Assessments under the Income tax Act

INTRODUCTION

As the topic suggests, it is of vital importance for both the professionals/clients on one hand and the tax authorities on the other end. The word ‘assessment’ is nowhere defined under any of the direct or indirect tax laws. There is no specific definition of the term ‘assessment’ under any of the provisions of the tax laws giving its meaning. The definition given in section 2(8) of the Income tax Act, 1961, provides that ‘assessment’ includes reassessment. Generally, the term ‘assessment’ is understood as the process of determination of total income and the tax payable thereon. In wealth tax it means the determination of the net wealth and the tax thereon. The word ‘assessment’ is used in comprehensive sense and it can comprehend the whole procedure for ascertaining and imposing liability upon the tax-payer and the machinery for enforcement thereof. In such a comprehensive sense, proceedings like rectification and revision would also fall within the scope of assessment. In ***C.A Abraham vs. ITO 41 ITR 425 (SC)***, the Hon’ble Supreme Court held that the word ‘assessment’ is wide enough to include all types of assessments including penalty proceedings. It includes all proceedings, inter alia, issuing of notice, opportunity of hearing, passing of the order of assessment and determination of the tax liability.

Assessment proceedings are thus quasi-judicial in nature and therefore the Assessing Officer has to give the other side an opportunity of being heard; consider all the necessary and relevant documentary evidences produced before him and pass an order in writing.

ASSESSMENT PROCEDURE

Issue of notice for scrutiny:

The starting point for making any assessment is the issue of notice for scrutiny in terms of provisions of section 143(2) r.w.s. 142(1). This notice needs to be issued and also ***served*** upon the assessee within one year from the end of the month in which the return of income is filed (prior to 1/4/2008). With effect from 1/4/2008, the Finance Act 2008 has amended the proviso to section 143(2)(ii) providing therein that the notice cannot be served after the expiry of six months from the end of the financial year in which the return is furnished. Thus, the time limit which earlier was one year is substituted w.e.f. 1/4/2008 to six months from the end of the financial year of filing return. Therefore for returns to be filed on or before July 31, the time limit for issue of notice would be till 30^{th} of September of the immediate succeeding year. For returns to be filed on or before September i.e. tax audit returns and corporate returns, if the return is filed in the month of September, in that case, it does not make any difference as far the period of limitation for service of notice is concerned.

Service of notice u/s.143(2) – whether mandatory:

The service of notice u/s.143(2) of the Act is mandatory requirement in order to assume jurisdiction for making a valid assessment order. The time limit was prescribed by the proviso (as amended by Finance (No.2) Act, 1991 w.e.f. 1/10/1991) to the sub-section and thus prior to the insertion of the time limit non-issuance of notice was treated as procedural irregularity but not a fatal defect so as to vitiate the entire assessment proceedings. Once the time limit was prescribed, it is not a mere procedure irregularity but mandatory provision in order to assume valid jurisdiction for making assessment. This view is supported by the decision of Gujarat High Court in ***DCIT v. Mahi Vally Hotels & Resorts (2006) 287 ITR 360 (Guj)*** wherein it was held that the service of notice u/s.143(2) is a mandatory requirement. This decision was rendered in the context of a normal assessment made u/s.143(3) of the Act.

Thus, if no notice is issued, there could not be question of service of notice and thus, the assessment made would be considered as illegal. In ***Smt. Bandana Gogoi v. CIT 289 ITR 28 (Gau)*** in relation to block assessment, it has been held that if no notice for making assessment is issued u/s.143(2) of the Act after issue of 158BC/158BD notice and return filed in pursuance of the same, the block assessment passed would be void ab initio, bad in law and liable to be quashed. Thus, even in cases of block assessment, the requirement of issue of notice is a pre-condition for making assessment. This procedure is of vital importance since if no notice is issued or if the same is not issued and served within the prescribed time limit, the entire assessment could be held to be bad in law and quashed.

Burden to prove service of notice is on the Assessing Officer. Thus, where the assessee files an Affidavit declaring that he has not received notice u/s.143(2), the burden is on the AO to prove service of notice within the statutory time limit – ***CIT v. Lunar Diamonds Ltd. (2006) 281 ITR 1 (Del)***.

Impact of amendment and insertion of section 292BB:

The amendment to the time limit as substituted w.e.f. 1/4/2008 would be applicable to Assessment Year 2007-08 since it is the law that is to be considered at the time of issuance of notice. Hence, if for AY 2007-08, return of income is filed in July 07, prior to the amendment, the notice u/s.143(2) ought to have been served on or before 31st July 08. However, in view of the amendment, the law as on the date of issue of notice provides for six months from the end of the financial year and hence, the notice served on or before 30th September 08 would be held to be a valid notice. [Refer ***ITO v. Nilofer Hameed (2003) 262 ITR 281 (Ker); SLP dismissed (2003) 261 ITR(St.) 44***]

Section 292BB is inserted w.e.f. 1/4/2008 providing therein that where the assessee appears in any proceedings or co-operated in any inquiry, it would be deemed that the notice has been duly served upon him within the stipulated time limit and the assessee ***shall*** be precluded from taking any objection in any proceedings or inquiry in respect of service of notice. However, proviso is also added to this section whereby the provision of the said section is held to be not applicable in case where the assessee raises the objection of non-service of notice before the completion of assessment or reassessment. Thus, it would be no longer for the assessee to take plea before the appellate authorities for the first time challenging the legality of service of notice.

The Hon'ble Delhi Special Bench in the case of ***Kuber Tabacco Products (P) Ltd. v. DCIT, IT(SS)A No.261/Del/2001, Delhi Special Bench, Order dated 14/1/2009*** has held as under-

(a) S. 292BB, inserted by the Finance Act 2008 w.e.f. 01.04.2008, creates a legal fiction and takes away the right of an assessee to claim that in case of invalid notice the whole proceedings taken pursuant to that notice would be void ab initio and will have no legal consequences;

(b) However, the rule of interpretation of statutes is that a provision creating a new disability or obligation and imposing a new duty in respect of completed transactions cannot be construed to be retrospective;

(c) Though the issue and service of notice relates to procedural law, S.292-BB takes away the valuable right of an assessee to challenge the validity of assessment during the course of appellate proceedings and creates a new disability on the assessee by debarring him from challenging the validity of the same;

(d) Consequently, s. 292-BB cannot be construed to be retrospective & has to be applied prospectively in respect of AY 2008-09 & subsequent years.

Notice for Assessments/Information:

Once a valid notice is issued and served for making assessment, one need to give proper reply to all the notices that are received from the tax authorities and the same should be in writing and placed on record. Thus, even for adjournments, the application for adjournment must be in writing and filed with the concerned officer. Even the first notice received should be replied properly inspite the fact that the same might be issued only to adhere to the time limit for service of notice and not for actually doing assessment/reassessment.

The notice may contain several points to be answered and / or information may be called for on various issues. It is quite possible that one may not have sufficient time in hand to answer to all the points and / or to furnish details in respect of all the issues. Thus, while giving reply to notice, point-wise reply must be given i.e. the point in the notice and the point in reply should be the same as far as possible. In the reply to be given, all the relevant details and factual aspects of the matter called for need to be furnished, (whichever is ready to be furnished on the given date and time and for the rest of the points, write specifically that some more time is required to furnish the other details thereby asking categorically for giving further time). Many a times it is seen that the reply is either not given at all and or even if few details are ready, reply is given to that extent without giving any reply for the details not available and without asking for further time to submit the same.

On the next date, it is important to give brief history of what transpired in the earlier hearing and then to proceed with giving details, etc. on the issues that were left out in the earlier submissions as per the notice issued.

Now a days, it is noticed that while issuing notice u/s.142(1), detailed questionnaire is also enclosed alongwith the notice. The questionnaire is computer print out, which is a detailed one possibly prepared in general manner to aid the officers, however, the officers issue the same without bothering to amend as per the facts of the case before hand. In such cases, reply need to be given to the relevant points and others can be stated as not applicable to the facts.

Requirements as per Proceeding Sheet:

Instead of issuing notices for the details that are required, in many cases, the requirements are written in the proceeding sheet itself and the professional/assessee appearing is asked to sign the same. In such cases, one should note down all the requirements written in the proceeding sheet before signing the same so that you don’t miss out any of the points asked by the AO in the course of assessment proceedings. Only after noting down the queries called for, one should sign the proceeding sheet. This will help to give proper replies with respect to the issues raised and details called for. Further, while giving replies in such cases, one should first narrate in brief in the reply the details that were asked for in terms of the proceeding sheet and then give appropriate submissions on each of the point raised.

Submission only on points asked for:

The submission to be given should be only in respect of the points raised and queries asked for and should not go beyond that. Explanation called for must be adhered to without giving details or explanations on any other points not called for. Thus, unnecessary and uncalled details should be avoided.

Submission to contain every aspect of the point in issue:

The submission to be given with respect to any of the point must be in detail and all the aspect of the same must be covered. The stand taken in the submission before the AO must remain the same as far as factual aspect of the matter is concerned. Thus, as far as possible, the factual aspect to be submitted before the tax authorities should be given properly without changing the stand. In case if the factual aspect of the matter is not known, one should refrain from writing on the factual aspect and the same must be given in writing only when the assessee gives the same.

Submission to contain two vital things:

Every submission must contain two vital things. The first is that every submission must begin with the wordings – ‘under the instructions of the assessee above-named’. This is very important for the reason that whatever is being submitted is on the instructions of the assessee and not on your own whims and fancies. Since we are merely authorized representatives on behalf of the assessees, whatever information we are submitting is under the instructions of the assessee and hence, it is important to write these wordings in every submission / reply given to the tax authorities. The second vital thing is that submission/reply should be always as far as possible signed by the assessee atleast wherever factual reply is given to the tax authorities. This is for the reason that the factual aspect may turn out to be incorrect or even that aspect may be defrauding the revenue and hence, all factual aspects of the matter should be signed by the assessee himself. This is more important for the professionals in terms of the provisions of Section 278 of the Act.

No admission in the submission / proceeding sheet:

While making submissions to the tax authorities, even if one thinks that there is no case in the point in issue, even in such cases, there should be no written statement to that effect such as we admit the mistake on our part or that we admit for the addition / disallowance proposed to be made. One should always refrain from making such statements in writing before the tax authorities. This is for 2 reasons – one is that thereafter you cannot challenge the said point in higher appellate authorities and second is the issue of concealment penalty. Similarly, in the proceeding sheet also, nothing should be admitted for addition or disallowance. One should refrain from signing the proceeding sheet if you do not agree to any addition or disallowance, which may be written by the AO in the proceeding sheet. Therefore, before signing the proceeding sheet, read the entire proceeding sheet carefully and then sign the same immediately below what is written so that nothing can be added further thereafter.

Another important aspect of this is that at times, the AO may assure that he will not levy penalty and insist the assessee / AR to admit for addition / disallowance. In such cases also, one should refrain from giving anything in writing for the reason that there is no concession as far as the Law is concerned and no one can go beyond the provisions of the Act. There can be no assurance for not levying penalty and if the AO really wants to assure, ask him to give in writing, which he will never do and therefore, similarly, even the assessee/AR should not give anything in writing for any additions/disallowances. However, if for any reasons, admission is to be made, then in such cases, depending on the facts, admission may be made with the condition for not to invoke penal proceedings and/or prosecution.

As regards the legal issues are concerned, assuming the assessee agrees for addition, the same is not binding on him ***- Gauri Sahai Ghisa Ram v. CIT 120 ITR 338 (All) - Rani Anand Kunwar v. CIT 8 ITR 126 (Oudh)***. This is for the reason that there is no concession on law.

Notice containing reliance on third party evidences/statements:

While asking for the details from the assessee, it may so happen that the AO may have relied upon various third party evidences and or statement of the third party and ask the assessee to furnish details/explanations in that regard. In such situation, the first thing is that the notice should be replied asking for the copies of the documents/statements relied upon and further stating that comments could be given only after looking at the documents/statements relied upon. After first reply to this, even then if the documents/statements are not given, once again ask for the same by filing letters, till the time the same is not given. In the meantime, even if such third party documents/statements are not given, give complete explanation with respect to the genuineness of the transaction alongwith supporting necessary documents. For eg- if it is a case of say bogus purchases for which AO makes reliance on evidence of third party saying that the said party has negated the purchases made to you, in such case, file supporting evidences such as invoice copy, delivery challan, bank statement showing payment made by cheque, quantitative details showing movement of goods, corresponding sales made, etc. Thus, whatever supporting documentary evidences that is in the possession of the assessee must be filed before the AO to rebut the third party reliance so placed. In case, the AO gives the copy of the documents/statements on which reliance is placed, give proper reply negating the third party evidences. In case the AO does not give the evidences relied upon, the additions/disallowances would be held as bad in law – Refer ***Kishenchand Chellaram v. CIT 125 ITR 713 (SC)***.

Ask for cross-examination:

In continuation to above, where the AO relies upon the statement of the third party to make addition/disallowance first is to ask for the copy of the statement recorded and then irrespective of the AO giving the copy of the statement recorded of that person, always ask categorically in writing for cross-examination of that person. It is quite possible that such third person may not turn up for cross-examination and even if he does come try to rebut the statement given by him on the basis of facts of case.

In ***Prakash Chand Nahta v. CIT [2008] 301 ITR 134 (MP)*** it is held that if the Assessing Officer does not summon the person whose statement is recorded and relied upon as evidence against the assessee in spite of the request made under section 131 of the Act, the evidence of that person statement could not have been used against the assessee and in absence of affording a reasonable opportunity of being heard by summoning the said witness the assessment order was vitiated. Similar view is taken in ***CIT v. SMC Share Brokers Ltd 288 ITR 345 (Del).; Kishenchand Chellaram v. CIT 125 ITR 713 (SC)***

Documents filed / produced to be properly stated:

While giving various submissions, supporting evidences are also filed. The evidences that are filed should be properly listed and each of the documents filed must be part of the submission so as to prove that such supporting documentary evidence was filed before the AO. Similarly, whatever documents are produced and / or books of account are produced, must also be stated in the submission in writing. Where the books of account are produced and are thoroughly vouched by AO or even test checked by AO, in the next hearing, a further reply should begin with a brief note as to what was checked and looked into by the AO in respect of the documents produced including the books of account. All these should be placed on record so as to prove in future that whatever was asked for was filed and / or produced before the AO.

Production of certain third party evidences/parties:

In the course of assessment proceedings, the AO may ask for production of the third party evidences in the form of confirmations and / or production of certain parties from whom certain transaction may be carried out. In such cases, it is always advisable to try and file the confirmation of the third party and also produce the party, if asked for. This is for the reason that the initial onus is cast upon the assessee to prove the transaction entered into. If there are any hardship for furnishing of the necessary documentary evidences, one should write about the same to the AO and ask for time, if we are able to file the necessary third party documentary evidences. If this cannot be done, i.e. if the third party does not co-operate or if that party is not available for any reason, convey the same to the AO and specifically ask the AO to issue summons and call for the necessary information from the said party. This is important from the assessees point of view for the reason that assessee does not have sweeping powers to force a third party to either give confirmation or other documentary evidences asked by the AO, which of course the AO does have in terms of issuing summons, etc. Thus, it is necessary to convey the AO about the status of the same. Similarly, the AO must also be informed as to non-cooperation of the party for appearing before the AO and to request AO to summon the said party. All these letters must be in writing forming part of the records so that the burden cast upon the assessee could be said to be shifted to the department. Further, in such cases, as stated earlier, filed all the necessary documentary evidences in the possession of the assessee to prove the genuineness of the transaction irrespective of whether the third party evidences could be given or not. Wherever applicable to furnish complete details of the party; i.e. address and PAN number so that the AO may take appropriate action at his end.

Impact of Goetze (India) Ltd. decision of SC:

The Board have issued instructions from time to time in regard to the attitude which the Officers of the Department should adopt in dealing with assessees in matters affecting their interests and convenience. ***Circular No.14(XL-35) of 1955, C.No.13(207)-IT/50, dated 11th April, 1955***, states that the Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is the duty of the Officers to assist the tax payers in every reasonable way and draw their attention to any refunds or relief to which they appear to be clearly entitled but which they have omitted to claim and also freely advise them as to their rights and liabilities and the procedure to be adopted for claiming refund and relief.

In the case of ***Goetze (India) Ltd. v. CIT 284 ITR 323 (SC)*** it was held that the new claim made before the AO could only be entertained if made by way of revised return of income and not by way of letter. However, the decision made it clear that it did not impinge the power of the Appellate Authority and it only restricted the power of AO to entertain a claim made for deduction otherwise than by a revised return. After considering the decision of the Supreme Court, it has been held by the Mumbai Tribunal in ***Chicago Pneumatic India Ltd. v. DCIT (2007) 15 SOT 252 (Mum)*** that it is the duty of AO to allow proper relief and refund to the assessee in view of the circular of CBDT of 1955, *supra*, which circulars are binding upon the revenue authorities – [***UCO Bank v. CIT 237 ITR 889 (SC)***] and since the powers of the ITAT are not impinged, the Appellate Authorities can entertain such claim. In fact, the Tribunal distinguished the decision of the Supreme Court on the ground that power and duty are both separate and if it is duty to give relief, irrespective of claim made by the assessee, the same ought to be given.

<u>Best Judgment & Protective Assessment:</u>

Best judgment assessment is given statutory recognition in terms of provisions of section 144 of the Act. However, the said provisions get triggered only when the defaults contemplated under that section is committed. The four fatal defaults attracting section 144(1) of the I.T. Act as mentioned in the clauses (a), (b) and (c) are: -

(a) failure to make a return required under section 139(1), when no return or a revised return has been filed under section 139(4) or section 139(5);

(b) failure to comply with all the terms of a notice under section 142(1) calling for production of specific books or documents or for giving specific information or total wealth statement or for furnishing a return of income, etc.;

(c) failure to comply with a direction under section 142(2A) to get accounts audited by an auditor nominated by the Chief Commissioner or Commissioner and to furnish the audit report thereof; and

(d) failure to comply with all the terms of a notice under section 143(2) by personally attending the hearing or, as the requirement may be, by production of evidence, etc., in support of the return earlier filed.

On happening of ***<u>any one or more</u>*** of the above defaults the Assessing Officer, after taking into account all relevant material which he might have gathered, ***<u>shall</u>***, after giving the assessee an opportunity of being heard, make a best judgment assessment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. The provisions are mandatory *[CIT v Segu Buchiah Setty, (1970) 77 ITR 539 (SC); Prabhat Mills Stores Co. Ltd. v. CIT, (1966) 59 ITR 197 (Cal); CIT v. Laxminarian Badridas, (1937) 5 ITR 170 (PC)].*

<u>Summary assessment compulsory if any of the four circumstances is found to exist:</u>

The clear import of section 144 of the I.T. Act is that once the assessee commits any one of the defaults mentioned therein the Assessing Officer is bound to make the assessment to the best of his judgment. In other words, if a person fails to make the return required by a notice under section 142(1) and he has further not made a return or revised return, the Assessing Officer must make an assessment under section 144.

Similarly, if the person fails to comply with all the terms of a notice issued under section 142(1) or 143(2), the Assessing Officer must make an assessment to the best of his judgment [*CIT v. Segu Buchiah Setty, (1970) 77 ITR 539, 542 (SC); Gangadhar Baijnath v. CIT, (1976) 102 ITR 662 (A11)]*. Further, it is pertinent to note that the four circumstances specified in the section are alternative and not cumulative and therefore, any one of the four defaults referred to in section 144 would entail a best judgment assessment [*D.R. Puttanna v. CIT, (1974) 96 ITR 333 (Mys)].*

Show-cause notice must be served – first proviso to section 144(1):

The first proviso to section 144(1) provides that before passing the ex-parte order, the Assessing Officer is required to give opportunity of hearing to the assessee and for this purpose, the Assessing Officer is required to serve a notice calling upon the assessee to show cause, on a date and time to be specified in the notice, why the assessment should not be completed to the best of his judgment.

The first proviso therefore entails that the service of the show-cause notice giving opportunity to the assessee is mandatory and the non-issuance of such notice was held to vitiate the best judgment assessment. Where the assessing authority proposes to proceed to make an order of assessment to the best of his judgment, the basis for the proposed assessment should be put to the assessee and an opportunity should be given to the assessee to show cause as to why assessment should not be made on the basis proposed [*Prabhakar Mallappa Panadare v. Ag. ITO, (197) 77 ITR 349, 350 (Mys(].*

At the same time, the first proviso merely requires that the assessee be given an opportunity of hearing before passing the ex-parte assessment order. This however, does not lead to the conclusion that if the opportunity is not given, the assessment is to be annulled. In such cases, assessment need not be annulled but set aside so as to give the opportunity to the assessee. In *CIT v. Agro Engineers [2004] 266 ITR 637 (Raj)* has held that the Tribunal had committed error in annulling the assessment made by the Assessing Officer. If statutory requirement had not been complied with, direction could be given to make a fresh assessment after complying with section 144 before framing the fresh assessment.

Opportunity must be real and effective:

By virtue of the first proviso to section 144 (1) of the I.T. Act, opportunity is to be given to the assessee so as to explain as to why ex-parte assessment should not be framed. But this opportunity to be given must be real and effective and not mere notional. In *S. Velu Palandar v. Dy. CTO; (1972) 83 ITR 683 (Mad)*, it was held that if any quasi-judicial authority does, as enjoined in the statute, give an opportunity to explain himself, it would be futile to fix a particular hour of a day as the outer limit for making submissions. The opportunity must be realistic and not notional. If any time is given, the normal presumption is that the assessee may file his objections or comply with the requisition before the expiry of the working hours of that date. Such outer limit may be fixed for administrative convenience; but, if it comes to the question of appreciation of rights and obligations of parties, equity and justice interfere and compel courts to afford a reasonable and effective opportunity to persons aggrieved and affected to state their objections by the end of the working day notwithstanding the fact that an hour, a minute or a second of the day was noted in an order.

Where a notice is issued to an assessee giving him seven days, for compliance, from the date of receipt of the notice, the Assessing Officer can have no jurisdiction to pass a best judgment assessment order before the expiry of such period. The fact that the assessee has complied with such notice after the expiry of seven days would be an irrelevant factor [*Cf. Abdulla v. AgITO, (1989) 180 ITR 391, 392-93 (Ker)].*

Requirement of giving an opportunity – when may be dispensed with – second proviso to section 144(1):

The second proviso to section 144(1) dispenses with the requirement of giving an opportunity of being heard in a case where a notice under section 142(1) has been issued prior to the making of the assessment under section 144(1).

Proper and valid service of notice to be proved by the department:

It is for the department to prove the service of the notice once the assessee contends that no notice is served upon him. Thus, where a best judgment assessment has been made under section 144 because of default in complying with any of the notices referred to in that section, and the assessee contends that no such notice was received by him, the department has to prove that such notice was properly and validly served on the assessee. A mere statement that the service was effected by affixation is not enough *[A.A. Kochandi v. Ag. ITO, (1977) 110 ITR 406 (Ker); Lakshmi Narayan Prasad Bhagat v. State of W.B., (1979) 118 ITR 454 (Cal)]*

Analysis of various defaults specified in section 144(1):

The first default failure to furnish a return within the 'due date' of section 139(1):

As a result of the amendment of section 144(1)(a) by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1st April, 1989, the first default for attracting the provisions of section 144(1) is the failure of the assessee to furnish a return within the 'due date' prescribed in his case under section 139(1) and non-furnishing of a return or a revised return under section 139(4) or section 139(5).

Thus, a best judgment assessment can be made where no return has been filed under section 139(1) within the period prescribed therein.

Second default – non-compliance with section 142(1) notice:

The second default relates to non-compliance of notice issued under section 142(1) of the I.T. Act i.e. by not furnishing the information or total wealth statement thereby required or by not producing the documents or evidence thereby demanded. Non-compliance of such notice results in a best judgment assessment under section 144 of the I.T. Act.

Further, for and from assessment year 1989-90, non-compliance with a notice under section 142(1) by not furnishing the return as required under clause (i) of section 142(1) of the I.T. Act also results in a best judgment assessment.

In *R.L. Narang v. CIT [2001] 249 ITR 68 (Delhi)* it was held that a combined reading of section 142(1) and 144 makes the position clear that the authorities would be justified in proceeding to make ex parte assessment when there was no response to the notice under section 142(1) of the Act.

Thus, in cases where the AO calls upon the assessee under section 142(1) to produce certain accounts and documents and the assessee does not produce the same, the Assessing Officer can arrive at his own conclusion and he can proceed under section 144. But if in such a case, there is no material from which the Officer could reasonably infer existence of books/documents, the non-production of such imaginary books/documents would not be a default attracting section 144.

<u>Notices u/s. 142(1) and 143(2), compliance with one and non-compliance with the other, result of:</u>

Failure to comply with all the terms of a notice issued under section 142(1) is a default separate from, and independent of, the default in compliance with all the terms of a notice under section 143(2). Even if the assessee has fully complied with a notice under section 143(2) by producing all the evidence he relies on in support of his return, but still, if he has failed to produce the evidence specifically called for in a 142(1) notice, the latter default entails a 144 assessment to the best of the Officer's judgment.

<u>Third default – non-compliance with audit direction:</u>

The third default contemplates for non-compliance with the audit direction in terms of provision of section 142(2A) of the Act. Thus, where the Assessing Officer directs the assessee to get his accounts audited by an auditor nominated by the Chief Commissioner or Commissioner and to submit within the stipulated time, the audit report to the Assessing Officer, a default therein will entail an ex-parte best judgment assessment under section 144(1)(b) of the I.T. Act.

<u>Fourth default – failure to produce evidence:</u>

The last clause in section 144(1) of the I.T. Act stipulates for best judgment assessment for failure to comply with all the terms of notice issued under section 143(2) of the I.T. Act. In *Rajmani Devi v. CIT [(1937) 5 ITR 631 (A11)],* it was held that a 143(2) notice could require either the personal attendance of the assessee or mere production of evidence in support of the return. The choice and option was of the assessee and compliance was complete if either of the two requirements was fulfilled. *Mohini Debi Malpani v. ITO [(1970) 77 ITR 674, 679 (Cal)]* goes a step further and it says that the 143(2) notice may require both, the personal attendance as well as production of evidence. It leaves the choice with the Assessing Officer. Thus, the conclusion that could be drawn from the aforesaid two decisions is that where an

Assessing Officer requires both – personal attendance as well as production of evidence – default in compliance with either of the requisitions would result in a ex-parte assessment in terms of section 144 of the I.T. Act.

At the same time, in order to commit the default under section 143(2), it is necessary that there must be a failure, on the part of the assessee, to produce books or documents or evidence on which the assessee relies in support of the return. If an assessee is not relying on any such books or document or evidence, it cannot be said that there was a failure, on the part of the assessee, to produce evidence in support of the return on which he relies. In such a case the best judgment assessment cannot be made and such an assessment, if made, is wrong and is in violation of the provisions of section 144 – *ITO v. Laxmi Prasad Goenka (1977) 110 ITR 674 (Cal).*.

<u>Nature of limited jurisdiction under section 144 – default to be indicated in the record:</u>

Before the Assessing Officer can assume jurisdiction under section 144 of the I.T. Act, he must record the finding in the first instance that there has been a non-compliance with any of the various defaults mentioned in that section. This recording of finding is important for the reason that if the same is challenged, the superior authority or the court could then examine whether or not the non-compliance exists, and if it does not exist, then it can give relief by quashing the 144 assessment [*Mohini Debi Malpani v. ITO, (1970) 77 ITR 674, 681, (Cal)]*

<u>Failure to comply with summons under section 131 cannot bring about an assessment under section 144:</u>

An ex parte best judgment assessment under section 144 can only be made for defaults specified in that section. Non-compliance with a summons requiring production of books of account and other documents, etc., is not such a specified default and, therefore, it cannot result in an ex-parte best judgment assessment [*ITO v. Laxmi Prasad Goenka, (1977) 110 ITR 674 (Cal)].*

Best judgment assessment – how to be made?

As seen earlier, the assessing officer is given power to proceed to make an ex-parte assessment if there is any of the default contemplated in the provision of Section 144(1) of the Act. However, the power so conferred has to be exercised judicially and not arbitrarily and therefore the assessing officer cannot make assessment at whatever figure as he like, but the same has to be made upon proper appreciation of the entire facts and circumstances of the case and based upon the records. In *CIT v. Laxminarian Badridas, (1937) 5 ITR 170, 180 (PC)* it was held that in making a best judgment assessment the Assessing Officer must not act dishonestly or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee and all other matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work.

In making a best judgment assessment the Assessing Officer does not possess absolutely arbitrary authority to assess at any figure he likes and that although he is not bound by strict judicial principles he should be guided by rules of justice, equity and good conscience [*Abdul Qayum & Co. v. CIT, (1933) 1 ITR 375, 378 (Oudh)]*

The best judgment assessment ought to be based on a fair and proper estimate of the assessee's income and the inferences to be drawn from the available material should be properly inferable inference. The assessment has to proceed upon definite basis or data as in the case of an assessment after enquiry, but the enquiry is summary unlike the case of a normal assessment. The assessment is to be based on materials to the extent to which the materials are discovered [*Sri Shankar Khandasari Sugar Mills v. CIT, (1992) 193 ITR 669, 672 (Karn)].* In other words, the Assessing Officer, while making a best judgment assessment, should make an intelligent well-grounded estimate. Such estimate must be based on adequate relevant materials [*CIT v. Popular Electric Co. (P.) Ltd., (1993) 203 ITR 630, 633 (Cal)].*

Best judgment estimates:

The Assessing Officer is conferred with the power to make the best judgment assessment. However, the limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary ca-price of a judge, but on settled and invariable principles of justice. Though there is an element of guess-work in a 'best judgment assessment', it shall not be a wild one, but shall have reasonable nexus to the available material and the circumstances of each case. [*State of Kerala v. C. Velukutty, (1966) 60 ITR 239, 244(SC); Brij Bhushan Lal Parduman Kumar v. CIT, (1978) 115 ITR 524, 530 (SC)]*

In *ITO v. Vijaya Authomobiles [2001] 243 ITR 874 (Ker.)* has held that even while making best judgment assessment Assessing Officer has to make rational estimate and some amount of guess-work notwithstanding, there is no scope for fixing an abnormally high and unreasonable figure.

Quantum must be based on adequate and relevant material:

In *State of Orissa v. Maharaja Shri B.P. Singh Deo [(1970) 76 ITR 690, 691]*, the Supreme Court has observed: "Apart from coming to the conclusion that the material placed before him by the assessee were not reliable, the Assistant Collector has given no reasons for enhancing the assessment. His order does not disclose the basis on which he has enhanced the assessment. The mere fact that the material placed by the assessee before the assessing authorities is unreliable does not empower those authorities to make an arbitrary power, it is an assessment on the basis of best judgment. In other words, that assessment must be based on some relevant material. It is not a power that can be exercised under the sweet will and pleasure of the concerned authorities. The scope of that power has been explained over and over again by this court."

Thus, the quantification part of the ex-parte assessment must be based upon the material relevant for making an assessment and the basis thereof must be stated in the ex-parte assessment order. In *CIT v. Chopra Bros. India (P.) Ltd. [2001] 252 ITR 412 (P&H)* it was held that it is undoubtedly true that if the Assessing Officer is not satisfied about the correctness or completeness of the accounts of the assessee, he can proceed to make best judgment assessment. However, even while doing so, the Assessing Officer is bound to take into account all relevant material on the record.

Basis must be discussed:

It is implicit in the section that the Assessing Officer should give his reasons for arriving at a particular figure of income so that the assessee may be enabled to appreciate the mental process leading to the assessment and the figure assessed. Such order being subject to appeal need also be a speaking order [*CIT v. Ranicherra Tea Co. Ltd., (1994) 207 ITR 979, 983 (Cal.)]*

Best Judgment in case of firm:

As per the provision of section 184(5) as amended by the Finance Act, 2003 w.e.f. 1/4/2004 i.e. for and from AY 2004-05, even when the assessment u/s.144 is made, change of status into AOP is not possible. However, no deduction would be allowed to the firm in respect of interest, salary, bonus, commission or remuneration made by such firm to any partner and consequently no such amount would be treated as income in the hands of such partner – refer sec. 28(v).

Protective Assessment:

There is no statutory provision in the Income-tax Act to make assessment on protective basis. In fact, as per the provisions of the Income-tax Act, the income is to be assessed only in the hands of the person to whom it belongs and it cannot be assessed in the case of any other person. This is the very basis of the levy of the Income-tax. However, it may so happen in certain cases that the income tax authorities are not clear as to whom the income belongs to and hence, in such cases, the only option left with the income tax authorities in order to safeguard revenue is to make two assessments for the same income on two different person i.e. one on substantive basis and one on protective basis. It is for this reason that the courts have recognized the concept of protective assessment although there is no such provision in the Income-tax Act to make protective assessment.

If the protective assessment is made, then additions, if any, could be made in the hands of the person who has really earned the income or is liable to pay tax thereon. The object of making the protective assessment is that the assessment is also made in the hands of some other person, and if such other person objects to the assessment, or finally it is held that he is not liable for payment of tax on such income, then the Department must get the tax from the person in whose hands the protective assessment is made [*CIT v. Smt. Saraswati Devi [(1995) 212 ITR 445, 447, 448 (Raj)]*.

In *Jagannath Hanumanbux v. ITO, (1957) 31 ITR 603 (Cal),* it was held that though there is no provision in the Act authorizing the levy of income-tax on a person other than “the assessee”, i.e., the person by whom the income-tax is payable, etc., it is open to the income-tax authorities to make a “protective” or “alternative” assessment where, owing to litigation between the parties concerned in Civil Court or for other reasons, the person who is really liable to pay the tax cannot be finally determined by the income-tax authorities

In *Lalji Haridas v. ITO, (1961) 43 ITR 387, 392 (SC)]; G. Topi Saheb v. CIT, (1988) 170 ITR 181 (AP),* it was held that in cases where it appears to the income-tax authorities that certain income has been received during the relevant assessment year but it is not clear who has received that income and prima facie it appears that the income may have been received either by A or B or by both together, it would be open to the relevant income-tax authorities to determine the said question by taking appropriate proceedings both against A and B.

Explaining the aforesaid two decisions, the Supreme Court in *ITO v. Bachu Lal Kapoor [(1966) 60 ITR 74]* observed at pages 82-3 thus:-

“In the former, the validity of protective assessment was approved; and in the later, this court, though the question of assessment was raised, did not express its final opinion thereon. This court held that when there was a doubt as to which person among two was liable to be assessed, parallel proceedings might be started against both; and it also laid down an equitable procedure to be followed in that situation.”

Similarly it was held in *Banyan & Berry v. CIT, (1996) 222 ITR 831, 868 (Guj)* that it is settled law that where there is doubt or ambiguity about the real entity in whose hands a particular income is to be assessed, the assessing authority is entitled to have recourse to making protective assessment in the case of one and regular assessment in the case of other. However, making of protective assessment does not affect the validity of the other assessment in as much as if ultimately one of the entities is really found to be liable to the assessment, then, the assessment in the hands of that entity alone remains the effective assessment and the other becomes infructuous, The levy is enforceable only under one assessment and not under both.

No Protective Recovery on Protective Assessment:

As seen above, protective assessment is permissible although there is no provision in the statute. However, the protective assessment does not extent to making protective recovery. In *Jagannath Bawri v. CIT, (1998) 234 ITR 464, 471 (Gauh),* it was held that while a protective assessment is permissible, a protective recovery is not. In making a protective assessment, the authorities are merely making an assessment and leaving it as a paper assessment until the matter is decided one way or the other - *[Jagannath Hanumanbux v. ITO, (1957) 31 ITR 603, 609 (Cal); P.K. Trading Co. v. ITO, (1970) 78 ITR 427 (Cal); CIT v. Cochin Co. (P.) Ltd., (1976) 104 ITR 655 (Ker); Sunil Kumar v. CIT, (1983) 139 ITR 880 (Bom)]*

No Protective order for Penalty:

As explained earlier, under the law, a protective order of assessment can be passed but not a protective order of penalty [*CIT v. Behari Lal Pyare Lal, (1983) 141 ITR 32 (Punj); CIT v. Super Steel (Sales) Co., (1989) 178 ITR 451, 452 (Cal); Metal Stores v. CIT, (1990) 186 ITR 612, 614, 615 (Gauh)]*

Inclusion of an amount on provisional basis in the total income not possible:

The total income of an assessee can include a sum only if it is found that the sum represents income liable to be taxed in the hands of the assessee for the relevant assessment year. It could not be included in the assessment on a provisional or tentative basis - *Asharfi Lal v. ITO, (1967) 66 ITR 63, 66 (A11).* At the same time, the circumstance that in regular assessment certain items of income are taken in provisionally subject to later rectification could not make the assessment a provisional assessment [*Roshan Lal Kuthiala v. ITO, (1966) 62 ITR 558 (Punj)]*.

Assessment in cases where search action conducted after 31/5/2003:

Introduction:

The scheme of block assessment has come to an end with effect from 1/6/2003 by insertion of section 158BI and search action initiated after 31/5/2003 would come under the new provisions for assessment of search and seizure in terms of sections 153A to 153C of the Income tax Act.

The new provisions are introduced by the legislature for the reasons that the main objectives for which the block assessment scheme was introduced i.e. avoidance of disputes, early finalisation of search assessments, reduction in multiplicity of proceedings, cost-effective, meaningful and efficient assessment proceedings, etc. have failed in totality and has spawned a fresh stream of litigation.

The objective of the new provision seems to be the same as was laid down while introducing the scheme of block assessment, however, it is only the matter of time that would perhaps give the idea as to whether the scheme of block assessment failed to achieve its objectives or it was too early to do away with the scheme of block assessment.

Provision – Summarised:

The new provision for assessment of search and seizure cases is introduced in terms of sections 153A to 153C, which in a nutshell is a mixture of both the old provisions relating to search and seizure cases as well as the provisions contained in the block assessment scheme.

Section 153A(1) provides that in case of a person where a search action is initiated u/s.132 of the Act or books of account or other documents or assets are requisitioned u/s.132A after 31/5/2003, the assessing officer ***shall*** issue a notice to such person requiring him to furnish a return of income within such period as mentioned in the notice. The return of income would be required to be filed for all the six assessment years preceding the assessment year in which search action is initiated u/s.132 or books of account, etc are requisitioned u/s.132A. The section starts with notwithstanding anything contained in sections 139, 147, 149, 151, & 153 meaning thereby that the provision of section 153A overrides all these sections and hence, the time limit as well as the criteria for reopening of assessments as provided under these sections would not be applicable to the assessment made in respect of search cases.

The proviso to section 153A(1) provides that the assessing officer ***shall*** assess or reassess all the six assessment years preceding the previous year in which search action is initiated or requisition made. It is also further provided by way of second proviso that the assessment pending on the date of initiation of search u/s.132 or requisition u/s.132A ***shall*** abate.

Section 153A(2) is inserted by the Finance Act, 2008, w.r.e.f. 1/6/2003 providing therein that where any proceedings are initiated or any assessment or reassessment order is made u/s.153A(1), which is annulled in any appeal or legal proceedings, in such cases, the assessment or reassessment that had abated under second proviso to section 153A(1) would revive with effect from the date of receipt of annulment order by the Commissioner. Proviso is also added whereby if the order of annulment is set aside, the revival shall cease to have effect.

In other words, the sub-section (2) to section 153A is inserted only to safe guard the revenue in cases of assessment / reassessment getting abated, which otherwise was a valid proceedings initiated, due to search action, which itself gets annulled at a later stage.

All other provisions of the Act except those overridden shall apply to the assessment or reassessment made under this section and tax shall be charged at the rates applicable to such assessment years

Section 153B provides for the time limit within which the assessment or reassessment u/s.153A has to be made. This section is similar to the section 158BE of block assessment and provides that the assessment or reassessment shall be made within a period of two years (21 months for last of authorization executed during the financial year commencing on 1/4/2004 onwards as amended by Finance Act 2006, w.e.f. 1/6/2006) from the end of the financial year in which the last of the authorizations was executed in case of search and in case of requisition, within a period of two years (21 months for last of authorization executed during the financial year commencing on 1/4/2004 onwards as amended by Finance Act 2006, w.e.f. 1/6/2006) from the end of the financial year in which the requisition was executed. With respect to assessment of other person referred to in section 153C, the assessment or reassessment shall be made within a period of 2 years in both the cases referred to above or one year (21 months instead of 2 years and 9 months instead of 1 year as amended by Finance Act, 2006 w.e.f. 1/6/2006) from the end of the financial year in which the books of account or documents or assets are handed over to the AO having jurisdiction over other person. The time limit so provided is extended in following circumstances:

Situation	**Time Extended for**
Opportunity of re-heard given u/s.129.	The time taken for reopening the whole or part of the proceedings.
Court grants injunction of assessment proceedings.	The period during which the stay is in force.
Special Audit has been directed u/s.142(2A).	The time allowed by the Assessing Officer to furnish the report of such special audit.
Application is made to Settlement Commission u/s.245 and the same is rejected.	The period commencing from the day when the application is made & ending on the day on which rejection order is received by the CIT.
Annulment of proceeding or order of assessment / reassessment referred to in section 153A(2)	The period commencing from the date of annulment till the date of receipt of the order setting aside the order of annulment by the Commissioner

The proviso further states that where the time limit available with the assessing officer is less than 60 days after exclusion of the aforesaid period, the time limit would be extended upto 60 days. For e.g. where the assessment is getting time-barred on 30/6/2006 and an order of injunction is made on 15/6/2006 staying the assessment proceedings and is vacated on 25/6/2006, the assessing officer would get a period of 60 days commencing from 26/6/2006 even though the stay was only for a period of 10 days.

Section 153C is analogous to section 158BD with the only exception that the words 'any Undisclosed Income' is done away with in the new section 153C. The section provides that where the assessing officer is ***satisfied*** that any money, bullion, jewellery or other valuable article or thing or books of account or documents or assets seized or requisitioned ***belong or belongs*** to any person other than the person searched or requisitioned, then such money, bullion, etc. is to be handed over to the assessing officer having jurisdiction over such other person and that other assessing officer shall proceed against such other person and assess or reassess in accordance with the provisions laid down in section 153A.

Issues arising:

Whether assessment / reassessment mandatory:

The proviso to section 153A states that the assessing officer ***shall*** assess or reassess the six assessment years preceding the previous year in which the search is initiated or requisition made. The use of the word 'shall' connotes that the assessment / reassessment is mandatory and will have to be made irrespective of the fact as to whether any material / document, etc. is found in the course of search action. This is more so when the proviso further states that the assessment pending on the date of search action or requisition 'shall' abate. Therefore, the logical conclusion that could be drawn is that even if nothing is found in the course of search action, assessment / reassessment would have to be made.

What issues could be examined in 153A assessment / reassessment:

The new provision does not refer to 'undisclosed income' as was categorically and specifically referred to in the block assessment. Therefore, it is felt that the assessing officer in the assessment proceedings u/s.153A could examine all the issues that could be taken up in pursuance of filing of return of income. However, as far as completed assessments are concerned, the issues already examined by the assessing officer in such completed assessment would be difficult for re-examining in assessments u/s.153A unless some material is found in the course of search action.

Issue of Notice u/s.153A – Whether Mandatory and Whether separate notice for all the years:

An assessment to be made u/s. 153A comes into picture only after the notice for filing the return of income is issued. Therefore, the issue of notice is a ***sine qua non*** for making assessment u/s.143(3) r.w.s 153A of the Act. Since the section uses the word ***'shall'***, it becomes a pre-requisite for the assessing officer to issue a notice u/s.153A before issuing a notice u/s.142(1)/143(2) of the Act for making the assessment. The jurisdiction of the assessing officer would also commence with the issue of notice and hence, it is felt that the issue of notice is mandatory before making an assessment u/s.143(3) r.w.s 153A of the Act. Thus, if no notice is issued or the notice issued is invalid, the assessment made in pursuance of such notice would also be bad-in-law, illegal and void. Reference may be made to the decisions in ***Karam Chand Thapar & Bros. (Coal Sales) Ltd. v. DCIT [1997] 228 ITR 317 (Cal); CIT v. Kurban Hussain Ibrahimji Mithiborawala [1971] 82 ITR 821 (SC); Verma Roadways v. ACIT [2000] 75 ITD 183 (All) – in respect of block assessment.***

The second issue relates to whether only one notice is sufficient for all the six assessment years preceding the previous year in which search action is initiated or requisition is made. One view could be that the assessing officer is required to issue only one notice requiring the assessee to file return of income for all the six assessment years for the reason that the section uses the words 'the return of income in respect of each assessment year' following the words 'issue notice'. Thus, the language indicates that only one notice may be required. The second view is that separate notice is required for each of the six-assessment year for the reason that each year is a separate assessment year unlike the block assessment, where only assessment was to be framed whereas under new provision, separate assessment is to be framed and separate return of income is to be furnished. Secondly, if one compares with section 148, separate notice is required for each assessment year to be reopened and even though section 153A overrides section 148, the analogy could be drawn as far as issue of notice is concerned. Thirdly, if nothing is found for a particular assessment year, the assessing officer may not issue any notice and no assessment may be framed by him in order to save time, cost, etc. and hence, a separate notice may be required to be issued for each of the six assessment years. The issue is debatable, however, the second view seems to be a better view and in order to avoid unintended litigation, it would be preferable if the department issues separate notices for each of the six assessment years.

Whether concept of 'Undisclosed Income' would still prevail:

Undoubtedly, a search action is initiated or requisition made in order to unearth income which is or which may not be disclosed to the department and hence, prima facie the assessment ought to be made of undisclosed income only. However, the concept of 'undisclosed income' (with which everyone is familiar with due to scheme of block assessment) may not prevail while framing assessments / reassessments under the new provisions. This is for the simple reason that the legislature has purposely omitted the word 'undisclosed income' from the new provisions thereby assessment / reassessment may be made as a normal scrutiny assessment taking into effect the material / documents found in the course of search action, if any. Secondly, the new provisions are introduced in order to overcome the parallel assessment that were made under the scheme of block assessment – the objective being reduction in litigation as to which income would fall under block and regular assessments and avoidance of time, cost, etc. in making two separate assessments. Thus, the concept of undisclosed income seems to have been done away with and the assessing officer would make assessments / reassessments without bifurcating undisclosed income.

Whether roving enquiries permitted:

Although the concept of 'undisclosed income' may be done away with, however, it is difficult to make roving enquiries even under the new provisions for the reason that as far as the completed assessments are concerned, it is difficult for the assessing officer to once again re-examine the issues already dealt with therein. As far as the pending assessment is concerned, the assessing officer, even otherwise, would have conducted normal enquiries, as done in regular scrutiny assessments. The question that arises is for the assessment years which are neither completed u/s.143(3) nor are pending. For such assessment years, to the extent of circumstantial evidences, enquiries could be made, but not otherwise.

<u>Whether material found for part period could be used for all the years:</u>

As far as the block assessment is concerned, the ***Hon'ble Bombay High Court in CIT v. Dr. M.K.E. Menon (2001) 248 ITR 310 (Bom)*** has laid down the ratio after referring to the decision of the ***Hon'ble Supreme Court in Haji Mohd. 90 ITR 271 (SC)*** that the block assessment could be framed only for the period with respect to which the material is found in the course of search action and cannot be estimated for other period. This decision was strictly in lieu of the special procedure of block assessment having specific meaning of undisclosed income embedded in it. Since, the concept of undisclosed income is itself done away with in the new provision, the decision of Bombay High Court in Menon's case, supra, would be of no held and instead the decision of the Supreme Court in Haji Mohd., supra, would be applicable with equal force. Thus, it may be difficult to argue that no estimation could be made for the period for which no material is found and the assessing officer may be able to use the material gathered for part of the period for making estimations for the other assessment years.

<u>Whether deductions, etc. could be claimed for first time in return of income filed in pursuance to notice issued u/s.153A:</u>

In the case of reassessment proceedings, the ***Hon'ble Supreme Court in CIT v. Sun Engineering Co. P. Ltd. 198 ITR 297 (SC)*** has laid down the ratio that the department cannot be worse off by reopening an assessment and hence, the assessee would be bared from claiming any relief in the course of reassessment proceedings.

However, the ratio laid down by the Supreme Court in Sun Engineering, supra, was specifically in respect of reopening of assessment where the income has escaped assessment. The provisions of sections 148 & 149 are overridden by the new provision of assessment u/s.153A and hence, the said ratio of the Supreme Court may not apply. Since the entire assessment / reassessment is made de novo (not only in respect of undisclosed income or the income that has escaped assessment) it may be possible to make a new claim altogether not made earlier. In my opinion it would be advisable to make such a new claim although the issue is not free from doubt.

Issues relating to loss:

The first issue that arises is whether loss could be claimed for the first time in the return of income filed in pursuance to notice issued in terms of provision of section153A. Here again, let us take an example of a person who has not filed his return of income at all wherein such person has suffered a loss. Now as per the normal provisions, the loss has lapsed since the return itself is not filed. If such person is searched and notice is issued, in my view, it is advisable to claim the loss for the reason that the assessment shall be made for every assessment year separately, which could include both disclosed as well as undisclosed income. Since all the provisions of the Act are applicable to the assessment made u/s.153A, so far as the same assessment year is concerned, the loss may be allowed to be set off with other income assessed for that year. But it may be difficult to carry forward the said loss in view of specific provision in terms of section 80 of the Act.

Another issue that arises is the carry forward and set off of undisclosed loss. In so far as the block assessment proceedings was concerned, the ratio laid down by the ***Hon'ble Mumbai Tribunal in BDA Ltd. v, Dy. CIT 65 ITD 501*** that since the block period is one single assessment, the undisclosed loss would be allowed to be set off against the undisclosed income irrespective of carry forward or carry backward position (which was although amended later), in the new provision of search cases, all the assessment / reassessment are to be separately made assessment year wise and hence, even the carry forward of undisclosed loss would be doubtful especially due to the provisions of sections 139 & 80, which may be difficult to overcome.

Another issue could be where loss is claimed in the original return and also allowed to be carried forward, but has lapsed due to insufficient profit in subsequent years. Now if some income is assessed for such assessment year where the loss was available for set off, in my view, in such cases, the loss ought to be available for set off and therefore, advisable to claim such loss in the return filed in pursuance to notice issued under 153A proceedings.

Abatement of assessment – some issues:

The proviso to section 153A states that the assessment / reassessment on the date of initiation of search or requisition shall abate. The literal meaning of the word 'abate' means – the act of eliminating or nullifying; the suspension or defeat of a pending action for a reason unrelated to the merits of the claim. Therefore, if any assessment or reassessment is pending with the assessing officer, the same shall become a nullity and fresh assessment would be made in pursuance to notice issued under section 153A of the Act.

The first issue arises is what happens to the proceedings taken in furtherance of the completed assessments – whether would become infructous or would have to be dealt with independently. The issue is not free from doubt but in my view, the proceedings taken in furtherance to the completed assessment would have to be dealt independent of 153A assessment. This is for the reason that what the section envisage is that only the pending assessment would abate and not the completed assessment. Further, the issues taken in appellate proceedings are either on question of facts or law, and nothing to do with framing of 153A assessment and therefore, would have to be dealt with independently.

What happens in cases where the assessment is pending due to the direction given by CIT as per order passed u/s.263 of the Act and what would happen to the appeal filed and pending before the ITAT against 263 order. If one goes by object of the legislature, two parallel proceedings are to be avoided and hence, in such cases, the assessment would abate since it is pending on the date of search action irrespective of the fact that the assessment is in pursuance to direction of the CIT u/s.263 of the Act. If this view is upheld then the appeal filed before the ITAT would become infructous. But the disadvantage that could be faced is that the assessing officer may use the directions of the CIT or take in to account the directions of the CIT while framing assessment u/s.153A and may assess on such issues which were subject matter of 263 proceedings. Thus, if object of legislature and literal meaning of words used in section

153A is taken, the assessment would abate and all other proceedings would become infructous. However, looking at the disadvantage, reasonable view would be that the appeal filed and pending before the ITAT would survive so that if the order u/s.263 is quashed, the assessee could then argue that such issues are already agitated in the original assessment and hence, could not be once again reviewed in the assessment/reassessment framed u/s.153A of the Act.

What happens to block assessment – whether abates? Take a case where a second search takes place after 31/5/2003 and there is a pending block assessment. Undoubtedly, the block assessment would be covering years over and above the years covered by the second search and hence, it is difficult to conclude that the block assessment would also abate. This view is further strengthened by the words used in section 153A, which refers to independent assessment year and not a block of assessment years and since the block assessment is an assessment of six years together alongwith part period upto the date of search, it could not separate individual assessment year from the block and hence, in my view, the block assessment would not 'abate'.

Assessment u/s.153C:

Whether 153C assessment could be made even if other person has disclosed the transaction, but is undisclosed of the person searched:

The provision of section 153C could be analyzed by breaking the section as under-

A) ***To what extent 'satisfaction' of the assessing officer is required:***

The requirement of section 153C with reference to satisfaction seems to be only ***prima facie*** satisfaction and not a firm conclusive satisfaction. Thus, the Assessing Officer must be prima facie satisfied that the money, bullion, etc. found in the course of search belongs to the person other than the one searched. This satisfaction is required before invoking the proceedings under section 153C and hence, the material, documents, money, bullion, etc. belonging to other person must be found in the course of search action and not on subsequent information etc. Further, there is nothing in section 153C that requires an assessing officer to record the satisfaction in writing. Wherever the legislature required such recording, it has specifically provided to that effect such as section 148 for reopening of assessments where the reasons for reopening have to be recorded in writing. The ***Supreme Court in Manish Maheshwari v. ACIT (2007) 289 ITR 341 (SC)*** has held in the context of section 158BD that satisfaction has to be recorded in writing and hence, the same would be applicable also to section 153C of the Act. The ***Madras Tribunal in L. Saroja v. ACIT (2001) 76 ITD 344 (Mad)*** has taken this view in the context of section 158BD holding that when the basis of satisfaction is challenged, nothing precludes the Tribunal from finding whether there were materials/information before the assessing officer on basis of which prima facie satisfaction was reached by him.

B) ***'belong' or 'belongs to' – what it connotes:***

The expression 'belong' is defined in the Oxford English Dictionary – "To be the property or rightful possession of." The ***Hon'ble Supreme Court in C.W.T. v. Bishwanath Chatterjee (1976) 103 ITR 539 (SC)*** in the context of Wealth tax Act has held that it is the property of a person, or that which is in his possession as of right, which is liable to wealth-tax. In other words, the liability to wealth-tax arises out of ownership of the asset, and not otherwise. Mere possession or joint possession, unaccompanied by the right to, or ownership of property would therefore not bring the property within the definition of "net wealth" for it would not then be an asset "belonging" to the assessee.

The expression "belonging to" has been the subject-matter of construction in many a decision and courts have construed that expression as meaning having proprietary rights or interests or ownership in the object in question.

The expression "belonging to" therefore is synonymous with ownership or proprietary rights in a particular property in question, and there can be no doubt that the expression "property belonging to a person" means the property which is of the ownership of that person – ***CWT vs. Harshad Rambhai Patel (1964) 54 ITR 747, 748 (Guj)***

The words "belonging to" need not necessarily connote ownership or proprietorship. The words are also used to indicate pertaining to, having a right or possession – ***Syed Khaja vs. Raghavendra Rao (1976) 103 ITR 296 (A.P.)***

The expression "belonging to" occurring in a particular statute has to be understood in the context in which it is used and, in the context in which that expression is used in section 2(m) of the Act, we are clearly of the opinion that it means only the full and absolute ownership – ***A & F Harvey Ltd. vs. CIT (1977) 107 ITR 341 (Mad)***

After analyzing the provisions of section 153C as above, if the aforesaid two vital conditions are fulfilled, then the assessing officer may hand over such documents or assets, etc., to the assessing officer having jurisdiction over the other person. Whether such asset, transaction, etc., is disclosed by the other person or not, may not have much bearing as far as the assessing officer of the person searched is concerned since he has to only be prime facie satisfied that such asset, etc., belongs to other person. The disadvantage of section 153C is that once the documents, asset, etc., is handed over to the assessing officer of the other person, the provisions of section 153A are made applicable and therefore, even if such asset, etc., is recorded and disclosed to the department by such other person, the assessment may have to be framed for all the seven assessment years. This is more so for the reason that the words "Undisclosed Income" as were used in the context of section 158BD are absent in section 153C and hence, irrespective of whether the assets, etc., are disclosed by such other person, assessment would be framed u/s.143(3) r.w.s. 153C of the Act. The only disadvantage as far as the department is concerned would be the completion of assessment of such other person, the time limit for which is the same as that of the person searched and hence, the assets, etc., if handed over after the time limit of completion of assessment, assessment u/s.143(3) r.w.s. 153C would be out of question unlike the provisions that were in the case of block assessment.

However, in ***LMJ International Ltd. v. DCIT (2008) 22 SOT 315 (Kol)*** it is held that under the new procedure of search assessment, the total income of the assessee is to be recomputed on the basis of the undisclosed income unearthed during search and the same is to be added with the regular income assessed under section 143(3) or sec. 143(1) for each of the six preceding assessment years. Where nothing incriminating is found in the course of search relating to any assessment year, the assessments for such year cannot be disturbed. Thus, the items of regular assessment cannot be added back in proceedings u/s.153C and only undisclosed income detected in the course of search of searched person or any other person u/s.153C can be added and charged to tax.

Search, seizure, survey – Documents to be asked for:

In cases of search/survey actions, after the same is completed, the assessee must ask in writing for the copies of the documents seized and all the statements recorded by the search party. To also ask for the inventories prepared by them as well as the copies of the Panchnama, if not given. Even if the same are not furnished to the assessee, and notice for filing return of income is issued or that the due date of filing of the return of income has approached, till then ask for the said documents by writing number of letters, so as to convey the department that the return is filed without having any knowledge of the documents seized and the extent of income, if any, not disclosed to the department. This may help atleast in penalty proceedings, if not in assessment proceedings.

Maintain Proceeding Sheet:

Last but not the least, the most important point is that one should maintain proceeding sheet at his end in the same way as the AO maintain in their file. This is also very important so that on each and every occasion, one can immediately write as to what has transpired in the assessment proceedings and what further details were asked for; the details regarding the requirements asked for from the assessee, with whom communication is done and so on. This helps as far as the professional is concerned so that he has all the noting in respect of the assessment proceedings and that the assessee cannot blame later on.