

Income Tax Authorities

Some Key Points : Recent Amendments

Application of seized assets for recovery of advance tax payable not allowed [Section 132B]

- (i) Section 132B(1), *inter alia*, provides that seized assets may be adjusted against -
 - (1) any "existing liability" under the Income-tax Act, 1961 Wealth-tax Act, 1957 etc.,; and
 - (2) the amount of liability determined on completion of assessments pursuant to search, including any penalty levied or interest payable in connection with such assessment and in respect of which such person is in default or deemed to be in default.
- (ii) The term "existing liability" has been interpreted by courts to include advance tax liability of the assessee. However, this interpretation does not reflect the real intent of the legislature, which is to ensure the recovery of tax, interest and penalty due and to further provide for recovery of taxes, interest and penalty which may arise subsequent to the search assessment.
- (iii) Therefore, section 132B has been amended by inserting *Explanation 2* to clarify that the "existing liability" does not include advance tax payable in accordance with the provisions of Part C of Chapter XVII of the Income-tax Act, 1961.

Director of Income-tax included in the definition of Commissioner [Section 2(16)]

Section 117 gives power to the Central Government to appoint such persons as income-tax authorities as it thinks fit. Clause (c) of section 116, enlisting the various income-tax authorities, refer to Directors of Income-tax or Commissioners of Income-tax. The post of a Commissioner and post of a Director of Income-tax are interchangeable.

Therefore, section 2(16) has been amended to reflect this position by including a Director of Income-tax within the meaning of Commissioner together with the Commissioner of Income-tax appointed under section 117(1).

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

Rajesh regularly files his return of income electronically. While he was trying to upload his return of income for assessment year 2013-14 on 31st July, 2013, last date for filing the same, he found it extremely difficult to do the same due to network problems and ultimately he became successful in making e-filing of his return only at 1 a.m. on 1st August, 2013. The return contained a claim for carry forward of business loss of ₹1 lakh. This circumstance was recorded in a letter delivered to the office of the Deputy Commissioner of Income Tax on 1st August, 2013 during normal office hours. Rajesh made a request to the CBDT for condonation of delay in filing the return of income.

Discuss whether the CBDT has the power to condone the delay in filing the return of income and permit carry forward of loss in the given circumstance.

Answer

Section 119(2)(b) empowers the CBDT to authorise any income tax authority to admit an application or claim for any exemption, deduction, refund or **any other relief under the Act** after the expiry of the period specified under the Act, to avoid genuine hardship in any case or class of cases. The claim for carry forward of loss in case of late filing of a return is relatable to a claim arising under the category of "any other relief available under the Act". Therefore, the CBDT has the power to condone delay in filing of such loss return due to genuine reasons.

The facts of the case are similar to the case of *Lodhi Property Company Ltd. v. Under Secretary, (ITA-II), Department of Revenue (2010) 323 ITR 0441*, where the Delhi High Court held that the Board has the power to condone the delay in case of a return which was filed late and where a claim for carry forward of losses was made. The delay was only one day and the

assessee had shown justifiable reason for the delay of one day in filing the return of income. If the delay is not condoned, it would cause genuine hardship to the assessee. Therefore, the Court held that the delay of one day in filing of the return had to be condoned.

Applying the rationale of the above court ruling to the case on hand, the CBDT has the power to condone the delay in filing the return of income of Mr. Rajesh and permit carry forward of business loss of ₹ 1 lakh, since the delay of one hour was due to a genuine and justifiable reason i.e., network problem while e-filing the return.

Question 2

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 3

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 4

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), 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 5

The premises of Ganesh were 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 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 6

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. 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 7

In the course of search operations under section 132 in the month of August, 2013, 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?

Answer

As per section 271AAB, penalty leviable on undisclosed income found during the course of a search, which has been initiated on or after 1st July, 2012, which relates to specified previous year, i.e.-

- (1) the previous year which has ended before the date of search, but the due date of filing return of income for the same has not expired before the date of search and the return has not yet been furnished;
- (2) the previous year in which search is conducted,

shall be:

- (1) penalty@10%, if undisclosed income is admitted during the course of search in the statement furnished under section 132(4), and the assessee explains the manner in which such income was derived, pays the tax, together with interest if any, in respect of the undisclosed income, on or before the specified date (i.e., the due date of filing return of income or the date on which the period specified in the notice issued under section 153A expires, as the case may be) and furnishes the return of income for the specified previous year declaring such undisclosed income.
- (2) 20%, if undisclosed income relating to the specified previous year is not admitted during the course of search in the statement furnished under section 132(4) but the same is disclosed in the return of income filed after the date of search and the tax along with the interest, if any, is paid before the specified date
- (3) in all other cases, penalty is leviable ranging from 30% to 90% of undisclosed income would be attracted.

Therefore, even if the assessee furnishes the statement under section 132(4), then also penalty @10% under section 271AAB would be attracted in respect of the specified previous year. Penalty under section 271(1)(c) shall be leviable in respect of undisclosed income of any other year. Therefore, the assessee cannot escape the levy of penalty all together.

Question 8

Cash of ₹ 25 lacs was seized on 12.9.2013 in a search conducted as per section 132 of the Act. The assessee moved an application on 27.10.2013 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. 'Existing liability', however, does not include advance tax payable. 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.

Question 9

The business premises of Ram Bharose Ltd. and the residence of two of its directors at Delhi were searched under section 132 by the DDI, Delhi. The search was concluded on 9.8.2013 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 16.4.2010 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 09.08.2013, notices for A.Y. 2008-09 to 2013-14 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 2 years 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 31.03.2016 as the search was concluded on 9.08.2013.

- (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 10

In the course of search on 25.03.2014, assets were seized. State the procedure laid down to deal with such seized assets under the Act.

Answer

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, 1961, Wealth-tax Act, 1957, etc. 'Existing liability', however, does not include advance tax payable. 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.

Question 11

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. Discuss the correctness of action of the bank in refusing to furnish the particulars as required by the Assessing Officer.

Answer

As per section 133(6), power is given to an Assessing Officer to issue notice, for the purposes of the Act, requiring any person, including a banking company, to furnish information in respect of such points or matters or to furnish statement of accounts and affairs verified in the manner specified by the Assessing Officer, as may be useful for, or relevant to, *any enquiry or proceeding* under the Act. Therefore, the provisions of this section can be invoked even in case of any enquiry and it is not necessary that any proceeding should be pending against the customer for the same.

However, in respect of an enquiry, this power can be exercised by any Income-tax authority below the rank of Director or Commissioner only after getting the prior approval of the Director or the Commissioner, as the case may be.

Therefore, the Assessing Officer can issue notice under section 133(6) asking for particulars relating to a customer in the specified format duly verified in the prescribed manner from the banking company, even if no proceeding is pending against such customer, provided he has obtained the prior approval of the Director or the Commissioner, as the case may be.

Hence, in such a case, the action of bank in refusing to provide the particulars relating to a customer as required by the Assessing Officer on the ground that no proceeding was pending against the customer, is not correct.

Question 12

The Assessing Officer within his jurisdiction surveyed a popular Cyber Café at 12 o'clock in night for the purpose of collecting information which may be useful for the purposes of the Income-tax Act, 1961. The Cyber Café is kept open for business every day between 2 p.m. and 2 a.m. The owner of the Cyber Café claims that the Assessing Officer could not enter the café in late night. The Assessing Officer wanted to take away with him the books of account kept at the Cyber Café. Examine the validity of the claim made by the owner and the proposed action of the Assessing Officer.

Answer

The Assessing Officer can exercise his power of survey under section 133A only after obtaining the approval of the Joint Commissioner or Joint Director, as the case may be. Assuming that he has obtained such approval in this case, he is empowered under section 133A to enter any place of business of the assessee within his jurisdiction only during the hours at which such place is open for the conduct of business.

In the case given, the cyber cafe is open from 2.00 p.m. to 2.00 a.m. for the conduct of business. The Assessing Officer entered the cyber cafe at 12 o'clock in the night which falls within the working hours of the cyber cafe. Therefore, the claim made by the owner to the effect that the Assessing Officer could not enter the cyber cafe at late night is not in accordance with law.

Further, as per section 133A(3)(ia), the Assessing Officer may, impound and retain in his custody for such period as he thinks fit, any books of account or other documents inspected by him. However, he shall not impound any books of account or other documents except after recording his reasons for doing so. He shall not retain in his custody any such books of account or other documents for a period exceeding ten days (exclusive of holidays) without obtaining the approval of the Chief Commissioner or Director General therefore, as the case may be.

Question 13

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.

Self-examination Questions

1. An income-tax authority, in the course of exercise of powers of survey under section 133A, serves 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 4.5.2013. 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 are 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? Is 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