Income Tax Search and Seizure: Irregularity versus an illegal Income Tax Search- Analysis

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Introduction:

Section 132 of the Income Tax Act'1961 prescribes that the competent authorities are empowered to permit the authorized officers to enter, search, break open, seize, place marks of identification and take other steps as contemplated under sub-clauses (i) to (v). However, such powers can be exercised against a person upon fulfilment of certain conditions. Firstly, the competent authority must have information in its possession and, secondly, on the basis of such information it must have reason to believe that the conditions as stipulated in sub-clauses (a), (b) and (c) of section 132(1) of the Income-tax Act, 1961 exist. Sub-clauses (a), (b) and (c) of section 132(1) speak of any person. Search and seizure cannot be sustained unless it is clearly shown that it was done by the authority duly authorized, and all the conditions precedent in relation thereto existed. Thus, before issuance of search warrant in order to take recourse under section 132 of the Income-tax Act, 1961, the authority competent to issue search warrant must be satisfied that search under section 132(1) is needed in respect of a definite person. Satisfaction required under section 132(1) of the Act 1961 is *qua* the person whose name appears in the warrant of authorization.

Rule 112 of the Income Tax Rules'1962 lays down the procedure, forms of authorization, manner and other procedural effects of

carrying out search and seizure action as enumerated u/s 132 of the act.

Issue under Consideration:

During the course of search there may be certain procedural irregularities which may inadvertently crept in such as:-

(a) Name of the person searched not mentioned in the Panchnama though duly recorded in the search warrant.

(b) Delay in revocation of prohibitory orders issued u/s 132(3) of the act but within time prescribed u/s 132(8A) of the act.

(c) Seizure of certain irrelevant documents during search due to an error of judgement.

(d) Seizure of certain disclosed asset inadvertently.

(e) Witnesses called by the authorized officer as against offered by the searched person.

(f) Delay in conclusion of search proceedings.

(g) Any other procedural irregularity which may crept in except any fundamental defect which may led to very search action as void.

It is seen from the verdicts of the courts that procedural irregularities that have crept in inadvertently does not vitiate the very search action as void unless the very defect crept is fundamental in nature going to the roots of the search and seizure action.

At this juncture, it is pertinent to put-forth a judgement of the Delhi High Court in case of ***MDLR Resorts (P.) Ltd.v.Commissioner of Income-tax [2013] 40 taxmann.com 365 (Delhi)*** wherein the assessee challenged the search action

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consequent assessment to certain procedural defect in the panchanama drawn. The court held that though there is certainly lapse and failure to comply with the requirements of search and seizure manual as the panchnama did not contain names of the petitioners but this would not affect the validity of the search.

The brief facts of the case are as under:-

- A search and seizure operation against the petitioners was initiated who belonged to one MDLR Group.

- The petitioners accepted the search and seizure operations in the writ petitions but the contention raised was that against them no panchnamas were drawn/issued and, thus, proceedings under section 153A were *void* and bad for want of jurisdiction.

- Another contention which had neither been raised in the writ petition nor in the amended writ petition but in the rejoinder affidavit to the amended writ petition, was to the effect that probably and possibly no warrant for search under section 132 was issued against the petitioners and, therefore, there names did not appear in the panchnamas.

The Hon'ble Court held as under:-

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Firstly, as regards contention raised in affidavit, it was noted that search warrants (i.e. Form No. 45) were printed documents in which requisite blanks i.e. names and details have been filled by hand. Due to paucity of space in the column, the authority issuing the search warrant had put an, (*) mark and thereafter mentioned other names in respect of whom the search warrant had been issued. [Para 10]

Names of parties to be subjected to search have been mentioned at two separate places on the first page of search warrants Form No. 45. The first point or place refers to pre-conditions mentioned in sections 132(1)(a) and (b) and the second point or place refers to the pre-conditions stipulated in section 132(1)(c).

Second page of the form requires mentioning the address where the

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suspected books of account, other documents, money, bullion, jewellery, valuable articles etc. were kept, by the persons who were being subjected to search. [Para 11]

In the panchnamas relating to MDLR Estate Private Ltd., MDLR Hotels Private Ltd. and 'S' Builders Private Ltd., it was noticed that their names were not included in the names of the persons mentioned in the column relating to clauses (a) and (b) of section 132(1). However, their names were mentioned in the column relating to section 132(1)(c).

In these circumstances, suspicion of the petitioners is not affirmed. It does not impel to form and decide the contention in favour of the petitioners. [Para 12]

The contention with regard to their addresses being different, is misconceived and mere ipse dixit. Address of a company will normally mean its registered office, head office etc. A person can operate from or keep documents, money etc. at different places and not necessarily from the registered office etc. or from where business is conducted.

The address mentioned in the warrant and the panchnama need not be the registered office or the head office of company but it has to be the place where the search has to be conducted and has been conducted. The address at which search could be conducted would be the place or location, where books of account, documents, jewellery, unaccounted assets etc. could be located/found. [Para 13]

In view of above, the petitioners' contention is rejected.

Coming to the first question relating to validity of notice under section 153A, it is undisputed that section 153A is a non obstante provision which is invoked in case of a person where the search is initiated against him under section 132 or books of account or other documents or any other assets which are requisitioned under section 132A after 31-5-2003.

The section requires the Assessing Officer to issue notice under section 153A, requiring the assessee in whose case search was initiated to file return of income for six assessment years in the prescribed form and thereupon the Assessing Officer is required to assess or reassess the total income of the said six years. Pending proceedings for regular or reassessment proceedings in respect of the six assessment years abate

subject to sub-section (2). [Para 16]

What is noticeable that the mandate and language of section 153A(1) does not make any reference to panchnama or the date of panchnama. It does not state that the panchnama is a pre-condition for invoking the said section.

The words used by the Legislature are 'search is initiated under section 132….' The word 'initiate' means to commence or start. The section is invoked and applicable when the search is 'initiated'. In other words, the section ticks of and comes into play when the search commences or is undertaken against a person. [Para 17]

The petitioners relied upon section 153B and submitted that the said section prescribes time limits for completing assessments under section 153A etc. Adjudication order under section 153A has to be passed within 2 years from the end of financial year in which last of the authorization for search under section 132 or 132A was executed.

Section 153B(2) states that the authorization is deemed to have been executed in case of search, on conclusion of search as recorded in the last panchnama drawn in relation to any person in whose case, warrant of authorization was executed.

Thus, the time limit for completion of the assessment is reckoned and has to be counted for 'search' under section 132 from the date as recorded in the last panchnama drawn in relation to any person. The contention is that sections 153B(1) and (2), refers to panchnama and when there is no panchnama, proceeding in respect of petitioners cannot be validly initiated under section 153A. [Para 19]

The aforesaid contention of the petitioners has to fail in the present cases for several reasons. The said contention was not raised against the first order under section 153A passed by the Assessing Officer which was made subject matter of challenge in a revision before the Commissioner under section 264.

The Commissioner has set aside the first assessment order under section 153A and has passed an order of remand for fresh adjudication. The petitioners have not questioned and challenged said orders and have accepted the same. All panchnamas are dated 31-1-2008. There are no

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subsequent or second set of panchnamas in the case of the search warrants against the petitioners. 31-1-2008 was the date of search as recorded in the warrants of search.

The petitioners, including petitioners whose names do not feature in the panchnamas, have not denied that they were subjected to search on 31-1-2008. It is also not repudiated or contested that several documents/papers relating to the petitioners were seized and were included in the list of the seized documents/papers attached to the panchnamas.

Thus, there cannot be any dispute or debate regarding the question of time limit or limitation period for completion of assessment under section 153A and indeed the said issue is foreclosed. In the facts of the present case, the contention should be and is rejected. [Para 21]

As per the manual prepared by the revenue relating to search and seizure operations, at the end of search or when it is temporarily concluded, a panchnama is required to be prepared or drawn. It is evidently clear that this document has considerable evidentiary value and should be prepared with care and caution.

The panchnama should be exhaustive, record of all events in the same sequence in which they have occurred and should specify details like name of person against whom warrant was issued, time of temporary conclusion of search etc. Panchmana should be prepared even in cases where nothing is found or seized in the search. [Para 22]

There is certainly lapse and failure to comply with the requirements of search and seizure manual as the panchnama did not contain names of the petitioners and does not record any suspension of search. Even the obstruction and presence of third persons were not mentioned in the panchnamas. But this would not affect the validity of the search. The Court recorded that the panchmanas in the present case to this extent are defective, but the search or initiation of search cannot be disputed. However, the respondents should take remedial steps and ensure that such lapses do not occur in future, otherwise similar allegations will get repeated, entailing litigation. [Para 23]

Panchnama is an important document because it informs the person from

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whose premises the articles are seized or the person searched as to the name of the person or the building etc. where the search was carried out and the officers who were authorized and had carried out the search and the articles, if any, seized.

The copy of the warrant of search is only shown to the occupant or persons against whom it is issued and their signatures obtained but no copy is furnished to them. Any search and seizure operation invades constitutionally protected and cherished right of privacy. Administrative lapse even of minor nature when there is invasion of the said right does lead to criticism and allegations.

It will be salutary and proper that a copy of the search warrant be furnished to the occupant or the person searched. This would curtail any allegation of interpolation, addition of names etc.

However, in the facts of the present case, the lapse or failure in the panchnamas does not affect the validity of the search or nullifies notice under section 153A of the Act. It certainly would not affect initiation of search which is the starting point and pre-condition for invoking section 153A. Panchnama is drawn when the search stands concluded finally or temporarily.

The effect of the said lapse on merits or to the value or degree of importance to be given to the material seized is a matter of appraisal and merits and not a question to be examined and answered in these writ petitions. [Para 24]

In view of the aforesaid, no merit was found in the writ petitions and the same are accordingly dismissed. [Para 29]

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In yet another case of ***Naraindas V CIT (1984) 148 ITR 567 (MP)*** the petitioner contended that the action of the authorised officers in making search and seizure was illegal and out the following irregularities : (i) respectable persons of the locality were not called as witnesses, (ii) inventory of the books of account and documents was not made, (iii) boxes were not sealed, and (iv) ornaments were also seized from the ladies in the family.

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The Hon'ble Court held as under:

"In our opinion, none of these objections can be reasonably sustaintd or can make the search and seizure illegal. It is stated in the return that the names of the witnesses were suggested by the petitioners. They wanted that outsiders should not be called as that would have affected their credit and prestige. The petitioners cannot now complain that the witnesses suggested by them were not respectable persons of the locality. As regards the inventory of the books and other documents seized, the return discloses that after the seizure of books and documents, Naraindas said that he was not feeling well and that the work of preparing the inventory could not be carried on. Naraindas requested that the books and documents be kept in a box and that he will himself come next day to Jabalpur and the inventory may then be prepared. It was on this request that the books and documents were kept in a box locked by Naraindas and the department. Similar request was made after the seizure of books of account and other documents of Venkatesh Trading Co. and Maheshwari Lime Works by Y.K. Maheshwari who was present at the time of the search of the business premises of these two concerns which are at the same place. Maheshwari signed the panchnama showing that the documents recovered were put in two boxes which were locked by the department and also by him. The returns clearly state that this was done at the request of the petitioners on the plea that Naraindas was not well. It is, thus, clear that the inventory of the books of account and other documents seized could not be made because of the request made by the petitioners themselves. They cannot now complain that the officers conducting the search did not make the inventory of the books of account and other documents, that were seized, then and there. As regards the objection that ornaments from the ladies were also seized, the fact is denied in the return. In the return it is clearly stated that nothing was seized from the ladies of the family. We are satisfied that none of the objections raised by the learned counsel for the petitioners has any weight. Moreover, as observed by the Supreme Court in the case of Seth Bros.' case (supra), any irregularity in the course of search and seizure committed by the officers acting in pursuance of the authorisations will not be sufficient to vitiate the action taken provided the officers had in executing the authorisations acted bona fide. In this case we are satisfied that the authorised officers had acted bona fide and, there fore, even if there was some irregularity, the action taken is not vitiated."

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Further reliance can also be placed in case of decision of Hon'ble Kerala High Court in case of ***CIT V. Dr. C. Balakrishnan Nair (2006) 282 ITR 158*** wherein it is held that keeping of the documents either in a room or almirah under seal could not be said to be irregular procedure. Therefore, there was, no infirmity in the action of the department in keeping the documents in the almirah kept in the premises after issuing an order under section 132(3). Similar was the ratio of the Hon'ble Delhi High Court in case of ***VLS Finance Ltd. V CIT (2007) 289 ITR 28*** upholding the inadvertent procedural delay in revocation of prohibitory orders issued u/s 132(3) of the act but within time prescribed u/s 132(8A) of the act. No fault with the search was found by the Hon'ble Court.

The sum and substance is that the bona fide inadvertent procedure irregularities do not render the very search action illegal.

To the contrary search action conducted in violation of Section 132 of the act per se going to the roots of the matter can't be cured and rectified at a later stage leading to search action along with consequential action as illegal.

Few of the instances are as under though not exhaustive:-

(a) Non recording of valid reasons to believe and non possession of some credible information by virtue of conditions stipulated in clauses (a), (b) and (c) of Section 132 (1).

(b) Reasons of believe coming into existence after issuance of warrant of authorization.

(c) Defective warrant of search qua person and qua permises.

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(d) Failure to justify the issuance of warrant of authorization in absence of fulfillment of conditions stipulated in clauses (a), (b) and (c) of Section 132 (1).

(e) Search and seizure action conducted on surmises and conjectures as a fishing and roving expedition.

The consequences of a search being held as illegal are very fatal which may include as under:-

1. The department can't initiate assessment proceedings since they only arise pursuant to a valid search action. Search assessment already concluded may also be rendered as void ab initio depending on case to case basis. Another controversial question arises so far as to whether in case where a search has been held illegal than as to whether the material unearthed in course of such search held illegal can still be used by the department against the assessee. As such the matter is still open to debate with both sides of arguments.

2. The assets and documents seized during the course of search including cash, jewellery etc. has to be returned to the assessee.

3. The statements recorded during the course of search shall be otiose and having no legal evidentiary value.

4. No legal presumption shall be available to the department under section 132(4A) and 292C of the act.

5. No penal and prosecution matter shall lie against the assessee as a consequence of the search held illegal which otherwise is available under the statute.

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Reliance can be placed on the decision of Hon'ble Delhi High Court in case of ***Madhu Gupta V DIT (2013) 350 ITR 598.*** In this the court held as under:-

"With regard to the argument raised by the learned counsel for the respondent that there was no need for the competent authority to have any reason to believe and a mere reason to suspect would be sufficient, we may point out that the answer is provided by the fact that the warrant of authorization was not in the name of the DS Group but was in the name of the petitioner. In other words, the warrant of authorization under Section 132(1) had been issued in the name of the petitioner and, therefore, the information and the reason to believe were to be formed in connection with the petitioner and not the DS Group. None of the clauses (a), (b) or (c) mentioned in Section 132(1) stood satisfied in the present case and, therefore, the warrant of authorization was without any authority of law insofar as the petitioner was concerned. Had the warrant of authorization been issued in the name of the DS Group and in the course of the searches conducted by the authorized officer, the premises of the petitioner had also been searched, then the position might have been different. But, in the present case, that is not what has happened. The warrant of authorization was in the name of the petitioner and, therefore, it was absolutely necessary that the pre-conditions set out in Section 132(1) ought to have been fulfilled. Since those pre-conditions had not been satisfied, the warrant of authorisation would have to be quashed. Once that is the position, the consequence would be that all proceedings pursuant to the search conducted on 21.01.2011 at the premises of the petitioner would be illegal and, therefore, the prohibitory orders would also be liable to be quashed. It is ordered accordingly. The jewellery/other articles/documents are to be unconditionally released to the petitioner. The writ petition is allowed as above. There shall be no order as to costs."

Further reliance can be placed in the case of ***L.R. Gupta v. Union of India [1992] 194 ITR 32***, wherein it was held by the Delhi High Court as under:-

"49. As we have come to the conclusion that, in the present case, no reasonable person could have come to the conclusion that the

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ingredients contained in clause (a), (b) or (c) of section 132 were attracted, therefore, we issue a writ of mandamus quashing the impugned authorisation and also the further action which has been taken by the respondents pursuant to the said authorisation including the seizure of all documents, cash and jewellery. The respondents are directed to return the said documents, cash and jewellery, seized by them, to the petitioners within two weeks from today.

50. The petitioners will also be entitled to costs. Counsel's fee Rs. 1,000."

Furthermore reliance can also be placed in the case of ***Shah E Naaz Judgev.Additional Director of Income-tax (Inv)-Unit-VI [2018] 100 taxmann.com 346 (Delhi)***, wherein it was held by the Delhi High Court as under:-

"32. *In view of the aforesaid discussion, we find merit in the present writ petitions and hold that the warrants of authorization for search and seizure operations in respect of the three lockers in the case of three petitioners are vitiated and illegal. Warrants of authorization against the petitioners are quashed and set aside. Consequently, proceedings under Section 153A of the Act are also set aside and quashed. We, however, clarify that we have not commented on evidence, if any, collected during the course of search and whether the said evidence or material can be used in any proceedings initiated by the income-tax authorities in accordance with law. Writ petitions are allowed in the aforesaid terms. In the facts of the present case, there would be no order as to costs."*

The apex court in case of ***Director General of Income-tax v. Diamondstar Exports Ltd.[2006] 156 Taxman 299 (SC)*** the apex court while upholding the decision of the high court to forthwith return the gold, diamond and jewellery and ornaments seized from the assessee respondents with interest and directed to pay cost in lieu of interest.

To legislature conscious of such situation, by virtue of Finance Act ,2018 with retrospective effect from 01-06-2003

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inserted sub-section (2) in Section 153A of the act which reads as under:-

(2) If any proceeding initiated or any order of assessment or reassessment made under sub-section (1) has been annulled in appeal or any other legal proceeding, then, notwithstanding anything contained in sub-section (1) or section 153, the assessment or reassessment relating to any assessment year which has abated under the second proviso to sub-section (1), shall stand revived with effect from the date of receipt of the order of such annulment by the [Principal Commissioner or] Commissioner:

***Provided** that such revival shall cease to have effect, if such order of annulment is set aside.*

However, such enactment shall only take care of the abated years however the concluded assessments cannot be cured by virtue of Section 153A(2) of the act. Interestingly, no such rider is forming part of the new schema of search assessments u/s 148 r.w.s 148A of the act for the searches conducted on or after 01st Day of April'2021.

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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 handing Income Tax Search and Seizure matters, matters before the Income Tax Settlement Commission and other direct tax litigation matters. As on today, he has wide experience of handling Income Tax Search and Seizure Cases, representing matters before the Income Tax Settlement Commission, ITAT and other appellate tribunals. He has been contributing articles in various professional magazines/journals and addressing various seminars on topics relating to Income Tax Search and Seizure, Income Tax Settlement Commission and other allied tax matters. He has to his credit plethora of well researched articles out of which many have appeared in leading journals. In Addition to the above, Mr. Mohit Gupta is a Special Auditor of the Income Tax Department and has carried out numerous Special Audits across the country on being appointed by the Income Tax Department which have plugged tax evasions, tax base erosion and other tax manipulative practices and in turn facilitated the Income Tax Department to collect huge tax revenues. Mr. Mohit Gupta has also been appointed as Special Auditor under other tax statutes and by other Investigation Agencies of the Government of India.Mr. Mohit Gupta, authored the periodical Newsletter on Income Tax Search and Seizure. The said newsletter contained well researched write ups / articles and judicial developments on the matters of Direct Taxation. The newsletter was circulated both electronically and otherwise.

Recently, in the year 2016, Mr. Mohit Gupta have authored two comprehensive books on the Income Declaration Scheme'2016, titled as "Law Relating to Income Declaration Scheme'2016". His books provided at one place the entire gamut of the Law relating the Income Declaration Scheme '2016 and set to rest all the queries that arose

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before, during and after the course of making the declaration under the Income Declaration Scheme'2016. The books received an extremely overwhelming response from the readers including the proposed tax payers, tax administration, tax professionals, corporate houses and academicians. The said books were released by erstwhile Hon'ble Union Finance Minister, Shri. Arun Jaitley, Shri.Arjun Ram Meghwal, Minister of State for Finance and the Chairman of Central Board of Direct Taxes and many other dignitaries.

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

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