

## **New Scheme of Income Tax Search and Seizure Assessments**



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### **Introduction:-**

The Hon'ble Union Finance Minister Nirmala Sitharaman had presented the Union Budget 2021 of India on the 1st of February, 2021. In significant changes to the taxation process, among other tax measures, the Hon'ble Finance Minister recommend paradigm changes to the provisions relating to Assessment in case of Search or requisition. The Finance Bill, 2021 received the Assent of the President on 28th March 2021 and thereafter became FINANCE ACT, 2021 (NO. 13 OF 2021).

In this article, the author has attempted to highlight the significant changes brought in by the virtue of the Finance Act'2021 in context to the Income Tax assessments to be made in pursuance to an Income Tax Search and Seizure Action conducted u/s 132 of the income tax Act'1961 and its implications thereupon.

### **Changes relating to Income Tax Search and Seizure Assessments brought in the statute by virtue of the Finance Act'2021:-**

The Finance Act' 2021 has done away with the existing legal framework for Assessment in case of search or requisition (forming part of Chapter XIV of the Income Tax Act'1961- Procedure for Assessment) viz. Section 153A to 153D of the Income Tax Act'1961 in respect of search or requisition conducted on or after 1<sup>st</sup> April'2021. For searches conducted on or after 1<sup>st</sup> April'2021, then forth, assessments shall be framed under Section 147 read with section 148, 148A, 149,151 of the Income Tax Act'1961.

While doing so, the reasons advanced in the memorandum explaining the provisions of Finance Bill'2021 are that the existing search assessment framework ( like the erstwhile block assessment procedure under Chapter

XIV-B of the Act) has failed to in its objective of early resolution of search assessments and were proving to be highly litigation-prone. As stated in the memorandum explaining the provisions of Finance Bill'2021 which later on culminated into Finance Act'2021, it is expected that the new system would result in less litigation and would provide ease of doing business to taxpayers as there is a reduction in time limit by which a notice for assessment or reassessment or re-computation can be issued.

### **Necessary Changes made by the Finance Act'2061 in the Income Tax Act'1961**

(Relevant changes only having a bearing on search and seizure assessments have been discussed here)

#### (a) Section 148 of the Income Tax Act'1961: " Issue of Notice where income has escaped assessment"

The erstwhile Section 148 of the Income Tax Act'1961 has been substituted by a distinct Section 148 viz. "Issue of Notice where income has escaped assessment."

Under the newly substituted Section 148, Explanation 2 has been brought into place to cover search, survey or requisition cases initiated or made or conducted, on or after 1<sup>st</sup> April, 2021, wherein it shall be deemed that the Assessing officer has information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the **three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or requisition is made or any material is seized or requisitioned or survey is conducted.**

The relevant explanation 2 is reproduced herein under:-

*"Explanation 2.—For the purposes of this section, where,—*

*(i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or*

*(ii) a survey is conducted under section 133A, other than under sub-section (2A) or sub-section (5) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or*

*(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

*(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee,*

*the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.”*

(b) Section 148A of the Income Tax Act'1961: " Conducting inquiry, providing opportunity before issue of notice under Section 148"

The Finance Act' 2021, inserted a new Section 148A which mandates that before issuance of notice under Section 148, the Assessing Officer shall conduct enquiries, if required, and provide an opportunity of being heard to the assessee. After considering his reply, the Assessing Office shall decide, by passing an order, whether it is a fit case for issue of notice under section 148 and serve a copy of such order along with such notice on the assessee. The Assessing Officer shall before conducting any such enquiries or providing opportunity to the assessee or passing such order obtain the approval of specified authority.

**Most important to note here is that this procedure of enquiry, providing opportunity and passing order, before issuing notice under section 148 of the Act, shall not be applicable in search or**

## **requisition cases. {Emphasis Supplied}**

### **(c) Section 149 of the Income Tax Act'1961: "Time limit for notice"**

The erstwhile Section 149 of the Income Tax Act'1961 has been substituted by a distinct Section 149. The newly substituted Section provides that in normal cases, no notice shall be issued if three years have elapsed from the end of the relevant assessment year. However, notice beyond the period of three years from the end of the relevant assessment year but not beyond the period of ten years from the end of the relevant assessment year can be issued only in a few specific cases where the Assessing Officer has in his possession books of accounts or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakhs rupees or more for that year.

Interestingly, the first proviso to sub-section (1) of Section 149 provides that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021. The implication of this proviso is of wide import in search and seizure cases so far as to which all assessments years can be covered for assessment. The issue is discussed in the later part of this article.

Furthermore, the second proviso also clarifies that Section 149(1) shall not apply in cases where search has been initiated on or before 31<sup>st</sup> March'2021.

### **(d) Section 153A, 153B, 153C and 153D of the Income Tax Act'1961:**

"Section 153A:Assessment in case of search or requisition" and Section 153C: Assessment of income of any other person" have been suitably amended by inserting a sunset clause so far as the they shall cease to operate for searches initiated on or after 01<sup>st</sup> April'2021. Accordingly, "Section 153B: Time limit for completion of assessment under Section 153A" and "Section 153D: Prior approval necessary for assessment in case of search or requisition" shall also become otiose and thus not applicable for searches initiated on or after 01<sup>st</sup> April'2021.

**Analysis of the changes made by the Finance Act'2021 and its apparent implications there upon the Assessments pursuant to a Search and Seizure action:-**

**(a) Apparent revival of Dual Assessment concept**

Under the erstwhile law, Section 153A of the act provides that the assessment(s) or reassessment (s) pending as on the date of initiation of search shall abate. Section 153A was brought in the statute only w.e.f. 1-6-2003 and thereafter ceased to operate for searches initiated on or after 01<sup>st</sup> April'2021 by virtue of Finance Act'2021.

Prior to the advent of Section 153A i.e. before 01-06-2003, Qua the search assessments, the earlier applicable procedure was contained in Chapter XIV-B (sections 158B to 158BI) wherein only undisclosed income mentioned in the seized documents, etc., relating to the block of ten years was liable to be brought to tax and for the regular income, the Assessing Officer had to frame the normal assessments. Therefore, there was a concept of dual assessments proceedings (assessment of regular income and assessment of undisclosed income separately) under the erstwhile Chapter XIV-B. This dual assessment concept was taken away by the advent of Section 153A for framing assessments for searches initiated after 31<sup>st</sup> May' 2003 since it was provided under Section 153A that the assessment(s) or reassessment (s) pending as on the date of initiation of search shall abate.

It can be traced out in the historical study of law relating to the search and seizure assessments that the Special Procedure for Assessment of search cases contained in erstwhile Chapter XIV-B (sections 158B to 158BI) which was brought in the statute book way back by the Finance Act'1995 w.e.f. 01-07-1995 was abolished by the Finance Act'2003 primarily to do away with the dual assessment concept. While doing so, the memorandum explaining the provisions of Finance Bill'2003 mentioned that the block assessment concept involving dual assessments for the same period have led to intense controversies and litigation. It further stated that the experience on implementation of the special procedure for search assessments (block assessment) contained in Chapter XIV-B, has shown that the new scheme has failed in its objective of early resolution of search assessments.

It is pertinent to reproduce the relevant part of the memorandum explaining the provisions of Finance Bill'2003 wherein it was proposed to abolish the special procedure for assessment in search cases

contained in Chapter XIV-B.

“

Assessment in search cases – Abolition of the special procedure in Chapter XIV-B and introduction of new provisions

*The existing provisions of the Chapter XIV-B provide for a single assessment of undisclosed income of a block period, which means the period comprising previous years relevant to six assessment years preceding the previous year in which the search was conducted and also includes the period up to the date of the commencement of such search, and lay down the manner in which such income is to be computed. The main objectives for the introduction of the Chapter XIV-B were avoidance of disputes, early finalisation of search assessments and reduction in multiplicity of proceedings. The idea was to have a cost-effective, efficient and meaningful search assessment procedure.*

*However, the experience on implementation of the special procedure for search assessments (block assessment) contained in Chapter XIV-B, has shown that the new scheme has failed in its objective of early resolution of search assessments. **The new procedure postulates two parallel streams of assessment, i.e., one of regular assessment and the other for block assessment during the same period, i.e., during the block period. Controversies have sprung up questioning the treatment of a particular income as ‘undisclosed’ and whether it is relatable to the material found during the course of search etc. Even where the facts are clear, litigation on procedural matters continue to persist. The new procedure has thus spawned a fresh stream of litigation.***

*It is proposed to provide that the provisions of this Chapter shall not apply where a search is initiated under section 132, or books of account, other documents or any assets are requisitioned under section 132A after 31st May, 2003 by inserting a new section 158BI in the Income-tax Act.*

.....

*These amendments will take effect from 1st June, 2003.”*

After having digging deep down, in my considered opinion, it shall not be out of place to mention that the legislature has chosen to fall back to the erstwhile block assessment procedure at least so far as the dual

assessment concept is concerned. This is primarily due to the reason that under the current scheme of search assessments introduced by the Finance Act'2021, the concept of dual assessment(s) appears to be revived again as there is no express provision now under the new scheme to abate the pending assessments on the date of search, if any.

**(b) Deemed escapement of Income without enquiry under Section 148A- whether only for preceding 3 Asstt. Years or even further before in search cases**

Under the newly substituted Section 148 viz. "Issue of Notice where income has escaped assessment." Explanation 2 has been brought into place to cover search, survey or requisition cases initiated or made or conducted, on or after 1<sup>st</sup> April, 2021, wherein it shall be deemed that the Assessing officer has information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the **three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or requisition is made or any material is seized or requisitioned or survey is conducted.**

Further it is pertinent to mention that the newly inserted Section 148A mandates that before issuance of notice under Section 148, the Assessing Officer shall conduct enquiries, if required, and provide an opportunity of being heard to the assessee. After considering his reply, the Assessing Office shall decide, by passing an order, whether it is a fit case for issue of notice under section 148 and serve a copy of such order along with such notice on the assessee. The Assessing Officer shall before conducting any such enquiries or providing opportunity to the assessee or passing such order obtain the approval of specified authority. **However, this procedure of enquiry, providing opportunity and passing order, before issuing notice under section 148 of the Act, shall not be applicable in search or requisition cases.**

Now a question arises that since there is an interplay between Section 148 and Section 148A, if an Assessing Officer desires to go beyond three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated, whether he or she is duty bound to follow the procedure laid down in Section 148A of conducting enquiries, providing opportunity and passing order before issuing notice(s) under section 148 of the Act for such assessment years beyond the three assessment years. In my considered opinion, there is no clarity on this issue in the statute as of now and therefore it will defeat the intended

purpose of the new legislation to be less litigation prone by inviting fresh stream of litigation in the future unless clarified at the inception.

**(c) Whether proceedings under Section 147 pertaining to search assessments will again tantamount to “de novo” proceedings**

The law in respect to the scope of erstwhile Section 153A of the act in respect of search assessments has been well crystallized and settled over the efflux of time by numerous judgments so far as that search assessments does not tantamount to “de novo” proceedings. As on date, it is judicially settled that in so far as abated/pending are concerned, the jurisdiction to make the original assessment and the assessment under section 153A merges into one. Only one assessment shall be made separately for each such AY on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer. As far as the completed assessments are concerned, the same can be interfered with by the Assessing Officer while making the assessment under section 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. Reliance can be placed on numerous judgments including:-

- *PCIT v. Meeta Gutgutia [2018] 96 taxmann.com 468 (SC)*
- *CIT v. Kabul Chawla [2016] 380 ITR 573(DELHI)*
- *Principal Commissioner of Income Tax v. Caprihans India Ltd. [2020] 114 taxmann.com 104*
- *CIT v. Radico Khaitan Ltd. [2017] 83 taxmann.com 375 (Delhi)*
- *Pr. Commissioner of Income Tax v. Dhananjay International Ltd. [2020] 114 taxmann.com 317 (Bom.)*
- *Principal Commissioner of Income Tax, Central-4 v. Jignesh P. Shah [2018] 99 taxmann.com 111 (Bombay)*
- *HBN Dairies & Allied Ltd. v. Assistant Commissioner of Income Tax, Central Circle-4, New Delhi [2018] 96 taxmann.com 353 (Delhi - Trib.) (TM)*



However, the Finance Act' 2021 has done away with the existing legal framework for Assessment in case of search or requisition (forming part of Chapter XIV of the Income Tax Act'1961- Procedure for Assessment) viz. Section 153A to 153D of the Income Tax Act'1961 in respect of search or requisition conducted on or after 1<sup>st</sup> April'2021. For searches conducted on or after 1<sup>st</sup> April'2021, then forth, assessments shall be framed under Section 147 read with section 148, 148A, 149,151 of the Income Tax Act'1961.

It is pertinent to mention here is that Explanation to newly substituted Section 147 w.e.f. 01-04-2021 provides that for the purpose of assessment or reassessment or recomputation under Section 147, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with.

In my considered opinion, the aforementioned explanation may act as an unguided missile and unsettle the well established and judicially settled law in respect of the search assessments so far as that the search assessments should be essentially based only on the incriminating material unearthed during the course of search.

**(d) Implications with regard to the assessment of the persons other than the person searched**

The erstwhile Section 153C of the act which was brought in the statute w.e.f. 01-06-2003 contains the procedure for assessment of income of persons other than that of the person searched which are covered u/s 153A of the act. Section 153C was a replacement to furthermore erstwhile "Section 153BD: Undisclosed income of any other person" contained in Chapter XIV-B which was made inoperative for searches initiated u/s 132 of the act after the 31<sup>st</sup> day of May'2003. Section 153C itself was made inoperative for searches action initiated on or after 01-04-2021.

Over the years since 2003, Section 153C is a subject matter of intense, protracted and prolonged litigation. However over these 18 years, the law was evolved and was by and large judicially settled wherein enough safeguards were put in place to restrict its administrative usurpation by virtue of numerous judicial decisions and legislative amendments.

However, this fresh schema of search assessments, in my considered opinion has not been put in place in lines with the well established and judicially settled law in respect of search assessments of a person other than that of person searched.

Now to understand the issues on this count, the attention can again be drawn to the Explanation 2 to the newly substituted Section 148 which has been brought into place to cover search, survey or requisition cases initiated or made or conducted, on or after 1<sup>st</sup> April, 2021, wherein it shall be deemed that the Assessing officer has information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the **three assessment years** immediately preceding the assessment year relevant to the previous year in which the search is initiated or requisition is made or any material is seized or requisitioned or survey is conducted.

For the purposes of understanding, the relevant part of explanation 2 is reproduced herein under :-

*"Explanation 2.—For the purposes of this section, where,—*

*(i) .....; or*

*(ii) .....; or*

*(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

*(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee,*

*the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the*

.....  
.....  
*money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person."*

Now, the perusal of the newly inserted Explanation 2 brings home the vital point that under the new scheme of law there is no requirement of recording of the prior satisfaction of the Assessing Officer of the searched person so far as that the money, bullion, jewellery, other valuable article, thing or books of accounts or documents seized belongs to/pertains to/relates to a person other than the person subjected to such search. Further by perusal of the newly introduced Explanation 2, it can be seen that only the satisfaction of the Assessing Officer of the person other than that of the searched person is deemed fit by the legislature.

It is pertinent to mention that under the erstwhile Section 153C, the trigger point of initiation of Section 153C was the recording of satisfaction of the Assessing Officer of the "person subjected to search" so far as that the money, bullion, jewellery, other valuable article, thing or books of accounts or documents seized belongs to/pertains to/relates to a person other than the person subjected to such search **and** thereafter the dual satisfaction of the Assessing Officer of the "person not subjected to search" was required to be recorded so far as that such books of accounts or assets have a bearing on the determination of the total income of such other person not subjected to search. This matter took a significant time before getting crystallized and judicially settled over the efflux of almost 18 years. The matter reached up to the apex court beside numerous other high courts and tribunals. Reliance can be placed on the decision of the apex court in *Super Malls (P.) Ltd. V PCIT [2020] 115 taxmann.com 105 (SC)*.

**In my considered opinion, striking off with the satisfaction of the "Assessing Officer of person searched" in the new schema of law is a very uncalled deviation from a well established and judicially settled law particularly keeping in view that roping in such other person not subjected to search along with a "person subjected to search" is an extreme draconian step as far as such "other person not subjected to search" is concerned and thus such roping should be exercised with abundant caution and exercise.**

**Secondly**, in the newly inserted Explanation 2 under the new scheme of law, before assuming jurisdiction in a case of "other person not subjected to search" there is no requirement of any prior satisfaction of the Assessing Officer so far as that such valuable articles or books of account or documents belonging to the other person have some bearing on the income of such other person. This again shall have very severe consequences in future.

It is herein pertinent to mention that the legal position relating to search assessments under the erstwhile law is largely in favour of "such other person who has been not been subjected to search" primarily due to a necessary safeguard as roping in such other person in the search assessment arena is draconian in nature. It is further pertinent to mention here is that in context even to the erstwhile Section 153C which is in fact contains much more safeguard as compared to the current scheme of assessment in case of "other person not subject to a search", majority of the courts (including the apex court) have held that the Assessing Officer could not assume jurisdiction against such other person in the absence of any incriminating information or transactions. Reliance can be placed on numerous decisions, including:-

- *Supreme Court in CIT v. Sinhgad Technical Education Society [2017] 84 taxmann.com 290*
- *PCIT V Index Securities (P.) Ltd. [2017] 86 taxmann.com 84 (Delhi)*
- *Green Range Farms (P.) Ltd. v. Deputy Commissioner of Income Tax, [2018] 96 taxmann.com 249 (Delhi - Trib.)*
- *CIT V. IBC Knowledge Park (P.) Ltd. [2016] 69 taxmann.com 108 (Karnataka)*

**(e) No prior approval of the superior authority is required to be obtained by the Assessing Officer before passing of the order**

Under the new schema of Search assessments which has been inserted by the Finance Act 2021 in Section 147 to Section 151, there is no provision of prior approval of superior authority before passing of such assessment orders.

It is pertinent to mention here is that in the statute, the prior approval of the superior authority is required by the assessing officer only in respect of issuance of notice u/s 148 of the act, conducting enquiry, providing an

opportunity of being heard and passage of order u/s 148A of the act. However, in the amended statute, no provision of prior approval of superior authority exists before passing of such assessment orders. Even otherwise, in such search and seizure cases, the provisions of "Section 148A: Conducting inquiry, providing opportunity before issue of notice under Section 148" are not applicable.

Therefore, legally speaking an Assessing Officer in search and seizure can pass the order without seeking any prior approval of the superior authorities.

This is in strange contrast to the erstwhile law on search and seizure assessments.

Section 153D of the act in the erstwhile Search Assessment regime mandates that a prior approval is necessary for a valid assessment under Section 153A of the act.

For the sake of brevity, the relevant extract provisions of erstwhile Section 153D of the act are reproduced herein below:-

*"No order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner in respect of each assessment year referred to in clause (b) of section 153A or the assessment year referred to in clause (b) of sub-section (1) of section 153B, except with the prior approval of the Joint Commissioner."*

The Legislative intent of erstwhile Section 153D can be gathered from the CBDT Circular No. 3 of 2008, dated 12.3.2008 which read as under:

*"50. Assessment of search cases Orders of assessment and reassessment to be approved by the Joint Commissioner.*

*50.1 The existing provisions of making assessment and reassessment in cases where search has been conducted under section 132 or requisition is made under section 132A does not provide for any approval for such assessment.*

*50.2 A new section 153D has been inserted to provide that no order of assessment or reassessment shall be passed by an Assessing Officer below the rank of Joint Commissioner except with the previous approval of the Joint Commissioner. Such provision has been made applicable to orders of assessment or reassessment passed under clause (b) of section 153A in*

*respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A. The provision has also been made applicable to orders of assessment passed under clause (b) of section 153B in respect of the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A.*

*50.3 Applicability-These amendments will take effect from the 1st day of June, 2007."*

From the perusal of the Section 153D of the act read with the CBDT Circular No. 3 of 2008, dated 12.3.2008, the legislative intent can be gathered so far as that the legislature in its highest wisdom made it compulsory that the assessments of search cases should be made with the prior approval of superior authority, so that the superior authority apply their mind on the materials and other attending circumstances on the basis of which the officer is making the assessment and after due application of mind and on the basis of seized materials, the superior authority have to approve the Assessment order. Object of entrusting the duty of Approval of assessment in search cases is that the Joint CIT, with his experience and maturity of understanding should scrutinize the seized documents and any other material forming the foundation of Assessment. It is an elementary law that whenever any statutory obligation is casted upon any statutory authority such authority is required to discharge its obligation not mechanically, not even formally but after due application of mind.

Thus, the obligation of granting Approval by the superior authority to high tax quantum assessment orders in search and seizure assessments acts as an inbuilt protection to the taxpayer against arbitrary or unjust exercise of discretion by the AO. However, this inbuilt protection has been taken away in the new scheme of search assessments.

**(f) No clarity on application of penalty provisions of "Section 271AAB: Penalty where search has been initiated"**

Penal provisions in a case where search has been initiated u/s 132 on or after 15-12-2016 are governed by Sub-Section (1A) of Section 271AAB for the specified previous year.

**"Specified previous year"** is defined under clause (b) of explanation to 271AAB which reads as under:-

*"Specified previous year" means previous year –*

*(i) which has ended before the date of search, but the date of furnishing the return of income u/s 139(1) 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 date of search; or*

*(ii) in which search was conducted;"*

The existing legal framework of Section 271AAB(1A) prescribes that during the course of search initiated after 15-12-2016, certain undisclosed income which may be discovered may be liable for penalty u/s. 271AAB (1A). It is provided in that Section that a penalty of 30% of undisclosed income may be levied, if assessee admits such undisclosed income u/s. 132(4), specifies the manner and substantiate the manner in which such income has been derived and on or before the **specified date**, pays the tax together with interest, if any, in respect of such undisclosed income and furnishes the return of income for the specified previous year declaring such income. In case above conditions are not fulfilled then a penalty of 60% of undisclosed income may be levied.

Thus, in order to avoid penalty of 60% of undisclosed income the assessee has to fulfil above conditions, one of them being that the assessee pays on or before the "specified date" the tax together with interest, if any, in respect of the undisclosed income and also furnishes the return of income for the specified year declaring such undisclosed income therein on or before the "specified date".

**"Specified Date"** is defined under clause (a) of explanation to 271AAB which reads as under:-

*"specified date" means the due date of furnishing of return of income under sub-section (1) of section 139 or the date on which the period specified in the **notice issued under section 153A** for furnishing of return of income expires, as the case may be;*

### **Anomaly:**

It is pertinent to mention here is that after the advent of new scheme of search assessment by virtue of Finance Act'2021, Section 153A of the act has been made inoperative for searches initiated on or after 1<sup>st</sup> April'2021.

For such searches initiated on or after 1<sup>st</sup> April'2021, the return shall be filed u/s 148 of the act only and not under Section 153A of the act. However, an enabling necessary amendment to this effect has not been made in the definition of "Specified Date" under Section 271AAB of the act so far as to also include a return filed u/s 148 of the act in Search and Seizure cases.

Owing to this count, in my considered opinion, there is no clarity on application of penalty provisions of "Section 271AAB: Penalty where search has been initiated" in case of searches initiated on or after 01<sup>st</sup> April'2021 and therefore here also it will defeat the intended purpose of the new legislation to be less litigation prone by inviting fresh stream of litigation in the future unless clarified at the inception.

**(g) No notice u/s 148 can be issued for any assessment year on or before 1<sup>st</sup> April 2021 if limitation for issuance of such notice has already expired before commencement of Finance Act'2021**

Legally speaking, apart from numerous adverse implications arising out in the New Search Assessment regime, there is also something to cheer about so far as an assessee is concerned.

The time limit for issuance of notice u/s 148 of the act is governed by the provisions of Section 149 of the act. The Finance Act'2021 has made significant changes in Section 149 of the act. The newly substituted "Section 149: Time limit for notice" by virtue of Finance Act'2021 reads as under (relevant part):-

*"149. (1) No notice under section 148 shall be issued for the relevant assessment year,—*

*(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);*

*(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which*



*has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:*

***Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section, as they stood immediately before the commencement of the Finance Act, 2021:{ Emphasis Supplied}***

*Provided further that .....*

*Provided also that for.....:*

*Provided also that where .....*

*Explanation.—.....*

*(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151."*

From the perusal of Section 149, it can be learnt that the newly substituted Section provides that in normal cases, no notice shall be issued if three years have elapsed from the end of the relevant assessment year. However, notice beyond the period of three years from the end of the relevant assessment year but not beyond the period of ten years from the end of the relevant assessment year can be issued only in a few specific cases where the Assessing Officer has in his possession books of accounts or other documents or evidence which reveals that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakhs rupees or more for that year.

What is important to note here is that the first proviso to sub-section (1) of Section 149 provides that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of Section 149, as it stood immediately before the commencement of the Finance Act, 2021.

Under the earlier Section 149 before its substitution by the Finance Act'2021, clause (b) of sub-section (1) of Section 149 provides that no notice under section 148 shall be issued for the relevant assessment year if four years but not more than six years, have elapsed from the end of the relevant assessment year.

Let us understand this issue with a help of an illustration.

Let us assume that a Search was conducted on XYZ Ltd. on 10<sup>th</sup> April'2021. During the course of search, incriminating documents pertaining to A.Y. 2013-14 evidencing escapement of income chargeable to tax amounting to more than fifty lakh rupees were unearthed.

In such a scenario, since A.Y. 2013-14 is already barred by limitation for issuance of notice u/s 148 under the new law read with earlier Section 149(1) clause (b) before its substitution by the Finance Act'2021 (limitation period of six years from end of the relevant assessment year), no notice under Section 148 of the act can be issued under the new scheme of Search Assessments despite of the fact that the Ld. Assessing Officer can go beyond up to 10 years. This is indeed a praiseworthy piece of legislation in lines with the legal fundamental principles so far as subsequent amendment cannot seek to enhance or extend limitation for reopening assessment for those assessment years in respect of which limitation had already expired/ lapsed before the date the amendment becoming effective. Reliance can be also placed on the following judgements wherein the above mentioned legal principle was echoed:

- *K. M. Sharma v. ITO [2002] 122 Taxman 426/254 ITR 772 (SC)*
- *Brahm Datt v. Assistant Commissioner of Income tax 100 taxmann.com 324*
- *S.S. Gadgil v. Lal & Co. [1964] 53 ITR 231 (SC)*
- *C.B. Richards Ellis Moritius Ltd. v. Asstt. DIT [2012] 21 taxmann.com 535(Delhi)*
- *CIT v. Scindia Steam Navigation Co. Ltd. [1961] 42 ITR 589 (SC)*
- *[2014] 49 taxmann.com 249/227 Taxman 121/367 ITR 466 (SC)*
- *Govinddas v. ITO [1976] 103 ITR 123 (SC)*

It is pertinent to mention that this safeguard was not in place in the erstwhile search assessment regime viz. Section 153A wherein the notice and assessment could have been issued and conducted respectively on the strength of 4<sup>th</sup> proviso to Sub-Section (1) of Section 153A of the act which was inserted w.e.f. 01-04-2017. This anomaly in Section 153A has led to varied intense litigation at different appellate forums which hopefully will meet the ends of justice now.

### **Conclusion:-**

Having analyzed the changes made by the Finance Act'2021 and its apparent implications there upon the Assessments pursuant to a Search and Seizure action, it will be too early to concede to the legislative intention behind washing away the well existing and judicially evolved Search Assessment regime which was so done in the anticipation that the new system of search assessments would result in less litigation and would provide ease of doing business. Interestingly, one must also note that historical study of law relating to the search and seizure assessments suggests that similar arguments were placed by the law makers while abolishing the erstwhile Special Procedure for Assessment of search cases in 2003 contained in Chapter XIV-B (sections 158B to 158BI) which was brought in the statute book way back by the Finance Act'1995 w.e.f. 01-07-1995.

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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 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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