

SURVEY

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Meaning of Survey

MEANING OF 'SURVEY' :

- The Act has no definition of 'survey'. Hence, the etymological construction of the word could well be used in interpreting the same.
- As per **Concise Oxford Dictionary**, the expression 'survey' means 'look carefully and thoroughly at'.
- As per **Chambers 20th Century Dictionary**, the word 'survey' means to view comprehensively and extensively, to examine in detail. In short, the term 'survey' in context of IT Act means collection of data and information for the purposes of the Act.

Background

BACKGROUND

- Inserted by Finance Act, 1964 w.e.f. 01.04.1964
- Substituted by the Taxation Laws (Amendment) Act, 1975, w.e.f. 1-10-1975.
- Memorandum Explaining Provisions Of Finance Bill 1964
“It is proposed to introduce a provision enabling the Income Tax Officer (or any Inspector of the Income Tax authorised by him on his behalf) to enter into any premise in his jurisdiction **where any business or profession is carried on by an assessee** and to inspect any books of account or document, to take extracts there from and to place marks for identification thereon.”

Power of Survey

SURVEY u/s 133A

- An Income Tax authority having jurisdiction or assigned with jurisdiction (being a Principal Director or Director, Principal CIT or CIT, Joint director, Joint Commissioner, Assistant Director, Deputy Director or an Assessing Officer or a Tax Recovery Officer or for certain limited purposes an Inspector of Income Tax authorized by any such other authority) may enter **any place within the limits of the area assigned to him or any place occupied by any person in respect of whom he exercises jurisdiction, at which a business or profession is carried on or *an activity for charitable purpose is carried on* .**
[Section- 133A(1)]
- Thus, if a person is assessed by an Income-tax Authority different from the territorial jurisdiction, survey can be carried out by both his assessing income-tax authorities as well as by his territorial jurisdictional Income-tax Authorities.

SURVEY u/s 133A

▪The survey operation **cannot** be carried out by an **Assistant Director or Deputy Director or Assessing Officer or Tax Recovery Officer or Inspector of Income-tax** unless they **obtain approval of the Joint Commissioner. [Proviso to S. 133A]**

▪Further The Inspector has power only in respect of inspecting books or documents or placing marks of identification or taking extracts or copies there from.

▪Thus, in case an inspector records statement or prepares cash or stock inventories, he acts beyond his power and is illegal. **ITO v. Jewells Emporium [1994] 48 ITD 164 (Indore).**

▪Explanation : If the **person carrying on business or profession states** that any of his books of accounts or other documents or assets relating to his business or profession are kept at some other place, then such other place shall also be covered.

▪In cases, where part of rent of residential premises and electricity are claimed as business expenditure on the ground that business is partly carried from there, survey under section 133A can be conducted at such premises.

Survey u/s 133A

- The object of survey is not the same as that of search or seizure under section 132 of the Act. This section empowers the income-tax authority to enter only a place at which a business or profession is carried on by the assessee, **he can not enter the residential premises of the assessee or the premises of the lawyer or the chartered accountant of the assessee.** [Board Circular No.7-D (LXIII) of 1967, dated 3-5-1967.
- The IT Authority does not assume any power to enter the business premises/Office of the CA/Lawyer/Tax Practitioner to conduct survey under section 133A in connection with survey of the premises of their client **unless the client states in the course of survey that his books of account/documents and records are kept in the office of his CA/Lawyer/Tax Practitioner- *U.K. Mahapatra & Co. v. ITO* [2009] 308 ITR 133/176 Taxman 293 (Ori.).**

Section 133A(1) & 133A(2)

▪Timing for Survey:

An Income Tax authority can enter only during hours at which such place is open for conduct of business or profession and in respect of any other place only after sunrise and before sunset. Once the authority enters the premises during business hours, no further limitations is imposed for the time the authority may remain in the premises. **[Section 133A(2)]**

▪Requirement during Survey:

On entering such place, he can require the following:

- To afford him necessary facility to inspect such books of accounts and documents.
- To afford him necessary facility to check or verify cash, stock or other valuable articles or things found.
- To furnish such information as may be required as to a any matter which may be useful for or relevant to any proceedings under the Act. **[Section 133A(1)]**

Section 133A(3)

■An Income Tax authority may do the following during the course of survey
[Section 133A(3)] :

- (a)Place marks of identification on the books and documents or take extracts or copies there from.
- (b)**Impound and retain any books of account or other document** after recording reasons for doing so. However, for retaining such books for more than 15 days (excluding holidays), prior approval of Principal Chief Commissioner or Chief Commissioner or Principal Director General or Director general or Principal Commissioner or Commissioner shall be obtained. (Provisions for impounding was introduced only by Finance Act 2002)
- (c)Make an inventory of any cash, stock or other valuable articles.
- (d)Record the statement of any person.

In the context of section 131(1), the Karnataka High Court in the case of ***Subha & Prabha Builders (P.) Ltd. v. ITO [2009] 318 ITR 29***, held that since the right of impounding is for few days, the extension can also be granted for few days and not for months or years. It further held that extension can be granted only once and not again and again.

■If a person refuses or evades to provide facility as required under this provision, the Income Tax authority shall have all powers u/s 131 for enforcing compliance thereof – namely powers as are vested in a Court under Code of Civil Procedure, 1908 **when trying a suit**, in respect of the following matters:—

(a) discovery and inspection;

(b)enforcing the attendance of any person, including any officer of Banking company and examining him on oath;

(c)compelling the production of books of account and other documents;
and

(d)issuing commissions.

[Section 133A(6)]

Validity of Examination On Oath

Whether Statement recorded u/s. 133A(3)(iii) can be taken on Oath?

- Statement u/s 133A(3)(iii) is not taken on oath. If one compares the wordings of the said provision with that u/s 132(4), one will find that the statement under the later provision is allowed to be taken on oath, whereas u/s 133A(3)(iii), there is no mention about statement to be taken on oath.
- Accordingly, the said statement does not have the same evidentiary value as the statement u/s 132(4). In fact if one compares the provision of section 133A(3)(iii) with provision of section 133A(5) which deals with the expenditure on functions, statement taken under the later section can be used as an evidence as stated in the said provision.
- The word 'may' in section 133A(3)(iii) clarifies that the material collected and the statement recorded cannot be conclusive piece of evidence – *CIT v. Dhingra Metal Works* 328 ITR 384(Del)

▪ **Decisions not considering the statement, as taken on Oath:**

▪ Thus, no additions can be made or no adjustments can be made merely based on the statement taken u/s 133A(3)(iii). The statement has to be corroborated by strong evidence.

▪ The Hon'ble Supreme Court in case of CIT vs. S. Kader Khan Son (352 ITR 480), has upheld the findings of the Hon'ble Madras High Court in 300 ITR 157, that Section 133A does not empower any IT authority to examine any person on oath, hence, any such statement has no evidentiary value and any admission made during such statement cannot, by itself, be made the basis for addition.

▪ Further, the Hon'ble Madras High Court in case of CIT vs. P. Balasubramanian (354 ITR 116) has held that the statement recorded during survey operation u/s 133A may be a relevant material, but in the absence of further materials to substantiate the same, such statement recorded u/s 133A can hardly be the basis for assessment.

- **Decisions considering the statement, as taken on Oath:**

- The Hon'ble Delhi Court in case of Raj Hans Tower Pvt. Ltd vs. CIT (373 ITR 9), has held that even in absence of any supporting material, based on the statement of the assessee, addition should be sustained.

- Further, in the said case, late retraction of the statement was also not accepted by the High Court. The decision in S. Kader Khan Son was not referred to in this case.

Retraction of Statement

- The statement in itself does not have any evidentiary value.
- However, if there are certain contradictory statements, it is advisable to retract those statements in time, especially in cases where certain supporting material has also been found by the Department.
- As in case of search – where the statement is given on oath and therefore, retraction has to be made on affidavit.
- In this case, the statement is not taken on oath, however, still if certain statements are given causing prejudice to the assessee, a retraction should be made immediately on an affidavit.
- Retraction of the statement shall further reduce the evidentiary value of the statement taken u/s 133A(3)(iii).

- In case of *Gajjam Chinna Yellappa v. ITO 370 ITR 671(AP)* - survey statement were retracted- court ruled that no addition can be made based on the statement.

- However, the Hon'ble Allahabad High Court in case of *Sanjeev Agrawal .v. ITSC (231 TM 71)* has held that even though there was no provision to administer oath under section 133A, it did not mean that statement could be retracted at whim and fancy of assessee.

- Where Assessing officer, while making addition in hands of assessee-firm as well as its partner, solely relied upon statement of partner recorded at time of survey which was subsequently retracted, addition made by Assessing Officer were to be deleted *CIT v. M.P. Scrap Traders [2015] 60 taxmann.com 205 (Gujarat)*

■Can a statement be retracted on the ground of coercion, recording the statement at odd hours?

CBDT Instruction F. No. 286/2/2003 - IT (Inv.) dated 10-3-2003 regarding Confession of additional income during the course of search & seizure and survey operation is relevant. The same is summarised as below-

"Instances have come to the notice of the Board where assesseees have claimed that they have been forced to confess the undisclosed income during the course of the search & seizure and survey operations. Such confessions, if not based upon credible evidence, are later retracted by the concerned assesseees while filing returns of income. In these circumstances, only confessions during the course of search & seizure and survey operations do not serve any useful purpose. It is, therefore, advised that there should be focus and concentration on collection of evidence of income which leads to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Departments. Similarly, while recording statement during the course of search & seizures and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action on the contrary shall be viewed adversely."

▪ **Can a statement be retracted on the ground of coercion, recording the statement at odd hours?**

▪ Where assessee made an admission regarding unaccounted investment and belatedly retracted from same on basis that admission was based on coercion and force without giving any reason, same was not acceptable and addition as undisclosed investment was to be upheld

Navdeep Dhingra v. CIT [2015] 56 taxmann.com 75 (Punjab & Haryana)

▪Can statement be taken u/s. 131?

▪The powers of the income-tax authorities concerned under section 131 are co-extensive with those of a ***civil court trying a suit*** and such power can be exercised only if a proceeding is pending before such authority. [CIT v. Mool Chand Salecha [2002] 256 ITR 730 (RAJ.), 27 Taxman 157(Bom) JamnadasMadhavji & Co. vs. ITO]. **Therefore, if no proceedings are pending, notice u/s 131(1) cannot be issued. After the survey is over, there are no proceedings pending and therefore notice u/s 131(1) can not be issued.**

▪Whereas during the survey proceedings, section 133A lays down that powers of section 131 can be exercised where a person, who is required to afford facility to income tax authorities for inspection of books, etc., refuses or refrains to do so at the time of survey [84 Taxman 416(Cal) Dr. Vijay Pahwa vs. DCIT]. Further summons can be served under section 131(1) only in case of obstruction by the person concerned or when some sort of hindrance is put by him.

▪Can statement be taken u/s. 131?

▪The Apex Court in ***Jagir Singh v. Ranbir Singh AIR 1979 SC 381*** has observed as under :

▪". . . What may not be done directly cannot be allowed to be done indirectly; that would be an evasion of the statute. It is a 'well known principle of law that the provisions of an Act of Parliament should not be evaded by shift or contrivance' [per Abbott, CJ. in Fox v. Bishop of Chester [1824] 2B & C 635]. 'To carry out effectually the object of a statute, it must be construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that which it has prohibited or enjoined' (Maxwell, 11th Edn., p. 109)" [Emphasis supplied] (p. 384)

■ Can statement be taken u/s. 131?

■ If assessee co-operates during survey and there is no default u/s 133A(6), no recourse can be had to section 131, as held in numerous decisions:

- Maruti Mills (P.) Ltd. v. Union of India [2002] 256 ITR 730 (RAJ.)
- CIT v. Mool Chand Salecha [2002] 256 ITR 730 (RAJ.)
- United Chemical Agency v. ITO [1974] 97 ITR 14 (ALL.)
- Dr. Vijay Pahwa v. Samir Mukhopadhyay, Dy. CIT [1995] 129 CTR 64 (Cal.)
- N.K. Mohnot v. Dy. CIT [1995] 215 ITR 275 (Mad.)
- Gheru Lal Bal Chand v. ITO [1982] 137 ITR 190 (P & H)
- United Chemical Agency v. R.K. Singh, ITO [1974] 97 ITR 14 (All.)
- Venkateshwara Tourist Home (P.) Ltd. v. Asstt. Director [1998] 233 ITR 736 (Kar.)
- Ram Saroop Pawan Kumar v. ITO [1980] 125 ITR 603.(P & H)

Other Important Points

Can hard disk be impounded?

▪Definition of books of accounts:

S. 2(12A) "books or books of account" includes ledgers, day-books, cash books, account-books and other books, **whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device**

▪Definition of document:

S.2(22AA) "document" includes an **electronic record** as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000);

▪Definition of electronic record (as per the Information Technology Act,2000):

(t) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;

Can Survey be converted into Search?

- Where during survey conducted under section 133A, department found huge cash and incriminating documents and director of assessee-company failed to provide explanation with regard to cash and dubious entries in seized documents, survey could be converted into search under section 132 after due approval of competent authority - *Rich Udyog Network Ltd. v. CCIT [2015] 63 taxmann.com 88 (Allahabad)*. Also see 226 ITR 781(Guj), 252 ITR 29(P&H)
- Where survey action u/s 133A was taken at the business and consequent search u/s 132 was authorised at the residential premises without recording independent reasons for satisfaction, the search was declared illegal. - *Dr.Nalini Mahajan and others v. DIT (Inv)(2002) 257 ITR 123 (Delhi)(HC)*

▪ **If Power of Survey is abused** and/or signature of the assessee is obtained without allowing him to read the contents, **what action can be taken?**

(a) Immediate retraction

(b) Approach CIT

(c) In present era, even mechanism like CP gram – pgportal

(d) In appropriate cases an FIR can be filed.

Hans Raj Chhabra v. Mukesh Mittal, Asstt. Commissioner [1994] 77 Taxman 273 (Delhi). In the said case, even two customers, who were in the shop at the time of survey were also not permitted to leave the shop. The Court observed that this case was prima facie a case under section 342/427/384/465/471 read with section 120B of the Code of Criminal Procedure, 1908 and the officer concerned was ordered to face the trial.

■Extrapolation:

■On the basis of evidence for a particular period, extrapolation of the income to the whole period of assessment **is not permissible** as held in a series of judgments:

1. Samrat Beer Bar v. Asstt. CIT (2000) 75 ITD 19 (Pune) (TM)
2. D.N. Kamani (HUF) v. Dy. CIT (1999) 70 ITD 77 (TM) (Pat.)
3. CIT v. Mahesh Chand (1993) 199 ITR 247 (All.)
4. Dr. S. Surendranath Reddy v. Asstt. CIT (2000) 72 ITD 205 (Hyd.)
5. Dy. CIT v. Royal Marwar Tobacco Product Pvt. Ltd. (2009) 120 TTJ (Ahd.) 387

■Further, even for the period for which evidence is found, the **addition should be based on Net Profit rate and not Gross Profit rate** of the alleged undisclosed sales, as held in the following decisions:

1. CIT v. Balchand Ajit Kumar [2003] 263 ITR 610 (MP)
2. Madanlal Narendra Kumar (HUF) v. Asstt. CIT [2003] 131 Taxman 41(Mag.)
3. Eagle Seeds & Biotech Ltd. v. [2006] 100 ITD 301 (INDORE)

Other Points to be considered:

- An Income Tax authority cannot remove assets during survey operations.
[Section 133A(4)]
- In a survey, a person is required to appear before the authority, as he is required under section 143, and applying the provisions of section 288, he is entitled to attend by an authorized representative.
- Presumptions u/s 132(4A) will be applicable in case of Survey also.
[Section. 292C]
- An unsigned draft agreement to sell, found during survey could have been starting point of carrying out investigation and further detailed verification, prior to making any addition. But addition can not be made on basis of unsigned draft agreement to sell when Assessing Officer had not made any investigation.

CIT v. AKME Projects Ltd. [2014] 221 Taxman 202 (Delhi)(MAG.)

▪ **Legality of materials found in Illegal Survey:**

Material gathered in case of illegal survey -could be used as evidence, if it could be established as relatable to the assessee as decided in CIT v. Kamal & Co. [2009] 308 ITR 129/[2008] 168 Taxman 246 (Raj.).

The Supreme Court in the case of Pooran Mal v. Director of Inspection (Investigation) [1974] 93 ITR 505 has held that materials found during an illegal search can be used as an evidence against the assessee.

Similar view was taken by the Supreme Court while interpreting other laws in the case of Dr. Partap Singh v. Director of Enforcement [1985] 155 ITR 166/22 Taxman 30 (SC).

■ **No addition only on the basis of statement.** CIT v. Dhingra Metal Works [2011] 196 Taxman 488/9 taxmann.com 83,(Del.)

ITO v. Vijay Kumar Kesar [2010] 327 ITR 497 (Chhattisgarh) and CIT v. Diplast Plastics Ltd. [2010] 327 ITR 399/186 Taxman 317 (Punj. & Har.).

■ Section 133A or section 132 nowhere provides for **sealing of the business** premises before or subsequent to the survey or even if there is difficulty in making survey - Shyam Jewellers v. Chief Commissioner (Administration) [1992] 196 ITR 243 (All.).

■ **Validity of certain documents:**

■ Dumb documents or loose papers **have no evidentiary value** unless corroborative material is found. The said view has been affirmed in following:

1. Amar Natvarlal Shah v. Asstt. CIT [1997] 60 ITD 560, 564-565 (Ahd.)
2. Asstt. CIT v. Shailesh S. Shah [1997] 63 ITD 153(Bom.)
3. D.D. Malhan v. Dy. CIT [2004] 91 TTJ 947 (Del.)
4. Addl. CIT v. Prashant Ahluwalia [2005] 92 TTJ 464 (Ctk.)
5. Smt. Bommana Swarna Rekha v. Asstt. CIT [2005] 147 Taxman 59 (Visakha.) (Mag.)
6. Asstt. CIT v. Satyapal Wassan [2007] 295 ITR (AT) 352 (Jabalpur)/ [2008] 5 DTR (Jab.) (Trib.) 202
7. Nirmal Fashions (P.) Ltd. v Dy. CIT [2009] 23 DTR 386 (Kol.) (Trib)

Section 133A(5)

Ceremonial Surveys [Section 133A(5)]

- Where having regard to nature and scale of expenditure in connection with any function, ceremony and event, if Income-tax Authority is of the opinion that it is necessary and expedient to do, he may at any time after such function:
 - (a) Require person who has incurred expenditure or any other person who has such information to furnish such information
 - (b) Record the statement of such persons which may be used as an evidence
- Addition u/s 69C can be made if the person who has incurred the expenditure is unable to explain the source or if the explanation offered is not satisfactory

Section 133B

Mass Survey [Section 133B]

An authorized officer for the purpose of collecting information may enter any building or place within the limits of area assigned to him or occupied by any person on whom he exercises jurisdiction at which a business or profession is carried on (may not be principal place) and require any proprietor/employee or any other person to furnish information. The authority may enter the place of business or profession only during business hours and on no account, remove from the building or place any books of account or other documents/cash/stock/other valuable article or thing. The information is called in Form No. 45D.

Assessment Post Survey

Assessment Post survey:

- No special procedure is prescribed for making assessment on the basis of information collected during the course of survey under section 133A (unlike in case of search).
- Therefore, on the basis of material gathered in course of survey, Department can initiate re-assessment proceedings. However the return of the assessment year falling in the year of survey is to be filed under the normal provisions of the Act. As per the scrutiny guidelines such returns are taken up for section 143(3).
- Even where based on assurance of survey party that return of income would not be taken-up for scrutiny, petitioner disclosed additional income, Assessing Officer was still empowered to select it for scrutiny assessment

Ajay v. DCIT [2014] 42 taxmann.com 210 (Bombay)

■ **Addition on account of difference in Stock Valuation:**

-Short Stock :

Allahabad High Court, in the case of Bhagwan Dass Hari Dass v. CIT [1996] 220 ITR 423 profit margin can be added.

-Excess Stock :

Jewelleries House v. Asstt. CIT [1996] 57 ITD 544. (Bang.) – Entire value

■ **Set off of loss against income offered in survey:**

Allowed – CIT v. Chensing Ventures [2007] 291 ITR 258/163 Taxman 175 (Mad.) & CIT v. Shilpa Dyeing & Printing Mills (P.) Ltd [2013] 219 Taxman 279 (Guj.)

Not Allowed – Kim Pharma (P) Ltd v. CIT [2013] 258 CTR 454 (Punjab & Haryana) relying on Fakir Mohamed Haji Hasan v. CIT [2001] 247 ITR 290 (Guj.)

From AY 2017-18- Section 115BBE amended.

No set off of loss or allowance against deemed income u/s 68, 69, 69A, 69B or 69C. Amendment is prospective as held in ACIT v. Sanjay Bairathi Gems Ltd. [2017] 166 ITD 445 (Jaipur - Trib.)

Amendment to Section 115BBE by **The Taxation Laws (Second Amendment) Act, 2016**

- *Tax on income referred to in section 68, 69, 69A, 69B, 69C or 69D whether included in ROI or added by AO – tax rate 60% (from existing 30%)*
- Further, Finance Act 2017 provides for a surcharge on such income at 25% of tax.
- So the effective rate becomes 77.25% (with 3% Education Cess*)
- * 4% cess from AY 19-20

Amendment to Section 115BBE by **The Taxation Laws (Second Amendment) Act, 2016**

Whether applicable for entire F.Y. 2016-17?

- Legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation.
- CIT v. Vatika Township (P.) Ltd.
- [2014] 367 ITR 466 (SC).

Common additions:

- **Short Stock – Estimated Profit**
- **Excess Stock – Section 69**
- **Short Cash – Unrecorded expenditure! But 69C difficult to apply**
- **Excess Cash – Section 69A!**
- **Unrecorded Sales or Receipts – Estimated Profit!**
- **Unrecorded expenditure – Section 69C!**
- **New Section 269ST – If cash receipts of 2 lacs or more**

TDS Survey

TDS Surveys:[Section 133A(2A)]

Without prejudice to the provisions of sub-section (1), an income-tax authority may for the purpose of verifying that tax has been deducted or collected at source in accordance with the provisions of Chapter XVII enter, **after sunrise and before sunset**, any office, or any other place where business or profession is carried on, within the limits of the area assigned to him, or any place in respect of which he is authorised for the purposes of this section by such income-tax authority who is assigned the area within which such place is situated, where books of account or documents are kept and require the deductor or the collector or any other person who may at that time and place be attending in any manner to such work,—

- i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place, and
- ii) to furnish such information as he may require in relation to such matter.

▪ **Other points to consider in TDS Survey:**

- In case of survey u/s 133A(2A) [for TDS/TCS], the income tax authority can not impound any books etc.
- No inventory of cash etc can be made.
- So the scope of TDS surveys is limited to collection of information and verification of documents to ascertain the TDS/TCS liability.

■ Issues in TDS Survey:

- Whether only those documents can be sought for which has TDS implications? Whether can he make fishing enquiry? Can he ask for information having other than TDS-TCS implications?
- What if he finds some issue other than TDS and TCS issue?
- Whether post sub-section 2A, the officer can only issue notice u/s 201 or can he reopen u/s 148? If he can reopen u/s 148, can he make other additions also based on the documents found during such survey?

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