Whether any incriminating material found during the course of an Income Tax Search on any other person can be considered in the assessment under Section 153A of the assessee - A study

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Introduction:

Section 153A provides the procedure for completion of assessment in case of a person where a search is initiated under Section 132 or books of account or other documents or any assets are requisitioned under Section 132A after 31st May, 2003 but on or before the 31st Day of March'2021. In such case, the Assessing Officer shall issue notice to such person requiring him to furnish, within such period as may be specified in the notice, return of income in respect of six assessment years (plus additional specified years by virtue of insertion in shape of 4th proviso to Section 153A of the act by Finance Act 2017 w.e.f. 01-4-2017) immediately preceding the assessment year relevant to the previous year in which the search was conducted under Section 132 or requisition was made under Section 132A. Though the Section 153A has been made otiose for the searches initiated on or after the 1st Day of April'2021, the issue is still having vide ramifications for the searches conducted on or before 31st Day of March'2021.

Before going deeper into the issue, let us go through the relevant provisions of section 132 and 153A of the act along with Rule 112 of the Income Tax Rules'1962, which are reproduced herein under:-

Relevant part of Section 153A of the act

Assessment in case of search or requisition

153A. *[(1)] Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003 but on or before the 31st Day of March'2021 , the Assessing Officer shall—*

(a) issue notice to ***such person*** *requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year falling within six assessment years [and for the relevant assessment year or years] referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;*

(b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which ***such search is conducted*** *or requisition is made [and for the relevant assessment year or years] :*

Provided *that the Assessing Officer shall assess or reassess the total income in respect of each assessment year falling within such six assessment years [and for the relevant assessment year or years]*

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Relevant part of Section 132 of the act

"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—

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(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 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—*

……

"

Relevant part of Rule 112 of the Income Tax Rules'1962

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112 . *(1) The powers of search and seizure under section 132 shall be exercised in accordance with sub-rules (2) to [56][(14)].*

[57][(2) (a)] *The authorisation under sub-section (1) of section 132 (other than an authorisation under the proviso thereto) by the [58][Director-General or Director] or the [59][Chief Commissioner or Commissioner] or any such [60][Deputy Director] or [61][Deputy Commissioner] as is empowered by the Board in this behalf shall be in Form No. 45;*

(b) the authorisation under the proviso to sub-section (1) of section 132 by a [59][Chief Commissioner or Commissioner] shall be in Form No. 45A;

(c) the authorisation under sub-section (1A) of section 132 by a [59][Chief Commissioner or Commissioner] shall be in Form No. 45B.

(2A) Every authorisation referred to in sub-rule (2) shall be in writing under the signature of the officer issuing the authorisation and shall bear his seal.

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Therefore a harmonious reading of relevant provisions of section 132 and 153A of the act along with Rule 112 of the Income Tax Rules'1962 brings home the point that the trigger point of applicability of Section 153A is the initiation of search u/s 132 of the act in case of person after 31st May, 2003 but on or before the 31st Day of March'2021. The search is initiated on the strength of warrant of authorization issued by the authorizing officer to the authorized officer in terms of Section 132 of the act read with Rule 112 of the Income Tax Rules'1962. Search warrant can be issued against any person who is falling within the scope of either or more of the conditions as mentioned in clause (a),(b) or (c) of section 132(1) and against whom "reasons to believe" has been formed based on the

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possession of information. Therefore, the warrant of authorization so issued should specify the name of the person or persons against whom it is issued along with the complete address of the premises to be searched. In other words, if a warrant of authorization has not been issued in case of a person ,the provisions of Section 153A cannot be initiated in his case.

Section 132 prescribes that the competent authorities are empowered to permit the authorized officers to enter, search, break open, seize, place marks of identification and take other steps as contemplated under sub-clauses (i) to (v). However, such powers can be exercised against a person upon fulfilment of certain conditions. Firstly, the competent authority must have information in its possession and, secondly, on the basis of such information it must have reason to believe that the conditions as stipulated in sub-clauses (a), (b) and (c) of section 132(1) of the Income-tax Act, 1961 exist. Sub-clauses (a), (b) and (c) of section 132(1) speak of any person. Search and seizure cannot be sustained unless it is clearly shown that it was done by the authority duly authorized, and all the conditions precedent in relation thereto existed. Thus, before issuance of search warrant in order to take recourse under section 132 of the Income-tax Act, 1961, the authority competent to issue search warrant must be satisfied that search under section 132(1) is needed in respect of a definite person. Satisfaction required under section 132(1) of the Act 1961 is *qua* the person whose name appears in the warrant of authorization. If search as contemplated under section 132 of the Income-tax Act, 1961 is conducted in the premises of a person without any warrant of authorization in the name of the person searched, or on the basis of a warrant of authorization in the name of some other persons, that would be a clear case of non-application of mind of the empowered income-tax authorities and such a search cannot be held to be valid. It is so, because the belief which forms the foundation of search relates to a definite person who is to be subjected to search. If the contrary is the fact situation, the same would amount to serious lapses and would be in clear violation of the provisions contained in section 132(1) of the Income-tax Act, 1961, as it does not stand the test of section 132 of the Income-tax Act, 1961. Therefore, the most serious content of the warrant of authorization is the name and description of the person whose premises, etc., are sought to be searched. Thus in absence

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of any search warrant in the name of an assessee, search conducted in its premises is not a valid search as contemplated under section 132 of the Income-tax Act, 1961 and therefore no question of initiation of assessment proceedings u/s 153A of the act.

The provisions of section 153A make it clear that only in the case of a person where a search is initiated under section 132 or books of account or other documents or any assets are requisitioned under section 132A after 31st day of March, 2003 but on or before the 31st Day of March'2021, the Assessing Officer shall after issuing notice assess or reassess the total income of such person for six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition made. The legislative intent is clear from the use of the expression "such person" in clause (a) of section 153A. The expression clearly relates to a person in respect of whom search under section 132 has been initiated as section 153A itself provides. Thus to exercise powers under section 153A in the case of a person the mandatory requirement is that there must be a conduct of a search as contemplated under section 132 or requisition under section 132A of the Income-tax Act, 1961 in respect of such person. In a case where there is no conduct of search as contemplated under section 132, the basic condition for issuance of notice under section 153A does not exist. In order to assume jurisdiction to assess a person under section 153A, there must be conduct of a valid search in respect of such person under section 132 of the Income-tax Act, 1961. The word "person" appearing in section 132 and in section 153A of the Income-tax Act, 1961, is one and the same person. Thus the person, in respect of whom search under section 132 is conduct, is the same person against whom notice under section 153A is to be issued for making assessment/reassessment under that section.

Issue under Consideration:

Having discussed the basic framework of law, let us come to the moot question so far as to whether any material found in the search of any other person than the assessee [after 31st day of March, 2003 but on or before the 31st Day of March'2021] can be considered in the assessment under Section 153A of the assessee.

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Analysis:

Let us understand this posed question with the help of an illustration. Let us assume that a search was conducted on ABC Group on 11-12-2019. Separate search warrants were issued in the name of two group companies of ABC Group namely XYZ Ltd. and KLM Ltd.

Findings of Search

S.No.	Search Warrant and execution of search	Findings of Search
1.	Search warrant in the name of XYZ Ltd to search its premises located at Noida. Search action conducted on 11-12-2019.	No incriminating evidence found.
2.	Search warrant in the name of KLM Ltd to search its premises located at Delhi. Search action conducted on 11-12-2019.	Incriminating evidence found in relation to XYZ Ltd.

Now, the question arises in this case, as to whether any addition can be made u/s 153A in case of XYZ Ltd. based on a document seized by virtue of execution of different search warrant issued in case of KLM Ltd.

Let us address this situation which may arise in every search case wherein large business groups are searched on the strength of different search warrants.

The scope of assessment under Section 153A has been considered recently by the Hon'ble Delhi High Court in case of *CIT v. Kabul Chawla [2016] 380 ITR 573(DELHI)*. In the said decision, the high court has considered all earlier decisions of Hon'ble Delhi High Court and has also considered the

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decisions of other High Courts and Tribunals and summarized the legal position in paragraph 37, which is reproduced below:-

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Summary of the legal position

37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned decisions, the legal position that emerges is as under:

i. *Once a search takes place under Section 132 of the Act, notice under Section 153 A(1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place.*

ii. *Assessments and reassessments pending on the date of the search shall abate. The total income for such AYs will have to be computed by the AOs as a fresh exercise.*

iii. *The AO will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The AO has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words there will be only one assessment order in respect of each of the six AYs "in which both the disclosed and the undisclosed income would be brought to tax".*

iv. *Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the AO which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this Section only on the basis of seized material."*

v. *In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or*

reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. *Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the AO.*

vii. *Completed assessments can be interfered with by the AO while making the assessment under Section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment.*

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In clause (iv) above, their Lordships held "Obviously an assessment has to be made under this Section only on the basis of seized material". In clause (v), the same is reiterated by holding "In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made". In clause (vii), it is stated "Completed assessments can be interfered with by the AO while making the assessment under Section 153A only on the basis of some incriminating material unearthed during the course of search".

From a reading of the above decisions of Hon'ble High Court, it is evident that completed assessment can be interfered with by the Assessing Officer on the basis of any incriminating material unearthed during the course of search. If in relation to any assessment year no incriminating material is found, no addition or disallowance can be made in relation to that year in exercise of power under Section 153 of the Act. The reference to the incriminating material in the above decisions of Hon'ble Jurisdictional High

Court is in regard to incriminating material found as a result of search of the assessee's premises and not of any other assessee.

Therefore on a conjoint conspicuous perusal of Section 153A read with Section 132 of the act and the judgment of the Delhi Court, in my considered opinion only the material unearthed during the course of a search by virtue of execution of a particular warrant of authorization qua a person can be used for framing assessment u/s 153A of the act in case of such a person. In case of above illustration, no addition u/s 153A can be made in case of XYZ Ltd. based on a document seized relating to XYZ Ltd. by virtue of execution of different search warrant issued in case of KLM Ltd.

However, in my considered opinion, such an incriminating document found from the premises of KLM Ltd. relating to XYZ Ltd. **can be brought to tax in hands of XYZ Ltd. by effective application of Section 153C in case of XYZ Ltd.** Necessarily the legal procedure for assuming jurisdiction u/s 153C has to be strictly followed as discussed in earlier chapters.

Reliance in this regard can be placed on the recent judgement of Hon'ble Delhi ITAT in case of ***Trilok Chand Chaudhary V ACIT (ITA No.5870/Del/2017)*** pronounced on 20-08-2019 which was delivered following an earlier decision of Hon'ble Delhi ITAT in case of ***DCIT V Shivali Mahajan*** (ITA 5585 / DEL / 2015) pronounced on 19-03-2019.

Case of Trilok Chand Chaudhary

Brief facts qua the issue in dispute were that during the search proceeding at the premise of Sh. Ashok Chowdhary certain document was seized which contained a list of valuables including, jewellery items, cloths for bride and bridegroom, household articles (freeze, TV, microwave, AC , washing machine etc), vehicles, total silver (3 quintile), total gold (8 KG) , Diamond

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(3 carats) etc. According to the Assessing Officer, daughter of the assessee has been married to the son of Sh. Ashok Chowdhary and these items were given by the assessee as dowry on marriage of his daughter. But, since this document was found from the premises of Sh. Ashok Chaudhri and due to no explanation by him, addition was made by the Assessing Officer in his hand on substantive basis and on protective basis in the case of the assessee. But the Ld. CIT(A) upheld addition in the case of the assessee on substantive basis. The Ld. CIT(A) observed that during the appellate proceeding in the case of Ashok Chowdhary, the assessee filed an affidavit and owned that this document was prepared by him. The Ld. CIT(A) further brought on record that during the search operation, Ashok Chaudhri stated that whole items mentioned in the list were received by his family from Sh Trilok Chaudhri i.e. the assessee at the time of marriage of his son. The assessee contested that there is no reference in the said document that those items have been given during the marriage. The Ld. CIT(A) made a detailed discussion as why these items must have been given in the marriage in view of circumstantial evidences.

During the course of hearing before the tribunal, the assessee submitted that for making addition on the basis of any material including document found during the course of search at the premises of the third party, the procedure laid down under section 153C of the Act is to be followed and said procedure of law has not been followed by the Assessing Officer and, therefore, the addition cannot be legally sustained. The assessee contended that no addition could have been made under section 153A of the Act in the case of the assessee in respect of incriminating material found from the course of search at the premise of the third parties.

The relevant part of the order is reproduced herein under for better understanding of the issue:-

"

5.4 We have heard the rival submissions of the parties and also perused copy of Panchnama through which the document in dispute was seized. On perusal of the Punchnama, we find that the said search warrant was issued in the case of Shri Ashok Chaudhri and the Panchnama is not containing name of the assessee. Therefore, it is evident that the material relied upon for making addition was not found from the premises of the assessee. 5.5 We also find that during relevant

period, i.e., FY: 2014-15, for using any material found from the premises of the third party during the course of the search in assessment proceeding of the assessee, the Assessing Officer of the third party was required to record satisfaction as the material belong to the assessee in terms of section 153C of the Act and then was required to proceed as per the provisions of section 153C of the Act. In the instant case, it is evident that addition in dispute has been made in the assessment completed under section 153A of the Act. The assessee raised this issue before the Ld. CIT(A), however, the Ld. CIT(A) rejected the arguments of the assessee observing as under:

> *"6.3 Another argument of the appellant, if understood correctly, is that in reference to the document under consideration, the AO ought to have initiated proceedings u/s 153C and that in no case this can be considered u/s 153A. This argument has no legs to stand for the simple reason that it is patently absurd. Undisputedly, a search u/s 132 was conducted in the appellant's case and therefore, the assessment was to be completed u/s 153A and the Ld. AO was under a statutory obligation to consider entire material irrespective of the place from where it was found (i.e. appellant's own place or some other place). There cannot be two assessment one u/s 153A and other u/s 153C. In short, the argument of the appellant that document seized from the premises of Sh. Ashok Chaudhary cannot be considered u/s 153A is absurd and is accordingly rejected."*

5.6 In our opinion, the finding of the Ld. CIT(A) is not based on correct appreciation of law. The reasoning of the Ld. CIT(A) is that there cannot be two simultaneous assessment under section 153A and other under section 153C of the Act. This reasoning is faulty. The assessment under section 153C could have been made after completion of the assessment under section 153A of the Act. The Act has provided separate provisions for making assessment in case of material found in the course of the search from the premises of the assessee as well as the material found in the course of search at the premises of the third party. The Assessing Officer is required to follow the procedure laid down in the Act for making the assessment and he cannot devise his own procedure for shortcut methods. In our considered opinion, when the case of the assessee is covered under the provision of section 153 of the Act and if reliance is placed on the incriminating material found during the course of search of third-party, then provision of section 153C of the Act would be applicable and have to be adhered to. Thus, in the instant case, the Assessing Officer was required to first complete the proceedings under section 153A in hand, which were initiated by way of notice dated 30/06/2014 and thereafter, he was at liberty to take action under section 153C of the Act for bringing the material found from the premise of Sh. Ashok

Chaudhri to tax in the hands of the assessee. 5.7 In the case of Shivani Mahajan(supra), identical question was raised before the Tribunal as under:

> *"9. We have carefully considered the arguments of both the sides and perused the material placed before us. After considering the facts of the case and the rival submissions, we find that in these appeals, following two questions arise for our consideration (i) Whether any material found in the search of any other person than the assessee in appeal can be considered in the assessment under 153A of the assessee.*

5.8 The Tribunal after considering arguments of the parties held as under:

> *"15. Thus, when during the course of search of an assessee any books, document or money, bullion, jewellery etc. is found which relates to a person other than the person searched, then the Assessing Officer of the person searched shall hand over such books of account, documents, or valuables to the Assessing Officer of such other person and thereafter, the Assessing Officer of such other person can proceed against such other person. However, in the case under appeal before us, admittedly, Section 153C is not invoked in the case of the assessee and the assessment is framed under Section 153A. We, respectfully following the above decisions of Hon'ble Jurisdictional High Court, hold that during the course of assessment under Section 153A, the incriminating material, if any, found during the course of search of the assessee only can be utilized and not the material found in the search of any other person."*

5.9 The facts of the case of Vinod Kumar Gupta (supra) are distinguishable with the facts of the instant case. In the case of Vinod Kumar Gupta (supra) material found from Sh. S.K. Gupta was used in assessment proceeding under section 153A of the Act in the case of Sh. Vinod Kumar Gupta. But in that case warrant in fact was issued in the name of Sh. SK Gupta, Gaurav Gupta, Sh. Vinod Kumar Gupta, Ms. Veena Gupta, Sh. Vikas Gupta, and Ms. Madhu Gupta. The Panchnama drawn was also signed by both the assessee (Sh. Vinod Kumar Gupta) and SK Gupta. The statements of both Sh. S.K. Gupta and Sh. Vinod Gupta were recorded on the same date. The Hon'ble High Court held that as search and seizure was conducted through one authorization, there was no requirement of issuing separate notice under section 153C of the Act and following separate procedure under section 153C of the Act. But in the instant case, separate search warrant has been issued in the case of the assessee as well in the case of Sh. Ashok Chowdhary and the Assessing Officer has used the material found in the course of

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search at the premise of Sh. Ashok Chowdhary, which is not permitted in view of the express provision of the law.

5.10 The addition made by the Assessing Officer in violation of the procedure provided in the Act is bad in law and void-ab-initio and cannot be sustained. Accordingly, the addition of Rs.3.3 crore, made protectively on the basis of the documents found from the premises of the third party, by the Assessing Officer and upheld by the Ld. CIT(A) on substantive basis, is deleted. The ground No. 6.2 of the appeal is accordingly allowed."

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

His forte is handing Income Tax Search and Seizure matters, matters before the Income Tax Settlement Commission, 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 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

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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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