

Post Income Tax Search and Seizure findings of incriminating material and undisclosed income cannot be pressed for supporting the authorization of an Income Tax Search- A Study



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Introduction:

Authority and power to conduct search and seizure operations is strident and caustic power authorized by law to be taken recourse to when the conditions mentioned under different clauses of Section 132 (1) of the Act are satisfied.

The jurisdictional facts that have to be established before a search under Section 132 (1) of the Act can be authorised are that (i) the authority issuing the authorisation is in possession of some credible information, other than surmises and conjectures (ii) that the authority has reason to believe that the conditions stipulated in clauses (a), (b) and (c) of Section 132 (1) qua the person searched exist; and (iii) the said information has nexus to such belief.

The law is well settled that a warrant of search and seizure under Section 132(1) can only be issued on the basis of some material or information on which the Commissioner/Director has reason to believe that any person is in possession of money, jewellery or other valuable articles representing wholly or partly income or property which has not been or would not be disclosed, under the IT Act. The satisfaction of the authorities under Section 132 must be on the basis of relevant material or information. The word used in Section 132(1) are "reason to believe" and not "reason to suspect".

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Search and seizure provisions in the Income Tax Act, 1961 were introduced by Finance Act, 1964 and have undergone a number of amendments including substantial amendments made by the Taxation Laws (Amendment) Act, 1975 and Direct Tax Laws (Amendment) Act, 1987. Sections 132(1) and 132(1A) of the Act as they exist read as under:—

"132. (1) Where the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that—

- (a) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or*
- (b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or*
- (c) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),*

then,—

- (A) the Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief*

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Commissioner or Principal Commissioner or Commissioner, as the case may be, may authorise any Additional Director or Additional Commissioner or Joint Director, Joint Commissioner, Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer, or

(B) such Additional Director or Additional Commissioner or Joint Director, or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income- tax Officer, (the officer so authorised in all cases being hereinafter referred to as the authorised officer) to—

(i) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

(iia) search any person who has got out of, or is about to get into, or is in, the building, place, vessel, vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;

(iib) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorised officer the necessary facility to inspect such books of account or other documents;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

Provided that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorised officer shall make a note or inventory of such stock-in-trade of the business;

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(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies therefrom;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing :

Provided that where any building, place, vessel, vehicle or aircraft referred to in clause (i) is within the area of jurisdiction of any Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, but such Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner has no jurisdiction over the person referred to in clause (a) or clause (b) or clause (c), then, notwithstanding anything contained in section 120, it shall be competent for him to exercise the powers under this sub-section in all cases where he has reason to believe that any delay in getting the authorisation from the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner having jurisdiction over such person may be prejudicial to the interests of the revenue :

Provided further that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorised officer may serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it, except with the previous permission of such authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (iii):

Provided also that nothing contained in the second proviso shall apply in case of any valuable article or thing, being stock-in-trade of the business:

Provided also that no authorisation shall be issued by the Additional Director or Additional Commissioner or Joint Director or Joint Commissioner on or after the 1st day of October, 2009 unless he has been empowered by the Board to do so.

[Explanation.—For the removal of doubts, it is hereby declared that the reason to believe, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.]

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(1A) Where any Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner, in consequence of information in his possession, has reason to suspect that any books of account, other documents, money, bullion, jewellery or other valuable article or thing in respect of which an officer has been authorised by the Principal Director General or Director General or Principal Director or Director or any other Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner to take action under clauses (i) to (v) of sub-section (1) are or is kept in any building, place, vessel, vehicle or aircraft not mentioned in the authorisation under sub-section (1), such Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner may, notwithstanding anything contained in section 120, authorise the said officer to take action under any of the clauses aforesaid in respect of such building, place, vessel, vehicle or aircraft.

[Explanation.—For the removal of doubts, it is hereby declared that the reason to suspect, as recorded by the income-tax authority under this sub-section, shall not be disclosed to any person or any authority or the Appellate Tribunal.]"

The sum, substance and intention of the legislation is though for curbing the menace of black money is a pre-requisite for equity, good governance and the welfare of the state but at the same time search and seizure action cannot be a fishing expedition. Before search is authorized the Director must on the relevant material have reason to believe that the assessee has not or would not disclose his income. It is again reiterated that the in conjecture to the intention of the legislature the courts have held unanimously that the jurisdictional facts that have to be established before a search under Section 132 (1) of the Act can be authorised are that (i) the authority issuing the authorisation is in possession of some credible information, other than surmises and conjectures (ii) that the authority has reason to believe that the conditions stipulated in clauses (a), (b) and (c) of Section 132 (1) of the act qua the person searched exist; and (iii) the said information has nexus to such belief. The word used in Section 132(1) are "reason to believe" and not "reason to suspect".

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The aforesaid legal position, viz., on the statutory mandate to record "reasons to believe" and their nexus with the three pre-conditions in clauses (a), (b) and (c) to Section 132 was thereafter emphasized and elucidated by the Supreme Court in ***DGIT (Investigation) v. Spacewood Furnishers (P.) Ltd. [2015] 57 taxmann.com 292/232 Taxman 131/374 ITR 545*** which also refers to an earlier decision of the ***Supreme Court in ITO v. Seth Bros. [1969] 74 ITR 836*** and Partap Singh v. Director of Enforcement Foreign Exchange Regulation ***[1985] 22 Taxman 30/155 ITR 166 (SC)***. Spacewood Furnishers (P.) Ltd. (supra) has laid down the following principles:—

"8. The principles that can be deduced from the aforesaid decisions of this Court which continue to hold the field without any departure may be summarised as follows:

8.1. The authority must have information in its possession on the basis of which a reasonable belief can be founded that—

(a) the person concerned has omitted or failed to produce books of account or other documents for production of which summons or notice had been issued

Or

such person will not produce such books of account or other documents even if summons or notice is issued to him

Or

(b) such person is in possession of any money, bullion, jewellery or other valuable article which represents either wholly or partly income or property which has not been or would not be disclosed.

8.2. Such information must be in possession of the authorised official before the opinion is formed.

8.3. There must be application of mind to the material and the formation of opinion must be honest and bona fide. Consideration of any extraneous or irrelevant material will vitiate the belief/satisfaction.

8.4. Though Rule 112(2) of the Income Tax Rules which specifically prescribed the necessity of recording of reasons before issuing a warrant of authorisation had been repealed on and from 1-10-1975 the reasons for the belief found should be recorded.

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8.5. The reasons, however, need not be communicated to the person against whom the warrant is issued at that stage.

8.6 Such reasons, however, may have to be placed before the Court in the event of a challenge to formation of the belief of the authorized official in which event the court (exercising jurisdiction under Article 226) would be entitled to examine the relevance of the reasons for the formation of the belief though not the sufficiency or adequacy thereof."

Issue under consideration:-

A vital question arises at this juncture and is also matter of prolong litigation so far as to whether the reasons to believe can come into existence after issuance of warrant of authorization ?

To put it differently in a more lucid manner, can the reliance be put on by the department on the incriminating material/ undisclosed income found during the course of search **if** later on it is found by courts that the reasons to believe as recorded by the "Principal Director General or Director General or Principal Director or Director or the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or Additional Director or Additional Commissioner or Joint Director or Joint Commissioner" before issuing authorization of search doesn't contain and/or record such findings.

Judicial Analysis:-

Before addressing let us go through various judicial pronouncements settling the legal position with regard to recording of satisfaction and consequent issuance of warrant of authorization to conduct a legal search.

The courts have unanimously held time and again that before taking any action under section 132 of the Act the condition precedent which must exist should be information in possession of Director of Income-tax which gives him reason to believe that a person is in possession of some article, jewellery, bullion money which represents wholly or partly his income which was not

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disclosed or would not be disclosed. If the aforesaid condition is missing the Commissioner or Director of Investigation will have no jurisdiction to issue the warrant of authorization under section 132(1). Reliance placed on the decisions in cases of **Ganga Prasad Maheshwari v. CIT [1983] 139 ITR 1043 (All.)**; **Dr. Nand Lal Tahiliani v. CIT [1988] 170 ITR 592 (All.)**; **Dr. Sushil Rastogi v. Director of Investigations [2003] 260 ITR 249 (All.)**; **Ravi Iron Industries v. Director of Investigation [2003] 264 ITR 28 (All.)** and **Smt. Kavita Agarwal v. Director of Income-tax [2003] 264 ITR 472 (All.)**.

In CIT v. Vindhya Metal Corporation and Ors. (1997) 224 ITR 614 (SC), the Supreme Court observed :

"Mere unexplained possession of an amount, without anything more, could hardly be said to constitute information which could be treated as sufficient by a reasonable person, leading to an inference that it was income which would not have been disclosed by the person in possession for purposes of the Act."

In **Dr. Nand Lal Tahiliani v. CIT [1988] 170 ITR 592**, the Allahabad High Court held that the averments of information under section 132 must be in good faith and there must be rational relation between the information and the material and reasonable belief. Mere rumour of roaring practice and charging of high rate of fee and living in a posh house, in the absence of any other material, could not be construed as constituting information in consequence of which the Director could have reason to believe that the petitioner had not disclosed his income or would not disclose it.

In **L.R. Gupta v. Union of India [1992] 194 ITR 32**, it was held by the Delhi High Court that the expression "information" must be something more than a mere rumour or a gossip or a hunch. There must be some material, which can be regarded as information, which must exist on the file on the basis of which the authorizing officer can have reason to believe that action under section 132 is called for. It was also observed (Therein): ". . . an assessee is

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under no obligation to disclose in his return of income all the moneys which are received by him which do not partake of the character of income or income liable to tax. If an assessee receives, admittedly, a gift from a relation or earns agricultural income, which is not subject to tax, then he would not be liable to show the receipt of that money in his income-tax return. Non-disclosure of the same would not attract the provisions of section 132(1)(c). It may be that the opinion of the assessee that the receipt of such amount is not taxable may be incorrect and, in law, the same may be taxable, but where the Department is aware of the existence of such an asset or the receipt of such an income by the assessee, then the Department may be fully justified in issuing a notice under section 148 of the Act, but no action can be taken under section 132(1)(c). . . ."

In ***Ajit Jain v. Union of India [2000] 242 ITR 302 (Delhi)***, it was observed (*vide* page 311): ". . . the mere fact that the petitioner was in possession of the said amount could not straightaway lead to the inference that it was his undisclosed income. . . . The intimation simplicitor by the CBI that the money was found in the possession of the petitioner, which, according to the CBI, was undisclosed, in our view, without something more, did not constitute information within the meaning of section 132 so as to induce a belief that the cash represented the petitioner's income which has not been or would not be disclosed. A bare intimation by the police or for that matter by any person, without something more, cannot be considered sufficient for action under section 132 of the Act, for it would be giving naked powers to the authorities to order search against any person and prone to be abused. This cannot be permitted in a society governed by rule of law. Even assuming that the said amount was not reflected in the books of account of the company as claimed by the petitioner, the mere possession of the said amount by the petitioner could hardly be said to constitute information which could be treated as sufficient by a reasonable person, leading to an inference that it was income which has not been or would not have been disclosed by him for the purposes of the Act, particularly when the petitioner

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as well as the company, of which he was claiming to be the managing director, were regular assesseees with the Income-tax Department."

In ***Lajpat Rai and Ors. v. CIT (1995) 215 ITR 608 (All)***, the Court held that where the IT authorities had no information or material that any valuable asset or documents relating to company was stated in the locker, they had no justification to proceed with the search and seizure, and the warrant of authorization in question was passed on irrelevant considerations.

In ***Smt. Manju Tandon v. T.N. Kapoor 1978 UPTC 349***, the Court held that the expression "reasons to believe" does not mean a purely subjective satisfaction on the part of the authority concerned. The reasons must be held in good faith and they cannot be merely pretence.

The ***Supreme Court in H.L. Sibal v. CIT [1975] 101 ITR 112 (Punj. & Har.)***, elucidated on compliance and satisfaction of the conditions of sub-clauses (a), (b) and (c) to Section 132 of the Act as recorded in the "reasons to believe", which formation of opinion must be in good faith and not mere pretence and subterfuge on the part of the authorities. It was held that the Court while examining the said reasons would not adjudge or test adequacy and sufficiency of the grounds, but could go into the question and examine rational connection between the information or material recorded and formation of the belief as to satisfaction of conditions specified in clauses (a), (b) and (c) to Section 132 (1) of the Act. The "reasons to believe" as recorded should have relevant bearing on formation of the belief, for the search warrants cannot be issued for making a fishing and roving inquiry. It was held that there must be nexus between the information and the "reasons to believe". Information, which is relied upon must not be in the nature of surmise or conjecture but must have tangible backing and some basis. It should not be mere ipse dixit but based upon reason. Simple "believe" was not sufficient, albeit satisfaction note must itself indicate and show whether the belief falls under clauses (a), (b) and (c) to Section 132(1) of the Act. "Likelihood and

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predisposition" in the "reasons to believe" for authorizing search were held to be in nature of surmise and conjecture.

In a recent judgment in case of ***Laljibhai Kanjibhai Mandalia v. Principal Director of Income-tax, (Investigation) [2019] 105 taxmann.com 260 (Gujarat)***, the Hon'ble Gujarat High Court quashed the warrant of authorization owing to the absence of existence of any of the three circumstances envisaged under clause (a) , (b) and (c) of sub-section (1) of section 132 of the Act. In the opinion of the court, on the information which has come on record there is no material on the basis of which a reasonable person could have formed the belief that action under sub-section (1) of section 132 of the Act is called for. It appears that merely because the first respondent does not have any other power under the Act to directly take action against the petitioner herein, resort has been made to the provisions of section 132(1) of Act by taking shelter behind the notification dated 13th November, 2014 issued by the CBDT in exercise of powers under sub-sections (1) and (2) of section 120 of the Act, which vests jurisdiction under Chapter XIII of the Act in respect of the territorial areas of the whole of India in the Director General of Income Tax specified in column (2) or the Principal Director/Director of Income-tax specified in column (4) of the Schedule to the notification.

Facts of the case:-

- The petitioner was a high net worth individual and has been paying tax regularly and the accounts of the petitioner are being audited on a regular basis. The petitioner was looking for an avenue to invest some money. By that time, a company by the name of Goan Recreation Clubs Private Limited was in the process of setting up a new business in Goa. The said company was in need of finance for setting up its business and consequently, approached the petitioner for a loan. On the petitioner asking for some sort of security, the said company offered that another company being Royale Recreation Private Limited would give its property bearing Sub Plot No.65 admeasuring 346 square metres and Sub-Plot No.68 admeasuring 463.50 square metres, in all, admeasuring

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809.50 square metres constituting a part of Aldeia De Goa of property known as "Nauxim" or "Chicalium Bhat" bearing Survey No.31/1-A admeasuring 1,06,950 square metres situated in village Bambolim, in registration sub-District Ilhas, District North Goa in the State of Goa as security for the said loan. Subsequently, an agreement was reached and a registered deed of mortgage came to be executed for the property between the petitioner, Goan Recreation Clubs Private Limited (also referred to as the "borrower company") and Royale Recreation Private Limited (also referred to as the "guarantor company") on 22.6.2016. Pursuant to the said agreement, an amount of Rs.10,00,00,000/- (rupees ten crore) came to be given by the petitioner to the borrower company at the agreed rate of interest and on agreed terms. So as to avoid any technical breach of law, the petitioner was advised to become Director of the borrower company at the time of giving the loan. The petitioner, therefore, became a Director of Goan Recreation Clubs Private Limited on 18.5.2016. However, soon after the loan formalities were completed, the petitioner resigned as a Director of Goan Recreation Clubs Private Limited on 25.6.2016. Accordingly, the petitioner remained as a Director of the borrower company for a little over one month.

- The borrower company which was a new venture was in the process of setting up its business, had yet to start its business when the petitioner resigned as a Director of that company and in fact it did not commence business for a further period of one month after the petitioner resigned as a Director of the company. According to the petitioner, his only role was to give a loan of Rs.10,00,00,000/- to the company, which amount was completely accounted for and its source was not only disclosed but also very well-known to the department. In due course, the borrower company repaid the loan along with the interest due to the petitioner. Consequently on 10.7.2017, a deed for release of mortgage came to be executed between the petitioner, Royale Recreation Private Limited (the guarantor company) and Goan Recreation Clubs Private Limited (the borrower company). The petitioner that has diligently paid tax on interest that he had earned from the loan. However, on 10.8.2018, the officers of the Income Tax Department conducted a search on the residential premises of the petitioner which went on till 3.00 a.m. on 11.10.2018. During the course of search, the petitioner was orally

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informed that the warrant of authorisation in the present matter has been issued by the Principal Director of Income Tax (Investigation), Kolkata. According to the petitioner as such no reason to believe was shown to the petitioner; however, in the course of search, the officials told the petitioner that the reason for the search was the fact that the petitioner was a Director of Goan Recreation Clubs Private Limited and the Income Tax Department was conducting a search on the said company and the present search was being conducted since the petitioner was a Director of that company. It appears that subsequent to the search, the respondents have been raising query after query and calling for details of assets, etc. from the petitioner. It is the case of the petitioner that the respondents are without any rhyme or reason or legal justification harassing the petitioner and his family members and are grossly abusing the power vested in them under the provisions of the Income Tax Act.

- The case of the petitioner was that the impugned search action is bad in law and in violation of the provisions of section 132 of the Act. It was submitted that firstly, the conditions precedent for any action under section 132 of the Act have not been satisfied; and secondly, the action under section 132 as well as all further actions of the respondents pursuant to the said action are illegal and deserves to be quashed. The attention of the court was invited to the provisions of section 132 of the Act to submit that for the purpose of issuance of an authorisation for search under section 132 of the Act, the concerned authority in consequence of information in his possession should have reason to believe that either of the three situations mentioned under sub-section (1) of section 132 exist. It was submitted that in the facts of the present case, none of the three situations exist. It was submitted that insofar as the circumstance (a) as envisaged under section 132(1) of the Act is concerned, the same is not applicable to the facts of the present case as no summons or notice as contemplated therein has been issued to the petitioner. Insofar as circumstance (b) is concerned, it was submitted that there was no reason for the respondent to believe that if any summons or notice was issued to the petitioner, he would not produce or cause to be produced any books of account or other documents which would be useful or relevant to the proceeding under the Act. It was submitted that insofar as circumstance (c) is concerned, it is not the case of the

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respondents that the petitioner was in possession of any money, bullion, jewellery or other valuable article or thing which had not been or would not be disclosed by him. It was submitted that in the present case, the search action has been taken in respect of a loan advanced by the petitioner to Goan Recreation Clubs Private Limited which was duly shown in the return of income filed by the petitioner. It was submitted that the petitioner had disclosed the entire transaction and had paid the tax on the interest earned from the loan. The whole transaction was by way of cheque. The payment was made by cheque and was also received by way of cheque. It was submitted that from the facts as emerging from the record, it appears that post the petitioner's resignation as a Director, the company namely, Goan Recreation Clubs Private Limited had entered into suspicious transactions and that having regard to the facts of the case, there was no need to carry out search and that it was always open for the respondents to carry out an inquiry.

- The case of the revenue was that the petitioner was not expected to comply with the notice of the as he would have brought the alibi of jurisdiction to evade compliance with the notice. The petitioner arguments was that the respondents have acted upon surmises and conjectures in coming to the conclusion that the petitioner would not comply with any summons or notice issued to him as contemplated under clause (b) of sub-section (1) of section 132 of the Act. It was submitted that there was no reason for the Commissioner, Kolkata to form the belief that the petitioner would not respond to the notice and that the only situation which would be applicable in the facts of the present case is clause (b) of section 132(1) of the Act, which would not be attracted having regard to the facts of the present case. Reference was made to the income tax return of the petitioner filed for assessment year 2017-18, to point out that in the return of income itself, the transaction in question has been reflected. It was pointed out that tax has been deducted at source in respect of the interest paid on the loan given by the petitioner and the department has also given credit to the petitioner.

Being aggrieved, the petitioner had filed the writ petition challenging the authorisation issued under section 132 of the Income Tax Act, 1961.

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The court held as under:-

"12. Insofar as the first circumstance as laid down under clause (a) of sub-section (1) of section 132 is concerned, the same relates to a case where any person to whom a summons under sub-section (1) of section 131 of the Act or notice under sub-section (1) of section 142 of the Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account, or other documents as required by such summons or notice, in which case an authorisation can be issued. In the facts of the present case, it is an admitted position that no such summons or notice as envisaged under clause (a) of sub-section (1) of section 132 has been issued in the present case. Therefore, the circumstance envisaged under clause (a) of section 132(1) of the Act does not exist in the present case.

13. Before adverting to the requirements of clauses (b) and (c) of sub-section (1) of section 132 of the Act, it may be noted that the learned counsel for the respondents had produced a satisfaction note for the perusal of this court. The satisfaction note which runs into thirty three pages, has been recorded in the case of Shri Sarju Sharma and other related groups. The petitioner's name finds place in the list of key persons of the Group concern and is shown to be associated with Goan Recreation Clubs Private Limited. The satisfaction note refers to huge deposits made during the periods of demonetisation and introduction of undisclosed income in the form of unsecured loans. Reference to the petitioner finds place in allegations made against Goan Recreation Clubs Private Limited wherein reference is made to the loan given by the petitioner to the said concern, which has given rise to the belief that the transaction of loan was prearranged and was an accommodation entry provided through some entry operator thereby giving colour of genuineness to an otherwise bogus loan. The satisfaction note refers to various other transactions; however, since the same is confidential in nature it would not be prudent to refer to the same. Suffice it to state that the allegation against the petitioner is limited to the above.

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14. On reading the satisfaction note in its entirety, except for what is referred to hereinabove, this court could not find any other material whatsoever insofar as the petitioner is concerned, for the purpose of recording satisfaction under section 132(1) of the Act.

15. In the above backdrop, the question as to whether or not the provisions of clause (b) and clause (c) of sub-section (1) of section 132 of the Act are satisfied is required to be considered.

16. Clause (b) of sub-section (1) of section 132 of the Act provides for issuance an authorisation in case where the authority in consequence of information in his possession, has reason to believe that such person to whom a summons or notice has been issued or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which would be useful for, or relevant to, any proceeding under the Act. In the facts of the present case, it may be noted that the first respondent, namely the authority who has issued the authorisation under section 132 of the Act, is not the jurisdictional Assessing Officer. The first respondent Principal Director of Income Tax (Investigation), Kolkata, who has issued the impugned authorisation is based in Kolkata and, therefore, has no jurisdiction over the petitioner under the normal provisions of the Act. The only provision under which the said respondent can exercise jurisdiction over the petitioner is under section 132 of the Act in view of the CBDT notification dated 3.12.2001 issued under section 120(1) and (2) of the Act, whereby the Director General of Income Tax have been empowered to exercise jurisdiction in respect of territorial areas of the whole of India. In the affidavit-in-reply the reason given by the respondent for issuance of search warrant is that the petitioner was not expected to comply with the notice of the respondent No.1 or the respondent No.5 as the petitioner would have brought the alibi of jurisdiction to evade or non-comply with the notice. Thus, as rightly submitted by the learned counsel for the petitioner, the belief that the petitioner would not respond to a summons or notice issued as envisaged under clause (b) of sub-section (1) of section 132 is not based upon any information or other material but is based upon conjectures and surmises that the petitioner would take the alibi of lack of jurisdiction on the part of the respondents. This contention of the first respondent also lends support to the contention raised on behalf of the petitioner that powers under section 132 of the

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Act have been resorted to because that is the only provision which vests jurisdiction in the Kolkata authorities for taking action against the petitioner. Evidently, therefore, the circumstance envisaged under clause (b) of sub-section (1) of section 132 of the Act does not exist in the present case.

17. Insofar as the third circumstance as contemplated under clause (c) of section 132(1) of the Act is concerned, the same relates formation of belief that the person concerned is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been or would not be disclosed for the purposes of the Act. In the present case, on a perusal of the satisfaction note as well as the affidavit-in-reply filed on behalf of the respondents and submissions advanced by the learned senior standing counsel for the respondents, it is evident that the sole ground on which the search is sought to be carried out is that the petitioner herein had advanced a loan of Rs.10,00,00,000/- (rupees ten crore) to Goan Recreation Clubs Private Limited. There is nothing on record to indicate that any belief has been formed by the competent authority to the effect that the petitioner has in his possession any money, bullion, jewellery or other valuable article or thing which would not have been disclosed by him for the purposes of the Act. On the contrary, in the facts of the present case, from the record of the case as produced by the respondents as well as by the petitioner, it is evident that the loan transaction whereby the petitioner had advanced Rs.10,00,00,000/- to the borrower company has been duly reflected in the books of account of the petitioner. In his return of income, the petitioner has duly shown the interest income from such transaction. The tax deducted at source in respect of such interest income, has been credited to the account of the petitioner by the concerned authority. Therefore, the entire transaction has been disclosed by the petitioner. There is no other material on record on the basis the respondents could have formed the belief as contemplated under clause (c) of sub-section (1) of section 132 of the Act. Evidently, therefore the circumstance envisaged under clause (c) of section 132(1) of the Act also does not exist in the present case.

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18. In the opinion of this court, on the information which has come on record there is no material on the basis of which a reasonable person could have formed the belief that action under sub-section (1) of section 132 of the Act is called for. It appears that merely because the first respondent does not have any other power under the Act to directly take action against the petitioner herein, resort has been made to the provisions of section 132(1) of Act by taking shelter behind the notification dated 13th November, 2014 issued by the CBDT in exercise of powers under sub-sections (1) and (2) of section 120 of the Act, which vests jurisdiction under Chapter XIII of the Act in respect of the territorial areas of the whole of India in the Director General of Income Tax specified in column (2) or the Principal Director/Director of Income-tax specified in column (4) of the Schedule to the notification.

19. Another aspect of the matter is that the respondent authorities have proceeded on the footing that Goan Recreation Clubs Private Limited has received various unsecured advances leading to the belief that the transaction in question is non-genuine. In the facts of the present case, the petitioner has produced on record a mortgage deed dated 22nd June, 2016 executed by and between Royale Recreation Pvt. Ltd. as the First Party, Goan Recreation Clubs Private Limited as the Confirming Party or the Second Party and the petitioner Shri Laljibhai Kanjibhai Mandalia as the Mortgagee or the Third Party, which had been executed by way of a security for repayment of the amount advanced by the petitioner to Goan Recreation Clubss Private Limited. The genuineness of such document has not been disputed by the respondents. Under the circumstances, on the basis of the information referred to hereinabove, no reasonable person could have come to the conclusion that the ingredients contained in clauses (a), (b) or (c) of sub-section (1) of section 132 of the Act were attracted. In the absence of existence of any of the three circumstances envisaged under sub-section (1) of section 132 of the Act, the impugned authorisation is invalid and cannot be sustained.

20. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned warrant of authorisation dated 7.8.2018 issued by the respondent No.1 under section 132 of the Income Tax Act, 1961 and rule 112(1) of the Income Tax Rules, 1962 (Annexure-A to the affidavit-in-reply filed by the respondent No.1) is hereby quashed and set aside. Consequently, all actions

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taken pursuant to such warrant of authorisation would also be rendered invalid. Rule is made absolute accordingly with no order as to costs."

Now coming to the moot question **as to whether the reasons to believe can come into existence after issuance of warrant of authorization ?**

It is a well-established law as laid down by the Supreme Court of India that the order originally passed cannot be improved by way of affidavits *vide Mohinder Singh Gill v. Chief Election Commissioner [1978] 1 SCC 405.*

In the landmark judgement in case of ***Pooran Mal V. Director of Inspection (1974) 93 ITR 505 (SC)***, the Hon'ble Supreme Court held that an undisclosed property found during the course of search may not be justification for authorization of search when it was not a reasonable ground for recording a reasonable belief as required by virtue of sub-clauses (a),(b) and (c) of Section 132(1) of the Income Tax Act,1961.

In case of ***Smt. Kavita Agarwal And Anr. vs Director Of Income Tax (2003) 185 CTR All 129***, the Hon'ble High Court held that the material on the basis of satisfaction under Section 132 has to exist must be material brought to the knowledge of the Commissioner/Director prior to the search, and the authorities cannot rely in material found during the search. In *Smt. Kavita Agarwal v. DIT [2003] 264 ITR 472/133 Taxman 848 (All.)* the search of the premises of the Petitioner's husband and his family resulted in the finding of keys to three lockers one of which stood in the couple's joint names. The jewellery found in that specific locker was valued at Rs.6,28,861. Yet, the Court was not prepared to accept that this by itself satisfied the requirement of the law. It held:

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"The law is well settled that a warrant of search and seizure under Section 132(1) can only be issued on the basis of some material or information on which the Commissioner/Director has reason to believe that any person is in possession of money, jewellery or other valuable articles representing wholly or partly income or property which has not been or would not be disclosed, under the IT Act. In the present case the respondents have not disclosed what was the material or information on the basis of which the Director/Commissioner entertained the belief that the lockers contained valuable jewellery or other articles representing undisclosed income. It is well settled that the satisfaction of the authorities under Section 132 must be on the basis of relevant material or information. The word used in Section 132(1) are "reason to believe" and not "reason to suspect". In the counter-affidavit it has been specifically stated in para 18 that the authorized officer had reason to suspect and not reason to believe."

The need for there to be, prior to issuance of the authorisation for search, of some credible information which leads to formation of a reason to believe that the conditions stipulated in Section 132 (1) (a) to (c) exists is the running theme of several decisions.

There should be existence of material which could lead to the formation of reason to believe that any of the three conditions mentioned in section 132(1) of the act had been fulfilled.

This very matter was taken up in case by the Hon'ble High Court of Allahabad in case of ***Dr. (Mrs.) Anita Sahai v. Director of Income-tax[2004] 136 TAXMAN 247 (ALL.)***.

The brief facts of the case before the Hon'ble Allahabad High Court were as under:-

The departmental authorities, the respondents, in purported exercise of the powers under section 132(1), searched the

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residential and business premises of the assessee-petitioners, who were husband and wife and both were doctors, and seized certain amount of cash and documents, etc., from their possession. The assessee filed a writ petition challenging, *inter alia*, the validity of the warrant of authorization under section 132(1) and the initiation of block assessment proceedings by issue of notice under section 158BC by respondent No. 5, and continuation thereof by respondent No. 6 by issuance of another notice under section 142(1) and in that regard it was submitted (i) that both the assessee were regularly assessed to tax, (ii) that there existed no material which could lead to the formation of reason to believe that any of the three conditions mentioned in section 132(1) had been fulfilled, (iii) that there did not exist any material which could lead to formation of reason to believe that any asset owned and possessed by the assessee was not, or would not be disclosed in due course, and (iv) that notice under section 131(1A) could be issued only before the authorized officer had taken action under section 132(1) and that while section 131(1A) uses the expression 'reason to suspect', section 132(1) uses the expression 'reason to believe' and that 'reason to believe' would stand on a higher footing than 'reason to suspect'.

Their lordships held as under:-

"

The respondents in their counter-affidavit had stated that it was respondent No. 4 who had sent the material to respondent No. 1 on the basis of which respondent No. 1 had recorded his satisfaction under section 132(1). It was respondent No. 4 himself who had issued summons under section 131(1A) after the search. As such, there could not possibly be any material, which could be the basis of having reason to believe in respondent No. 1. The very fact that respondents issued notice under section 131(1A) after the search and seizure operation under section 132 would show that there was neither reason to believe nor material before the authorising officer on the basis of which he could issue a warrant under section 132. [Para 25]

It is well-settled that before taking any action under section 132, the condition precedent which must exist should be information in

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possession of Director of Income-tax which gives him reason to believe that a person is in possession of some article, jewellery, bullion money, etc., which represents wholly or partly his income which was not disclosed or would not be disclosed. If the aforesaid condition is missing, the Commissioner or Director of Investigation will have no jurisdiction to issue the warrant of authorization under section 132(1). [Para 26]

The scheme of section 132 postulates that the mind has to be applied by two officers at two different stages that is,

(i) firstly by the Director of Investigation or the Commissioner while issuing a warrant of search on the basis of his reason to believe that any person is in possession of any jewellery, ornaments or money etc. which are believed to be an undisclosed property; and

(ii) Secondly by the authorized officer when during the search any particular jewellery, ornaments or money is found can be reasonably believed to be an undisclosed property.

Since the authorized officer has to form an opinion before seizing the particular ornaments, he will necessarily have to investigate the matter. In the instant case, no such investigation had been done by the authorized officer at the time of seizure and indiscriminate seizure had been made by him contrary to the guidelines of the CBDT, etc. [Para 27]

In the instant case, there had been an indiscriminate seizure without any application of mind inasmuch as, all the books of account which were duly reflected in the balance sheet, income-tax returns, patients' case records which were required for medico legal case purposes, computers and other professionally related documents and certain other articles had been seized by the department. The respondents were trying to justify the seizure on the basis of post search materials, which could not be legally done. [Paras 29 and 30]

In the instant case, the department had acted only on rumours. The petitioners were admittedly leading doctors and were regularly

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assessed to tax and had filed income-tax returns up to date. [Para 37]

The assessee had clearly stated in the writ petition that there existed no material before the Director which could lead to the formation of reason to believe under section 132(1) for issuance of the warrant of authorization. [Para 38]

In the counter-affidavit, it was stated that the Additional Director of Income-tax (Investigation) and the Joint Director of Income-tax (Investigation) had brought material on record and they had made an analysis which showed that the assessee had been concealing their income in the income-tax returns and were in possession of undisclosed assets. The aforesaid averment was very vague. When a positive averment was made in the writ petition that there was no material which could lead to formation of reason to believe in the Director for issuance of warrant of authorization under section 132, the respondents must in their counter-affidavit give specific details as to what particular facts and material were taken into consideration by the Director which lead to formation of reason to believe under section 132. That material must be taken into consideration by the Director at the time when he issued warrant of authorization under section 132. If the Director considered that material after issuance of warrant of authorization it would be illegal, even if the material existed earlier. In the instant case, there was nothing to show that any relevant material was considered by the Director at the time of issuing the impugned warrant of authorization which led to formation of reason to believe that assessee had undisclosed assets or undisclosed income. [Para 39]

No doubt, in the counter-affidavit it had been mentioned that the Director had recorded satisfaction note on 26-2-2002 but the said note had not been annexed to the counter-affidavit. The instant case was heard on many dates but the respondents had not filed copy of the alleged satisfaction note dated 26-2-2002 and, hence, no reliance could be placed on the same. [Para 40]

Search and seizure cannot be a fishing expedition. Before search is authorized, the Director must on the relevant material have reason

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to believe that the assessee has not or would not disclose his income. [Para 41]

The reason to believe must exist and must be taken into consideration by the Director/Commissioner at the time of issuing a warrant of authorization. If the reason to believe comes into existence later, i.e., after issuance of warrant of authorization, then the warrant of authorization and entire search and seizure will be illegal even if the material on the basis of which the Director formed his opinion that there was reason to believe existed prior to the issuance of warrant of authorization. In the instant case, even assuming that there existed relevant material prior to issuance of warrant of authorization which could have led the Commissioner to form his reason to believe under section 132, it was an illegal warrant of authorization, since the aforesaid material was taken into consideration by the Director/Commissioner subsequent to the issuance of the warrant of authorization. [Para 42]

Therefore, the search and seizure in question was illegal and was liable to be quashed. The prohibitory orders under section 132(3), read with section 281B, expired on 27-2-2003 and no extension was on the record. Hence, the entire seizure and restraint order relating to the bank accounts in question had become infructuous and they were directed to be released forthwith. [Para 44]

Therefore, the warrants of authorization and all proceedings subsequent thereto were quashed. The cash and other articles and books seized from the petitioners shall be returned to them forthwith. [Para 47] "

It is also pertinent here to put forth another judgment of the Hon'ble High Court of Allahabad in case of **Suresh Chand Agarwal v. Director General of Income-tax** [2004] 139 TAXMAN 363 (ALL.)

The brief facts of the case before the Hon'ble Allahabad High Court were as under:-

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The assessee's case was that he had been carrying on business of manufacturing perfumed supari. He contended that in relation to such business activity as also other sources of income, he had been regularly assessed to income-tax by the Assessing Officer. It was also contended that he had been maintaining all such records as were required to be maintained under the Central Excise Act, and no discrepancy was ever found by the excise authorities either in his working or in the records so maintained. On 10-12-2002, search operations under section 132(1) were carried out at residential premises, business premises and at the bank locker of the assessee. In search operations, cash, gold, silver articles and certain documents were seized. Against the said act of revenue authorities, the petition was filed seeking directions to the respondent to quash the warrant of authorisation issued under section 132 and to restore the possession of the cash amount as well as other articles seized.

It was alleged in petition that the authorisation was issued by the respondent No. 2, the Director of Income-tax (Investigation) which was illegal as none of the conditions mentioned in section 132(1) existed and that there existed no material which could lead to formation of reason to believe that any asset owned and possessed by the assessee had not been disclosed or would not be disclosed in due course.

Their lordships held as under:-

"

It was clear from the facts of the case that the assessee was regular income-tax payee and that he had been returning a progressive return of income over the last several years. [Para 9]

No material had been disclosed in the revenue's counter affidavit to show that there were reasons to believe by the authority concerned for issuing the warrant of authorization. [Para 10]

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The material on the basis of which the reason to believe by the Commissioner/Director is said to exist must be such material which was brought to the knowledge of the said authority prior to the search. In other words, the authorities cannot rely on material found during the search for taking the plea that this was the basis of the reason to believe, unless such material was brought to the knowledge of the authority, who signs the warrant of authorization, before, or at the time when he signs it. To take a contrary view would mean that the Commissioner/Director can issue a warrant of authorization under section 132(1) without considering any material, and thereafter, the income-tax authorities can indulge in a fishing enquiry to uncover some undisclosed asset. No such view can be countenanced as it would give unbridled and arbitrary powers to the income-tax authorities to harass the citizens. [Para 12]

For the reasons given above, the petition was allowed and the impugned warrant of authorization was quashed and the entire search and seizure was declared illegal. The respondents were directed to release the cash, articles and documents seized from the assessee and his wife from their residence as well as the bank locker forthwith. [Para 13] "

In **Balwant Singh v. R.D. Shah, Director of Inspection, Income-tax, New Delhi [1969] 71 ITR 550 (Delhi)**, a Division Bench of the Delhi High Court held that before the Commissioner acts under section 132(1) of the Act, he must be reasonably satisfied that it is necessary to take the action contemplated by that section. If the grounds on which the belief is founded are non-existent or are irrelevant, or are such on which no reasonable man can come to that belief, the exercise of the power would be bad.

Recently the Hon'ble Delhi High Court in case of **Shah E Naaz Judge V Additional Director of Income-tax (Inv) [2018] 100 taxmann.com 346 (Delhi)** while quashing the search warrants in respect of a locker held that validity or invalidity of search is not to be judged and decided on the basis whether or not anything was found in the locker. Validity of search has to be decided and

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adjudicated on the basis of satisfaction note; whether satisfaction note satisfies the statutory requirements and the respondents have acted in accordance with law.

Further the Hon'ble Delhi High Court in case of ***Khem Chand Mukim V Principal Director of Income Tax (Inv.) [2020] 113 taxmann.com 529 (Delhi)*** at para 27 of the order held as under:-

"Before parting we may add that the opinion which has to be formed is subjective, and though the jurisdiction of the Court to interfere is very limited, and we are not to act as an Appellate Court and meticulously examine the information in order to decide whether an action under Section 132 is called for, yet at the same time we may emphasize that the power to search a person is a stringent power provided by law and this requires the officers to scrupulously follow the mandate and the rigor of the law prior to authorizing such an action, and unless the conditions to exercise such power are shown to exist, we would have no hesitation in striking down such an action. We are compelled to interfere as there was complete lack of information prior to the action of search, exhibiting gross non application of mind and arbitrariness by the authorities. The reason to believe in the present case was non existent prior to the search. Even after the search, there was no material to conclude that no such disclosure had been made, or that no disclosure would be made so as to satisfy the prerequisites of Section 132 of the Act. The Respondents have merely acted on the basis of surmises and conjectures, and without due authorization. Their actions are in contravention of law, making the action of search and seizure bad in law."

Conclusion:

In my considered opinion, though it is undisputed fact that a search and search action to curb the menace of black money and evasion is necessary and strongly advisable, however at the same time such seizure and seizure action is a serious invasion made upon rights, privacy and freedom of the taxpayer, therefore the

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power must be exercised strictly in accordance with the law and only for the purpose for which the law authorises it to be exercised. Therefore keeping in view the discussion above, in my considered opinion justifying a search action on post search material is not the legal intent of Search and seizure legislation and thus cannot be legally permissible. Accordingly, reasons of believe should not come into existence after issuance of warrant of authorization.

The jurisdictional facts that have to be established before a search under Section 132 (1) of the Act can be authorised are that (i) the authority issuing the authorisation is in possession of some credible information, other than surmises and conjectures (ii) that the authority has reason to believe that the conditions stipulated in clauses (a), (b) and (c) of Section 132 (1) qua the person searched exist; and (iii) the said information has nexus to such belief.

The law is well settled that a warrant of search and seizure under Section 132(1) can only be issued on the basis of some material or information on which the Commissioner/Director has reason to believe that any person is in possession of money, jewellery or other valuable articles representing wholly or partly income or property which has not been or would not be disclosed, under the IT Act. The satisfaction of the authorities under Section 132 must be on the basis of relevant material or information. The word used in Section 132(1) are "reason to believe" and not "reason to suspect".

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ABOUT CA. MOHIT GUPTA

Mr. Mohit Gupta is a Fellow Member of the Institute of Chartered Accountants of India, a commerce graduate from prestigious Ramjas College, Delhi University and an alumni of St. Xavier's School, New Delhi. He is practicing as a Chartered Accountant for more than 15 years and managing the Direct Tax Advisory and Litigation practice of M/s. Dhanesh Gupta & Co., Chartered Accountants, New Delhi a renowned Chartered Accountancy firm in the core domain of direct taxation established in 1978.

His forte is handling Income Tax Search and Seizure matters, matters before the Income Tax Settlement Commission, other direct tax litigation matters and matters related to legal representation before various authorities enforcing economic and tax laws incl. under PMLA, SFIO, EOW, DRI, SEBI, CCI, Benami Laws and Black Money etc. 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

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

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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