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Is Section 132(4A) a free getaway pass for the assessees?: An analysis of Allahabad High Court ruling in *Ajay Gupta v. CIT*

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Introduction

Search under Section 132 of the Income-tax Act, 1961 ("IT Act") is conducted to unearth cases of assessees with undisclosed income and is always considered as invasion of privacy by the assessees on whom it is conducted. The assessees also fear search because information found during search will not only affect that assessment year but would also empower Authorities to conduct Assessment/Reassessment proceedings for preceding six years.

Section 132(4A), empowers an Assessing Officer to presume that anything that is found in searched premises belongs to the occupant of such premises. However, this power to presume is not absolute in the hands of the Assessing Officer, in that the presumption is rebuttable. This Article attempts to elucidate the scope and extent of the presumption contained in Section 132(4A) in light of a recent judgement of Allahabad High Court in the case *Ajay Gupta* v. *Commissioner of Income Tax*[1].

Section 132(4A) extracted[2]

> *"(4A) 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, it may be presumed-*
>
> *(i) that such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;*
>
> *(ii) that the contents of such books of account and other documents are true; and*
>
> *(iii) 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."*

Before insertion of this sub-section, the onus of proving that the books of account, other documents, money, bullion, jewellery, etc. found in the possession or control of a person in the course of a search belonged to that person, was on the Income-tax Department. After insertion of sub-section 4A, the expression "may be presumed" enables an Assessing Officer to raise a rebuttable presumption.

[1] *Ajay Gupta v. Commissioner of Income Tax*, TS-732-HC-2019 (All.).
[2] Inserted by Taxation Law (Amendment) Act, 1975 with effect from 01-10-1975.

In *Shorter Oxford English Dictionary*, it is mentioned that, in law 'presume' means 'to take as proved until evidence to the contrary is forthcoming'. Therefore, it is clear that the onus is on the person searched to rebut the presumption and prove it otherwise. Now the question that arises for consideration is whether mere denial that the documents found during search do not belong to an assessee can be considered as a possible rebuttal to prove the presumption wrong and whether the use of the phrase 'may be presumed' plants a discretion on the Assessing Officer to invoke the presumption only based on evidence. Precisely this issue was considered in *Ajay Gupta* case.

Facts and decision in Ajay Gupta v. CIT

In this case, an assessment was completed for a block period under Section 158BC based on search conducted in the residential premises and bank locker of the assessee, subsequent to which some jewellery was seized. Statements were also recorded from the assessee during the search proceedings. Additions were made by the AO to the total income of the assessee based on two papers which were found during search. The matter travelled up to the High Court.

The High Court, in this case, without considering any other factors, arrived at a finding by emphasizing only on the expression "may be presumed" provided in the Section 132(4A). The Court held that the word used in the section is "may" and not "shall" thereby making the presumption not absolute unless supported by corroborative evidence. While the Court in its judgement did mention assessee's statement denying any knowledge about the documents found, onus was cast only on the department for not corroborating the evidences found during the search proceedings to the assessee, thereby making the presumption not eligible for addition.

Analysis of the judgement

The expression 'may be presumed' used in Section 132(4A), though not defined in the IT Act, can be examined from the point of view of evidence law as held by the Supreme Court in the case of *Chuharmal* v. *CIT*[3]. Section 4 of the Evidence Act, 1872 provides that whenever the expression "may presume" is provided in a statute, the Court may regard such facts as proved unless and until it is disproved, or may call proof of it. In the case of *Chuharmal*, the Apex Court held that the wrist watches in possession of assessee which were seized during search proceedings under the Customs Act, represented concealed income of the assessee. In arriving at the conclusion, reliance was placed on Section 110 of the Evidence Act which provides that where a person is found to be in possession of anything, the onus of proving that he was not the owner lies on such person. The Apex Court opined that while rigours of rules of evidence would not apply to the IT Act, the principles of Evidence Act may be invoked for proceedings under the IT Act. Thus, to state that the phrase 'may be presumed' casts onus on the Department to demonstrate why the presumption can be invoked, seems to be contrary to the law laid down by the Apex Court.

The next question is, where the Revenue relies on the presumption under Section 132(4A) to make additions to total income, would a mere statement of denial, as was given by the assessee in *Ajay Gupta*, be sufficient rebuttal to the said presumption? Though it is an accepted fact that rebuttal to the presumptions will vary from case to case, the question is what should be the level of onus an Assessee must discharge to disprove the presumption?

It is pertinent to note that many Courts have ruled in favour of the assessee after taking into

[3] *Chuharmal v. CIT*, (1988) 172 ITR 250 (SC).

consideration the plausible explanations given by the assessee rebutting the presumption created against them. For instance, in the case of *CIT* v. *Raj Pal Singh Ram*[4], a paper was seized from the respondent's business premises which contained details of the amount advanced to various persons and the interest earned thereon. It also contained the dates along with the amounts and therefore, the Assessing Officer had added the principal amount as also the interest as income from undisclosed sources based on the presumption under Section 132(4A) of the IT Act. The Tribunal, on considering the detailed explanations given by the assessee rebutting the presumptions, was however satisfied that the assessee had discharged his burden in proving that there was no connect between him and the documents found in the searched premises and that both the Assessing Officer and the first appellate authority were at fault in making the addition without considering the explanations made by the assessee.

In a judgement of the Delhi High Court in the case of *CIT* v. *Naresh Kumar Aggarwala*[5], some documents with respect to purchase of property for a consideration was found in a search conducted and a presumption was framed by the Assessing Officer under Section 132(4A) of the IT Act. In this case, the Delhi High Court ruled in favour of the department distinguishing the Allahabad High Court judgement in the case of *Raj Pal Singh Ram* on the ground that unlike in the latter's case, the assessee in the present case did not make any effort to rebut the presumption by giving plausible explanation. The Court further held that a letter submitted by the assessee without any proper explanation to disprove the presumption cannot be considered as reasonable and therefore, upheld the addition made by the Assessing Officer, thus reversing the order of the Tribunal.

This being the position, the author is of the humble opinion that the view taken by the Allahabad High Court in *Ajay Gupta* may not be correct and is likely to be challenged in due course.

This view taken by the Court seems to put forth that the onus to prove that the documents seized belongs to the assessee is on the department and not *vice versa*. This may not be the correct position for the reason that the presumption provided in the statute is a rebuttable presumption, to be rebutted by the assessee. It is for the assessee to come forward and explain as to why the documents found during search should not be associated with him/her. While the assessee did mention in the statement which was recorded by the Investigating officer that he had no knowledge about the papers or the names mentioned in the papers, this cannot be considered as a plausible rebuttal to the presumption formed by the Assessing Officer.

The author is of the view that the burden to prove will be shifted to the department only when an assessee has proven beyond doubt that the presumptions framed against him are incorrect. A mere statement of denial will not shift the onus.

Conclusion

If the view taken by the Allahabad High Court is to be accepted, then it will plant a seed in every assessee's mind that mere denial of knowledge of the documents found during search without any reasonable explanation to deny the same would be sufficient to obtain a free pass from the addition being made unless proven by the department. If this being the case, the purpose of inserting sub-section 4A into the Act will fail since the onus to prove that the document belongs to the person searched would again fall on the department as it existed prior to the amendment.

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[4] *CIT v. Raj Pal Singh Ram*, [2007] 288 ITR 498 (All.).
[5] *CIT v. Naresh Kumar Aggarwala*, [2011] 331 ITR 510 (Delhi).

Circulars

Direct Tax Vivad se Vishwas Act, 2020 – Clarifications

Circular No. 7 of 2020 dated 04-03-2020 was issued to clarify certain queries raised after the introduction of Direct Tax Vivad se Vishwas Bill, 2020, and was subject to the approval and passing of the Bill. After the enactment of the Direct Tax Vivad se Vishwas Act, 2020, CBDT has issued Circular No. 9, dated 22-04-2020, reissuing the questions captured in earlier circular with certain modifications. Other than modifications like change of reference to Bill to Act, or from 'clause' to 'section', etc., the new Circular clarifies that where only notice for initiation of prosecution has been issued without prosecution being instituted, the assessee is eligible to file declaration under the new Act. The Circular further states that however, where the prosecution has been instituted with respect to an assessment year, the assessee is not eligible to file declaration for that assessment year, unless the prosecution is compounded before filing the declaration.

Further, as per Corrigendum dated 27-04-2020, in the answer to question numbers 26, 28, 29 and 41 (all relating to 'disputed tax' calculation and payment), the figures, letters and word '31st March, 2020', wherever they occur, are to be read as '30th June, 2020'.

Reporting requirement under clauses 30C and 44 of Tax Audit Report in Form 3CD deferred till 31-03-2021

Section 44AB of the IT Act read with Rule 6G of the IT Rules requires specified persons to furnish the Tax Audit Report along with the prescribed particulars in Form No. 3CD. The reporting under clause 30C (Reporting of GAAR transactions) and clause 44 (Reporting of GST transactions) of the Tax Audit Report was extended to 31-03-2020 *vide* Circular No. 9/2019. Due to the difficulty in implementation of reporting requirements under clause 30C and clause 44 of the Form No. 3CD in view of COV1D-19, CBDT has decided that the reporting under clause 30C and clause 44 of the Tax Audit Report shall be kept in abeyance till 31-03-2021. Circular No. 10 of 2020, dated 24-04-2020 has been issued for the purpose.

Residency under Section 6 of Income Tax Act, for 2019-20, clarified

CBDT has clarified on residential status of individuals who had come on a visit to India during the previous year 2019-20 for a particular duration and intended to leave India before the end of previous year for maintaining their status as a non-resident or not ordinarily resident in India, but were forced to stay in India after declaration of lockdown and suspension of international flights due to COVID-19. According to Circular No. 11 of 2020, dated 08-05-2020, for determining the residential status under Section 6 of the Income Tax Act, during the previous year 2019-20 in respect of an individual who has come to India on a visit before 22-03-2020 and:

- has been unable to leave India on or before 31-03-2020, his period of stay in India from 22-03-2020 to 31-03-2020 shall not be taken into account; or
- has been quarantined in India on account of COVID-19 on or after 01-03-2020 and has departed on an

evacuation flight on or before 31-03-2020 or has been unable to leave India on or before 31-03-2020, his period of stay from the beginning of his quarantine to his date of departure or 31-03-2020, shall not be taken into account; or

- has departed on an evacuation flight on or before 31-03-2020, his period of stay in India from 22-03-2020 to his date of departure shall not be taken into account.

Ratio Decidendi

Payments to Foreign Cricket Boards, linked with matches in India, liable to TDS under Section 194E – Obligation not affected by DTAA

The assessee, PAK-INDO-LANKA Joint Management Committee ('PILCOM'), was formed by the Cricket Control Boards/Associations of three countries viz. Pakistan, India and Sri Lanka, for the purpose of conducting the World Cup Cricket tournament for the year 1996 in these three countries. In order to facilitate the payments, PILCOM opened two bank accounts in London through which it made payments to International Cricket Council as well as to the Cricket Council Boards/Associations of its member countries. On an enquiry, the Assessing Officer concluded that such payments were taxable under Section 115BBA of the Income Tax Act and thus, tax was deductible under Section 194E. PILCOM was accordingly treated as 'assessee-in-default' for non-deduction of tax at source.

The Supreme Court in this regard observed that the cricket teams of such associations played matches in India and thus, participated in the event in India. It held that though the payments were described as guarantee money, they were intrinsically linked with playing of matches in India, and therefore the income had arisen from a source in India, i.e. playing of cricket matches in India. The Court further observed that the expression 'in relation to' in Section 115BBA(1)(b) emphasized the connection between the game or sport played in India on one hand and the guarantee money paid or payable to the non-resident sports association on the other. Therefore, once the connection was established, the liability under the provision was attracted. Accordingly, the Court held that the payments made to the non-resident sports associations represented their income which accrued or arose or was deemed to have accrued or arisen in India. Consequently, it was held that the assessee was liable to deduct tax at source in terms of Section 194E. The Court in this regard also upheld the view of the High Court that the obligation to deduct Tax at Source under said provision is not affected by the DTAA. [*PILCOM* v. *Commissioner* - TS-219-SC-2020 (SC)]

No addition to be made under Section 68 in hands of firm once source of contribution made by partner established

The assessee preferred an appeal against the order of the Tribunal upholding the addition made under Section 68 of the Income Tax Act for the assessment year 1999-2000. Such addition was

made on the ground that the assessee-firm was unable to prove the source of income of the partners who made deposits to its account. On an appeal to the High Court, the Allahabad High Court relied upon *CIT* v. *Taj Borewell,* [2007] 291 ITR 232 (Mad.) and held that the requirement under Section 68 (as it existed for the relevant AY) was to explain the source of credits in the books of accounts but not the source of the source i.e. source of the creditor. Relying on various decisions, the Court also noted that once the assessee-firm proves three things, namely, identity of the creditor; creditworthiness of the creditor; and genuineness of transaction in question, its onus is discharged. Noting that the partners, who were independently assessed to tax, had shown the agricultural income in their individual returns which were accepted by the department, it was held that the source of investment by the partners stood sufficiently explained. [*Kesharwani Sheetalaya Sahsaon* v. *Commissioner* - TS-220-HC-2020 (Allahabad)]

Taxability of loan given by an entity to its sister concern – Section 2(22)(e) when not invokable – Reassessment when not correct

In this case, the reassessment was initiated beyond a period of 4 years from the end of the concerned assessment year on the issue of taxability of loan given by an entity to its sister concern under Section 2(22)(e), in a scenario where the assessee held substantial interest in both the entities. On the Petition challenging such reassessment, the Gujarat High Court noted that the issue in relation to the deemed dividend was specifically addressed and responded to during the course of scrutiny assessment and held that when the primary facts are disclosed, it cannot be stated that there was a failure on the part of assessee to disclose true and full material facts. On merits, the Court relied on *CIT v. Mukunday K Shah,* [2007] 290 ITR 433 (SC) wherein it was held that unless there is income or benefit received by the shareholder, question of invoking Section 2(22)(e) will not arise. Quashing the reassessment proceedings, the Court noted that there was no information to the effect that loan extended by the lender company to its sister concern was made for the benefit of the assessee. [*Jayesh T Kotak* v. *DCIT* - TS-206-HC-2020 (Gujarat)]

Section 40(a)(ia) is attracted only if expenses are claimed in profit and loss account

One of the issues before the ITAT was regarding the addition made to the income of the assessee on account of non-deduction of tax at source on professional charges. As regards the applicability of Section 40(a)(ia) of the Income Tax Act, 1961, the Tribunal held that it is attracted only if the expenses are claimed in the profit and loss account and the assessee fails to deduct tax on such payments. In the given factual matrix, however, since the assessee had capitalised professional charges as part of fixed assets and disclosed the same as Work-in-Progress, the Tribunal deleted the addition made by the Assessing Officer. [*ACIT* v. *Conwood Medipharma Pvt. Ltd.* - TS-228-ITAT-2020 (Delhi-Tribunal)]

Guideline value of property - First proviso to Section 50C is retrospectively applicable

The assessee had adopted the guideline value as on the date of agreement to sell, for the purpose of computing the capital gain from the sale of his property. The Assessing Officer however rejected such computation and adopted the guideline value as on the date of registration of the sale deed. On an appeal, the first appellate authority relied on the first proviso to Section 50C

of the Income Tax Act and held that the guideline value on the date of agreement to sell must be adopted.

Aggrieved by the Order, the Revenue preferred an appeal before the ITAT Chennai wherein it was noted that once the parties enter into an agreement of sale of the property, the purchaser obtains the right to enforce the specific performance of the agreement. That is, the seller-assessee being the vendor cannot claim any more money above the agreed sale price merely because there is an increase in the guideline value. Accordingly, the Tribunal held that the first proviso to Section 50C was merely clarificatory in nature and was applicable retrospectively. The Assessing Officer was therefore directed to adopt the guideline value as on the date of the agreement. [*ACIT* v. *Vummidi Amarendran* - TS-205-ITAT-2020 (ITAT Chennai)]

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