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Survey, Search & Seizure

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Introduction

Search and survey are two weapons in the armory of the revenue department to detect tax evasion. However, search and survey is not end in themselves but they are process by which evidence is gathered to be used in assessment of tax due.

SURVEY

1. Power of Survey – Section 133A

1.1 The powers under provisions of survey, though not very wide as powers of search, are wide enough to effectively detect evasion of tax on income earned. The preconditions which need to be satisfied by the Income Tax Authority before exercising the power of survey are limited.

Who can carry out survey?

1.2 Any income tax authority having jurisdiction over the assessee can carry out survey. Such jurisdiction may either be because of assessment jurisdiction or because of jurisdiction over the place of business. Even Assessing Officer having charge of TDS circle or a Tax Recovery Officer can carry out survey.

Provisions relating to survey have been amended by Finance Act, 2003 w. e. f. 01.06.2003. Earlier no prior approval or authorization was needed to carry out a survey and an assessing officer could himself have carried out survey at place of business of his assessee without any authorization from his superior officers. With effect from 1st June, 2003, an assessing officer or a Tax Recovery Officer or an Inspector of Income Tax or Assistant Director or a Deputy Director cannot carry out survey without obtaining prior approval from the Joint Commissioner or the Joint Director.

Who can authorize survey?

1.3 Income Tax Authority as mentioned above can carry out survey only if approval has been obtained from Joint Commissioner or Joint Director.

Premises that can be surveyed

1.4 In exercise of powers of survey, income tax authority can only visit place at which business or profession is carried out, whether principal or otherwise.

They can also visit any other place, where the person surveyed states that, books of account, cash or stock in trade or other valuable or article or thing relating to business or profession is kept.

Hours during which survey can commence

1.5 Survey can be carried out and commence, at a place where business or profession is carried on, when it is open for business. The restriction is only as regards when the income tax authority can enter premises to survey. As regards any other place where books, etc are stated to have been kept, income tax authority can enter only after sunrise and before sunset.

Extent of powers under provisions of survey

1.6 An income-tax authority can exercise only following powers during the course of survey:

i) To inspect books of accounts and other documents,

ii) To place marks of identification on books of accounts or documents examined,

iii) To make extracts or copies of books of accounts or documents,

iv) To check, verify and prepare inventory of cash, stock or other valuable article or thing found.

Whether books, cash, valuables etc. can be seized or impounded during survey

1.7 Survey party can merely survey and cannot seize cash or valuables. The Finance Act 2002 has given power to the income-tax authority to impound and retain in his custody books of account or other documents inspected by him during survey, after recording his reasons for doing so. However the power to impound is restricted to only books and documents and does not extend to cash, valuables and other assets found.

Presumption in respect of seized/found books of account, documents etc.

1.8 According to S. 292C of the Act, where any books of account , other documents, money, bullion, jewellery or other valuable articles are found in the possession of any person during a search, it is presumed that such documents etc belong to that person. This presumption is rebuttable.

This section has been amended retrospectively w.e.f. 1-6-2002 to provide that such presumption will also apply in respect of books of account, documents etc. in the possession or control of any person in the course of Survey operation u/s 133A. This presumption is also extended to books of account, documents etc. delivered to the requisition officer u/s 132A. This amendment is effective retrospectively from 1-10-1975.

Recording of statement / retraction, etc. in survey and search proceedings:

1.9 The income tax authority may examine on oath any person, which may be useful for the purpose of any proceeding under the Act. A statement on oath may be used as evidence in any proceedings under the Act.

1.9.1 However, it is only when the statement is recorded by the authorized officer on oath, which could be used as evidentiary value against the person making the statement. In the course of survey proceedings, the statement is not recorded under section 132(4) and hence, the same is not on oath and therefore it could be said that such statement

does not have evidentiary value. The ***Hon'ble Kerala High Court in Paul Mathews & Sons v. CIT [2003] 263 ITR 101 (Ker.)*** has held that - *section 133A enables the income-tax authority only to record any statement of any person which may be useful, but does not authorize for taking any sworn-in statement. On the other hand, such a power to examine a person on oath is specifically conferred on the authorized officer only under section 132(4) in the course of any search or seizure. Thus, the Income-tax Act, whatever it thought fit and necessary to confer such power to examine a person on oath, the same has been expressly provided, whereas section 133A does not empower any ITO to examine any person on oath. Statement recorded under section 133A is not given any evidentiary value obviously for the reason that the officer is not authorized to administer oath and to take any sworn-in statement which alone has the evidentiary value as contemplated under law. Therefore the statement elicited during the survey operation has no evidentiary value.*

1.9.2 Similar view is taken in ***CIT v. S. Khader Khan Sons [2008] 300 ITR 157 (Mad)*** – after considering the instructions issued by the CBDT that no confession statement to be recorded and holding that statement recorded in course of survey proceedings have no evidentiary value. Relying upon the said decision, the Mumbai Tribunal in ***DCIT v. Premsons [2010] 130 TTJ 159 (Mum)*** has taken similar stand and deleted the addition that was not based upon the evidences and merely on the basis of statement, which was also retracted. Also in the case of ***M/s. Vama Apparels (India) P. Ltd. v. ACIT, ITA No.5835/Mum/2005, Bench 'I', order dated 31/8/2010***, it has been held that in the absence of any material found in the course of survey to what the assessee earned income disclosed in the statement, the impugned addition could not have been made purely based on the statement recorded at the time of survey.

1.9.3 No addition could be made only on the basis of third party statement if the same is not allowed to be cross-examined; if the statement is retracted, then retraction of the statement is to be taken in to consideration and merely on the earlier statement recorded, additions cannot be made-

A) ***CIT v. SMC Share Brokers Ltd. [2007] 288 ITR 345 (Del)*** – wherein it was held that rejection of request to cross examine person searched and on

whose statement reliance is placed, the same would vitiate assessment / additions being made in violation of principles of natural justice.

B) ***Vinod Solanki vs. UOI Civil Appeal No. 7407 of 2008 arising out of SLP (C) No. 35370f 2008 dated 18th December, 2008*** - Held that

(i) The retracted statement must be substantially corroborated by other independent and cogent evidences, which would lend adequate assurance to the court that it may seek to rely thereupon;

(ii) The initial burden to prove that the confession was voluntary in nature would be on the Department.

(iii) The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a conviction.

(iv) With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.

C) ***Mehta Parikh & Co. v. CIT (1956) 30 ITR 181 (SC)*** – held that once affidavit is filed, the contents of the affidavit should be regarded as correct and relied upon as sufficient proof unless the party is called upon and cross-examined and the contents of the affidavit is proved otherwise with sufficient documentary evidence.

D) ***DCIT v. Pramukh Builders [2008] 112 ITD 179 (Ahd)(TM)*** – held that there was no evidence to show that the assessee had any undisclosed income barring the statement given by the managing partner while in an utter state of confusion. Further the managing partner had retracted the admission. There may be hundreds of reasons and thoughts crossing the mind of the deponent

during the search and it is not expected that whatever is reeled out during the search is only after proper application of mind. Therefore the additions were not justified merely based upon the statement without any evidence to corroborate the addition made as undisclosed income.

E) ***First Global Stockbroking P. Ltd. v. ACIT [2008] 115 TTJ (Mum) 173*** – held that the evidence given by Chief Financial Officer of assessee in a statement given under section 132(4) may be a good factor for probing issue further and can be a corroborative piece of evidence but surely on basis of this statement, addition in hands of assessee cannot be made, more so, where such statement is not a voluntary statement and has been retracted.

F) ***Kailashben Manharlal Chokshi v. CIT [2008] 174 Taxman 466 (Guj)*** – held that additions were made and / or confirmed merely on the basis of statement recorded u/s.132(4) despite the fact that the said statement was later on retracted and therefore, merely on the basis of admission, addition could not be made more particularly when the statement was recorded in mid-night at such odd hours, which could not be considered as voluntary statement, if it was subsequently retracted.

Enquiry relating to expenditure incurred on function, etc

1.10 Sub-section (5) of section 133A provides that an Income Tax Authority may make enquiries as regards expenditure incurred in a function, etc. organized by an assessee. The powers under sub-section (5) are different from other provisions of section 133A. Enquiry can be made and information can be sought not only from the person who has incurred the expense but also from any other person, who in the opinion of the Income-tax Authority is likely to possess the information. For example, in the case of marriage, he may make enquiries from a hotel, a restaurant, caterer, decorators, printers of invitation cards, jewelers, etc., who may give the information with regard to the expenditure incurred at the time of marriage.

The power can be exercised only after the event and the officers cannot visit the event itself for survey.

2. Determination of income in pursuance of survey

2.1 Survey and search results in gathering of evidence from the assessee involuntarily, there is an element of surprise, atleast for the assessee. As such, in most cases, department is able to collect evidence which otherwise would not have been available to it. However, in most case such evidences may not necessarily be complete in all respects and does not contain full details of transactions. Therefore, determination of income on the basis of such evidences always presents various possibilities.

2.2 Evidence found during survey and search and the provisions for computation of income on its basis can be broadly classified into following categories:

i) Undisclosed sales/turnover;
ii) Undisclosed investments in assets, cash, stock, valuables, etc.;
iii) Shortage of cash and / or stock;
iv) Admission/declaration of income in statement recorded.

The above is not an exhaustive list but the above are most common areas of findings in a survey and search proceedings.

Post survey and search assessments proceeds on similar lines in above respects especially after the introduction of new assessment procedures for search cases.

Tax dodging has been developed into an art form and when detected, each novel device requires equally unique solution to determine income therefrom. Denial of relevance of any evidence is one of the potent weapons to overcome the findings of survey and search and the manner of such denial would depend on facts and circumstances of each case.

In cases where denial cannot or does not help, the assessee can minimize the loss i.e. the tax effect thereof, by computing income on the basis of such evidences at the lowest possible amount. The discussion that follows assumes that denial of relevance of evidence found would not be upheld and the fact of income being earned but not disclosed cannot be denied in toto.

2.3 Quantification of income post survey and search is like fitting a jigsaw puzzle. The evidences found indicate various possibilities. Some evidence would point towards undisclosed turnover. Some papers would evidence undisclosed expenditure. There would be undisclosed investments, cash credits in books of accounts, etc. Such situations throw up a challenge to tax professional's abilities to compute the correct income.

2.4 Normally, an Assessing Officer picks and chooses only those pieces, which would support his case for determination of highest possible income. It is not uncommon to see assessment orders where addition has been made on account of income earned from undisclosed sales and separate addition on account of undisclosed investment.

In such situations, the correct approach would be to determine income on earning basis i.e. undisclosed sales, inflation of expenses etc. and than correlate the same with undisclosed investments, cash credit, etc.

2.5 **Whether evidence collected illegally can be used by the Department**

As per the general law of evidence, as propounded by the decisions of the hon'ble Supreme Court, valid evidence, even if obtained in pursuance of an illegal action, can be used and proceedings can be initiated on the basis of such evidence.

Even if there is some illegality in survey action or books, etc have been impounded illegally during a survey action, the Department cannot be prevented from utilizing such evidence.

In the case of ***United Chemicals Agency v/s Income-tax Officer (1974) 97 ITR 14 (All.)***, it was held that since Section 133A expressly authorizes the surveying officer to take extracts from the documents, the Income-tax Officer can neither be restrained from making any extract from the documents, nor be directed to return the extracts made from them or of them, even if the documents were illegally impounded, nor can the authorities be restrained from initiating proceedings on the basis of information gathered from such documents.

3. Undisclosed Sales Turnover

3.1 In case of traders, hoteliers, shopkeepers, etc., visiting survey or search party normally verifies the actual sale of the day by taking charge of the cash counter and sales of the day are presumed to represent the average daily sales. Actual daily sales so determined are compared with sales recorded in books and the difference is treated as undisclosed sales.

3.2 In some cases, loose chits or other documents are found evidencing undisclosed sales either in the form of cash premium charged on sales recorded in books of accounts or sale itself being not reflected in books of accounts.

3.3 The first step towards quantification of income in such cases would be to determine the undisclosed turnover. Depending upon the nature of evidence and facts of the case, following can be some of the arguments to ensure that the undisclosed turnover is determined at the lowest figure:-

i) evidence found relates to a solitary transaction of the said type;

ii) transaction recorded in the evidence is not the normal transaction and actual concealment of sales is less than recorded in such material.

3.4 The second step would be to contend and substantiate that only net profit arising on such sales after deducting purchase cost and other expenses can be treated as income.

3.5 Sale of goods requires the existence and ownership of such goods by the assessee and for such ownership of goods, the assessee has to spend either by way of purchase cost or manufacturing cost. As such, if there are unaccounted sales, the cost of bringing into existence and possession goods sold, must also have been incurred. Whether or not evidence as to undisclosed purchase cost & other expenditure is available, if the assessee can prove that such expenditure has not been recorded in regular books of accounts, the same will have to be considered in computing income earned by making undisclosed sales. The whole of the sale proceeds cannot be treated as income but only income component thereof can be subjected to tax. In ***CIT vs. S.M. Omer (1992) 201 ITR 608 (Cal)***, before the Hon'ble Calcutta High Court, the Assessing Officer treated whole of the unaccounted sales receipt as income. The Hon'ble High Court held that whole of the unaccounted sales cannot be treated as income and only net

profit can be added to total income. Similar proposition has been laid down in the case of ***Ashok Kumar Rastogi vs. CIT (1991) 100 CTR (All) 204; CIT v. President Industries 258 ITR 654 (Guj); Kishore Mohanlal Telwala v. ACIT 64 TTJ 543 (Ahd); Abhishek Corporation vs. DCIT 63 TTJ 651 (Ahd)***

3.6 In case where transaction of sale is already recorded in books and the case is of suppression of sales price, it may be possible to contend that though cash premium has been charged on sale, similar premium was paid on purchase of goods or raw material which has not been recorded in books of accounts. Deduction of such premium paid can be made from premium charged and balance only can be treated as income.

4. Undisclosed Investments, Assets, Cash, Stock, etc.

4.1 Undisclosed investment, etc found is normally dealt with under the provisions of section 69, 69A, 69B & 69C of the Income Tax, 1961. The provisions of Section 69, 69A, 69B and 69C are basically rules of evidence. Section 69 to 69C cast onus of proof on the assessee to prove that source of investment/expenditure is fully explained.

4.2 However, before such onus of proof is cast on the assessee, the Department has to prove that the provisions of those sections are applicable. For example, before applying section 69C the Department has to prove that assessee himself has incurred the alleged expenditure. The primary onus is on the Department to prove that particular state of affairs are existing - ***J.S. Parkar vs. V.B. Palekar (1974) 94 ITR 616 (Bom); Yadu Hari Dalmia vs. CIT (1980) 126 ITR 263 (Punj); and Kishanchand Chellaram vs. CIT (1980) 125 ITR 713 (SC)***.

4.3 However, once the primary onus is discharged by the Department, the provisions are applicable irrespective of whether the investments is in assets standing in the name of the assessee or somebody else. Once the investment is proved to have been made by the assessee, it is wholly immaterial as to whether the asset is owned by the applicant or somebody else - ***Rati Agnihotri vs. First Income-tax Officer (1990) 36 TTJ (Bom) (TM) 272; Lallumal vs. CIT (1980) 126 ITR 42 (All)***

4.4 However, merely because wife of the assessee has made certain investments, the same cannot be treated as income of the husband unless proved otherwise - ***CIT vs. Roshan Lal Seth (1989) 178 ITR 660 (Punj); Shiv Charan Dass vs. CIT (1980) 126 ITR 263 (Punj)***

4.5 The Assessee must be found to be owner and not merely in possession of asset, investment, etc. Normally, being in possession may be sufficient proof of ownership and presumption normally arises that the assessee in possession is owner thereof. However, the assessee can rebut the presumption by explaining how he came in possession thereof without being owner of such assets. If the assessee proves that he is not owner of goods found in his possession, no addition can be made u/s. 69A - ***CIT vs. Amratlal Chunilal Shah (1980) 40 CTR (Bom) 387; Mohan B. Samtani vs. CIT (1993) 199, ITR 370 (Cal); Smt. Nayanben Mansukhal Raichura vs. Income-tax Officer (1991) 36 ITD 332 (Ahd)***

4.6 If any evidence is found as to amount invested or it can be otherwise determined, than such amount would be treated as income. In case no evidence is available, market value on the date of investment or when assessee is found to be owner, as the case may be, would be the amount assessable as income.

5 Effect of Amendment to Section 37 and 69C by Finance (No. 2) Act, 1998.

5.1 The amendments to section 37 and 69C by Finance (No. 2) Act, 1998 may substantially effect computation of income in pursuance of survey and search.

5.2 An explanation is inserted in section 37 with retrospective effect from 1-4-1962 to provide that any expenditure incurred by an assessee which is an offence or which is prohibited by law shall not be allowed as deduction. The objective of the amendment is stated to be to overcome the decision of the hon'ble Tribunal at Bombay which held that payment of protection money is allowable as deduction.

5.3 A proviso is inserted in section 69C with effect from 1-4-1999 to provide that unexplained expenditure deemed to be income u/s. 69C shall not be allowable as deduction under any head of income.

5.4 A detailed analysis of the amendment is beyond the scope of this paper and I have restricted the discussion to the effect of these amendments on computation of income subsequent to survey and search and the possible ways to overcome the same.

The amendments shall affect allowability of expense in following circumstances:-

i) Payments of bribes, etc. would not be allowable as expenditure even if incurred to earn the very income which is detected to have been earned.

ii) If income is assessed on the ground that the source of expenditure incurred is not explained than such expense shall not be allowed as deduction.

One can overcome the amendment to section 69C by taking care that even if unexplained expenditure is detected, the source is explained by income that has not been disclosed and thereby ensuring that income is assessed on the ground of undisclosed income and not unexplained expenditure.

Also, allowability of payment of secret commission, in most cases, may not be affected as such payment may not be ethical but is not illegal.

No disallowance on ground of Public morality – Dr. T.A. Qureshi v. CIT 157 Taxman 514 (SC)

6. Shortage in cash and / or stock

6.1 Shortage of cash and / or stock on physical verification at the time of survey or search does not necessarily constitute undisclosed income. Such shortage reflects non availability of asset on physical verification acquisition whereof has already been reflected in the books of accounts.

6.2 Shortage may have arisen for many reasons and it may be on account of in-house consumption, or pilferage, or misappropriation. If the shortage is on account of any such reasons than obviously no income arises on account of such shortage.

6.3 Shortage may have also arisen on account of sale not recorded or expense or investment not recorded. If such an eventuality can be correlated with finding of the nature referred above than it may not represent any independent transaction but would be part of the earlier referred transactions.

6.4 Even though there is no such correlation, the whole of the income from undisclosed sales represented by shortage of stock would not be income but only Gross Profit thereon as the purchase is already recorded in books and treated as part of closing stock. Thus if sales is to be accounted to the extent of shortage of stock, that much of stock appearing in the books of account would get reduced and therefore only GP could be added. In case of investment represented by shortage of cash only income earned on such investment would be income.

7 Head of Income under which assessable

7.1 Section 69 to 69C does not constitute a separate head of income. Income assessable due to applicability of sections 69 to 69C is assessable under various heads of income as specified u/s. 14. Though in most of the cases, the income is assessed under the head "income from other sources" due to non availability of particulars, in cases where the assessee can prove that income arises from particular activity, the income would have to be assessed under the respective head and computed as per the provisions of such head of income.

8 Deductions under Chapter VIA

An interesting issue arises as to whether deductions under Chapter VIA would be available on income computed and assessed on account of circumstances referred to above. The provisions of the Act for computation of income apply for all types of income: whether legal or illegal, whether disclosed or undisclosed. If all other conditions for claiming a particular benefit or exemption under the Act are satisfied, the assessee would be entitled to such benefit irrespective of the fact that such income was undisclosed and was detected by the Department - ***CIT vs. Ganpatrai Gajanan (1977) 108 ITR 403 (Ori.); CIT vs. Dahyabhai Pitamberdas & Co. (1974) Taxation 36 (1) 25-26 (Guj.)***

9 Penalty under Section 271(1)(c) - cases of Survey

9.1 Basically, penalty u/s 271(1)(c) is leviable on the basis of concealment of income in the return of income already filed. The provisions of section 271(1)(c) are attracted only if there is any concealment of particulars in a return of income filed. Merely, for not filing return of income no penalty is leviable u/s. 271(1)(c). Only Explanation 5 and Explanation 3 provides for circumstances in which penalty can be levied u/s. 271(1)(c) even if return has not been filed by the assessee.

Explanation 5 to Section 271 (1)(c) is applicable only in cases of search u/s. 132 and it does not apply to additions made in pursuance of survey u/s. 133A.

Explanation 3 applies now to all assessees irrespective of whether he was previously assessed to tax or not and has not filed his return of income within time specified under Explanation 3.

As such, subject to other conditions for levy of penalty u/s. 271(1)(c), if at all, penalty can be levied in pursuance of survey u/s. 133A only if:

i) the assessee, has failed to file return of income within time prescribed in Explanation 3, or
ii) addition is made for a year for which return had already been filed earlier without disclosing income so assessed.

If detection of income or declaration of income in statement recorded during survey u/s. 133A relates to an assessment year for which return of income is not due and is also not filed and such income is declared in return of income filed subsequent to survey, penalty u/s. 271(1)(c) would not be leviable –

CIT v. SAS Pharmaceuticals (Del) (HC) - A survey was conducted pursuant to which certain discrepancies were found and the assessee surrendered Rs. 88.14 lakhs. In the ROI due for the financial year of survey, the assessee offered the said sum as

income. The AO levied penalty u/s 271(1)(c) on the ground that the offer of income was pursuant to detection in the survey and not voluntary. The CIT(A) & Tribunal deleted the penalty. On appeal by the department to the High Court, Held dismissing the appeal:

Though it is possible that but for detection in the survey, the assessee might not have offered the income, penalty u/s 271(1)(c) can only be levied if "in the course of proceedings" the AO is satisfied that there is "concealment" or "furnishing of inaccurate particulars". The words "in the course of proceedings" **mean the assessment proceedings** because there is no question of the satisfaction of the AO in survey proceedings. Further, the **question whether there is "concealment" or "inaccurate particulars" has to be determined with reference to the return of income**. As the assessee had offered the detected income in the return, there was neither concealment nor the furnishing of inaccurate particulars.

Similar view taken in- ***Hon'ble Mumbai ITAT in Shri Dilip M. Shah v. ACIT, ITA No.4413/Bom/98, A.Y. 1994-95, Bench 'SMC', order dated 25/1/1999; Amirchand v. ITO 49 ITD 171 (Del); Gulamrasul M. Pathan v. ACIT [1996] 57 ITD 129 (Ahd); Sant Ram Parma Nand v. ACIT [2004] 1 SOT 312 (Del); Vinod Goyal v. ACIT (2008) 115 TTJ 559 (Nag); DCIT v. Dr. Satish B. Gupta (2010) 42 SOT 48 (Ahd)***

10. Entries in books of accounts – Capitalization of income offered

Income detected and assessed in pursuance of search and survey can be credited in books of accounts. However, care should be taken that provisions of Explanation 2 to section 271(1)(c) are not attracted to such credit of income in the books of accounts.

1. Search and Seizure u/s 132

1.1 Meaning

'Search' means a thorough inspection of the building, place, vehicle, vessel, aircraft, etc.

'Seizure' means taking possession under the authority of law.

1.2 Powers in exercise of search

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

The authorized officer has the power to:

a) To enter and search any building, place, etc. where he has reason to suspect that books of accounts, other documents, money, bullion, jewellery or other valuable article or thing representing undisclosed income is kept;

b) To break open the locks, where the keys thereof are not available;

c) To carry out personal search of the person who is suspected to have secreted any item as mentioned in a) above;

d) Seize the items as mentioned in a) above;

e) Place marks of identification and take extracts or copies of the books of accounts and other documents; and

f) Make a note or inventory of the valuables found during the search.

The authorized officer is also permitted to pass orders placing prohibition on the person in possession or control of the valuable article or thing from removing, parting with or otherwise dealing with such

article or thing without prior permission. The authorized officer also has the right to demand the services of any Police officer or any officer of the Central Government.

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

1.3 Circumstances in which search can be carried out

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

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

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

"The Courts have held that the exercise of power of search and seizure infringes upon the privacy of a citizen and causes social stigma. It is, therefore, mandatory that the condition precedent must be satisfied. The condition precedent is the possession of

information and the reason to believe that the bullion, jewellery or other valuable article or thing represents wholly or partly income or property which has not been or would not be disclosed for the purpose of the Act. On perusal of all the above referred judgments, the principles that emerge can be summarized as under:

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

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

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

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

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

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

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

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

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

1.4 Who can authorise search

The authorisation to carry out the search can be given by the Director General, Director of Income Tax, Chief Commissioner of Income Tax and Commissioner of Income Tax only.

1.5 Authority who can execute and carry out search

However, the search warrant can be executed by a Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income Tax Officer and they can be authorised to carry out actual search and seizure.

2. Guidelines for seizure of jewellery and ornaments in course of search

The CBDT has vide instruction No. 1916 dated 11th May, 1994, issued guidelines for seizure of jewellery and ornaments in course of search. The said guidelines, which is reported in (1994) 120 Taxation (St.) 98, is reproduced below.

'Instances of seizure of jewellery of small quantity in course of operations under section 132 have come to the notice of the Board. The question of a common approach to situations where search parties come across items of jewellery, has been examined by the Board and following guidelines are issued for strict compliance:–

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 only need be seized.
ii. 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.
iii. The authorised 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 authorising 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.

These guidelines may please be brought to the notice of all the officers in your region.'

3. Search illegal – whether evidence found can be used

If a search is held to be illegal on the ground that same was not authorized in accordance with law or for any other reason, issue arises as to whether material found during such illegal search action can be used as evidence. Contention has been raised in various cases that once search is held to be illegal, assessee has to be restored to pre search position. The issue has been considered in various cases and it has been held that though material seized has to be returned to the person searched, the department is not barred from calling for such papers and documents and use it as evidence. Some of the landmark judgments on the issue are discussed hereinafter.

i) In the case ***Balwant Singh v. R. D. Shah (1969) 71 ITR 550 (Del)*** it was contended that search without authority of law is in violation of fundamental rights of the citizen and therefore if evidence found in pursuance of illegal search is allowed to be used, it would amount to violation of fundamental rights. Rejecting the argument, the hon'ble Court held that:

"Though in Ohio's case the Supreme Court of the United States said that the rule which excludes unconstitutional evidence from being admitted is an essential part both of the Fourth and Fourteenth Amendments, Mr. Veda Vyasa suggested that the said rule as developed in the United States was not only a command of the Fourth Amendment but also a judicially created rule of evidence and there was no reason why the same rule of evidence should not be created by the courts in India because article 19 in our Constitution is intended also to serve the same purpose as the Fourth Amendment in the United States. There are two ways of looking at the American decisions. One way of looking at those decisions may be, as suggested by Mr. Veda Vyasa, that the exclusionary rule is a judicially created rule of evidence. If that be so, then it would be open to the Legislature to override that rule and permit use of

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

be the situation if there is no power in law in the authority concerned to call for such information or documents does not arise before us and I need not consider that. I would like to make it clear that I am expressing no opinion on the impact of article 20 on the use of such information."

ii) The above judgment was affirmed by ***hon'ble Supreme Court in Pooran Mal v. Director of Inspection (1974) 93 ITR 505 (SC)*** and it was held as follows:

"It would thus be seen that in India, as in England, where the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to be shut out."

The hon'ble Court referred to following passage in Babindra Kumar Ghose v. Emperor:

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

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

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

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

iv) In ***Ali Mustafa Abdul Rahman Moosa v. State of Kerala (1994) 6 SCC 569 (SC)***, a case relating to prosecution under Narcotic Drugs & Psychoptropic Substances Act, 1985, after distinguishing Pooranmal's case, it has been held that material found during illegal search cannot be used as evidence to prove possession. Under Narcotic Drugs & Psychoptropic Substances Act, 1985, possession of prohibited substance has to be proved by prosecution beyond reasonable doubt and it was held that due to illegality, possession cannot be proved in the instant case.

v) The issue of admissibility of evidence seized during search has also been tested in terms of Article 20 of Constitutuion in ***Dwarka Prasad Agarwalla v. Director of Inspection (1982) 137 ITR 456 (Cal)*** and it was held that: *"In view of the decision of the Supreme Court in the case of Ramesh Chandra Mehta v. State of West Bengal, AIR 1970 SC 940, and the observations of the court at p. 946, it is clear that a person whose house is being searched for gathering the materials as contemplated under sub section (1) of section 132 is not an accused and, therefore, no question of testamentary compulsion arises."*

vi) In ***Thakursidas Banwarilal v. CIT [1998] 232 ITR 846 (Gauhati)***, the Court has held that illegal search will not invalidate seizure of the articles. In such cases only the court is to scrutinize the evidence carefully.

NEW PROVISIONS ON SEARCH & SEIZURE

INTRODUCTION

1. The scheme of block assessment has come to an end with effect from 1/6/2003 by insertion of section 158BI and search action initiated after 31/5/2003 would come under the new provisions for assessment of search and seizure in terms of sections 153A to 153C of the Income tax Act.

2. The new provisions are introduced by the legislature for the reasons that the main objectives for which the block assessment scheme was introduced i.e. avoidance of disputes, early finalisation of search assessments, reduction in multiplicity of proceedings, cost-effective, meaningful and efficient assessment proceedings, etc. have failed in totality and has spawned a fresh stream of litigation.

3. The objective of the new provision seems to be the same as was laid down while introducing the scheme of block assessment, however, it is only the matter of time that would perhaps give the idea as to whether the scheme of block assessment failed to achieve its objectives or it was too early to do away with the scheme of block assessment.

NEW PROVISION - SUMMARISED

4. The new provision for assessment of search and seizure cases is introduced in terms of sections 153A to 153C, which in a nutshell is a mixture of both the old provisions relating to search and seizure cases as well as the provisions contained in the block assessment scheme.

5. Section 153A provides that in case of a person where a search action is initiated u/s.132 of the Act or books of account or other documents or assets are requisitioned u/s.132A after 31/5/2003, the assessing officer ***shall*** issue a notice to such person requiring him to furnish a return of income within such period as mentioned in the notice. The return of income would be required to be filed for all the six assessment years preceding the assessment year in which search action is initiated u/s.132 or books of account, etc are requisitioned u/s.132A. The section starts with notwithstanding anything contained in sections 139, 147, 149, 151, & 153 meaning

thereby that the provision of section 153A overrides all these sections and hence, the time limit as well as the criteria for reopening of assessments as provided under these sections would not be applicable to the assessment made in respect of search cases.

The proviso to section 153A provides that the assessing officer ***shall*** assess or reassess all the six assessment years preceding the previous year in which search action is initiated or requisition made. It is also further provided by way of second proviso that the assessment pending on the date of initiation of search u/s.132 or requisition u/s.132A ***shall*** abate.

Section 153A(2) is inserted by the Finance Act, 2008, w.r.e.f. 1/6/2003 providing therein that where any proceedings are initiated or any assessment or reassessment order is made u/s.153A(1), which is annulled in any appeal or legal proceedings, in such cases, the assessment or reassessment that had abated under second proviso to section 153A(1) would revive with effect from the date of receipt of annulment order by the Commissioner. Proviso is also added whereby if the order of annulment is set aside, the revival shall cease to have effect.

In other words, the sub-section (2) to section 153A is inserted only to safe guard the revenue in cases of assessment / reassessment getting abated, which otherwise was a valid proceedings initiated, due to search action, which itself gets annulled at a later stage.

All other provisions of the Act except those overridden shall apply to the assessment or reassessment made under this section and tax shall be charged at the rates applicable to such assessment years

6. Section 153B provides for the time limit within which the assessment or reassessment u/s.153A has to be made. This section is similar to the section 158BE of block assessment and provides that the assessment or reassessment shall be made within a period of two years (21 months for last of authorization executed during the financial year commencing on 1/4/2004 onwards as amended by Finance Act 2006, w.e.f. 1/6/2006) from the end of the financial year in which the last of the authorizations was executed in case of search and in case of requisition, within a period of two years

(21 months for last of authorization executed during the financial year commencing on 1/4/2004 onwards as amended by Finance Act 2006, w.e.f. 1/6/2006) from the end of the financial year in which the requisition was executed. With respect to assessment of other person referred to in section 153C, the assessment or reassessment shall be made within a period of 2 years in both the cases referred to above or one year (21 months instead of 2 years and 9 months instead of 1 year as amended by Finance Act, 2006 w.e.f. 1/6/2006) from the end of the financial year in which the books of account or documents or assets are handed over to the AO having jurisdiction over other person. The time limit so provided is extended in following circumstances:

Situation	Time Extended for
Opportunity of re-heard given u/s.129.	The time taken for reopening the whole or part of the proceedings.
Court grants injunction of assessment proceedings.	The period during which the stay is in force.
Special Audit has been directed u/s.142(2A).	The time allowed by the Assessing Officer to furnish the report of such special audit.
Application is made to Settlement Commission u/s.245 and the same is rejected.	The period commencing from the day when the application is made & ending on the day on which rejection order is received by the CIT.
Application is made to Authority for Advance Ruling u/s.245Q and the same is rejected / pronounced.	The period commencing from the day when the application is made & ending on the day on which rejection order / pronouncement is received by the CIT.
Annulment of proceeding or order of assessment or reassessment as per s.153A(2)	The period commencing from the date of annulment till the date of receipt of setting aside annulment order by CIT
Reference for exchange of information is made by competent authority referred in s.90 or 90A	The period commencing from date of making reference till the date of receipt of information by CIT or period of six months, whichever is less

The proviso further states that where the time limit available with the assessing officer is less than 60 days after exclusion of the aforesaid period, the time limit would be extended upto 60 days. For e.g. where the assessment is getting time-barred on 30/6/2006 and an order of injunction is made on 15/6/2006 staying the assessment

proceedings and is vacated on 25/6/2006, the assessing officer would get a period of 60 days commencing from 26/6/2006 even though the stay was only for a period of 10 days.

7. Section 153C is analogous to section 158BD with the only exception that the words 'any Undisclosed Income' is done away with in the new section 153C. The section provides that where the assessing officer is ***satisfied*** that any money, bullion, jewellery or other valuable article or thing or books of account or documents or assets seized or requisitioned ***belong or belongs*** to any person other than the person searched or requisitioned, then such money, bullion, etc. is to be handed over to the assessing officer having jurisdiction over such other person and that other assessing officer shall proceed against such other person and assess or reassess in accordance with the provisions laid down in section 153A.

IMPORTANT ISSUES ARISING OUT OF NEW PROVISIONS

8. Various issues arise out of new provisions relating to search & seizure. The same are bifurcated into various sub-headings to understand the implications & consequences:

I ASSESSMENT
A. PROCEDURE

9. **Whether assessment / reassessment mandatory:**

The proviso to section 153A states that the assessing officer ***shall*** assess or reassess the six assessment years preceding the previous year in which the search is initiated or requisition made. The use of the word 'shall' connotes that the assessment / reassessment is mandatory and will have to be made irrespective of the fact as to whether any material / document, etc. is found in the course of search action. This is more so when the proviso further states that the assessment pending on the date of search action or requisition 'shall' abate. Therefore, the logical conclusion that could be drawn is that even if nothing is found in the course of search action, assessment / reassessment would have to be made.

10. **What issues could be examined in 153A assessment / reassessment:**

The new provision does not refer to 'undisclosed income' as was categorically and specifically referred to in the block assessment. Therefore, it is felt that the assessing

officer in the assessment proceedings u/s.153A could examine all the issues that could be taken up in pursuance of filing of return of income. However, as far as completed assessments are concerned, the issues already examined by the assessing officer in such completed assessment would be difficult for re-examining in assessments u/s.153A unless some material is found in the course of search action. [Shyam Lata Kaushik 114 TTJ 940 (Del); Shivnath Harnarain 340 ITR 271 (AT) (Del)]

11. **Issue of Notice u/s.153A – Whether Mandatory and Whether separate notice for all the years:**

An assessment to be made u/s. 153A comes into picture only after the notice for filing the return of income is issued. Therefore, the issue of notice is a ***sine qua non*** for making assessment u/s.143(3) r.w.s 153A of the Act. Since the section uses the word ***'shall'***, it becomes a pre-requisite for the assessing officer to issue a notice u/s.153A before issuing a notice u/s.142(1)/143(2) of the Act for making the assessment. The jurisdiction of the assessing officer would also commence with the issue of notice and hence, it is felt that the issue of notice is mandatory before making an assessment u/s.143(3) r.w.s 153A of the Act. Thus, if no notice is issued or the notice issued is invalid, the assessment made in pursuance of such notice would also be bad-in-law, illegal and void. Reference may be made to the decisions in ***Karam Chand Thapar & Bros. (Coal Sales) Ltd. v. DCIT [1997] 228 ITR 317 (Cal); CIT v. Kurban Hussain Ibrahimji Mithiborawala [1971] 82 ITR 821 (SC); Verma Roadways v. ACIT [2000] 75 ITD 183 (All) – in respect of block assessment.***

The second issue relates to whether only one notice is sufficient for all the six assessment years preceding the previous year in which search action is initiated or requisition is made. One view could be that the assessing officer is required to issue only one notice requiring the assessee to file return of income for all the six assessment years for the reason that the section uses the words 'the return of income in respect of each assessment year' following the words 'issue notice'. Thus, the language indicates that only one notice may be required. The second view is that separate notice is required for each of the six-assessment year for the reason that each year is a separate assessment year unlike the block assessment, where only assessment was to be framed whereas under new provision, separate assessment is to be framed

and separate return of income is to be furnished. Secondly, if one compares with section 148, separate notice is required for each assessment year to be reopened and even though section 153A overrides section 148, the analogy could be drawn as far as issue of notice is concerned. Thirdly, if nothing is found for a particular assessment year, the assessing officer may not issue any notice and no assessment may be framed by him in order to save time, cost, etc. and hence, a separate notice may be required to be issued for each of the six assessment years. The issue is debatable, however, the second view seems to be a better view and in order to avoid unintended litigation, it would be preferable if the department issues separate notices for each of the six assessment years.

Notice u/s.143(2) – whether mandatory:

In ***Narendra Singh v. ITO (2011) 138 TTJ 615 (Agra)***, it is held that while making an assessment under s.153A service of notice under s.143(2) within the prescribed time is mandatory. In the absence of service of such notice, the AO cannot make the addition in the income of the assessee and the AO is bound to accept the income as returned by the assessee.

B. LAW

11. **Whether concept of 'Undisclosed Income' would still prevail:**

Undoubtedly, a search action is initiated or requisition made in order to unearth income which is or which may not be disclosed to the department and hence, prima facie the assessment ought to be made of undisclosed income only. However, the concept of 'undisclosed income' (with which everyone is familiar with due to scheme of block assessment) may not prevail while framing assessments / reassessments under the new provisions. This is for the simple reason that the legislature has purposely omitted the word 'undisclosed income' from the new provisions thereby assessment / reassessment may be made as a normal scrutiny assessment taking into effect the material / documents found in the course of search action, if any. Secondly, the new provisions are introduced in order to overcome the parallel assessment that were made under the scheme of block assessment – the objective being reduction in litigation as to which income would fall under block and regular assessments and avoidance of time, cost, etc. in making two separate assessments. Thus, the concept of

undisclosed income seems to have been done away with and the assessing officer would make assessments / reassessments without bifurcating undisclosed income.

12. **Whether roving enquiries permitted:**

Although the concept of 'undisclosed income' may be done away with, however, it is difficult to make roving enquiries even under the new provisions for the reason that as far as the completed assessments are concerned, it is difficult for the assessing officer to once again re-examine the issues already dealt with therein. As far as the pending assessment is concerned, the assessing officer, even otherwise, would have conducted normal enquiries, as done in regular scrutiny assessments. The question that arises is for the assessment years which are neither completed u/s.143(3) nor are pending. For such assessment years, to the extent of circumstantial evidences, enquiries could be made, but not otherwise.

In ***LMJ International Ltd. v. DCIT 119 TTJ 214 (Kol)*** - "Where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such years cannot be disturbed; items of regular assessment cannot be added back in the proceeding under s. 153C when no indiscriminating documents were found in respect of the disallowed amounts in the search proceedings".

13. **Whether material found for part period could be used for all the years:**

As far as the block assessment is concerned, the ***Hon'ble Bombay High Court in CIT v. Dr. M.K.E. Menon (2001) 248 ITR 310 (Bom)*** has laid down the ratio after referring to the decision of the ***Hon'ble Supreme Court in Haji Mohd. 90 ITR 271 (SC)*** that the block assessment could be framed only for the period with respect to which the material is found in the course of search action and cannot be estimated for other period. This decision was strictly in lieu of the special procedure of block assessment having specific meaning of undisclosed income embedded in it. Since, the concept of undisclosed income is itself done away with in the new provision, the decision of Bombay High Court in Menon's case, supra, would be of no held and instead the decision of the Supreme Court in Haji Mohd., supra, would be applicable with equal force. Thus, it may be difficult to argue that no estimation could be made for the period for which no material is found and the assessing officer may be able to use the material gathered for part of the period for making estimations for the other assessment years.

The Hon'ble Mumbai Tribunal in ***Chunilal P. Mali v. CIT, ITA No.1483/M/2010, Bench 'C', Order dated 18/3/2011*** has after considering both the aforesaid decisions and various other decisions held that *"each assessment year is an independent assessment year and unless some material is found for that year showing some unaccounted sale estimation of unaccounted sales for that year based on the material found in other years will not be justified. In case the assessee had really indulged into unaccounted sales in A.Y.2005-06 there would have definitely been some material found showing unaccounted sales for that year also as both the residential and office premises of the assessee had been searched. Moreover we also note that unaccounted sales for A.Y.2006-07 had been found only from 1.10.2005 to 31.3.2006 and AO had accepted the unaccounted sales found on the basis of material found and had not estimated any accounted sale for the remaining period of A.Y.2006-07 i.e. from 1.4.2005 to 30.9.2005. Therefore estimation of unaccounted sales for the period of even before 1.4.2005 cannot be justified. The Learned DR has relied upon the judgment of Hon'ble Supreme Court in case of H.M. Esufali and others (90 ITR 271). On perusal of the said judgment we find that for the accounting period 1.11.59 to 20.10.60 the assessee had disclosed turnover of Rs.3,97,356/- and taxable turnover of Rs.1,10,246/- for the purpose of sales tax. There was inspection by sales tax authorities on 19.9.63 and a bill book was found for 19 days from 1.9.60 to 19.9.60 showing that sales of Rs.31,171.28 were not recorded. On that basis, the AO estimated unaccounted sales for the entire year at Rs.2.50 lacs under the state sales tax act and Rs.1 lac under the central sales tax act. The Hon'ble Supreme Court upheld the estimation of sales made by the sales tax authorities. It may be noted that estimation of turnover had been made for the year for which the material had been found and not on the basis of material found for other years. Therefore the said judgment does not help the case of the revenue that unaccounted sales can be estimated on the basis of material found for some other years. There are however judgments which support the case of the assessee that undisclosed sales or income cannot be estimated for the period for which there were no material found. In case of CIT Vs CJ Shah & Co. (117 Taxman 577) relied upon by the assessee, the seized material had indicated unaccounted sale for the period 3.9.96 to 4.12.96 i.e. for the three month period. The AO on that basis had estimated undisclosed profit for the entire block period at Rs.3.40 crores. The tribunal however deleted the addition on the ground that there was no material found indicating undisclosed sale for the*

period prior to the three months period. The order of tribunal was upheld by the High Court. Similarly in case of CIT Vs Smt. Usha Tripathi (116 Taxman 838) the Hon'ble High Court held that the AO was not justified in estimating undisclosed income for the period for which there were no details in any of the seized materials. The Learned AR for the assessee has also relied on the decision of the tribunal in case of DCIT Vs Royal Marwar Tobacco Products Pvt. Ltd. (29 SOT 53). In that case the search has resulted into material showing suppressed sales for A.Y.2004-05 but there was no material for 2001-02 to 2003-04. The AO had however estimated suppressed sales for A.Y.2001-02 to 2003-04 based on the material for A.Y.2004-05 in assessments made under section 153A. The tribunal held that there was no material found for the earlier years and there was also no defect in the books and therefore addition in the earlier years was not justified. Therefore in our view estimation of unaccounted sales for A.Y.2005-06 is not justified and order of CIT(A) on this point is set aside and addition made on this account is deleted."

14. **Whether deductions, etc. could be claimed for first time in return of income filed in pursuance to notice issued u/s.153A:**

14.1 In the case of reassessment proceedings, the ***Hon'ble Supreme Court in CIT v. Sun Engineering Co. P. Ltd. 198 ITR 297 (SC)*** has laid down the ratio that the department cannot be worse off by reopening an assessment and hence, the assessee would be bared from claiming any relief in the course of reassessment proceedings.

However, the ratio laid down by the Supreme Court in Sun Engineering, supra, was specifically in respect of reopening of assessment where the income has escaped assessment. The provisions of sections 148 & 149 are overridden by the new provision of assessment u/s.153A and hence, the said ratio of the Supreme Court may not apply. Since the entire assessment / reassessment is made de novo (not only in respect of undisclosed income or the income that has escaped assessment) it may be possible to make a new claim altogether not made earlier. In my opinion it would be advisable to make such a new claim although the issue is not free from doubt.

14.2 The Hon'ble Mumbai Tribunal in ***DCIT v. Eversmile Construction Co. P. Ltd., ITA No.4238/Mum/2010, AY 2001-02, Bench 'G', order dated 30/8/2011*** has held that assessee can agitate claim given up at assessment stage. In that case, the assessee filed a ROI declaring a loss of Rs. 3.93 crores. The AO passed order u/s.

143(3) wherein he disallowed interest of Rs. 58 lakhs. The assessee accepted the disallowance and it became final. Subsequently, pursuant to a search u/s 132, the assessee filed a ROI u/s 153A in which it reserved its right to claim deduction for the said interest of Rs. 58 lakhs. The AO rejected the claim though the CIT (A) gave part relief. The department filed an appeal before the Tribunal claiming that in s. 153A proceedings the assessee was not entitled to seek relief on additions which were made in the original assessment as s. 153A did not permit assessment at an income lower than the one assessed in original assessment. Held dismissing the appeal:

S. 153A requires the AO to make the assessment afresh and compute the "total income" in respect of each of the relevant six assessment years. **There is no inhibition on the jurisdiction of the AO on the including of new income and likewise there is no restriction on the assessee to claim any deduction which was not allowed in the original assessment**. The determination of total income u/s 153A has to be done afresh without any reference to what was done in the original assessment. The fact that there was an addition in the original assessment does not preclude the assessee from contesting it in the s. 153A proceedings. **As it is a fresh exercise of framing assessment of "total income", the assessee is not estopped from arguing about the merits of his case qua the additions made in the original assessment**. Debarring the assessee from making a claim about the deductibility of any item, which was earlier disallowed, counters the very concept of fresh assessment of total income (**Sun Engineering Works** 198 ITR 297 (SC) & **Goetze (India) Ltd** 284 ITR 323 (SC) distinguished)

14.3 In contrast to the above, there are other decisions whereby the revenue was precluded from making the same addition again in assessment made u/s.153A of the Act. In ***ACIT v. Kores (India) Ltd., ITA No.5074/Mum/2009, Bench 'A', order dated 9/9/2010*** disallowance was made in respect of compensation paid to contractor of Rs.29.80 lacs while passing order u/s.143(3) dated 16/2/2004. The assessee carried matter to CIT(A) and the disallowance was deleted. It was stated that the department had filed appeal to the Tribunal and was pending. A search action was conducted u/s.132 on 19/9/2006 and while passing order u/s.153A, the AO once again made the same disallowance, which was again deleted by CIT(A) and the revenue filed appeal to the Tribunal. Held, dismissing the appeal – *"Nothing has been brought on record by the revenue to show that the said order of CIT(A) dated 19.1.2005 was*

either stayed or set aside or reversed. Even otherwise when the assessment was completed prior to the search took place then the addition made in the original assessment cannot be repeated in the assessment u/s 153A(1). As per second proviso to section 153A(1), the assessment or reassessment relating to any assessment falling within the six assessment pending on the date of initiation of search or making of requisition u/s 132A as the case may be shall abate. Therefore, the assessment completed before the date of search in which any addition is made the same cannot be repeated while making the assessment under sect ion 153A. In view of the above discussion, we do not find any error or illegality in the order of the CIT(A) , the same is to be upheld."

14.4 Similarly, in the case of ***Uttara Shorewala v. ACIT, C.O. No.107/M/2010, AY 2001-02, order dated 25/5/2011,*** the assessment was reopened on the ground of bogus purchase of capital gains and reassessment order was passed dated 29/3/2006 after considering the statement of the broker and other evidences treating short term capital gains as unexplained expenditure u/s.69C. The order was challenged to CIT(A) and the said addition was deleted. The revenue did not prefer second appeal and the matter attained finality between the parties i.e. the assessee and the revenue. A search action was conducted on 28/6/2006 and assessment order was passed u/s.153A dated 11/12/2008 wherein the AO once again made the addition in respect of short term capital gains u/s.69C by considering statement once again recorded of the broker and taking his affidavit. The jurisdiction of the AO was objected to before the CIT(A), however, the CIT(A) deleted the addition on merits while confirming the jurisdiction of the AO to make once again addition in order passed u/s.153A. Assessee filed cross objection appeal to the Tribunal and the Tribunal allowed the appeal and it was held-

"15. The argument of the learned counsel for the assessee is that : -

(a) there is no incriminating material found during the search on the assessee on the basis of which the additions under section 69C of the Act could have been made and therefore the assessments were invalid; and

(b) in any case the assessments are invalid because there was no undisclosed income which could be brought to assessment, and the additions made under section 69C cannot be considered as undisclosed income because those very additions had been made in the reassessment orders dated 29.03.2006, which additions were deleted by the CIT(A), whose decision was accepted by the

revenue and in these circumstances it cannot be said that the additions represented undisclosed income of the assessee.

16. We are in agreement with the contention (b). It can possibly be argued, as was held by the CIT(A), that even where there is a search it is not necessary that some incriminating material should have been found in the course of the search justifying the additions of undisclosed income because section 153A is so broadly worded that the assessments made there-under are not confined to undisclosed income or income to be added on the basis of any incriminating evidence gathered during the search. Even if such an extreme contention is acceptable, we do not see how finality of issues can be ignored and additions made in the earlier proceedings for the same assessment years which were deleted in appeal can be revived and added over again in the assessment made under section 153A of the Act. We do not think that the scheme of the Act permits matters that have become final between the assessee and the income tax authorities to be reopened and reagitated except by a process known to law. It is a well settled proposition under the Income Tax law that an assessment once made is final unless it is disturbed under the authority of law. In the cases before us the very same additions that are the subject matter of appeal before us were made in the earlier reassessments. Those additions were deleted by the CIT(A) by orders dated 26.06.2007. The orders of the CIT(A) were not challenged by the revenue by filing appeals before the Tribunal. Thus the orders of the CIT(A) became final between the parties. Even assuming that section 153A is vast and sweeping and the only condition therein is that there should be a search on the assessee, it would be against all cannons of justice and public policy to construe the section as giving authority to the Assessing Officer to disturb the finality of matters and make additions which have been held to be not justified. The revenue ought to have kept the matter alive by filing appeals to the Tribunal. As between the parties the orders of the CIT(A) deleting the additions have become final and have to be respected. It is a matter of no consequence that Shri Mukesh Choksi gave a further statement and affidavit during the present proceedings. It is a question of jurisdiction of the Assessing Officer to even attempt to examine matters which have already attained finality. In any case, the evidence of Shri Mukesh Choksi in the course of the present proceedings is nothing but a reiteration of what he stated in the course of the earlier reassessment proceedings. His evidence does not carry matters further in favour of the department.

17. Finality of assessments or judicial orders passed in appeal is sacrosanct and has been so recognized by the Courts. The judicial committee of the Privy Council in CIT vs. Khemchand Ramdas (1938) 6 ITR 414 (PC) held that after a final assessment is made, the Income Tax Officer cannot go on making fresh computations and issuing fresh notices of demand to the end of all time and it can be reopened only in the circumstances detailed in sections 34 and 35 of the 1922 Act and within the time limited by those sections. The Privy Council again in CIT vs. Tribune Trust, Lahore (1948) 16 ITR 214 (PC) reaffirmed the position and held that assessments once made would be valid and effective until they were set aside in the manner prescribed by the Act and if they are not so set aside, they are final. These decisions were approvingly cited by the Supreme Court in CIT vs. Rao Thakur Narayan Singh (1965) 56 ITR 234 (SC). In this case a decision of the Tribunal was sought to be circumvented by the Income Tax Officer by initiating proceedings for reopening the assessment despite the finding of the Tribunal. Commenting on the action of the Assessing Officer the Supreme Court held that since the finding of the Tribunal is binding on the Income Tax Officer, he cannot reopen the assessment and initiate proceedings all over again and that it could not have been the intention of the Legislature to enable the Income Tax Officer to reopen final decisions made against the revenue in respect of questions that directly arose for decision in earlier proceedings. It was observed that "*if that was not the legal position, we would be placing an unrestricted power of review in the hands of an Income Tax Officer to go behind the findings given by a hierarchy of Tribunals and even those of the High Court and the Supreme Court with his changing moods*".

18. Applying the above principles, we do not in the present case think that the intention of section 153A is to disturb matters that have reached finality between the parties. It is true that the provisions of the section apply notwithstanding anything contained in section 147 and section 148. But that only conveys the limited idea that once a search takes place, it is open to the Assessing Officer to assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted and in exercising such power, the Assessing Officer is not bound to take recourse to section 147 or section 148 of the Act. But that is only for the purpose of initiating proceedings for assessment under section 153A of the Act. It does not mean, in our humble opinion, that matters that have already been decided between the parties and had reached finality can be

disturbed and brought back to assessment. If such a power is given to the Assessing Officer, he could even nullify decisions of the High Courts and the Supreme Court, a power which would be wholly inconsistent with the law of the land. Section 153A cannot be construed in such a manner.

19. For the above reasons we are of the view that contention (b) of the assessee is well founded and the Assessing Officer has no jurisdiction to include the same additions, which were deleted by the CIT(A) earlier and whose orders have become final, in the assessments made under section 153A of the Act."

14.5 Similar view was taken in ***ACIT v. Rajkumar Shorewala, C.O. No.109/Mum/2010, AY 2001-02, order dated 31/3/2011***, wherein the Tribunal held as under-

"We have considered the issue. As examined from the orders of the A.O. passed originally under section 143(3) r.w.s. 147 dated 29.03.2006 the issues considered in that order were the same which are considered in the orders under section 143(3) r.w.s. 153A. It is also on record that there is no incriminating material found and seized in the search regarding these aspects on 28.06.2006. At that point of time the appeals before the CIT(A) were pending and the Revenue has not made out any effort to support the issues before the CIT(A). The CIT(A)'s order dated 28.06.2007 giving relief to the assessee on the disallowances made/additions made in original orders has not been contested in appeal. Thus those orders became final. In view of the Coordinate Bench decision relied upon, it was held that when the issues decided in assessment cannot be reconsidered and reagitated unless there is some fresh material found during the course of search in relation to such points. The learned D.R. tried to make out a case that consequent to the search enquires were conducted with Mr. Mukesh Chokshi and his statements were the basis for making the additions. We are afraid that this line of argument cannot be accepted as the search did not result in any incriminating material with reference to the genuineness or otherwise of the transactions undertaken by the assessee. As stated by the CIT(A) in his order the search was conducted in order to enquire the long term capital gains and sale of certain shares being indulged by the assessee group and the search resulted in identifying that the transactions have not been undertaken at all as the said shares were available in the demat accounts of the persons in the group including that of the assessee. There is also no incriminating material for the

allegation of cash being given and sale of shares obtaining by way of accommodation entries with the broking companies of Shri Mukesh Choksi. Under these circumstances, we are of the opinion that the A.O. has wrongly considered the same issues again in the order under section 143(3) r.w.s. 153A. On merits the CIT(A) already deleted the additions and the Revenue has not contested. Even in the case where it was contested in other assessees in the group the ITAT affirmed these orders of the CIT(A). Therefore there is no issue on merits."

15. **Issues relating to loss:**

The first issue that arises is whether loss could be claimed for the first time in the return of income filed in pursuance to notice issued in terms of provision of section153A. Here again, let us take an example of a person who has not filed his return of income at all wherein such person has suffered a loss. Now as per the normal provisions, the loss has lapsed since the return itself is not filed. If such person is searched and notice is issued, in my view, it is advisable to claim the loss for the reason that the assessment shall be made for every assessment year separately, which could include both disclosed as well as undisclosed income. Since all the provisions of the Act are applicable to the assessment made u/s.153A, so far as the same assessment year is concerned, the loss may be allowed to be set off with other income assessed for that year. But it may be difficult to carry forward the said loss in view of specific provision in terms of section 80 of the Act.

Another issue that arises is the carry forward and set off of undisclosed loss. In so far as the block assessment proceedings was concerned, the ratio laid down by the ***Hon'ble Mumbai Tribunal in BDA Ltd. v, Dy. CIT 65 ITD 501*** that since the block period is one single assessment, the undisclosed loss would be allowed to be set off against the undisclosed income irrespective of carry forward or carry backward position (which was although amended later), in the new provision of search cases, all the assessment / reassessment are to be separately made assessment year wise and hence, even the carry forward of undisclosed loss would be doubtful especially due to the provisions of sections 139 & 80, which may be difficult to overcome.

Another issue could be where loss is claimed in the original return and also allowed to be carried forward, but has lapsed due to insufficient profit in subsequent years. Now

if some income is assessed for such assessment year where the loss was available for set off, in my view, in such cases, the loss ought to be available for set off and therefore, advisable to claim such loss in the return filed in pursuance to notice issued under 153A proceedings.

16. **Abatement of assessment – some issues:**

The proviso to section 153A states that the assessment / reassessment on the date of initiation of search or requisition shall abate. The literal meaning of the word 'abate' means – the act of eliminating or nullifying; the suspension or defeat of a pending action for a reason unrelated to the merits of the claim. Therefore, if any assessment or reassessment is pending with the assessing officer, the same shall become a nullity and fresh assessment would be made in pursuance to notice issued under section 153A of the Act. This view is taken in ***Abhay Kumar Shroff v. CIT [2007] 290 ITR 114 (Jharkhand).*** The fact in that case was that search action was conducted on 24/8/2006. For AY 2004-05, return of income was filed u/s.139 of the Act and scrutiny assessment proceedings after issue of notice u/s.142 was pending as on the date of search action. The AO in that case did not issue notice u/s.153A of the Act but went on to complete the assessment for AY 2004-05 and passed assessment order u/s.143(3) of the Act. The High Court held that the pending assessment proceedings stood abated by virtue of second proviso to section 153A and hence, the action of the AO in completing the pending assessment was in contravention of the provisions of section 153A and therefore the assessment order passed u/s.143(3) dated 28/12/2006 stood abated and was a nullity.

I] The first issue arises is whether additions / disallowances can be made in 153A assessment even if no incriminating material is found and the assessment is already completed in terms of section 143(3) / 143(1). It has been held in number of cases that only pending assessment before AO gets abated and thus, the assessments that are not pending and completed either u/s.143(1) or 143(3) does not get abated and therefore for making any addition / disallowance u/s.153A for such assessment years, there needs to be some evidence found in the course of search action –

Guruprerna Ent. v. ACIT, Mumbai Bench 'G', order dated 7/1/2011 – Held that only the assessments pending before the AO for completion shall abate and that under section 153A the issues decided in the assessment cannot be reconsidered and

readjudicate, unless there is some fresh material found during the course of search in relation to such points. As in this case, the undisputed fact is that, there is no incriminating material found or seized in the search, the ground of the assessee has to be accepted*;*

Anil Kumar Bhatia v. ACIT, Delhi Bench, order dated 1/1/2010 – Held, " S. 153A provides that where a search is initiated u/s 132 the AO shall "assess or reassess the total income of **six assessment years** immediately preceding the assessment year" relevant to the previous year in which the search is conducted or requisition is made. The first proviso states that the AO shall "assess or reassess the total income in respect of each assessment year falling within such six assessment years" while the second proviso state that the assessment or reassessment relating to the said six assessment years "pending" on the date of initiation of the search under section 132 shall "abate". In the assessee's case, search action was initiated and assessments under s. 153A were framed for six assessment years making various additions. The assessee claimed that the additions were not tenable as regular returns had been filed where the particulars relating to the additions had been disclosed and the and the same had been accepted u/s 143(1) and also that no material had been found during the search to justify the additions.

The revenue claimed that **the effect of the provisos to s. 153A was that all assessments abate and there had to be a de novo assessment in which the AO was not confined to the material found during the search.** Rejecting the claim of the Revenue, it was held as under-

> (i) **S. 153A does not authorize the making of a de novo assessment.** While under the 1st Proviso, the AO is empowered to frame assessment for six years, under the 2nd Proviso, only the assessments which are pending on the date of initiation of search abate. **The effect is that complete assessments do not abate.** There can be two assessments for the same assessment year. **Assessments which are not pending before the AO on the date of search but are pending before an appellate authority will survive.**
>
> (ii) An assessment can be said to be "pending" only if the AO is statutorily required to do something further. If a s.143(2) notice has been issued, the assessment is pending. However, **the assessment in respect of a return**

processed u/s 143(1) is not "pending" because the AO is not required to do anything further about such a return.

(iii) The power given by the Proviso to "assess" income for six assessment years has to be confined to the undisclosed income unearthed during search and **cannot include items which are disclosed in the original assessment proceedings.**

(iv) On facts, s the returns had been processed u/s 143(1), the assessments were not "pending" and as no material was found during the search, the additions could not be sustained.

"We are of the considered view that since for all the assessment years in consideration, processing returns u/s 143(1)()(a) stood completed, for returns filed in due course before search, and no material being found in search thereafter, no addition can be made for agricultural income, gifts, unexplained deposit as stated in chart (supra)."

Anil P. Khemani v. DCIT, Mumbai Bench 'H', order dated 23/2/2010 – Held, A perusal of the assessment orders in all these cases, clearly demonstrate that the sole addition in question is on account of low withdrawals. This had not been made, based on any material found either during the course of search or during the course of assessment proceedings.

Relied upon the decision in Anil Kumar Bhatia, supra, and deleted the additions made.

Similar view taken in ***Meghmani Organics v. DCIT, 5 ITR (Trib) 360 (Ahd)***].

In ***ACIT v. SRJ Peety Steels (P) Ltd. (2011) 53 DTR 347 (Pune); Order dated 30/11/2010 -*** Search action was initiated on 17/3/2006 and the returns of income for AYs 2000-01 to 2005-06 had already been filed under s.139(1) and proceedings u/s.143(1) stood completed. When nothing incriminating was found in the course of search relating to any of these assessment years, the assessment for such years could not be disturbed. The returns have already been accepted and no assessment as such could be said to be pending on the date of initiation of search and abated in light of the provisions of section 153A.

II] What happens to the proceedings taken in furtherance of the completed assessments – whether would become infructous or would have to be dealt with independently. The issue is not free from doubt but in my view, the proceedings taken in furtherance to the completed assessment would have to be dealt independent of 153A assessment. This is for the reason that what the section envisage is that only the pending assessment would abate and not the completed assessment. Further, the issues taken in appellate proceedings are either on question of facts or law, and nothing to do with framing of 153A assessment and therefore, would have to be dealt with independently. [***Guruprerna Ent. v. ACIT, Mumbai Bench 'G', order dated 7/1/2011 – only assessment pending before AO shall abate***]

III] What happens in cases where the assessment is pending due to the direction given by CIT as per order passed u/s.263 of the Act and what would happen to the appeal filed and pending before the ITAT against 263 order. If one goes by object of the legislature, two parallel proceedings are to be avoided and hence, in such cases, the assessment would abate since it is pending on the date of search action irrespective of the fact that the assessment is in pursuance to direction of the CIT u/s.263 of the Act. If this view is upheld then the appeal filed before the ITAT would become infructous. But the disadvantage that could be faced is that the assessing officer may use the directions of the CIT or take in to account the directions of the CIT while framing assessment u/s.153A and may assess on such issues which were subject matter of 263 proceedings. Thus, if object of legislature and literal meaning of words used in section 153A is taken, the assessment would abate and all other proceedings would become infructous. However, looking at the disadvantage, reasonable view would be that the appeal filed and pending before the ITAT would survive so that if the order u/s.263 is quashed, the assessee could then argue that such issues are already agitated in the original assessment and hence, could not be once again reviewed in the assessment/reassessment framed u/s.153A of the Act.

IV] What happens to block assessment – whether abates? Take a case where a second search takes place after 31/5/2003 and there is a pending block assessment. Undoubtedly, the block assessment would be covering years over and above the years covered by the second search and hence, it is difficult to conclude that the block assessment would also abate. This view is further strengthened by the words used in

section 153A, which refers to independent assessment year and not a block of assessment years and since the block assessment is an assessment of six years together alongwith part period upto the date of search, it could not separate individual assessment year from the block and hence, in my view, the block assessment would not 'abate'.

17. **Year of Taxability:**

Unlike block assessment, the issue of year of taxability would take importance under the new provision, as was the case under the old provision prior to insertion of block assessment. The onus of proving that the income, which is assessed in year 1 relates to year 2, would be on the assessee challenging the assessment. This would increase litigation and it may happen that in some cases, the department may suffer as the income may go tax free for the reason of not assessing the same in the correct assessment year.

THIRD PARTY ASSESSMENT – CERTAIN ISSUES

18. **Whether 153C assessment could be made even if other person has disclosed the transaction, but is undisclosed of the person searched:**

The provision of section 153C could be analyzed by breaking the section as under-

A) ***To what extent 'satisfaction' of the assessing officer is required:***

The requirement of section 153C with reference to satisfaction seems to be only ***prima facie*** satisfaction and not a firm conclusive satisfaction. Thus, the Assessing Officer must be prima facie satisfied that the money, bullion, etc. found in the course of search belongs to the person other than the one searched. This satisfaction is required before invoking the proceedings under section 153C and hence, the material, documents, money, bullion, etc. belonging to other person must be found in the course of search action and not on subsequent information etc. Further, there is nothing in section 153C that requires an assessing officer to record the satisfaction in writing. Wherever the legislature required such recording, it has specifically provided to that effect such as section 148 for reopening of assessments where the reasons for reopening has to be recorded in writing. The ***Supreme Court in Manish Maheshwari v. ACIT 289 ITR 341 (SC)*** has held in the context of section

158BD that satisfaction need be recorded in writing & the procedure need to be followed of handing over the seized documents etc to the AO having jurisdiction of that other person and this is mandatory since the provisions dealing with search and seizure cases are draconion because six assessment years of a person is kept open for scrutiny by the department. This decision would be applicable also to section 153C of the Act. The ***Madras Tribunal in L. Saroja v. ACIT (2001) 76 ITD 344 (Mad)*** has taken this view in the context of section 158BD holding that when the basis of satisfaction is challenged, nothing precludes the Tribunal from finding whether there were materials or information before the assessing officer on the basis of which prima facie satisfaction was reached by him.

B) ***'belong' or 'belongs to' – what it connotes:***

The expression 'belong' is defined in the Oxford English Dictionary – "To be the property or rightful possession of." The ***Hon'ble Supreme Court in C.W.T. v. Bishwanath Chatterjee (1976) 103 ITR 539 (SC)*** in the context of Wealth tax Act has held that it is the property of a person, or that which is in his possession as of right, which is liable to wealth-tax. In other words, the liability to wealth-tax arises out of ownership of the asset, and not otherwise. Mere possession or joint possession, unaccompanied by the right to, or ownership of property would therefore not bring the property within the definition of "net wealth" for it would not then be an asset "belonging" to the assessee.

The expression "belonging to" has been the subject-matter of construction in many a decision and courts have construed that expression as meaning having proprietary rights or interests or ownership in the object in question.

The expression "belonging to" therefore is synonymous with ownership or proprietary rights in a particular property in question, and there can be no doubt that the expression "property belonging to a person" means the property which is of the ownership of that person – ***CWT vs. Harshad Rambhai Patel (1964) 54 ITR 747, 748 (Guj)***

The words "belonging to" need not necessarily connote ownership or proprietorship. The words are also used to indicate pertaining to, having a right or possession – ***Syed Khaja vs. Raghavendra Rao (1976) 103 ITR 296 (A.P.)***

> The expression "belonging to" occurring in a particular statute has to be understood in the context in which it is used and, in the context in which that expression is used in section 2(m) of the Act, we are clearly of the opinion that it means only the full and absolute ownership – ***A & F Harvey Ltd. vs. CIT (1977) 107 ITR 341 (Mad)***

After analyzing the provisions of section 153C as above, if the aforesaid two vital conditions are fulfilled, then the assessing officer may hand over such documents or assets, etc., to the assessing officer having jurisdiction over the other person. Whether such asset, transaction, etc., is disclosed by the other person or not, may not have much bearing as far as the assessing officer of the person searched is concerned since he has to only be prime facie satisfied that such asset, etc., belongs to other person. The disadvantage of section 153C is that once the documents, asset, etc., is handed over to the assessing officer of the other person, the provisions of section 153A are made applicable and therefore, even if such asset, etc., is recorded and disclosed to the department by such other person, the assessment may have to be framed for all the seven assessment years. This is more so for the reason that the words "Undisclosed Income" as were used in the context of section 158BD are absent in section 153C and hence, irrespective of whether the assets, etc., are disclosed by such other person, assessment would be framed u/s.143(3) r.w.s. 153C of the Act. The only disadvantage as far as the department is concerned would be the completion of assessment of such other person, the time limit for which is the same as that of the person searched and hence, the assets, etc., if handed over after the time limit of completion of assessment, assessment u/s.143(3) r.w.s. 153C would be out of question unlike the provisions that were in the case of block assessment.

In ***Singhad Technical Education Society v. ACIT; ITA Nos.114 to 117/PN/10, Pune Bench 'B', order dated 28/4/2011*** Search & seizure action u/s 132 was carried out in the case of Shri M.N. Navale, the President of the assessee Educational Society, in the course of which certain documents pertaining to the assessee were found. Based on the documents, the AO issued a notice u/s 153C and made an assessment on the assessee. The assessee challenged the s. 153C proceedings on the ground that the mere finding of documents in the premises of the searched

person was not sufficient if the documents were not "incriminating". Held upholding the challenge:

Though s. 153C confers jurisdiction if the AO is "satisfied" that "documents" seized belong to a person other than the person referred to in s. 153A so as to be able to assess that other person, the document must have prima facie incriminating information. The document seized must not only be a 'speaking one' but also be prima facie 'incriminating one' for attracting s.153C. If the impugned documents merely contain the notings of entries which are already recorded in the books of account or subjected to scrutiny of the AO in the past in regular assessment u/s 143(3) of the Act, such document cannot be said to be containing the incriminating information so as to confer jurisdiction u/s 153C**.**

C. <u>INTEREST</u>

19. The issue arises as to charging of interest. Suitable amendments have been made in sections 234A, 234B and 234C of the Act.

20. As per the provisions of section 234A, where the return of income is filed belatedly in pursuance of notice issued u/s.153A, interest would be charged and the same is mandatory. Therefore, it seems that return would have to be filed irrespective of whether the copies of seized material are given or not.

21. As per provision of section 234B, if first assessment for a particular assessment year is u/s.153A of the Act, then the same shall be treated as assessment for charge of interest u/s.234B and hence, the interest shall be charged on the demand raised as per the assessment framed u/s.153A of the Act. Where the original assessment is completed, the interest u/s.234B would be charged on the demand raised in the original assessment for the period up to the framing of the assessment u/s.153A and thereafter, on the demand outstanding as per the amount added by way of assessment made u/s.153A. This provision indirectly supports the view that assessment u/s.153A is not a de novo assessment and the completed assessment earlier ought not to be opened once again unless some material or evidence is found.

II APPEAL

22. The issue relates to the fees for filing of appeal to CIT(A) and more particularly to ITAT. After understanding the provisions relating to interest, etc., the assessment-framed u/s.153A would be inclusive of the amount assessed in the original assessment. Now take an example – original assessment was completed on assessed income of Rs.10 lakhs. The addition made by way of 153A assessment is say Rs.10,000/- only, which is required to be agitated. What will be the appeal fees is such a case? The provisions relating to filing fees refers to assessed income and hence, even though the addition contested is only Rs.10,000/-, the appeal fees may be related to the assessed income of Rs.10,10,000/- as per the assessment made u/s.143(3) r.w.s. 153A of the Act and not merely Rs.10,000/-. Thus, unless the constitution validity is challenged, it may be difficult to come out of the provisions based upon assessed income. The cost of filing fees increases for the assessee for the reason that under the scheme of block assessment, there was only one order and one appeal was to be preferred. Under new provision, separate assessment year is to be framed and hence, separate fees will have to be paid for each of the assessment year where the assessee wants to prefer appeal.

III PENALTY

23. **Whether immunity from penalty in terms of Expl. 5/5A to Sec. 271(1)(c) / 271AAA available:**

As per Explanation 5 to section 271(1)(c) of the Act, immunity is available only for the year of search and that too if the conditions are fulfilled i.e. the statement is given u/s.132(4) of the Act disclosing the income, the manner of earning the income is categorically stated and the amount of tax is paid on the same. In the speech of the Finance Minister for the Budget of 2003 (260 ITR (St.) 27), it is clearly stated that in the course of search proceedings, no confessional statement is to be recorded. After the Finance Minister's speech, the Central Board of Direct Taxes has issued instruction dated 10/3/2003, stating clearly that no confessional statement is to be recorded. In this circumstances, the department officers may not record any confession in the statement taken u/s.132(4) of the Act and hence, the assessee may not get immunity even for the year of search. The question that may arise is whether the disclosure offered by way of letter or otherwise in the course of search proceedings itself explaining in detail the manner of earning, etc. and also making the payment of tax on the amount of disclosure would suffice the assessee from availing immunity from

penalty. In my view, this may not be sufficient for the reason that Explanation 5 specifically refers to disclosure made in the statement recorded u/s.132(4) of the Act and such statement is recorded by the authorized officer on oath as per the provision of section 132(4) and hence, the disclosure made otherwise by way of such statement may not be fruitful to come outside the guise of penalty proceedings and therefore, it is advisable to make disclosure, if any, only in the statement recorded u/s.132(4) of the Act by also fulfilling other conditions laid down in Explanation 5 to section 271(1)(c).

As far as the other years are concerned, issue may arise as to whether the penalty would be initiated vis-à-vis the original return of income or the return of income filed in pursuance to notice issued under section 153A of the Act. If one were to minutely analyze Explanation 5 to section 271(1)(c) of the Act, irrespective of whether the penalty is to be initiated with reference to the original return of income or the return of income filed in pursuance to notice issued u/s.153A, it may be very difficult to come out of Explanation 5 to section 271(1)(c) of the Act and therefore, it is felt that the penalty provision may become almost mandatory in each and every case of search and for all the assessment years.

Explanation 5A:

Inserted w.e.f. 1/6/2007 and provides as under-

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 in the new Explanation) and claims that such assets have being acquired by him by utilizing (wholly or in part) his income for any previous year; 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 clause (c) of sub-section (1) of this section, be deemed to have

concealed the particulars of his income or furnished inaccurate particulars of such income.

The provision of Explanation 5A replaces the old Explanation 5 and relates to assessment year/s prior to the year in which search action is conducted and for which the due date of filing the return of income has expired as on the date of search action and no return of income is filed for that year. The Explanation 5A seeks to make stringent provision in respect of concealment penalty in relation to a person searched because the penalty is to be levied also in respect of income that is recorded in the books of account of the assessee in cases where the due date for filing the return of income has expired and no return of income is filed before the date of search action for that assessment year. Thus, even though regular books of account are maintained and the entries are duly recorded in the books of account, the income would be deemed to be concealed income if the due date for furnishing the return has expired and no return of income is filed as on the date of initiation of search action. In other words, the assessee is required to file the return of income within the due date. Further, there is no reasonable cause provided in the section for not filing return of income in time. However, as per the amendment made in Explanation 4(b), even though there is no such provision in Explanation 5A, credit for the taxes paid for that year ought to be allowed while computing the amount of penalty for the reason that similar provision for deeming concealment of income exists in Explanation 3.

Section 271AAA:

Section 271AAA provides that, in a case where search has been initiated under section 132 on or after 1st June, 2007, 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 ten per cent 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 sub-section (4) of section132 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 clause (c) of sub-section (1) of section 271 shall be levied or imposed upon the assessee in respect of the undisclosed income referred to in this section. 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 the new section.

For the purposes of this section it has been defined undisclosed income so as 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 Chief Commissioner or Commissioner 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, it has also defined specified previous year so as to mean the previous year—

(i) which has ended before the date of search, but the date of filing the return of income under sub-section (1) of section 139 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.

Immunity is provided from the levy of penalty if the conditions specified in the section are fulfilled, which conditions are more or less similar as were in the old Explanation 5 to section 271(1) of the Act except to the extent that additional burden is cast upon the assessee to substantiate the manner of earning of the income disclosed. The immunity is provided for the specified year/s, which is defined in the provision itself i.e. the year

of search and the year proceeding the year of search if the due date of filing return of income is not expired when the search is initiated and no return of income is filed for that year. As per the section, if the undisclosed income found is not offered, no immunity would be provided and in that case, the penalty would be 10% of the undisclosed income and the provision of section 271(1)(c) would not be made applicable in respect of such undisclosed income. In other words, penalty would be levied at the rate of 10% of the undisclosed income in cases where no disclosure is made in the statement and / or the other conditions specified therein are not fulfilled. Thus, the immunity is only in respect of amount disclosed in the course of search action and all the conditions specified therein are duly fulfilled.

The definition of undisclosed income is more or less similar to section 158B(b). The definition of undisclosed income also covers the expenses, which are found to be false and such expenses would not have been found to be false otherwise than search action. In other words, it is only the search action wherein the expenses ought to be found to be false and not otherwise.

24. **Whether Explanation 3 to section 271(1)(c) is attracted even in case of disclosed income in the books of account but no return of income is filed within the time limit as prescribed under Explanation 3 to section 271(1)(c).**

Explanation 3 to section 271(1)(c) is amended to the effect that earlier it was applicable only in cases of new assessees whereas now it is made applicable to all the assessees and therefore, even in cases where the income is recorded in the regular books of account but the return of income is not filed for any reason within the time limit prescribed under the said explanation 3, the assessing officer may initiate and levy penalty in respect of incomes, which are recorded in the regular books of account.

IV. PROSECUTION

25. **Whether prosecution vis-à-vis original return of income:**

As per the provisions of sections 276C & 276CC of the Act, the prosecution could be launched vis-à-vis the original return of income and not only with reference to the return of income filed in pursuance to notice issued u/s.153A of the Act. The

prosecution could be launched not only for filing false return or inaccurate particulars of income, but also for delay in filing of the return of income in terms of section 276C. Thus, in nutshell, the new provisions of search and seizure are made very strict and the person searched may have to face all the rigors of tax, interest, penalty and prosecution under the Income tax Act.

CONCLUSION

The new provisions for search and seizure are very harsh and the object of the legislature seems to punish all such person who are not disclosing their income, etc. correctly or persons who are though liable to tax are not filing their return of income at all. The distinction seems to be between the honest tax-payers and the tax evaders and rightly so because under the scheme of block assessment, such strict and harsh provisions were absent and the person searched could get away with on the ground of technicalities, etc. One of the best recourse for the person searched could be Settlement Commission forum since the forum has power to grant immunity from penalty, if not interest, and also to grant immunity from prosecution.

The subject is very wide and vast and I have presented some of the issues. I thank the organizers for giving me an opportunity for the same.

Charter of Rights & Duties of persons searched – reported in [1994] 208 ITR (St.) 5:

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 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 of 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.
- Every person who is examined under section 132(4) has a right to ensure that the facts so stated by him have been recorded correctly.
- To have a copy of the panchanama together with all the annexures.
- To have a copy of any statement that is 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 make an application objecting to the approval given by the Commissioner of Income-tax for retention of books and documents beyond 180 days from the date of the seizure.

6.2 Duties of the person searched

- To allow free and unhindered ingress into the premises.

- To see the warrant of authorisation and put signature on the same.
- 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 impersonation. If he cheats by pretending to be some other person or knowingly substitutes one person for another, it is an offence punishable under section 416 of the Indian Penal Code.
- Not to allow or encourage the entry of any unauthorised person into the premises.
- 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 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 –
- If he refuses to answer a question on a subject relevant to the search operation, he shall be punishable with imprisonment of fine or both, under section 179 of the Indian Penal Code.
- 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 under section 181 of the Indian Penal Code.
- Similarly, if he provides evidence which is false and which he knows or believes to be false, he is liable to be punished under section 191 of the Indian Penal Code.
- To affix his signature on the recorded statement, inventories and the panchanama.

- 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 investigations at the earliest.

7. Do's and Don'ts for assessees

1. Return of income should be filed within the time limit prescribed.
2. Copies of returns of income filed should be properly documented. Though your tax representative may be having and maintaining complete tax records, it is necessary that a copy of income tax and wealth tax returns filed are kept at office premises and in case of individuals, it should also be maintained at residence for all family members.
3. Books of account are maintained properly and upto date.
4. You may be called upon to explain any document, loose papers, etc. found during search or survey. As such, care should be taken to maintain papers in proper manner.
5. Investments made in assets should be properly accounted and supporting evidence should be available to substantiate the investment made.
6. Ornaments belonging to different members of the family should be kept separately. It is advisable to keep lists of the ornaments of each person and also where the ornaments are kept. Valuation report of a jeweller can be obtained. Also Tax records substantiating such ownership should be available at residence.
7. Statement recorded at the time of search are very crucial. The person making statement is advised to state truly, correctly, fully and completely. Reply should not be vague or evasive. One should be very cautious and careful while answering the question and the person should not panic.
8. Further, necessary co-operation should be made with the authorised officers. As per amendment made by the Finance Act, 2002, if a person who is required to afford the authorised officer the necessary facility to inspect the books of account or other documents maintained in electronic form, fails to afford such facility to the authorised

officer, he shall be punishable with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine.

Taxpayers charter - Every taxpayer is entitled to expect the Income-tax Department:

To be fair

- in deciding tax matters, by providing a right to be heard and by being objective and impartial ;
- in collecting the taxes that are legitimately due.

To provide quality service

- by settling tax affairs promptly ;
- by keeping personal and private information furnished to the Department confidential ;
- by being courteous to the taxpayers.

To assist him

- in understanding the rights and duties under the tax laws ;
- in availing of the benefits and concessions due to him ;
- in getting information and assistance at the enquiry counters.

And in return, the Income-tax Department expects the taxpayer

- to extend co-operation to tax officials in the matter of assessment and collection ;
- to voluntarily disclose his correct income and pay the taxes due ;
- to discharge his statutory obligations in time ;
- to provide true and complete information.

Other guidelines - With a view to focus on high revenue yielding cases and to make the optimum use of manpower, the Board has decided that officers deployed in the Investigation Wing should restructure their activities. They should henceforth strictly adhere to the following guidelines:

(*i*) Searches should be carried out only in cases where there is credible evidence to indicate substantial unaccounted income/assets in relation to the tax normally paid by the assessee or where the expected concealment is more than Rs. 1 crore;

(*ii*) Search operation will also be mounted when there is evidence of hidden unaccounted assets arising out of a conspiracy to cause public harm, terrorism, smuggling, narcotics, fraud, gangsterism, fake currency, fake stamp papers and such other manifestations;

(*iii*) Tax payers who are professionals of excellence should not be searched without there being compelling evidence and confirmation of substantial tax evasion.

Henceforth, search operations shall be authorised only by the concerned DGIT (Inv.), who will be accountable for the action initiated by the officers working under him. He should also ensure that all the work relating to search and seizure, like post-search inquiries, preparation of appraisal report and handing over of seized books of account, etc., should be completed by the Investigation Wing within a period of 60 days from the date on which the last of the authorisations for search was executed - *Instruction : No. 7/2003, dated 30-7-2003*.