

# **SURVEY UNDER INCOME TAX ACT WITH PRACTICAL ASPECTS**

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31/08/2015

## **INTRODUCTION**

Survey means collection of facts and information. However, Survey has not been defined in Income Tax Act.

Unlike searches, the Income-tax Act, 1961 is silent on the circumstances under which a survey can be conducted. Thus the conducting of survey is dependent on the discretion of the Department. The objective of survey is to extract information. Thus, where the department is in need of information, a survey may be conducted.

## **TYPES OF SURVEY**

Survey operations are conducted by various income tax authorities such as assessing officers, officers of investigation wing, officers of TDS wing etc. Although surveys are made under section 133A by all such officers but still there is difference in its impact, process and power.

1) Survey by Assessing Officer:- The assessing officers normally make surveys either for collection of higher advance tax or on the basis of some irregularity in Tax Returns of the assessee. Such surveys are made by the jurisdictional assessing officers on their own assessee.

2) Survey by Investigation Wing:- The surveys are also made by officers of Investigation wing. Such Surveys are difficult to deal because the officers of the investigation wing have vast powers, vast infrastructure and vast experience.

Generally, the purpose of the survey by investigation wing is different than the survey by the assessing officer. There are various reasons for which the investigation wing conducts survey –

a) Consequential to search - When any search is conducted, so many places of the group are to be covered and it is either not required or it is not possible to issue warrant for all the places, therefore, survey operation is made on some of such places.

In connection with search operation on a group, some other persons like business associates, auditors, customers, suppliers are to be covered for collecting certain specific information and therefore, survey is conducted on such persons. All such surveys are called consequential surveys.

b) On the basis of any complaint - Surveys are regularly made on the basis of complaints. Such complaints are made by staff, relatives, competitors, etc. On the basis of complaints, the officers collect some more information related to tax evasion and if they are satisfied, such surveys are conducted. These complaint letters are called Tax Evasion Petitions.

c) For verification of particular transaction - Some times for verification of certain transactions, survey can be conducted on the assessee.

d) On own information of concealment - The investigation wing keep full watch on business community and professional community. They have own sources of collecting details of

parties on whom they want to make survey, Such as newspapers, websites, department inspectors.

e) On information from assessment wing - Sometimes the assessing officers also sends information to the investigation wing for conducting survey on assessees.

f) For verification of lavish function expenditure - Surveys are also made for verification of lavish functions u/s 133(5). These surveys are not made on the date of function. **CIRCULAR NO 179 dtd 30-09-1975** related to Lavish expenses states that survey should be made after function is over. Further, the assessing officers are not empowered to conduct survey on their own assessee u/s 133(5). Such surveys can only be conducted by the officers of the investigation wing.

3) TDS Wing:- Surveys are commonly made by TDS wing for verification of TDS or for non-payment of TDS etc. Such surveys are also very common nowadays. Recently, an amendment has been made in the finance bill 2014, that the income tax authority shall not impound and retain in his custody any books of account or documents inspected by him or make an inventory of any cash, stock or other valuables and hence no action under clause (ia) or clause (ii) under subsection (3) can be taken by him. It is a welcome amendment.

4) Door-2-door survey:- The provisions of Door-to-Door Survey are contained in section 133B of the Income-tax Act, 1961. The section reads as "Power to collect certain information". Such a survey takes place when the survey party visits a particular market and goes to each and every shop of the locality to find those persons who are not assessed to income tax inspite of having income above taxable limit. Information is collected in a prescribed form (Form 45D). The survey procedure is simple and the proceedings are not devastating. It is a normal form containing basic particulars.

### **TRANSPARENCY**

As per CBDT instruction, for bringing transparency in survey operations and obviate the possibility of any grievance to the taxpayers, it is decided that henceforth:

I. Survey teams visiting taxpayer's premises under the provisions of section 133A of the Income tax Act will, before the commencement of survey proceedings, provide to the taxpayer the names, designations & contact numbers of their Chief Commissioner, Commissioner & Additional/Joint Commissioner of Income Tax.

II. Inform the taxpayer that in case of any grievance or otherwise, he is free to contact Chief Commissioner/Commissioner/Addl Commissioner/Joint Commissioner of Income Tax. In order to give effect to the above instruction, survey parties will invariably carry in their survey kit names, designations & contact numbers of their CCIT/CIT/Addl/JCIT in the proforma provided, on which, as a proof of implementation of above directions, signature of the taxpayer surveyed would be obtained. The said proforma, duly signed by the taxpayer, would be submitted back to the CIT, to be preserved as permanent record.

### **DAY TIME AND PLACE OF SURVEY**

A survey can be made on any working day, during business hours and at business place. Survey cannot be made on holidays. It cannot be made in residence, but it can be made on Offices, Godowns and other business establishment. If the business hours of the assessee starts from 7PM the survey can be commenced after 7PM. However, during course of survey, it is found that stock or cash of the assessee is lying in his residence, the survey party can enter in to residence of the assessee and can conduct survey. However, in case of other places, surveys can be conducted only during sunrise to sunset.

### **CONVERSION OF SURVEY IN TO SEARCH**

A survey u/s 133A can be converted into search action u/s 132 of the Income Tax Act, 1961, mainly under following situations –

- 1) When any vital information related to undisclosed income is found during course of survey.
- 2) When huge unaccounted cash or other valuable assets are found.
- 3) For non-compliance of notice u/s 131 of the Income Tax Act in connection with survey.
- 4) For non - cooperation during survey.

If during the survey operation, information comes to the department which leads to formation of a reasonable belief that the conditions authorizing action u/s 132(1) exist, the department has right to take action u/s 132 — **Vinod Goel v. UOI [2001] 252 ITR 29/118 Taxman 690 (P&H)**.

### **CAN CA OR AUDITOR BE COVERED IN SURVEY?**

One may note a very important **CBDT Instruction No. 7/2003 dtd. 30.07.2003**, whereby it was directed that search cannot be conducted against professionals of excellence unless there is compelling evidence and confirmation of substantial tax evasion. Rigours of this Instruction can be applied to survey also.

Further, a direct **CBDT Circular No. 7D dtd. 03.05.1967** stated that an IT-authority shall not enter the premises of the CA u/s 133A for inspecting the books of account of his clients. It may be noted that when the circular was issued section 133A(1) did not contain explanation whereby business premises could be extended to other places where books/records are kept. However, the provision was amended subsequently to cover such other places also where books/records could be kept. It is pertinent to note that even after the amendment, in **U.K. Mahapatra & Co. 221 CTR 328 (Orissa)**, the said Circular was considered and relied on.

Further, in case survey is conducted at premises of CA, it has to be limited only to purpose for which survey has been extended in respect of which he has been surveyed. In **DIT (Inv.) v. S. R. Batliboi & Co. & Ors. (2009) 31 DTR 187 / 227 CTR 238 / (2010) 186 Taxman 350 (SC)** it has been held that it was open to the department to copy the data relating to the specified three entities of the assessee group from the two laptops which were seized from the possession of auditor of firm.

### **RIGHTS OF SURVEY PARTY**

The survey party can require the owner, employee or any other person attending the business or helping in carrying on of business at the time of survey-

- (a) To afford necessary facilities to inspect books of account/other documents.
- (b) To afford necessary facility to check or verify cash, stock or other valuable articles or things, which may be found at the place of survey.
- (c) To furnish such information as may be required in relation to any matter which may be useful for, or relevant to, any proceeding under the Act.
- (d) Further, the I-T Authority may:-
  - i) Place marks of identification on books/records.
  - ii) Obtain copies of books/records.
  - iii) Impound and retain books/records in his custody.
  - iv) Make inventory of any cash, stock or other valuable article or thing.
  - v) Record statement of any person.

However, the Income tax authority has no right –

1. To Record statement on oath, unless assessee does not co-operate.
2. To Impound cash, stock or any asset.
3. To Break-open the locks.

4. To Detain any person.

### **DISCLOSURE OF UNDISCLOSED INCOME**

There is no provision in the income tax act, in case of survey for making disclosure of undisclosed income. There is no immunity from penalty proceedings if disclosure of undisclosed income is made during survey for any financial year. Whether the assessee during course of survey makes any disclosure of his undisclosed income for any earlier year or not, he is liable for penalty u/s 271C of the Income Tax Act if any undisclosed income is found from the impounded documents during course of survey.

Disclosure in survey related to earlier years should be made on the basis of incriminating documents impounded during survey and not on the basis of entries made in regular books of accounts.

It is strange that inspite of various CBDT circulars, the income tax authorities are regularly insisting for disclosure of undisclosed income during survey operation and the assesses even having no immunity makes disclosure of undisclosed income. The assesses also do not wait to verify the impounded documents and make confessional statement in respect of undisclosed income on the spot. Later on, such confessional statement in respect of undisclosed income are retracted by the assesseees. The income tax authorities should not insist the assesseees for such disclosure of undisclosed income and the senior officers should also not allow the subordinate officers to obtain such confessional statement for the sake of admitting undisclosed income by the assesseees.

### **WORKING OF UNDISCLOSED INCOME**

After obtaining the Xerox copies of the impounded documents and print out from CD or pen drives, the working of undisclosed amount is made and is furnished to the concerned authority. The assessee should be very careful while doing working of impounded documents. He should go through each and every noting or entry being made in the impounded documents and he should also verify whether such entries are duly recorded in the regular books of accounts or not.

### **RECORDING OF STATEMENTS**

During course of survey, a statement is recorded u/s 133A of the persons present at the premises. The statement u/s 133A cannot be recorded on oath. In case of non cooperation by the assessee during survey operation, the statement can be recorded u/s 131 of the Income Tax Act. But as a matter of practice, notice u/s 131 is served on the assessee during survey operation and the statement is again recorded u/s 131 a few days after the date of survey operation.

As per Oaths Act, 1969, a statement should be recorded in the language which the person from whom the deposition is taken understands. If it is not possible to do so, it should be explained to him in the language known to him.

Officers of the department generally enforce/were enforcing confession by assessee during survey proceedings. It was stated by Finance Minister while presenting the Union Budget, 2003, that no coercive action shall be taken to obtain confession. In this regard **Circular dtd 10.03.2003** was also issued stating that no confession shall be obtained. If confession is obtained, it should be taken adversely.

### **RETRACTION OF STATEMENT OF UNDISCLOSED INCOME**

A statement recorded by the income tax authority during course of survey operation can be retracted subsequently. Retraction of statement depends on facts of each case. However, Burden of proof is on the person who retracts the statement. The retracted statement must be substantially corroborated by other independent and cogent evidences, which would lend

adequate assurance to the court that it may seek to rely there upon. The initial burden to prove that the confession was voluntary in nature would be on the Department. The burden is on the prosecution to show that the confession is voluntary in nature and not obtained as an outcome of threat, etc. if the same is to be relied upon solely for the purpose of securing a conviction.

With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.

The statement made in survey u/s 133A has not evidentiary value in the eye of law as this statement is not made under oath as held in **Paul Mathews & Sons (2003) 263 ITR 101 (Ker)**. It was held that statement during survey does not give the same status of "evidence". Reference is also made in regard to following decisions –

**ASHOK MANILAL THAKKAR V ASST .CIT (2005) 279 ITR (AT) 143**  
**CIT V KADER KHAN SON (2008) 300 ITR 157 MAD**

Further, in various rulings it has been held that merely on basis of statement/confession during survey, addition cannot be made. There has to be some corroborative evidence. Addition made to Assessee's income on basis of admission during survey without any supportive material is not sustainable **Ashok Manilal Thakkar vs ACIT – [2005] 97 ITD 361(AHD)**.

It may be noted that statement during survey although held not to have evidentiary value, yet has persuasive value. It cannot be totally ignored.

In **Kailash Manhar Lal chooksi 174 Taxman 466 Gujarat high court**, it has been held that statement taken at mid night can be retracted if it is proved that it was taken at midnight.

### **PRESENCE OF AUTHORIZED REPRESENTATIVE**

Whether an authorized representative, an Advocate or a Chartered Accountant is allowed to be present during the survey operation?

The Income Tax Act, 1961 does not mention about the presence of an Advocate or a Chartered Accountant during such action. However, as a matter of practice, normally during survey, authorized representatives are allowed but during search action they are not allowed to be present. Even, if they are allowed, in reality, they should not interfere in the proceedings otherwise, they can be asked to leave the place during such operation.

### **CONCLUSION**

One should not panic when survey party enters the business premises. One thing should be kept in mind that the income tax authorities don't have any personal grudges against the assessee. The authorities do their work and they should be cooperated. The presence of a tax professional can be of great help to both the assessee and the authorities. Non-cooperation with the survey party may result in adverse effect whereas the cooperation with the authorities might result in wining cooperation from the officers of the department.