



**AFR**  
Reserved

Writ Tax No. 75 of 2010  
 M/s MD Overseas Limited ... Petitioner  
 Versus  
 Director General of Income-tax and others ... Respondents

**Hon'ble Yatindra Singh, J.**  
**Hon'ble Prakash Krishna, J.**

(Delivered by Hon'ble Yatindra Singh, J)

1. The main question involved at this stage of the case is, if a search under section 132 of the Income Tax Act, 1961 (the IT Act) is challenged on the ground that information leading to reasons to believe for authorising search was irrelevant then how should this question be resolved? Should the court,

Look into the records and decide it alone; or

Disclose the information to the aggrieved person and then adjudicate upon it, after hearing the parties?

#### **THE FACTS**

2. M/s MD Overseas Limited (the Petitioner) was incorporated as a private company under the Companies Act, 1956 (the Companies Act) on 5.12.1980. It was converted into public limited company on 16.5.1997.

3. The Petitioner carries on business of precious metals namely gold, silver, and platinum. It imports these metals and also purchases them in the domestic market. The metals are then processed and sold abroad as well as in the domestic market.

4. The registered office of the company is at New Delhi. It has 8 branches, situate in seven different states of the country and atleast one warehouse situate at Noida, UP and the other is said to be at Surat, Gujrat though there is no pleading in respect of the same.

5. The warehouse at Noida is situated within special economic zone (SEZ) created under the Special Economic Zone Act (the SEZ Act). In this warehouse imported precious metals are stored and then dispatched for export or domestic sales.

6. Sri Satish Bansal, Sri Vinod Bansal, and Sri Anil Bansal are real brothers. They are directors of the Petitioner company.

7. A search was conducted by the Income Tax Department (the Department) on

15<sup>th</sup> and 16<sup>th</sup> September 2009 not only in the offices, branches, and the bonded warehouse of the Petitioner at Noida but also at residences of its directors as well as on some other persons. In all, the search was conducted in ten companies, one firm, and fifteen individuals.

8. According to the Department, the Petitioner is a flagship company; whereas, the firm and the other companies are connected with it. Two individuals are employees in the companies; the rest of them are the directors in the companies or their relations.

9. According to the Department, the search was conducted on the satisfaction note of the Director of the Income-tax (Investigation), Kanpur {the DIT(I)-Kanpur} after getting approval of the Director General of Income-tax (Investigation), North, Lucknow {the DGIT(I)-Lucknow}.

10. The Petitioner filed an application on 7.11.2009 before the DGIT(I)-Lucknow and the DIT(I)-Kanpur requesting them to provide, apart from other papers, the copy of satisfaction note to the petitioner. Neither the satisfaction note was provided nor, any order on the application has been intimated to the petitioner.

11. The petitioner filed the present writ petition challenging the search. It was entertained and time was granted to the parties to exchange the affidavits. The affidavits have been exchanged.

12. Subsequently, the Departmental authorities passed orders centralising the assessment cases of the persons under search at Noida. The Petitioner has filed an amendment application challenging the same.

13. Essentially, the WP and the amendment application,

- (i) Challenge the search and seizure action;
- (ii) Question the centralisation of assessment case at Noida; and
- (iii) Seek a direction for conducting the assessment proceeding at Delhi, in case the answer to the aforesaid questions is in negative.

14. The remaining nine companies, the firm, and the nine individuals (out of fifteen) have also filed writ petitions raising similar points. These petitions are connected

with the present one.

15. The search by the Department, is being challenged on the number of grounds. The main ground of challenge is that there was no relevant information that could lead to reasonable belief to authorise the search.

16. The case was taken up on 8.12.2010. On that date, the officials from the Department were present alongwith the record of the case. No privilege for not showing the records to the court was claimed however, the counsel for the Department stated that:

The information/ material as well as reasons to believe, authorising the search are on the record and are relevant;

The record can be seen by the court without showing it to the counsel for the petitioners;

The relevancy of the information leading to reasonable belief for authorising the search may be judged by the court, without disclosing the same to the petitioner or his counsel.

17. In the nutshell, the procedure proposed by the counsel for the Department meant that we were required to adjudicate the question of relevancy of the information without hearing the counsel for the petitioner on the point of their relevancy—he (counsel for the petitioner) cannot argue unless he is informed about the information.

18. This procedure was objected to by the counsel for the petitioner. According to him,

The Department has not claimed privilege for not showing the records;

The court may not see the record unless, it is also shown to the counsel for the petitioner or at least information leading to belief is revealed to him;

The question, whether the information is relevant or not, may be judged only after hearing the counsel for the petitioner; and

The counsel of the petitioner cannot make submissions unless they know what was the information with the Department that led to belief authorising the search.

19. Considering the submissions advanced, the case was adjourned and the

counsel were requested to address the court on the question, whether the Petitioner is entitled to know the information/ material or the reasons to believe for authorising the search.

### **POINTS FOR DETERMINATION**

20. We have heard Sri SK Garg, Sri Ashish Bansal for the Petitioner, Sri Nikhil Agarwal for the petitioner in a similar case and Sri Bharatji Agrawal, Sri Ashok Kumar, Sri Dhananjai Awasthi for the Department.<sup>1</sup> The following points arise for determination at this stage:

- (i) Whether it is mandatory to record the reasons to believe for authorising the search;
- (ii) Whether the DIT(I)-Kanpur had jurisdiction to authorise the search;
- (iii) Whether the search was invalid as no prior approval of the Development Commissioner was taken under section 22 of the SEZ Act;
- (iv) Whether the Petitioner is entitled to be informed about the information/ material or reasons to believe for authorising search before the question of their relevancy is decided by the court;
- (v) Whether the court can examine the records to adjudge the relevancy of the information/ material or the reasons to believe for authorising search without assistance of the Petitioner;
- (vi) Whether the Petitioner has made out a *prima facie* case against the search.

### **1<sup>st</sup> POINT: NOT NECESSARY TO DECIDE**

21. Section 132(1) of the IT Act empowers the income tax authorities of the Department to conduct a search. It states that if, in consequence of the information in their possession, the officers (specified in that section) have reasons to believe that any circumstance as mentioned in section 132(1) clauses (a) to (c) exist, then they could authorise the officers to enter and search a building. Such an authorised officer could also perform other functions as mentioned in section 132(1) clauses (i) to (v).

22. Section 132 of the IT Act does not specifically provide for recording of reasons to believe for authorising the search. Should the reasons to believe be recorded in writing?

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<sup>1</sup> The counsel appearing in the case have corrected a part of the judgement under the headings (THE FACTS, POINTS FOR DETERMINATION and 1<sup>st</sup> POINT). We are thankful to them. Yet, if there are any mistakes, they are ours.

23. Section 127 of the Act is titled 'Power to transfer cases'. It empowers the officers mentioned there in to transfer any case from one assessing officer to another for the reasons to be recorded after affording opportunity to the assessee.

24. Section 147 of the Act is titled 'Income escaping assessment'. It empowers an assessing officer to reassess income of an assessee, if the conditions mentioned in that section are satisfied. It is subject to section 148 to 153 of the Act. Prior to 1.4.89, it contained specific words that reassessment could be done for reasons to be recorded in writing.

25. Sub-Rule (2) of rule 112 of the Income Tax Rules, 1962 (the Rules) as it stood prior to its substitution by the Income-tax (Fourth Amendment) Rules, 1975 specifically provided that the authority must record his reasons before issuing a warrant of authorisation for search. In the new sub-rule (2) of rule 112, the words 'after recording his reasons for doing so' were deleted.

26. The counsel for the Department brought the aforesaid provisions to our notice and submitted that:

Section 132 of the IT Act is differently worded than section 127 or section 147 of the IT Act;

The substitution of rule 112(2) of the Rules, as it stands today, does not require reasons to be recorded as held by the Calcutta High Court (see below)<sup>2</sup>;

The reasons are not required to be recorded.

27. The counsel for the petitioner submitted that:

Section 132 of the IT Act may not specifically provide for recording reasons. However, it applies section 165 CrPC to searches and seizure under the IT Act. Section 165 CrPC provides recording of reasons for conducting search. The amendment of 112(2) of the Rules has not dispensed with the recording of reasons as has been held by this court (see below)<sup>3</sup>;

The reasons have to be recorded.

28. Sub-section (13) of Section 132 {section 132(13)} of the IT Act provides that, so

2 Subir Roy Vs Chattopadhaya (158 ITR 472).

3 Shyam Jewellers Vs. Chief Commissioner; 1992 (196) ITR 243.

far as may be applicable, the provisions of the Code of Criminal Procedure, 1973 (CrPC) relating to searches and seizure, shall apply to searches and seizure under section 132(1) or (1A).

29. Section 165 of CrPC is titled 'Search by Police Officer'. Sub-section (1) of section 165 CrPC mandates recording of reasons for conducting a search. However, the counsel for the Department pointed out that:

Section 165 CrPC only applies as far as applicable and not verbatim;  
It was not a case of applying the section in the same (exact) words;  
The circumstances and purpose in both the cases were different and the words mandating the reasons to be recorded could not be read under section 132 of the IT Act.

30. The counsel for the Department also stated that:

The Central Board of Direct Taxes (the Board) Department had issued instructions that reasons should be recorded and approval of the Director General should be obtained before authorising a search;  
In this case, the reasons were recorded and;  
This point was academic in this case.

31. In view of the statement of the counsel for the Department, we refrain from deciding this point.

## **2<sup>nd</sup> POINT: DIT(I)-KANPUR HAD JURISDICTION**

32. The counsel for the Petitioner submitted that:

The DIT(I)-Kanpur had territorial jurisdiction over the State of UP and Bihar;  
The petitioner or any other person subjected to search was not assessed within the territorial jurisdiction of UP and Bihar;  
The DIT(I)-Kanpur had no jurisdiction to authorise search against them under the IT Act.

33. Section 120 of the IT Act is titled 'Jurisdiction of income-tax authorities'. Its different sub-sections provide as follows:

- (i) Sub-section (1) of section 120 {Section 120(1)} of the IT Act provides that Income-tax authorities shall exercise all or any of the powers and perform functions conferred on them under the IT Act in accordance with the

- direction of the Board for exercising their powers and performing functions;
- (ii) Sub-section (2) of section 120 {Section 120(2)} of the IT Act provides that the Board may further authorise any income-tax authority to issue order for exercising power, functions by all or any of income-tax authorities, who are subordinate to him;
- (iii) Sub-section (3) of Section 120 {section 120(3)} of the IT Act provides that while issuing the direction under section 120(1) or (2), among the other things, the Board would have regard to the territorial area.

34. In pursuance of section 120(2) of the IT Act, the Board has issued directions {SO 703(E) CF. No. 187/4/1989-ITA-1 dated 6.9.1989}. It provides that the Directors mentioned in column 2 of the schedule could exercise power under section 132 of the IT Act in respect of whole of India; whereas, in respect of the powers other than section 132, they could perform their functions relating to the territorial area mentioned in column 3.

35. The DIT(I)-Kanpur is also mentioned in column 2 of the schedule. In column 3 State of UP and Bihar are mentioned. This shows that he could authorise search under section 132 of the IT Act throughout the territory of India; though, in respect of powers, other than under section 132, he could exercise only for State of UP and Bihar.

36. Apart from above, it is not correct to say that the Petitioner has no concern with the State of UP. It is not disputed that the petitioner has a warehouse at Noida within the territorial jurisdiction of the DIT(I)-Kanpur and their business is also carried on from that place. In view of this, it cannot be said that the DIT(I)-Kanpur had no jurisdiction to authorise search under section 132 of the IT Act.

37. In our opinion, the search cannot be invalidated merely for the reason that it was authorised by the DIT(I)-Kanpur.

### **3<sup>rd</sup> POINT: SECTION 22 NOT ENFORCED—SEARCH CANNOT INVALIDED**

38. The counsel for the petitioner submitted that:

According to the Department, main business was being transacted from Noida, unit, situate within SEZ;

No approval of the Development Commissioner was obtained under section

22 of the SEZ Act before conducting the search;

The search was invalid.

39. Section 22 is titled 'Investigation, inspection and search or seizure'. It does place restrictions on search and seizure conducted within SEZ area. However, it is not necessary to consider the aforesaid submissions as section 22 of the SEZ Act was not enforced on the date of the search. It was enforced from 13.1.2010.

40. In our opinion, the validity of search is not required to be adjudged as section 22 of the SEZ Act was not in force.

#### **4<sup>th</sup> & 5<sup>th</sup> POINT: PETITIONER IS ENTITLED TO KNOW**

41. Section 132 of the IT Act is titled 'Search and Seizure'. It provides for search and seizure. There are conditions precedent before exercising it. The relevant conditions for this case are as follows:

- (i) Under section 132(1) of the IT Act, a search may be authorised only if the officer (specified in that section) has reasons to believe that any circumstance as enumerated in section 131(1) clauses (a) to 131(1)(c) exist on the basis of information before him. The belief to authorise the search has to be based on information or material: it cannot be conducted without any information or material. This is the first condition.
- (ii) A search is a serious invasion on the right of privacy: the right protected under article 21 of the Constitution. Considering it, the courts have also held that the information/ material leading to belief should also be relevant; it should be connected with the search. It is only then that a search can be authorised. This is the second condition.

42. The corollary to the aforesaid conditions is that, where there is no information or if there is information but it is irrelevant then the court can quash the search. Nevertheless, the adequacy or sufficiency of the information cannot be adjudged; the correctness of the information also cannot be questioned, if it was bonafide believed by the officer authorising the search.

43. To summarise, the information that led to belief must be relevant though it may or may not be correct. Even if it is not correct but is bonafide acted upon, then the search cannot be invalidated.

44. The counsel for the petitioner submitted that:

The petitioner was an aggrieved party. Apart from him, anyone was also entitled to know about the information or reasons to believe for authorising search under the Right to Information Act, 2005 (the RTI Act);

The search was challenged before the court of law. The department had to justify its action. This could only be done by producing the record or filing affidavit disclosing the information;

Before this court, the Evidence Act is applicable. The Department had produced the record without claiming any privilege. The court as well as the petitioner were entitled to see it; and

The question of relevancy of the information could only be adjudged after hearing the counsel for the petitioner otherwise, it would amount to denial of principles of natural justice.

#### **Right to Information Act— Not Applicable**

45. The RTI Act has been enacted to bring about the transparency in government action. It was enacted to establish a practical regime to secure access to information under the control of public authorities. This was in order to promote the transparency and accountability in the working of public authority.

46. The RTI Act is a very useful and powerful enactment. However, it has limitations.

47. Section 24 of the RTI Act is titled 'Act not to apply to certain organizations'. It provides exception to obtaining information from intelligence and security organisations specified in the second schedule to the RTI Act or any information furnished by them to the Government.

48. Sub-section (2) of section 24 {section 24(2)} of the RTI Act also empowers the central Government to amend the second schedule. This schedule was amended by the notification dated 27.3.2008 published in the gazette of India extraordinary, Part-II-section 3-Sub-section (i) dated 28.3.2008. The Directorate General of Income-tax (Investigation) has been added at serial number 16.

49. The search is conducted and its records are maintained in the organisation of

Directorate General of Income-tax (Investigation). In view of section 24, the RTI Act does not apply to it. No information can be obtained from the office of Director General of Income Tax (Investigation) under the RTI Act.

50. A citizen may not be entitled to any information under the RTI Act but it does not mean that the information cannot be revealed even, when its relevancy is being questioned in a court of law?

#### **No Bar Under the IT Act**

51. Section 138 of the IT Act is titled 'Disclosure of information respecting assesseees'. It provides as follows:

Sub-section (1)(a) of Section 138 {section 138(1)(a)} provides information may be given to the other officer or the authorities subject to the conditions mentioned therein;

Sub-section (1)(b) of section 138 {section 138(1)(b)} provides that information in respect of any assessee may be given to a person if it is public interest to do so;

Sub-section (2) of section 138 of the IT Act provides that the Central Government may by order in official gazette provide that any information or a document may neither be furnished nor produced by a public servant in respect of the matter specified therein.

52. Section 138(1) of the IT Act provides for circumstances when information regarding an assessee may be disclosed; whereas, section 138(2) provides when disclosure or production of information regarding an assessee may be prohibited.

53. The Central Government has published an order (notification no. S.O. 2048, dated 23.6.1965) in the gazette under section 138(2) of the IT Act. It prohibits giving out certain information to the person other than the assessee. However, it does not prohibit providing the reasons to believe for authorising search or the information on the basis of which the satisfaction is founded.

54. No provision, prohibiting the disclosure of the information or reasons to believe has been pointed out to us: there is no such provision. Does it mean that this information can be obtained? We do not think so: the information may be secret; it may be confidential.

### **Position under the Evidence Act**

55. Section 74 of the Evidence Act is titled 'Public documents'. It also defines them. Among others, it states that documents forming the acts or records of the acts of public officers to be public documents.

56. Section 75 of the Evidence Act is titled 'Private documents'. It provides that the documents that are not provided for in section 74 are private documents.

57. The record relating to search is maintained by the public officers of the Department. It contains the information received and reasons to believe for authorising the search. It is a public document.

58. Section 76 of the Evidence Act is titled 'Certified copies of public documents'. It requires a public officer to give a copy of the public document together with a certificate that it is a true copy of such a document on payment of the requisite fee. However, the condition precedent is that the person should have right to inspect the same. Has a person right to inspect the information and reasons to believe for authorising the search?

59. We have already held that this information cannot be supplied under the RTI Act. Though there is no bar under the IT Act restraining inspection of the documents but there is also no provision allowing the same. However, it is not necessary to consider, whether a person has right to inspect it or not as the proceeding are before the court and are governed by the Evidence Act. Section 123 to 125 of the Evidence Act provide what information may be seen and disclosed by the court.

60. Section 125 of the Evidence Act is titled as 'Information as to commission of offences'. It provides that no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue. 'Whence' means—from where, from what source. In cases of information regarding offences against the public revenue, the source of the information is even beyond the domain of the courts.

61. The explanation to section 125 explains the 'Revenue Officer' to mean any

officer employed in or about the business of any branch of public revenue. The DIT(I)-Kanpur is employed in the branch of public revenue and is a revenue officer.

62. Chapter XXII of the IT Act is titled as 'Offences and prosecution'. Sections 276C, 277, 277A, 278B are part of this chapter. They provide punishment for 'wilful attempt to evade tax, etc.', 'False statement in verification, etc.', 'Falsification of books of account or document, etc.', and also 'Offences by companies'.

63. According to the counsel for the Department, the search in this case was authorised by the DIT(I)-Kanpur and approved by DGIT(I)-Lucknow, in consequence of information in his possession as he had reasons to believe that the conditions mentioned under section 132(1)(c) of the IT Act existed. If it is correct (we do not comment on this), then the petitioner might be guilty of the offences mentioned as aforesaid under Chapter XXII of the IT Act.

64. The information in possession of the DIT(I)-Kanpur is within the ambit of section 125 of the Evidence Act. The Department can neither be compelled to say from where the information was received, nor can it be divulged. Section 125 of the Evidence Act would bar the disclosure of source of information but this does not bar the content or nature of the information or the reasons (minus the source) to believe for authorising the search.

65. Section 123 of the Evidence Act is titled as 'Evidence as to affairs of State'. It provides that no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

66. Section 124 of the Evidence Act is titled as 'Official communications'. It provides that no officer shall be compelled to disclose communications made to him in official confidence, if he considers that the public interest would suffer by its disclosure.

67. The information received by the DIT(I)-Kanpur is in unpublished official records relating to the affairs of the State and was in official confidence. It cannot be produced before the court if privilege is claimed. However, the court may inspect

the record to consider whether it is rightly claimed or not (for citations see below)<sup>4</sup>

68. We need not to say anything further regarding section 123 or 124 of the Evidence Act, as yet privilege has not been claimed under these sections. At present, only section 125 of the Evidence Act is relevant.

69. The relevancy of information can only be judged after looking into the information: it cannot be done on mere statement of the officials of the Department or their counsel. In our opinion, in an appropriate case, or if the *prima facie* case is made out against the search then the court may ask the Department to indicate the information/ material or reasons to believe (except the source) for authorising the search.

70. Let's consider the question, whether the relevancy of information leading to reasons to believe for authorising the search is to be adjudged after disclosing and hearing the aggrieved person or not.

#### **Indicating Information to Aggrieved Person—Ensures Fairness**

71. In case, we consider the question of relevancy of information without disclosing the information, then the counsel for the Petitioner cannot address us on that point. We might hold the information to be relevant. The result would be that this question would be decided without opportunity to the petitioner: a situation, not compatible with the jurisprudence that we follow.

72. In our jurisprudence, no case except the question of privilege under section 123 and 124 of the Evidence Act is decided without reasonable opportunity to the aggrieved person (see *fn-4*). This is done as the disclosure might affect public interest and the court cannot be party to it.

73. Our court, while deciding a question regarding disclosure of reasons for reassessment under section 148 of the IT Act observed (for citation see below)<sup>5</sup>:

'We may also observe that it is not enough that the reasons are disclosed to the court. No doubt, the court will look into them, but that is no substitute for

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<sup>4</sup> SP Gupta Vs President of India, AIR 1982 SC 149; Union of India Vs. HS Parashar, AIR 1978 NOC 253; 1978 Raj LR 345; SN RAI Vs. Union of India, AIR 1977 NOC 243; ILR (1976) 2 Del 667; State Vs. Kailashwati, AIR 1979 Raj 221; State of Orissa Vs. Jagannath, AIR 1977 SC 2201.

<sup>5</sup> KM Bansal Vs CIT: 1991 UPTC 1086.

the affected party looking into them and submitting his objection thereto. The system of jurisprudence we follow—adversarial—cannot recognise such half-measures.

74. Lord Denning says<sup>6</sup>:

'[T]he judge, before he comes to a decision against a party, must hear and consider all that he has to say. No one ought to be condemned unheard. The best way, and indeed the only fair way, of reaching a correct decision on any dispute is for the judge to hear all that is to be said on each side and then come to his conclusion.'

75. A man's home is his castle, is a proverbial expression of personal privacy and security. It means, there is nothing more sacred; more strongly guarded than one's own home: a man's home is his castle where he can be in perfect safety from intrusion.

76. More than 400 hundred years ago, Sir Edward Coke, an English judge, in *Semayne's Case* (1604) 77 Eng. Rep. 194 gave it legal recognition by observing,

'[T]he house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose.'

Since then it is not only part of English jurisprudence but of all democratic nations of the world; so is the case with us: the Constitution guarantees fundamental rights and protects our privacy under article 21 of the Constitution.

77. We are not only exercising writ jurisdiction, but are also sentinel on the qui view for protections of the rights; we are on alert on any encroachment on any freedom. Should we decide a point relevant to intrusion of privacy without affording reasonable opportunity to the petitioners; should we adopt a procedure that might not be fair—the ultimate aim of all jurisprudence; the yardstick on which all procedure should be tested.

78. The courts have evolved different principles—the promissory estoppel, or the legitimate expectation, or the principles of the natural justice, or the *Wednesbury* principle, or any other ground (bad faith, irrelevant consideration,

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<sup>6</sup> See the article 'The Just Judge' in the book 'The Art of a Lawyer' published by 'The University Book Agency, Allahabad'

acting under dictation etc.)—to ensure fairness in administrative action. Should we adopt a procedure that might not pass the test of fairness?

79. We do not think so. The procedure of indicating information and reason to believe (except the source) to the petitioner, then taking a decision on relevancy of the information after hearing the parties, ensures fairness. Had their disclosure barred by any enactment or were they privileged under the Evidence Act, then it would have been otherwise.

80. In our opinion, the question of relevancy of the information or reasons to believe for authorising search has to be decided after informing the Petitioner about them and then hearing him.

#### **Submissions and Rulings by the Department**

81. The counsel for the Department submitted that:

The search was part of making assessment of undisclosed income;  
 In case any information or material found is to be used against the petitioner for completing the assessment then the Petitioner would be given reasonable opportunity;  
 In case the information or reasons to believe was shown to the Petitioner at this stage, then it might adversely affect the assessment proceeding;  
 In case the reasons to believe were disclosed to the Petitioner then this would be the first case of its kind. No other High Court had taken a similar view.

82. The counsel for the Department has also cited the following decisions in support of his submissions:

- (i) Dr. Pratap Singh and another vs. Director of Enforcement and others: (1985) 155 ITR 166 (the Pratap-Singh case);
- (ii) Sriram Jaiswal vs. Union of India and others: 176 ITR 261 (the Sriram case);
- (iii) Prakash Chand Maloo vs Union of India and other, WP No. 800 of 2005 decided on 4.12.2010 by the High Court of Chhatisgarh (The Prakash-Chand case);
- (iv) The Gwalior Citizen Sakh Sahakarita Maryadit, through its Chairman Vs.

Union of India and others, WP 1569 of 2008 decided by the MP High Court at Jabalpur on 16.6.2008 (The Gwalior-City case);

(v) Takshila Education Society vs. DI (Investigation): 272 ITR 274 (the Takshila-Society case).

(vi) Kalpaka Bazar and others vs. Commissioner of Income-tax and another: (1990) 186 ITR 617 (the Kalpaka-Bazar case);

(vii) Southern Herbals Ltd. Vs. Director of Income-tax (Investigation): 207 ITR 55 (the Southern-Herbal case);

83. The law relating to authorising a search has remained the same but the procedure for assessment after search has undergone a change. At present, if the search is valid then the assessment is to be made for six earlier years under section 153A of the IT Act. This is to be done on the basis of documents or material found in the search and other information, found in the investigation as well as supplied by the Assessee. How this material is to be utilised and when it is to be utilised, is entirely dependent on the discretion of the assessing officer. It is also up to him to indicate the same as and when he considers appropriate.

84. However, in the assessment proceeding under section 153A of the IT Act, the information or material or reason to believe for authorising search is not relevant. It was only relevant for authorising the search.

85. In the assessment under section 153A of the IT Act, reasons for search will not be disclosed—the only thing that will be disclosed to the petitioner is the material or information that is sought to be utilised against the petitioner in the assessment. The reasons for the search are neither used for making assessment nor would they be ever communicated to the Petitioner. This position was also accepted by the counsel for the Department.

86. In case, the information or reasons to believe for authorising a search are not germane to assessment proceeding then it is difficult to conceive as to how their disclosure would adversely effect the assessment proceeding: they only affect the search.

87. Apart from above, whatever documents or material was seized by the Department is known to the Petitioner; they are in the custody of the Department:

no manipulation can be done in the same. It does not stand to reason as to how disclosure of the information or the reasons to believe would adversely affect the assessment; if it affects the assessment proceeding, then privilege should be claimed.

88. Let's consider the cases cited by the counsel for the Department. He strongly relied upon the Pratap-Singh case and the Sriram case, as being decisions of the Supreme Court and of our court, are binding on us.

### **The Pratap-Singh Case**

89. The counsel for the Department submitted that:

The Pratap-Singh case was an authority for the proposition that, in case search was challenged, it was not necessary to produce the records;  
If the record could not be ordered to be produced then there was no justification to show the reasons to the Petitioner or his counsel;  
Yet, in order to be fair they were producing the records.

90. The facts of the Pratap-Singh case were as follows:

A search was conducted under section 37 of Foreign exchange Regulation Act, 1973 (FERA). Some documents as well as foreign currency found in the search was seized. Subsequently, the documents were requisitioned by the Department under section 132A of the IT Act;  
The search was challenged before the High court. A statement was made that no further action was contemplated in pursuance of the search under FERA. The High Court dismissed the writ petition but did not order for return of the documents as the Department had issued a valid warrant of authorisation under section 132A of the IT Act;  
The case was taken up in appeal. Before the Supreme Court, the records relating to search were shown to the court.

91. The Supreme Court held that:

That there was material before the respondents for entertaining the reasonable belief that some documents would be useful in proceeding under FERA;  
It was not necessary to state the grounds that induced the reasonable belief in the search warrant;

Assuming that it was obligatory and non recording of the reasons would result in the search being illegal, yet the documents could not be returned as the documents seized during illegal search could be used;

There was no malice on the part of the respondent;

92. The counsel for the Petitioner submitted that:

The legality of search was not relevant as no action was proposed to be taken on the basis of the search under FERA;

The only relevant question was whether the documents should be returned or not and the documents could not be returned as the authorisation under section 132A was valid;

The wording of section 37 of FERA and 132 of the IT Act were different (see below)<sup>7</sup>. Section 132 of the IT Act used the words, 'in consequence of information in his possession'. These words were absent under section 37 of FERA;

The petitioner (who had argued the case personally) had submitted that;

'If the court is going to look into the file produced on behalf of the second respondent, the same must be disclosed to the Appellant so that they can controvert any false or wholly unsustainable materials set out in the file.'

In case the search was challenged, then the correctnesses or falsity of information/ material could not be seen. The only things that could be seen

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7 Section 37 FERA: Power to Search Premises: (1) If any officer or Enforcement, not below the rank of an Assistant Director or Enforcement, has reason to believe that any documents which, in his opinion, will be useful for, or relevant to, any investigation or proceeding under this Act, are secreted in any place, he may authorise any officer of Enforcement to search for and seize or may himself search for and seize such documents.

(2) The provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating to searches, shall, so far as may be, apply to searches under the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the words "Director of Enforcement or other officer exercising his powers" were substituted.

**Section 132 of the IT Act:** (1) Where the Director General or the Chief Commissioner or Addl. Director or Addl. Commissioner or Joint Director or Joint Commissioner in consequence of information in his possession, has reason to believe that—

...

(c) any person is in possession of any ...undisclosed income is then—

(A) the Director...

(B) ...may authorise ....

to -

(i) enter and search ....

...

is relevancy or bonafide belief of the officer and the question of relevancy was neither raised nor considered by the Supreme Court;

The Pratap-Singh case was decided before Finance Act, 1995 was enforced. At that time, the illegality of search did not make any difference.<sup>8</sup> Now it makes difference (see Appendix-1 for details). The observations made in the cases of that time were not relevant, while adjudging the validity of a search made after enforcement of Finance Act, 1995;

The observation made in the Pratap-Singh case should be confined to the facts of that case.

93. It is not necessary to consider the submissions of the counsel for the Petitioner. Suffice to say, that the Supreme Court has not held that in no case the material cannot be disclosed. This is clear from the following observations of the court:

'The material on which the belief is grounded may be secret, may be obtained through intelligence or occasionally may be conveyed orally by informants. It is not obligatory upon the officer to disclose his material on the mere allegation that there was no material before him on which his reason to believe can be grounded.'

94. The aforesaid observations show that it is not necessary for the officer to show the reason on mere allegation of there being no material. This does not mean that even in an appropriate case where *prime facie* case is made out against the search, the production of record cannot be ordered. Same is true with the Sriram case.

### **The Sriram Case**

95. The facts of the Sriram case were as follows:

- (i) The search was made on 22/23 July 1987. Subsequently the assessing officer had estimated the undisclosed property in the summary manner under section 132(5) of the IT on 17.11.1987;
- (ii) The writ petition was filed on 7.12.1987 for,  
Quashing the order dated 7.11.1987 under section 132(5) of the IT act;

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<sup>8</sup> It is settled law that invalidity of search does not vitiate the evidences collected during search: Pooranmal vs Director of Inspection (1974) 93 ITR 505= AIR 1974 SC 348; Dr. Partap Singh and another Vs Director of Enforcement and others 155 ITR 166= AIR 1985 SC 989; Shyam Lal vs. State of MP AIR 1972 SC 886(paragraph 5); and State of Punjab vs Balbir Singh AIR 1994 SC 1872 (paragraph 1, 7, 8).

Releasing the asset seized under section 132(1) and attached under section 132(3);

Direction to return all the books of account seized under section 132(i);

(iii) In the order under section 132(5), undisclosed assets were mentioned.

There was neither any averment nor any material to show that this undisclosed assets were disclosed in any income-tax return;

96. In Sriram case no relief was sought for quashing the search but it appears that the question of validity of search was taken up for grant of the prayers claimed in the writ petition. It was for this reason that the court had thought that there was an alternative remedy under section 132(11) by way of filing objection before the Commissioner against the order under section 132(5). The court observed:

'[W]hen the petitioner has an alternative remedy under sub-section (11) of section 132 by way of filing objections before the Commissioner, in our view, the courts should be loath to interfere under article 226.'

97. The court also did not hold that in an appropriate case, the Department could not be asked to produce the records. It is clear from the following observations:

'The Income-tax Officer has already set out the details of the undisclosed assets in the said order and therefore, it became easier for the petitioner to show that the assets said to be undisclosed in the order passed under section 132(5) had, in fact, been disclosed. There is no precise averment and no supporting material in this behalf. On these facts, merely on the basis of denial of the petitioner, we do not consider it proper to call upon the respondents to disclose the information they received for having acted under section 132(1).'

98. It merely means that if there was estimation of undisclosed income, then unless there was an averment explaining it, the information could not be disclosed. In the present case there is no estimation of income. It is not known, if there is any undisclosed income or not.

99. The Sriram case is neither applicable to the facts of this case, nor is an authority for the proposition that in case the record is produced by the Department

or ordered to be produced, then relevancy of information should be decided without disclosing the same to the aggrieved person.

### **The Other Cases**

100. The Prakash-chand case was decided by Chattishgarh High Court. In this case this question was not raised but was only mentioned in the written submission. The court had not permitted this issue to be raised (see paragraph 21 of the judgement).

101. The Gwailor-City case was decided by the MP High Court. In this case, the contents of information or reasons to believe for authorising the search are mentioned in the decision and are relevant. It is not clear whether they were disclosed to the counsel before the case was argued or not. However, observations in paragraph 13 of the report suggest that they were shown to the counsel for the petitioner before arguments.

102. In the Takshila-Society case, a part of material was disclosed in the counter affidavit and for other material, privilege was claimed so that subsequent action might not be prejudiced. In the present case no privilege has been claimed.

103. In the Kalpaka-Bazar case, the records were produced and the court was satisfied that there was information on record. The question raised here was not raised in that case.

104. The Southern-Herbal case were decided by the Karnataka High Courts. With due respect, we do not agree with it.

105. It is not correct to say that no other court has taken the view that we are taking. Two other division benches of our court (see below for citation)<sup>9</sup> have taken a similar view. The observations made therein are wide and the reasons are different however, substantially they have held that though it was not necessary that the material information should be disclosed in every case, but when search was challenged then in an appropriate case, such disclosure should be made.

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<sup>9</sup> Shyam Jewellers and another vs. Chief Commissioner (Administration) UP and others: 196 ITR 243; and City Montessori School vs Union of India in WP No. 2818(MB) of 2000 decided by Lucknow bench of the Allahabad High Court on 23.5.2007.

106. In our opinion in an appropriate case, where the petitioner makes out a *prima facie* case:

The court, in an appropriate case, can order the Department to indicate contents or nature of information/ material and reasons to believe authorising the search (without disclosing the source of information) to the aggrieved person;

The question of relevancy of information/ material and reasons to believe is to be judged after hearing the aggrieved person;

The question of their relevancy is not to be decided without assistance of the aggrieved person.

This is subject to any valid claim of privilege under section 123 and 124 of the Evidence Act.

#### **5<sup>th</sup> POINT: IT IS AN APPROPRIATE CASE**

107. The Government of India had announced a Special Economic Zone (SEZ) Scheme in April, 2000 with a view to provide an internationally competitive environment for exports. The objective of Special Economic Zone includes making available goods and services free of taxes and duties supported by integrated infrastructure for export production, expeditious and single window approval mechanism, and a package of incentives to attract foreign and domestic investments, for promoting export-led growth.

108. The SEZ Act was enacted to give effect to the policy of the Government of India and for establishing development and management of special economic zone for promotion of export.

109. The SEZ Act, not only has overriding effect over any other enactment (section 51) but, also empowers the Central Government not to apply the other enactments so far as SEZ is concerned (section 49).

110. Section 7 of the SEZ Act also provides exemption from taxes, duties or cess. Under this section any goods, services exported out of, or imported into, or procured from the domestic tariff area also exempt from payment of taxes, duties or cess under all enactments specified in the First Schedule.

111. The crux is that the SEZ Act is a very special Act for promoting foreign

exchange earning in the country and grants numerous exemptions for the same. It is a privileged place for promoting export and earning foreign exchange.

112. It is not disputed that the Petitioner has a warehouse at Noida within SEZ. According to the Department, its main business is done there.

113. The privacy of anyone is prized possession. It may not be violated without lawful excuse. One should tread with care and caution; more so for a warehouse in SEZ. This does not mean that the Petitioner in its garb can amass black money or defraud the revenue. However, the only reason that we have mentioned it is that business house in SEZ are given special treatment and it should be borne in mind.

114. In paragraphs 14 to 17, 43, 44 of the writ petition, the Petitioner has mentioned the nature of its business and how it is conducted. It is as follows:

The Petitioner company is a recognized 'Premier Trading House/ Five Star Export House' and has been accorded the status of 'Nominated agency under the Foreign Trade Policy of the Government of India;

The business activities of the Petitioner are being regulated by the Foreign Trade Policy and Customs Regulations. They are maintained and monitored by the Reserve Bank of India. The import of precious metals go through custom checks;

The imports are through 'foreign letters of credit'. Stock of bullion are procured through nominated agencies, MCX and MCDEX. The volume of purchase are reflected in the quantitative tally;

The Petitioner also purchases stock-in-trade from the domestic market but it is only through the nominated agencies Multi Commodity Exchange (MCX) and National Commodities and Derivatives Exchange (NCDEX);

The domestic sales are through cheques and some are through cash. However, they are fully reflected in their quantitative tally. The part of the turnover by cash is through the regular bank accounts and is duly entered in the account books. There is no hidden bank account.

115. In paragraphs 62 to 64 of the writ petitions, the facts regarding recovery have been asserted. They are as follows:

The total amount of cash found in different offices of the Petitioner was ₹5,01,605. Out of this ₹4,90,000 was from its Chennai office and was seized.

The jewellery found in the Bangalore office of the Petitioner was valued at ₹2,96,082 and was seized;

The search was also conducted at the residences of Directors of the Petitioner. The total cash found was ₹4,89,000. Out of this, ₹2,00,000 was seized;

The jewellery found from the residence of the Directors of the Petitioner was valued at ₹1,07,23,459 but nothing was seized as there was proper explanation for the same.

116. In paragraph 35 to 38 and 48, the following facts have been asserted:

There is no material or information that could lead to the formation of reasons to believe that the Petitioner was in possession of any amount which was not disclosed.

The Petitioner and its Directors were assessed out side the State of UP and Bihar. The person authorising the search did not have any audit report, P and L Account, Balance Sheet that could have shown the assets of the Petitioner. The Petitioner was asked to supply them (by the notice dated 6.10.2009) after the search.

117. The aforesaid paragraphs are not specifically denied in the counter affidavit.

118. The counsel for the Department submitted that:

The validity of search could not be judged on the basis of recovery;

It could not be quashed merely on the ground that there was no recovery;

The validity of the search was to be judged on the basis of information in possession of the Department that led to belief authorising the search.

119. The submission of the counsel for the Department is correct. However, at this stage of the writ petition, we are considering the question, whether a *prima facie* case is made out against the search or not; whether it is an appropriate case where the Department may be asked to produce the record. At this stage, the recovery cannot be ignored.

120. The relevant point to note is that the cash found could be at any business house or the residence of any businessman: it is not a huge amount. No unaccounted bank account has been found.

121. In our opinion, the Petitioner has made out a *prima facie* case against the search. It is an appropriate case where the Department should be asked to indicate the information as well as reasons to believe then after hearing the parties the question of its relevancy should be adjudged.

122. The counsel for the Department laid emphasis on the certain assertions in the counter affidavit that the petitioner had surrendered a sum of ₹11 crores. According to him, it shows that there was undisclosed money in the hands of the Petitioner.

123. There is nothing to show that the Petitioner had surrendered a sum of ₹11 crores for the period prior to search.

124. Sri Satish Bansal is one of the directors in the Petitioner. He filed an application dated 30.10.2009 before the Assistant Director of Income Tax (Investigation), Noida, UP {the ADIT(I)-Noida}. This application is in reference to the discussion held in connection with a proceeding related to search and seizure.

125. The aforesaid application is four pages long and has 11 paragraphs. In different paragraphs it gave information sought by the ADIT(I)-Noida. Paragraph 7 of this application is as follows:

'At the same time; it is gathered that, looking to over all trends of business that are being carried on by the "persons" as aforesaid and/or the activities with which they are connected, the results are progressive so far during the financial year 2009-10 relevant to assessment year 2010-11. Keeping in view such trends, all the persons taken together agree to pay tax on additional income of Rs. 11 crores approximately for the assessment year 2010-11, as compared to the immediately preceding assessment year.'

126. The search took place in the assessment year 2010-11. This application was also filed in the same assessment year. It states that in view of the trends, all persons together agree to pay tax on additional income approximately ₹11 crores in the assessment year 2010-11. There is nothing in the aforesaid paragraph to show that any income for the period already over was surrendered.

127. The application surrenders ₹11 crore considering the trend in the business for

the entire assessment year in which search took place and there is no surrender for any income for the earlier six assessment years for which, assessment can be done under section 153A of the IT Act.

128. This application is also not only for one person. This income is for all persons against whom the search was conducted. It is for this reason that it was rejected on 10.11.2010. Nothing turns upon this application and it does not detract from the *prima facie* case against the validity of the search.

129. In our opinion— considering the special status given to the person working in SEZ; the amount of recovery; the assertions that all transactions are through custom authorities or through the bank and shown in the accounts books; the audit report, P&L account, and balance sheet being unavailable to the DIT(I)-Kanpur—the Petitioner has made out a *prima facie* case for disclosure of the information in possession of the Department.

### **CONCLUSIONS**

130. Our conclusions are as follows:

- (a) The Director of Income-tax (Investigation) Kanpur had jurisdiction to authorise the search;
- (b) There is no necessity to adjudge the validity of search on the parameters of section 22 of the Special Economic Zone Act, 2005, as the section was not enforced on the date of search;
- (c) In case the petitioner makes out a *prima facie* case against the validity of the search then (subject to privilege under section 123 or 124 of the Evidence Act), the Petitioner is entitled to know the information in possession of the Department or the reasons to believe for authorising the search except the source of the information;
- (d) In the present case the Petitioner has made out a *prima facie* case.

131. In view of our conclusions, the Department may produce the record after showing it to the counsel for the Petitioner or file a supplementary counter affidavit indicating therein the information or material and reasons to believe for authorising the search. In case record is shown to the Petitioner or a supplementary counter affidavit is filed then, it will be open to the Department not to show or state that part

of information that might indicate source of the information.

132. We also clarify that:

The Department has not claimed privilege under the Evidence Act as yet. It will also be open to the Department to claim privilege under section 123 or 124 of the Evidence Act;

There are other points in the writ petition that we have not considered at this stage. They may be considered subsequently.

Date: 4<sup>th</sup> February, 2011

BBL

## **APPENDIX-1**

### **In case of search, pre and post Finance Act 1995 position regarding search, as stated by the counsel for the Petitioner, is as follows:**

(i) A search is conducted under 132 of the IT Act. Earlier, it could be done under section 37 of the Income-tax Act, 1922. Irrespective of the date of search, even if search is illegal, information or material collected during search can be used for making assessment or for any other lawful purpose.

#### **Pre Finance Act 1995 Position**

(ii) The position was as follows:

(a) In case of valid search an assessment could be made in that assessment year or reassessment proceeding could be started on the basis of assets or documents found in the search if otherwise permissible under law;

(b) In case the search was invalid, similar action could be taken as invalidity of search does not vitiate evidence collected during search;

In substance, there was no material difference in assessment proceeding whether the search was valid or invalid.

#### **Post Finance Act 1995 Position**

##### *Changes by Finance Act, 1995*

(iii) The Finance Act 1995 inserted chapter XIVB titled 'Special Procedure for assessment of search case' with effect from 1.7.1995.

(iv) This was done to make the procedure of assessment in case of search or requisition effective. The assessing officer could make block assessment of previous ten (later amended to six) years up to date of search of the undisclosed income detected as a result of search or requisition. The words 'undisclosed income' was also explained in the Chapter XIV-B.

(v) A flat rate of tax at 60% was charged for the block period.

##### *Changes by Finance Act 2003*

(vi) The aforesaid procedure was again changed by the Finance Act 2003. Now, the procedure for assessment in case of search is governed by sections 153A to 153C. These sections provide the assessment in case of search or requisition, time limit, as well as prior approval for completing assessment in these cases. These provisions apply to the searches made after 31.5.2003.

(vii) Section 153A to 153C of the IT Act also permits assessment or reassessment of previous six assessment years. The assessment of the year in which search took place is to be done for the entire year rather than alongwith block upto the date of search as was the case under chapter XIVB. There is single assessment for the whole year. There is no break in the previous year in which the search took place. The pending proceeding for assessment also abate.

(viii) The income assessed is charged to tax at the rate applicable to the respective years. The base for tax is total income as far a normal assessment and not for the undisclosed income as for block period. There is also no exemption for interest and penalty.

(ix) The position of assessment in post Finance Act 1995 is as follows:

(a) In case a search is valid then assessment for the block period under chapter XIV B or assessment for six previous assessment years under section 153A

to 153C can be done;

- (b) If the search is invalid then neither the block assessment under chapter XIVB nor assessment of previous six assessment years under section 153A to 153C can be done {Ajit Jain Vs Union of India: 2000 (242) ITR 302} though the material found during search may be utilised for making assessment for that year or reassessment proceeding may be started if otherwise permissible under law;

In substance there is material difference if the search is valid or invalid so far as assessment and reassessment are concerned.

### **Result**

(x) In a nutshell, earlier in practise, it did not make any difference whether the search was valid or not but at present validity of the search does make substantial difference and its consequences are more drastic.

(xi) The authorisation for search should be more closely scrutinised and the decisions on search of pre Finance Act 1995 era are no longer relevant.