

J.B. NAGAR CPE STUDY CIRCLE
SEARCH & SEIZURE – PRACTICAL ASPECTS
POST AMENDMENTS BY FINANCE ACT 2021



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SNEHAL & ASSOCIATES
07TH AUGUST 2021

OVERVIEW

✦ Pre-Search Inquiry and Authorization of search.

✦ Important points to be considered at Commencement of Search.

✦ Recording of Statements during Search.

✦ Retraction of Confessions in Statements.

✦ Seizure- All relating aspects.

✦ Post Search Proceedings – PARADIGM SHIFT in existing provisions vis a vis new provisions.

PRE-SEARCH ENQUIRY AND AUTHORIZATION OF SEARCH

Possible Causes of Search:-

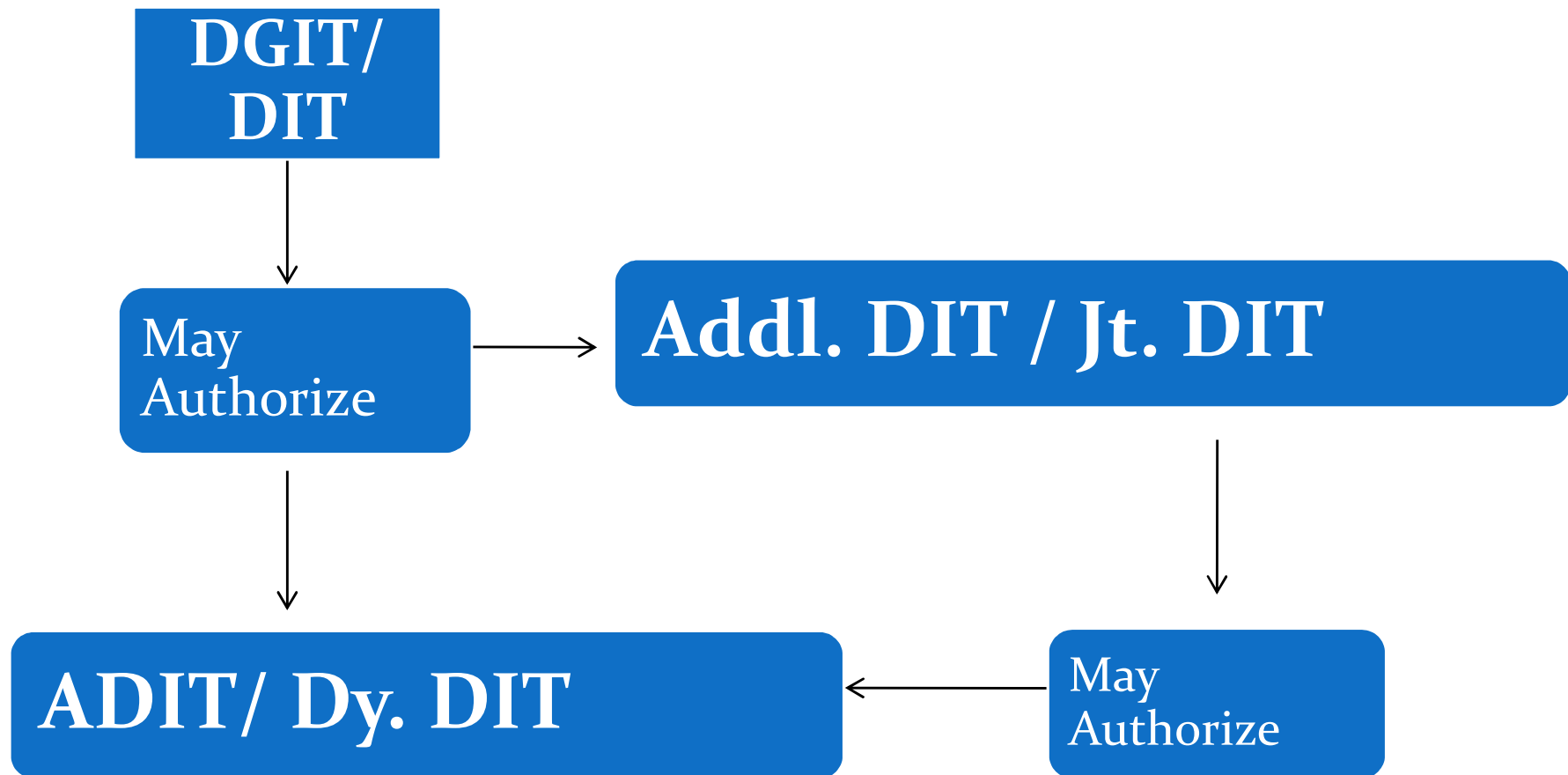
Informant / Grievances

Information of **Hawala Transactions** such as Bogus Purchases / Expenses, Bogus Cash Credits, Bogus Capital Gains, Foreign Bank Accounts

Information gathered during search of third party or associates

Any information flagged in accordance with “Risk Management Strategy” or any final objections raised by CAG that income computed is not as per the Act

AUTHORIZATION OF SEARCH



Note: Addl. Director, Joint Director are also empowered by CBDT to issue authorization u/s 132 (1) [refer Proviso to section 132(1) read with Notification No. 82/2009/F.NO.142/23/2009, dated 11-11-2009]

VALID SEARCHES

Authority must have information

Reason to believe and not suspect

It must be information and not rumor or gossip or hunch

Information must exist prior to authorization

Reason to believe must have reasonable bearing/ connection to information substantiated by a “Satisfaction Note”

Existence of condition precedent is open to judicial scrutiny

But sufficiency of information is not open to judicial scrutiny

DUTIES OF ASSESSEE SEARCHED:

1. Allow free access.
2. See the warrant of authorization and put signatures on the same.
3. Identify all receptacles and hand over keys of such receptacles to the authorized officer.
4. Identify and explain ownership of assets, books and documents found.
5. Not to allow or encourage the entry of any unauthorized person in the premises.
6. Not to remove any article without knowledge of the Authorised Officer.

DUTIES OF ASSESSEE SEARCHED:

7. Affix signature on the recorded statement, inventories and the panchnama.

8. Cooperate with search party till search action is concluded.

9. To answer all questions truthfully and to the best of his knowledge.

PROCESS OF SEARCH

Verify name and address mentioned in search warrant. (It is an instrument to arm him with the authority to search.)

The assessee should inspect it carefully to see that: (a) it is not blank; (b) irrelevant portions are struck off, etc..

If these defects are found, he should bring them on record by filing a letter before the authorized officer.

PROCESS OF SEARCH (Contd.)

Ask for identity card of officers, if they do not possess them produce some other documents to prove their identity, e.g. a certificate attesting their signatures. The certificate should be issued by a senior officer in charge of the search or by an immediate superior.

In a case where there is no proof of identity, the assessee would be within his right to refuse the ingress.

Authorised officer can ask for any other officers for assistance after complying with procedure but statements can be recorded only by the authorised officer.

COMMENCEMENT OF SEARCH

See that the warrant is duly signed and stamped

Verify the identity of each member of the search party

Carry out personal search of all members of the search party (to guard against 'Planting')

Insist upon personal search of ladies by ladies only (Especially after Tehelka and SC Judge's issue)



COMMENCEMENT OF SEARCH (contd.)

Have two witnesses (Panchas) (Refer Rule 112 (6) and (7)) preferably who would support you even in case of “Retraction” at any later date.

Preferably Two respectable inhabitants of the locality, who will witness the search and remain present at the premises throughout the operation comes to an end.



At least two known respectable inhabitants of the locality

CONDUCT OF OFFICERS

Despite aggressive approach, the conduct of some member in the search team is uncivilized and questionable leading to hurt of sentiments and feelings. The best course would be to lodge a complaint with the Director or Commissioner concerned or with the Director General or Chief Commissioner concerned or with the Member (Investigation).

In extreme cases, the action may lie in “torts”, of course, it will have to be established that it was covered by the immunity of sovereign act by challenging the proceedings under Article 226 of the Indian Constitution. The same is possible if it is established that the search is done in an irregular and illegal manner.

PRECAUTIONS TO BE TAKEN WITH REFERENCE TO SEARCH WARRANT:

There may be a situation where in the same premises two or more persons have similar names as mentioned in Search Warrant. e.g. Search Warrant is issued in the name of Mr. K.J. Sharma living in Flat no. 22 of a building and Income Tax Department searched Flat No. 501 of another Mr. K.J. Sharma of the same building. In this case Department has no jurisdiction to search Flat no. 22.

There may also be a situation where search warrant is issued for one particular premises and search is conducted at another premises of the same person. Ensure that the address of another premise is also mentioned in the warrant.

PRECAUTIONS TO BE TAKEN WITH REFERENCE TO SEARCH WARRANT:

When personal assets are destroyed like sofas and beds are torn, floor is dug and walls are broken with mala fide intention and there was no reason to suspect that items broken or destroyed contained any concealed income or assets hidden therein neither on the basis of information received from the informer, nor from any other source, the assessee may take action.

As such no remedy lies against such actions if they are done bona fide and in good faith in carrying out the object of the search. At best the assessee may explore possibility of filing complaint with the DI(Investigation) who may take administrative action only in extreme circumstances.

DURING THE CONTINUATION OF THE SEARCH

SI No.	Subject	What to do and why?
1	Be Vigilant	<ul style="list-style-type: none">• While attending to and serving the large search team be careful and vigilant.
2	Call your Key Personnel	<ul style="list-style-type: none">• Assessee may seek permission to call his key personnel to assist him during the course of search.
3	Have medicines in Time	<ul style="list-style-type: none">• Yes
4	Call your Counsel	<ul style="list-style-type: none">• Assessee may call his legal advisor during the search. <p>However, at initial stage of search, presence of counsel is not allowed since the search action is fact finding exercise. (128 ITR Madras HC is against the assessee.)</p>

DURING THE CONTINUATION OF THE SEARCH

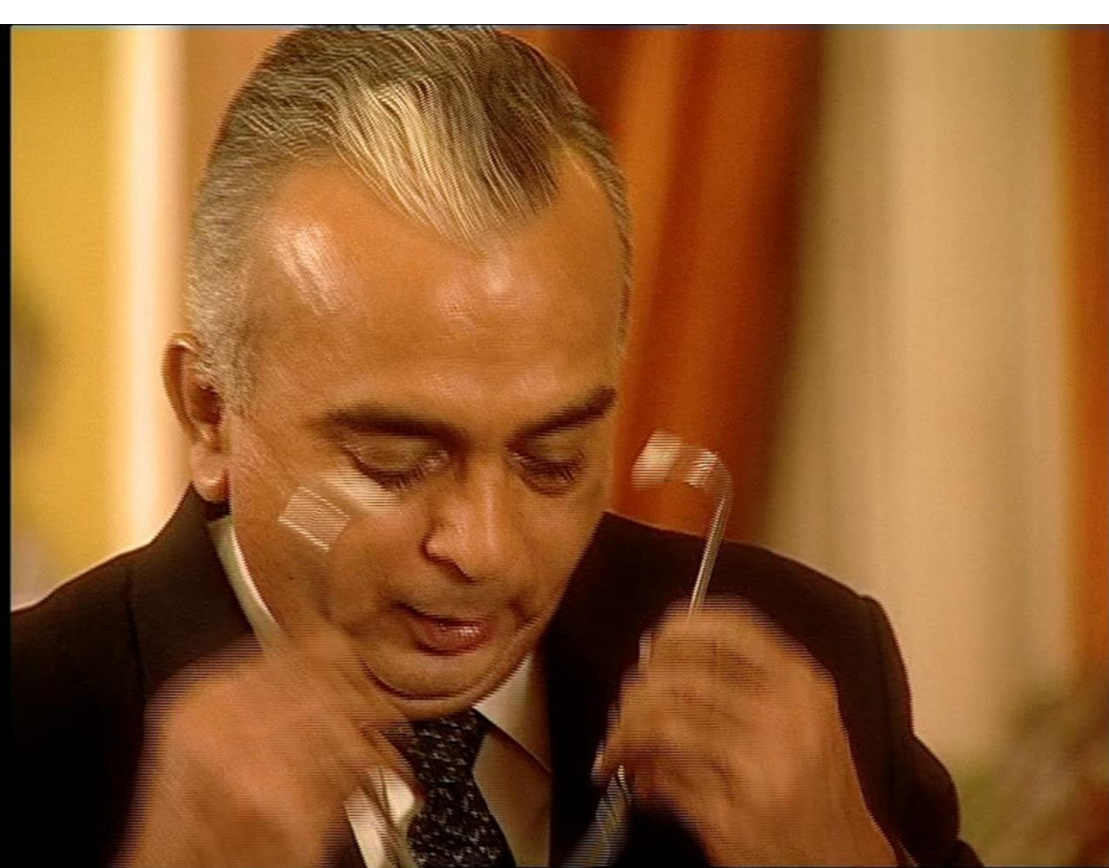
SI No.	Subject	What to do and Why ?
5	Co-operate	<ul style="list-style-type: none">• Fully cooperate with search party and let them do their job
6	Records on Computer	<ul style="list-style-type: none">• Provide all necessary facilities to inspect and copy records• Call the concerned person
7	Be assertive	<ul style="list-style-type: none">• Explain the facts and circumstances assertively, but not aggressively• Don't lose patience• If not 100% certain then tell that "we shall reply after accessing data".• Remain calm, cool and pleasant• Do not sign any statement which you have not given
8	Don't react but respond	<ul style="list-style-type: none">• Be receptive• Keep track of your reactions and even body language• Attack the problem, not the officer



Women can be checked only by lady members of raid team.

Children can go to school after the Search team conducts search of school bags etc.





In case of any health related emergency you have the right to call a doctor of your choice. You also have the right to have your meals at proper time.

Ensure that peace is maintained throughout the duration of the search and refrain from making false statement or producing false evidence.



PRECAUTION TO BE TAKEN DURING STOCK TAKING BY SEARCH PARTY

Carefully oversee/ watch procedure followed by Search Party

Explain what is the Tag Price, Trade Discount, Invoice Value, Purchase Bill Value while valuing stock

Explain Gross Margins item wise depending upon prices of competitors and past performance (More applicable in survey operations)

BANK LOCKERS

If at the time of the search the details of one or more lockers are found, then order u/s 132(3) of the Act is passed.

It restrains the assessee from opening or operating the said Locker.



PRECAUTIONS TO BE TAKEN WHILE EXPLAINING JEWELLERY

In case of search of a jeweller , bifurcate “Stock in trade” and “Capital Asset”

Refer - Sri Pushpa Ranjan Sahoo v. ACIT (2012) 252 CTR 113/75 DTR 341 (Orissa) (HC)

Wealth tax return (if applicable) disclosing jewellery should be readily available

Explore possibility of producing copies of bills and such other documents to the satisfaction of the search party.

It is always advisable to state that, the jewellery belongs to family as a whole, so as to take maximum benefit of the CBDT Instruction no. 1916.



Jewellery up to a specified limit (e.g. 500 grams per married lady, 250 grams per unmarried lady and 100 grams per male member of the family) is generally accepted. In case of a wealth tax assessee, jewellery in excess of the gross weight declared in the wealth tax return only needs to be seized. The inventory of the entire jewellery is taken by the Departmental valuer who accompanies the search team.

Release of Asset (Sec 132B)

If following condition is satisfied, asset may be released (after recovery of existing liability from such asset) :-

Apply to AO within 30 days from the end of the month in which the asset was seized for release of asset;

Explains the nature and source of acquisition of such asset to the satisfaction of the Assessing Officer; and

Prior approval of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner.

Asset or any portion thereof shall be released within a period of 120 days from the date on which the last of the authorisations for search u/s 132 or for requisition u/s 132A, as the case may be, was executed..

PROHIBITORY ORDER [SECTION 132(3)]

Where its not practicable to 'seize' any :-

- books of accounts/ others documents,

- money, bullion, jewellery,

- other valuable article or things.

order served on person in possession of above; and

such person is directed not to part or otherwise deal with same.

Is a Prohibitory order issued under subsection (3) of Section 132 of the Act in respect of Current Account of the searched person without any material showing that amount deposited therein is undisclosed income sustainable in law?

Ans: No

Refer:

M/s VISA COMTRADE LIMITED Vs UNION OF INDIA AND OTHERS [2011] 201 TAXMAN 413 (ORISSA)/[2011] 338 ITR343 (ORISSA)/[2011] 243 CTR 348 (ORISSA)

SPECIMEN- LIST OF INVENTORY



Annexure _____ Page _____
Date of Search/Survey _____

LIST/INVENTORY OF JEWELLERY ETC., FOUND/SEIZED

List of Bullion (Primary gold, silver etc.) / gold ornaments and jewellery / silver articles found / seized in the case of M/s. / Shri / Smt. _____
at _____

Specific place where found : _____

Item claimed to be belonging to : _____

Sr. No.	Description of the articles	No.	Metal	Gross Wt.	Estimated Net Wt.	Value Rs.

Signature of Panchas. _____ Signature of Authorised Officers. _____ Signature of Party. _____

1. _____ 1. _____

2. _____ 2. _____

Note: 1. Seperate lists to be prepared for items found at different places or claimed to be belonging to different persons

SPECIMEN- PANCHNAMA



A panchnama is prepared in which an account of the entire proceedings is recorded, and all the statements recorded and inventories prepared during the search are appended to it. The panchnama is to be signed by the authorized officer, the person in whose case the search is being conducted and the witnesses to the search.

D. D. I., T.'s Copy

S. S. - 5

PANCHNAMA

[To be prepared in quintuplicate] Party No. _____

- [A] Warrant in the case of : _____
 [B] Warrant to search : _____
 [Details & Ownership
 of place of search]
 Telephone Numbers. _____
 [C] (A) and (B) stated to : (A) _____ (B) _____
 be assessed by _____
 [D] Search party consisting of : _____

Authorised Officers

Name

Full Designation

1. _____
2. _____
3. _____
4. _____
5. _____

Other officials who assisted the authorised officers

6. _____
7. _____
8. _____
9. _____
10. _____

[E] Name and complete address of Panchas :

1. _____
2. _____

On being called by Shri. _____ on _____ at _____
 a.m./p.m. we, the above named panchas, presented ourselves at the above place of search. The authorised Officer, Shri
 _____ showed the warrant of authorisation dated _____
 issued under Section 132 of the Income-Tax Act 1961/37A of the W.T. Act, 1957 in the case of (A) above to search the
 place of mentioned at (b) above and duly signed and sealed by the Director of Income-Tax (Inv.) Mumbai, New Delhi/
 Commissioner of Income-Tax Mumbai City / Central Mumbai / Joint Director of Income-Tax (Inv.) Unit -
 Mumbai / Joint Commissioner of Income Tax _____ Range, Mumbai to
 Shri/Smt. _____ who was present in the said place the time and who after
 reading the said authorisation/after the authorisation was explained in local language viz. _____ by
 Shri/Smt. _____ signed it in our presence and along with us, in token of having
 per used the same.

2. As today's search was in continuance of the proceedings on _____ we along with the aforesaid
 authorised officers before the commencement of proceedings today inspected the seals which had been placed on that
 date and found them to be intact/tampered with as narrated in the enclosures.

PRELIMINARY STATEMENT RECORDED u/s 132(4):

Statement u/s 132(4) is recorded **on oath and** its evidentiary value is high and it can be used in any proceedings under the Act

Investigating officer normally puts questions in order to gain support for the 'findings' in search

Correct facts must be stated or time may be sought

Vide Instruction F. No. 286/2/2003-IT (Inv).II dated 10/03/03, CBDT has advised search parties not to obtain confessions by adopting coercive means. However, in practice in all most all the cases search parties insist upon getting confessions

DECLARATION TAKEN BEFORE RECORDING THE STATEMENT U/S 132(4)

You are being made aware of the certain sections of Indian Penal Code (IPC) and Income-tax Act, 1961:

- 177 of IPC, pertaining to furnishing false information.
- 179 of IPC, pertaining to refusing to answer a question.
- 180 of IPC, pertaining to refusal to sign a statement.
- 181 of IPC, pertaining to making any false statement on oath.
- 277 of Income Tax Act, 1961 pertaining to false statements.
- 277A of Income Tax Act, 1961 pertaining to enabling others to evade tax.

Violation of these sections would attract penal action as per the provisions of the respective Acts.

OPERATION OF PROHIBITORY ORDER

The Inventory of all the items of jewellery based on the respective gross and net weights of Gold, carats of Diamonds, or precious stone as per departmental valuer's reports are reconciled and are either released/seized depending upon wealth-tax returns/bills etc.

The DDI uses discretionary power to release jewellery against payment of tax equivalent to the value of jewellery depending upon emotional attachment of the assessee and his family.

Various documents suspected by the DDI as incriminating are duly inventorized and seized for assessee's explanation.

EXPLANATION OF SEIZED DOCUMENTS

The DDI conducts detailed investigation of the case by conducting inquiries, surveys, issuing various summons, recording statements and various other coercive modes that includes cross-examination of third parties, employees, customers, suppliers, or any other person deemed fit.

The assessee is duty bound to explain the accountability of all the transactions forming part of seized documents in the regular books of accounts.

The assessee should explore the option of giving “DISCLOSURE” depending upon the facts of the case, but not later than the operation of the final prohibitory order.

DO'S

1. Panchnama- Copy must be obtained immediately.
2. Inventory- Copy must be obtained.
3. Copies of documents seized- Make application to furnish copies
4. Copies of statements – make application to furnish copies
5. Factual Error – Valuing Stock – Inventory etc. - Write immediately to the concerned officials who have conducted the search operation
6. Goods of perishable nature if kept under prohibitory order- ask to release or sell- if loss is occurred the department is responsible
7. In case of Seizure of cash- Ask adjustment against tax liability
8. Disposal of assets seized- release of assets or sell by the tax department

9. Damages- File petition for loss due to action of the Tax officials

10. Retraction- within reasonable time before the same officials who have taken the statements. If required copy to higher authorities

11. If any valuable or document of 3rd party is seized ask the party concern to make an application for release and claiming the ownership.

12. If any documents or a statement of 3rd party is proposed to be used against you, ask for the copies such documents or statements and further request for opportunity to cross examine them.

13. In response to summons, attend and answer the questions- If you don't know the answer verify and reply.

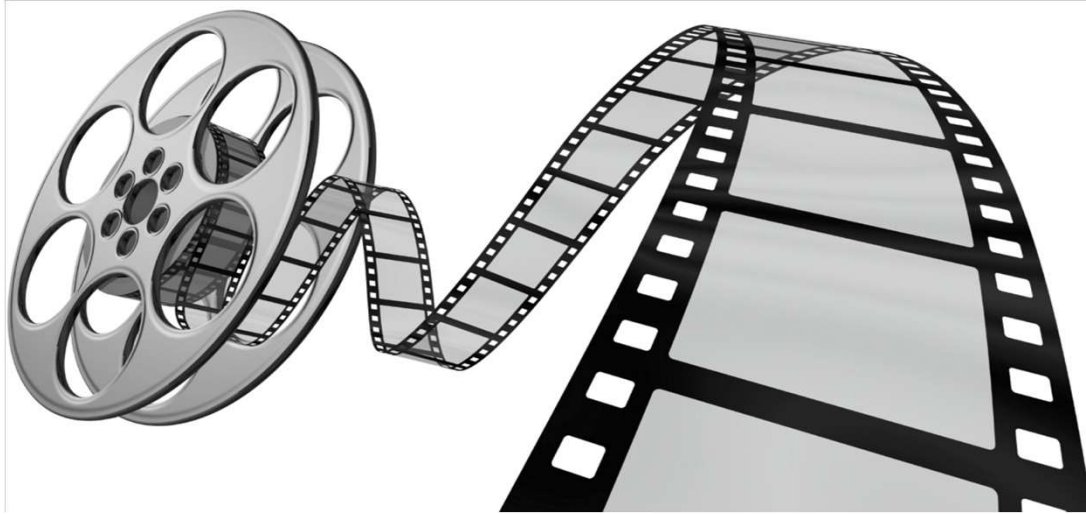
14. Discuss with consultant – way forward.

15. Cooperate with proceedings

DON'TS

1. Removing valuables, books, documents, chits, notings, diaries, etc put under prohibitory order
2. Mislead on facts
3. Try to destroy the books, documents, chits, notings, diaries, etc

A SHORT MOVIE TO BE PLAYED



Please click the above hyperlink !

SUBSEQUENT STATEMENTS RECORDED u/s 132(4)-SIGNIFICANCE

Evidential Value of a Statement recorded u/s 132(4) at an Assessee's premises subjected to search is extremely high.

Statement recorded u/s 133A at the Assessee's premises subjected to Survey has no evidential value unless backed by incriminating documents.

Why Surrender of Income duly substantiating the manner of earning undisclosed income –

To avoid penalty

To mitigate rigors of search and to wrap up the search proceedings

SUBSEQUENT STATEMENTS RECORDED u/s 132(4)-SURRENDER

Cover incriminating material found

Creation of capital

Generation of income v. Application in assets (Telescoping)

Set-off of losses

SUBSEQUENT STATEMENTS RECORDED u/s 132(4)- SURRENDER

Try giving disclosure in Current year as if income is yet to be recorded depending upon the facts of the case

No immunity on conditional surrender on pretext of buying peace

Principle of Peak Balance (Circular Trading, etc)

No surrender for third party (Benami Act)

SUBSEQUENT STATEMENTS RECORDED u/s 132(4)- SURRENDER

A paragraph mentioning that the surrender letter submitted by the assessee is in the nature of statement of the assessee u/s.132(4).

To mention broad manner of earning undisclosed income and to substantiate it to the extent possible.

Surrender letter to be signed by the person/entity making the surrender. In case a person makes declaration on behalf of other person, he should be authorized to do so.

Surrender of undisclosed income to be made in the hands of the person/entities against whom search warrant has been issued.

SUBSEQUENT STATEMENTS RECORDED u/s 132(4)- SURRENDER

To ensure that surrender letter is given prior to the date of conclusion of search with respect to the concerned person/entity.

In case declaration is made amending or improving upon any earlier declaration, this fact should be clearly mentioned.

In case there is seizure of cash, assessee should state and request to treat the amount of cash seized as payment of advance tax in the hands of concerned person/entity.

A line mentioning that surrender of undisclosed income is being made to buy peace and to settle the dispute. However, turned down in view of Supreme Court decision in MAK Data Pvt. Ltd. vs CIT

SUBSTANTIATE THE MANNER OF EARNING UNDISCLOSED INCOME u/s 132(4)

Assessee should explore the possibility of availing the benefit of telescoping i.e. ensuring that he co-relates the application of undisclosed income with the source thereof. For instance, he may try to co-relate “Unexplained jewellery” with unaccounted Sales/Cash Generated through Bogus Purchase bills etc. and ensures that the entire manner of earning such undisclosed Income is substantiated in a statement of admission u/s 132(4).

RETRACTION OF CONFESSION/SURRENDER MADE IN STATEMENT

It is completely factual and differs from case to case

It should be done as early as possible after confession

It should be made in an affidavit and backed by corroborative evidences justifying the retraction

Help can be sought by referring to CBDT circular No.286/2/2003-IT (Inv.), dt. 10th March, 2003, before deciding retraction.

RETRACTION OF CONFESSION/SURRENDER MADE IN STATEMENT (contd.)

Conditional surrender- fulfilling conditions

Consequences of retraction.

In case of retraction burden of proof on assessee : Krishan Lal Shiv Chand Rai v. CIT (1973) 88 ITR 293 (P&H).

As discussed earlier, statement given u/s 132(4) is on oath and whereas u/s 133A is not on oath and therefore it is difficult to retract the disclosure made in the statement u/s132(4) as compared to the disclosure made in the statement made u/s 133A.

*Other Matters related
to Search and seizure*

Provisional Attachment

Assets seized u/s Sec. 132 (9A), (9B) and (9D) in accordance with “execution of an authorisation for search” as per the provision of sub-section (2) of Section 153B.

Section 132 (9B) and (9C) is to protect the interest of revenue and safeguard recovery in search cases.

Section 281B– Assessing Officer shall explore possibility of attaching property to protect interest of revenue during the pendency of assessment proceedings.

EXISTING TAX LIABILITY (No changes despite change in Post Search Assessment Proceedings)

A view may be taken that, after the amendment of Section 132B by the Finance Act, 2013, adjustment of seized cash is available only on completion of assessment, since tax liability is determined at that point of time

But where, the Assessee himself offers the seized cash as undisclosed income in his Return of Income, a view can be taken that the liability is created on the filing of the Return and accordingly, the seized cash must be adjusted against his self assessment tax liability.

Under this scenario it is advisable to file a letter seeking adjustment of seized cash against the self assessment tax liability

Contd...

After the amendment made by the Finance Act, 2013 w.e.f 1.06.2013, seized cash cannot be adjusted against liability for payment of advance tax

Before the above amendment, the Assessee used to request in writing for adjustment of seized cash against liability for payment of advance tax and courts had taken the view that seized cash should be applied towards such liability.

Refer - Shri Ram S. Sarda v DCIT (ITA no. 1172/Rjt/2010 dated 02/11/2011) Shreeji prints Pvt. Ltd. v. ACIT (ITA no. 359/Ahd/2012 dated 20/04/2012)

However Department may take a view that, existing tax liability is determined only when Return of Income is processed u/s 143(1) and in such situation the following consequences may arise:

Return of income may be considered as defective and may be considered as non –est.

Immunity from penalty u/s 271AAB may not be available

Assessee may be treated as Assessee in default u/s 140A(3) for non payment of Tax

Instruction No.11 of 2006, of 1st Dec., 2006 regarding release of seized cash deposited in PD Account :-

Where an application is made in accordance with first proviso to section 132B(1)(i) for release of seized cash *and* the nature and acquisition of such cash is explained to the satisfaction of the Assessing Officer, the seized cash should be released within the time-limit provided under that section after adjustment of any existing liability.

Where seized cash or part thereof was not released under first proviso to section 132B(1)(i), the amount lying in PD Account should be released within one month of passing the (search and seizure) assessment order after :-

Contd..

(i) adjusting the seized cash against any existing liability and the amount of liability determined on completion of the search and seizure assessment; and

(ii) in cases where penalty proceedings, connected with such assessment, have been initiated, retaining out of the balance an amount to meet the expected liability on account of the penalty imposed

MODES OF SEIZURE:

Actual Seizure

Deemed Seizure/` Restraint order second proviso to section 132(1)

-Due to physical attributes, possession of any valuable article or thing not possible or practicable; then

-order served on the person in possession of such article or thing; and

-person directed not to part/ deal with the article or thing

-Such action is termed as 'deemed seizure'

Shift of Focus – “ASSUMED BENAMI” to “BENAMI TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016” and “BLACK MONEY AND IMPOSITION OF TAX ACT, 2015”

Section 132(4A) provides that where a person is found to be in possession of any books of account, documents, money, bullion, jewellery or any valuable article or thing during the course of search, then it may be presumed that :

(a) such books and assets belong to such person,

(b) the contents of such books and documents are true,

(c) the books of account and documents are to be deemed to be in handwriting of the person and are deemed to be carrying such person's signature where they are signed as such.

BENAMI TRANSACTIONS (PROHIBITION) AMENDMENT ACT, 2016

It is a system of acquiring and holding property and even of carrying on business in names other than those of the real owners.

Principle that transaction is presumed to be for benefit of person providing money.

Benamidar representing the true owner.

PMLA 2002 w.e.f 19.04.2018

The Word 'ABROAD' introduced to implement Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act 2015- to bring back Indian Residents' undisclosed assets lying outside India

Corporate frauds included as Scheduled offence-Section 447 of Companies Act is being included as scheduled offence under PMLA

Exchange of information by Investigation wing with Enforcement directorate to enhance effectiveness of efforts against black money.

Measures to enhance effectiveness of investigations

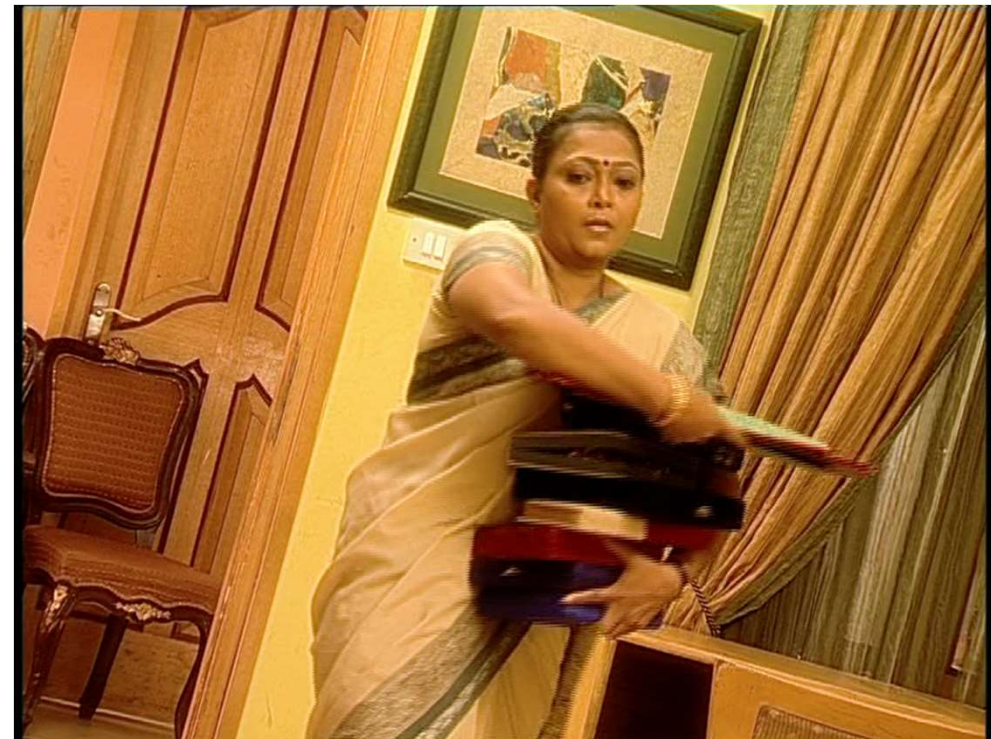
ITEMS WHICH CAN BE SEIZED

Unaccounted cash, jewellery, gold, bullion, lockers, promissory notes, cheques, drafts

Books of accounts, chits, diaries etc

Computer Hard Disks and other data storage devices

Documents of property, title deeds etc



ITEMS WHICH CANNOT BE SEIZED

Stock held in business

Items disclosed in Income Tax and Wealth tax Returns

Items appearing in books of accounts

Cash for which explanation can be given

Jewellery mentioned in wealth tax return

Gold up to 500 Gm per married woman, 250Gm per unmarried woman and 100Gm per male member of the family

Jewellery as per the status of the family if so appear to the satisfaction of investigating officer

PROCEDURE AS PER RULE 112

No	Rule	Brief
1.	Sub rule (3) & (4A)	Power of the officer to ingress and duty of the person in charge of the place qua ingress by officer
2.	Sub rule (4) & (4A)	Use of Police.
3.	Sub Rule 4(B)	Power of the Officer to break open any box, locker, safe etc.
4.	Sub rule (6) & (7)	Power of calling witness for search and preparation of list of things seized.
5.	Sub rule (8)	Permission to an occupant or any other person on his behalf to attend search.
6.	Sub rule (9)	Delivery of list of things seized to occupant.
7.	Sub rules (10) to (12)	Custody of seized articles.
8.	Sub rule (13)	Opening of Seal.

APPRAISAL REPORT

Conducting DDI (Inv) to prepare an appraisal report and forward to A.O.

The Appraisal Report shall contain indicative details such as:

- List of information leading to search, List of Premises covered u/s 132 and 133A of the Act, List of important statements recorded, findings of the search and seizure action.

- The appraisal report shall also contain details of undisclosed income and summary of disclosure along with inventory of books of accounts/documents etc., analysis of seized/impounded materials etc, analysis of computer data backup, core documents if any.

Contd..

The DDI in its appraisal report shall also suggest the A.O. for the line of investigation, detention of impounded materials, possibility of launching prosecution proceedings against the assessee and suggestions to the A.O. to duly consider the findings for tax evasion elaborated in the report while framing the assessment orders u/s 153A or 153C (search prior to 01.04.2021) and u/s 147 (search on or after 01.04.2021) of the Act.

POST SEARCH PROCEEDINGS

Paradigm shift in the provisions relating to Income Tax Search and Seizure Assessments

- ❖ The Hon'ble Union Finance Minister presented the Union Budget 2021 of India on 01.02.2021. In significant changes to the taxation process, among other tax measures, the Hon'ble Finance Minister has brought an OVERHAUL change to the provisions relating to “Assessment in case of search or requisition viz. section 153A to 153D” and “ Reassessment u/s 147”.
- ❖ Earlier notice u/s 148 could be issued by the Assessing Officer if there was “ REASON TO BELIEVE” that income chargeable to tax had escaped Assessment which has now been totally replaced w.e.f 01.04.2021.
- ❖ Similarly, a search u/s 132 could have been authorized if there was “REASON TO BELIEVE” that
 - (i) any person to whom notice u/s 142(1) or summon u/s 131 issued/might be issued to produce Books of A/c's or documents & Assessee failed to produce/will not produce such books of accounts or documents ;

Paradigm shift in the provisions relating to Income Tax Search and Seizure Assessments (Contd..)

- Any person is in possession of any money, bullion, jewellery or other valuable article or thing, which has not been disclosed/would not be disclosed for the purpose of IT Act, 1961.
- ❖ As per the new provision laid down by the FA 2021, in order to mitigate the arbitrary utilisation of the phrase -- “**REASON TO BELIEVE**” by the Learned Assessing Officer in re-opening the case of the Assessee u/s 148 of the Act, the same been completely been replaced as under:

“Information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment”.

It can be argued that information in the possession of the AO must have direct nexus or live link in the form of “evidence.”

- ❖ In view of the above, search initiated on or after 01.04.2021 shall undergo assessment proceedings u/s 147 of the Act by issuing notice u/s 148 of the Act.

Notice u/s 148 of the Act

*SEARCH &
REQUISITION
CASES
(Sec 132, 132A)*

*NON SEARCH AND
REQUISITION CASES
(Sec 133A and other
reopening cases
proposed)*

Procedure u/s 148A
is mandatory prior
to issue of notice
u/s 148

New provisions relating to income escaping assessment and search assessments as per Finance Act, 2021

Section 148A: Conducting Inquire, Providing opportunity before issue of notice/s 148

The Assessing Officer shall before issuing notice u/s 148:

148A(a)

- ❖ *conduct any enquiry, IF **REQUIRED**;*
- ❖ *Take prior approval of specified authority w.r.t the info. which suggests that the income chargeable to tax has escaped assessment; (refer Expl 1 to sec 148)*

148A(b)

- ❖ *Provide **Opportunity** of being heard to assessee in the form of **SCN** as to why notice u/s 148 should not be issued.*
- ❖ *Take approval of specified authority*
- ❖ *Time Limit – 7-30 days*

148A(c)

- ❖ ***consider the reply of assessee** furnished, if any, in response to the show-cause notice.*

148A(d)

- ❖ *Decide whether **fit case** to issue notice u/s 148.*
- ❖ *Pass a speaking order with prior approval.*
- ❖ *Time Limit – 1 month*

The provisions of section 148A shall not apply in the following cases, i.e. notice under section 148 can directly be issued:

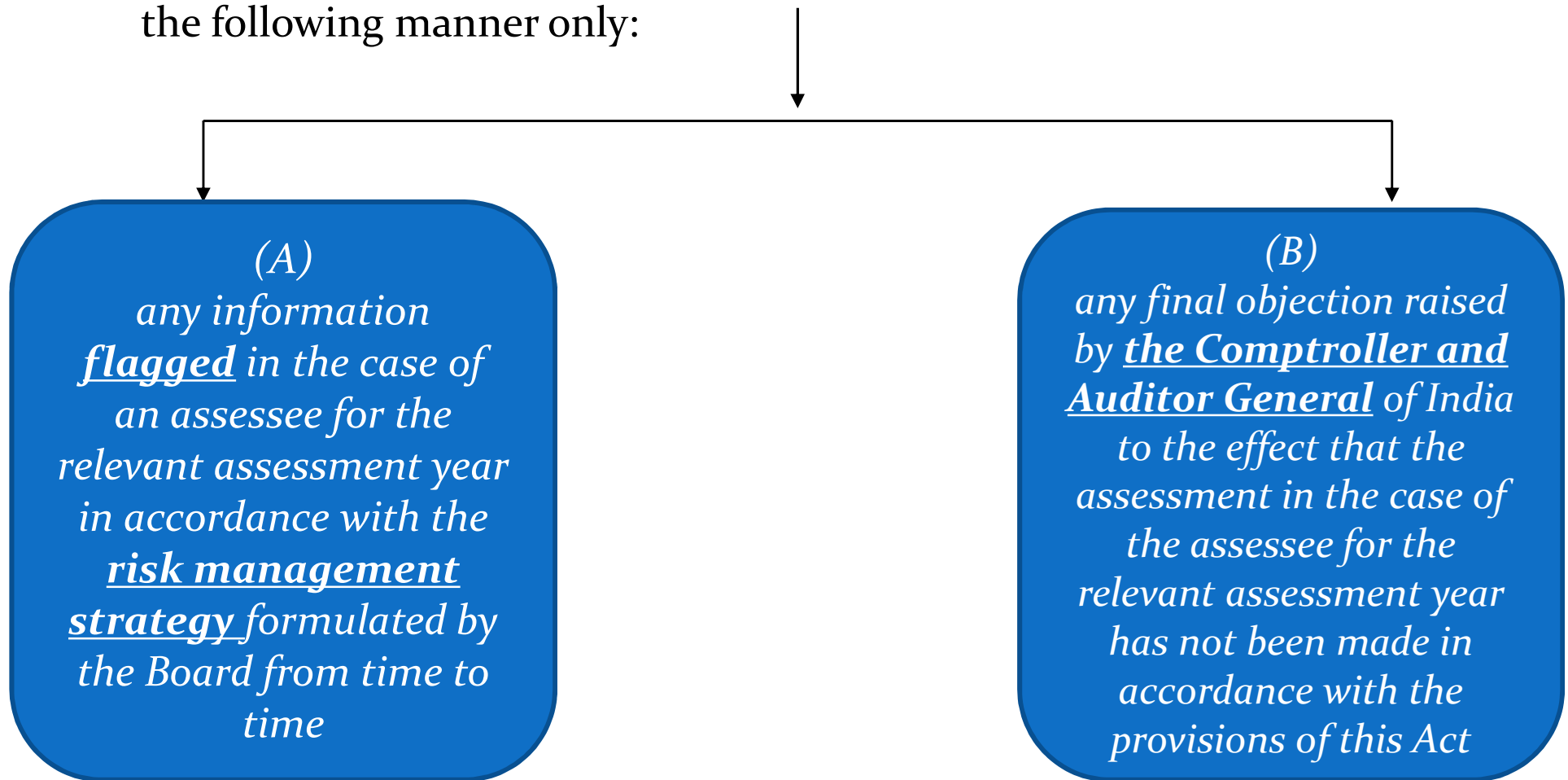
- ❖ a search is initiated under **section 132** or books of account, other documents or any assets are requisitioned under **section 132A** in the case of the assessee on or after the 1st day of April, 2021; or
- ❖ the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under **section 132** or requisitioned under **section 132A**, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or
- ❖ the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under **section 132** or requisitioned under **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.

Section 148: Issue of notice where income has escaped assessment.

- ❖ The Assessing Officer shall “**IF REQUIRED**” (non-search cases), serve notice u/s 148 A of the IT Act, 1961 alongwith the copy of order u/s 148A(d) of the IT Act, 1961 before making any assessment, reassessment and recomputation u/s 147 of the Act.
- ❖ The notice shall require the assessee to furnish the return of income.
- ❖ No notice can be issued u/s 148 unless there is information with the assessing officer that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.
- ❖ There are 3 explanation to section 148 which are explained in subsequent slides:

Explanation 1 to Section 148 of the IT Act, 1961

- ❖ “The information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment” can be obtained in the following manner only:



Explanation 2 to Section 148 of the IT Act, 1961

- ❖ 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 in the following cases :-
 - 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
 - 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

Contd..

- 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
- 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, **pertain to**, or any information contained therein, relate to, the assessee,

Explanation 3 to Section 148 of the IT Act, 1961

- ❖ For the purposes of this section, specified authority means the specified authority referred to in section 151.

Section 149: Time limit for notice.

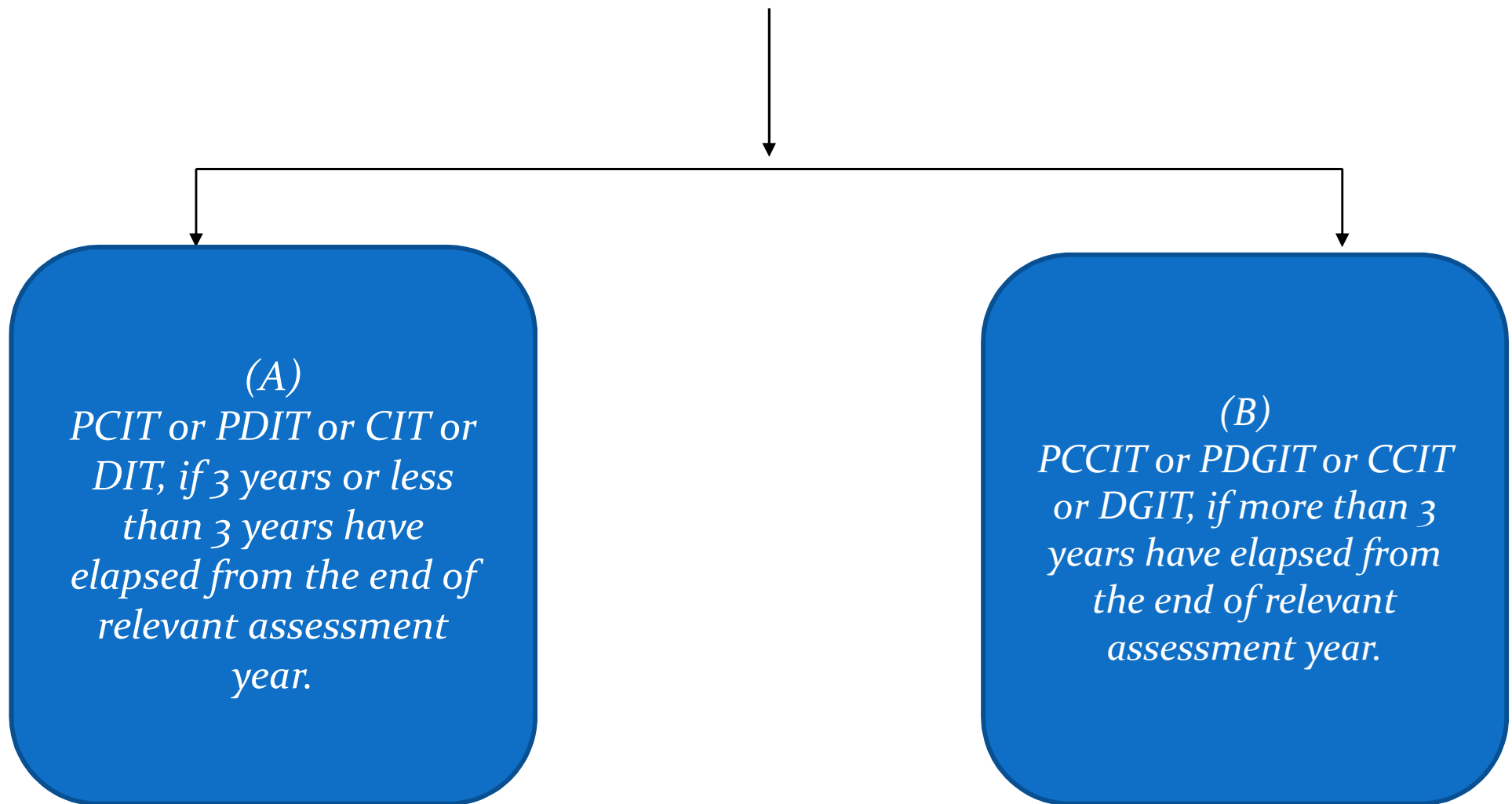
- ❖ No notice under section 148 shall be issued for the relevant assessment year,—
 - (a) if three years have elapsed from the end of the relevant assessment year, unless the case falls in clause (b);
 - (b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment 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 LAKHS** rupees or more for that year:
- ❖ The term "**Asset**" has been defined in Explanation to section 149 and the same shall **include** immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account. It is pertinent to note that the definition is inclusive in nature and therefore not restricted to the above assets.

Contd..

- ❖ No notice under section 148 shall be issued at any time for the relevant assessment year beginning on or before 1st day of April, 2021, if the time limit for the issuing such such notice for the said Assessment Year has expired as per the earlier provisions of the Act, i.e, as the law stood immediately before the commencement of the Finance Act, 2021.
 - ✓ **For Example:** No notice can be issued under the new provisions of the Act i.e. from Assessment Year 2011-12 to AY 2014-15. (Old provision of four, six, ten, sixteen years redundant).
- ❖ Where a notice under section 153A, or section 153C r.w.s 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021, the new provisions under section 149 shall not be applicable.

Section 151 : Sanction for issue of notice

❖ “Specified Authority” for the purpose of sec 148A and sec 148 shall be



Section 151A – Faceless Reassessment (by notification)

With effect from 01/11/2020 the taxation and other laws (relaxation and amendment of certain provisions) Act, 2020 has inserted a section 151A to empower the CG to make a scheme to carry out the following functions in the faceless manner:

- A. Assessment, reassessment or re-computation under section 147
- B. Issuance of notice under section 148 ⁵[or conducting of enquiries or issuance of show-cause notice or passing of order under section 148A] or sanction
- C. Sanction u/s 151 for issue of such notice under section 148 for conducting reassessment
- D. *Conducting of enquiries or issuance of show-cause notice or passing of order under section 148A (Before issuing notice u/s new 148*

Section 153: Time Limit for Completion of Assessment, Reassessment and Recomputation

Section	Time Limit (As per Act)
Order u/s 143(3) and 144	AY 2020-21: 31 March 2022
	AY 2021-22: 31 December 2022
Order u/s 147 (Notice u/s 148 received after 01.04.2019)	12 months from end of the financial year in which notice u/s 148 is received

Issues

Due date for reopening of assessment for AY 13-14 and 14-15

COVID-19 pandemic

Extended

Due dates extended under TLA, 2020

Compliances falling due between 20.03.2020 to 31.12.2020

31.03.2021

Issue of notice u/s 148 for AY 2013-14

31.03.2021.

Due dates extended as per notifications

Compliances falling due up to 30.03.2021

31.03.2021

(Notification No. 93/2020 dated 31.12.2020)

Compliances falling due up to 31.03.2021

30.04.2021

(Notification No. 20/2021 dated 31.03.2021)

Issue of notice u/s 148 for AY 2013-14 and for A.Y. 2014-15

30.04.2021

Issue of Notice u/s 148 for AY 2013-14 and AY 2014-15 etc.

30.06.2021

(Notification No. 38/2021 dated 27.04.21)

AMBIGUITY IN INTERPRETATION- Validity of notices issued after 1-4-2021 as per old provisions questioned! – Interim stay granted.

WRIT PETITIONS

✦ Bombay High Court in the case of Tata communications transformation services ltd v/s ACIT in WP no. 1334 of 2021 passed interim order on 05/07/2021 has restrained IT Dept from taking any further action.

✦ Sahil International v/s ACIT in WP no. 13687 of 2021 (Bombay HC)

✦ Bagaria Properties Pvt Ltd v/s Union of India in WP no. 244 of 2021 (Calcutta HC dated 15/07/2021)

✦ Mon Mohan Kohli v/s ACIT in WP no. 6176 of 2021 (Delhi HC dated 07/07/2021)

Due date for reopening of assessments for AY 2015-16 to 17-18?

✦ The extensions provided under the TLA, 2020 on account of the ongoing pandemic are effective till 30.06.2021 and pertain to the compliances falling due up to 31.03.2021.

✦ The due date for completion of assessment u/s 147 (for income of more than Rs. 1 Lakh escaping assessment) under the old law for AY 2015-16, AY 2016-17 and AY 2017-18 would have been 31.03.2022, 31.03.2023 and 31.03.2024 respectively. The benefit of the TLA Act, 2020 can be applicable only to the compliances falling due upto 31.03.2021.

✦ The newly introduced law states that an assessment can be reopened u/s 148 up to 3 years from the end of the assessment year.

✦ The due dates for reopening of assessments for AY 2015-16 and AY 2017-18 under the new law shall expire on 31.03.2019 and 30.06.2021 as the case may be. Thereafter, the assessments from these years cannot be reopened as the old law which provided for a period of 6 years shall not be in force and the new law shall not permit reopening beyond 3 years!

Which law shall apply to the notices issued after 31.03.2021?

An explanation has been inserted in the Notification No. 20/2021 and 38/2021 which states that for the purposes of issuance of notice under section 148, the provisions of section 148, section 149 and section 151 of the Income-tax Act, as they stood as on the 31st day of March 2021, before the commencement of the Finance Act, 2021, shall apply.

However, the TLA, 2020 delegates to the Central Government, the limited power to specify the extension of due dates.

Issues

Can a notification issued by a delegated legislation authorized to notify due dates for various compliances lay down a new procedural law also alongwith notifying the extended date? Can such a notification be held as ultra vires and in excess of jurisdiction?

From the reading of section 3(1) of TLA, 2020 it is clear that the Notifications referred to above would be applicable only for those assessment years for which time limit for issue of notice u/s.148 were expired by 30.06.2021 as extended by earlier Notification dated 31.03.2021 and then 27.04.2021. In a case where notice u/s.148 is issued for A.Y. 2015-16 or AY 2016-17, the time limit for which ended on 31.03.2022 and 31.03.2023 respectively, the said Notification has no applicability. Consequently issue of a notice in respect of AY 2015-16 and AY 2016-17 under the erstwhile section 148 is ultra vires and bad in law.

Issues

✦ The TLA, 2020 has delegated power to the Central Government to extend time limit *inter alia* for issuing a notice u/s 148 without any maximum limitation or without laying down the maxima subject to which the delegation may be exercised by the subordinate law making authority.

✦ Thus, the said power is arbitrary, unreasonable and unconstitutional being violative of Article 14 of the Constitution of India.

✦ The legislature cannot delegate the essential legislative function of imposition of tax to an executive authority. TLA, 2020 could not have delegated the power to delay applicability of section 148 and 148A of the Income-tax Act, 1961 itself as it would have lead to delegation of essential legislative function of imposition of tax to an executive authority which is arbitrary and unconstitutional being violative of Article 265 and 14 of the Constitution of the Act.

✦ Thus, the explanation inserted in para A(a) of the Notification No. 20/2021 dated 31.03.2021 and Notification No. 38/2021 dated 27.04.2021 is *ultra vires* and without jurisdiction and violative of Article 265 and therefore deserves to be read down being unconstitutional.

PENALTY U/S 271AAB(1A)

	Particulars	Penalty u/s 271AAB
(I)	(a) Assessee during the search admits the undisclosed income and (b) Specifies the manner in which such income was earned and (c) Pays tax plus interest on undisclosed income and (d) Furnishes the return of income declaring undisclosed income before the due date	30%
(II)	In any other cases where above 4 conditions are not satisfied	60%

No penalty u/s 271 (1)(c) /270A shall be imposed in respect of the undisclosed income that has been subjected to penalty u/s 271AAB

PENALTY – 270A to replace 271(1)(c) for Non- Specified Previous Years

	Quantum of Penalty	Penalty u/s 270A
A.	Under-reporting of income	50%
B.	Mis-reporting of income	200%
C.	Deemed total income(MAT	NIL (if No addition under MAT) despite addition under Normal provision)

No penalty u/s 271 (1)(c) /270A shall be imposed in respect of the undisclosed income that has been subjected to penalty u/s 271AAB (1A)

PROSECUTION-INCOME TAX ACT

Section	Nature of Default	Rigorous Imprisonment
275A	Contravention of prohibitory order u/s 132(3)	Up to 2 years
275B	Failure to allow inspection of books of accounts or other documents during search action u/s 132.	Up to 2 years
276C	Willful attempt to evade tax, penalty or Interest chargeable or <u>under-report income</u> .	Evasion > 25Lacs: 6 Months to 7 years Other cases: 3 months to 2 years
276CC	Willful failure to furnish in due time a ROI u/s 148	Evasion >25Lacks: 6 Months to 7 years. Other cases: 3months to 2 years (If tax pay payable does not exceed Rs. 10000/- no prosecution)

PROSECUTION-INDIAN PENAL CODE

Section	Nature of Default	Rigorous Imprisonment
179	Refusing to answer a question on a subject relevant to the search operation	Up to 6 months
181	False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation.	Up to 3 years
191	Giving false evidence.	Up to 7 years
204	Destruction of any document or electronic record to prevent its production as evidence.	Up to 2 years

SUGGESTIONS TO OUR FELLOW CHARTERED ACCOUNTANTS

Keep all the files / documents of the searched clients separately at one place.

Never keep sensitive documents of undisclosed nature.

Ensure that files/documents /data are not found at a place other than the place as stated to the search party.

Profusely request the DDI not to carry out “Search” but to restrict the proceedings to “Survey” only.

Thank You...

SNEHAL & ASSOCIATES
Chartered Accountants

CA Snehal R Shah
Snehal & Associates

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