

Whether an Income Tax survey proceedings u/s 133A of the Income Tax Act'1961 can be converted into an Income Tax Search and Seizure action u/s 132 of the Income Tax Act '1961



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I. Introduction:

It is seen in practice that in course of search and seizure action on large business houses u/s 132 of the act, surveys u/s 133A of the act are also conducted on such associates and entities having close nexus with the person(s) so searched under Section 132 of the act. Sometimes it is also seen that surveys conducted u/s 133A of the act for limited purpose of gathering information are eventually converted into search and seizure action u/s 132 of the act. This article has been primarily penned down for putting forth the legality of conversion of such Income Tax Surveys into a full fledged Income Tax Search and Seizure action u/s 132 of the Income Tax Act'1961 (hereinafter also referred to as "the Act").

II. Governing Law:

A Search and Seizure action is governed by Section 132 of the act and survey action is governed by Section 133A of the act. The power of entry into the residential and business premises prescribed under section 132 of the act can be exercised by the income-tax authority only, in consequence of information in his possession and also with an additional condition that such authority should have reason to believe, on the basis of such information, that there is wilful omission, non-compliance or concealment on the part of the assessee. Under section 132, an income-tax authority can enter and search any building, break open the lock of any door, search any person, seize any books, money, bullion, jewellery or other valuable article, make a note of inventory of any such money, bullion, etc. He may also examine on oath any person and any statement obtained during such examination may thereafter be used in evidence in any proceeding under the Act. Whereas for exercising power of survey under section 133A of the Act, no such prior information

or reason is necessary and it also overrides other provisions of the Act with *non obstante* clause. In the survey operation, the income-tax authority can enter only the business premises and also only during the hours at which such place is open for the conduct of business or profession. Under the power of survey under section 133A, an income-tax authority can inspect the books of account, make an inventory of cash, stock or other valuable article or thing checked or verified by him, record a statement of any person which may be useful for, or relevant to, any proceeding under the Act. The information so collected may be used in any proceeding, which may be past, present or future proceeding. The Act has prescribed a special procedure for assessment of search cases. No such kind of special procedure is prescribed for making assessment on the basis of information collected during the course of survey under section 133A. Section 133A talks of the powers conferred upon an income-tax authority to enter in a place and inspect such books of accounts or documents as necessary. There is also difference with regard to the treatment of the statement recorded both under section 132 and section 133A. Under the provisions of section 132(4), the statement recorded during the search proceedings may be used as "evidence in any proceedings" under the Act. However, the same status of "evidence" is not accorded to the statement recorded under section 133A. This difference has been pointed out by ***Hon'ble Kerala High Court in the case of Paul Mathews & Sons v. CIT [2003] 263 ITR 101***. Hence, the statement taken under section 133A during the survey cannot have same value as evidence as compared to the statement recorded during search under section 132(4).

From the departmental perspective, the conversion of survey into search also gathers strength from the Instruction of the CBDT No. F.No.414/16/2014-IT(INV.I) dated 30.09.2014 wherein it was instructed that where cash amounting to more than Rs. 10 lacs (Rs. 15 lacs in case of Delhi, Mumbai, Kolkata, Chennai, Ahmedabad, Pune, Bangalore and Hyderabad) is found at the premises during the survey under Section 133A of the Act, the Director of Income Tax (Investigation) having territorial jurisdiction over the survey should be intimated to examine the facts for taking recourse to Section 132(1) of the Act.

Furthermore, due to limited applicability of Section 133 A, it is seen that the department is compelled to resort to convert such survey a action into search in certain cases particularly where:-

- Incriminating material highlighting undisclosed income assets are kept at the residential premises and no statement to this effect is given by the assessee so as to cover the said premises in term of Explanation to Section 133A(1).

- Where the circumstances demand to break open the safe, box, almirah, locker etc. where the incriminating material and/or the undisclosed asset are secreted.
- Where large quantum of undisclosed cash and valuables which are required to be seized which otherwise can't be seized or impounded during the course of survey.
- Non compliance of surveys may also trigger the department to convert survey into a search action.

III. Now the question arises as to whether such conversion of survey proceedings into Search and Seizure action is legal and permissible under law.

At the very outset, it is most pertinent to mention here is that the authority and power to conduct search and seizure operations is strident and caustic power authorized by law to be taken recourse to when the conditions mentioned under different clauses of Section 132 (1) of the Act are satisfied.

The jurisdictional facts that have to be established before a search under Section 132 (1) of the Act can be authorised are that (i) the authority issuing the authorisation is in possession of some credible information, other than surmises and conjectures (ii) that the authority has reason to believe that the conditions stipulated in clauses (a), (b) and (c) of Section 132 (1) qua the person searched exist; and (iii) the said information has nexus to such belief. The law is well settled that a warrant of search and seizure under Section 132(1) can only be issued on the basis of some material or information on which the Commissioner/Director has reason to believe that any person is in possession of money, jewellery or other valuable articles representing wholly or partly income or property which has not been or would not be disclosed, under the IT Act. The satisfaction of the authorities under Section 132 must be on the basis of relevant material or information. The word used in Section 132(1) are "reason to believe" and not "reason to suspect".

Therefore, unless and until, the ingredients of Section 132 are met, a survey action can't be converted into a search. A conversion of survey into search or seizure cannot be sustained unless it is clearly shown that it was done by an authority duly authorised and all conditions precedent in relation thereto exist. A search conducted under section 132 invades the privacy of a citizen. Thus, formation of the opinion or reason to believe by the authorizing officer must be apparent from the records of the

case. The opinion or the belief so recorded should clearly demonstrate that the case falls within any one or more clauses contained in clauses (a), (b) and (c) of sub-section (1) of section 132.

Search and seizure provisions in the Income Tax Act, 1961 were introduced by Finance Act, 1964 and have undergone a number of amendments including substantial amendments made by the Taxation Laws (Amendment) Act, 1975 and Direct Tax Laws (Amendment) Act, 1987. Sections 132(1) of the Act as it exist read as under (relevant part for discussion only):—

"132. (1) Where the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that—

- (a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or*
- (b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or*
- (c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),*

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IV. Judicial Pronouncements:-

In L.R. Gupta v. Union of India [1992] 194 ITR 32 (Delhi), the law is stated in following terms:

"A search which is conducted under section 132 is a serious invasion into the privacy of a citizen. Section 132(1) has to be strictly construed and the formation of the opinion or reason to believe by the authorizing officer must be apparent from the note recorded by him. The opinion or the belief so recorded must clearly show whether the belief falls under sub-clause (a), (b) or (c) of section 132(1). No search can be ordered except for any of the reasons contained in sub-clause (a), (b) or (c). The satisfaction note should itself show the application of mind and the formation of the opinion by the officer ordering the search. If the reasons which are recorded do not fall under clause (a), (b) or (c), then the authorization under section 132(1) will have to be quashed. . . ." (p. 50)

In *Seth Bros.* case (***ITO v. Seth Bros. [1969] 74 ITR 836 (SC)***), the Apex Court has stated the law as under:—

"The section does not confer any arbitrary authority upon the revenue officers. The Commissioner or the Director of Inspection must have, in consequence of information, reason to believe that the statutory conditions for the exercise of the power to order search exist. He must record reasons for the belief and he must issue an authorization in favour of a designated officer to search the premises and exercise the powers set out therein. The condition for entry into and making search of any building or place is the reason to believe that any books of account or other documents which will be useful for, or relevant to, any proceeding under the Act may be found. If the officer has reason to believe that any books of account or other documents would be useful for, or relevant to, any proceedings under the Act, he is authorised by law to seize those books of account or other documents, and to place marks of identification therein, to make extracts or copies therefrom and also to make a note or an inventory of any articles or other things found in the course of the search. Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorizes it to be exercised. If the action of the officer issuing the authorization or of the designated officer is challenged, the officer concerned must satisfy the court about the regularity of his action. . . ." (p. 843)

In ***Ajit Jain v. Union of India [2000] 242 ITR 302 (Delhi)***, it has been observed thus :

". . . 'Information' in consequence of which the Director General or the Chief Commissioner, etc., as the case may be, has to form his belief is not only to be

authentic but capable of giving rise to the inference that a person is in possession of money, etc., which has not been or would not be disclosed for the purpose of the Act. In other words, it must necessarily be linked with the ingredients mentioned in the section. While the sufficiency or otherwise of the information cannot be examined by the court in writ jurisdiction, the existence of information and its relevance to the formation of the belief is open to judicial scrutiny because it is the foundation of the condition precedent for exercise of a serious power of search of a private property or person, and to prevent violation of the privacy of a citizen. The words 'reason to believe' mean that a reasonable man, under the circumstances, would form a belief which will impel him to take action under the law. The formation of opinion has to be in good faith and not a mere pretence. For the purpose of section 132 of the Act, there has to be a rational connection between the information or material and the belief about undisclosed income which has not been and is not likely to be disclosed by the person concerned. A bare intimation by the police or for that matter by any person, without something more, cannot be considered sufficient for action under section 132 of the Act, for it would be giving naked powers to the authorities to order search against any person and is prone to be abused. This cannot be permitted in a society governed by the rule of law." (p. 303)

In ***Vindhya Metal Corpn. v. CIT [1985] 156 ITR 233 (All.)***, it was observed that:—

"It is settled that the existence or otherwise of the condition precedent to exercise of power under these provisions is open to judicial scrutiny. The absence of the condition precedent would naturally have the effect of vitiating the authorization made by the Commissioner in either of the two provisions and the proceedings consequent thereto. While the sufficiency or otherwise of the information cannot be examined by the court, the existence of information and its relevance to the formation of the belief can undoubtedly be gone into. Also, whether on the material available with the Commissioner, any reasonable person could have arrived at the conclusion that a search, seizure or requisition should be authorised is a field open to judicial review. . . ." (p. 239)

The said decision was affirmed by the Apex Court in ***CIT v. Vindhya Metal Corpn. [1997] 224 ITR 614*** in following words:—

"Vinod Kumar Jaiswal', according to the information in the possession of the Commissioner, was not borne on the General Index Register of Income-tax assesseees of the Income-tax Officer at Mirzapur to which place he belonged.

Obviously, therefore, there was no occasion for him to have disclosed the amount as his income in any assessment proceedings under the Act. Without anything more than what was actually there before the Commissioner, how could it have been assumed that he would not have disclosed it for purposes of any proceedings under the Act. There was nothing before the Commissioner to suggest that it was, in fact, wholly or in part, income of any person connected with Vinod Kumar Jaiswal so as to induce a belief that, if called upon, Vinod Kumar Jaiswal would not have disclosed it for the purpose of the Act. The mere fact that Vinod Kumar Jaiswal was in possession of this amount and did not have any documents with him regarding its ownership or possession could not be treated as appears to have been done by the Commissioner as information relating to a conclusion that it represented income which would not have been disclosed by Vinod Kumar Jaiswal for purposes of the Act. Mere unexplained possession of the amount, without anything more, could hardly be said to constitute information which could be treated as sufficient by a reasonable person, leading to an inference that it was income which would not have been disclosed by the person in possession, for purposes of the Acts." (p. 618)

The Allahabad high court had the occasion to examine the issue of conversion survey into search in ***Rich Udyog Network Ltd.v. Chief Commissioner of Income-tax [2015] 63 taxmann.com 88 (Allahabad)*** wherein the court held that the survey proceedings have been rightly converted into search after fulfilling the ingredients of Section 132 of the act.

Brief Facts of the case are as under:

- During the course of survey under section 133A, which was conducted after due approval of the Competent Authority, certain huge amount of cash was found from the premises of the petitioner assessee company along with the incriminating documents showing huge cash transactions. The statement of the Director of the assessee was recorded under section 131(1A), who was asked to explain the source of cash. He failed to explain the source of cash. He was also asked to explain various entries in the documents where the assessee was taking cash from various parties and returning the money by cheque to the same parties. He was asked to furnish the books of account of all the companies allegedly doing business from the premises in question, which he failed to produce. There, were also entries, which showed that assessee was taking payment in cheque and returning the money after taking commission in cash. These facts were confronted to the director and he failed to produce any explanation and only stated that Managing Director of the assessee would be in a position to explain as he was the main person.

- Based on the dubious entries in the documents found at the premises and the unexplained cash found was taking cognizance to convert the survey into a search. After obtaining administrative approval from the Director General of Income-tax (Investigation), a warrant of authorisation was issued under section 132(1) to seize the unaccounted cash and documents from the premises of the assessee and other companies.
- On writ the petitioner assessee contended that the action of the respondent department in converting the survey under section 133A into a search under section 132 was wholly illegal and without jurisdiction. Merely because some cash was found would not entitle the authorities to convert the survey into a search operation.

The court held as under:

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- Section 132(1) has to be strictly construed and the formation of the opinion or reason to believe by the Authorising Officer must be apparent from the note recorded by him. The opinion so recorded must clearly show whether the belief falls under clause (a), (b) or (c) of section 132(1). No search can be ordered except for any of the reasons contained in clause (a), (b) or (c). The satisfaction note should itself show the application of mind and the formation of the opinion by the officer ordering the search. If the reasons, which are recorded, do not fall under clause (a), (b) or (c), in that event, the authorisation issued under section 132(1) will become illegal and will have to be quashed as held in *L.R. Gupta v. Union of India* [1992] 194 ITR 32/[1991] 59 Taxman 305 (Delhi). [Para 12]
- In order to attract clause (c) of section 132(1), there must be 'information' with the authorising authority relating to two matters, namely, that any person is in possession of money, etc., and secondly, that such money, etc. represents either wholly or partly income or property, which has not been or would not be disclosed for the purposes of the Act. The search would be valid if the authorising authority had reasonable ground for believing that a search was necessary and that he further believes that the required object cannot otherwise be obtained without undue delay. It is opinioned clauses (a), (b) and (c) of section 132(1) spells out the circumstances under which authorising authority may issue a warrant of authorisation. Such authorisation is possible only if the authorising authority in consequence of information in his possession has reason to believe the existence of the circumstances enumerated in clauses (a), (b) and (c) of section 132(1). [Para 13]

- In order to justify the action under section 132, it is incumbent upon the authority to collect relevant material on the basis of which, the authority can form an opinion that he has reasons to believe that an action under section 132 would be justifiable. The expression 'information' must be something more than a mere rumor, gossip or hunch. There must be some material, which can be regarded as 'information', which must exist on the file, on the basis of which the Authorising Officer can have 'reason to believe' that an action under section 132 is called for any of the reasons mentioned in clauses (a), (b) and (c). [Para 14]
- The words 'has reasons to believe' as provided in section 132(1) postulates a belief and existence of reasons for that belief. The belief must be held in good faith: it cannot be a mere pretence. Such belief should not be based on mere suspicion but must be based on information which is in the possession of the authorising authority. The formation of the belief within the meaning of section 132(1) is a condition precedent to the authorisation of search and seizure. It is basically a subjective step essentially to make up one's mind as to whether on the basis of information available he had or had not formed the reasons to believe. This belief, cannot be a mere pretence nor can it be a mere doubt or suspicion but has to be something more than that. [Para 15]
- From perusal of the record, it is found that the warrant of authorisation was issued after according approval from the competent authority. The contention of the petitioner that the search was conducted without recording satisfaction since it was only a survey conducted under section 133A appeared to be attractive in the first blush but upon perusal of the record, it is found that the department had definite information about the clandestine activity of the petitioner and upon recording a satisfactory note permission was accorded from the competent authority for a survey under section 133A based on this permission, a survey was made and incriminating evidence was found. The statement of one of the Directors' were recorded in which the said Director failed to provide any explanation with regard to the cash found at the premises in question and also failed to explain various entries in the documents, which indicated that the petitioner was taking cash from various parties and returning the money via cheque to the same parties. This unexplained cash and dubious entries in the documents fortified the belief and gave reasons to believe that there was undisclosed income, which would not have been disclosed in ordinary course and accordingly, a satisfactory note was prepared upon an application of mind and requesting a search to be conducted. It is also found that the competent authority, after considering the matter, recorded its satisfaction and issued authorization for conducting a search under section 132. [Para 16]

- The contention that the mere fact that cash was found could have been utilized in assessment proceedings and that the same cannot be a ground to convert the survey into a search operation under section 132 cannot be accepted. It is found that the petitioner's had not brought on record the statement of the Director, who was examined during the course of search but upon perusal of the original record, it is found that the Director was repeatedly asked to explain the source of the cash and entries. Since no plausible reply came forward and the Director was unable to explain the entries, which showed that the petitioner was taking cash from various parties and returning the money via cheque to the same parties and vice-versa, the authorities had reasons to believe that the petitioner's would not produce or cause it to produce the books of account or documents evidencing true state of affairs, even if summons under section 131 or notice under section 142 was issued. [Para 20]
- In this regard, it is found that the Central Board of Direct Taxes has issued Instructions dated 30-9-2014 indicating that where cash amounting to more than Rs. 10 lakhs is found at the premises during the survey under section 133A, the Director of Income-tax (Investigation) having territorial jurisdiction over the survey should be intimated to examine the facts for taking recourse to section 132(1). [Para 21]
- In the light of this instruction, there is no hesitation in holding that pursuant to the survey and the undisclosed cash and unexplained entries found, steps to covert the survey into a search was rightly taken. [Para 22]
- Consequently, it is opined that in the facts and circumstances of the case, the authorities had information based upon material which led to a valid survey being conducted under section 133A. Based on further incriminating evidence that came forward during the course of survey, a satisfactory note was placed before the competent authority, who after considering the material recorded his satisfaction. Such satisfaction recorded was in accordance with the provision of section 132. [Para 23]
- The writ petition is dismissed. [Para 25]

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The High court of Punjab and Haryana in case of ***Vinod Goel v. Union of India [2001] 118 TAXMAN 690 (PUNJ. & HAR.)*** also justified the conversion of survey action into search.

To the contrary, the Hon'ble High court of Punjab and Haryana in case of ***Pawan Kumar Goel v Union of India [2019] 107 taxmann.com 21 (Punjab &***

Haryana) has held conversion of survey action into search as illegal as survey at residential premises of assessee could not have been converted into search and seizure without tax authorities recording that assessee he had failed to co-operate or there was a suspicion that income had been concealed by assessee warranting resort to process of search and seizure. On the similar lines, the Hon'ble High Court of Delhi in case of **Nalini Mahajan v. Director of Income-tax 252 ITR 123** held that if the survey is converted into search without fulfillment of conditions precedent for initiating search or without application of mind or satisfaction by the higher authority eligible to initiate search then the search will be illegal.

Epilogue:-

Therefore in view of the intent of the law and judicial pronouncements, a survey action cannot be converted into a search action except for fulfillment of any of the reasons contained in sub-clause (a), (b) or (c) of Section 132(1) of the act carved out as a reason to believe based on some credible information. Undoubtedly the satisfaction note recorded as precursor to the issuance of the warrant of authorization of search should itself show the application of mind and the formation of the opinion by the officer ordering such search.

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About CA. Mohit Gupta:

CA Mohit Gupta's forte is handling Income Tax Search and Seizure matters, matters before the Income Tax Settlement Commission, direct tax litigation matters, matters relating to Prevention of Money Laundering Act, Benami Prohibition Act, Black Money Act and other economic and financial laws . As on today, he has wide experience of handling Income Tax Search and Seizure Cases, representing matters before the Income Tax Settlement Commission, ITAT and other appellate tribunals. He has been contributing on regular basis articles in various professional magazines/journals and addressing various seminars on topics relating to Income Tax Search and Seizure, Income Tax Settlement Commission and other allied tax matters. He has to his credit plethora of well researched articles out of which many have appeared in leading journals, tax websites , e-platforms and professional tax federations . In Addition to the above, Mr. Mohit Gupta has carried out numerous Special Audits on being appointed by the Income Tax department across the country which have plugged tax evasions, tax base erosion and other tax manipulative practices and in turn facilitated the Income Tax Department to collect huge tax revenues. Mr. Mohit Gupta, authored the periodical Newsletter on Income Tax Search and Seizure. The said newsletter contained well researched write ups / articles and judicial developments on the matters of Direct Taxation. The newsletter was circulated both electronically and otherwise. Mr. Mohit Gupta have also authored comprehensive books on the subject of Income Tax.

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