Seminar on Search & Seizure and Survey
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Survey Under Income Tax Act 1961

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1. Provisions in brief

1.1. The Income-tax Authority has power to enter into any place in respect of which he has the jurisdiction or any place occupied by any person in respect of whom he exercises jurisdiction where a business or profession is carried on (Business premises) and inspect the books of account and other documents or to check or to verify the cash, stock or other valuable article or thing which may be available at such place and gather such other information which may be useful for, or relevant to, any proceedings under this Act. For this purpose, the place where the books of account or other documents, cash, stock, etc. are stated to have been kept is also treated as business premises – [Sec. 133A(1)]. If a survey action is to be taken by Assistant Director or a Deputy Director or as Assessing Officer or & Tax recovery officer or an Inspector of Income Tax, it can be done only with prior approval of Joint Director or the Joint Commissioner.

1.2. For the above purpose, the Income-tax Authority is entitled to enter the business premises only when it is open for the conduct of business or profession and in case of other place (which is treated as business premises as aforesaid under certain circumstances) only after sunrise and before sunset. This limitation has been provided only in respect of timing for entry and not for the exit – [Sec. 133A(2)].

1.3. The Income-tax Authority is also entitled to place marks of identification on books of account, etc. inspected by him and also to take extracts or copies thereof. He can impound and retain the books of accounts & other documents after recording the reasons for the same for ten days (excluding holidays) without permission of higher authorities. He is also entitled to make inventory of the cash, stock, etc. checked or verified by him and also to record statement of any person which may be useful for, or relevant to, any proceedings under the Act – [Sec.133A (3)].

1.4. It is specifically provided that the cash, stock etc. available at such business premises cannot be removed from the place by the Income-tax Authority acting under this provision – [Sec. 133A(4)].
1.5. The Income-tax Authority is also empowered to require the assessee or any other person to furnish necessary information in respect of the expenditure in connection with the function, ceremony or such other events at any time after such a function, ceremony or such other events which may be useful for, or relevant to, any proceedings under the Act and record the statement of the assessee or such other person which can be used in evidence in any proceedings under the Act – [Sec. 133A(5)].

1.6. The Income-tax Authority has all the powers under sec. 131(1) for enforcing compliance of his requirements under this provision if a person who is required to afford facility to the Income-tax Authority to inspect books of account, etc. or to check or to verify any cash, stock, etc. or to furnish any information etc. either refuses or avoids to do so – [Sec. 133A(6)].

1.7. For the above purpose, the Income-tax Authority is defined to include the Assessing Officer and higher officers. For the limited purpose of inspecting the books of account or for placing identification marks thereon, etc. as well as for collecting information with regard to the expenditure connected with any function etc., it will include the Inspector of Income-tax as income tax authority – [Explanation (a) to Sec. 133A].

1.8. For the purpose of this provision, the expression “proceedings” has also been very widely defined to include any proceedings in respect or any year which may be pending on the date of survey as well as which may have been completed on or before such date as well as the proceedings which may be commence after such date in respect of any year – [Explanation (b) to sec. 133A.]

1.9. There is amendment in section 292C by the finance Act 2008 w.e.f 1/6/2002 regarding Presumption as to assets, books of account, etc. As per 292C (1) Where any books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under section 132 or survey under section 133A , it may, in any proceeding under this Act, be presumed—

- that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;
- that the contents of such books of account and other documents are true; and
- that the signature and every other part of such books of account and other documents which purport to be in the handwriting of any particular person or which may reasonably be assumed to have been signed by, or to be in the handwriting of, any particular person, are in that person’s handwriting, and in the case of a document stamped, executed or attested, that it was duly stamped and executed or attested by the person by whom it purports to have been so executed or attested.

2. **Why Survey**

2.1.1. The purpose of conducting survey is to broaden the tax base by discovering the new assesses, to gather information, evidences for detecting evasion of taxes, to collect
information on the spot from the place of business by inspecting stock, cash, books of accounts and other items related to business. All these help in preventing tax evasion. But the recent trend in the tax department is that the quota is given to the income tax officials for number of surveys. The main objective today is to get more declaration and there by increase the revenue.

3. **Who can conduct the survey**

3.1. The Survey can be conducted by the Income tax authority. These income tax authorities are Commissioner, a Joint Commissioner, a Director, a Joint Director or an Assistant Director or a Deputy Director or an Assessing Officer or a Tax recovery officer and for limited purpose as mention in para 1.7 the Inspector A Inspector is not empowered to record the statement nor he is empowered to prepare the stock inventory at the time of survey, therefore, the additions made on the basis such records of survey will not sustain. 62 TTJ 527 Kamal & co vs ACIT (Jaipur)

3.2. If we compare this with Income Tax Authorities as mentioned in 116 there are three authorities that are not included. Surprisingly Additional Directors, Additional Commissioner are not authorities under 133A and therefore they cannot enter the premises or conduct surveys. Similarly there are two more authorities excluded and they are CBDT and Director General or Chief Commissioner. It would not be surprising if all the three authorities are also included in the list in next few years seeing the power of survey. But if we consider the recent retrospective amendments by Finance Bill 2006 as explanation to section 120 then if directed by CBDT then additional directors and additional commissioners can exercise these powers.

3.3. W.e.f 1/6/2003 section 133 A provides that the TRO can also conduct survey. In the case of Reckitt & colman of India Ltd. V ACIT (TDS) 251 ITR 306 and also in Reckitt & colman of India Ltd. V ACIT (TDS) 252 ITR 550 it was held that TDS authorities are empowers to conduct a survey. But as far as the scope of their survey is concerned it would be reasonable to say that TDS authorities must confine their survey to matters relevant to TDS only and should not expand the scope of their survey by probing into other matters.

3.4. One very important and welcome change w.e.f 1/6/2003 the proviso has been inserted in section 133A which says that survey can be conducted by Assistant Director, Deputy Director, Assessing Officer or Tax recovery Officer or by Inspector only after obtaining the approval of the Joint Director or the Joint Commissioner as the case may be.

4. **Where can the Survey be conducted**

4.1. Authorities as mentioned in para 3.1 can conduct survey at

4.1.1. Any place within the area assigned to them

4.1.2. Any place occupied by any person in respect whom they excercies Jurisdiction.

4.1.3. any place in respect of which they are authorised for the purpose of survey by the Income Tax authority who is assigned the area within which such place is situated or who excercies jurisdiction. The jurisdiction can be based on territorial area, person or classes of person, income or classes of income and cases or classes of cases.
4.2. **Business Premises**

4.2.1. Sub-section (1) of Section 133A provides that survey can be conducted only at a place where business or profession is carried on, though, it is not necessary that such place should be the principal place of business. The words ‘at which the business or profession is carried on’ in sub-section (1) does not mean only those places where the buying or selling activities are carried on, but also includes places where other activities are carried on, like premises where goods are manufactured, processed or stored, etc. Further, it also includes places where activities which helps in carrying on business or profession are carried on, for example, factory, workshop or even godown, are places at which it can said that the business or profession is carried on.

4.2.2. Sometimes it may happen that the same premises may be put to use for business as well as residential purpose. An Income-Tax authority is entitled to enter such premises for the purpose of survey and the survey operation can extend to whole of the premises.

4.3. **Survey at Residential Premises**

Normally, the power of survey does not confer a right to make survey of residential premises. If during the course of survey the income tax authority finds that some books of account or documents or the stocks are not available at the place of business and the assessee makes a statement that these are available at his residence, the income tax authority will assume jurisdiction to enter the residence for the purpose of inspecting such books of account, documents or the stock of the business. Similarly, if any discrepancy is found in cash and the assessee states that the same is kept at the residence, the authority concerned will be authorised to go to the residence and to check the same. In view of this, the assessee should avoid the keeping of stocks at his residence or the cash balance of the business at his residence so that it may not be required from him to state that these are kept at his residence. No businessman would desire to allow anybody to enter his house. It is therefore, required to be planned that the records, stocks cash or other valuables pertaining to the business not be kept at the residence or be removed from the place of residence if they are kept there, so that the unwanted guest may not enter the residence for encroaching upon the assessee's privacy.

4.4. **Survey at CA's Office & third party**

Reference is invited to Circular No.7D dated 3-5-1967 which states that the place where entry can be made under section 133A must not be a place where the assessee does not carry on business. Residential or office premises of third parties including a Chartered Accountant, a pleader or income-tax practitioner of whom the assessee may be a client are not places which may be entered into for the purposes of section 133A.

But if in course of survey, client states that his books of account/documents and records are kept in office of his chartered accountant/lawyer/tax practitioner; then the income-tax authority has power to enter business premises/ office of chartered accountant/lawyer/tax
practitioner to conduct survey under section 133A in connection with survey of premises of their client [176 TAXMAN 293 (ORI.)U.K. Mahapatra & Co.*v.Income-tax Officer]

4.5. **Conduct of Survey when business premises are locked**

There is no provision in Section 133A enabling the surveying authority to break open any door or lock or windows to obtain ingress. Entry can be made only if the premises are open and that too during the normal business hours of the assessee.

5. **Timing of Survey**

5.1.1. Sub-section (2) of section 133A states that an income-tax authority may enter any place of business referred to in sub-section (1) only during the hours at which such place is open for the conduct of business or profession and, in the case of any other place, like residence, third party’s premises etc. only after sunrise and before sunset.

5.1.2. Here also, once the entry has been made before sunset, the survey can be continued till any time beyond sunset. [Madras High Court in N.K.Mohnot v. Deputy CIT – 215 ITR 275, 128 CTR 247, 83 TAXMANN 238]

6. **Powers of Survey Party**

6.1. The Income Tax Authority has power to enter the place of survey, inspect the books of accounts and other documents, to check or to verify cash, stock or other valuables, articles or things which may be available at such place, to take extracts or make copies of books of accounts which are inspected and gather such other information which may be useful for, or relevent to, any proceedings under the Act.

6.2. The Income Tax Authority is also empowered to place marks of identification on the books of accounts etc. inspected by him, to make inventory of cash, stock etc., checked or verified by him and also to record statement of any person, which may be useful for, or relevent to, any proceedings under the Act.

6.3. The survey party has now authority to impound the books of accounts and documents and keep under their custody. This power has been given from 1-6-2001, however they are duty bound to give the reasons for the empoundment. Such empound will not exceed more than 10 days (excluding holidays). In case of empoundment more than 10 days, the permission of the Chief Commissioner or director general or director or Commissioner is necessary.

6.4. Survey party can only collect information but cannot draw inferences and conclusion to support its report. (54 ITD 116 (COCH)/[1996] 54 TTJ 397 (COCH) [1995] 54 ITD 116 (COCH.) Assistant Commissioner of Income-tax v. Manorajam
6.5. Statement during Survey

6.5.1. The Survey authorities do have power to take statement u/s 133A(3)(iii). But this statement cannot be statement on oath. There is difference between statement and statement on oath. A statement made on oath would have more sanctity than the statement made otherwise than on oath. In the search provision 132(4) special powers have been given to take statement on oath. As per section 7 of the oaths Act also there is requirement that for administering the oath the proceeding should be judicial. Hence it has to be considered if the authority was empowered to administer the oath and whether it was judicial R. R. Gavit vs Smt. Sherbanoo Hasan Daya And Another (161 ITR 793, 55 CTR 427, 28 TAXMANN 349). Recently Kerla High Court in Paul Mathew’s & Sons 263 ITR 101 has held that survey authorities do not have power to record statement on oath. Moreover mere statement without the corroborative evidence cannot be made basis of the assessment. ACIT vs Satya Narayan Agarwalla (91 TTJ 481- Cal), Abdul Qayumm vs CIT (184 ITR 404 - Allh). Due care has to taken while giving the replies to the question put while recording the statement. This statement can be used against the assessee during the assessment unless he proves that the statement was recorded under undue influence, coercion or threat. Where ever things are not sure it should be stated accordingly. Witness who signs the statement is presumed to be present throughout the proceedings.

6.5.2. However when resort to section 131(1) is made during the survey a statement can be recorded on oath because the powers to record a statement on oath are definitely vested in the authorities under section 131(1) is possible during the survey only if the condition laid down in section 133A(6) when an assessee does not afford facility to the Income Tax authority etc are fulfilled that is that the person refuses or evades to co-operate during the survey.

6.5.3. Statements of third party: If certain additions are made on the basis of statement of certain witnesses or third parties during the course of survey, not only the copies of said statements should be supplied but an adequate and proper opportunity for cross-examination of witnesses / third party should be given [CIT v. Land Development Corpn. [2009] 316 ITR 328 (Kar.)]

7. During the Survey

7.1. Duties of the person being surveyed

7.1.1. Sub-section (6) of the section 133A states that if a person under this section is required to afford facility to the income-tax authority to inspect books of account or other documents or to check or verify any cash, stock or other valuable article or thing or to furnish any information or to have his statement recorded either refuses or evades to do so, the income-tax authority shall have all the powers under sub-section (1) of section 131 for enforcing compliance with the requirement made. The authority concerned shall invoke the powers under this sub section only if forced to do so.

7.1.1.1. Consequences of non co-operation
7.1.2. Provision of section 131 (1) may also be made applicable in case of non-cooperation on the part of assessee. Alternatively, if an assessee who is being surveyed does not co-operate, either in respect of inspection or verification mentioned above in sub-section (1) or does not supply or share the information with the surveying officer and if the officer feels that he is deliberately avoiding such an inspection or evades to furnish the information or to answer the question which are material, it is likely that the survey officer may approach his superiors for authorising a search under section 132. All this will cause greater difficulties to him. Therefore the assessee should co-operate fully with the survey team in respect of all matters connected with the survey namely, inspection, verification, furnishing of information and answering the statements recorded by the survey party.

7.1.3. Explanation (b) below Section 133A(6) makes it amply clear that for conducting survey, no proceedings need to be pending.

7.2. **Whether business premises can be sealed?**

7.2.1. In Shyam Jewellers & Anr v. Chief Commissioner (Admn) U.P. & Ors. (1992) 196 ITR 243, Allahabad High Court observed that a business place cannot be sealed during the course of survey. The Court held that sealing of business place during survey or even in course of search under Section 132 is not permitted in view of the fundamental right to practice any profession or carry on any trade or business bestowed under Article 300A of Constitution of India and is also violation of Article 19(1)(g) relating to the fundamental rights of a citizen.

7.3. **Interrupt / Stoppage of business**

7.3.1. The authorities cannot stop the business or the normal activities of a person. The authorities do not have power to interrupt the ordinary business or peaceful life of citizen. They should use the power given to them strictly within the four corners of large power. Since the powers vested are large, even a millimeter departure there from is not allowed (Dr. Vijay Pahwa VS DCIT [250 ITR 354 (Cal) , 129 CTR 64, 84 TAXMANN 416] and L. R. Gupta 194 ITR 32)

7.4. **Chits / Slips found during survey**

7.4.1. When there chits /slips found during the survey the issue comes up is if these chits/ slips belong to the assessee. Second can these chits/ slips can be called as documents. Third is the figures in these chits / slips without any narrations or details represents income the assessee. These issues are answered in para 23 & 24 of 39 ITD 183 (Delhi) in the case of Ashwani Kumar V ITO.

7.4.2. If the slips/chits can be called as documents is also an issue. Document has been defined in section 3(18) of the General clauses Act to include any matter written, expressed or described upon any substance by means of letters figures or marks or by more than one of those means which is intended to be used or which may be used for the purposes or recording that matter. If the slips/chits do not indicate whether the figures refers to quantities
of money or quantities of goods and if so which side represents receipts and which side represents outgoing. Where there is no narration the chits can be called, as dumb documents without indicating any meaning cannot be treated as document.

7.5. Legal assistance during survey

7.5.1. Law does not permit an assessee to insist the tax authorities not to conduct survey till arrival of the Tax Consultant irrespective of an Advocate, Chartered Accountant or a Tax Practitioner. However, an Assessee may request and if permitted may call for, to assist in proper conduct of the survey. Section 288(1) of the Act provides that any assessee, who is entitled or required to attend before any Income-tax authority or the Appellate Tribunal in connection with any proceeding under the Act, otherwise than when required under section 131 to attend personally for examination on oath or affirmation, may subject to the other provisions of section 288 attend by an authorized representative. The said section does not entitle an authorized representative to attend the survey proceedings. The said section does not help in seeking personal presence in survey proceedings. Practically it has been experienced that after persuasion the consultant is allowed to be present but he is not allowed to interfere in the proceedings.

7.6. Physical search during the Survey not permitted

7.6.1. The authorities conducting survey do not have right to taken physical search of any person. There is a specific right gives for physical search in search & seizure provisions under section 132(1)(B)(ia). Practically the survey party will request the persons surveyed to keep all their belonging in their pockets on the table and then they see the belongings. If person denies to fulfill this request, then the survey party cannot take his physical search.

7.7. When survey is converted into a search

7.7.1. Proceedings under section 133A, 133B, and 132 are independent of each other. The object and scope of action under each of these sections is well defined. A survey can lead to a search only when on the basis of information collected in survey, condition laid down in clause (a), (b) or (c) of section 132(1) are satisfied. Similarly, a persistent failure on the part of the assessee to show co-operation with income-tax authorities in the matter of survey may also result into income-tax raid leading to search and seizure. For instance, if the income-tax authority comes to know that some account books, documents, cash, valuable articles or things, etc., are lying in some place other than the place where business or profession is carried on but the assessee does not state so, action can be taken under section 132 because unless the assessee makes a statement to the above affect, the department shall not be in a position to enter such other place under section 133A or 133B. In such a situation, the department cannot rest contended with the idea of taking penal action. Rather it should move fast for taking action under section 132 lest the assessee removes such account books, etc. from there to another secret place.
7.7.2. According to Punjab & Haryana High Court in Vinod Goel, Advocate & Ors. V. Union of India & Ors. 252 ITR 29, the survey ordered at the premises of petitioners under section 133A and conversion of said operation into search operation on the basis of authorisation given by Additional Director cannot be declared illegal. Absence of express enumeration of post of Additional Director in the list of authorities embodied in section 132 cannot lead to an inference that Additional Director is not entitled to exercise power of Director General under that section. Many times authorities threat that survey will be converted into search is just to take out more declarations during the survey. Practically only when very big tax evasions are found then only the search provisions are applied.

7.7.3. However, Delhi High Court in a very recent judgement in Dr.Nalini Mahajan & Ors v. DIT(Inv) & Ors – 257 ITR 123 dissented from the view of Punjab & Haryana High Court.

7.8. Surrender of amounts during survey

7.8.1. It is a common experience of the assessee whose premises are surveyed under section 133A of the Income Tax Act, 1961, that irrespective of whether any apparent discrepancy in cash, stock or books of account is found or not, they are asked to make surrender towards concealed income. They do so by referring to section 132(4) and the Explanation 5 to section 271(1) (c) assuring him that if he so surrenders he will not be subjected to penalty, etc. But such is not the correct position of law. The immunity granted under the Explanation 5 to section 132 and not under section 133A. Delhi Tribunal in Amir Chand v. ITO – 49 ITD 606 held that penalty u/s 271(1)(c), Explanation 5 cannot be pressed into service while dealing with a case of survey u/s 133A but is applicable only in search proceedings u/s 132. It is impossible to subscribe to the views of CIT(A) that “by sheer logic Explanation 5 to Section 271(1)(c) would cover Section 133A also.”

7.8.2. The proper course for the assessee under such circumstances is to assure that he will reconcile the discrepancy noticed by the surveying authorities or he will return the amount representing the discrepancy as his income of the current year. Further, by that time he would be able to value the stock, etc., correctly and as such, the disclosure made by way of return would be more accurate. Therefore, surrendering would not entitle the assessee to any extra benefit. If there is a charge against him to willfully evade tax under section 276C of the Act, it would not be diluted by making a surrender. Further, the surrender made in hurry is going to worsen the assessee's plight. Therefore, assessee should avoid surrendering of any income during the course of survey. The CBDT has issued a clarification [vide F No 286/2/2003 – IT (Inv)]dated 10th March 2003 published in AIFTP journal Vol 5 April 2003 on page 25. It advices that focus of survey, search should be collection of evidence of income and while recording the statement no attempt should be made to obtain confession.

8. Major Survey Findings Affecting the Determination of Income

8.1. DISCREPANCY IN STOCK:
8.1.1. This is one of the most common and major problem faced by the assessee during survey and in subsequent assessment proceedings. It may be in the form of excess stock or shortage in stock.

8.1.2. Income Tax authority normally values excess stock at market value, instead of the actual cost, i.e. the amount invested/utilised to acquire such excess stock, for the purpose of determination of additional income. One needs to consider the accounting treatment of such excess stock, implications of provisions of section 40A(3) as such excess stock could represent purchases in cash out of undisclosed income and implications of section 69C with regard to disallowance of unexplained expenditure. Reasons for excess stock may be due to calculation of lower GP rate than as per records, certain purchases for which deliveries are received but bills are not received, certain sales are made but delivery is not dispatched. Certain materials received for job work or on sale or return basis, Certain stock which is obsolete which may be overvalued by the authorities, goods received on consignment, difference in valuation. Similarly shortage of stock may be due to consumption, samples sent to customers, pilferage, mis-appropriation, theft, non-delivery of goods purchased, goods send on consignment, difference in valuation.

8.1.3. If the reasons for discrepancies are brought on record at the time of survey, there may not be much difficulty during the course of assessment.

8.1.4. In case of shortage, normally income tax authority treats it as undisclosed sales and the sale value is declared as income. The assessee can content that only the profit element included in such sale should be taxed. The accounting treatment of this is very important as it can change the percentage GP, it may affect Sales Tax, Excise & other levy.

8.1.5. [51 TTJ (Del) 743, 28 TTJ(JP) 128, 201 ITR 608 (Cal), 100 CTR 204 All 258 ITR 654, 60 ITD 531 (Mad), 40 ITD 180 (JP), 66 TTJ 695 (Pune).]

8.2. DISCREPANCY IN CASH: -

8.2.1. This discrepancy arises due to difference in physical cash available and balance as per Books of Accounts. Excess cash may be due to cash sales yet to be recorded, assessee’s personal money lying in business premises, recovery from debtors, advances received or other receipts remaining to be recorded for the past few days, money received for safe keeping. Generally such excess cash, being unexplained, is treated as additional income.

8.2.2. Similarly shortage in cash may be due to withdrawal by partners/ proprietors, which is yet to be recorded, pending entries of payments made, advances given etc. Generally even in cases of shortages a declaration of income is obtained from the assessee. 30 Taxman 389, 27 TTJ ITO 170 (All).

8.3. INCOMPLETE BOOKS AND RECORDS AT THE TIME OF SURVEY: -
In many of the cases, at the time of survey, the books and records are incomplete or not written at all. By and large identification marks are placed by the income tax authority on the basic documents. However some documents might go unnoticed or may be received / obtained subsequently. In such cases the Assessing Officer raises an issue whether books of accounts produced by assessee are reliable for determining his correct income and thus may reject the same. The Assessing Officer cannot reject the of books prepared on basis of genuine documents merely on the ground that the books were incomplete on the date of survey.

8.4. **Treatment of undisclosed turnover**

During the course of survey some material may lead to existence of undisclosed turnover. In such a case, it is important to keep in mind the fact that for every unaccounted sale there must be corresponding unaccounted purchase without which sale is not possible. If the assessee is in a position to prove that purchase cost of goods sold has not been recorded in the regular books of account, the whole of sales proceeds cannot be treated as income but only the income component embedded in the unaccounted sales can be liable to tax. Again here proviso to section 69C is to be considered carefully. [CIT v. S. M. Omer – 201 ITR 608 and Ashok Kumar Rastogi v. CIT – 59 Taxman 82.]

8.5. **Treatment of income declared without specifying the nature thereof**

When declaration of income is made without specifying the nature of income, then such income may be taxed, under the head ‘Income from other sources’. It is advisable to specify the nature of income disclosed because if facts indicate that the income is generated in business, a case then can be made out to get it taxed as business income.

8.6. **Capitalisation of declared income when represented by tangible assets.**

Normally, if a declaration is made admitting some income, then it can be treated as the income represented by cash and it is not capitalised. However, the facts of the case can ultimately decide whether capitalisation of income is possible or not.

9. **Retraction of Statements**

9.1.1. A statement made during survey operations is normally binding on the person who made the statement only if it is voluntary and without threat, undue influence, misrepresentation, coercion or misunderstanding. If that were so, it would not be binding on the person making the statement. However, if he claims that the statement is not voluntary, onus would be on him to prove the same and must show to the authority concerned the reasons leading to making the statement. According to section 94 of Evidence Act the burden to prove that the admission made is untrue lies on the party who made the admission. [Satinder Kumar (HUF) vs CIT 106 ITR 64 HP, Kunhumbu (V) & Sons vs CIT 219 ITR 235, ITO vs Ratan Devi Dugar 20 ITD 483 JP]
9.1.2. Besides, after the survey, when the person making declaration finds that the declaration is not substantiated with facts found, it should be retracted within a reasonable time. Its retraction later on may not be very efficacious though the consequences will depend on facts and the nature of declaration. For instance when certain facts by nature take time to be available, then time taken for retraction in such cases may be held to be justified. On the other hand, when a declaration is made to buy peace and not retracted within a reasonable time, its retraction later on may not be efficacious.

9.1.3. Supreme Court in Pullangode Rubber Produce Co. Ltd. v. State of Kerala – 91 ITR 18 held that an admission though is an important piece of evidence cannot be said to be conclusive and it is open for the person making admission to show that it is incorrect.

9.1.4. The Ahmedabad Tribunal in the case of Ashok Manilal Thakkar vs Asst CIT (2005 ) 279 ITR 143 has held that the statement of disclosure made during the survey, has no evidential value by it self.

9.1.5. Similarly, Mumbai Tribunal in Pushpa Vihar v. Assistant Commissioner of Income Tax – 48 TTJ 389 after considering its own judgment in Kishore A.Meswani (ITA No.7161/B/87 dated 7.8.1990) as also the Supreme Court judgment in Krishna v. Kurushetra University – AIR 1976 SC 376 held as under:

9.1.6. “that merely on the basis of assessee’s offer for being taxed, the assessment cannot be sustained. The Apex Court in the case of Krishna v. Kurushetra University (supra) has held that any admission made in ignorance of legal rights or under duress cannot bind the maker of the admission. It is an accepted position that what is admitted by the party to be true, must be presumed to be true, unless the contrary is demonstrated. However, mere admission cannot be bedrock or foundation of an assessment. It is always open to the assessee who made the admission to show that what he admitted was not correct. Thus, it can be said that the admission made by a person is relevant in deciding the matter. But it is not always conclusive. The person who admitted the fact is at liberty to explain or clarify the circumstances and the nature of statement and also the correct facts. It is well settled that the effect of an alleged admission depends upon the circumstances in which it was made. Therefore, it can be said that an admission is the best evidence that Revenue can rely upon and though not conclusive, is decisive of the matter unless successfully withdrawn and proved erroneous.”

10. Precautions

10.1. Precaution to avoid Survey

Some precautions that one needs to exercise are:

10.1.1. Avoid large cash and stock balances.  
10.1.2. Update books of accounts, at least primary books.  
10.1.3. Periodical verification of stock and cash.  
10.1.4. Maintain Inventory of previous year.
10.1.5. Facilitate Location of goods with identification.
10.1.7. Keep track of Cash receipts.
10.1.8. Keep track of Goods received without bills.
10.1.10. Avoid Residential Address to be used as Place / Address for Business.

10.2. **Precaution during Survey & after Survey**

10.2.1. The Assessee should not be unduly influenced by the pressure tactics exerted by the survey team and must maintain his mental state cool and observe the following points:

10.2.2. The assessee must satisfy himself about the identity and genuineness of the person conducting the survey and for this he must ask for his identification or may contact his superior to find out the real facts. He may also ask for the copy approval of the Joint Director or Joint Commissioner for verification and return.

10.2.3. The assessee and the concerned persons must co-operate with the official and try to give all the available facts. Any evasive tactics on the part of the assessee may lead to search and seizure operations by the department.

10.2.4. The assessee, in order to avoid the production of books of account or documents or stock or cash or any other asset, should not take up a plea that they are laying at residence. Such a statement may prove to be suicidal and invite the authorities at his residence because of his own foolishness.

10.2.5. If during the course of survey, discrepancies are found, as for instance the actual cash does not tally with the amount in the books of account, the assessee shouldn’t get panicky but should try to reconcile the difference and give appropriate explanation to the official to his satisfaction.

10.2.6. As the books of accounts and other documents and valuable things can be impounded only on non-cooperation by the assessee, he must cooperate with the income-tax authority conducting the survey.

10.2.7. Surrender of any income or asset as income in a statement recorded under section 133A should be avoided, as no immunity is available under Explanation 5 to Section 271(1)(c) as advocated by survey team. Even if pressed, the assessee should avoid surrendering of any income during the course of survey. Ultimately if any income is surrendered, the income so surrendered should be included in the current year’s income to be returned.

10.2.8. If the authorised representative is not present during survey operations, the assessee must keep and preserve copies of the inventories, statements etc. and to contact his Tax Advisor immediately on completion of survey. The Assessee would be running a great degree of risk if he hides or conceals such material aspects, which were detected by survey.
party in survey. If any of the statements are not available, they must be gathered from the Income Tax authorities as they are bound to be used against the person surveyed during the course of assessment by the concerned official.

10.2.9. The Assessee must disclose all the material facts to his Tax Advisor and act as per the best advice of his Tax Advisor and to do any other act or step which may be in the facts and after considering the prevalent circumstances

11. **Tax Authorities should refrain from doing the following acts:**

11.1. To remove or seize cash, stock-in-trade and other valuable article or thing etc. found during the course of the survey.

11.2. To harass and resort to coercion and related tactics.

11.3. To exert pressure on the assessee to declare and surrender exorbitant amount under the pretext that there would be no liability for interest, penalty etc. if the assessee surrendered as per the sweet will of the survey team.

11.4. To collect cheque for tax applicable to amount of declaration.

11.5. To act in a manner which is against the provisions of law or travel beyond his jurisdiction.

11.6. To interrupt incoming telephone calls or to deny usage of telephone etc.

11.7. To physically search person or the persons present at the place of survey and to stop ingress or exit of any person inside the place at the time of survey.

11.8. Not allowing meals, rest, medical facility whenever required.

11.9. Not giving copies of statements.

11.10. Breaking lock of any cupboard or room.

Some of the Circulars/Press Releases issued by CBDT from time to time in the context of Section 133A are reproduced hereunder:


This circular talks about powers of Income Tax Officer to enter place of business or profession during normal working hours and to inspect books of accounts and to exercise powers under sub - sections (1) and (2) of section 131, if necessary, in case of non co-operation from the assessee

The Text of relevant para reads as under:

93. A new section 133A has been inserted with effect from 1-4-1964, by section 31 of the Finance Act, 1964, conferring powers on an income Tax officer (or any income Tax Inspector
authorised by him on this behalf) to enter (a) any place within his territorial jurisdiction, where a business or profession is carried on, or (b) any place which is occupied by a person within his jurisdiction and where a business or profession is carried on, for the purpose of inspecting any books of account or other documents which is may be available at such a place, and placing marks of identification thereon or taking extracts from such books and documents. Such place can be entered into by the Income Tax officer or the authorised Inspector of Income Tax, even if it is not the principal place of the business or profession concerned. Entry in such premises is allowed, under this provision, only during the working hours of the business or profession. Further, the removal of any books of account or documents from the place by the Income Tax Officer or the authorised Inspector is expressly barred under this section. The section casts an obligation on any proprietor, employee or other person who may be attending to or helping in carrying on the business or profession to afford the Income Tax Officer or the authorised Inspector of Income Tax, necessary facilities for inspecting the books of account and other documents which may be required by the Income Tax, Officer or the Inspector. If such person refuses to afford facilities to the Income Tax Officer or the authorised Inspector for inspecting the Books of account or documents or evades to do so, the Income Tax Officer (not the Inspector) is empowered to enforce compliance by taking recourse to the powers under sub-section (1) and (2) of section 131 (viz.,powers as are invested in a civil court under the Code of Civil Procedure, 1908 for discovery and inspection, compelling the production of books of account and other documents, enforcing the attendance of any person, issuing commissions; and powers of levying a fine up to Rs.500 on a person intentionally omitting to attend or to produce books of account and documents as required in summons issued to him for the purpose).

2. Circular No.7-D (LXIII-7), dated 3-5-1967 (Reported on page 2059 Vol 2 of Taxmann Direct Tax Circulars 2002)

This circular lays emphasis on the fact that only the place of business/profession of the assessee, whether principal place or not, can be subject to survey under section 133A. Business and/or residential premises of third parties or residential premises of assessee cannot be entered into for conducting survey.

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

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


This circular talks about the power of survey assigned also to Inspecting Assistant Commissioner and Assistant Director of Inspection. It also states that scope of Section 133A is widened because cash, stock and other valuable are also made subject to inspection and making inventory and power to record statement of persons concerned is also provided under the substituted section. It further says that Inspector of Income Tax can exercise powers of survey only with the permission of Income Tax Officer.

The Text of relevant para reads as under:

14. The Amending Act has substituted a new section for the existing section 133A with a view to enlarging the scope and powers of survey available to the Income Tax authorities. The main changes made in this behalf are as follows:

1. At present, the powers of survey are vested in the Income Tax Officers or the Inspectors of Income Tax authorised by them in this behalf. These powers will now be available to Inspecting Assistant Commissioners the and Asstt. Directors of Inspection as well.

2. Under the existing law, the power of Income Tax authorities is limited to the inspection of the books of account and other documents available at the place of business or profession of the assessee, placing of marks of identification thereon and taking of extracts therefrom. Under the amendment the inspecting Assistant Commissioner, the Asstt. Director of Inspection and the Income Tax officer will have further power to check or verify the cash, stocks or other valuables found in the premises where the business or profession is carried on and also to require the proprietor,employee,etc.,to furnish information which may be useful for or relevant to any proceeding under the act.

3. At present, the income-tax authorities have the power to enter only a place where business is carried on. Such entry can be made during the hours at which such place is open for the conduct of business or profession. Under the amendment, the Income Tax authorities will also have the power to enter any other place in which the person carrying on business or profession states that any of his books of account or other documents or any part of his cash or stocks or other valuable articles or things relating to his business or profession are kept. The entry to such other place will, however, be made only after sunrise and before sunset.
4. The Inspecting Assistant Commissioner, the Asstt. Director of Inspection and the Income Tax Officer will now have the power to make an inventory of any cash, stocks or other valuable articles or things checked or verified by them and also to record the statement of any person which may be useful for or relevant to any proceeding under the Act.

5. The Income Tax authorities will also have the power to collect information and record statements of persons concerned any time after any function, ceremony or event even before the stage of assessment proceedings for the following year for which the information may be relevant, if they are of the opinion, that having regard to the nature, scale or extent of the expenditure incurred, it is necessary to do so.

15. It may be noted that while the Inspecting Assistant Commissioner, the Asstt. Director of Inspection and the Income Tax Officer will have all the powers under the new provision, the Inspector of Income Tax has not been vested with the new powers referred to in items (2) and (4) of the preceding paragraph. Further, the Inspector of Income Tax can exercise the powers of survey vested in him only if he is authorised by the Income Tax Officer to do so.

4. Circular No.551, dated 23-1-1990 - Direct Tax Laws (Amendment) Act, 1987 – 183 ITR (st) 7 - Amendment of clause (a) of Explanation to section 133A

This circular draws attention to the fact that now Deputy Commissioner & Assistant Director can also authorise an Inspector to conduct survey

The Text of relevant para reads as under:

9.12 The Amending Act, 1987 has amended clause (a) of the Explanation to provide that instead of only the Income Tax Officer, any income tax authority mentioned in the section can authorise the Inspector of Income Tax to conduct the survey.


This circular explains the difficulty faced in conducting survey and hence certain other Income Tax authorities are empowered for conducting survey in order to accentuate operational efficiency.

The Text of relevant para reads as under:

42.1 Section 133A of the Income Tax Act, 1961, empowers an income-tax authority to conduct survey. The term 'income-tax authority' for the purpose of conducting survey has been defined in the Explanation appearing at the end of section 133A, to mean a Deputy Commissioner, an Assistant Director or an Assessing and for some specific purpose, if authorised, an Inspector of Income Tax. The powers of these authorities are restricted to
their territorial jurisdiction resulting in operational difficulties whenever any of the specified authorities is not available for conducting a survey on the basis of any unexpected information from any external source warranting immediate action. Secondly, in the case of big assessee, service of a number of officers may be required. Therefore, in order to accentuate operational efficiency of the department as also to cover large premises, the existing law has been amended to provide that the Deputy Director, the Director and the Commissioner will also have powers to conduct survey and an officer having jurisdiction over an assessee or within the limits of his territorial jurisdiction can authorise any other officer to conduct survey.

42.2 This amendment takes effect from 1-7-1995.

6. **Press Release dated 3.6.1989 – Income Tax Officers authorised under Section 133A to make surveys of marriage ceremonies and other ostentatious social functions to detect use of unaccounted money.**

Government will launch a drive against ostentatious wedding ceremonies and other social functions, which often involve blatant use of tax-evaded money. According to Revenue Secretary, Dr. Manish Sengupta, such ostentation is inconsistent with the egalitarian values of Indian Society.

Section 133A of the Act, authorises Income Tax Officers to make surveys of marriage ceremonies and other ostentatious social functions and to detect use of unaccounted money. So far, this provision has not been sufficiently used to make a visible impact on the curbing of wasteful expenditure.

**The CBDT vide instruction dated 10th March 2003 Instructing officers to focus and concentrate on collecting of evidence of income which is not disclosed or is not likely to be disclosed rather than record an unsubstantiated statement. Vide no F No 286/2/2003/IT ( Inv)**

To
All Chief Commissioner of Income Tax &
Aii Directors General of Income Tax

**Subject: Confession of additional Income During the course of search and seizure and survey operations**

Instances have been come to the notice of the Board where assessee have claimed what 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 assesses while filing returns of income. In these circumstances, confessions during the 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 lead to information on what has not been disclosed or is not likely to be disclosed before the Income Tax Department. Similarly, while recording
statement during the search, seizure and survey operations no attempt should be made to obtain confession as to the undisclosed income. Any action contrary shall be viewed adversely.

Further, in respect of pending assessment proceedings also, assessing officers should rely upon the evidence/materials gathered during the course of search, seizure and survey operations or thereafter while framing the relevant assessment orders.

Yours faithfully,

Sd/-

(S.R. Mahapatra)
Under Secretary (Inv.II)

SURVEY STATISTICS

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