

**Income Tax Search and Seizure: Application of seized assets during the course of an Income Tax search towards the self assessment tax liability of an assessee- whether permissible**

**By CA.Mohit Gupta**



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**Introduction:**

The application of assets seized during the course of search and seizure action is governed by the provisions of Section 132B of the Income Tax Act'1961.

Before digging deeper into the matter, let us go through the provisions of Section 132B in the statute as on date which are reproduced herein under with relevant amendment notes:-

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***Application of seized or requisitioned assets.***

*132B. (1) The assets seized under section 132 or requisitioned under section 132A may be dealt with in the following manner, namely:—*

- (i) *the amount of **any existing liability under this Act**, the Wealth-tax Act, 1957 (27 of 1957), the Expenditure-tax Act, 1987 (35 of 1987), the Gift-tax Act, 1958 (18 of 1958) and the Interest-tax Act, 1974 (45 of 1974), and the amount of the liability determined on completion of the assessment <sup>1</sup>[under section 153A and the assessment of the year relevant to the previous year in which search is*

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*initiated or requisition is made, or the amount of liability determined on completion of the assessment under Chapter XIV-B for the block period, as the case may be] (including any penalty levied or interest payable in connection with such assessment) and in respect of which such person is in default or is <sup>2</sup>[deemed to be in default, or the amount of liability arising on an application made before the Settlement Commission under sub-section (1) of section 245C, may be recovered out of such assets] :*

*<sup>3</sup>[Provided that where the person concerned makes an application to the Assessing Officer within thirty days from the end of the month in which the asset was seized, for release of asset and the nature and source of acquisition of any such asset is explained] to the satisfaction of the Assessing Officer, the amount of any existing liability referred to in this clause may be recovered out of such asset and the remaining portion, if any, of the asset may be released, with the prior approval of the <sup>4</sup>[Principal Chief Commissioner or] Chief Commissioner or <sup>4</sup>[Principal Commissioner or] Commissioner, to the person from whose custody the assets were seized:*

*Provided further that such asset or any portion thereof as is referred to in the first proviso shall be released within a period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or for requisition under section 132A , as the case may be, was executed;*

- (ii) if the assets consist solely of money, or partly of money and partly of other assets, the Assessing Officer may apply such money in the discharge of the liabilities referred to in clause (i) and the assessee shall be discharged of such liability to the extent of the money so applied;*
- (iii) the assets other than money may also be applied for the discharge of any such liability referred to in clause (i) as remains undischarged and for this purpose such assets shall be deemed to be under distraint as if such distraint was effected by the Assessing Officer or, as the case may be,*

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the Tax Recovery Officer under authorisation from the <sup>4</sup>[Principal Chief Commissioner or] Chief Commissioner or <sup>4</sup>[Principal Commissioner or] Commissioner under sub-section (5) of section 226 and the Assessing Officer or, as the case may be, the Tax Recovery Officer may recover the amount of such liabilities by the sale of such assets and such sale shall be effected in the manner laid down in the Third Schedule.

(2) Nothing contained in sub-section (1) shall preclude the recovery of the amount of liabilities aforesaid by any other mode laid down in this Act.

(3) Any assets or proceeds thereof which remain after the liabilities referred to in clause (i) of sub-section (1) are discharged shall be forthwith made over or paid to the persons from whose custody the assets were seized.

(4) (a) The Central Government shall pay simple interest at the rate of <sup>5</sup>[one-half per cent for every month or part of a month] on the amount by which the aggregate amount of money<sup>6</sup> seized under section 132 or requisitioned under section 132A, as reduced by the amount of money<sup>6</sup>, if any, released under the first proviso to clause (i) of sub-section (1), and of the proceeds, if any, of the assets sold towards the discharge of the existing liability referred to in clause (i) of sub-section (1), exceeds the aggregate of the amount required to meet the liabilities referred to in clause (i) of sub-section (1) of this section.

(b) Such interest shall run from the date immediately following the expiry of the period of one hundred and twenty days from the date on which the last of the authorisations for search under section 132 or requisition under section 132A was executed to the date of completion of the assessment <sup>7</sup>[under section 153A or] under Chapter XIV-B.

<sup>8</sup>[Explanation 1].—In this section,—

- (i) "block period" shall have the meaning assigned to it in clause (a) of section 158B;
- (ii) "execution of an authorisation for search or requisition" shall have the same meaning as assigned to it in Explanation 2 to section 158BE.]

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**<sup>9</sup>[Explanation 2.—For the removal of doubts, it is hereby declared that the "existing liability" does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII.]**

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Amendment Notes

1. Substituted for "under Chapter XIV-B for the block period" by the Finance Act, 2003, w.e.f. 1-6-2003.
2. Substituted for "deemed to be in default, may be recovered out of such assets" by the Finance Act, 2015, w.e.f. 1-6-2015.
3. Substituted for "Provided that where the nature and source of acquisition of any such asset is explained" by the Finance Act, 2003, w.e.f. 1-6-2003.
4. Inserted by the Finance (No. 2) Act, 2014, w.r.e.f. 1-6-2013.
5. Substituted for "six per cent per annum" by the Finance Act, 2007, w.e.f. 1-4-2008. Earlier word "six" was substituted for "eight" by the Taxation Laws (Amendment) Act, 2003, w.e.f. 8-9-2003.
6. For the meaning of the term "money", see Taxmann's Direct Taxes Manual, Vol. 3.
7. Inserted by the Finance Act, 2003, w.e.f. 1-6-2003.
8. *Explanation* renumbered as *Explanation 1* by the Finance Act, 2013, w.e.f. 1-6-2013.
9. Inserted by the Finance Act, 2013, w.e.f. 1-6-2013.

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Therefore, Section 132B of the Income Tax Act 1961, provides for adjustment of seized assets/requisitioned assets against the amount of any existing liability under the Income Tax Act, 1961, the Wealth-tax Act, 1957, the Expenditure-tax Act, 1987, the Gift-tax Act, 1958 and the Interest-tax Act, 1974, and the amount of the liability determined on completion of the assessment under section 153A of the Act and the assessment of the year relevant to

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the previous year in which search is initiated or requisition is made, or the amount of liability determined on completion of the assessment under Chapter XIV- B for the block period, as the case may be (including any penalty levied or interest payable in connection with such assessment) and in respect of which such person is in default or is deemed to be in default, or the amount of liability arising on an application made before the Settlement Commission under sub-section (1) of section 245C of the Act.

It is interesting to note that Finance Act, 2013, w.e.f. 1-6-2013 inserted Explanation 2 which states that for the removal of doubts, it is hereby declared that the "existing liability" does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII. This insertion was intentionally brought in by the legislature to nullify the impact of various judgments wherein it was predominantly held that seized assets can be adjusted against the advance tax liability of the assessee which is also an existing liability. However, the Finance Act, 2013, w.e.f. 1-6-2013 has clearly put in place an embargo against such adjustment of seized asset against the advance tax liability of the assessee being advance tax payable not included as an existing liability.

Subsequently, pursuant to the above embargo, a new thread of litigation started so far as to whether the insertion is prospective or retrospective. Predominant view of the court was that the insertion is only prospective in nature. This opinion of the courts was also conceded by the department in view of CBDT circular 20 of 2017 dated 20-06-2017. The same is reproduced herein under:-

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*SECTION 132B OF THE INCOME-TAX ACT, 1961 - SEARCH AND SEIZURE - RETAINED ASSETS, APPLICATION OF - CBDT'S CLARIFICATION ON APPLICABILITY OF EXPLANATION 2 TO SECTION 132B OF SAID ACT WITH REGARD TO ADJUSTMENT OF SEIZED/REQUISITIONED CASH AGAINST ADVANCE TAX LIABILITY*

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*CIRCULAR NO.20/2017 [F.NO.279/MISC./140/2015/ITJ], DATED  
12-6-2017*

*Section 132B of the Income-tax Act, 1961, provides for adjustment of seized assets/requisitioned assets against the amount of any existing liability under the Income-tax Act, 1961, (the Act), the Wealth-tax Act, 1957, the Expenditure-tax Act, 1987, the Gift-tax Act, 1958 and the Interest-tax Act, 1974, and the amount of the liability determined on completion of the assessment under section 153A of the Act and the assessment of the year relevant to the previous year in which search is initiated or requisition is made, or the amount of liability determined on completion of the assessment under Chapter XIV-B for the block period, as the case may be (including any penalty levied or interest payable in connection with such assessment) and in respect of which such person is in default or is deemed to be in default, or the amount of liability arising on an application made before the Settlement Commission under sub-section (1) of section 245C of the Act.*

*2. Dispute arose between the Department and the assessee with regard to adjustment of such seized /requisitioned cash against advance tax liability etc. Several Courts held that on an application made by the assessee, the seized money is to be adjusted against the advance tax liability of the assessee. Subsequently, Explanation 2 to Section 132B of the Act was inserted by the Finance Act, 2013 w.e.f. 01-06-2013, clarifying that "existing liability" does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII of the Act. However, the dispute continued on the issue as to whether the amendment was clarificatory in nature having retrospective applicability or it has only prospective applicability.*

*3. Several Courts have held that the insertion of Explanation 2 to section 132B of the Act, is prospective in nature and not applicable to cases prior to 01.06.2013. The SLPs filed by the Department against the judgment of the Hon'ble Punjab and Haryana High Court in the case of Cosmos Builders and Promoters Ltd.<sup>1</sup> and the Hon'ble Allahabad High Court in the case of Sunil Chandra Gupta<sup>2</sup>, have been dismissed. Subsequently, the*

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*CBDT has also accepted the judgment of the Hon'ble Punjab & Haryana High Court in the case of Spaze Towers Pvt. Ltd.<sup>3</sup> dated 17.11.2016, wherein it was held that the Explanation 2 to Section 132B of the Act is prospective in nature.*

**4. Accordingly, it has now been settled that insertion of Explanation 2 to Section 132B of the Act shall have a prospective application and so, appeals may not be filed by the Department on this issue for the cases prior to 01.06.2013 and those already filed may be withdrawn/ not pressed upon.**

*5. The above may be brought to the notice of all concerned.*

*1.Order dated 14-7-2015 in ITA No. 425 of 2014 (P & H)*

*2.Order dated 11-3-2013 in ITA No. 182 of 2014 (All.)*

*3.ITA No. 40 of 2015 "*

The issue of application of seized assets towards advance tax liability of the assessee has reached a level of finality after the insertion of Explanation 2 by Finance Act, 2013, w.e.f. 1-6-2013 which clearly states that seized assets cannot be adjusted against the advance tax liability as existing liability not to include advance tax payable by the assessee. Further CBDT circular 20 of 2017 dated 20-06-2017 conceded to the judicial view that the insertion is only prospective in nature.

### **Issue under consideration:**

**Having said so, another important question arises as to what is the position of self assessment tax payable by the assessee.**

Let us understand this issue by the help of an illustration. Let us assume that one Mr. X was searched on February'2019. During the course of search, undisclosed cash of Rs. 10 crores was found

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which he admitted u/s 132(4) of the act as his undisclosed income for the year of search i.e. F.Y. 2018-19 and specified and substantiated the manner of earning such income of Rs. 10 crores as prescribed u/s 271AAB of the act. The cash of Rs. 10 crores was seized by the department during the course of search. Mr. X has not yet filed the return of income for F.Y. 2018-19 u/s 139 till the date of search as the Financial Year 2018-19 has not as yet concluded as on the date of search and therefore is a specified previous year in view of explanation (b) to Section 271AAB of the act.

Now, the question arises, as to whether Mr. X can seek for an adjustment/application of cash seized towards the self assessment tax payable on the additional admitted undisclosed income of Rs. 10 crores in F.Y. 2018-19.

### **Analysis, Judicial Precedents and Conclusion:**

One rigid view can be that self assessment tax and advance tax operate on similar line and serve the single purpose of tax payment. Since advance tax payable is excluded from existing liability, similar should be the position of self assessment tax payable. In support of this view, one can also argue that unless and until a liability is determined by a order, a liability doesn't assumes the character of "existing liability".

However, in my considered view, denial of application of seized assets towards the self assessment tax liability of the assessee may be draconian to an assessee and may render the application of search and seizure scheme totally ineffective.

Let us consider the example again as mentioned above. If Mr. X is denied to adjust the seized asset towards the self assessment tax liability on additional admitted undisclosed income, let us understand what will happen.

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1. The tax on such additional disclosure of Rs. 10 crores will be worked out in assessment for F.Y. 2018-19 with additional interest u/s 234B and 234C as Mr. X was denied the adjustment of assets seized towards the self assessment tax. In such a scenario a higher liability will arise in case of Mr. X owing to excessive interest.
2. The assessee may be liable to pay enhanced penalty u/s 271AAB of the act as the assessing officer shall make out a case that the assessee has not tax on or before the specified date as specified u/s 271AAB of the act.

In some cases, there might a possibility that the assessee is left out with no liquidity after the seizure of undisclosed cash. In such cases, whether it would not amount to injustice to an assessee so as to force such an assessee to arrange additional funds, over and above, for payment of taxes particularly when cash seized is already lying with the department.

Having said so, in my considered opinion, the Explanation 2 inserted w.e.f. 01-06-2013, makes it clear that the terms 'existing liability' does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII. But self assessment tax liability has not been excluded for the term existing liability and moreover self assessment tax is covered Chapter XIV. Hence it can be safely concluded that what is precluded in the statute is adjustment of seized cash towards advance tax liability only and not self assessment tax.

Even otherwise, provisions regarding payment of self assessment tax are contained in Chapter XIV u/s 140A while the provisions regarding payment of advance tax are contained in Part C of Chapter XVII. It is pertinent to mention here is that the requirement of payment of advance tax is before the end of a financial year on an estimated income relating to that year. On the other hand the self assessment tax is paid after the end of the

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financial year at the time of filing of return of income for on the basis of actual tax liability determined after taking into account the taxes already paid by the assessee. Therefore, self assessment tax is different in nature as compared to advance tax.

It is also important to mention here is that in a search case particularly when an assessee admits certain undisclosed income u/s 132(4) which have also been substantiated with equivalent seizure of assets and other supporting corroborative evidences and such statement u/s 132(4) has never been retracted, he is roped in with the tax liability on such additional income disclosed though it is only the payment which has to effected or reflected later on while filing the return of income. Therefore, under such circumstances, the self assessment tax payable by an assessee should definitely be treated as a liability existing and therefore should be admissible to be adjusted from the seized asset.

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

#### Facts:

Pursuant to the search, a notice under section 153A was issued on the assessee and in response to the same, the assessee filed his return of income for the assessment year 2006-07 declaring certain taxable income. During the course of search, cash to the extent of Rs. 20,00,000 was found from a locker with the Canara Bank belonging to the assessee and the same was seized by the department. The assessment was completed under section 153A determining taxable income raising a demand. Originally the Assessing Officer gave credit for seized cash towards self assessment tax which was later rectified under section 154

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by the Assessing Officer by revoking the credit for seized cash as according to the Assessing Officer, there was no existing liability, and consequentially charged interest under sections 234B and 234C.

Held:

Held that the subsequent action of the Assessing Officer in revoking the credit given for seized cash towards existing tax liability under proceedings under section 154 is illegal. The provisions of section 132B makes it clear that the terms 'existing liability' does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII. But this amendment was brought in the statute by the Finance Act, 2013 with effect from 1-6-2013 only. Hence, it can be safely concluded that what is precluded in the statute is adjustment of seized cash towards advance tax liability only and not self assessment tax or regular tax and that too only with effect from 1-6-2013. The action of the assessee in seeking to adjust the seized cash with self assessment tax payable along with the return of income is in order and in accordance with section 132B as admittedly self assessment tax payable becomes 'existing liability' on the part of the assessee to settle.

On the similar lines, Hon'ble ITAT, Delhi in case of ***Sh. Sajjan Singh V ACIT, New Delhi on 18 January, 2018 in ITA No. 6640/Del/2016*** held that what is precluded in the statute is adjustment of seized cash towards advance tax liability only and not self assessment tax .

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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. He is about to release two comprehensive books on Income Tax Search and Seizure in few months time depending upon the normalization of the COVID situation. The release of the books have been kept on hold due to current COVID position. The first book is an in depth commentary on the Law relating to Income Tax Search and Seizure , while the second book is relating to addressal of controversial issues arising during search and seizure action, assessment and settlement commission thereupon as the case may be.

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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