



S. 132: A Practical Guide To The Law And Procedure Of Search And Seizure

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1. Introduction.

1.1. One may recollect that in the year 1991, when the Chamber of Income-tax Consultants had organised the second All India Tax Conference, one of the session was regarding tax payers' education programme. It was the first time in the history of taxation that the Chamber of Income tax Consultants had produced a **“skit on Search and seizure”**. The skit (play) was informative about how a search was conducted, the common mistakes committed by assesseees and the like. In the year 1991, the Chamber of Tax Consultants also had a unique programme held at Baidas Hall, where the high income-tax payers of Mumbai were honoured. In this programme also, the play was enacted and was appreciated by all including the Chairman of the CBDT, the Commissioners of Income-tax of Mumbai and the officials of the search team. It is worth considering, subject to permission and precautions, if this play can be posted in the website of the Chamber of Tax Consultants or could be re-enacted during seminars like this.

1.2. One of the important provisions of the Constitution of India is Article 265, which provides that **“no tax shall be levied or collected except authority of law”**

Articles 226/ 227 of the Constitution of India provides that the citizens can approach the High Court when their fundamental rights are violated or when powers are exercised in a manner not authorised by the law. Search and seizure is an invasion into the privacy of the individual. A house, hut, home or castle of a person is his /her personal property and no one has a right to enter and disturb the peace without prior permission of the person in occupation. In **R. K. Garg v. UOI (1981) 133 ITR 239 (SC) (255)**, the constitutional Bench observed that *“Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc”*.

1.3. It is to be acknowledged and appreciated that the department always does lot of preparation before conducting search proceedings. The search and seizure manual of the department contains various checklists to be adhered to by the search parties. In most of the search cases, department officials do follow the check lists.

2. What is the Object of search?

2.1.S.132 elaborates the circumstances under which a search and seizure action can be undertaken.

As per the section 132, a search and seizure action can be undertaken against any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been disclosed or would not be disclosed for the purpose of this Act (i.e to unearth undisclosed income or property)

The search and seizure action can also be taken when there is failure to produce books of accounts, documents etc. in respect of summons issued or notice issued under section 143(2).

2.2. Non-residents.

Ram Kumar Dhanuka v. UOI (2001) 252 ITR 205 (Raj)(HC), The court held that, even a non-resident Indian can be subjected to a search under this section if the department has definite information that the person concerned has income earned in India which may be taxable under the Act and which might not have been disclosed or would not be so declared.

Prabhubhai Vastabhai Patel v. R.P.Meena (1997) 226 ITR 781(Guj.)(HC), the High Court has discussed the principles for exercise of the power of search and seizure. The Court observed that the person bringing gold must satisfy the Income-tax authorities that he had the means to purchase such gold and that income from sale would be disclosed. On the facts of that case, the Court held that seizure of gold from the Non-resident Indians was valid though the gold was brought within permissible limit of 5 Kgs as per the extant scheme. The Court also observed that,

“We cannot accept the contention raised by Mr. Shah that once the gold was lawfully brought in and proper custom duty was paid, the same should not have been pursued by the income-tax authorities. Buying gold in a foreign country and bringing it in to this country after paying custom duty in foreign exchange does not absolve the person bringing the gold from abroad of his liability to satisfy that the gold was purchased from income lawfully earned by him and the income earned out of sale of such gold would be disclosed for the purpose of the Act.”

2.3. Recovery of tax at pre-assessment stage.

Section 132 relates to the pre-assessment stage, and it cannot be invoked after an assessment is made to recover the tax due. There can be no question of making a seizure under section 132 of the Act and proceeding further under the provisions of that section, once an assessment is completed”.

K.Choyi v. Syed Abdulla Bafakky Thangal & Ors. (1980) 123 ITR 435 (SC) (437)

2.4. No arrest or detention can be made under this section.

2.4.1. Mere failure to disclose property purchased is not enough. No power to arrest or restraint in movement of individual.

“There is no power contained in the Act or the Rules where by the movement of a person against search is ordered can be restricted. By refusing to give permission to the petitioner to attend his work in effect, it amounted to his confinement which is not permissible in law”.

L. R. Gupta & Ors. v. UOI (1992) 194 ITR 32 (Delhi) (HC) (55) [SLP granted (1992) 194 ITR 239 (St)].

2.4.2. Search and Seizures: New ground rules (1986) 159 ITR 1-4 (Journal) also reads as under,

8. Arrests- The power of arrest vests with the Customs, Central Excise and Enforcement Officers. Income-tax Officers have no powers of arrest. Arrests are generally resorted to in cases where the detected offence is of a serious nature and the case appears to be fit for criminal prosecution. Persons are generally not arrested when the intention is only to have departmental proceedings. Persons are arrested when there is a gravity of offence, evidence of personal culpability, a strong and prima facie case and a likelihood of person tampering with evidence by remaining at large or absconding.

3. Can survey be converted in to search?

3.1. Under normal circumstances, “no”. However, in exceptional cases, “yes”.

- A survey undertaken under section 133A can be subsequently converted into a search if the conditions of this section are satisfied.

Vinod Goel v. UOI (2001) 252 ITR 29(P&H)(HC)(40)

- Where survey action u/s 133A was taken at the business and consequent search u/s 132 was authorised at the residential premises without recording independent reasons for satisfaction, the search was declared illegal.

Dr. Nalini Mahajan and others v. DIT (Inv)(2002) 257 ITR 123 (Delhi)(HC)

- Survey operation converted into search and seizure – No reason given for such conversion - No independent application of mind –Search and seizure operation was held to be invalid - Hospital premises belongs to Trust and not assessee.

Jinesh Farshubhai Kakad v. DIT (Inv.) (2003) 264 ITR 87 (Gau.)(HC)

4. Legality of search and Jurisdiction

4.1. ITO v. Seth Brothers & Ors. (1969) 74 ITR 836 (SC)

- If the action of the officer issuing the authorisation or of the designated officer is challenged, the Officer concerned must satisfy the court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the court. If the conditions for the exercise of the power are not satisfied, the proceedings are liable to be quashed. But, where the power is exercised with bonafide intention and in furtherance of the statutory duties of the tax officer, any error of judgement on the part of the officers will not vitiate the exercise of the power.

4.2. Pooran Mal v. DIT (1974) 93 ITR 505 (SC)

- Provision of search and seizure in section 132 and Rule 112 of the Income-tax Rules 1962, do not violate the fundamental rights under articles 19(1)(f)/(g) of the Constitution of India. Restrictions placed by any of the provisions of section 132, section 132A or Rule 112A are reasonable restrictions on the freedom under these Articles. Evidence obtained in search made in contravention of provisions can be used, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as result of illegal search or seizure is not liable to be rejected.

4.3. Dr. Pratp Singh and Anr v. Director of Enforcement and ors (1985)155 ITR 166 (SC)

“Illegality of a search does not vitiate the evidence collected during such illegal search. The only requirement is that the Court or the authority before which such material or evidence is placed has to be cautious and circumspect in dealing with such material or evidence”

4.4. Prakash V. Sanghvi v. Ramesh G., Major, DDIT (Inv.) (2013) 356 ITR 426 (Karn) (HC), the court held that in case of trespassing of assessee’s property, the delinquent officers may be prosecuted by a competent Criminal court. However, warrant issued was held to be valid.

The Act does not invest in the Deputy Director, the power to have a camp office at the residence of the assessee and call the assessee's attendance in connection with proceedings under the Act. The allegation that the Deputy Director trespassed into the house of the assessee and, thereafter, issued the notice to him was not controverted. Therefore, the Deputy Director without the authority of law, having trespassed into the house of the assessee deserved to be prosecuted before a competent criminal court, if so advised.

However, the warrant preceded the search. The assessee had time up to March 15, 2012, to pay the advance tax and, thereafter, time to file his return for the previous year 2011-12 (assessment year 2012-13), but that by itself did not mean that the authorities did not have the jurisdiction to issue a warrant and effect search and seizure under section 132.

4.5. DCIT v Mahesh Kumar Agrawal (2003) 262 ITR 338 (Cal) (HC)

Before issue of warrant of authorisation, they record the satisfaction and reasoning. Court cannot sit in appeal over the opinion formed. Existence of materials to be looked into, Court has to examine whether on such material a reasonable man can form opinion. Change in life style of assessee not a material for purpose of formation of opinion.

4.6 Search and seizures: New ground rules (1986) 159 ITR 1-4 (Journal). New Ground rules for search and seizure, framed in the year 1986, prescribes the guidelines to be followed in the course of a search and seizure.

4.7. Taxpayer's Charter - Rights and duties of the persons searched (1994) 208 ITR 5 (St.)

The list of details to be provided to search parties includes copies of Taxpayer's Charter indicating rights and duties of the persons searched.

4.8. It is desired that the said charter may be published in all national languages and when the search and seizure action is carried out, the same must be given to the person in the language known to him and in which he is comfortable. If the department is not equipped with resources to translate the charter in different languages, associations like the Chamber or BCAS may print the copies and may give to the Director General of Income-tax so that he can hand it over to the person in charge of the search party. In Mumbai, it can be in, English, Marathi, Hindi and Gujarati.

4.9. Taxpayer's charter indicating rights and duties of persons searched (1994) 208 ITR 5 (St.)

Rights of the person searched –

- (i) To see the warrant of authorisation duly signed and sealed by the issuing authority.
- (ii) To verify the identity of each member of the search party.
- (iii) To have at least two respectable and independent residents of the locality as witness.
- (iv) To have personal search of all members of the search party before the start of the search and on conclusion of the search.
- (v) To insist on a personal search of female members by another female member only with strict regard to decency.
- (vi) To have a copy of panchnama together with all the annexures.
- (vii) To put his own seals on the packages containing the seized assets.
- (viii) A woman occupying any apartment etc., to be searched, has the right to withdraw before the search party enters, if according to the customs he does not appear in public.
- (ix) To call a medical practitioner if he is not well.
- (x) To have his children permitted to go school, after examining of their bags.
- (xi) To inspect the seals on various respectable placed in the course of the search and subsequently reopened by continuation of search.
- (xii) To have the facilities of having meals etc., at the normal time.
- (xiii) To have a copy of any statement before it is used against him in an assessment or prosecution proceedings.
- (xiv) To inspect books of account etc. seized or to take extracts there from in the presence of any of the authorised officers or any other person empowered in this behalf.
- (xv) To make application objecting to the approval given by the Commissioner for retention of books and documents beyond 180 days from the date of seizure

Duties of person searched:-

- (i) To allow free and unhindered ingress in to the premises.
- (ii) To see the warrant of authorisation and put signatures on the same.
- (iii) 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.
- (iv) To identify and explain the ownership of the assets, books of account and documents found in the premises.
- (v) To identify every individual in the premises and to explain their relationship to the persons being searched. He should not mislead by impersonation. If he cheats by pretending to be some other person or knowingly substitutes one person for other, it is an offence punishable under section 416 of the Indian Penal Code.
- (vi) Not to allow or encourage the entry of any unauthorised person in the premises.
- (vii) Not to remove any article from its place without notice or knowledge of the Authorised Officer. If he secretes or destroys any document with the intention of preventing the same from being produced or used as evidence before the Court or public servant, he shall be punished with imprisonment or fine or both, in accordance with section 204 of the Indian Penal Code.
- (viii) To answer all questions 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 also keep in mind that:-

- (a). 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, under section 179 of the Indian Penal Code.
- (b). Being legally bound by an oath or affirmation to state the truth 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.
- (c). 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.

- (viii). To affix his signature on the recorded statement, inventories and the panchnama.
- (ix) To ensure that peace is maintained throughout the duration of the search, and to co-operative with search party in all aspects so that the search action is concluded at the earliest and in a peaceful manner.
- (x) 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 investigations at the earliest.

The Search manual also contains the Instruction No. 1916 dated 11-05-1994 which lays down the following guidelines for seizure of Jewellery:

1. In the case of a Wealth Tax assessee, gold jewellery and ornaments found in excess of the gross weight declared in the wealth tax return only need be seized.
2. In the case of a person not assessed to wealth tax, gold jewellery and ornaments to the extent of 500 gms per married lady, 250 gms per unmarried lady and 100 gms per male member of the family, need not be seized.

4.10. CIT v. Ratanlal Vyaparilal Jain (2011) 339 ITR 351 (Guj) (HC), the Court held that the approach adopted by the Tribunal considering the extent of jewellery specified under the said circular to be a reasonable quantity cannot be faulted with. Addition made under section 69 was deleted.

4.11. Article 21 of the Constitution of India reads as under

“Protection of life and personal liberty - No person shall be deprived of his life or personal liberty except according to procedure established by law.”
- Natural justice is implicit in this article.

- It must be protected.
- School going children must be allowed to go
- Brother may be allowed to go
- If you are not allowed to go by the Officer, then it is a violation of Article 21 of the Constitution of India “Wrongful confinement”
- If the statement is taken under threat or coercion, make complaint to Chief Magistrate or Chief Commissioner.

Solitary confinement.

- Solitary confinement violates the fundamental right guaranteed by Article 21, unless it is awarded as imposing punishment.

Sunil Batra v. Delhi Administration, AIR 1978 SC 1675.

4.12. The Foreign Exchange Management Act, 1999

General permission is available to any resident individual to surrender received / realised / unspent / unused foreign exchange to an Authorised Person *within a period of 180* days from the date of receipt / realisation / purchase / acquisition / date of return of the traveler, as the case may be. The liberalized uniform time limit of 180 days is applicable only to resident individuals and in areas other than export of goods and services. The search manual also contains that foreign currency found / travellers’ Cheque, need to be communicated to any other Agency. Therefore, the assessee may be advised to comply with the provisions.

4.13. Bombay Prohibition Act, 1949

Liquor permit is necessary for the purchase, possession, transport and consumption of liquor. Any person above the age of 25 years is eligible for obtaining the liquor permit for preservation and maintenance of his health. Purchase and drinking without a liquor permit is an offence under Bombay Prohibition Act, 1949.

With permit, one can possess 12 units of foreign liquor, beer or wine foreign and country liquor (1 unit = 750 ml, wine 1 unit = 1500 ml, Beer and mild liquor= 2600 ml)

4.14. According to **Delhi Excise Rules**, no individual can stock more than 18 litres of wine or beer, nine litres of Indian Made Foreign Liquor (IMFL) or anything above three litres of country-made liquor at home or for parties. **Delhi Excise Act, 2009**, states: "Those found guilty (of stocking more than permissible booze) may have to pay a fine of up to Rs 1 lakh and serve a jail sentence of up to three years. Assesseees who are not complying the provisions may be advised to comply the with provision.

5. Which court has Jurisdiction?

Rajendran Chingaravlelu (Mr) v. R. K. Mishra, Addl. CIT (2010) 320 ITR 1 (SC)

The court held that Genesis for the entire episode of search and seizure and detention having been taken place at Hyderabad airport, cause of action arose at Hyderabad and therefore writ petition was maintainable at Andhra Pradesh High Court.

6. Stock in trade cannot be seized

6.1. S.132(1)(iii). Seize any such books of account, other documents, money, bullion, jewellery or other article or thing found as a result of such search.

Provided that bullion, jewellery or other valuable article or *thing being stock in trade of the business, found as a result of such search shall not be seized* but the authorised officer shall make a note or inventory of such stock in trade of the business. (w.e.f. 1-06-2003-Finance Act, 2003)

As per the third proviso to section 132 1)(v), stock in trade cannot be seized even in case of deemed seizure given in the second proviso.

6.2.Sri Pushpa Rajan Sahoo v. ACIT (2012) 252 CTR 113/ 75 DTR 341 (Orissa) (HC), on a writ petition, the court directed the authorities to release the stock in trade and return to the party, in view of specific provision contained in proviso to section 132(1)(iii) and third proviso to section 132 (1)(v).

Sri PushaRajanSahoo v. ACIT (2012) 252 CTR 113/ 75 DTR 341 (Orissa) (HC)

6.3. VAT Act of different States

6.3.1. Some of the States have provision that when the goods are brought to that particular state by the employees or agents of the assessee company for showing on approval basis, then if the value is beyond certain exemption limit prescribed by the respective VAT law, the same is required to be intimated by filing prescribed form. Many of the jewellers send their employees to other States to sell the jewellery on approval basis. If the assessee is not complying the VAT provisions, the respective State, though it is stock in trade the respective VAT authorities of the State may take action, which may lead to litigation. It may be desirable to know the VAT law of respective State before sending the high valued goods for approval or sale.

7. Validity of search

7.1.If the search is not in accordance with the law, it can be challenged by way of a writ. The burden to prove so is on the assessee. Before approaching the court, assessee must be very cautious. As per section 132(13), the provisions of the Code of Criminal Procedure 1973, relating to search and seizure apply as far as may be applicable, to search and seizure proceedings under the Income-tax Act, 1961.

By analysing some of the decided cases one may be able to take the decision whether it is worth approaching the court. Some of the instances where the writ petitions can be considered-

7.2. Where there is no rational nexus between the information on record and reason to believe that books of account or other documents would not be produced or the assets representing the income will not or would not be disclosed.

- Existence of alternate remedy is no bar when action is taken without jurisdiction and affects fundamental rights.

Vindhya Metal Corporation and ors v.CIT (1985) 156 ITR 233 (All) (HC)

7.3. Where the search is conducted for collateral purposes or as a matter of policy decision and not as a result of cogent information in relation to a particular assessee.

Allegation against advocates were that most of them were submitting estimated income

H. L. Sibal v. CIT (1975) 101 ITR 112 (P&H) (HC)

7.4. Where the search is directed on the basis of information that a particular person is in possession of various assets etc., without any reason to believe that those assets represent concealed income of that person – Probe into the wealth of assessee - Non application of mind –Search and seizure action was held to be illegal.

Anand Swaroop v. CIT (1976) 103 ITR 575 (P&H) (HC)

7.5. Where there is no application of mind by the Officers of the department who authorised the search, search was held to be not valid.

Dwaraka Prasad Agrwalla v.DIT (1982) 137 ITR 456(Cal.)(HC)

7.6. Where the information on the basis of which a search is conducted on based on conjectures and surmises or on vague information.

Mere rumour that Doctor was charging high fees and living in posh house – Search and seizure was held to be invalid.

Dr. Nand Lal Tahiliani v. CIT (1985) 170 ITR 592 (All.)(HC)

Affirmed by Supreme Court in CIT v. Dr. Nand Lal Tahiliani (1988) 172 ITR 627 (SC)

7.7. Where the warrant of authorisation is blank or proper name and address is not recorded-Blank warrant of authorisation without filing up the name was issued by the Commissioner-Search warrant was quashed and the respondents were directed to return the articles recovered from the possession of the petitioners.

Jagmohan Mahajan & Anr. v. CIT(1976) 103 ITR 579 (P&H)(HC)

7.8. Sealing of business premises-Cannot be done-Alternative remedy –Not an absolute bar to the issue of Writ.

Sealing of business premises during the course of survey or section 132,133A, or any other provision of the IT Act is not permitted, as it would amount to violation of the fundamental right guaranteed under Article 19(1)(g) &300A of the Constitution of India.

“That the sealing of the business premises, for which there was no provision of law in violation of the fundamental rights guaranteed to a citizen under article 19(1)(g) of the Constitution of India which guarantees right to practice any profession, or to carry on any occupation, trade or business and also under article 300A of the Constitution of India in as much as the same amounted to temporary deprivation of property without authority of law.”

Shyam Jewellers and another v. CCIT (1992) 196 ITR 243 (All.)(HC)

8. Alternative remedy-Writ is not maintainable.

The assessee shall avail and exhaust the remedies available to him/it under the Act. (A.Ys. 2001-02 to 2006-07)

CIT v. Vijaybhai N. Chandrani (2013)357 ITR 713(SC)

9. Tribunal cannot consider validity of Search.

The satisfaction to be reached by the authority issuing a warrant of authorisation is an administrative function and its validity cannot be called into question by Assessing Officer or Tribunal.

CIT v. A. K. Bansal (Dr.) (Individual) (2013) 355 ITR 513(All) (HC)

10. Suit for damages

10.1. No suit lies for any damage caused which is unintentional or incidental to the carrying out of the search action.

10.2. Sardar Parduman Singh v. UOI (1987)166 ITR 115 (Delhi)(HC)

Possession of shop was seized. Department was directed to pay damages of Rs 10000 for illegal action and if the possession was not handed over immediately, damages of Rs 500 rupees every day of delay was levied.

SLP filed by the Department was dismissed (1987) 168 ITR 3 (St)

10.3. In the course of search of gold, diamond, jewellery and other ornaments were seized. In writ proceedings the High court quashed the proceedings initiated under block assessment and directed the department to return items seized with interest on value of items seized. The Supreme Court, in appeal by Department not decided on whether interest was payable. Department directed to pay cost in lieu thereof.

DGIT v. Diamondstar Exports Ltd. (2006) 156 Taxman 299 / (2007) 293 ITR 438 (SC)

10.4. Assessee is entitled to interest on cash appropriated during search even if refund is directed in appeal proceedings

Chironilal Sharma HUF v. UOI S.LP.NO 20381 of 2012 dt 26-09 2013.www.itatonline.org

11. Violation of human rights

Interrogation till late night amounts to “torture” & violation of “human rights” - Officers are held liable for to pay compensation from their salary

CCIT v. State of Bihar, Through Chief Secretary (Rajendra Singh) (2012) 205 Taxman 232 / 71 DTR 268 / 250 CTR 304 (Patna)(HC).www.itatonline.org

In an appropriate case the assessee can make compliant to human right authority.

12. Trail by media.

12.1. When a survey or search is conducted on a well-known business house or well-known personality - Based on the report, media houses give their own verdict. But when the matter is finally decided by the Tribunal after four years, there may not be any addition sustained by the Tribunal. One can visualise the damage to the reputation of a person’s business, his family members – especially school going children.

12.2. Ground Rules 11:

The raiding party will not make any statement to the press. Statement to the press if any will be made by the head of the department and will be factual in nature. It may be necessary in some cases to give out a press note especially where distorted version have been released to the press by other parties.

12.3. The apex court in **Rajendran Chingaravlelu (Mr) v. R. K. Mishra, Addl. CIT (2010) 320 ITR 1 (SC) (10)** observed that **“there is a growing tendency among investigating officers (either police or other departments) to inform the media, before the completion of investigation, that they have caught a criminal or an offender. Such crude attempts to claim credit for imaginary investigational breakthrough should be curbed”**

12.4. What can be done?

If the reports are false, send a legal notice to the concerned tax officials asking for an appropriate explanation and media houses may be asked to clarify that the contents of their information are not correct. Or give a statement in the paid column of a newspaper clarifying your position. This will help in the appellate proceedings as well as save you from further damage due to wrong reporting by the media.

13. Right of information Act, 2005

13.1. Assessee can get the information, which may be useful in the regular assessment. In one of the matter the notice was issued under section 158BC. In appeal proceedings the assessee realised that his name may not be there in the warrant of authorisation. He made an application under right to Information Act. He received the reply in which his name was not there in the warrant. This helped him to win the appeal only on technical grounds.

13.2. Similarly in the reassessment proceedings, in one of the matter it was found that recording of reason and PAN and address of different person and notice was issued to another person, because the name was common.

13.3. There could be number of instances the Right of information Act can help to bring more transparency in tax administration.

13.4. Copy of the search warrant on the basis of which the search and seizure operation was carried out could be disclosed under RT

Shri Jagdish Singh Saini v Directorate General of Income Tax, CIC/AT/A/2008/00324dt 16-07-2008

It was directed that the copies of the search warrants which were already disclosed to the appellant at the time of the search and seizure operation by the DGIT (Investigation) officials, may be provided to the appellants.

14. Information Technology Act,2000 - Assent 9th June 2000

If any person is tampering with computer system he may be liable for penalty. In the course of search, in spite of receiving co-operation from the assessee, if tax officials tamper with computer system, they may be held personally liable for penalty.

Section 81 – Acts to have overriding effect

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force; Information Technology Act has overriding provisions against other Acts.

Section 43: (Penalty and compensation) for damage to computer, computer system, etc. – If any person without permission of the owner or any other person who is in charge of a computer, computer system or computer network.

Section 64: Offences – Penalty may extent up to 2 lakhs.

15.Prosecution.

If any person try to violate prohibitory order, he may be liable for prosecution under IPC as well as under the Income tax-Act.

16. Whether recording of entire search or survey be permitted. Modern technology – Whether recordings collected in sting operation is admissible as evidence in the court?

16.1. S. Pratap Singh v.The State of Punjab AIR 1964 SC 72.

The tape recording of a conversation was admitted in evidence, to corroborate the evidence of witnesses who had stated that such a conversation had taken place.

16.2. Yusufalli Esmail Nagree v. The State Of Maharashtra, 1968 AIR 147 (SC)

Court held that the contemporaneous dialogue between the appellant and S is relevant and admissible under s. 8 of the Indian Evidence Act. The process of tape recording offers an accurate method of storing and later reproducing sounds. The court must be satisfied beyond -reasonable doubt that the record has not been tampered with.

16.3. Ram Singh v. Col. Ram Singh AIR 1986 SC 3 Fazal Ali, J. for the majority laid down specific guidelines regarding the admissibility of a tape recorded statement, fine tuning the process as follows:

(1) the voice of the speaker must be duly identified by the maker of the record or by others who recognise his voice. In other words, it manifestly follows as a logical corollary that the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape recorded statement has to be proved by the maker of the record by satisfactory evidence direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of Evidence Act.

(5) The recorded cassette must be carefully sealed and kept in safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances.

16.4. Rama Reddy v. V. V. Giri. AIR 1971 SC 1162, the Court of Appeal noted that there is no difference in principle between a tape recording and a photograph. It was noted that the evidence as to things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted for quite long. The court affirmed that the tape records are admissible, provided the accuracy of the recordings can be proved and the voices recorded properly identified and provided also that the evidence is relevant and otherwise admissible. The court observed in Hopes Case evidence of the conversation was as much primary evidence as the evidence from replaying of the tape recorded. Each received it at the same time, the one recording it in the human memory, the other upon a piece of tape.

The Court further held that the previous statement recorded on tape can be used not only to corroborate the evidence given by the witness, but also to contradict the evidence given before the court as well as to test the veracity of the evidence and also to impeach his impartiality, i.e. under Sections 157, 155(3), 146(1) and 153 Exception 2 of the Evidence Act.

16.5. R.M.Malkani v. State of Maharashtra AIR 1973 SC 157 In the case involving a demand for bribe amounting to extortion by Coroner of Bombay, a civil servant, the court allowed admission of tape recorded conversations obtained at the trap set up holding that it was not tainted by coercion or unfairness.

16.6. Z. B. Bukhari v. B. R. Mehra AIR 1975 SC 1788, an election case, Supreme Court held that the tape records are really 'documents' under Section 3 of the Evidence Act. The court therein reiterated that the same are admissible on satisfying the following conditions:

"(a) The voice of the person alleged to bespeaking must be duly identified by the maker of the record or by others who knew it. (b) Accuracy of what was actually recorded had to be proved by the maker of the record and satisfactory evidence, direct or circumstantial, had to be there so as to rule out possibilities of tampering with the record. (c) The subject matter

recorded had to be shown to be relevant according to rules of relevancy found in the Evidence Act".

16.7. Naroda Patiya cases dt 29-08 2012 (Special Court) while relying on video recordings of sting operation court held that, extrajudicial confession in this case possesses a high probative value as it emanates from the person who commits a crime, which is free from every doubt. This extra judicial confession, in case of all the three accused is relevant and admissible in law under Sec.24 of the Indian Evidence Act. This extrajudicial confession, considering the foregoing discussion on its merits, is found very dependable, reliable, having the contents full of probability and it is absolutely found safe to convict the accused on its basis'.

16.8. CIT v. East Coat Commercial Company Ltd. (1967)63 ITR 449 (SC)(457)

Income tax authorities are not strictly bound by the rules of evidence.

17. Laptops seized from auditor

17.1. It is open to the department to copy the data relating to the specified three entities of the assessee group from the two laptops which were seized from the possession of auditor of firm.

DIT (Inv.) v. S. R. Batliboi & Co. &Ors. (2009) 31 DTR 187 / 227 CTR 238 / (2010) 186 Taxman 350 (SC)

18. S.132B: Application of seized or requisitioned assets – Moneys in the bank account is not equivalent to cash cannot be impounded.

Cash in bank is conceptually different from cash in hand and it is not permissible for the department to convert asset to cash and thereafter impound it in case of search conducted under section 132 of the Act. The relationship between the banker and the customer is not that of trustee and beneficiary but is one of debtor and creditor.

KCC Software Ltd. &Ors. v. DIT (Inv.) (2008) 298 ITR 1 / 214 CTR 553 / 167 Taxman 248 / 2 DTR 185 / 5 SCC 201 / 204 Taxation 42 (SC)

19. S. 133A: Survey – Retention of documents

In case of the retention of documents beyond unreasonable period, the Registrar was directed to return the documents to the Respondents within two weeks with the liberty to take out Xerox copies of all pages.

ITO v. U. K. Mahapatra & Co. (2009) 225 CTR 131 / 186 Taxman 181 / 27 DTR 155 (SC)

20. Retraction of statement recent trend

20.1. Very recently, the Customs and Excise Tribunal, in the case of **Sidharth Shankar Roy v. Commissioner of Customs, Mumbai 2013 (291) ELT 244 (Trib.) (Mum.)** held that retraction must be addressed to the same officer to whom confessional statement was given.

In this case, the retraction was made before the Judicial Magistrate and not before the concerned officer of Customs (AIU). Moreover, though the officer of Customs who was alleged to have manhandled the appellants challenged their retractions before the ACMM where he was not cross-examined by any of the appellants.

20.2. In taxation proceedings, the statements are taken by officials who conduct the search proceedings. In most of the cases, the assessee does not retract his statement within a reasonable time. He even does not apply even for copy of his own statement. In many cases, when the matter reaches the Tribunal, the assessee on specific advice request for the statements. There may be certain statements which are against the assessee and retraction at this stage may be too late.

20.3. Instruction no F.NO 286/2/2003 –IT (Inv) dated 10-3-2003 – Confession of additional income during the course of Search and seizure and survey operation (**AIFTP Journal Vol. 5, April 2003 P.25**)

21. Natural Justice

21.1. Natural Justice - Right of cross examination – Is integral part of natural justice Ayaaunhan Noorkhan v. State of Maharashtra & Ors AIR 2013 SC 58

“Not only should the opportunity of cross examination be made available, but it should be one of effective cross examination, so as to meet the requirement of the principle of natural justice. In the absence of such an opportunity, it cannot be held that the matter has been decided in accordance with law, as cross examination is an integral part and parcel of the principles of natural justice.”

21.2. If the department relies on certain documents or statements, it is a right of the assessee to be furnished a copy of the statements and an opportunity for cross examination. Such requests made before the Tribunal for the first time, may not be entertained.

21.3. Non-furnishing of “all documents” does not violate principles of natural justice.

Kanwar Natwar Singh v. Director of Enforcement (2011) 330 ITR 374 / (2010) 160 Comp Cas (SC)

The documents which the appellants wanted were documents upon which no reliance was placed by the authority for setting the law in motion. The demand for supply of all documents in possession of the authority was based on vague, indefinite and irrelevant grounds. The appellants were not sure whether they were asking for copies of documents in the possession of the adjudicating authority or in the possession of the authorized officer who lodged the complaint. The only object in making such demand was to obstruct the proceedings.

21.4. Question of law – Statement is on a point of law - Even though such statements are not retracted, they will not bind the assessee. E.g. I will not claim deduction under section 80IB(10) or will not set off against carried forward losses. This is so because there is no estoppel against the law.

21.5. Question of fact - I have received this much amount on money - is a fact. My drawings are this much is a question of fact.

21.6. Statements by third party – Cash dealings

If the agreement is in writing, proper stamp duty is paid, merely because of buyer’s statement that he has paid cash would be insufficient.

The Supreme Court in **Bhandari Construction Company v. Naryan Gopal Upadhye AIR 2007 SC 1441/(2007) 3 SCC 163** observed that

“A mere suspicion that builders in the Country are prone to take a part of the sale amount in cash, is no ground to accept the story of payment of Rs 4 lakhs”.

When the terms of the transaction are reduced in writing, it is impossible to lead evidence to contradict these terms, in view of section 91 of the Evidence Act. There is no case that any of the provisos to section 92 of the Act are attracted.

22. S.292C: Presumption as to assets, books of account etc. - Inserted by the Finance Act, 2008 wef. 1-10-1975.

Presumption is applicable even to survey proceedings

Section 132(4A): Presumptions-Books of accounts etc.

23. Settlement commission – Advantages

It may be desirable to approach the Settlement Commission in appropriate cases, which will save the assessee from penalty, prosecution. Assessee gets an opportunity to capitalise the amount disclosed and the matter comes to an end within a reasonable time. In matters involving bogus purchases, some assesses have approached the Settlement Commission. The petitions are admitted on the basis of offering of GP. However, the matters are yet to be finally decided.

24. S.127: Transfer of cases for better co-ordination - What circumstances can be challenged

24.1. Effective and coordinated investigation - Held valid Shree Ram Vessel Scrap (P.) Ltd. v. CIT (2013) 91 DTR 235 (Guj.)(HC)

24.2. Coordinated investigation – Transfer case was held to be valid

CIT v UOI (Maa Mahamaya Group and others) (2013) 216 Taxman 135/358 ITR 341 (Chhattisgarh)(HC)

24.3. Once the nexus is established transfer cannot be interfere with

Arrow Alloys Pvt. Ltd. v. UOI (2013) 351 ITR 259 / 215 Taxman 141(Mag.) (Gauhati)(HC.)

24.4. Reasons for transfer cannot be vague – Specific reasons -General reasons

Reasons for transfer of case cannot be vague and too general in nature but must be specific and based on material facts and same should be communicated to affected party.

Ram Gopal Agrawal v. UOI (2013) 216 Taxman 154(Mag.) (Chhattisgarh)(HC)

24.5. S.127: Power to transfer cases – Natural justice – Objection to transfer of cases - The notice was not appended with any relevant material particulars

In absence of relevant material particulars, petitioner was handicapped to submit objection for transfer of its case, therefore, the order transferring case of petitioner was to be quashed and assessment order passed by authority at Hyderabad was to be declared a nullity.

Span Design & Development (P.) Ltd. v. CIT (2013) 215 Taxman 559 (Karn.)(HC)

24.6. Merely mentioning that it is necessary to transfer the case for co-ordinated investigation is not sufficient.

Held, there cannot be any dispute that the case can be transferred for the purpose of coordinating investigation but why the Commissioner feels that it is necessary to transfer the case for co-ordinated investigation has to be at least briefly stated in the said order. In the instant case, the Commissioner apart from stating that case has been transferred for co-ordinating investigation has not given any other reason. Impugned order is therefore quashed and set aside.

Global Energy (P) Ltd. v CIT (2013) 215 Taxman 224/89 DTR 194/356 ITR 502 (Bom.)(HC)

24.7. Failure to inform assessee of reasons for transfer - Objections of assessee to be considered.

Unless a party is informed of the reasons for the proposed action, it would be impossible for the notice to put forth its point of view with regard to the reasons for the proposed action. A show-cause notice to be effective must be adequate so to enable a party to effectively object/respond to the notice and the

authority concerned is obliged to consider the objections, if any. Merely because the assessee had not specifically asked for a personal hearing it would not absolve the Revenue of its obligation to ordinarily grant such a hearing.

**Shikshana Prasaraka Mandali v. CIT (2013) 352 ITR 53 / 258 CTR 289/85 DTR 345 / 215
Taxman 191 (Bom.)(HC)**

25. Representation

Representation before lower authorities has to be on facts and not law. E.g. Officer may be desire to make addition as cash credits which is coming from earlier years. The reply should be on facts. If AO makes an addition, you may file an appeal before the CIT (A). Against the order of CIT (A), we may file an appeal before Tribunal . When Tribunal decides that is the final fact finding authority. Appeal to the High court will be on substantial question of law. Therefore representation before the Income tax appellate Tribunal is very important. Once Tribunal decides that is the final on facts. Assuming the appeal is admitted it may take a decade or more to get the final hearing of appeals.

26. Practical guide or check lists after search and seizure and survey - Do's and don'ts.

Do's

1. Panchanama-Copy must be obtained immediately.
2. Inventory-Copy must be obtained.
3. Copies of documents seized-Make application to furnish the copies seized.
4. Copies of statements-Make application to furnish copies
5. Factual error-Valuing stock-Inventory etc- Write immediately to the concerned Officials who have conducted the search or seizure
6. Goods of Perishable in nature if kept under prohibitory order-Ask to release or sell –If loss is occurred the department is responsible.
7. Adjustment of cash-Ask adjust against tax liability.
8. Disposal of assets seized-Release of assets or sell by the tax department.
9. Damages- File petition for loss due to action of the tax Officials.
10. Retraction- Within reasonable time before the same Officials who have taken the statement. If required copy to higher authorities.
11. If any valuable or documents of third party is seized-Ask the party concerned to make an application for release and claiming the ownership.
12. If any documents or statement is proposed to be used against me, ask for the copies and opportunity for cross examination of the parties who have given statements.
13. Discuss with consultant possibility of approaching Settlement Commission advantages and disadvantages.
14. Co-operate with proceedings

Don'ts

1. Goods put under prohibitory order cannot be removed.
2. Never mislead on facts.
3. Don't try to destroy the documents or books.

We do have check list for representing the appeals before ITAT which you will find on **initatonline.org**. Under the heading practical guide to representation, we are trying to add more after getting feedback from the readers. We are trying to improve.

Today's check list you may circulate, discuss, modify and try to improve based on case laws and practical experience. It may take one year or more. If any survey or search takes place in the premises of your client send copy of copy check list to your client. This will help for better representation. This will also help the tax administration. The Chamber of consultants may post the check list in their website and request the views of tax practitioners. Many of them present hear has lot of experience in

representing the matter relating to search and seizure. Their experience can be utilised for preparing a check list. By sharing the knowledge you will be increasing your wealth of knowledge.

27. Conclusion.

Clauses 135 to 141 of Direct taxes code, 2010 (2010) 326 ITR 41(ST) (147) deal with provisions relating to Search Seizure and Survey-Provision being identical-Whether or not Direct taxes code will be introduced, today's discussion will hold good even if the new code is introduced in the present form.

Speech delivered in a Seminar organised by the Chamber of Tax Consultants on 7.12.2013 at Mumbai on the subject of Search seizure and survey. Compiled by research team of KSA Legal Chambers and Miss Saloni Bhandari, law student, HNLU, Raipur.

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