



Analysing the Practice of Income Tax Authorities and Customs Authorities to Hand Over Seized Materials to One Another

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ABSTRACT

Tax officers, viz. Income Tax officers and Custom Officers have been observed to have been sharing the articles, documents seized in exercise of special provisions of Income Tax Act,1961 and Customs Act,1962. This practice of handing over materials seized under special Acts has been going on in the name of 'Inter-Departmental Co-operation'. It is in this light that this article analyses legality of this practice on legal touchstone.

Keywords: *Seizure; Income tax; Customs authorities; Power to requisition, Handing over seized item.*

1.0 Introduction¹

Let us think of a situation where the Income Tax Authorities have searched the shop of a goldsmith u/s 132(1) of the Income Tax Act,1961 which results among other things, significant number of foreign gold bars being seized by the said Authority after following appropriate legal procedures *i.e.* after making panchnama, making inventory of seized items etc. As the seized items also include foreign gold bars, the bars eventually get handed over to Customs Authorities by the Income Tax Authority. Now, the question arises whether or not such a practice of handing over of seized items (esp. when such items were seized in the exercise of provisions of a special statute) by one department to another is permissible in law. This situation isn't just a figment of one's imagination. In various undernoted cases² it has been observed that both the departments, *viz.* Customs Department and Income Tax Department, have handed over items seized by them to each other in the name of inter-departmental co-operation.

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It is in this light that this article endeavours to analyse this practice of the said departments to see whether such a practice can pass muster when tested on legal touchstones. Thus, the entire focus of this article would be to answer following two questions:

1. Can authorities under Customs Act, 1962 hand over the goods/documents etc. seized by them u/s 110 of the Act to Income Tax officials?
2. Can authorities under Income Tax Act, 1961 hand over the goods/documents etc. seized by them u/s 132 of the Act to Custom officers?

2.0 Procedure Relating to ‘Seizure’ Elucidated under Income Tax Act, 1961 and Customs Act, 1962

Under Income Tax Act, 1961, the procedure relating to search and seizure has been discussed u/s 132 of the Act, summary of which has been provided below:

Pr. Dir-Gen or Dir Gen or Pr. Dir or Prin Chief Comm or Chief Comm or PrincComm or Comm or Addl. Dir or Addl. Comm or Jt. Dir or Jt. Comm in consequence of information in his possession, has reason to believe that wrt any books of account (hereinafter will be referred as “BOA”) or other documents (hereinafter will be referred as “Doc” or money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing (hereinafter will be collectively referred as “valuable items”)—

- (i.) any person to whom a summons u/s 131 (1) or u/s 142(1) this Act was issued (wrt any BOA or other Doc) has omitted or failed to produce, or cause to be produced, or
- (ii.) any person to whom a summons u/s 131 (1) or u/s 142(1) this Act has been or might be issued will not, or would not, produce or cause to be produced, any BOA or Doc which will be useful for, or relevant to, any proceeding under this Act, or
- (iii) any person is in possession of valuable items which has not been, or would not be, disclosed for the purposes of this Act

Then, in such a case they may authorise an officer

- (a) enter and search any building, place, vessel, vehicle or aircraft (hereinafter will be collectively referred as “Place”) where he has reason to suspect that such BOA, other Doc, valuable items are kept;
- (b) search any person who has got out of, or is about to get into, or is in, such Place, if the authorised officer has reason to suspect that such person has secreted about his person any such BOA, other Doc, valuable items;

(c) seize any such such BOA, other Doc, valuable items found as a result of such search. However, where such valuable item forms stock-in-trade of the business the authorised officer shall make a note or inventory of such stock-in-trade.

In application of the said provision following pertinent legal points were developed by judicial authorities in the under-mentioned cases:

1. That the material relied upon for taking action u/s 132 must exist before the search and the officer cannot rely on material found during search or thereof.³

2. This section related to pre-assessment stage; and it cannot be invoked after an assessment is made to recover the tax due.⁴

3. The requirement of 'reason to believe' by the authority who is authorising such search/seizure/search & seizure on the basis of requisite 'information' has to be recorded in writing.⁵ And, in the absence of requisite information, a search cannot be authorised.⁶ Moreover, it would be interesting to note that Hon'ble Supreme Court in the case of *Union of India vs Ajit Jain*⁷ held that "mere information from CBI that cash was found in possession of an individual is not 'information' for the purpose of authorising a search."

4. This section cannot be resorted to for an inquisitorial search or for making a roving enquiry.⁸ It does not permit a sweeping search or seizure of document or thing irrespective of their relevancy to or usefulness for some proceeding under this Act.⁹

5. Under this provision, it is not necessary that warrant of authorisation should specify the particulars of the account books or documents¹⁰ or that before effecting such search and seizure the department should supply a copy of the warrant to the person concerned¹¹ or disclose material information or reasons to him.¹²

6. Under this section, the power of seizure cannot be exercised in respect of items which are in the custody of a department of the government e.g. Custom Authorities.¹³ Reason being, under this section, authorisation for search & seizure can only be given against those articles which absolutely belong to the person in possession of the same¹⁴ and the authorisation would be illegal if issued in the name of the person who do not have possession of the article, in respect of which it was issued.

(Note: This lacuna has now been plugged by Section 132A of the Act which empowers Income Tax Authorities to requisition assets and documents which are in custody of any officer or authority except for those items which are in custody of courts (this point will be covered later in this article in a detailed manner))

Thus, from the perusal of the above-mentioned decisions it is clear that Customs Officials having failed in successfully prosecuting a person under the Customs Act, 1962 or otherwise, cannot simply hand over the seized documents/ goods to Income Tax

Authorities to take appropriate actions under the Income Tax Act, 1961 for such a practice would be bad in law on the following counts:

i) As per the decision given by Hon'ble P&H High Court in *Tarsem Kumar vs. Commissioner of Income Tax and Ors.*¹⁵, where an amount is seized by the Customs authorities and the seizure is held illegal by the Court, Customs authorities are bound to return the money to the person entitled to it under the relevant provisions of Section 110 of the Customs Act, 1962. Therefore, Customs Authorities cannot deliver the goods to Income Tax Authorities instead of returning them to the entitled person.

ii) If appropriate Income Tax authority issues 'Search & Seizure Authorisation' u/s 132 based on the information passed by the Customs Officials, then, such an authorisation cannot be said to have been properly issued as it would not satisfy the requirement of "in consequence of information in his possession" mentioned u/s 132 of the Income Tax Act, 1961 in light of decision given by the Hon'ble Supreme Court in the case *Union of India vs Ajit Jain*¹⁶. Moreover, in such a situation seizure of goods cannot be said to have transpired from the possession of person who is mentioned u/s 132(1) of the Income Tax Act, 1961 as the possession of the seized goods was with Customs Department.¹⁷

iii) Remedy lies to Income Tax Department in the form of Section 132A of the Income Tax Act, 1961. A perusal of section 132A (1) shows that the jurisdiction of the authorising authority to authorise an officer to requisition assets which have been taken into custody by an officer or authority under any other law and thereafter to proceed to deal with the assets in the manner provided in sections 132 and 132B arises only where the authorising authority has 'in consequence of information in his possession, has reason to believe that' such assets represent either wholly or partly income or property which has not been or would not be disclosed for the 1961 Act by any person from whose possession or control such assets had been taken into custody by the officer or authority from whom these were to be requisitioned.¹⁸ Therefore, it becomes clear that as this provision also includes same terms, viz. "in consequence of information in his possession" and "has reason to believe" therefore, judicial tests given in the context of Section 132 of the Income Tax, 1961 will also be applicable here to determine the existence of these two.

Here, it will be pertinent to note the following findings of the different courts given in the context of S.132A:

a. In *Sohanlal Mundra v. Union of India*¹⁹, it was held that there must be some material which can be regarded as information which must exist on the file on the basis of which the authorising officer can have reason to believe that action under section 132A is called for, for any of the reasons mentioned in clauses (a), (b) and (c) of the aforesaid section

b. In *Sudarshan & Co. v. CIT*²⁰, it was held that section 132A casts a duty on the authorising authority to apply his mind and to proceed to take action under it, only when, the grounds for the same existed. Failure to carry out a duty imposed by the statute may afford grounds for interference by the courts

c. In *Shree Janki Solvent Extractions Ltd. v. DDIT*²¹, it was held that warrant of authorisation must record the satisfaction or formation of opinion in respect of the condition that the document will not or would not be produced if the summons are issued or might be issued, needless to say, it must also include other materials or reasons resorted for arriving at such belief. Absence of recording of such satisfaction would show that the order was issued mechanically and without any proper application of mind.

Under the Customs Act, 1962 procedure relating to 'seizure' has been set out in Section 110 of the Act, as per which, where proper officer under Customs Act, 1962 **has reason to believe that** any goods are liable to confiscation under the Act, he may seize such goods or may seize any documents or things which, in his opinion, will be useful for, or relevant to, any proceeding under the Act.

In application of the said provision following pertinent legal points were developed by judicial authorities in the under-mentioned cases:

1) Section 110 does not place any limitation as to the person from whose possession or time and the place at which the goods believed to be liable to confiscation can be seized. If there is reasonable belief that the goods are liable to confiscation, they can be seized from any person who has custody of them even if he has obtained such custody unlawfully. Therefore, it was held by the Hon'ble Bombay High Court in *Vasantal Ranchhodas Patel and Ors. vs. Union of India and Ors.*²² that the transfer of custody of goods, which were seized without any authority of law, by the officers of the Enforcement Directorate to the proper officer of Customs constitutes 'seizure' within the meaning of Section 110 of the Act. However, while holding so, Hon'ble High Court had clearly suggested that such proper officer has to record and mention the materials, which led him to entertain the belief that the goods are liable to confiscation under the Act for want of which whole proceedings would become non-est and thus, become liable to be dismissed.²³

2) In *P.K. Ghosh vs. Kailash Kumar Mazodia*²⁴, the Calcutta High Court held that if the Custom Authorities have some secret information regarding the articles to be seized, it will be a reasonable belief of the authorities to conduct the search and seizures. Further, while validating seizure conducted by the Custom Authority, the Calcutta High Court observed that "the suspicion arising out of the information hardened into reasonable belief and thereafter search and seizure followed." From this decision of the Calcutta HC

it is clear that any person can provide information to Customs Authority and Customs Authority may act upon that information; however, it must be remembered that under Customs Act seizure cannot be conducted on mere suspicion. On this point, following observation made by the Hon'ble Delhi High Court in *S.B. International vs. The Assistant Director, DRI & Ors.*²⁵ is worth noticing:

It is clear from the above that the Customs Act contains express provisions for conduct of search and seizure. In terms of Section 110(1) of the Customs Act, the proper officer has the power to seize goods provided he has "reason to believe" that the goods are liable for confiscation. The words "reason to believe" are material and the Customs Act does not contemplate seizure of goods only on mere suspicion.

3) 'Reason to Believe' has to be recorded prior to the seizure of the goods in the absence of which the act of seizure is liable to be quashed. In this regard, following observation made by the Hon'ble Delhi High Court in *Worldline Tradex Private Limited vs. The Commissioner of Customs (Import) and Ors.*²⁶ is worth noticing:

"23. The power of seizure under Section 110 of the Act has to obviously be exercised for valid reasons. The proper officer has to record his reasons to believe that the goods that he proposes to seize are liable to confiscation. The said reasons for exercise of the power have to be recorded prior to the seizure."

While making this significant observation Hon'ble Delhi High Court also highlighted following observation made by the Hon'ble P&H High Court in *MAPSA Tapes Pvt. Ltd. vs. Union of India*²⁷ that:

"25. We are of the view that while existence power of seizure may be justified but its exercise will be liable to be struck down unless 'reasons to believe' were duly recorded before action of search and seizure is taken, which has not been done in the present case because the respondents have not been able to satisfy the court that due process of law was followed while taking drastic step of search and seizure in the case of the petitioner. On this ground alone, we are of the view that action of search and seizure is liable to be quashed and accordingly we answer the second issue in favour of the petitioner and against the revenue"

3.0 Conclusion

Thus, from the perusal of the above-mentioned decisions it is clear that Income Tax Authorities having failed in successfully prosecuting a person under Income Tax Act, 1961 or otherwise, cannot simply hand over the seized documents/ goods to Customs Authorities to take appropriate actions under the Customs Act, 1962 for such a practice would be bad in law on the following count:

From the perusal of the decisions of the case *Worldline Tradex Private Limited vs. The Commissioner of Customs (Import) and Ors; MAPSA Tapes Pvt. Ltd. vs. Union of India; Vasnatal Ranchhoddas Patel and Ors. vs Union of India and Ors; and S.B. International vs. The Assistant Director, DRI & Ors*, it is clear that though proper officer under Customs Act has the power to seize any goods against whom he has reason to believe that such goods are liable for confiscation under the Customs Act but before doing so he has to record his reasons which led him to arrive at the conclusion that the goods are liable for confiscation. Further, from the reasoning adopted by the Hon'ble Supreme Court made in *Gian Chand vs State of Punjab*²⁸ it is clear that the goods which are seized by the Income Tax officials if delivered to Customs Authorities will not amount to seizure by the Custom Officers within the meaning of the section 110 of the Customs Act, 1962 for the reason that when Income Tax Officials seized the goods under Income Tax Act, 1961 the 'person' would lose possession of the goods which would then vest in Income Tax Department and when that possession is transferred to Customs Authorities there wouldn't be any fresh seizure under the Customs Act, 1962. Therefore, Custom Officer has to cause a fresh seizure in the terms of S.110 of the Customs Act and cannot simply take over the possession of goods from Income Tax Department. Moreover, such Custom Officer has to also show that proper application of mind has been exercised and will also have to show that the information that he had with him in his possession was such that any reasonable person can discern the nexus between the information and formation of "reason to believe". Any error committed in this regard, if challenged, is open to judicial scrutiny (which might lead to the quashing of such seizure) as Hon'ble Supreme Court in *Indian Nut Products and Ors. vs. Union of India*²⁹ very rightly held that:

"12. It is well-settled that if a statute requires an authority to exercise power, when such authority is satisfied that conditions exist for exercise of that power, the satisfaction has to be based on the existence of grounds mentioned in the statute. The grounds must be made out on the basis of the relevant material. If the existence of the conditions required for the exercise of the power is challenged, the courts are entitled to examine whether those conditions existed when the order was made. A person aggrieved by such action can question the satisfaction by showing that it was wholly based on irrelevant grounds and hence amounted to no satisfaction at all. In other words, the existence of the circumstances in question is open to judicial review."

Endnotes

1. Authors can be contacted on the email address: vsj180594@gmail.com
2. Devkumar G Aggarwal vs Collector of Customs (Prev.) 1994 (53) ECR 395 Tri- Mumbai, Udai Lal Doshi vs Collector Of Customs And Central -1992 (60) ELT 288 Tri Del, Shri Bharat Kumar Jain Alias Shrivs Cc - 007 (217) ELT 42 Tri Del, Commissioner Of Customs (Prev.) vs Sanjay Badgamia 2004 (168) ELT 83 Tri Mumbai, Sheikh Md. Sayeed vs Assistant Collector of Customs-AIR 1970 Cal 134
3. Kavita Agarwal vs DIT 264 ITR 472
4. Choy vs Syed Abdulla 123 ITR 435 (SC)
5. Hazari Lal vs Union of India 208 ITR 365
6. Janak Raj vs DIT 215 ITR 234; Ganga Prasad vs CIT 139 ITR 1043; Mahesh Kumar vs DDIT 260 ITR 67, Spacewood Furnishers Pvt. Ltd vs DIG (Inv) 340 ITR 393
7. 260 ITR 80 (SC)
8. Anand vs CIT 103 ITR 575
9. Senairam vs Johnson 52 ITR 637 (FB); NK Textile vs CIT 62 ITR 58
10. ITO vs Seth 74 ITR 836 (SC); ITO vs Madan 70 ITR 293
11. Jain vs Union of India 134 ITR 655; Subir vs Chattopadhyay 158 ITR 472
12. Jain vs Union of India 134 ITR 655; Subir vs Chattopadhyay 158 ITR 472
13. CIT vs Tarsem 161 ITR 505 (SC)
14. Alleppey Financial Services vs ADIT 236 ITR 562
15. MANU/PH/0215/1973
16. 260 ITR 80 (SC)
17. Supra note 13
18. Manju Tandon v. T.N. Kapoor, (1978) 115 ITR 473, 484 (All)
19. (1996) Tax LR 960, 961 (Raj)
20. (1983) 139 ITR 1032, 1042 (All)
21. (1996) 221 ITR 30, 32 (All)
22. MANU/MH/0116/1967
23. Refer Para 7
24. MANU/WB/0443/1999
25. MANU/DE/0590/2018
26. MANU/DE/1768/2016
27. MANU/PH/0377/2006
28. 1983 (13) ELT 1365 (SC)
29. MANU/SC/0713/1994