.e.f.01.06.2016 and subsection (2A) was removed. The relevant provisions under sub sections (3), (4) (5)and (6) as amended are as follows:

Where an order u/s.254 is received or u/s.263 or u/s.264 set aside or cancelling an assessment is passed. (Section 153(3))	Fresh assessment may be made at any time before the expiry of 9 months from the end of the financial year in which the order u/s.254 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT
where a reference under sub-section (1) of section 92CA is made during the course of the proceeding for the assessment or reassessment (Section 153(4))	the period available for completion of assessment or reassessment, as the case may be, under the said sub-sections (1), (2) and (3) shall be extended by twelve months.
Where effect to an order u/s.250 or u/s.254 or u/s.260 or u/s.262 or u/s.263 or u/s. 264 is to be given by the Assessing Officer, wholly or partly, otherwise than by making a fresh assessment or reassessment(Section 153(5))	such effect shall be given within a period of three months from the end of the month in which order u/s.250, u/s.254, u/s.260 or u/s.262 is received by the CCIT or CIT or as the case may be the order u/s.263 or 264 is passed by the CCIT or CIT. where it is not possible for the Assessing Officer to give effect to such order within the aforesaid period, for reasons beyond his control, the Principal Commissioner or Commissioner on receipt of such request in writing from the Assessing Officer, if satisfied, may allow an additional period of six months to give effect to the order.
Where effect to any order, finding or direction referred to in sub-section (5) or sub-section (6) is to be given by the Assessing Officer, within the time specified in the said sub-sections, and such order	the Assessing Officer shall give effect to such order, finding or direction, or assess, reassess or recompute the income of the assessee, on or before the 31st day of March, 2017.

has been received or passed, as the case may be, by the income-tax authority specified therein before the 1st day of June, 2016	
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Further sub section (9) of Section 153 states that the provisions of section 153 as they stood immediately before the commencement of the Finance Act, 2016, shall apply to and in relation to any order of assessment, reassessment or recomputation made before the 1st day of June, 2016.

Penalty for Concealment of or Furnishing Inaccurate Particulars of Income – Search Cases

Under the provisions of Explanation 5 to section 271(1), it has been provided that where in the course of a search under section 132, the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing (referred to as assets in this Explanation) and the assessee claims that such assets have been acquired by him by utilising (wholly or in part) his income –

- (i) for any previous year which has ended before the date of the search, but the return of income for such year has not been furnished before the said date or, where such return has been furnished before the said date, such income has not been declared therein; or
- (ii) for any previous year which is to end on after the date of the search, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under section 271(1)(c), be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income. However, penalty shall not be levied if certain conditions prescribed therein are fulfilled.

Explanation 5 has been amended so as to provide that provisions of said Explanation shall be applicable only in a case where search under section 132 was initiated before 1st June, 2007.

This amendment is effective from 1st June, 2007 and will be applicable to cases where search under section 132 is initiated on or after 1st June, 2007.

Explanation 5A to section 271(1) has been inserted so as to provide that where in the course of a search initiated under section 132 on or after the 1st day of June, 2007, the assessee is found to be the owner of – (i) any money, bullion, jewellery or other valuable article or thing (referred to as assets) or (ii) any income based on any entry in any books of account or other documents or transactions and claims that such assets or entry in the books of account or other documents or transactions represents his income (wholly or in part) for any previous year; which has ended before the date of the search and the due date for filing the return of income for such year has expired and the assessee has not filed the return, then, notwithstanding that such income is declared by him in any return of income furnished on or after the date of the search, he shall, for the purposes of imposition of a penalty under section

271(1)(c), be deemed to have concealed the particulars of his income or furnished inaccurate particulars of such income.

This amendment is effective from 1st June, 2007 and will be applicable to cases where search under section 132 is initiated on or after 1st June, 2007.

Section 271AAA has been inserted so as to provide that, in a case where search has been initiated under section 132 on or after 1st June, 2007 but before the 1st day of July 2012, the assessee shall be liable to pay by way of penalty, in addition to tax, if any, payable by him, a sum computed at the rate of 10% of the undisclosed income of the specified previous year. However, provisions of this section shall not be applicable if the assessee— (i) in a statement under section 132(4) in the course of the search, admits the undisclosed income and specifies the manner in which such income has been derived; (ii) substantiates the manner in which the undisclosed income was derived; and (iii) pays the tax, together with interest, if any, in respect of the undisclosed income. It is further provided that no penalty under the provisions of section 271(1)(c) shall be levied or imposed upon the assessee in respect of the undisclosed income referred to in section 271AAA. It is also provided that the provisions of section 274 and section 275 shall, so far as may be, apply in relation to the penalty leviable under section 271AAA.

For the purposes of this section undisclosed income has been defined to mean – (i) any income of the specified previous years represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or which has otherwise not been disclosed to the Principal CCIT / CCIT / Principal CIT / CIT before the date of the search; or (ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.

For the purposes of this section, previous year is defined to mean the previous year - (i) which has ended before the date of search, but the date of filing the return of income under section 139(1) for such year has not expired before the date of search and the assessee has not furnished the return of income for the previous year before the said date; or (ii) in which search was conducted.

Section 271AAB has been inserted to apply to cases where search has been initiated under section 132 on or after 1st June, 2012 but before 15.12.2016. In such cases, there are three rates of penalties prescribed in addition to taxes, if any :

- a. the assessee shall be liable to pay by way of penalty a sum computed at the rate of 10% of the undisclosed income of the specified previous year, if the assessee— (i) in a statement under section 132(4) in the course of the search, **admits** the undisclosed income and specifies the manner in which such income has been derived; (ii) substantiates the manner in which the undisclosed income was derived; and (iii) on or before the specified date,

- pays the tax, together with interest, if any, in respect of the undisclosed income, and furnishes the return of income for the specified previous year declaring such undisclosed income therein.
- b. the assessee shall be liable to pay by way of penalty a sum computed at the rate of 20% of the undisclosed income of the specified previous year, if the assessee— (i) in a statement under section 132(4) in the course of the search, **does not admit** the undisclosed income (ii) on or before the specified date, declares such income in the return of income furnished for the specified previous year, and, pays the tax, together with interest, if any, in respect of the undisclosed income
 - c. in any other case, the assessee shall be liable to pay by way of penalty a sum computed at the rate of not less than 60% (30% but not exceeding 90% - upto 31.3.2017) of the undisclosed income of the specified previous year.

Sub-section (1A) has been inserted in Section 271AAB to prescribe penalty in cases where search has been initiated u/s 132 on or after 15.12.2016. Two rates have been prescribed:

- (a) if the assessee— (i) in a statement under section 132(4) in the course of the search, **admits** the undisclosed income and specifies the manner in which such income has been derived; (ii) substantiates the manner in which the undisclosed income was derived; and (iii) on or before the specified date, pays the tax, together with interest, if any, in respect of the undisclosed income, and furnishes the return of income for the specified previous year declaring such undisclosed income therein – penalty is payable at 30% of undisclosed income of specified previous year
- (b) in any other case – 60% of the undisclosed income of the specified previous year.

It is further provided that no penalty under the provisions of section 271(1)(c) or 270A shall be levied or imposed upon the assessee in respect of the undisclosed income referred to in section 271AAB. It is also provided that the provisions of section 274 and section 275 shall, so far as may be, apply in relation to the penalty leviable under section 271AAB.

For the purposes of this section undisclosed income has been defined to mean – (i) any income of the specified previous years represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132, which has not been recorded on or before the date of search in the books of account or other documents maintained in the normal course relating to such previous year; or which has otherwise not been disclosed to the Principal CCIT / CCIT / Principal CIT / CIT before the date of the search; or (ii) any income of the specified previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the specified previous year which is found to be false and would not have been found to be so had the search not been conducted.

For the purposes of this section, previous year is defined to mean the previous year - (i) which has ended before the date of search, but the date of filing the return of income under section 139(1) for such year has not expired before the date of search

and the assessee has not furnished the return of income for the previous year before the said date; or (ii) in which search was conducted.

Specified date means the due date of furnishing return of income u/s 139(1) or the date on which the period specified in the notice u/s 153A for furnishing of return of income expires, whichever is later.

Some legal issues that may be considered in respect of a search proceeding:

1. Can action u/s 132(1) be challenged? (Instruction 7 of 2003); 318 ITR 125
2. Is a warrant issued in the name of PA Nambi valid for search proceedings to be conducted in the premises of AP Nambi?
3. Can a non-resident be subject to search?(Ram Kumar Dhanuka v Union of India 252 ITR 205)
4. Where warrant is issued in the name of one person, can notice u/s 153A be issued to another person residing in the same premises?
5. Where warrant is issued in respect of one premises, can the same warrant be used to search other premises belonging to the same person?
6. Where the warrant of authorisation was signed on 23.03.2017 but search took place on 04.04.2017, can the Assessing Officer issue notice u/s 153A for ten assessment years preceding the assessment year relevant to previous year of search? Can he do so for any year between six years and ten years or will it be for all years upto the tenth assessment year preceding the assessment year of search?
7. How to calculate the date of the last authorisation of the search?
8. Can the assets seized be applied for recovering liability arising out of an order of the ITSC?
9. Can the searched person refuse to answer questions?
10. Can he insist on presence of his consultant / lawyer?
11. Can the admission during search be used against the person? Can statement given during search be withdrawn? If so, is there any time for the same?
12. Can searched person insist on taking copies of documents before being seized by search party?
13. Meaning of incriminating material:
 - a. Where documents are present in the searched premises of A which mention payments made to B, C, D and E, can the mere presence of these documents be considered as incriminating material in order to initiate action against B, C, D and E?

- b. Where proceedings in respect of a particular assessment year have abated but the incriminating materials found relate to that year, can notice u/s 153A be issued in respect of that assessment year? Similarly where time for issue of notice u/s 143(2) has elapsed and no such notice has been issued, can notice u/s 153A be issued for that year and can additions be made in that year?
 - c. In search proceedings in the premises of X, the Assessing Officer finds incriminating material relating to P and believes that income of P may have escaped taxation, whereupon he transfers the incriminating material to the jurisdictional Assessing Officer of P, can P take the defence that the AO of X has transferred the material without actually recording satisfaction and therefore the proceedings are vitiated and void?
 - d. In the case of search in the premises of M, there is incriminating material found relating to S, and after due process of law the material is handed over to the Assessing Officer of S. If, during the assessment of S, it is found that there are certain items of income of M that may have escaped assessment, what action can the Assessing Officer take?
 - e. Where separate search proceedings have taken place in the premises of A and B, and incriminating material relating to B have been found in the premises of A, can the Assessing Officer of B include this incriminating material in B's hands, without the Assessing Officer of A recording satisfaction and without notice u/s 153C being issued to B?
14. Whether a notice u/s.153A / 153C can be issued for six years preceding to the assessment year relevant to the previous year of search, if incriminating material found during the course of search does not relate to any of the earlier assessment years?
15. Whether an assessment order has to be mandatorily passed accepting the returned income even if there are no incriminating material or whether the assessment initiated by issuing a notice u/s.153A can be dropped?
16. Assessment proceedings for a particular assessment year as on the date of search is not pending. Further no incriminating material is found during the course of search. However Assessing Officer has made additions based on the details filed during the course of search assessment and passed an order. In appeal, the CIT(A) has decided that additions cannot be made without any incriminating material. In such a situation is the additions alone will get deleted or the assessment will be quashed?

17. Where addition alone is deleted by CIT(A), whether revisionary proceedings can be initiated by the CIT u/s.263 on the order passed u/s.143(3) r.w.s. 153A or on the order giving effect to the order of the CIT(A).
18. In a case of search assessment, the income admitted by the assessee in the return filed in response to notice u/s.153A has been accepted by the AO and no further additions were made. Can the AO initiate penalty proceedings u/s.271(1)(c) in respect of the income admitted in the return filed in response to notice u/s.153A?
19. In the case of search assessment for the year of search, the Assessing Officer has framed an assessment u/s.143(3). The Assessing Officer initiated penalty proceedings u/s.271AAA but however finally passed an order u/s.271(1)(c)? Can the Assessing Officer do so?
20. During the course of search, the assessee in his statement admitted Rs.1.50 crores of undisclosed income from money lending and filed the return of income. However the assessee had paid taxes on the same only after completion of assessment. The Assessing Officer has initiated penalty proceedings u/s.271AAA for the reason that the assessee has not substantiated the manner in which the undisclosed income was earned and has not paid the taxes before the filing the return of income on the undisclosed income? Can the Assessing Officer do so?
21. In the search assessment if the Assessing Officer makes additions u/s.68, whether tax should be levied as the normal rates of income or u/s.115BBE. Whether in such cases penalty can be levied u/s.271AAC?

SURVEY

Income Tax Authority

An Income Tax Authority for the purpose of Section 133A means a Principal Commissioner, Commissioner, Joint Commissioner, Principal Director, Director, Joint Director, Assistant Director, Deputy Director or an Assessing Officer or Tax Recovery Officer and for certain purposes also an Inspector of Income Tax.

An Income Tax Authority below the rank of a Joint Commissioner or a Joint Director can conduct a survey only with the prior approval of the Joint Commissioner or Joint Director.

What can the Income Tax Authority do during survey

- *General*

An Income Tax Authority may enter any place within the limits of his jurisdiction, or any place occupied by any person in respect of whom he exercises jurisdiction, or any place for which he receives authorization by the income tax authority exercising jurisdiction over that place or over the person occupying that place.

It is open to these Income Tax Authorities to survey such place, where a business or profession or an activity for charitable purpose is carried on by the assessee, whether it is the principal place of business or profession or of such charitable activity or not, or any other place in which the person carrying on business or profession or charitable activity states that any books of account or other document or any part of cash, stocks or other valuable articles or things relating to the business or profession are or is kept. Several taxpayers claim to do business even in their residence by claiming expenses relating to telephone at their residence. In such a case, it may be possible that a survey may also be conducted at such residence. A survey can be done at a place of business or profession only during regular hours of business or profession. In case of any other place, it has to be commenced after sunrise and before sunset.

- *In connection with function, ceremony or event*

An Income Tax Authority can also require furnishing of information regarding expenditure incurred or any other information that he may consider useful or relevant, in connection with any function, ceremony or event, where the nature and scale of expenditure incurred by an assessee is such that the income tax authority is of the opinion that it is necessary or expedient to do so. Such information can be sought at any time after such function, ceremony or event.

- *In connection with tax deduction / collection*

An Income Tax Authority is also empowered to enter any place after sunrise and before sunset for the purpose of verifying whether tax has been deducted or collected at source in accordance with the provisions of Chapter XVII-B or Chapter XVII-BB. The authority can enter any place where business / profession is carried on, which is within his jurisdiction or which he is authorised to enter by the authority having jurisdiction over such area. Such Income Tax Authority may require the

deductor / collector other person in attendance at that time, to afford him the necessary facility to inspect the available books of account or other documents, or to furnish information in relation to such deduction / collection. In this case, the authority is not empowered to impound books of account / document or to make inventory of cash, stock or other valuable article or thing checked or verified by him.

Other matters

Taxpayers are not required to make a statement admitting or denying any concealment of income during the course of a survey. In this connection one may take note of the following instructions of the CBDT in *F.No.286/2/2003-IT(Inv)*:

“Instances have come to the notice of the Board where assesseees have claimed that 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 assesseees 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 Departments. Similarly, while recording statement during the course of search & seizures and 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 evidences/materials gathered during the course of search/survey operations or thereafter while framing the relevant assessment orders.”

From the foregoing instruction it is clear that it would not be open for an assessing officer to make an assessment merely relying on the confession statement of an assessee. The assessing officer would be bound to make an assessment only on the basis of evidences and materials gathered during the survey/search.

In this connection reference may also be made to the following decisions:

- *CIT v S.Khader Khan Son [2008] 300 ITR 157 (Mad) affirmed by Supreme Court in CIT v S.Khader Khan Son [2013] 352 ITR 480 (SC)*
- *Paul Mathews & Sons v CIT [2003] 263 ITR 101 (Ker)*
- *CIT v Dhingra Metal Works[2010] 328 ITR 384 (Del)*
- *R.Bharagthwaj v ACIT in ITA No.166 / Mds / 2011 for the Assessment Year 2007-08*
- *CIT v Kabul Chawla [2016] 380 ITR 0573 (Del)*

It may be possible that at the time of a survey, the books are incomplete. In such a case it would be advisable to reconcile the existing cash or stock with reference to other records like bill books, purchase vouchers, etc., with the accounts written up to the date on which the survey was done. This may be done immediately after the survey also, if sufficient time is not given for reconciliation by the authorities.

Where there has been a survey, the taxpayer ordinarily needs the information that has been gathered from him, whether in matters of any stock or as regards maintenance of accounts as to whether it has been up-to-date, etc. Where there is *prima facie* liability on such survey in respect of years for which return has already been filed and time is available for revised return, the assessee may file a revised return and thereby limit the interest which may otherwise be payable. He may also avoid possible penalty and even prosecution. Even where the time for filing the revised return has expired, the assessee, by filing the return and inviting regularization of the same, by issue of notice u/s.148 will become entitled to waiver of penalty u/s.273A of the Income Tax Act and thereby also avoid prosecution.

Where the taxpayer is unable to explain certain discrepancies at the time of survey but is subsequently able to reconcile the same or explain any statement which he had made during such survey, it is best that the reconciliation or explanation is furnished to the authorities even without any notice from Revenue, since what is explained shortly after the incident carries better conviction.

In *H.Gouthamchand Jain v ITO [2016] 97 CCH 0006 ChenHCitwas* held that when no registers or records was maintained by assessee insofar as expenditure incurred by him and only sales and purchase details were maintained so far, a sudden booking of huge expenditure in a month's time after survey operations were carried out would lead to an inference that the same was deliberately booked to avoid reporting additional income.

Specific Powers of Income Tax Authority during survey

- (i) to inspect the books of account or other documents available in the place of survey
- (ii) to place marks of identification on the books of accounts or other documents inspected
- (iii) to make or cause to be made extracts of copies of the books or documents
- (iv) to check or to verify the cash, stock or other valuable article or thing found in the place of survey
- (v) to make an inventory of such cash, stock or other valuable article or thing
- (vi) to call for any information and recording of statement of any person found in the surveyed premises
- (vii) to impound and retain books of account or other documents inspected for such period as he may deem fit

Note: An Income Tax Inspector shall not be entitled to exercise the powers listed in (iv), (v), (vi) and (vii) above.

Restriction on impounding

It may be noted that books of account and other documents can be impounded and retained in the course of a survey only after recording reasons for doing so by the Income Tax Authority. It may further be noted that such retention can be done only for a period of 15 days excluding holidays and beyond this only if the approval of the Principal Chief Commissioner / Chief Commissioner / Principal Director General /

Director General / Principal Commissioner / Commissioner / Principal Director / Director is obtained.

It may also be noted that the Income Tax Authority cannot during the course of a survey remove or cause to be removed from the place any cash, stock or other valuable article or thing.

Duties of the person surveyed

It is required that every person who is attending to or in any manner helping in carrying on the business or profession must

- ✓ afford the Income Tax Authority necessary facility to inspect the books of account and documents that he may require
- ✓ afford the Income Tax Authority necessary facility to check and verify cash, stock or other valuable article or thing found
- ✓ furnish such information as he may require as to any matter which may be useful or relevant to a proceeding under this Act.

Powers of Income Tax Authority u/s 131

If a person required to afford such facility or information or give a statement, refuses or evades to do so, the Income Tax Authority may exercise the powers u/s.131 for enforcing compliance.

CHAPTER XIX-A : SETTLEMENT OF CASES

1. In what situation is it a good option to file an application before the Income Tax Settlement Commission?

2. Meaning of case – pending assessments:

- In the following situations can it be said there is a “Case”?
 - Notice u/s 143(2) has been issued and assessment not completed
 - Time for issue of notice u/s 143(2) has expired and no notice issued, however, time for completing assessment u/s 143(3) has not expired
 - Time for completion of assessment u/s 143(3) / 153A has expired
 - Assessment has been completed after filing of settlement application but before intimation to Assessing Officer.

- When is an assessment said to be pending?
 - On the first day of the assessment year?
 - On issue of notice u/s 143(2) / 153A?
 - On issue of notice u/s 148?
 - On passing of order u/s 263 directing Assessing Officer to revise assessment order?
 - On passing of order by High Court or Supreme Court directing fresh assessment

3. Who can make an application before ITSC?

- Should additional payment of Rs.50 lakhs comprise only taxes or can include interest also?
- Section 245C provides that application to ITSC can be made by a person only where additional income tax payable exceeds Rs.50 lakhs. Can this amount also include tax referred to in Section 115BBE?
- What is the meaning of ‘connected person to specified person’? Is it necessary for such connected person also to have been issued notice u/s 153A / 153C?

- Where one of the partners of a firm is searched, would the other partner fall within the definition of related person?
- Can a charitable trust make an application for settlement?
- On which date is the existence of substantial interest to be examined – on the date of search or on the date of settlement application?
- Where a company has made an application to the ITSC and order has been passed including penalty for concealment of income, then does the bar u/s 245K apply to all the directors in the company? Would any such bar apply where prosecution has been initiated on the company in relation to a year not included in the settlement application?

4. Full and true disclosure - of income and manner of deriving income

- If the assessee withdraws claim for expenses / losses, can such claim be included in offer of income? (Supreme Court in *Commissioner of Income-tax v. Express Newspapers Ltd.* 203 ITR 443 (SC).)
- Should assessee offer additional income in respect of each year before the ITSC, or is it sufficient if overall for all years included in the application there is positive income declared and additional tax is more than the required limits? (Airtech (P) Ltd &Ors 209 ITR 0021(SB))
- If the ITSC considers there is no “full and true disclosure” what are the consequences? Especially with regard to the confidential annexure made available to the Assessing Officer.

5. Payment of taxes with interest

- If the applicant is unable to make payment of the additional tax and interest and the confidential annexure has been made available to the Assessing Officer, what would be the fallout?
- Similarly, if after the ITSC passes the order and directs payment of certain amounts, what would be the consequences if the applicant does not or cannot make payment of these amounts?
- Does the Settlement Commission have the power to reduce or waive the interest leviable u/s 234A / 234B / 234C?
- In computing the interest u/s 234B, should it be computed upto the date of order u/s 245D(1) and not upto the date of the Commission u/s 245D(4).

6. Application can be made only once in a lifetime

Even where the application has been rejected due to

- failure to make full and true disclosure
- failure to pay the taxes and interest,

will the assessee be debarred from making any future application though the earlier application did not reach its logical conclusion?

7. Possibility of future re-opening

- Can the ITSC reopen its concluded proceedings by invoking Section 154 of the Act so as to levy interest under Section 234-B, particularly, in view of Section 245-I
- Where the ITSC has passed an order and the conditions thereupon are fulfilled by the assessee, can the Assessing Officer re-open the assessment subsequently –
 - on an issue not considered in the settlement, or
 - on an issue which has been subsequently decided in a different manner by a High Court or the Supreme Court?
- Where the settlement application has been rejected due to absence of full and true disclosure, when does jurisdiction pass to Assessing Officer?