

## **SURVEY AND ASSESSMENTS**

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## **1 Introduction to Survey**

### **1.1 *What is the purpose of conducting a survey?***

A survey is conducted for the purpose of extracting information. THE OBJECTIVE IS NOT TO OBTAIN CONFESSION/ SURRENDER AND COLLECT TAXES. It is aimed at knowing the information. The benefits of survey are: -

1. Since survey is carried at the premises of assessee, all the information which the assessee might be concealing from department may be extracted.
2. By conducting survey, it is ensured that all transactions are recorded in books or not. Further, stock, cash etc are counted which provides idea of the discrepancy, if any, in the business.
3. Survey carries an element of suspense. Many times what is stated in records may not be the truth about assessee's business. By conducting survey, the truth can be extracted.

### **1.2 *Under what circumstances can it be undertaken?***

Unlike searches, the Income-tax Act, 1961 is silent on the circumstances under which a survey can be conducted. A search is conducted in a very specific circumstances where the department has *reasons to believe* that one of the conditions of section 132(1) (a) to (c) are satisfied. However, there are no such circumstances specified for a survey to be conducted. Thus the conducting of survey is dependent on the discretion of the Department. As stated earlier, the objective of survey is to extract information. Thus, where the department is in need of information, a survey may be conducted.

### **1.3 *What are the types of survey under the Income-tax Act, 1961?***

A survey under the Income-tax Act, 1961 can be classified into three types: -

1. ***General Survey (Door-2 Door survey) - U/s. 133B*** : Such a survey is conducted when the survey team visits each and every shop in a particular locality. The objective is to identify new assessee's. The survey is discussed in details in Chapter 2.
2. ***Survey at Ceremonial Occasion U/s. 133A(5)*** : Such a survey is conducted in order to determine the nature and scale of expenditure incurred by an assessee, in connection with any function, ceremony or event. Such a survey is conducted with the objective to collect information on expenditure incurred and use the information to identify the tax evasion. The survey is discussed in details in Chapter 3.
3. ***Specific survey U/s. 133A*** : This is the most popular form of survey under the Income-tax Act, 1961. The survey is conducted at the business premises of the assessee, with an objective to extract the information and use the same for charging correct tax from him.

## **2 General Survey (Door-2-door survey)**

### *2.1 Discuss the provision relating to Door-to-door survey?*

The provisions of Door-to-Door Survey are contained in section 133B of the Income-tax Act, 1961. The section reads as “Power to collect certain information”. Such a survey takes place when the survey party visits a particular market and goes to each and every shop of the locality. Information is collected in a prescribed form (Form 45D). The survey procedure is simple and the proceedings are not devastating. It is a normal form containing basic particulars.

### *2.2 What is the objective for conducting such survey?*

As stated earlier, the provision empowering the survey party to conduct door-to-door survey section 133B reads as “Power to collect certain information”. The object is to collect specific information from the market. This is aimed at identifying the new assessee<sup>s</sup>. There is no intention to identify as to what the assessee discloses in the books is correct in comparison to that actually existing in business.

### *2.3 What information can be asked?*

Only prescribed information can be asked. The information is prescribed in Income-tax Rules, 1962, as Form 45D. The information is basic and covers aspects as the dates of filing of returns, amount of income disclosed, tax paid etc.

### *2.4 Who can conduct such survey?*

The powers u/s. 133B are conferred on an income-tax authority. Income-tax authority for this purpose means any of the following having jurisdiction over the assessee: -

1. Joint Commissioner
2. Assistant Director
3. Deputy Director
4. Assessing Officer
5. Inspector authorized by Assessing Officer

### *2.5 What type of jurisdiction is referred u/s. 133B?*

The jurisdiction can either be: -

1. on the assessee; or
2. on the place of business.

Say A, assessed at Nagpur has one office at Mumbai. Income-tax authority of Nagpur can conduct a survey at Mumbai-office of A, and also Income-tax authority at Mumbai may conduct such survey on the Mumbai-office of A.

### *2.6 What are the powers and restrictions on conducting such survey?*

The objective of conducting such survey is to identify the new assessee<sup>s</sup> in a particular segment.

1. Income-tax authority can enter the premises only during the hours when such business is open for conduct of business or profession.
2. The survey can be conducted of the principal place of business or any other place of business.

3. No statement can be recorded during such survey.
4. The income-tax authority cannot himself, search the premises and find out the information, as no such power is conferred.
5. No power of taking inventory or impounding any material is contained.
6. No power of examining books of accounts or any records, placing identification on them, obtaining copy of such books of accounts or records is there.

**2.7 What is the procedure to be followed in filling up Form No. 45?**

- (a) It should be filled in duplicate.
- (b) The assessee should have one extra copy for his record.
- (c) The assessee can ask for time as the possibility of not having full information readily cannot be ruled out.

**2.8 What would happen in case, the assessee does not co-operate?**

Penalty u/s. 272A(2) is provided @ Rs. 100 per day of default.

**2.9 How such information collected can be used?**

The objective of obtaining the information is to identify new assessee's. The information obtained for knowing who are the persons liable for tax, issuing them suitable notices u/s. 142(1) to file a return or section 147.

### **3 Survey at Ceremony**

#### ***3.1 Discuss the provision relating to survey of function, ceremony or event?***

In case the income-tax authority is of the opinion that it is necessary or expedient so to do, having regard to the nature and scale of expenditure incurred by an assessee, in connection with any function, ceremony or event, he may require the assessee by whom such expenditure has been incurred or any person who, in the opinion of the income-tax authority, is likely to possess information as respects the expenditure incurred, to furnish such information as income-tax authority may require as to any matter which may be useful for, or relevant to, any proceeding under this Act.

#### ***3.2 What is the objective for conducting such survey?***

We all are aware that in India one of the major way to expend the black money is at any occasion, ceremony or event. To identify such expenditure and to assess the income in the hands of the person, who expends such black money, the provisions of section 133A(5) have been inserted.

#### ***3.3 What is an occasion, ceremony or event?***

These terms are not defined in the Income-tax Act, 1961. One may argue that Diwali, dasshehra, holi etc are 'festival' and it seems that they cannot be regarded as 'occassion, ceremony or event'. Thus survey cannot be conducted to inquire expenditure on festivals.

#### ***3.4 What are the powers and restrictions on conducting such survey?***

The income-tax authority empowered to conduct a survey u/s. 133A is entitled to conduct such survey. Please refer Q. 5.1. Information is required to be furnished under this provision, in respect to the expenditure incurred during such occasion, ceremony etc. The information can be obtained: -

1. From the person:
  - a. who has incurred such expenditure or
  - b. who is, in the opinion of the income-tax authority, is likely to possess information as respects the expenditure incurred.
2. The information asked for should be relevant for the purpose of assessment.
3. The information may be in the form of: -
  - a. Summary of expenditure
  - b. Evidence of expenditure like bills of expenses
  - c. Recording of expenditure.
4. The income-tax authority cannot himself, search the premises and find out the information, as no such power is confronted.
5. Cash, jewellery etc. cannot be counted or inventoried as the powers u/s. 133A(1) are not available. Impounding of cash, jewellery etc. cannot be done.
6. Identification marks can be placed and documents can be impounded. Refer Q. 3.9.

#### ***3.5 Whether such information can be obtained prior to ceremony?***

Section 133A(5) itself reads "at any time after such function, ceremony or event". Thus the information cannot be required prior to ceremony.

### **3.6 On which place such survey can be conducted?**

The provision of section 133A(5) does not provide the place at which such survey operations can be conducted. Provisions of section 133A(1) empower the income-tax authority to visit the business premises of assessee. However, provisions of section 133A(1) seem to have no link with the provisions of section 133A(5), as both confer different power which are independent of each other. Thus, it seems that even the business premises, house or place of marriage cannot be visited. The proper course would be to issue summons u/s. 133(5). As on date, no judicial decision is available on the subject.

### **3.7 Whether statement can be recorded?**

U/s. 133A(5) the power of recording a statement has been conferred. Such statement would not be a statement on oath. However, where the assessee does not co-operate section 133A(6) would become operational and the provisions of section 131(1) will apply.

### **3.8 Whether inventory can be taken?**

As discussed in question 3.6, there is no power to search the premises. Since the premises could not be searched, the inventory cannot be taken.

### **3.9 Whether powers u/s. 133A(3) are available?**

There are no powers conferred in section 133A(5) in respect to obtaining copies of records or placing identification marks. However, section 133A(3) empowers the income-tax authority acting under “this section”. Thus the powers of section 133A(3) are available.

Therefore, the survey party can place identification marks, obtain copy and also impound the documents or books of accounts. However, cash or jewellery etc cannot be impounded u/s. 133A.

### **3.10 Whether video shooting can be conducted or photographs taken?**

Under the provisions of section 133A(5), which are very clear, any information can be required after such occasion, ceremony or event. Thus video shooting or taking photographs at marriage may not be permissible. Secondly, the information is required to be furnished. The authorities themselves cannot extract the information. Hence, looked from this point also, it seems that the information cannot be taken.

### **3.11 How such information collected can be used?**

The objective of obtaining the information is to have knowledge of the expenditure incurred during any occasion, ceremony or event. The details of expenditure incurred can be verified against the sources of income of assessee. Thus in case, if the expenditure has been incurred which is more than the available funds, the same can be treated as undisclosed income u/s. 69 to 69C.

### **3.12 What shall be the treatment of gift received on occasion, ceremony etc.**

One may remember section 56(2)(vii) whereby gift at time of marriage is exempt. However, gifts at other occasions are not exempt. Like gift at engagement (from non-relatives) may not be exempt.

## **4 Specific Survey**

### ***4.1 Discuss the provision relating to specific survey?***

Most common and popular form of survey is survey u/s. 133A(1). In this survey, the survey party enters the premises of the assessee, obtains information by way of verification of stock and cash, examination of books of account, documents etc. through recording statement of assessee. The surveying party, by doing so, ascertains the information and the same information is used for the purpose of assessment of the assessee.

### ***4.2 What is the objective for conducting such survey?***

The objective of conducting survey u/s. 133A(1) is to extract information from the assessee so that such information is used for the purpose of making assessment. The objective is NOT TO GET CONFESSION AND COLLECT TAXES ON THE SAME. A survey is conducted does not mean that the assessee is guilty of non-disclosure of income. [*CIT vs Mayank Rotoplast Industries (2002) 253 ITR 442 (Guj)*] or that penalty or prosecution shall be launched against assessee. [*Susheela Naidu (Smt.) (N) 225 ITR 506 (AP)*]

### ***4.3 What is the distinction between survey u/s. 133A and 133B?***

U/s. 133A, the Income-tax Authority has the power to enter any place at which business or profession is carried on. He can ask the proprietor, and/ or employee, to allow the authority to inspect the books of accounts and/ or other documents. He can check the cash, stock etc.

U/s. 133B, the I-T authorities are authorised to collect information in prescribed Form. There is no power under this section to verify the books of account, stocks, cash etc. Such information collected in form 45D can be used at the time of assessment either in the case of existing assessee and/ or for discovery of new assessees.

### ***4.4 Whether the person against whom survey is conducted should be a taxpayer?***

The person concerned need not be a taxpayer. A survey can be conducted as a consequence of the survey conducted and/ or in continuation to the survey at other place, with whom the person had transactions in his business or otherwise.

### ***4.5 Can survey be done only when some assessment is pending?***

No, survey can be done for any past, present or future proceedings.

## **5 Conditions for conducting survey**

### ***5.1 Who are the officers competent to conduct a survey?***

Under the Income-tax Act, 1961, the following officers are competent to conduct a survey:

- - Commissioner
  - JCIT
  - Director
  - JDIT
  - Asst. DIT
  - DDIT
  - AO.
  - Tax Recovery Officer
- } Action cannot be taken  
without prior approval of  
JD or JCIT

An inspector is also entitled to verify books of accounts and records with the approval of Joint Director or Joint Commissioner.

### ***5.2 Can an inspector take part in survey proceedings?***

An inspector may take part in survey proceedings, however, prior approval of Joint Director or Joint Commissioner is required. If action is taken without such approval, the same is illegal. Another important aspect is that the inspectors have been given limited powers. They can only verify books of accounts and records. They cannot record statement, take stock and prepare inventory.

### ***5.3 Is a TDS officer entitled to conduct a survey?***

In *Reckitt and Colman of India Ltd. (2001) 251 ITR 306 (Cal.)* affirmed in *(2001) 252 ITR 550 (Cal.)*, it was held that TDS officer can also conduct survey.

However, one may argue that in such case, survey should be limited to TDS matters and he should not verify physical cash, stock etc.

### ***5.4 Whether Tax Recovery Officer entitled to participate in survey proceedings?***

Although survey proceedings are not intended to be with an objective of tax recovery, ironically tax recovery officer is also entitled to participate in survey proceedings. However, Tax Recovery Officer can participate only if authorized by Joint Director or Joint Commissioner.

### ***5.5 Whether recovery can be done during survey proceedings?***

As held in *Priyanka Wines (1998) 110 STC 73 (AP)*, recovery cannot be done during survey.

In one case, *Omprakash Gupta & Others (2001) 251 ITR 714 (MP)*, property was provisionally attached during survey. High Court held for release of property but directed the department to obtain bank guarantee.

In *N.K. Mohonot (1999) 240 ITR 562 (Mad.)*, TRO was present at the time of survey and he seized the promissory notes in exercise of his powers under Rule 30 of Schedule II. High Court held that his action was justified.

### 5.6 *What jurisdiction are conferred for survey?*

It is conducted based on **jurisdiction**, which may be: -

- (a) areawise jurisdiction, or
- (b) assessee-wise jurisdiction, or
- (c) any other place for which he is authorised (delegated/conferred jurisdiction).

### 5.7 *On which place the survey can be conducted?*

The income-tax authority may enter any place within his jurisdiction at which **a business or profession is carried on**, whether such place be the principal place or not of such business or profession. The place of business would include any other place, where the person carrying business or profession states that any of his books of accounts or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession are or is kept.

Thus, the survey would be conducted at: -

1. Place of Business or Profession of assessee.
2. Any other place where he states that either of following are kept: -
  - a. Books of accounts
  - b. Other Documents
  - c. Cash
  - d. Stock
  - e. Other valuable article or thing relating to his business or profession.

### 5.8 *Can the residential premises of assessee be covered? In such a case, whether entire residential premises will be covered?*

In case, assessee claims that his books/ records/ cash/ stock/ other valuable is kept at residence, survey can be extended to residence also.

It may so happen that when survey party conducts survey of residence, they may start survey of entire residence and may not limit themselves to the books/ asset for which survey was extended. Whether such an action is legally correct has been a matter of debate. In a recent case law, S.R. Batliboi & Co. 181 Taxman 9 (Del.), search was conducted on client of assessee C.A. firm. Since their records were kept in laptop of C.A. firm, department seized the laptop of C.A. Firm also. Department required C.A. firm to disclose all the information in the laptop related to other clients also. It was held that department cannot do so. Same would amount to conducting roving and fishing inquiries.

Following the principle of the case, it may be held that survey of residence has to be restricted only to the records/ assets for which it was extended.

### 5.9 *Can the office premises of assessee's CA be covered?*

In case, assessee claims that his books/ records/ cash/ stock/ other valuable is kept at residence, survey can be extended to residence also.

One may note a very important *CBDT Instruction No. 7/ 2003 dt. 30.07.2003*, whereby it was directed that search cannot be conducted against professionals of excellence unless there is compelling evidence and confirmation of substantial tax evasion. So at least, search

on client cannot be a basis for search on C.A. Rigours of this Instruction can be applied to survey also.

Further, a direct *CBDT Circular No. 7D dt. 03.05.1967* stated that an IT-authority shall not enter the premises of the CA u/s. 133A for inspecting the books of account of his clients. It may be noted that when the circular was issued section 133A(1) did not contain explanation whereby business premises could be extended to other places where books/ records are kept. However, the provision was amended subsequently to cover such other places also where books/ records could be kept. It is pertinent to note that even after the amendment, in *U.K. Mahapatra & Co. 221 CTR 328 (Orrisa)*, the said Circular was considered and relied on.

Further, in case survey is conducted at premises of C.A., as discussed in the earlier question, it has to be limited only to purpose for which survey has been extended.

#### 5.10 *Whether disclosure by CA would be disclosure of privileged information u/s. 127 of the Evidence Act?*

One may note that as per Code of Ethics, if a CA discloses privileged information of client, then same amounts to professional misconduct. However, one may further note that Code of Ethics itself states that in tax evasion cases, same would not amount to professional misconduct. Same was so held in a recent case *U.K. Mahapatra & Co. 221 CTR 328 (Orrisa)*. However, interestingly in this case, there was no information in the case of client so as to extend the survey to CA's office. Thus it was held

*“Precondition for conducting survey in the premises of CA, lawyer etc. in connection with survey of the business place of their client is that the client in course of survey must state that his books of accounts/documents and records are kept in the officer of his CA/ lawyer etc. There being no material on record to show that survey of premises of firm of CA was undertaken consequent upon any statement of its client that its books of accounts were kept in premises of CA, survey conducted at the premises of CA firm was without authority of law.”*

#### 5.11 *When can the proceedings of survey have to commence?*

**A survey can commence only at the following time: -**

**(a) Business place:** - At any time during the hours at which such **place is open** for the conduct of business/profession.

**(b) Any other place:** - After sunrise but before sunset.

#### 5.12 *Till how much time the survey proceedings can continue?*

The Act is silent on the issue. However, one may note that the survey is conducted to collect information. Once the information is collected, the survey should be concluded.

In matters relating to search, it was held in *Dr. C. Balakrishnan Nair 237 ITR 70, 77* that search cannot be post-poned for a long period as there is no provision for same in IT Act or Criminal Procedure Code.

#### 5.13 *Whether a survey could be conducted after sunset?*

Survey can be initiated during hours at which such place is open for the conduct of business/ premises. At other places, survey can be initiated only after sunrise and before

sunset. One needs to note that once survey is initiated within time, it need not be concluded within such time. In *N.K. Mohnot (1995) 215 ITR 275 (Mad.)*, it was held that once the survey party enters during business hours, survey may continue till it is completed notwithstanding the fact that survey would spill over beyond business hours.

**5.14 Can survey party close the survey on one day and continue the same on next day?**

Generally, in case of search, search are closed on one day and Panchanama is drawn and the search continues till last panchanama is drawn. Some important things to note are: -

- (a) Search party can pass prohibitory order.
- (b) Search party have power to make panchanama and search continues till last of the panchanama is drawn.

However, during survey, it seems that survey cannot be closed and then again continued. Once the survey party comes, they shall complete the survey and then leave.

## **6 Rights & Duties during survey?**

### **6.1 *Elucidate the rights of survey parties?***

1. The survey party can require the owner, employee or any other person attending the business or helping in carrying on of business at the time of survey, to: -
  - (a) To afford necessary facilities to inspect books of account/ other documents
  - (b) To afford necessary facility to check or verify cash, stock or other valuable articles or things, which may be found at the place of survey
  - (c) To furnish such information as may be required in relation to any matter which may be useful for, or relevant to, any proceeding under the Act.
2. Further, the I-T Authority may: -
  - (a) Place marks of identification on books/ records
  - (b) Obtain copies of books/ records
  - (c) Impound and retain books/ records in his custody.
  - (d) Make inventory of any cash, stock or other valuable article or thing
  - (e) Record statement of any person.
3. In case assessee does not co-operate, I-T authority shall get powers u/s. 131(1).

The IT Authorities have no power other than above. They cannot: -

1. Record statement on oath, unless assessee does not co-operate.
2. Impound cash, stock or any asset
3. Break-open the locks
4. Detain any person

### **6.2 *Can survey party break any door, lock or window to gain entry into the business premises?***

Section 132 grants such power to search party. However, no such provision is there for survey.

### **6.3 *Can assessee be prohibited to make phone calls?***

There is no provision in the Act which prohibits assessee from making any phone call. Thus, it seems that assessee can make phone call. However, if it is found that such phone is intended to tamper the evidences, same may be prohibited.

### **6.4 *Whether the shop be sealed?***

Sealing the business would be violation of article 19(1)(g) which gives every person a freedom to do business or profession. [*Shyam Jewellers and Anr (1992) 196 ITR 243 (All.)*]

In one case *Hans Raj Chhabra (1994) 77 Taxman 273*, two customers in shop at time of survey were not permitted to leave the shop. Further power of survey was abused. The court observed that this case was prima facie a case u/s. 342/ 427/ 384/ 465/ 471 of Criminal Procedure Code. Officer was ordered to face trial.

### **6.5 *Whether assessee can be denied to go out of the shop/office?***

Survey is not house arrest. In case assessee is detained in shop, same would amount to arrest, which would be a violation of Article 21 of the Constitution.

In one interesting case, of *L.R. Gupta (1992) 194 ITR 32 (Del.)* assessee was not permitted to attend the court. It was held that it amounts to confinement in the house or arrest of a person, for which there is no provision in the Act.

The Chelliah Committee also recommended that house arrest by survey/ search party should be stopped.

### 6.6 Whether counsel can be called?

There is no provision in the Act which prohibits calling of assessee's counsel. It seems that counsel can therefore be called.

In respect to searches, Rule 112(8) provides that "occupier/ owner of building etc may attend the search". Section 288 of the Act states that assessee can appear through authorised representative where he is entitled to appear or attend under the Act. Reliance is placed on *K.L. Advani vs State (1985) CLJ 1325*.

One may note that counsel should not interrupt the proceedings. Assessee cannot appear through Counsel where personal attendance of assessee is required. Like while recording statement. Counsel can in such cases, be a silent spectator but he can make his objections in writing after the interrogation is over, even against use of third degree methods. *Abdul Razak Qazi Modh. Vs UOI (1986) C.R. LJ 2018*.

Following are some illustrative rights of legal representative during survey/ search: -

1. In case, any illegal action is taken by the Officer, it would be open to the legal representative to lodge his objections.
2. It would be open to legal representative to object to the asking of any question which may not be relevant or otherwise not legally permissible. He may insist upon such objections being recorded in the deposition along with the decision of the officer on the subject of any other officer recording statement showing the rejection or the overruling of such objections.
3. Legal representative may assist the assessee in the matter of submitting his explanation about the documents or assets recovered during search
4. He may also produce the returns of wealth / income.
5. He may also assist in showing as to in which AY items found were declared in return
6. He may assist in stock taking and valuation of stock
7. He may assist in preparation of inventories, placing marks of identification and so on.
8. It is open to the legal representative to file his objections before Officer in the matter of disproportionate seizure.
9. Legal representative is also empowered to object to the basis of valuation if it is being wrongly adopted by the approved valuer.
10. Legal representative can also assist in explaining the stock/ cash/ other assets recovered.

### 6.7 Whether survey party should also accompany police staff with them?

Since there is no provision u/s. 133A similar to section 132, help of police may not be taken unless something offensive occurs or for law and order purpose.

## **7 Non-co-operation by assessee**

### ***7.1 Whether it is the duty of the assessee to help the survey party?***

Yes, it is the duty of assessee to co-operate the survey in: -

- (a) Obtaining information
- (b) Taking inventory of stock, cash etc.
- (c) Verification of books, records or other documents

### ***7.2 What would happen, if the assessee does not co-operate in survey proceedings?***

If assessee does not co-operate in survey proceedings, as per section 133A(6) AO gets the powers u/s. 131(1). Thus the AO would get following powers: -

- (a) discovery and inspection;
- (b) enforcing attendance of any person and examining him on oath;
- (c) compelling production of books of accounts and other documents;
- (d) Issuing commission.

However, in case assessee co-operates, powers u/s. 131(1) cannot be exercised. [*Gheru Lal Bal Chand (1982) 137 ITR 190 (P & H); Ram Swaroop Pawan Kumar (1980) 125 ITR 603 (P & H); Maruti Mills P Ltd. (2001) 250 ITR 348 (Raj.)*]

### ***7.3 Who can take proceedings u/s. 131(1) in case of non-co-operation.***

Section 131(1) become applicable – 133A(6). By person not below certain rank – proviso.

### ***7.4 In case of non-co-operation whether statement on oath be recorded?***

Yes, in such a case, section 131(1) would be applicable and statement on oath can be recorded.

### ***7.5 Whether assessee can be physically hurt/ abused in case of non-co-operation?***

No. There is no provision which empowers any officer of Department to do so. Both are punishable under Indian Penal Code. If survey party does so, FIR can be lodged against them.

### ***7.6 In case assessee refuses to sign on statement or furnish information, what would happen?***

Penalty of Rs. 10,000 is prescribed in case assessee refuses so.

### ***7.7 In what circumstances, can the survey be converted into search?***

Generally a survey shall not be converted into search. Both the proceedings are separate proceedings. However, when during survey, material leading to formation of “reason to believe” u/s. 132(1) is found survey may be converted to search. It has been held that survey shall not be converted to search for effecting seizure of assets/ books. *Jignesh Farshubhai Kakkad (2003) 264 ITR 87 (Guj.)*

However, in such case, survey party should obtain the authorization of the prescribed officer u/s. 132. Further, warrant shall be issued and signed by assessee.

Once warrant is signed, proceedings for search would commence. It is doubtful whether the statements recorded in the survey/ stock taken during survey would be treated as statement/

stock during survey or during search. In *ACIT vs Mangaram Chaudhary 119 TTJ 671 (Trib. Hyd)*, it was held that once survey was converted into search as a continuous proceedings, the former merges into the latter, hence any undisclosed income revealed in the course of survey will have to be subjected to block assessment and not regular assessment.

In *Vinod Goel (2001) 252 ITR 29 (P & H)*, it was held that a persistent failure on the part of assessee to extend cooperation to authorities during survey may result in search and seizure.

Where survey was taken at business premises and consequent search was authorised at residential premises without recording independent reasons for satisfaction, search was declared illegal despite cash having been found during search. [*Jignesh Farshubhai Kakkad (2003) 264 ITR 87 (Gau.)*]

### **7.8 What Remedies are available against illegal survey?**

Following are some of the remedies: -

1. FIR
2. Writ
3. Departmental complaint

### **7.9 Whether material can be used against assessee, even though the survey was illegal?**

Yes, AO can make additions based on illegal survey. *CIT Vs Kamal & Co 168 Taxman 246 (Raj)*. Also *Pooran Mal (1974) 93 ITR 505 (SC)*.

## **8 Provisions relating to impounding**

### **8.1 *What can be impounded?***

Books, records or other documents can be impounded. Cash or other assets cannot be impounded.

### **8.2 *Specify the procedure for impounding?***

U/s. 133A, books/ records can be impounded by the I-T Authority for 10 working days. However, before impounding, the I-T Authority shall provide the reasons in writing for doing so. CCT/ DGIT can extend the period.

One may look to decision in *CIT vs Oriental Rubber Works (1984) 145 ITR 477 (SC)* which dealt with retention of books/ assets seized during search. Taking support from that decision, following can be stated: -

1. The survey authority has to record reasons of satisfaction reached by them to impound the books of account on the spot.
2. The assessee can ask for the same on the spot and even subsequently. Copy may normally not be provided.
3. One line reasoning that books are required for further investigation without specifying the details would not be sufficient. In *Mrs. Rumona Rahman vs UOI (2004) 265 ITR 16 (Gau.)* books were impounded on the ground that they “were found during the course of survey u/s. 133A of the IT Act”. It was held that the reasons were not proper.
4. The assessee shall be entitled to the copy of the approval extending the time for further retention of books with the reasons recorded for same.

### **8.3 *In case the assessee does not co-operate, whether books or records can be impounded?***

One may note that in case the assessee does not co-operate, section 131 becomes applicable. In such case, books can be impounded without complying with the requirements of section 133A.

### **8.4 *Whether a computer containing books of accounts or data can be impounded?***

As per section 2(12A) “books or books of account” includes ledgers, day books, cash books, account books and other books, whether kept in written form or as print out of data stored in floppy disc, tape or any other form of electro magnetic data storage device”. Therefore, it seems that the computer cannot be called as books of account or article. One may argue that computer cannot be impounded.

One may note that under Information Technology Act, 2000, section 43 states that in case someone unauthorisedly tampers with any electronic record, or views it, penalty upto Rs. 1 crores can be imposed.

### **8.5 *When CCIT/ DGIT can grant extension?***

U/s. 133A generally books can be impounded for 10 working days. However, CCIT/ DGIT can grant extension.

The direction of CCIT for impounding books for 18 months, was held to be arbitrary and misuse of the power which is illegal. *ITO vs Raj & Raj Investments 293 ITR 57 (Kar.) confirmed in ITO vs Raj & Raj Investments 293 ITR 66 (Kar.).*

The books cannot be retained indefinitely “whatever might be the extent of power available to the AO with the permission of the superior officer concerned”. [*Dayaram Agrawal vs ITO (2003) 261 ITR 419 (Orissa)*]

#### **8.6 Whether impounding is improper in case it is done without authority?**

In *Vijay Pahwa (Dr. ) (2001) 250 ITR 354 (Cal.)*, it was held that assessee had provided all cooperation to survey party. The officers conducted a survey. Clothed with the large powers given to them by the Act, “they started acting in a manner people do in autocratic countries where there is no check on petty govt officials.... Under the grab of conducting a simple survey u/s. 133A, books were seized, without any authority. The IT Authorities do not have any power to interrupt the ordinary peaceful citizens of the country in any manner they like by utilizing the large powers given to them, without keeping strictly within the four corners of those large powers. Since the powers vested are large, even a millimeter of departure therefrom must be immediately shorn off by the impartial courts of law, if this country is to continue to remain free one.”

#### **8.7 How can assessee get his books back?**

It is the duty of department to return the books back when the relevant period is over. However, it may seldom happen that department would return the books. Assessee shall apply for return of books. In case there is no response reminders should be given and copy of reminder can be given to higher authorities also.

If still the department does not return the books, then Writ remedy could be used. Alternatively use of Right to Information Act, 2005 may help.

#### **8.8 Should books be released for getting them audited?**

Generally in such cases, copies of books can be obtained from department.

#### **8.9 In case books are lost by department, can assessee claim damages?**

It was held in the case of *Banke Behari Lal Agrawal 226 ITR 498 (Raj)* that whenever a search is made and books of account are seized by the authorised officer, he is responsible for the safe custody of those seized records. If the said record has been handed over to some other officer/ custodian, then the other officer or custodian is responsible for it. The protection u/s. 293 is not available to an officer who has lost the books so seized, because such an action cannot be said to be in good faith. An assessee whose books are lost can claim damages.

## **9 Statement during survey**

### **9.1 *What are the provisions relating to obtaining the statement of assessee during survey?***

Generally a statement can be recorded u/s. 133A of the persons present at the premises. Such a statement cannot be a statement on oath. However, statement on oath can be recorded in case the assessee does not co-operate.

### **9.2 *What is the objective of recording statement during survey?***

Survey is conducted to obtain information. The purpose of obtaining a statement is to obtain information for any past, present or future proceedings under the Act.

### **9.3 *Whether an inspector can record a statement?***

No, inspector cannot record statement. *ITO vs Jewels Emporium (1994) 48 ITD 164 (Trib. Indore)*.

### **9.4 *In which language the statement could be recorded?***

As per Oaths Act, 1969, a statement should be recorded in the language which the person from whom the deposition is taken understands. If it is not possible to do so, it should be explained to him in the language known to him.

### **9.5 *Whether a statement on oath be recorded?***

Generally a statement u/s. 133A is to be recorded not on oath. However, if the assessee does not cooperate, section 131(1) would become applicable and then statement on oath can be recorded.

### **9.6 *Whether the statement can be recorded to obtain confession?***

Officers of the department generally enforce were enforcing confession by assessee during survey proceedings. It was stated by Finance Minister while presenting the Union Budget, 2003, that no coercive action shall be taken to obtain confession.

In this regard *Circular dt. 10.03.2003* was also issued stating that no confession shall be obtained. If confession is obtained, it should be taken adversely.

Unfortunately, still it is seen that the department takes coercive action for obtaining a confession. In such cases, assessee's should take appropriate action against errant officers.

### **9.7 *What shall be the evidentiary value of confession recorded during survey?***

Statement during survey has no evidentiary value as held in *Paul Mathews & Sons (2003) 263 ITR 101 (Ker.)*. It was held that statement during survey does not give the same status of "evidence". Section 132(2) specifically states that such statement can be used as "evidence in any proceedings under the Act.". However section 133A does not give statement during survey the status of an evidence.

Further, in various rulings it has been held that merely on basis of statement/ confession during survey, addition cannot be made. There has to be some corroborative evidence.

It may be noted that statement during survey although held not to have evidentiary value, yet has persuasive value. It cannot be totally ignored.

Both, statement u/s. 133A and u/s. 132(4) can be retracted. One may note that even statement u/s. 132(4) is not sacrosanct. It can be retracted, if it is not based on material. Circumstances in which the statement was taken, the fact whether it was retracted, how much time was taken to retract the statement, what evidences are available to retract, whether confession was done with/ without records, what pressure was examined on assessee, whether confession was based on erroneous knowledge of fact/ law are some of the relevant facts which would be considered.

**9.8 *Whether the assessee can make confession by himself?***

Although department has no power to press assessee to confess, however, assessee can on his own make a confession.

**9.9 *Whether the tax be collected on the basis of amount surrendered then and there itself.***

No. Tax cannot be collected then and there. Even Post Dated Cheques should not be obtained.

**9.10 *Once the statement of assessee is recorded, whether the assessee has a right to obtain a copy of such statement?***

Yes, if any evidence is used against assessee, he has a right to obtain copy of statement.

**9.11 *What shall be the consequences of making a false statement?***

U/s. 136, proceedings before I-T Authorities are judicial proceedings for certain provisions of Indian Penal Code and Criminal Procedure Code, which deal with giving false evidence before the Court. In such cases, assessee can be charged under those provisions.

## 10 Assessment in survey cases

### 10.1 *How assessment for cases where survey has been undertaken shall be done?*

Unlike search, there is no separate procedure for assessment of survey cases. Survey is only for collecting information. Based on information, proceedings u/s 143(3) or 148 can be done. Information can be used in pending assessments.

As per Scrutiny norms declared every year, all survey cases shall be taken in scrutiny.

### 10.2 *Whether assessment can be reopened for earlier years based on information obtained in survey?*

In such a case, assessment can be reopened if there are reasons to believe that income escaped assessment. Further on mere change of opinion, assessment cannot be reopened.

There should be information in possession for that year for which AO wants to reopen the assessment. General reasoning that assessment may have undisclosed income in this year also, would be vague.

### 10.3 *Whether assessment can be reopened based on survey report?*

Survey party can only collect information as required by the AO and cannot draw inferences and conclusions to support its report.

However in *Badri Prasad Rameswar Prasad (1996) 219 ITR 441 (MP)*, it was held that report of survey authority will constitute information for reopening assessment, when it is found as a point of fact that some income has escaped assessment.

In *ACIT vs Manorajyam (1995) 54 ITD 116 (Coch.)*, on basis of survey report assessment was reopened. Survey report was saddled with surmises, inferences and opinions. Reassessment was held to be invalid.

### 10.4 *Whether the material found during survey, not confronted to assessee during survey, can be used against assessee?*

No in case any material found during survey is used against assessee same should be confronted to assessee. Otherwise, it would amount to non compliance of natural justice.

### 10.5 *What would be the implication of excess stock?*

Excess stock found during survey would represent that undisclosed income has been invested in the stock. Same can be added u/s. 69/ 69A.

### 10.6 *Excess stock was found during survey. AO made addition u/s. 69. Further, he applied section 40A(3). Whether section 40A(3) can be applied?*

It was held that section 40A(3) cannot be applied because there should allowable expenditure. Further, it needs to be proved that the stock was purchased in cash, that too vide a single payment exceeding Rs. 20,000. [*Sharma Associates (1995) 55 ITD 171 (Pune)(TM)*]

In matters of search assessments, it has been held that section 40A(3) cannot be considered while computing undisclosed income as undisclosed income is computed, hence there can be

no question of making payment by account payee cheque. *Parikh Food Ltd. 64 ITD 396 (Pune); Western India Bakers Pvt. Ltd. Vs. DCIT 87 ITD 607 (Mum.)*

**10.7 Assessee is covered u/s. 44AD/ 44AF. No books are maintained. Stock found during survey is in excess of what could be. What would be the implication?**

Assessee shall have to explain the source of such excess stock. Section 69 and 44AD-44AF operate independently. [*ITO vs Devi Singh Solanki 99 TTJ 890 (Jp)*].

**10.8 Assessee does not maintain stock records. Closing stock every year is calculated on basis of physical verification. How stock found during survey should be tallied with books?**

In such a case, a trading account for the period would be required to be prepared. G.P. rate would have to be adopted on a reasonable basis. Based on same closing stock shall be worked out.

In case stock is found to be short during survey, what can be added is Net Profit. [*Balchand Ajitkumar 186 CTR 419 (MP); Eagle Seeds 100 ITD 668 (Indore); Manmohan Sadani 304 ITR 52 (MP)*]

**10.9 What shall be the implication of cash found in excess?**

If cash is found excess same would be understood as unexplained capital in circulation of the business. Thus, same should be added.

**10.10 What shall be the implication of cash found short during survey?**

If cash is found short, same cannot be added. However, same can be explained as a source of investment, if any.

**10.11 What shall be the implication if unrecorded turnover is found during survey?**

In case of unrecorded turnover, net profit rate can be added. Further there may be undisclosed capital for the unrecorded business. Peak of such capital shall be added.

**10.12 Whether addition can be made merely on confession?**

As discussed earlier, no addition can be made merely on confession. CBDT Instruction is relevant in this regard. There should be corroborative material to make addition. Further, confession can be retracted subsequently.

**10.13 What is peak theory?**

It is also called as Money Circulation Benefit Theory/ Rotation Theory/ Recycling Thoery/ Chain Theory. When the same money is rotated in business, addition can only be made of peak amount. However, there should be both inflow and outflow of funds. If there is only inflow of funds, peak credit theory cannot be applied.

**Example**

Date	Particulars	Amount	Balance
01.01.2008	Deposit	10,000	10,000
02.01.2008	Withdrawal	8,000	2,000
03.01.2008	Deposit	8,000	10,000
04.01.2008	Withdrawal	10,000	NIL
05.01.2008	Deposit	15,000	15,000

Thus since the same money is circulating in the business, the maximum balance during the period can only be added i.e. Rs. 15,000. Rest of the balance was only deposited and withdrawn from business.

However, if there were only deposits and no withdrawal, then peak theory cannot be applied.

#### 10.14 What is telescoping?

This theory states that source of investment can be explained by realization of another investment/ cash credit. In such a situation double addition should not be made.

**Example:** - Money borrowed Rs. 10 lacs and invested in stock. AO made addition as follows:

-	
Cash credit u/s. 68	Rs. 10 lacs
Stock found u/s. 69A	<u>Rs. 10 lacs</u>
	<u>Rs. 20 lacs</u>

This theory prevents double addition. Thus once addition is made for cash credit, source of stock is explained by cash credits. No addition for stock found can be then be made.

#### 10.15 Under which head, the income offered during survey shall be taxed?

If the income is admitted during survey, without specifying the nature of income, in all probability, it would be taxed as income from other sources. The person making confession should generally specify the source of such income.

One may note that if there is only one source of income, then whatever undisclosed income arises would be treated from that source. *Daulatram Rawatmal 64 ITR 593(Cal.); Annamalai Reddier 53 ITR 601 (Ker); CIT vs Margret's Hope Tea Co. Ltd. 201 ITR 747.*

#### 10.16 Whether partnership firm can pay remuneration to partners from income found during survey?

In *CIT vs S.K. Srigiri and Bros 298 ITR 13 (Karn.)*, it was held that where a survey on firm was conducted and during survey, additional income was offered, same would be included in book profit. Hence salary could be paid out of that.

One needs to have regard to the nature of income during survey. Like if the income relates to excess stock, it may be business income. However, if the income found during survey is from sale of capital asset, it may be from Capital gains. Nature of income would determine whether it is from business or other sources.

#### 10.17 Whether income based deduction (like u/s. 80IA-80IE) can be claimed out of income offered during survey?

Here also one needs to have regard to the nature of income during survey. If it is from business, deduction can be claimed.

In the course of survey assessee surrendered an amount of Rs. 25 lacs in respect of variation of stocks, the AO treated the said income as income from other sources and not allowed the claim under section 80IB, the ITAT held that the income is assessable as business income and the assessee is entitled to claim under section 80IB. [*ACIT vs L. Rai and ons, Jalandar 31 IT Rep 323 (Trib. Amritsar)*]

However, subsequently P & H High Court has held that the burden is on assessee to prove export of goods for claiming deduction u/s. 80HHC. If excess stock is found during survey, it does not prove that it is income from export. Thus the burden was not discharged. [*National Legguard Works vs CIT(A) 288 ITR 18 (P & H)*]

Another decision has been given by P & H High Court in *CIT vs Bawa Skin Co. 294 ITR 537 (P & H)*. Here addition was made in trading account. It was held that the deduction is admissible.

Thus, to summarize the position, for claiming deduction, the source of income should be established and it should be eligible income u/s. 80IA- 80IE.

**10.18 Whether since survey was conducted on assessee and assessee disclosed his income, can it be a basis for rejecting the books of accounts?**

It has been held in *Action Electricals 258 ITR 188 (Del.)*, that it can be a basis for rejecting the books. However, whatever found during survey was already surrendered, no addition for G.P. or anything else could generally be made, unless AO brings something else on record to show further undisclosed income.

When the material recovered in a survey related to a year other than the relevant asst. year, then the same could not be used for rejection of the account books for different years. *Baleshwar Flour & Oil mills 67 STC 450 (All.)*

**10.19 What presumption are there when material is collected during survey?**

U/s. 292C, where material is found as a result of survey, the AO **“may”** make the following presumptions: -

**1) Presumption regarding Ownership:**

Material/ records belong to person in whose possession they are found.

**2) Presumption regarding Contents:**

Contents of such books and other documents are true.

**3) Presumption regarding Handwriting:**

Signature and every other part of the books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to be signed by that person are so handwritten/signed by that person.

**4) Presumption regarding Stamping, attestation and execution of documents etc.:**

In case of documents stamped, executed or attested, they were so stamped, executed or attested by the person by whom they purport to have been so executed, attested or stamped.

It may be noted that the provision providing presumption during survey has been inserted with retrospective effect from 01.06.2002. Following important points may be noted: -

1. The presumption is “May presume”. There are three types of presumption “may presume”, “must presume” and “conclusively presumed”. Thus, u/s. 292C, the AO may not always presume and then also the presumption is rebuttable.

2. It is not a mandate that whenever the books of account are seized, the court shall necessarily draw the presumption, irrespective of any other factors which may dissuade the court from doing so. *ITO vs Abdul Majeed (T.) 169 ITR 440 (Ker.)*
3. Assessee contending that he does not know English and loose papers found in English. No addition u/s. 69 is called for when the assessee has rebutted the presumption and AO failed to cross-examine. [*Raj Pal Singh Ram Avtar 202 CTR 261 (All.)*]
4. There can be no presumption that the seized books and documents are in the handwriting of the assessee. [*Ushakant Patel 201 CTR 501 (Guj.)*]

**10.20 Discuss certain cases relating to explanation of discrepancies/ loose papers found during survey.**

1. Loose papers found during search. AO applied section 69A and completed assessment by including amounts appearing on slips. CIT(A) upheld those additions, but ITAT deleted same, holding that assessee had discharge onus by explaining that slips contained rough calculations and it was for revenue to prove that same represented transaction of sale of stock-in-trade. High Court approved the order of ITAT in *CIT vs Ravi Kumar 168 Taxman 150 (P & H)*
2. No addition can be made on basis of Dumb document. Document which are undated are dumb, as they do not show as to which year the undisclosed income belongs.
3. In *Shri Brijlal Rupchand 40 TTJ 668 (Trib. Indore)*, it was held that the ITO did not even care to know as to in whose handwriting those papers were. No attempts were made to connect the assessee with those papers in any manner. Under these circumstances, it was not justified to throw burden of proof on the assessee. Even if it is assumed that all the papers belonged to the assessee, it is difficult to make out the transactions contained therein. The presumptions drawn out of certain set of facts and circumstances must carry sense. *DCIT vs Himmatmal Fafari 9 ITJ 475 (Indore)*.
4. In *CIT vs Khazan Singh & Bros 164 Taxman 30 (P & H)* it was held that when entries in the books were imaginary, and no material brought on record that the entries were real, no addition could be made.
5. Slip found contained only rough calculations. No transaction was denoted therein. No corroborative material to show any transaction. No addition can be made. *CIT vs Ravi Kumar 168 Taxman 150 (P & H)*
6. Estimation of income on cancelled bills is not valid. *CIT vs H.C. Chandra P. Ltd 299 ITR 429 (Del.)*
7. Commission paid by one firm to another cannot be disallowed, irrespective of the fact that the firms are working in the same premises. *IAV vs British Pharmaceutical Labs (1991) 39 ITD 105 (Bom.)*

**10.21 Discrepancies were found during survey. They were offered in return subsequently. Whether Penalty u/s. 271(1)(c) shall be levied.**

It has been held that penalty cannot be levied in such a case as penalty is linked to returned income. [*Vinod Goyal 11 ITJ 364 (Trib. Nagpur)*]

Further, even prosecution u/s. 276C may not be applicable. [*Refer ITO vs Mahinderpal Ajay (1993) 203 ITR 866 (P & H); Jog Raj vs State of Punjab (1987) 164 ITR 763 (P & H)*]

**10.22 Discrepancies were found during survey for earlier years. Return for those years were already filed. Whether revised return can be filed; and whether penalty can be avoided in such cases?**

Revised return can be filed only if there is error or omission which was discovered subsequently. If undisclosed income is found, then it may not be an error, as held by the Courts. Thus the revised return would be invalid.

Further, it is only after detection by department assessee is offering the income. Penalty would arise therefore for concealment. [*Deepak construction co. 293 ITR 285 (Guj.); P. Rajaswamy, Raja Jewellery 174 Taxman 321 (Ker.)*]

In *K. Deedar Ahmed 97 ITD 240 (Hyd.)*, a lenient view was taken and it was held “Even after detection, if assessee comes forward, and files returns of income offering additional income and expresses remorse for his past conduct, unhesitatingly, the AO may have to exercise discretion in favour of such assessee as otherwise the expression 'may' u/s. 271(1)(C) remains a dead letter if it is understood that in a case of admitted concealment, penalty is automatic.”

**10.23 Discrepancies were found during survey for earlier years. Return for those years were already filed. AO issued notice u/s. 148 for those years. Assessee filed return offering the income. Whether penalty can be levied?**

In a recent case, *CIT vs T.M. Abdul Azeez & Co. 172 Taxman 212 (Mad.)* based on notice u/s. 148, assessee offered cash credits in return. IT was held that penalty cannot be levied. [*CIT vs Rajiv Garg & others 224 CTR 321 (P & H)*]

It seems that in such cases, no penalty shall be levied.

**10.24 Assessee offered the income during survey on assurance that no penalty would be levied. Whether penalty can still be levied in such cases?**

First, there can be no concession of law. If under law, penalty can be levied, it can be levied and vice-versa. Mere statement of department that they would not levy penalty would not be binding upon them.

However, in case penalty is initiated, one may argue that amount was surrendered to buy peace and to co-operate with department, and otherwise it was explained.

**10.25 Whether assessee can take benefit of Explanation 5/ 5A of section 271(1)(c)?**

The explanation related to search only. It cannot be taken into consideration for survey cases. [*Amir Chand vs ITO (1994) 49 ITD 606 (Del.)*]

**10.26 Can amount surrendered during survey be a source of investment in subsequent proceedings?**

As per Explanation 2 to section 271(1)(c), a receipt/ deposit/ outgoing/ investment cannot be treated as a source of investment in subsequent year, unless penalty has been paid on same. Thus, it can be treated as a source of investment, however, it seems to me that one may be liable for penalty on same.

**10.27 What are the implications of survey on the assessee's tax liability under other revenue laws?**

If documents and other material, found during the course of survey show that the assessee had understated the tax liability under the Sales tax/ VAT/ Central Excise or other revenue laws, he will be exposing himself to additional tax, interest and penalty under those laws.

**10.28 Are the I-T Authorities obliged to inform the other enforcement authorities about the results of survey and forward copies of the material for necessary action by them?**

There are internal administrative instructions that the IT Authorities should inform the other enforcement agencies whenever evidence of law breaking is discovered during the course of survey or a search. Information is normally passed on to the concerned enforcement agency.

**10.29 How can the taxpayer reduce his tax liability under other revenue laws?**

The tax payer can reduce his tax liability under other revenue laws by making a clean breast of his affairs at the earliest and making payment of the additional tax under other laws. In case, there is any authority like the Settlement Commission, he may apply to such authorities.

**ANNEXURE – 1**

DEPARTMENT OF REVENUE (CENTRAL BOARD OF DIRECT TAXES)

**Subject:**

Search &amp; Seizure - matters relating thereto

**Instruction No.7 /2003****File No.286/77/2003-IT (Inv.II)****Date.30 Jul 2003****Instruction**

To,

All Director Generals of Income Tax (Inv.).

**Sub: Search & Seizure - matters relating thereto.**

With a view to focus on high revenue yielding cases and to make the optimum use of manpower, the Board has decided that officers deployed in the Investigation Wing should restructure their activities. They should henceforth strictly adhere to the following guidelines:-

- (i) Searches should be carried out only in cases where there is credible evidence to indicate substantial unaccounted income/assets in relation to the tax normally paid by the assessee or where the expected concealment is more than Rs. 1 crore;
- (ii) Search operation will also be mounted when there is evidence of hidden unaccounted assets arising out of a conspiracy to cause public harm, terrorism, smuggling, narcotics, fraud, gangsterism, fake currency, fake stamp papers and such other manifestations;
- (iii) Tax payers who are professionals of excellence should not be searched without there being compelling evidence and confirmation of substantial tax evasion.

2. Henceforth, search operations shall be authorized only by the concerned DGIT (Inv.) who will be accountable for the action initiated by the officers working under him. He should also ensure that all the work relating to search & seizure, like post-search enquiries, preparation of appraisal report and handing over of seized books of accounts, etc. should be completed by the Investigation Wing within a period of 60 days from the date on which the last of the authorisations for search was executed.

3. DGsIT (Inv.) are requested to ensure that officers of competence and proven integrity are taken in the Investigation Wing. The officers posted in the Investigation Wing will be trained at NADT in a special course for which arrangements will be separately made.

4. DGsIT (Inv.) are required to ensure strict compliance of the above guidelines/instructions.

**ANNEXURE 2**

DEPARTMENT OF REVENUE (CENTRAL BOARD OF DIRECT TAXES)

**Subject:**

Whether Business/Residential Premises Of Third Parties Or Residential Premises Of Assessee Are Places Which Could Be Entered Into For The Purposes Of Conducting Survey

**Circular No.**7-D (LXIII-7) of 1967**Date.**03 May 1967**Circular**

The place which an Income-tax Officer or an Inspector, authorised by him in this behalf, may enter under the provisions of section 133A, must be either a place within the limits of the area under the jurisdiction of the Income-tax Officer or any place occupied by any person in respect of whom the Income-tax Officer exercises jurisdiction, at which a business or profession is carried on. The provisions of section 133A make it clear that, in either case, the place must be one where the business or profession of an assessee is carried on, although it is not necessary that it should be the principal place of business or profession. The place, where entry can be made under the section, must not be a place where the assessee does not carry on business. Business or residential premises of third parties, including a chartered accountant, a pleader or income-tax practitioner, of whom the assessee may be client, are not places which could be entered into for the purpose of section 133A. It would be improper for an Income-tax Officer or an Inspector, authorised by him in this behalf, to enter the office of a chartered accountant for the purpose of inspecting the books of his client. It is also necessary that the place entered should be the business premises and not residential premises of the assessee and the entry should be during business or office hours

It may, however, be noted that the above restrictions do not apply to cases of search and seizure specifically authorised under section 132 by the Commissioner of Income-tax/Director of Inspection, which will be governed by the provisions of that section

### ANNEXURE 3

#### Provision of survey in proposed Direct Tax Code

##### “Power of survey

**145.** (1) The prescribed income-tax authority may enter, or authorise any other income-tax authority to enter, any place at which a business is carried out by a person, if -

- (a) he has reason to suspect that the person has not complied with the provisions of this Code; and
- (b) the place is -
  - (i) within the limits of the area assigned to him; or
  - (ii) occupied by any person in respect of whom he exercises jurisdiction.

(2) The income-tax authority, referred to in sub-section (1), shall enter any place of business referred to therein only during the hours at which such place is open for the conduct of business and, in the case of any other place, only after sunrise and before sunset.

(3) On entering the place, the income-tax authority may require any person, who may be attending in any manner to the business at the place, to -

- (a) afford him to inspect the books of account or documents available at the place;
- (b) afford him to check or verify the cash, stock or other valuable article or thing found there; and
- (c) furnish any information relevant, or useful, for the proceedings under this Code, or the Income tax Act 1961, in respect of the person or any other person.

(4) For the purposes of this section, any place at which a business is carried out includes a place-

- (a) which is not the principal place of such business;
- (b) where any business or activity is being carried out and the tax base relating to such business or activity is not to be included in the total tax base under any provision of this Code;
- (c) where any of the books of account, documents, cash, stock-in-trade or valuables, relating to the business, or activity, referred to in sub-clause (b), are kept; or
- (d) where any of the books of account, documents or other record containing the particulars regarding deduction of tax at source, or collection of tax at source, made, or required to be made, under this Code, are kept.

(5) On entering the place, the income tax authority may -

- (a) place marks of identification on the books of account, documents or record inspected by him and take extracts, or copies, therefrom;
- (b) impound any books of account, documents or record inspected by him, after recording the reasons for doing so;
- (c) make an inventory of cash, stock or valuables; or
- (d) examine on oath any person if his statement would be useful for, or relevant to, any proceeding under this Code.

(6) The statement made by any person under clause (d) of sub-section (5) may be used in evidence in any proceeding under this Code.”