

Legality of roping in an unconnected third party in the rigors of an Income Tax Search and Seizure action (including bank lockers of such unconnected third parties)



CA. Mohit Gupta

E: ca.mohitgupta@icai.org

M: 91-9999008009

Introduction:-

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

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

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

CA. Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

word used in Section 132(1) are "reason to believe" and not "reason to suspect".

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

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

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

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

Or

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

Or

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

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

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

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

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

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

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

Issue under consideration:-

A vital question arises at this juncture as to whether an unconnected third party can be roped in with such rigors of Search and Seizure action.

To understand this issue let us conceive an illustration. Let us suppose, the premises of XYZ Ltd. were subjected to a search and seizure action u/s 132 of the act after fulfilling the mandate of law as discussed above. Now during the course of search at the premises of XYZ Ltd., the auditors of the company XYZ Ltd. were camped in the premise of XYZ Ltd. for last few days before the search and were conducting the audit of books of accounts of XYZ Ltd. Since the audit was continuing, the auditors were also present in the premises of XYZ Ltd. on the date of search. The laptops of the audit team were also containing financial data of other client companies having no connection whatsoever with XYZ Ltd. Whether in such circumstances, Section 153C or 148 can be resorted by the tax authorities or otherwise on other client companies of the auditors by using the material available in their laptops.

This is a controversial issue. There can be two sides of arguments to address this issue.

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

Analysis:-

On one side, a rigid argument may be that by virtue of clause (iib) of Section 132(1) of the act, any person who is in possession or control of any document or books of accounts maintained in any electronic form as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act `2000 shall be mandated to afford the necessary facility to the authorized officer to inspect such books of accounts or other documents, as the case may be. The pleaders of such an argument may also rely on Section 275B which reads as under:-

"Failure to comply with the provisions of clause (iib) of sub-section (1) of section 132.

275B. If a person who is required to afford the authorised officer the necessary facility to inspect the books of account or other documents, as required under clause (iib) of sub-section (1) of section 132, fails to afford such facility to the authorised officer, he shall be punishable with rigorous imprisonment for a term which may extend to two years and shall also be liable to fine."

Therefore, considering the legal matrix as discussed above, one may say that the auditors of XYZ Ltd. who were present in the premises of XYZ. Ltd. at the time of search on XYZ Ltd. are legally bound to afford an unrestricted, unambiguous, unconditional inspection of the laptops of the auditors in totality. It is irrelevant that the laptops also contain confidential data of other clients of auditor. Such laptop can also be subjected to a seizure and thereafter such unconnected other clients of the auditor can also be roped in by invoking Section 153C or 148 during the assessment stage.

Second View:

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

In my considered opinion, resorting to the aforementioned first view and effecting seizure of the laptop of the auditor in entirety and using the information of totally unconnected third parties shall tantamount to an indiscriminate seizure and thereby allowing department to make fishing or roving inquiries to initiate proceedings against all the clients of the auditor who have no connection, dealing or transaction with company searched i.e. XYZ Ltd whatsoever. The application of first view stated above, would entitle and empower the authorized officer to seize any or all the articles, valuables or documents found during the course of the Search regardless of whether they are relevant or not for the purpose of assessment of the assessee on whom a Search and Seizure is conducted.

It is pertinent to mention that the powers of the Search and Seizure are very draconian in nature and thus the Legislature has provided ample safeguards. It is a settled legal position that to justify search and seizure action it is essential that (i) the authority issuing the authorisation is in possession of some credible information, other than surmises and conjectures (ii) that the authority has reason to believe that the conditions stipulated in clauses (a), (b) and (c) of Section 132 (1) qua the person searched exist; and (iii) the said information has nexus to such belief. All these rigorous formalities are explicit safeguards incorporated by the legislature in the statute. Therefore necessarily, the authorized Officer is also required to apply his mind while affecting a seizure which should primarily at the first hand relates to the person qua whom the satisfaction was recorded. An arbitrary seizure affecting any unconnected third party is not the intent of law and should not be legally maintainable. Therefore resorting to the aforementioned first view shall be grossly contrary to the legislative intent and thus unwarranted.

Legally speaking, the books of accounts and document referred to in clause (iib) of Section 132(1) has to be in reference to the books of accounts and documents referred to in clauses (a), (b) and (c) of Section 132 (1) pertaining to the person searched against whom

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

the satisfaction is drawn. If the seizure effected pertains to some "other person" other than the person searched, undoubtedly Section 153C of the act can be invoked against such "other person" though there should be some connection between such "other person" and person searched. Nevertheless having said so, it is also very pertinent to mention here is that the auditor of XYZ Ltd., however shall be under a legal obligation to allow the inspection of his laptop and to provide copies of the data/material, in respect of material and data pertaining to his client XYZ Ltd.

Judicial Analysis:-

In this regard, reliance can be placed on the judgment delivered in case of ***N.K. Textiles Mills v. CIT [1966] 62 ITR 58 (Punj.)***. The Division Bench of the Court had opined that it was "necessary and essential for these officers to take into custody only such books as were considered relevant to or useful for the proceedings in question. It was not open to them to indiscriminately, arbitrarily and without any regard for relevancy or usefulness, seize all the books and documents which were lying in the premises, and, if they did so, the seizure would be beyond the scope of the authorization". Their lordship have designedly used the words "proceeding in question", in order to clarify that material that may possibly be of relevance to the affairs of a third party, unconnected with the raided assessee and beyond the contemplation of the search and seizure exercise, should not be retained. In case of ***H.L. Sibal v. CIT [1975] 101 ITR 112 (Punj. & Har.)*** the Division Bench has analysed *Commissioner of Commercial Taxes v. Ramkishan Shrikishan Jhaver* [1967] 66 ITR 664 (SC) into four concomitants - (1) The Authorized Officer must have reasonable grounds for believing that anything necessary for the purpose of recovery of tax may be found in any place within his jurisdiction; (2) he must be of the opinion that such thing cannot be otherwise got at without undue delay; (3) he must record in writing the grounds of his belief; and (4) he must specify in such writing, so far as possible, the thing for which search is to be

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

made. Where material or document or assets belong to a third party, totally unconcerned with the person who is raided, none of these conditions are fulfilled. In *H.L. Sibal's* case (*supra*) the belongings of a house-guest of Shri Sibal were searched and some money found therein was seized. The Court had concluded that the authorization for the search of the house-guest was prepared after the planned search of Shri Sibal. The warrants were quashed partly for this reason.

The aforementioned second view point also gathers strength from the judgment of Hon'ble Delhi High Court delivered in case of ***S.R. Batliboi & Co. V. Department of Income-tax (Investigation) [2009] 181 Taxman 9 (Delhi)***. The Hon'ble High Court on being seized of a similar issue before them, held that an indiscriminate seizure deracinates the personal liberty and privacy of the citizen and is anathematic to law and not permissible in context to an unconnected third party. The court further opined that even otherwise Section 153C is restricted to any person having dealings or transactions with the person who is the subject of the Search and Seizure operation.

Facts of the case before the Hon'ble High Court were as under:-

The petitioner was a reputed firm of auditors and accountants. While conducting an audit of the assessee, the laptops of two employees of the petitioner were seized by the Dy. Director in the course of conducting a search and seizure operation against the assessee. On the request of the Dy. Director, said employees provided him with the electronic data relating to three companies of the assessee group together with the print copies of the data. Nevertheless, the Dy. Director insisted on securing total and unrestricted access to the laptops, obviously in order to gain information and data of all the other clients of the petitioner. That request was refused by the petitioner. The seized laptops were sent by the respondents to the Central Forensic Science Laboratory (CFSL) which, however, could not ascertain the password and, accordingly, could not access the entire data on the

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

laptops. The petitioner was thereupon asked to disclose the password, which it again declined and thereafter, the laptops were sealed in the presence of the said employees of the petitioner. The petitioner, thereafter, filed instant writ petition seeking a writ to prevent the respondents from forcibly gaining or securing access to the data contained in two seized laptops. The contention of the petitioner was that granting absolute access to the department of all the data even pertaining to the other clients of the petitioner having no dealings with the assessee group, would tantamount to grave professional misconduct and would be contrary to the Code of Ethics applicable upon the petitioner as well as the obligations contained in the Chartered Accountants Act, 1949, which proscribes them from disclosing confidential information to third parties. On the other hand, the revenue contended that the petitioner was legally bound to provide unabridged, unrestricted and comprehensive data available/stored on the laptops pertaining to all the clients/companies. The argument was that the law entitles the Income-tax Department to seize not only the data concerning the assessee to whom notice under section 132 has been served, but by virtue of section 153C, its dominion is extended over any money, bullion, jewellery or other valuable article or thing or books of account or documents seized by the department even if it belongs to a third party.

The Hon'ble High Court held as under:-

“

It could not be accepted that section 153C would entitle and empower the Dy. Director to seize any or all the articles, valuables or documents found during the course of the search, regardless of whether they are relevant for the purpose of assessment of the assessee on whom a search and seizure is conducted. The section provides for 'assessment of income of any other person' and the same is a much later stage to one which was present in the instant case. The question under consideration was whether the revenue was entitled to demand an unrestricted access to and/or right to acquire the electronic records present in the laptops, that belonged to the auditor of the assessee and not to the assessee himself, including electronic records pertaining to third parties unconnected with the assessee group. [Para 7]

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

Section 132(1)(iib) casts a compulsion on the owner of the laptops to provide the department with the password to the computer to enable inspection of the books of account maintained in electronic form in the laptops. The authorized officer of the department may, after inspection of the documents, seize such documents and books of account, obviously connected with the assessee in respect of whom steps under the other parts of section 132 have been initiated. [Para 8]

It would be perilous and fatal to lose sight of the reality that the powers of the search and seizure are very wide and, thus, the Legislature has provided a safeguard that the Assessing Officer should have reasons to believe that a person, against whom proceedings under section 132 are to be initiated, is in possession of assets which have not been or would not be disclosed. Secondly, the authorized officer is also required to apply his mind as to whether the assets found in the search have been disclosed or not, and if no undisclosed asset is found, no action can be taken under section 132(1)(iii) or sub-section (3). An arbitrary seizure cannot be maintainable even where the authority has seized documents with ulterior motives. [Para 9]

For a search or seizure to be legal, firstly it should not be ordered for mala fide, extraneous or for oblique reasons. Secondly, it must be predicated on information received by the authority who would have reason to believe that it is necessary to conduct such an operation. Thirdly, it should not be in the nature of a roving or fishing exercise. These three factors must be observed rigorously and even punctiliously, since the exercise of such powers invariably results in a serious invasion of the privacy and freedom of the citizen. However, search and seizure operations may not be illegal if the seized documents pertain to transactions of allied concerns, since they would have a bearing on the case of evasion of income-tax by the assessee concerned. CIT v. Jawahar Lal Rastogi [1970] 2 SCC 225 mandates that if the seized material is to be retained beyond 180 days, it must be supported by good and adequate reasons which have received the approval of the Commissioner. Although the warrant of authorization needs not specify the particulars of documents and books of account, yet an indiscriminate search or seizure is not postulated by the Act. Form Nos. 45 and 45A and rule 112(2) of the Income-tax Rules, 1962 which seek to effectuate the purposes of section 132(1) reinforce

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

the distillation of the law articulated above. To justify search and/or seizure, it is essential that : (a) there must exist information which is laid before the Commissioner as a consequence of which he has (b) reason to believe that it is expedient to issue summons to produce books of account or other documents specified therein, which summons must (c) be addressed to a particular person, which formality obtains even in the case of money, bullion, jewellery, etc., that has not been declared; (d) specific particulars of the place where the above items are believed to be available must be indicated. All these rigorous formalities are indicative of the intention of the Parliament that the extremely harrowing experience of search or seizure made available under the Act must be particular to the named person and be confined to the mentioned place. If this is applicable to all and sundry, it would infract and nullify the fundamental rights of the citizen (third or unconnected party) concerned. [Para 10]

The words 'other person' employed in section 158BD must only be construed as referring to the 'other person' having dealings or transactions with the party who is being searched or whose material is being seized. Otherwise, the provisions may well be seen as violative of the fundamental rights enshrined in articles 14 and 19 of the Constitution. [Para 11]

The petitioner had argued that the laptops, that had been seized by the respondents, had confidential information relating to the accounts of 46 other clients having no relation or business dealings with the assessee; and that seizure of those accounts would amount to serious breach of confidentiality which they were bound to protect by the principles of professional ethics. The Income-tax Department could not make fishing or roving inquiry to initiate proceedings against all those companies which were the clients of the petitioner. It had been argued orally as well as in the synopsis that the petitioner could not assist any party in breaking the law. This submission was illogical, since it could not be presumed that the accounts relating to 46 other clients of the petitioner contained in the two laptops were of that character. The rigours of the law, inter alia, the necessity to have reasons to believe so must be recorded and be followed by warrants. An indiscriminate search frustrates the whole scheme of section 132 and emasculates the protective measures against these draconian powers. [Para 14]

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

So far as the case in hand was concerned, the words 'a person' employed in section 153C have to be interpreted. The consideration would be whether these words would include a person totally unconnected with the party in respect of whom the seizure or seizure maneuver is directed, who by a quirk of fate chances to be in the wrong place at the wrong time. [Para 16]

The Supreme Court in District Registrar & Collector, Hyderabad v. Canara Bank AIR 2005 SC 186, which concerns the challenge to section 73 of the Stamp Act, 1899 (as substituted by the A.P. Act No. 17 of 1986), permitting any person authorized by the Collector to inspect registers, books, papers, documents and proceedings and to take notes and extracts, as may be deemed necessary, reiterated, the triple tests distilled by the 7 Judge Bench in Maneka Gandhi v. Union of India [1978] 1 SCC 248, viz., that a law interfering with personal liberty must : (a) be consonant with a prescribed procedure which should, (b) be compliant with one or more rights mentioned in article 19 and (c) with article 14 additionally. The Court thought it to be essential that documents deposited or stored in a bank must remain confidential. The same privilege of confidentiality must extend to auditors as well. The decision of the High Court striking down unbridled power sought to be given in section 73 of the Stamp Act was affirmed by the Supreme Court. This ratio could logically be extrapolated upon the facts of the instant case to conclude that the revenue was not empowered to make use of material stumbled upon by its officers in search conducted against a third party. [Para 17]

There are several decisions of the different High Courts where the material which was not found as a result of search and seizure was discarded for the purposes of assessment under Chapter XIV-B. If apparently reliable material cannot be directly used against an assessee solely because it was not collected during a search of that assessee, a fortiori, material palpably concerning a third party with no connection with the raided party must be ignored. It is also illogical that the rigours, which apply to the search of a particular notified person, can be flagrantly ignored so far as an unconnected person is concerned. It was argued that under section 153C, the department acts as a post office, viz., it sends the seized material to the concerned Assessing Officer. This proposition advanced by the revenue is legally acceptable so long as it is restricted to any person having dealings or transactions

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

with the person who is the subject of the search and seizure operation. [Para 18]

Finally, so far as the prayers in the petition were concerned, in view of the fact that the respondents had rejected the offer made by the petitioner that the laptops be de-sealed, the entire data be examined by the Assessing Officer in the presence of representatives of the petitioner and the assessee; and inspection of the data on the laptops be done, without copying the data in any form for the purposes of informing the Court as to which files were connected with the assessee and would be required by the Assessing Officer, the impugned summons were to be set aside, and the respondents were to be directed to forthwith return the laptops to the petitioner. [Para 19]

“

The SLP of the department against the judgment of the Delhi High Court was reported at **(2009) 227 CTR 239(SC)** wherein the apex court primarily concurred with the findings of the high court and directed to desal the laptops of auditor in presence of Director General of National Informatics Centre, representative of Income Tax Department and the assessee so as to enable the department to inspect the same and obtain copies of data in respect to the assessee subjected to search.

Bank Lockers of such unconnected third parties:-

On the similar footing, let us dig deep into another issue of almost similar nature as to what we have discussed above. During search and seizure actions, invariably in every such search and seizure action locker keys are found which sometime may pertain to or belong to some “other person”. Such “other person” may be a relative or a close acquaintance who has no business connection whatsoever with the person actually subjected to search. Such lockers at the first hand are subjected to a restraint/prohibitory order u/s 132(3) of the act and subsequently a consequential warrant of search is obtained in the name of such “other person” to revoke the restraint so made u/s 132(3) of the act and effect seizure.

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

Let us understand this locker issue with help of an illustration. Let us assume that an initial satisfaction is recorded in case of Mr. X only and thereafter warrant of authorization to search the premises of Mr. X was issued. On the strength of warrant of authorization, the premises of Mr. X were searched. During the course of such search action, a locker key was found which was in the name of his cousin brother Mr. Y. On the strength of initial warrant of authorization in the name of Mr. X, a restraint order was made u/s 132(3) of the act in respect of the impugned locker belonging to Mr. Y. Subsequently, the authorized officer, obtained a consequential warrant of authorization in name of Mr. Y to search the impugned locker. This is a standing operating procedure in such cases.

Now the question arises, since Mr. Y has no business connection with Mr.X, merely by founding the keys of the locker, can Mr. Y be roped in the rigors of search along with Mr.X.

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

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

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

In ***CIT v. Vindhya Metal Corpn. [1997] 224 ITR 614/91 Taxman 192 (SC)***, it was explained by the Supreme Court that:

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

In ***Pooran Mal v. Director of Inspection (Investigation) [1974] 93 ITR 505 (SC)***, constitutional and legal validity of Section 132 was upheld relying on the inbuilt safeguards in the section itself including the condition that exercise of this power of search and seizure can follow only on a reasonable belief being entertained by an officer that any of the three conditions mentioned in clauses (a), (b) and (c) to Section 132(1) are satisfied. These reasons have to be recorded in writing before authorization is issued to the officer to conduct search and seizure. The Supreme Court observed that the provisions were evidently directed against persons who are believed on good grounds to have illegally evaded the payment of tax on their income and property. Drastic measure to get at such income and property for recovery of government dues were justified and required. The search and seizure provisions were reasonable restrictions and curbs on the freedoms mentioned under Article 19 (1)(f) and (g) of the Constitution.

In ***Lajpat Rai v. CIT [1995] 215 ITR 608 (All.)***, locker key was found in residence of petitioner No. 1 therein during search and seizure operation. Request for issue of consequential warrant of authorization for search of locker was made 25 days after the earlier search. The Court observed that the authorities had sufficient opportunity to peruse the material already seized from the residential premises and in spite of time and opportunity, the report did not contain any material or reason to justify search of the locker. Consequently, the authorization was based on irrelevant consideration and was quashed. This verdict highlights

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

the need to protect citizens from unnecessary and unsubstantiated assertion resulting in breach and violation of right to privacy.

In ***Smt. Kavita Agarwal v. DIT [2003] 264 ITR 472/133 Taxman 848 (All.)***, the search of the premises of the Petitioner's husband and his family resulted in the finding of keys to three lockers one of which stood in the couple's joint names. The jewellery found in that specific locker was valued at Rs.6,28,861. Yet, the Court was not prepared to accept that this by itself satisfied the requirement of the law. It held:

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

In ***Ajit Jain v. Union of India [2000] 242 ITR 302/[2001] 117 Taxman 295 (Delhi)***, the Petitioner was the managing Director of a company in the business of importing PU synthetic linings and was a regular income-tax Assessee. For clearing some imported goods that had arrived in Chennai he went there with cash of Rs. 8.6 lakhs which he intended to use for payment of the customs duty. The CBI conducted a raid and recovered the said sum from his hotel room in Chennai. This information was passed on by the CBI to the income tax authorities leading to the issuance of a search warrant under Section 132 (1) of the Act.

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

The Court agreed with the Petitioner that:

"The intimation simpliciter by the CBI that the money was found in the possession of the petitioner, which according to the CBI was undisclosed, without something more, did not constitute information within the meaning of Section 132 so as to induce a belief that the cash represented the petitioner's income which had not been or would not be disclosed. The condition precedent for the exercise of the power under Section 132 was lacking in the present case and authorisation issued by Respondent No.4 and the consequent action of the search and seizure of the said amount was without jurisdiction."

The above decision of this Court in the *Ajit Jain (supra)* was affirmed by the Supreme Court by the dismissal of the Revenue's Special Leave Petition by an order reported as ***Union of India v. Ajit Jain [2003] 129 Taxman 74.***

Recently the Hon'ble Delhi High Court in case of ***Ameeta Mehra V. Additional Director of Income-tax (Inv) [2017] 82 taxmann.com 279 (Delhi)*** had an occasion to examine this very issue in context of search of a locker. In this case, the maternal uncle of the petitioner was subjected to a search and during the course of said search, a locker key pertaining to the petitioner was found at the premises of her uncle. The petitioner except for the said relation, had no other commercial/business or financial relation with her uncle, his family members and/or his business associates who was subjected to search. On finding the key of locker from the premises of petitioner's uncle, the Additional Director of Income tax drawn a satisfaction note and issued a warrant of search authorization in the name of the petitioner to search the said locker. The court observed that the satisfaction note recorded that in the opinion of the authorizing authority, the lockers **"may contain"** such cash, jewellery, FDRs and other important documents which represent either wholly or partly income or property not disclosed or would not be disclosed for the purpose of the Act even if summons under Section 131 of the Act

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

were issued to them. Notices under section 153A were thereafter issued requiring the petitioner to furnish returns of total income.

The Hon'ble Delhi High Court had quashed the warrant of authorization issued in case of the petitioner to search the locker of the petitioner primarily owing to **two reasons**; **Firstly** that the department had failed to bring on record that petitioner is linked in some manner to the business or other activities of the his uncle and Nanda Group. **Secondly**, the court was of the strong opinion that in the absence of as any credible information in possession of the revenue that could lead to the reasonable belief that the petitioner was in possession of money, jewellery etc. that constituted income that she has not or would not have disclosed, no search warrant qua her locker could have been issued.

The court held as under:

“

- *The jurisdictional facts that have to be established before a search under section 132(1) can be authorized are that (i) the authority issuing the authorisation is in possession of some credible information, other than surmises and conjectures (ii) that the authority has reason to believe that the conditions stipulated in clauses (a), (b) and (c) of section 132(1) qua the person searched exist; and (iii) the said information has nexus to such belief. [Para 14]*
- *Turning to the case on hand, in the first place there is nothing in the Satisfaction Note to indicate that there was any credible information available with the Department that the Petitioner belonged to the Nanda Group who were being searched. It must be recalled that the Petitioner is a regular assessee. The information needed to trigger the search action against the Petitioner had to be such that would show that she is linked in some manner to the business or other activities of the Nanda Group. Secondly such information had to have a nexus to the belief that could be reasonably formed that she is in possession of any money, jewellery or valuable representing her income which has not been or would not be disclosed by her. The mere*

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

fact that the key to the locker which she was operating was found during the search of her uncle SN would not constitute 'information' leading to the reasonable belief that the locker would contain jewellery, or other valuable articles which she would not have disclosed in her returns. There obviously had to be something more. Therefore, the jurisdictional pre-condition justifying the invocation of the power of search under section 132(1) against the Petitioner, was not fulfilled in the present case. [Para 20]

- *The Satisfaction Note does not throw any further light on how the authority could form a reasonable belief that the Petitioner was connected with the Nanda Group and that her locker would contain money, jewellery etc that constituted her undisclosed income. [Para 21]*

- *In the absence of any credible information that could lead to the reasonable belief that the petitioner was in possession of money, jewellery etc. that constituted income that she has not or would not have disclosed, no search warrant qua her locker could have been issued. Further, the Satisfaction Note had to reflect the basis on which the reasonable belief was entertained. The one shown to the Court fails on this score. [Para 22]*

- *The Respondent's search of the Petitioner was a classic case of a 'false start'. It was without legal basis. What were the options available to the Respondents when they came across the locker key when they searched SN. The first step was to seal the locker. In fact they did so by issuing an order under section 132(3). However, instead of immediately jumping to conclusions against the Petitioner, and before actually searching the locker by lifting the restraint order, the Respondents ought to have investigated further and gathered some credible information that could lead them to form a reasonable belief that (i) she was linked to the activities of the Nanda Group and (ii) her locker might contain money, jewellery etc that constituted undisclosed income. Only then was a search warrant qua her justified. Alternatively, they may have opted to proceed against her under section 153C. That too would have required two satisfaction notes, one by the*

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

Assessing Officer of the searched person followed by one by her own Assessing Officer. However, in the present case, the Respondents did not opt for the alternative. [Para 23]

- *For the aforementioned reasons, it is held that search conducted on locker by issuing an authorization under section 132 against the Petitioner was invalid. The said authorization is hereby quashed. [Para 24]*

”

A similar matter again came up for consideration before the Hon'ble Delhi High Court in case of ***Shah E Naaz Judge V Additional Director of Income-tax (Inv) [2018] 100 taxmann.com 346 (Delhi)***. The matter was decided on the similar lines relying on its earlier verdict delivered in case of *Ameeta Mehra (supra)*. In case of *Shah E Naaz Judge (supra)* also the Hon'ble court has quashed the warrant of authorization to search the locker primarily on three reasons. The first two reasons are the same as in case of *Ameeta Mehra (supra)* i.e. **Firstly** the department had failed to bring on record that petitioner is linked in some manner to the business or other activities of the person searched. **Secondly**, the court was of the strong opinion that in the absence of as any credible information in possession of the revenue that could lead to the reasonable belief that the petitioner was in possession of money, jewellery etc. that constituted income that she has not or would not have disclosed, no search warrant qua her locker could have been issued.

Third Reason

The revenue also raised an alternative argument before the Hon'ble Court that that consequential warrants of authorization were issued under clause (i) to sub-section (1) to Section 132 in respect of the place i.e. locker, on the basis of "reasons to suspect" as key of locker No. 7325-A was discovered and seized during the course of search under Section 132(1) in the case of Karamjit Singh Jaiswal who is the first cousin of the petitioner. Accordingly, revenue argued that validity of these search warrants should meet the parameter and the test of "reasons to suspect" and not on the

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

legal requirement of "reason to believe". A lower test and requirement of "reason to suspect" is sufficient. According to the revenue, "Reasons to believe" with reference to sub-sections (a) (b) and (c) to Section 132(1) was against or qua the person, whereas warrant of authorization qua place or location under clause (i) to Section 132 (1) do not require recording of "reasons to believe". Warrants of authorization qua the place/location i.e. the lockers, was issued on the basis of "reasons to suspect".

The said argument of the revenue was negated by the Hon'ble Court primarily due to the reason that issuance of consequential warrant for a different premise wherein books of accounts, assets, etc. are suspected to be secreted, as mentioned in clause (i) of Section 132(1) and Section 132(1A), is qua the same person against whom satisfaction is record on fulfillment of conditions laid down in clauses (a),(b) and (c). Issuance of Warrant qua a new person has to independently meet the requirement as mandated under Section 132 (1) of the Act, viz. (i) the authority issuing the authorisation is in possession of some credible information, other than surmises and conjectures (ii) that the authority has reason to believe that the conditions stipulated in clauses (a), (b) and (c) of Section 132 (1) qua the person searched exist; and (iii) the said information has nexus to such belief. The observations of the court in this regard are given in para 22 and 23 of the judgment.

For the sake of better understanding, the facts of the case and the relevant of the judgement is reproduced herein under:-

Facts of the case were as under:-

- A search and seizure operations under section 132 was carried out at the residential and business premises of one, Karamjit Singh Jaiswal (KSJ) who was the first cousin of assessee, Shah E Naaz Judge (SJ). During the search, keys of three lockers in Delhi Safe Deposit Company Ltd (DSDCL) in the joint names of the assessee and her sister was found and seized.
- On finding the keys of lockers from premises of KSJ, restraint order under section 132(3) in respect of three lockers of the

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

assessee was passed. Subsequently, the Additional Director of Income-tax issued a warrant of search authorisation along with a satisfaction note in the name of assessee and her sister to search said lockers. A notice under section 153A was issued requiring the assessee to furnish returns of total income and undisclosed income. He noted that the lockers might contain cash, jewellery, FDRs and other important documents etc. which were not disclosed by the assessee. On opening two lockers nothing was found and in one locker jewellery was found.

- In instant writ petition, the assessee objected to impugned notice of search.

The court held as under:-

“

- *The satisfaction note dismally ignores the statutory mandate and requirements of clauses (a), (b) and (c) of section 132(1). Note begins by referring to the factum that residential premise of KSJ was subjected to search. Thereafter, it states that information had been received that three bank lockers were being maintained in DSPCL. Without referring to any 'information' in the form of material and evidence, the note proceeds to imprudently and on pretence record that 'In my opinion, the lockers may contain valuables such as cash, jewellery, FDRs and other important documents, etc, which represent either wholly or partly income or property not disclosed for the purpose of Income-tax Act, 1961, even if, summons under section 131 are issued to them. The satisfaction note woefully forms the negative conclusion and finding without referring to material and evidence that had led and prompted the author to reach the denouncement. Use of the word 'may' to presume presence of undisclosed assets in the locker, given the absence of reference to even a single shred of evidence and material to justify the inference, reflect and establishes supine indifference to the statute and constitutional guarantee that 'right to privacy' should not be impinged and violated on mere posturing and pretentiousness. The first paragraph does not elucidate the information and*

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

details available with the authorities. Indeed, none are available to be found in the original produced. Conspicuously, the note does not refer to the statement of KSJ recorded in respect of locker. No attempt was made to verify and ascertain when and who had operated the said locker and who was paying rent for the said locker. Keys of the two lockers were not found during the course of search at the residential premises of KSJ. Details with regard to operation of these lockers had not been ascertained, when the search team had visited DSDCL. The satisfaction note is precipitously silent on any business connection, link and association between the petitioners and the Jaiswal Group ('J' Group) or KSJ, who had been subject to search and seizure operations. Lockers were not subjected to search to unearth undisclosed and concealed assets of 'J' Group or KSJ. Accordingly, the three 'consequential' warrants of authorization issued in the name of persons and lockers for search/seizure do not meet the mandate and requirement of clauses (a), (b) and (c) of section 132. [Para 17]

- *Search is not valid when there was no material and evidence to justify intrusion and interference. In the present case also, there was time gap between the date of search, i.e., the date of the seizure of locker key, and the date of authorization. The respondent authorities, therefore, had sufficient time to ascertain and verify facts and form an informed and considered opinion. Satisfaction note does not state that any attempt was made to verify and ascertain facts post discovery of the locker key. The note had not indicated that the statement on oath by KSJ was incorrect and false. On the other hand, assertion of KSJ that the locker key belonged to his cousins was found to be correct. On the date of search and even subsequently KSJ was not questioned that the locker belongs to him or stores assets belonging to him. No attempt was made to verify and question SJ on these aspects. As stated above, the last paragraph of the satisfaction note, without adverting to any fact and evidence records that the author's opinion that the locker 'may' contain valuables such as cash, jewellery, FDRs and other important documents etc. This would not meet the statutory requirement on formation of opinion with reference to*

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

information and material. [Para 18]

- *There could be a good ground and reason why the legislature has used expression 'reasons to suspect' in clause (i) or even for that matter in sub-section (1A) to section 132 while the expression 'reasons to believe' is used in sub-section (1) to section 132. Clause (i) to section 132(1) refers to search of any building, place, vessel, vehicle or aircraft where it is suspected that 'such' books of account, other documents, money, bullion, jewellery or other valuable articles or things are kept. The word 'such' is with reference to books of account, documents, money, bullion, jewellery or other valuable articles or things etc. referred to in clauses (a), (b) and (c) to section 132(1). The legislature felt to state and clarify that the same quality or material and information was not required to justify when consequential search of a building, place, vessel, vehicle or aircraft under clause (i) of the section 132 (1) is undertaken, for search would be in continuation of the authorized search recording the 'reasons to believe'. Consequential warrants would be justified in cases where the exact location of the offending articles, books of account etc. for which search had been initiated by recording reasons to believe is unknown or had been shifted and re-located to avoid detection and seizure. In such circumstances, the 'reasons to believe' must meet the requirements of clauses (a), (b) or (c) of section 132(1) albeit the authorized officer directing consequential search must record and state the reason why another place, building, vehicle etc. was being subjected to search. Some latitude and stringent requirements in comparison may not be required when the satisfaction note records the reason for issue of warrants of authorisation under clause (i) of section 132(1). However, the satisfaction note in such cases must evince and be speak this reason. Confluence and connection between the justification and reasons to believe recorded earlier meeting the mandate of clauses (a), (b) and (c) of section 132(1) and the consequential warrant of authorisation under clause (i) of section 132(1) should be indicated and so stated. Clause (i) of section 132(1) is not a substitute and an independent provision to authorize search and seizure operations against third persons not included and subjected to the search after recording 'reasons to believe'.*

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

Connection and link between 'such' assets, articles etc. of the person subjected to search and the place, building etc. to be intruded and subjected to search must be elucidated by setting out 'reasons to suspect' why 'such' infringing articles could be found in the place, building, vehicle etc. mentioned in the authorization under clause (i) to section 132(1). [Para 22]

- *The expression 'reasons to suspect' used in clause (i) and sub-section (1A) to section 132 is not to dilute the requirement of 'reasons to believe' but to only clarify that on occasions authorities will not know the exact location or the place where the offending books of account, money, bullion etc., may be kept for which consequential warrant of authorisation can be issued. One is conscious and aware that 'such' documents, articles etc. can be hidden off and kept with third parties and clandestinely concealed at different places and locations to prevent seizure and hamper investigation. [Para 23]*
- *The need and requirement to record 'reasons to believe', which is the statutory mandate was required and necessary in the present case, in the absence of the satisfaction of the condition and requirements of clause (i) to section 132(1) in the satisfaction note. [Para 24]*
- *In view of the aforesaid discussion, the warrants of authorisation for search and seizure operations in respect of the three lockers in the case of three petitioners are vitiated and illegal and same are quashed and set aside. Consequently, the proceedings under section 153A are also set aside and quashed. [Para 32]*

”

Conclusion:-

Concluding the above discussion on the locker issue, the focal point that has to be considered is that there should be an independent credible information that could lead to the reasonable belief that

CA.Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org

such locker holder is in possession of money, jewellery etc. that constitutes his or her income which has not been or would not be disclosed. Secondly as courts have held as discussed above, the locker holder should also be some commercial or business or financial connection with the persons searched from whose premises the lockers keys were found. Only on fulfillment of aforementioned conditions, the warrant of authorization should be issued to search such locker.

[This article has been initially published at Taxmann- Citation (2021) 133Taxmann.com 52(Article) and again re-published only for wider circulation with due permission of the author]

CA.Mohit Gupta can be reached at ca.mohitgupta@icai.org, 91-9999008009 (A-301, Defence Colony , New Delhi-110024).

CA.Mohit Gupta
A-301, Defence Colony, New Delhi-110024
M: 91-9999008009
E: ca.mohitgupta@icai.org

ABOUT CA. MOHIT GUPTA

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

His forte is handling Income Tax Search and Seizure matters, matters before the Income Tax Settlement Commission, other direct tax litigation matters and legal representation before various authorities enforcing economic and tax laws incl. under PMLA, SFIO, EOW, DRI, SEBI, CCI, Benami Laws and Black Money etc. As on today, he has wide experience of handling Income Tax Search and Seizure Cases across the country, represented matters before the Income Tax Settlement Commission, ITAT and other appellate tribunals constituted under various economic laws. He has been contributing articles in various professional magazines/journals and addressing various seminars on topics relating to Income Tax Search and Seizure, allied tax matters and economic laws. He has to his credit plethora of well researched articles out of which many have appeared in leading journals. In Addition to the above, Mr. Mohit Gupta is also a Special Auditor of the Income Tax Department and has carried out numerous Special Audits across the country on being appointed by the Income Tax Department which have plugged tax evasions, tax base erosion and other tax manipulative practices and in turn facilitated the Income Tax Department to collect huge tax revenues. Mr. Mohit Gupta has also been appointed as Special Auditor under other economic statutes and by other Investigation Agencies of the Government of India. Mr. Mohit Gupta has also authored the periodical Newsletter on Income Tax Search and Seizure. The said newsletter contained well researched write ups / articles and judicial developments on the matters of Direct Taxation.

Mr. Mohit Gupta is also a renowned author on Direct Tax Subjects. His books received extremely overwhelming responses from the readers including the tax payers, tax administration, tax professionals, corporate houses and academicians. The said books were released by erstwhile Hon'ble Union Finance Minister, Shri. Arun Jaitley, Shri. Arjun Ram Meghwal, Minister of State for Finance and the Chairman of Central Board of Direct Taxes and many other dignitaries.

Due to his continuous desire to always rise on the learning curve, he always has a quest and quench to read more, learn more and perform even more.

CA. Mohit Gupta can be reached at ca.mohitgupta@icai.org, 91-9999008009 (A-301, Defence Colony , New Delhi-110024).

CA. Mohit Gupta

A-301, Defence Colony, New Delhi-110024

M: 91-9999008009

E: ca.mohitgupta@icai.org