

## Law and procedure for Release of seized assets under Income Tax Act

### **INTRODUCTION:**

Search and seizure is undoubtedly a serious invasion on the rights of citizens, therefore the revenue authorities are expected to be abundantly cautious while conducting a search. The scope of provisions related to search and seizure is very wide ranging from authorization of valid search -issue of search warrant to completion of search assessments and finally release of seized assets. Focus of the article is on validity of seizure/requisitioning of assets and release of seized assets before/after completion of assessments u/s 153A (under section 147 w.e.f. 01.04.21).

### **BACKGROUND:**

#### **What can be seized u/s 132:**

As per section 132(1)(iii), the Authorized Officer can seize only such books of account and other documents, which the assessee has failed to produce in response to notice u/s 142(1) or summons u/s 131 or which he or she will not or would not produce. Similarly, in the case of money, bullion, jewellery or other valuable articles or things etc. seizure can be made if it represents, either wholly or partly, income or property which has not been or would not be disclosed as income/property for the purpose of Income-tax Act. As per proviso to section 132(1)(iii), stock in trade cannot be seized. Nevertheless, the same can be inventorised by the authorized officer.

#### **Seizure of cash:**

Naturally, section 132(1)(B)(iii) of the Act empowers the Revenue to remove the cash/money from the place where it has been seized as a consequence of search made in terms of section 132(1).

**Where the money/jewellery/other valuable articles etc. found in course of the search belong to the person other than the persons searched:**

In case it is explained to the satisfaction of the authorized officer that the money/jewellery, etc. found belongs to some other person and has been kept in the safe custody of the assessee, the same may not be seized. However, having regard to the facts and circumstances of the case, if the authorized officer is of the opinion that the jewellery belongs to the assessee himself, he can seize the money/jewellery, etc.

**In practice, it has been experienced that in many cases the seizure of cash/other assets is made mechanically without proper efforts to find out whether the same is disclosed or not. Sometimes, search party ignore the direct evidences in support of source of cash, etc. and make the seizure as a matter of routine practice.**

**Seizure of Jewellery- Special treatment:**

The guidelines issued by CBDT with regard to seizure of jewellery and ornaments in course of search action vide **Instruction No. 1916 dated 11.5.1994** are as under:

- (i) 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 can only be seized.
- (ii) **In the case of a person not assessed to wealth-tax, gold jewellery and ornaments to the extent of 500 grams per married lady, 250 grams per unmarried lady and 100 grams per male member of the family, need not be seized.**
- (iii) The Authorized Officer may, having regard to the status of the family and the custom and practices of the community to which the family belongs and other circumstances of the case, decide to exclude a larger quantity of jewellery and ornaments from seizure. This should

be reported to the Director of Income Tax/Commissioner authorizing the search at the time of furnishing the search report.

- (iv) In all cases, a detailed inventory of the jewellery and ornaments found must be prepared to be used for assessment purposes.

In case the assessee has not filed his/her wealth tax return he can furnish other evidences in support of his claim that the jewellery has been acquired from disclosed sources.

**In a nutshell, practically, family member wise inventory should be made for jewellery found in the course of search keeping in mind the above limits of 500/250/100 grams, as the case may be.**

**Power to requisition books of accounts, assets etc.- S. 132A**

**Seizure of handsome amount of cash found in the possession of any person travelling by car/railway/other public transport etc. by police department / flying squads is a common phenomena, especially during the election periods.**

In fact, as per detailed SOP issued by Election Commission of India dt. 29.05.15, if cash of more than 10 Lacs is found by the static Surveillance Team [SST] in a vehicle during election process and there is no suspicion of commission of any crime or linkage to any election candidate or agent or party functionary, the SST shall not seize the cash, but pass on the information to the income tax authority, for necessary action under Income Tax laws.

However, if there is suspicion of commission of crime, the incharge Police officer of SST shall seize the cash as per provisions of CrPC, file complaint/FIR in court and forward a copy of seizure of cash in excess of Rs. 10 Lacs to the Income Tax authority. *[For detailed SOP on seizure & release of cash and other items refer ECI instruction No. 76/Instructions/EEPS/2015/Vol-II dt. 29.05.2015]*

### **The requisitioning process- S. 132A:**

- Generally, on the information of police officer about seizure of cash, Investigation wing of the Income Tax department initiate action u/s 132A of the act, according to which where the Income Tax authorities have reason to believe that, any assets represent either wholly or partly income or property which has not been, or would not have been, disclosed for the purposes of this Act by any person from whose possession or control such assets have been taken into custody by any officer or authority under any other law for the time being in force, the prescribed authorities under the I.T. Act (i.e. requisitioning officers) may require any such officer or authority under any other law to deliver such books of account, other documents or assets to the Income Tax department. **Rule 112D of the Income Tax Rules prescribes the procedure for requisition in view of section 132A.**

**Thus, for exercising power u/s 132A, the primary condition is that the amount of cash or the assets seized by the authorities under any other law has not or would not have been disclosed under the Income tax Act, or in other words, such cash is undisclosed income of the assessee.**

### **Judicial references:**

A cotton broker, carried with him cash of Rs.11 lakhs collected from A in respect of the sale of cotton through him. The cash was seized by the police authorities. The assessee furnished an explanation but the police authorities did not accept the explanation and seized the cash. An order was passed under section 132A and the amount was requisitioned by the income-tax authorities. The income-tax officials recorded the statement of the assessee wherein he stated that the amount had been arranged by Rajan Shah (RS) through a shroff of Kalupur against purchase of cotton. The income-tax officials surveyed the business premises of RS and examined his books of account. RS corroborated the statement of the petitioner assessee.

It was held that in view of the factual background, no reasonable person could have come to the conclusion that the amount of Rs.11 lakhs belonged to the assessee or that he would not disclose the amount to the income-tax authorities under the provisions of the Act. **In the circumstances, on the basis of the material before him, the Director of Income-tax could not have formed the requisite opinion as required under section 132A of the Act. The warrant of authorization issued by him, therefore, was vitiated as having been issued without the condition precedent for exercise of powers under section 132A being satisfied.** The warrant of authorization as well as the order u/s 132A were quashed. The department was directed to release the seized amount along with interest. [*Prakash Jaichand Shah v. DIT (Investigation)* [2012] 23 *taxmann.com* 8 (Guj)]

Every asset which is capable of being seized under s. 132A cannot be subjected to the rigour of s. 132/132A proceedings by the Revenue. It is only when the assessee fails to explain its source when called upon to do so or when the source to acquire the assets is found to be not legal or when it could not be explained satisfactorily that, formation of belief is made out in favour of the Revenue resulting in attracting the rigour of s. 132A. Respondents are directed to return the seized amount of Rs. 30,00,000 to the petitioner forthwith. [*Biaora Constructions P. Ltd. vs. DIT (2006)* 281 ITR 247 (MP)]

Section 132(1) is a serious invasion on privacy of citizens, and has to be resorted to when there are pre-existing and pre-recorded good reasons to believe that action under section 132(1) is called for. Sole ground for action of search and seizure was that Investigation Wing of Income Tax department was in possession of credible information that assessee was in possession of jewellery which represented his undisclosed income or property, however, no cogent basis for arriving at this conclusion was discernible from satisfaction note. .... Therefore revenue was to be directed to forthwith return jewellery seized to assessee. [*Khem Chand Mukim vs. DIT (2020)* 113 *taxmann.com* 529 (Delhi)]

Section 132A of the Income-tax Act, 1961 - Power to requisition books of account, etc. - Mere unexplained possession of amount without anything more would not constitute sufficient information leading to an inference that amount is income which would not have been disclosed by person in possession, so as to justify issuance of authorisation for requisitioning such amount. [*CIT vs. Vindhya Metal Corp. (1997) 91 Taxman 192 (SC)*]

#### **RELEASE OF SEIZED ASSETS:**

**Section 132B provides the procedure for application of the assets seized under section 132 or requisitioned under section 132A and release of assets thereafter:**

- **S. 132B(1)(i):** The amount of any existing liability under this Act, The wealth Tax Act, etc. and the amount of the liability determined on completion of the assessment under section 153A and the assessment of the year relevant to the previous year in which search is initiated or requisition is made, including interest and/or penalty payable in connection thereto, and in respect of which such person is in default or is deemed to be in default may be first recovered out of such seized or requisitioned assets.
  
- **Provided that, where the person concerned makes an application to the Assessing Officer [Central Circle ranges in current scenario] within thirty days from the end of the month in which the asset was seized, for release of asset and the nature and source of acquisition of any such asset is explained to the satisfaction of the AO, the amount of any existing liability referred to in this clause may be recovered out of such asset and the remaining portion, if any, of the asset may be released, with the prior approval of the Chief Commissioner /Commissioner, to the person from whose custody the assets were seized.**

- further such asset or any portion thereof as is referred to in the first proviso shall be released within a period of one hundred and twenty days from the date on which the last of the authorizations for search under section 132 or for requisition under section 132A, as the case may be, was executed;
- Any assets or proceeds thereof which remain after the liabilities referred to in S. 132B(1)(i) as above are discharged, shall be forthwith made over or paid to the persons from whose custody the assets were seized (if the said person is dead, to his legal heirs), in presence of two witnesses. [see also Rule 112C of Income Tax Rules]
- As per Explanation 2 to section 132B inserted by the Finance Act, 2013 it has been clarified that the "existing liability" does not include advance tax payable, and accordingly, cash seized by the department during search and seizure operation cannot be appropriated against advance tax liability of the year in which search took place.
- **Interest on refund arising out of seizure of cash by the department in course of search:**
- As per section 132B(4) assessee is entitled to interest of 0.5 per cent for every month or part of month from the expiry of 120 days from the date on which the last authorization for search u/s 132 or requisition u/s 132A was executed to the date of completion of the assessment. However, practically, in many cases the department makes unreasonable delay in granting refund even after the completion of assessment. Various courts have held that in addition to interest u/s 132B(4), department must pay interest u/s 244A from the date of assessment till the date of refund in cases of inordinate delays. [*Refer: S.K. Jain v. CIT [2013] 33 taxmann.com 36 (Del.), Sitaram v. CIT [2012] 21 taxmann.com 262 (Bom), Gurvinder Singh vs. DIT [2013] 35 taxmann.com 649 (All), Bhagwan Prasad Agarwal v. CIT [2006] 152 Taxman 472 (All), etc.*]

**Guidelines for getting the assets released - CBDT Instruction F. NO.286/6/2008-IT (INV.II) Dt. 21-1-2009**

Generally, assets are released after completion of assessment and payment of tax liability. CBDT Instruction dated 21.01.2009 has laid down the guidelines for release of seized assets other than cash, which reads as under:

"3. (a) Where the nature and source of acquisition of seized assets is explained by the assessee to the satisfaction of the assessing officer, such seized assets should be released subject to recovery of outstanding arrear demand and fulfilment of other requirements contained in sub-section (1) of Section 132B of the Income Tax Act.

(b) Where the seized assets are not released under sub-section (1) of section 132B of the Act, such seized assets should be released within one month of passing of the last search and seizure assessment orders u/s 153A/153C, 143(3), 148 or 158BC/158BD of the Act. The seized assets should be released only with the prior approval of Commissioner of Income Tax or Chief Commissioner of Income Tax. However, no approval should be given for release of:

- (i) that part of the seized assets, the value of which is sufficient to adjust any existing liability and the amount of liability determined on completion of the search and seizure assessments; and also
- (ii) that part of seized assets which is sufficient to meet the expected liability on account of the penalty imposable in cases where penalty proceeding connected with search assessments have been initiated.

(c) Whereas assessee is in appeal against search assessment orders and the penalty has not been imposed up to the date of the order of the CIT (Appeals), the position regarding the seized assets lying with the department should be reviewed at the time of giving effect to the order of the CIT (Appeals). **Only that part of the seized assets should be retained which is sufficient to meet the demand outstanding against the assessee for any assessment year (including non-search assessment years) after**



**giving effect to order of the CIT (A) and the expected amount of penalty imposed on the search assessments as revised after appeal effect.** The remaining seized assets should be released within one month after giving effect to appeal order u/s 250 of the Act.

(d) The seized assets can also be released, at any time, with the approval of the Commissioner of Income Tax or Chief Commissioner of Income Tax provided:

- (i) the assessee unconditionally accepts the ownership and the valuation of the seized assets determined at the time of search and seizure operation; and
- (ii) makes a written request to release the seized assets and provides unconditional and irrevocable **bank guarantee** to the extent of the value of seized assets.

(e) The Board is also aware of the fact that some assessee's have great attachment to the seized assets and are willing to exchange such seized assets for an equivalent amount of cash. The replacement of seized assets with cash also makes it easier for the Department to adjust this cash against tax liability. Hence, it has been decided that the seized assets can also be released at any time, with the approval of the CIT or CCIT provided that:

- (i) the assessee accepts unconditionally the ownership of the seized assets and also the valuation of the seized assets, determined at the time of search and seizure operation;
- (ii) makes a request in writing requesting release of seized assets against equivalent amount of cash to be provided by him
- (iii) pays to the CIT a draft of an amount equal to the value of the seized assets and
- (iv) Agrees in writing that the amount may be deposited in the PD account and may be used for adjustment against tax liability in accordance with the provisions of section 132B of the Act.

Such amount should be deposited in the P.D. account and dealt in the manner laid out in Board Instruction No.11/2006.

(f) Notwithstanding anything contained in above paragraphs, [except in para 3 (a) above] where the valuation or the ownership of any particular seized assets is disputed or where the specific items of seized assets have evidentiary value in prosecution proceedings, such assessment or penalty or prosecution proceedings, whichever is later."

It has further been clarified in Search and Seizure Manual -2007 of the Income Tax Department that, **no amount should be retained merely because of the reason that Department is in appeal before the ITAT, High Court and Supreme Court.**

**Procedure laid down in S & S Manual-2007 for release of assets under the proviso to section 132B(1)(i):**

On receipt of an application for release of assets under the proviso to section 132B(1)(i), the Assessing Officer should take the following steps:

- (1) He should, after giving the assessee an opportunity of being heard, and wherever necessary after obtaining suitable inputs, if any, from the Investigation unit, examination of relevant records and verification of the evidence submitted by the assessee, **decide whether the nature and source of such assets is explained or not.** Any conclusion drawn in this regard should be based on proper appreciation of facts and evidence and due application of mind.
- (2) If the Assessing Officer comes to the conclusion that the assessee has not explained the nature and source of such assets to his satisfaction, he should communicate his decision to the assessee. This should, inter alia, contain the following:
  - (i) points submissions made by the applicant in his application and oral hearing;

- (ii) Assessing Officer's findings on the points/submissions referred to at S.No. (i) above; and
- (iii) the points for determination, the decision thereon and the reason for the decision

(3) If the Assessing Officer comes to the conclusion that the nature and source of such assets or any part hereof, has been explained to his satisfaction, he should ascertain the amount of existing liability referred to in section 132B(1)(i). This can be recovered out of the said assets. In case the amount of aforesaid liability exceeds the realisable value of the explained assets, no part of the asset can be released. This should be communicated to the assessee.

(4) If the Assessing Officer finds that the amount of aforesaid liability is less than the realisable value of the explained assets, he should send a comprehensive proposal to the Commissioner (through the Joint/Additional CIT) specifying the assets that are required to be released. The Joint/Additional CIT should examine the proposal and forward the same to the appropriate authority, along with his detailed comments.

(5) The Commissioner should apply his mind to the proposal and communicate his decision to the Assessing Officer and the range Joint/Additional CIT.

(6) Based on the outcome of the proposal submitted to the Commissioner, the Assessing Officer should pass an appropriate order and communicate the same to the assessee. Copies of the order should be sent to the CIT, Joint/Additional Commissioner and ADIT/DDIT (Investigation). The order should, inter alia, contain the following:

- (i) points/submissions made by the applicant in his application and oral hearing;
- (ii) Assessing Officer's findings on the points/submissions referred to at S.No. (i) above;
- (iii) the points for determination, the decision thereon and the reason for the decision;
- (iv) in case any existing liability referred to in section 132B (1)(i) is being recovered out of the seized asset(s), details of all such liabilities and the computation showing, (a) realisable value of the asset(s); (b) amount of the aforesaid existing liability required to be recovered out of the said asset(s) and (c) remaining portion, if any of the said asset(s) ordered to be released.

(7) The ADIT/DDIT (Investigation) should place copies of the said order in the relevant files, including the file containing panchnama and other documents and reward file. **In case the said decision is received prior to finalization of appraisal report, this fact should be incorporated in the appraisal report to be finalised.**

(8) If on the basis of the said order, the said asset(s) or any part thereof is/are required to be released, suitable steps for releasing the same to the person from whose custody the same was seized should be taken. The procedure for releasing such assets will be the same as in the case of release of any other asset after completion of search related assessment(s).

#### **ISSUES ARISING FROM SECTION 132B:**

##### **Whether Self-assessment Tax is 'existing liability' for S. 132B(1)?**

It appears that as Explanation 2 to S. 132B has only excluded advance tax, and self-assessment tax has not been excluded. Therefore, where assessee has declared additional income in the return filed u/s 153A which requires payment of self-assessment tax u/s 140A at the time of filing of return, assessee can make a request to the AO to adjust self-assessment tax out of cash seized.

**See:**

*ITAT, Kolkata in ACIT Vs. Narendra N. Thacker [2017] 82 taxmann.com 64 (Kolkata)* wherein it was held that the action of the assessee in seeking to adjust the seized cash with self- assessment tax payable along with the return of income is in order and in accordance with section 132B as admittedly self-assessment tax payable becomes 'existing liability' on the part of the assessee to settle.

Similarly, ITAT Delhi in *Sajjan Singh V ACIT, (ITA No. 6640/Del/2016)* it was held that what is precluded in the statute is adjustment of seized cash towards advance tax liability only and not self-assessment tax.

**Assessee's application for release of assets not decided within statutory time limit of 120 days as required under S. 132B(1):**

There is a consistent judicial view that, if assessee's application for release of assets made within time under 1<sup>st</sup> proviso to S .132B(1)(i) is not responded to in any manner within the expiry of 120 days and once this period is over the revenue have no authority to retain the assets and the assets should be released immediately.

**See:**

- *Kamlesh Gupta v. Union of India (2021) 130 taxmann.com 494 (Delhi)*
- *Mitaben R. Shah vs. DCIT (2011) 331 ITR 323 (Guj.)*
- *Mul Chand Malu (HUF) v. ACIR (2016) 69 taxmann.com 437 (Guj.)*

**When nature and source of seized assets is explained, the assets must be released in view of S. 132B(1)(i):**

Section 132B of the Income-tax Act, 1961 - Search and seizure - Retained assets, application of - During search conducted at business premises of petitioner, certain cash was found - Petitioner's explanation regarding nature and source of acquisition of said cash was, on verification, found to be correct - Despite that, Assessing Officer seized said amount and also rejected petitioner's application seeking release of said cash - Whether Assessing Officer was justified in doing so - Held, no [*Bipin V. Jain vs. ADIT (2008) 169 Taxman 396 (Bombay)*]

Section 132, r.w.s. 132A and 132B, of the Income-tax Act, 1961 - Mere possession of cash of large quantity, could not be said to constitute information which could be treated as sufficient reason, leading to an inference that it was income which would not have been disclosed by person in possession for purpose of Act. Assessee entrusted sum of Rs. 5 crore to its employee in relation to one business transaction in Telangana. Assessee's employee and his vehicle was detained with Rs. 5 crore cash by Task Force Police of Telangana on 23-8-2019. Task Force handed over said cash to Income-tax department on 27-8-2019. Subsequently on 28-8-2019, revenue prepared panchanama along with affidavit referring to a warrant issued under section 132 for search of a place where employee of assessee was present and cash was seized. Income tax inspection or investigation would be permissible only in respect of a past event and not for possible future contingencies; hence if assessee would disclose, cash of Rs. 5 crore in return of income tax, there would be no basis for retention of cash. **Whether since there was no reason to believe that assessee would not disclose cash transaction, intimation by Task Force police on 27-8-2019 would not confer jurisdiction on revenue to detain and withhold cash by issuance of an invalid search warrant under section 132 - Held, yes** - Thus provisions of sections 132, 132A and 132B could not be invoked [*Mectec Vs. DIT (Inv) [2021] 125 taxmann.com 96 (Telangana)*]

The employee of assessee was intercepted and searched at Jaipur Airport during his journey from Mumbai to Jaipur while he was carrying jewellery and diamonds, by the Income Tax Authorities. The said jewellery found in his possession was seized in terms of Section 132 of the Income Tax Act, 1961.

**HELD:** Seizure under Income Tax has to be conducted after due care and caution. Merely on account of reasons to suspect, seizure of goods ought not to be undertaken. In fact the investigation wing has to show reason to believe that a person is carrying undisclosed asset.

However, if the concerned person has shown documents in order to explain the goods which he is carrying and also gives a statement like in the present case that the articles were belonging to a firm and were part of stock-in-trade. Before seizure is conducted explanation ought to be taken from the concerned firms and if they are able to produce the related books of account and necessary proof of articles which may include sale details, purchase details, stock register, audit reports, income tax returns etc, the Income Tax Authorities ought to take a decision at this stage and ought not to be allowed to seize the goods for years together to await for the assessment order to be passed in relation to concerned employee. The same was required to be released as the seizure itself is found to be unjustified and illegal. [*Harshwardhan Chhajed vs. DGIT (WP No. 6097/2020) (Rajashthan)*]

**Cash belonging to assessee seized from third person- release thereof:**

Section 132B of the Income-tax Act, 1961 - Retained assets, application of - Cash seized from 'V' (third person) who stated that the said cash belonged to the assessee. Assessee also admitted that cash seized from third person belonged to him and also disclosed same in his return of income. Accordingly, assessee could not be denied release of amount remaining after adjusting his tax dues on ground that cash had been seized from third person. [*Hemal D. Shah vs. ACIT (2017) 80 taxmann.com 151 (Gujrat)*]

**Section 132B is applicable in praesenti & not intended to be made applicable for future course of action:**

Section 132B, read with sections 234A, 234B, 234C and 132, of the Income-tax Act, 1961 - Search and seizure - Retained assets, application of (Appropriation towards tax) - Assessment year 1991-92 - In absence of any return filed and assessment made or any determinative process undertaken, question of Assessing Officer specifying a liability arising out of search proceeding would not arise. Reference to an 'existing liability' as used in section 132(5)(iii) would mean such liability that had already been determined and crystalized in respect of prior years where assessment had been made for and any other liability

stood crystallized by any determinative process under Act. [*CIT vs. Sri Chand Gupta (2015) 64 taxmann.com 108 (Delhi)*]

Section 132B of the Income-tax Act, 1961 - Search & seizure - Retained assets, application of - Assessment years 2002-03 to 2004-05 - Amount seized can only be utilized for purpose of discharge of liability with regard to tax liability already determined and not paid by assessee and not for tax liability to be determined in pending assessment. [*Fatema Hussain Vs. Union of India (2017) 88 taxmann.com 725 (Patna)*]

### **CONCLUSION:**

Fundamentally, the seizure/requisitioning of assets must be valid at first place. In the case of money, bullion, jewellery or other valuable articles or things etc. seizure can be made if it represents, either wholly or partly, income or property which has not been or would not be disclosed as income/property for the purpose of Income-tax Act. Once seizure or requisitioning of assets is found legal, the assets can be released by AO even before completion of related assessments, if-

- Assessee makes an application for release within 30 days' time stipulated u/s 132B(1)(i); and
- the nature and source of acquisition of any such asset is explained to the satisfaction of the AO; and
- the amount of any 'existing liability' referred to in S 132B(1)(i) shall be recovered out of such asset.

The remaining portion, if any, of the asset may be released, with the prior approval of the Chief Commissioner /Commissioner.

The term 'existing liability' as appearing in S. 132B(1)(i) would refer to tax liability already determined and not paid by assessee and not to tax liability to be determined in pending assessment. However, as held by Hon'ble Supreme Court in *KCC software Ltd. Vs. DIT (2008) 167 Taxman 248 (SC)*, if there is no challenge to the order passed u/s 132B, no relief to assessee against retention of amount could be granted even though cash was retained by revenue for estimated liability pending completion of assessment.