

**“COMPARATIVE PROVISIONS OF SEARCH UNDER INCOME TAX AND GOODS
AND SERVICE TAX LAWS”**

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Abstract

The word 'Search' is not defined under Income Tax Act, 1961 as well as Goods and Service Tax Act, 2017. However, in common parlance search means to look out, to seek or to find something the presence of which is suspected. Meaning of the term 'Search' can be noticed in the decision of Kerala High Court¹ wherein it was mentioned that, "the word 'Search', considering the object and scope of the section, should not be given a far too technical meaning. The word 'Search' has varied meanings and it should be given the general meaning 'to look for' or 'seek'."

Income Tax Act contains provisions pertaining to search and survey whereas the Goods and Service Tax Act provides for search and Inspection. Inspection is not search; these are two different proceedings and inspection is a permitted method to assess a taxpayer's premises, but only as an anti- evasion measure as laid down in the law in the form of 'pre-requisite' to invoke the exceptional powers allowed.

The study delves into an analysis of the provisions of search and inspection in both Income Tax and GST laws.

1. Introduction:

The provisions for search, inspection and seizure and designed to detect tax evasion and are exercised only in exceptional circumstances to protect the interests of the Revenue. Search operations are probing exercises on the basis of information with the department to find undisclosed income and transactions which are not declared in discharge of the tax obligations. Enough checks and balances are inherently built in the statutes to ensure that the power to search is not exercised arbitrarily. The objective of Search can be understood from the decision of the Supreme Court² wherein it was held that, Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly

¹ *Assainar vs. ITO*, 101 ITR 854¹

² *ITO vs. Seth Brothers*, 74 ITR 836

in accordance with the law and only for the purposes for which the law authorizes it to be exercised.'

A search action can be authorized for the reasons provided under section 132 of the Income Tax Act, 1961 which is a procedural section. The constitutional validity of this provision is upheld by the Supreme Court³.

Under the Income Tax law, power to search is as per the provisions of sub-section (1) of Section 132 by a proper officer in consequence of information in his possession, where he has to reason to believe that;

- a) Any person to whom summons is issued Any person to whom summons is issued 142(1) was issued has failed to produce the requisite books/ documents
- b) Any person to whom summons or notice under section 142(1) might be issued would not produce the books/ documents useful for IT proceedings
- c) Any person is in possession of money, bullion, jewellery or other valuable article and it represents either wholly or partly, income or property which has not been, or would not be, disclosed for the purposes of the Act.

It is trite law that mere information from CBI, ED and other agencies, that a particular person possesses money and according to such agencies the money is undisclosed, does not constitute 'information' for the purpose of search.

The term 'Information' has not been defined in the Act. Reference may be had to the decision of Supreme Court⁴ wherein the Court had observed that, "information" means instruction or knowledge concerning (a) facts or particulars, or (b) law. By its inherent nature, a fact has concrete existence. It influences the determination of an issue by the mere circumstance of its relevance. It requires no further authority to make it significant.

Powers of Search under GST Act are prescribed under Section 67(2) of CGST Act, 2017

Search can be undertaken under Goods and Service Tax Act either,

- 1) Pursuant to an Inspection u/s 67(1) where the proper officer has reason to believe that:
 - i) The taxable person has suppressed any transaction of supply of goods or services r stock of goods in hand
 - ii) Has claimed excess Input credit in excess of his entitlement under this Act
 - iii) Has indulged in activities in contravention of the Act/ Rules
 - iv) Any Transporter, Owner of warehouse godown or any other place of keeping goods for escaping payment of tax or maintain accounts in a manner to evade tax.
- ‘OR’
- 2) When Proper officer has 'reason to believe' that any goods liable to confiscation or any documents or books or things are secreted in any place

Who can Authorize Search?

³ *Pooran Mal vs. Director of Inspection, 93 ITR 505*

⁴ *Indian & Eastern Newspaper Society vs. CIT, 119 ITR 996 (SC)*

The power to conduct search is to be exercised only upon authorization by an officer specified under the respective Statutes. It is not only that authorization should be by the competent authority, but it is on satisfaction of the authority that search warrant can be issued. Search warrant not issued by the competent officer would vitiate the search.

The following Officers are authorised to search under respective statutes:

Income Tax Act, 1961 132(1)	Goods & Services Tax Act, 2017-67(2)
Principal Director General, Director General, Principal Director, Director, Principal Chief Commissioner, Chief Commissioner, Chief Commissioner, Additional Director or Additional Commissioner or Joint Director or Joint Commissioner (To be empowered by Board to authorise search)	Joint Commissioner of SGST/CGST or a superior officer can order for a search

The powers for authorisation of search under respective statutes has been granted only to superior officers as mentioned supra to ensure that arbitrary actions cannot be undertaken and also to ensure that the officers will take actions based on the relevant information before them.

Reason to Believe

Since search is a serious invasion upon the rights, privacy and freedom of the taxpayer, recording of reason to believe has been considered to be the most valuable safeguard on the exercise of the powers by the officers concerned.

The expression "reason to believe" has been defined under Section 26 of the Indian Penal Code, 1860 as "A person is said to have 'reason to believe' a thing, if he has sufficient cause to believe that thing but not otherwise."

The term 'reason to believe' requires more ingredients than mere doubt or suspicion. It suggests that the belief must be that of an honest and reasonable person based upon reasonable grounds and the officer may Act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour.

The words 'reason to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and the ITO may Act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The sufficiency of the reasons for the belief cannot be investigated by the Supreme Court⁵

⁵ *Sheo Nath Singh vs. Appellate Asst. CIT, 82 ITR 147 (SC)*

Disclosure of Reason to Believe

There is no specific provision under GST laws to provide reason to believe. However, at present under the Income Tax law, after amendment by Finance Act, 2017, reason to believe cannot be disclosed to any authority including the ITAT. Prior to amendment by Finance Act, 2017, the taxpayers could seek the copy of the reason to believe as recorded by the authority as held in the decision of Karnataka High Court.⁶

However, such reasons may have to be placed before the High Court in the event of challenge to formation of the belief.⁷

Warrant of Authorisation

Warrant of Authorisation is the inception of any search operation. Recording reasons for issue of warrant of authorisation for search is necessary under both the Statutes to ensure accountability

and responsibility and enable a proper judicial assessment of the decision taken by the officers.

Rule 112 of the IT Rules, 1962 prescribes Form 45 for warrant of authorization.

Rule 139 of CGST Rules prescribes Form GST INS- 01 as an authorisation form to conduct inspection/search.

it is mandated that the form shall be shown to the person incharge of the premises to be searched and his/her signature with date and time shall be obtained.

Presumption during Search

As per Section 132(4A) of the IT Act, 1961

Where any books, documents, money, bullion, jewellery or other valuable article is found in the possession/ control of any person in the course of a search, it may be presumed –

- I. that such books or assets found belong to such person;
- II. that the contents of such books and documents are true;
- III. that the signature and every other part of such books and documents are in the handwriting of a particular person or signed by such person

There is no similar provision akin to Section 132(4) under GST Act. Presumption in GST Act is limited to only 'documents' as found in Section 144 of the CGST Act, 2017.

Assistance to the authorised officer

Section 132(2) of the IT Act, 1961 provides that during the course of search, the authorised officer may requisition the services of any police officer or any officer of the Central Government, to

⁶ *C Ramaiah Reddy vs. ACIT, 339 ITR 210*

⁷ *PCIT vs. Laljibhai Kanjibhai Mandalia, 446 ITR 18 (SC)*

assist him for any of the actions required to be performed during the course of such search, and it shall be the duty of such officer to comply.

Due to the increased use of technology and digitisation in every aspect, the procedure for search & seizure has become complex. Services of other professionals are also required in most of the cases, due to typical nature of the operations. Therefore Section 132 was amended w.e.f. 01.04.2023 to empower the authorised officer to take assistance of any other person or entity duly approved in accordance with the procedure prescribed.

Section 72 of the GST Act empowers all officers of Police, Railways, Customs, and those officers engaged in the collection of land revenue including village officers, officers of State tax and officers of Union territory tax to assist the proper officers in the implementation of this Act. The Government may, also empower and require any other class of officers to assist the proper officers in the implementation of this Act when called upon to do so by the Commissioner.

Provisional attachment of property

The power of provisional attachment is draconian in nature. By utilizing the expression 'it is necessary so to do' the legislature has shown an intent that an attachment is authorized not merely because it is expedient to do so (or profitable or practicable for the revenue to do so) but because it is necessary to do so in order to protect interest of the revenue. It was widely reported that assesseees were indulging in alienation of assets or transfer of assets post the search and before conclusion of assessment because the liability was not crystalized. This was resulting in loss of revenue to the exchequer when the dues could not be recovered in the normal course and they also would not have recourse to the properties of the assessee.

To ensure that the interest of the revenue is protected and to attach the properties during the course of search, Finance Act, 2017 among other tax measures had introduced sub-sections 9B and 9C to Section 132 of the IT Act, 1961 to provide that the authorized officer during the course of search or within a period of sixty days from the date on which the last of the authorisations for search was executed, may provisionally attach any property belonging to the assessee for the purpose of protecting interest of the revenue.

The provisional attachment so made, shall be valid only for 6 months. Section 83 of the CGST Act, 2017 – Attachment of property (including bank account), when interests of Revenue is at risk, is empowered under section 83 of the CGST Act, 2017 which includes proceedings under section 67. There is inherent difference between provisional attachment of property under Section 83, Seizure of goods under Section 67(2), Recovery under section 79 and Confiscation under section 130.

Provisional attachment under GST can be done only on initiation of proceedings. Section 83(2) states that every provisional attachment ordered under section 83(1) shall cease to have effect after the expiry of 1 year from the date of the order. Therefore provisional attachment must not continue beyond one year and property attached must be released on expiry of this time.

The continuation of provisional order after the expiration of statutory limit shall violate Article 14, 19(1)(g) and 300A of the Constitution of India as held by Telangana High Court⁸

Seizure

The legal definition of the word “seizure” has been provided in P Ramanatha Aiyar's Advanced Law Lexicon, 5th Edition, Volume 4 - Page No. 4715 as “taking possession of property by an officer under legal process.”

Under the Income Tax Act, the stock-in-trade of the business found as a result of search shall not be seized but the officer shall make a note or inventory of such stock-in-trade of the business. Whereas, under the GST Act, stock-in-trade of the business can be seized in accordance with the provisions of the Act.

Release of Seized Goods on Provisional Basis

Conclusion of search proceedings is a prerequisite for provisional release because after search proceedings are concluded, Form GST INS-02 will be issued containing list of seized articles. Section 67(6) of the CGST Act,

2017 provides that the seized goods can be released on a provisional basis against a bond for the value of the goods in FORM GST INS-04. Provisional release is against own assurance that the seized goods will be produced when called for by the Authorized Officer. The owner must also furnish a security in the form of a bank guarantee for the amount due (applicable tax, interest and penalty payable). If the owner fails to produce the provisionally released goods at the appointed date and place then the security will be encashed and adjusted against the amount due — Rule 140(2)

There is no such specific provision for release of seized goods on provisional basis under the Income Tax Act, 1961.

Code of Criminal Procedure

The provisions of the Code of Criminal Procedure, 1973, relating to searches and seizure shall apply, so far as may be, to searches and seizure under Section 132(13) of the IT Act, 1961 and Section 67(10) of the CGST Act, 2017. Usage of words 'so far as may be' in the section suggests that the Provisions contained in the Code should not be applied entirely and no strict compliance with provisions of Section 165 Code of Criminal Procedure is called for when a search is conducted with reference to specific provisions of the Act.

Provisions of special law will prevail over the provision of the Code of Criminal Procedure in case of inconsistency.

⁸ *KMC Constructions Ltd. vs. PCCT, 124 taxmann.com 276.*

Conclusion

In this paper, it has been the endeavour to lucidly explain the nuances of the relevant provisions with a view to initiate discussions / debate. Each case would have its own nuances and therefore requires in depth analysis on the facts on hand to derive the applicability of the provisions.