

**Issuance of notice u/s 131 (1A) of the Income Tax Act'1961  
after conclusion of Income Tax Search and Seizure u/s 132  
of the Income Tax Act'1961 – Legal Paradox**



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**Introduction:**

Ever since the enactment of the original Income-tax statute of 1922, the Income-tax authorities have been vested with certain powers that are coterminous with the powers of a Court under the Code of Civil Procedure, 1908. Section 131 of the Income-tax Act, 1961 is one such provision which includes, inter alia, the power to enforce the attendance of any person and examine him on oath.

The justification or rationale for these powers, depending on the reader's point of view, is amply supported by the well-settled and pervasive judicial principle of 'audi alterem partem,' (no one be condemned unheard) in spite of the equally well-settled principle that 'nobody can be compelled to render evidence against himself'.

The powers u/s 131(1) are exercised for the proper administration of tax laws and for obtaining further elucidation, on information available with the authorities, from the assessee concerned. It enables the authorities to conduct inquiry and collect evidences in support of their contentions. It also helps to bring to light the correct facts and circumstances, for the purpose of carrying out proceedings under the Act and is treated to be equally fair to the Department as well as the assessee.

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Section 131(1A) was introduced with effect from 1-10-1975 to empower the officers of the Investigation Wing (also to include officers authorized to carry out search operations i.e 'authorised officers'), to exercise the powers mentioned in the Section 131(1).

The said provision was introduced to nullify the effect of the ruling of the Calcutta High Court in the case of **UOI v. Gopal Das Gupta, (1974 Tax LR 656)** wherein the Court held that the officer of the Investigation Wing had no power to issue a notice u/s.131 and record a statement of the person under the said Section as the same was available to the assessing officer.

This practical difficulty was explained by the Departmental Circular No. 551 dated 23-1-1990 which was issued to explain the scope and effect of the amendment in the following words :

". . . difficulty felt was that an authorized officer could record a statement on oath only during the course of search under the provisions of Section 132(4). Sometimes it becomes necessary to record a preliminary statement before the commencement of search for proper investigation. This was not possible as the Courts had held that such a preliminary statement before the search could not be re-corded under the provisions of S. 132(4) . . ."

To overcome these difficulties, the Income Tax Act , Section 131(1A) was introduced to extend similar powers to an 'authorised officer' within the meaning of Sub-Section (1) of Section 132 before he takes search and seizure action under clauses (i) to (v) of that sub-section.

### **Section 131(1) and Section 131(1A) – Distinction and controversy:**

Section 131 is comprised of two complementary sub-sections relating to two different classes of officers. Whereas Section 131(1) empowers the jurisdictional assessing officer to issue summons, Section 131(1A) empowers the officers of the investigation wing viz. Assistant Director, Deputy Director or the Director of Income-

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tax (Investigation).

Another point of distinction is that powers u/s 131(1) can be exercised by the assessing officer only when any proceedings are pending before him in relation to that assessee. Whereas power u/s 131(1A) can be exercised notwithstanding that no proceeding is pending before the investigation officers. In other words, Section 131(1A) can also be invoked for the purposes of a preliminary inquiry before carrying out the search operations.

**However, the controversy arises when the said Section i.e. Section 131(1A) is brought into play by the authorized officers after conclusion of search action u/s.132.** The questions arise whether such acts on the part of the authorized officers are valid in view of the fact that the same powers are available to the assessing officer u/s 131 and whether, such exercise of power u/s 131(1A), after conclusion of action u/s.132, is valid.

By bringing both the provisions into play simultaneously, there occurs multiplicity of proceedings in connection with the same assessee for the same case; one before the assessing officer u/s 131(1) and another before the investigation officers u/s 131(1A).

In order to shed more light on the issue, let us analyse the scope of powers u/s 131(1A) and related issues.

### **Scope of power u/s 131(1A) :**

The Section reads as under:

“If the Principal Director General or] Director General or Principal Director or Director or Joint Director or Assistant Director or Deputy Director, or the authorised officer referred to in sub-section (1) of [section 132](#) before he takes action under clauses (i) to (v) of that sub-section, has reason to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purposes of

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making any enquiry or investigation relating thereto, it shall be competent for him to exercise the powers conferred under sub-section (1) on the income-tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other income-tax authority.”

From the above, three important phrases emerge in relation with the exercise of powers u/s.131(1A) that seize our attention in the present discussion. These are:

- (a) Before he takes action under clauses (i) to (v) of S. 132;
- (b) Has reason to suspect that income has been concealed; and
- (c) Notwithstanding that no proceedings with respect to such person or class of persons are pending.

From a plain reading of the provision as aforesaid and the explanatory memorandum, the intent and the purpose of the legislature is clearly evident. The said provision enables the officers of the investigation wing to exercise the powers as mentioned before search and seizure action u/s.132(1), clauses (i) to (v) are applied. However, a recent trend is that even after conclusion of the search, the authorized officers keep summoning the person searched u/s.131(1A) to conduct a ‘post-search inquiry’.

### **Post search inquiry**

The officers as aforesaid conducts ‘post search inquiry’ as called in common parlance. The searched assessee is summoned and his statement is recorded on the various assets/papers/books seized.

It is incumbent upon the ‘authorised officers’ to hand over the seized documents, statements recorded by them u/s.132(4) and other material to the assessing officer for the purposes of completion of assessment procedure under Chapter XIV. In case a

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'post-search inquiry' is carried out, a report of the same is also forwarded, along with recommended lines of inquiry. This report is a confidential official document normally known as an Appraisal Report.

As a result, at the time of search assessment proceedings under Chapter XIV, it is often felt that, the jurisdictional assessing officer, gets unduly influenced by the findings in the appraisal report and thereby the assessing officer is unable to judiciously and independently analyze the case before him. This is more so when the said report is never forwarded to the person searched by the assessing officer.

It is a well-laid down principle that the assessing officer is a quasi-judicial authority having quasi-judicial powers during the course of assessment. The Supreme Court in the case of ***Sirpur Paper Mills Ltd. v. CWT, (1970) 77 ITR 6*** at pages 7 and 8 have upheld the above contention.

The need for independent application of mind by the assessing officer and non-applicability of any guiding force is further stressed by the Supreme Court in the case of ***Orient Paper Mills Ltd. v. Union of India, AIR 1969 SC 48, 51***. The Court held that :

"No authority, however high placed, can control the decision of a judicial or quasi-judicial authority. That is the essence of our judicial system. It is true that the assessing authorities as well as appellate authorities are judges in their own cause; yet when they are called upon to decide disputes arising under the Act, they must act independently and impartially. They cannot be said to act independently if their judgement is controlled by the directions given by others. Then it is a misnomer to call their orders as their judge-ments; they would essentially be the judgements of the authority that gave the directions and which authority had given those judgements without hearing the aggrieved party" (***Orient Paper mills Ltd. v. Union of India, AIR 1969 SC 48, 51***)

. . . their two functions are separate; while functioning as quasi-

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judicial officers they should not allow their judgements be influenced by administrative considerations or by the instructions or directions given by their superiors." (Orient Paper Mills Ltd. v. Union of India, AIR 1969 SC 48, 51)

Similar view, in respect to the report sent to the assessing officer by the authorised officer, has also been expressed by the Madras Bench of the ITAT in the case of ***Kirtilal Kalidas & Co. v. DCIT reported in 67 ITD 573 (Mad.)***.

### **Legal Paradox**

Summoning the person searched u/s 131(1A) after conclusion of search also appears to be regressive in nature. Search action u/s 132 is an extreme step taken by the Income-tax Department to unearth the undisclosed income/asset of a person. Prior to issuance of a warrant of authorization, the issuing authority should have adequate information which forms the 'reason to believe' that there is undisclosed income. However, the powers u/s 131(1A) are exercisable upon having a 'reason to suspect' the existence of undisclosed income.

Now, once a 'reason to believe' has been formed by the Department regarding the existence of the undisclosed asset/income and search operations have been carried out, formation of 'reason to suspect' for issuance of summons appears to be quite regressive and illogical. Hence, the practice of issuance of summons to the person searched u/s 131(1A), for the purpose of the post search inquiry, seems incorrect and tends to hit at the very root of the purpose behind the introduction of this sub-section.

Powers much more enlarged in scope are already exercised by the Department on a person at the time of carrying out search and seizure operations. The provisions related to search operations are expansive enough to enable the officers to complete their investigation, within the provided framework. Hence, there cannot be an occasion in law to virtually carry out the same act once again

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by the same authorities by issuing summons u/s 131(1A) after exercising the powers as mentioned u/s.132.

There is a controversy in this respect. There are conflicting decisions of different courts **Gujrat High Court in the case of Arti Gases v. DIT (Inv.) (2001) 248 ITR 55** has held that notices u/s 131(1A) can be issued after completion of search undertaken under the provisions of section 132, as it would be absolutely logical to call for information so as to have better particulars or to have complete idea about the material seized during the search.

**Gujrat High Court in the case of Neesa Leisure Ltd. v. UOI (2011) 338 ITR 460** has held how the satisfaction recorded by the Director General of Income Tax has subsequently issued notices under section 131(1A) of the act.

The Allahabad High Court in case of **Dr. Roop V. CIT [2012] 20 taxmann.com 205 (All.)** held as under:-

*"In respect of notice under Section 131 (1A) this Court observed that it confers powers on the authorities as mentioned in Section 131 (1), if he has reason to suspect that any income has been concealed or is likely to be concealed notwithstanding that no proceedings with respect to such person, class of persons pending before him. It is only a enabling Section and does not in any manner affect the search and seizure operations carried out under Section 132 of the Act. Section 132 is an independent code in itself. The Court held in paras 37 and 38 that the exercise of power under Section 131 (1A) is contemplated in a situation anterior to exercise of power under Section 132. In other words before authorising an officer to carry on search and seizure operation, the officers referred to in Section 132 (1) would exercise power under Section 131 (A) of the Act. Section 131 (1A) operates in different fields than Section 132. Section 131 (1A) occupies the field before issuing search and seizure warrants, while Section 132 comes into play thereafter, and thus the power under Section 131 (1A) cannot*

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*possibly be invoked before the power under Section 132 is put into motion. If power is invoked, it will not affect the validity of search and seizure operations.*"

The Allahabad High Court in case of **Dr.Anita Sahai V. DIT [2004] 136 TAXMAN 247 (ALL.)** has held that in case a notice is issued under section 131(1A) after search and seizure operation under section 132, it would show that there was neither reason to believe nor material before authorizing officer on basis of which he could issue a warrant under section 132. The judgement of the Hon'ble court is draconian from the angle of the department as it was held that issuance of 131(1A) post search u/s 132 was devoid of formation reasons to believe and in such circumstances very issue of warrant of authorization can be quashed at a later stage.

The court held as under:-

*"The respondents in their counter-affidavit had stated that it was respondent No. 4 who had sent the material to respondent No. 1 on the basis of which respondent No. 1 had recorded his satisfaction under section 132(1). It was respondent No. 4 himself who had issued summons under section 131(1A) after the search. As such, there could not possibly be any material, which could be the basis of having reason to believe in respondent No. 1. The very fact that respondents issued notice under section 131(1A) after the search and seizure operation under section 132 would show that there was neither reason to believe nor material before the authorising officer on the basis of which he could issue a warrant under section 132. [Para 25]"*

Interestingly, considering the decision of *Dr.Anita Sahai V. DIT [2004] 136 TAXMAN 247 (ALL.)*, the Allahabad High Court have delivered a contrary decision in case of in case of **Dr. V.S. Chauhan vs. Director of Income-tax, [2011] 12 taxmann.com 230** wherein it was held that held as under:-

*"A fair reading of the aforesaid sub section would show that the power conferred on the Income-tax Authorities mentioned therein can be exercised--before ordering search and seizure under section 132. The*

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exercise of power under section 131(1A) is contemplated in a situation anterior to exercise of power under section 132. In other words, before authorising an officer to carry on search and seizure operation, the Income Tax Authorities i.e. the Director General or Director or Joint Director or Assistant Director or Deputy Director or authorised officer referred to in sub section (1) to section 132 could exercise the power under section 131(1A) of the Act. The Income Tax Authorities are defined under section 116 of the Act. Power has been conferred under the aforesaid section to be exercised before the search and seizure operation with a view to collect the necessary information with regard to the intended search and seizure operation. The striking feature of the provision is that the Income Tax Authorities mentioned in sub section (1A) have been empowered to exercise the power notwithstanding the fact that no proceeding with respect to such person or class of person are pending before him or any other Income Tax Authority. The section is in the nature of enabling provision conferring the power on certain Income Tax Authorities. The section 131(1A) operates in a different field than section 132. Both these sections occupy different fields. Section 131(1A) occupies the field before issuing search and seizure warrant, while section 132 comes into play thereafter. The point which we want to bring home is that after search and seizure operation, the power under section 131(1A) cannot possibly be invoked in view of its plain language and if the power is invoked, it will not in any manner affect the validity of the search and seizure operation.

38. It may be noted that section 131(1A) was inserted in the Statute w.e.f. October 1, 1975. Earlier the judicial view was that the authorities under the Income Tax Act can exercise the power regarding the discovery/production of evidence etc. only in relation to a pending matter. To overcome it, section 131(1A) was enacted giving powers of discovery/production of evidence etc. to Director General, or Director or Joint Director etc. notwithstanding the fact that no proceeding is pending before them. The use of words "it shall be competent for him to exercise the powers confirmed under sub section (1) are indicative of confirmation of power on such officers even for the purposes of making any enquiry or investigation under sub section (1) of section 132. Section 131(1A) and Section 132 should be interpreted harmoniously.

39. The above aspect of the case, it appears, was not brought to the notice of the Division Bench of this Court in the case of Dr. Anita Sahai (supra).

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*40. In any case, a futile exercise made by the department by issuing a notice under section 131 (1A) of the Act will not in any manner affect the search operation validly carried on within the four corners of section 132 of the Act.”*

### **Conclusion:-**

The Act has undergone conceptual and fundamental change in search and seizure operations after the introduction of new framework for the assessment of search cases. Consequential changes in Section 132 [for instance abolition of Section 132(5)] also leads to an inevitable conclusion that there is a clear demarcation between the authorities conducting investigation and the authorities passing the assessment order. Separate powers have been provided by the statute to both these authorities to enable them to exercise their authority in the right manner. However, whether or not these powers are coterminous or are they mutually exclusive is what is to be decided not only judicially but also administratively. As such the matter is still open to debate with both sides of arguments. To avoid further unwarranted litigation, clarity in this regard is also required by way of a necessary specific piece of legislation or otherwise.

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## ABOUT CA.MOHIT GUPTA

Mr. Mohit Gupta is a Fellow Member of the Institute of Chartered Accountants of India, a commerce graduate from prestigious Ramjas College, Delhi University and an alumni of St. Xavier's School, New Delhi. He is practicing as a Chartered Accountant for more than 15 years and managing the Direct Tax Advisory and Litigation practice of M/s. Dhanesh Gupta & Co., Chartered Accountants, New Delhi a renowned Chartered Accountancy firm in the core domain of direct taxation established in 1978.

His forte is handling Income Tax Search and Seizure matters, matters before the Income Tax Settlement Commission and other direct tax litigation matters. 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 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. In Addition to the above, Mr. Mohit Gupta is a Special Auditor of the Income Tax Department and has carried out numerous Special Audits across the country on being appointed by the Income Tax Department 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 has also been appointed as Special Auditor under other tax statutes and by other Investigation Agencies of the Government of India. 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.

Recently, in the year 2016, Mr. Mohit Gupta have authored two comprehensive books on the Income Declaration Scheme'2016, titled as "Law Relating to Income Declaration Scheme'2016". His books provided at one place the entire gamut of the Law relating the Income Declaration Scheme '2016 and set to rest all the queries that arose before, during and after the course of making the declaration under the Income Declaration Scheme'2016. The books received an extremely overwhelming response from the readers including the proposed tax payers, tax administration, tax professionals, corporate houses and academicians. The said books were released by erstwhile Hon'ble Union Finance Minister, Shri. Arun Jaitley, Shri.Arjun Ram Meghwal, Minister of State for Finance and the Chairman of Central Board of Direct Taxes and many other dignitaries.

Due to his continuous desire to always rise on the learning curve, he always have a quest and quench to read more, learn more and perform even more.

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