

Income Tax Authorities

Some Key Points : Recent Amendments

Powers for facilitating collection of information on requests from tax authorities outside India [Section 131]

For facilitating quick collection of information on request from tax authorities outside India, notified income-tax authorities (not below the rank of Assistant Commissioner of Income-tax) to now have powers under section 131(1) for making an inquiry or investigation in respect of any person or class of persons relating to an agreement for exchange of information under section 90 or 90A, even if no proceeding is pending before it or any other income-tax authority with respect to the concerned person or class of persons. Such notified authorities to also have the powers under section 131(3) to impound and retain in their custody for such period as they think fit, any books of account or other documents produced before them in any proceeding under the Act.

Such notified authorities are also empowered, for the purposes of an agreement referred to in section 90 or section 90A, to exercise the powers conferred under section 133 to call for information, irrespective of whether any proceedings are pending before it or any other income-tax authority.

Authorisation to Additional Director / Additional Commissioner / Joint Director / Joint Commissioner [Section 132]

The authorization warrant issued by Additional Director/ Additional Commissioner / Joint Director / Joint Commissioner upto 30th September, 2009 are valid, whether or not they have been specifically empowered by the CBDT to issue such warrants.

However, with effect from 1st October, 2009, an Additional Director / Additional Commissioner/ Joint Director / Joint Commissioner can issue warrant of authorization only if he has been specifically empowered to do so by the CBDT.

Question 1

Explain the duty of an Assessing Officer under section 220(6) as summarized by the following statement: "The Assessing Officer while acting under section 220(6) should not act as a mere tax-gatherer but as a quasi-judicial authority."

Answer

As per section 220(6), where an assessee has presented an appeal under section 246A, the Assessing Officer may, in his discretion and subject to such conditions as he may think fit to impose in the circumstances of the case, treat the assessee as not being in default in respect

of the amount in dispute in the appeal, even though the time for payment has expired, as long as such appeal remains undisposed of.

Being a quasi-judicial authority, the powers should be exercised judicially, keeping in mind that –

- (a) The power under section 220(6) is coupled with a duty to take into consideration all relevant grounds. It should not be exercised arbitrarily or, capriciously or should not be based on matters extraneous or irrelevant.
- (b) The Assessing Officer should apply his mind to the relevant factors such as the assessment history of the assessee, his conduct and co-operation to the Department, the points raised in appeal, chances of recovery in case the appeal is dismissed, the hardship to the assessee by insistence on immediate payment, etc.
- (c) He must remember that he is not the final arbiter of the dispute involved, but only the first amongst the statutory authorities. [*Rajan Nair (N) v ITO (1987) 165 ITR 650 (Ker.)*].

Question 2

The Director General of Income Tax after getting the information that Mr. Mogambo is in possession of unaccounted cash of ` 50 lacs, issued orders by invoking powers vested in him as per section 131(1A) of the Act, for its seizure. Is the order for seizure of cash issued by the Director General of Income Tax correct? If not, does the Director General of Income Tax have any other power to seize such cash?

Answer

The powers under section 131(1A) deal with power of discovery and production of evidence. They do not confer the power of seizure of cash or any asset. The Director General, for the purposes of making an enquiry or investigation relating to any income concealed or likely to be concealed by any person or class of persons within his jurisdiction, shall be competent to exercise powers conferred under section 131(1), which confine to discovery and inspection, enforcing attendance, compelling the production of books of account and other documents and issuing commissions. Thus, the power of seizure of unaccounted cash is not one of the powers conferred on the Director General under section 131(1A).

However, under section 132(1), the Director General has the power to authorize any Additional Director or Additional Commissioner or Joint Director or Joint Commissioner etc. to seize money found as a result of search [Clause (iii) of section 132(1)], if he has reason to believe that any person is in possession of any money which represents wholly or partly income which has not been disclosed [Clause (c) of section 132(1)]. Therefore, the proper course open to the Director General is to exercise his power under section 132(1) and authorize the Officers concerned to enter the premises where the cash is kept by Mr. Mogambo and seize such unaccounted cash.

Question 3

The premises of Ganesh was subjected to a search under section 132 of the Act. The search was authorized and the warrant was signed by the Joint Commissioner of Income-tax having jurisdiction over the assessee. The assessee challenged the validity of search, since section

20.3 Direct Tax Laws

132(1) does not empower Joint Commissioner to authorise a search under the Act. Decide the correctness of the contention raised by the assessee.

Answer

Under section 132(1), the income-tax authorities listed therein are empowered to authorise other income-tax authorities to conduct search and seizure operations. The authorities empowered to issue authorization include such Joint Director or Joint Commissioner as are empowered by the CBDT to do so.

However, a Joint Commissioner can issue warrant of authorization only if he has been specifically empowered to do so by the CBDT. Therefore, if the Joint Commissioner has not been specifically empowered by the CBDT to do so, the contention of the assessee would hold good.

Question 4

Examine the correctness of the statement “the jurisdiction of an Assessing Officer cannot be objected by the assessee”.

Answer

According to section 124(3), the assessee can raise a question as to the jurisdiction of an Assessing Officer within the prescribed time limit as under:

- (i) **where a return has been filed** under section 139(1) then, within one month from the date of service of notice under section 142(1) or section 143(2) or before the completion of assessment, whichever is earlier.
- (ii) **where no return has been filed**, then, within the expiry of time allowed by the notice under section 142(1) or section 148 for filing the return or within the time allowed in show cause notice issued seeking as to why a best judgment assessment under section 144 should not be made, whichever is earlier.

Where the assessee calls in question the jurisdiction of an Assessing Officer and the Assessing Officer is not satisfied with such claim, he shall refer the matter for determination by the Director General or Chief Commissioner or Commissioner before the assessment is made.

Therefore, in view of the above provisions, the statement that “the jurisdiction of an Assessing Officer cannot be objected by the assessee” is not correct.

Question 5

The Assessing Officer issued notices under section 133 to four banks requiring particulars relating to a customer in a specific format duly verified in a prescribed manner. One of the banks refused to part with the information on the ground that the letter did not specify about any proceeding pending against the said customer under the Income-tax Act, 1961.

Answer

It is not necessary that any proceeding should be pending against the customer for the purpose of invoking section 133(6). It is with a view to collecting information that power is given to an Assessing Officer under section 133(6) to issue notice requiring a banking company to furnish

information in respect of such points or matters as may be useful or relevant to any *enquiry or proceeding* under the Act. The second proviso to section 133(6) makes it clear that such information can be sought for even when no proceeding under the Act is pending; such power can be exercised even in case of an enquiry, the only safeguard being that before this power can be invoked by the Assessing Officer below the rank of Director or Commissioner, the approval of the Director or the Commissioner, as the case may be, has to be obtained [*Karnataka Bank Ltd. vs. Secretary, Government of India (2002) 255 ITR 508 (SC)*].

The action of the Assessing Officer in this case is correct if he has obtained the prior approval of the Director or the Commissioner, as the case may be.

Question 6

An Assessing Officer entered a hotel run by a person, in respect of whom he exercises jurisdiction, at 8 p.m. for the purpose of collecting information, which may be useful for the purposes of the Act. The hotel is kept open for business every day between 9 a.m. and 9 p.m. The hotelier claims that the Assessing Officer could not enter the hotel after sunset.

The Assessing Officer wants to take away with him the books of account kept at the hotel.

Examine the validity of the claim made by the hotelier and the proposed action of the Assessing Officer with reference to the provisions of section 133B of the Income-tax Act, 1961.

Answer

Section 133B(2) of the Income-tax Act, 1961 empowers an income-tax authority to enter any place of business during the hours at which such place is open for the conduct of business. The hotel is open from 9.00 a.m. to 9.00 p.m. for the conduct of business. The Assessing Officer entered the hotel at 8.00 p.m. which falls within the working hours. The claim made by the hotelier to the effect that the Assessing Officer could not enter the hotel after sunset is not in accordance with law.

Section 133B(3) provides that an income tax authority acting under this section shall, on no account, remove or cause to be removed from the place wherein he has entered, any books of account. In view of this clear prohibition in section 133B(3), the proposed action of the Assessing Officer to take away with him the books of account kept at the hotel is not valid in law.

Question 7

In the course of search operations under section 132, a tax payer makes a declaration under section 132(4) on the earning of income not disclosed. Can that statement save the tax payer from a levy of penalty under section 271(1)(c)?

Answer

Explanation 5 to section 271(1)(c), providing immunity from concealment penalty in respect of search cases for the admission given in the statement recorded at the time of search under section 132(4) will not apply where the search is initiated on or after 01.06.2007.

20.5 Direct Tax Laws

As per Explanation 5A to section 271(1)(c), no immunity from concealment penalty could be obtained by making a statement / declaration under section 132(4) of the Act.

However, where penalty is proposed under section 271AAA, statement recorded at the time of search under section 132(4) would shield the assessee from levy of penalty. It may be noted that section 271AAA meant for imposition of penalty in respect of search cases is applicable from 01.06.2007 and could be imposed only for the previous year which has ended before the date of search and the due date for filing the return under section 139(1) had not expired before the date of search and the assessee has not filed return of income for the previous year before the said date.

In other words, penalty under section 271AAA including its possible waiver could cover the previous year preceding the year of search and would not cover the earlier assessment years.

Question 8

State whether the information regarding possession of unexplained assets and income received from the Central Bureau of Investigation, a Government agency, can constitute "information" for action under section 132 of the Act. Discuss

Answer

As per section 132(1)(c), authorization for search and seizure can take place if the authority, in consequence of *information in his possession*, has *reason to believe* that any person is in possession of money, bullion, jewellery or other valuable article or thing and these assets represent, either wholly or partly, income or property which has not been, or would not be disclosed by such person for the purposes of this Act. In the absence of such information, a search cannot be validly authorized.

The Apex Court in *UOI v Ajit Jain [2003] 260 ITR 80* has held that mere intimation by the CBI that money was found in the possession of the assessee, which according to the CBI was undisclosed, without something more, does not constitute "information" within the meaning of section 132, on the basis of which a search warrant could be issued. Consequently, the Supreme Court held that the search conducted on this basis and the (block) assessment made pursuant to such search was not valid.

Question 9

- (a) *In the course of search on 25.03.2012, assets were seized. State the procedure laid down to deal with such seized assets under the Act.*
- (b) *The Director of Income-tax received information that Mr. X has unaccounted cash exceeding ₹ 50 Lacs. Can the Director pass orders for seizure of the cash invoking his powers under section 131(1A)? Does the Director have any other course open to him for the seizure of cash?*

Answer

- (a) Section 132B of the Income-tax Act, 1961 deals with the application of assets seized under section 132. Such assets will be first applied towards the existing liability under

the Income-tax Act, Wealth-tax Act, Expenditure-tax Act, Gift-tax Act and the Interest-tax Act. Further, the amount of liability determined on completion of search assessment and in respect of which the assessee is in default or deemed to be in default, may be recovered out of such assets.

Where the nature and source of acquisition of such seized assets is explained to the satisfaction of the Assessing Officer, the amount of any existing liability mentioned in para 1 above may be recovered out of such asset and the remaining portion, if any, of the asset may be released, with the prior approval of the Chief Commissioner or Commissioner as the case may be. The release must be made within 120 days from the date on which the last of the authorisations for search under section 132 or for requisition under section 132A was executed. The assets would be released to the person from whose custody they were seized.

When the assets consist of solely of money, or partly of money and partly of other assets, the Assessing Officer may apply such money in the discharge of the liabilities referred to in para 1 above and the assessee shall be discharged of such liability to the extent of the money so applied. However, the assets other than money may also be applied for the discharge of such liabilities if the complete recovery could not be made from the money seized or the money seized was not sufficient.

- (b) The powers under section 131(1A) deals with power of discovery and production of evidence. They do not confer the power of seizure of cash or any asset. The Director, for purposes of making an enquiry or investigation relating to any income concealed or likely to be concealed by any person or class of persons within his jurisdiction shall be competent to exercise powers conferred under section 131(1), which confine to discovery and inspection, enforcing attendance, compelling the production of books of account and other documents and issuing commissions. Thus, the power of seizure of unaccounted cash is not one of the powers conferred on the Director under section 131(1A).

However, under section 132(1), the Director has the power to initiate search proceeding by issuing search warrant and effect seizure through an authorized officer, if he has reason to believe that any person is in possession of any money which represents wholly or partly income which has not been disclosed. Therefore, the proper course open to the Director is to exercise his power under section 132(1) and authorise the officers concerned to enter the premises in which the cash is kept and seize the unaccounted cash.

Question 10

During the course of survey operations under Section 133A, carried on 5th March, 2012, the Income-tax authority, impounded the books of account and other documents inspected by him, relating to the assessee and retained the same in his custody. Is the action of the officer justified under law?

Answer

Section 133A empowers the Income-tax Authority to impound and retain in his custody, books of account or other documents inspected by him during survey subject to recording of reasons

20.7 Direct Tax Laws

for so doing. However, such impounded books of account or other documents shall not be retained for more than 10 days (exclusive of holidays) without obtaining the approval of the Chief Commissioner or Director General as the case may be.

Hence, assuming that the above conditions are fulfilled, the action of the Income-tax authority is justified.

Question 11

The business premises of Ram Bharose Ltd. and the residence of two of its directors at Delhi were searched under section 132 of the Act by the DDI, Delhi. The search was concluded on 9.8.2011 and following were also seized besides other papers and records:

- (i) Papers found in the drawer of an accountant relating to Shri Krishna Ltd., Mumbai indicating details of various business transactions. However, Ram Bharose Ltd. is not having any direct or indirect connection of any nature with these transactions and Shri Krishna Ltd., Mumbai and its directors.*
- (ii) Jewellery worth ₹ 5 lacs from the bed room of one of the director, which was claimed by him to be of his married daughter.*
- (iii) Papers recording certain transactions of income and expenses having direct nexus with the business of the company for the period from 16.4.2008 to date of search. It was admitted by the director that the transactions recorded in such papers have not been incorporated in the books.*

You are required to answer on the basis of aforesaid and the provisions of Act, following questions:

- (a) What action the DDI shall be taking in respect of the seized papers relating to Shri Krishna Ltd., Mumbai?*
- (b) Whether the contention raised by the director as to jewellery found from his bed-room will be acceptable?*
- (c) What presumption shall be drawn in respect of the papers which indicate transactions not recorded in the books?*
- (d) Proceedings for how many years shall now be taken up and within which time limit the assessment thereof be completed by the Assessing Officer?*
- (e) Can the company move an application for settlement of case as per Chapter XIX-A of the Act?*

Answer

- (a)** The authorised officer being DDI, Delhi is not having any jurisdiction over Shri Krishna Ltd., Mumbai, and therefore as per section 132(9A), the papers seized relating to this company shall be handed over by him to the Assessing Officer having jurisdiction over Shri Krishna Ltd., Mumbai within a period of 60 days from the date on which the last of the authorisations for search was executed for taking further necessary action thereon.

- (b) The contention raised by the Director will not be acceptable because as per the provisions of sub-section (4A)(i) of section 132, where any books of account, other documents, money, bullion, jewellery or other valuables are found in the possession or control of any person in the course of search, then, in respect thereof, it may be presumed that the same belongs to that person.
- (c) As per section 132(4A), the presumptions in respect of the papers, indicating transactions not recorded in the books but having direct nexus with the business of the company, are that the same belong to the company, contents of such papers are true and the handwriting in which the same are written is/are of the persons(s) whose premises have been searched.
- (d) The search was conducted after 31.05.2003 and therefore, as per provisions of section 153A, the Assessing Officer will issue notices to the company to furnish the return of income in respect of each assessment year falling within six assessment years immediately preceding the assessment year relevant to the previous year in which the search is conducted. The date of search as 09.08.2011, notices for A.Y. 2006-07 to 2011-12 shall be issued by the Assessing Officer.

The assessment for six assessment years shall be completed (as per provisions of section 153B(1)(a) read with proviso) within a period of 21 months from the end of the financial year in which the last of the authorisation for search was executed. Therefore, the assessment for the six assessment years shall be required to be completed by the Assessing Officer by 31.12.2013 as the search was concluded on 9.08.2011.

- (e) As per clause (iiia) in the proviso to section 245A, the assessee can approach the Settlement Commission at any time after the date of issue of notice under section 153A or section 153C initiating the assessment proceedings. Therefore, an application can be made to the Settlement Commission where search has been initiated under section 132 followed by assessment under section 153A or section 153C.

The proviso to section 245C(1) specifies the monetary limit for making application for settlement of cases, in respect of search cases. Accordingly, the additional amount of income-tax payable on the income disclosed in the application must exceed ₹ 50 Lacs so that application for settlement of the case is eligible for admission.

Question 12

Cash of ₹ 25 lacs was seized on 12.9.2011 in a search conducted as per section 132 of the Act. The assessee moved an application on 27.10.2011 to release such cash after explaining the sources thereof, which was turned down by the department. The assessee seeks your opinion on, the following issues:

- (i) *Can the department withhold the explained money?*
- (ii) *If yes, then to what extent and upto what period?*

Answer

The proviso to section 132B(1)(i) provides that where the person concerned makes an application to the Assessing Officer, within 30 days from the end of the month in which the asset was seized, for release of the asset and the nature and source of acquisition of the asset is explained to the satisfaction of the Assessing Officer, then, the Assessing Officer may, with the prior approval of the Chief Commissioner or Commissioner, release the asset after recovering the existing liability under the Income-tax Act, 1961, Wealth-tax Act, 1957, etc. out of such asset. Such asset or portion thereof has to be released within 120 days from the date on which the last of the authorizations for search under section 132 was executed.

In this case, since the application was made to the Assessing Officer within the 30 day period the amount of existing liability may be recovered out of the asset and the balance may be released within 120 days from the date on which the last of the authorizations for search under section 132 was executed.

Note- It may be noted that one of the conditions mentioned above for release of an asset is that the nature and source of acquisition of the asset should be explained to the satisfaction of the Assessing Officer. However, in this case, it has been given that the assessee's application for release of the asset, explaining the sources thereof, was turned down by the Department. It is possible to take a view that the application was turned down by the Department due to the reason that it was not satisfied with the explanation given by the assessee as to the nature and source of acquisition of the asset. In such a case, the above condition is not satisfied, and the asset (namely, cash) cannot be released.

Self-examination Questions

1. An income-tax authority, in the course of exercise of powers of survey under section 133A, serves a summon on the assessee and impounds the books of account and other documents found in the premises visited. Discuss the legality of the action.
2. Certain assets were seized in the course of search on 4.5.2011. State the procedure laid down to deal with such assets seized under the Act.
3. What are the presumptions which can be made if any books of account, document, money, bullion, jewellery is found in possession of a person in the course of a search?
4. What are the circumstances under which an authorization under section 132 can be issued?
5. Is it possible to retain seized books and other documents beyond a period of 30 days? If so, what are the conditions to be fulfilled in this regard?
6. Explain the manner of utilization of the assets seized.
7. Write short notes on the following powers of an income-tax authority -
 - (a) Power to call for information
 - (b) Power to make enquiry

8. The Director of Income Tax received information that Mr. X has unaccounted cash exceeding ₹ 50 lakh. Can the Director pass orders for seizure of the cash invoking his powers under section 131(1A)? Does the Director have any other course open to him for the seizure of cash?
9. The assessment of ABC Ltd. was completed under section 143(3). The assessing authority subsequently reopened the assessment by relying upon the circular issued by the CBDT in which the Board had given a direction to subordinate authorities to treat the ex-gratia amounts paid by the company to its employees under the Voluntary Retirement Scheme (VRS) as capital expenditure. ABC Ltd. contended that the circular issued was contrary to the provisions of the Act and also that it was beyond the powers of the CBDT to issue such a circular against the interest of the assesseees. Discuss the correctness or otherwise of ABC Ltd.'s contention.
10. Is the CBDT competent to permit admission of an application for refund under section 237 even after the expiry of the period prescribed under section 239 for avoiding genuine hardship in any case or class of cases?

Answers

8. The powers under section 131(1A) deal with power of discovery and production of evidence. They do not confer the power of seizure of cash or any asset. The Director, for purposes of making an enquiry or investigation relating to any income concealed or likely to be concealed by any person or class of persons within his jurisdiction shall be competent to exercise powers conferred under section 131(1), which confine to discovery and inspection, enforcing attendance, compelling the production of books of accounts and other documents and issuing commissions. Thus, the power of seizure of unaccounted cash is not one of the powers conferred on the Director under section 131(1A).

However, under section 132(1), the Director has the power to authorise any Assistant Director, Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer to seize money found as a result of search [Clause (iii) of section 132(1)], if he has reason to believe that any person is in possession of any money which represents wholly or partly income which has not been disclosed [Clause (c) of section 132(1)]. Therefore, the proper course open to the Director is to exercise his power under section 132(1) and authorise the officers concerned to enter the premises in which the cash is kept and seize the unaccounted cash.

9. This issue came up before the Madras High Court in *Madura Coats v. Dy. CIT (2005) 145 Taxman 226 / 273 ITR 0032*. The High Court held that under section 119(2), the CBDT is given the power to issue instructions to subordinate authorities for the purpose of proper and efficient management of the work of assessment and collection of revenue, provided that such instructions are not prejudicial to the assesseees. Therefore, any instruction to be issued should not affect the interests of the assesseees. If such directions are issued, they have to be held ultra vires the scope of section 119(2). The reason behind the

20.11 Direct Tax Laws

statutory bar under section 119(2) to issue any instruction contrary to the interests of the assessee is that a subordinate official is bound to comply with the directions/opinion of a superior authority. Any such instruction to an authority discharging the functions of a quasi-judicial nature would be impermissible. In the instant case, there was a positive direction to the assessing authorities to treat the ex-gratia amount as capital expenditure, which direction was certainly adverse to the assessee. Therefore, to the extent the circular was against the interests of the assessee, the same was liable to be held ultra vires.

Therefore, in this case, the contention of ABC Ltd. is correct.

10. This question was taken up by the Full Bench of the Punjab & Haryana High Court in *Jaswant Singh Bambha v. CBDT* (2005) 142 *Taxman* 528. The High Court observed that under section 239, no power has been conferred on the Assessing Officer to entertain a claim for refund after the period prescribed thereunder. However, section 5 of the Limitation Act, 1963 permits the admission of an application beyond the period of limitation, if the applicant satisfies the Court that he had sufficient cause for not making the application within such period. This provision has general application.

Section 29(2) of the Limitation Act provides that section 5 of the Limitation Act shall apply in cases of special or local laws to the extent to which it is not expressly excluded by such special or local laws. In other words, section 5 of the Limitation Act cannot be resorted to only when it is expressly excluded by such special or local law.

Section 239 has not expressly excluded the application of section 5 of the Limitation Act, 1963. In fact, a conjoint reading of sections 239 and 119(2) clearly shows that the application of section 5 of the Limitation Act, 1963 to the claims of refund has been specifically included in the Act. Thus, the power given to the Board under section 119(2) to entertain a belated claim is nothing but incorporation of the provisions of section 5 of the Limitation Act. Therefore, by virtue of power conferred on the CBDT under section 119(2), it is competent to permit admission of an application for refund even after the expiry of the period prescribed under section 239 for avoiding genuine hardship in any case or class of cases.