

[2023] 150 taxmann.com 287 (Article)

Does section 133A permits gate crashing the residential premises unconditionally?



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Section 133A found place in the IT act in 1964 to empower the tax authorities to undertake survey of the business premises. Subsequently in 1967 a circular No. 7-D(LXII-7) of 1967, dated 3-5-1967 is issued by the board stating that residential place is out of bound of survey. The circular read the following: -

"The place which an Income-tax Officer or an Inspector, authorized 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 a 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, authorized by him in this behalf, to enter the office of a 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 authorized under section [132](#) by the Commissioner of Income-tax/Director of Inspection, which will be governed by the provisions of that section."

Thus there has been a common understanding that power to conduct income tax survey is limited to the business premises.

The section got reworded in 1975 by which an explanation was also inserted in section 133A as under:

Power of survey.

133A. (1) Notwithstanding anything contained in any other provision of this Act, an income-tax

authority may enter—

- (a) any place within the limits of the area assigned to him, or
- (b) any place occupied by any person in respect of whom he exercises jurisdiction, or
- (c) any place in respect of which he is authorised for the purposes of this section by such income-tax authority, who is assigned the area within which such place is situated or who exercises jurisdiction in respect of any person occupying such place,

at which a business or profession or an activity for charitable purpose is carried on, whether such place be the principal place or not of such business or profession or of such activity for charitable purpose, and require any proprietor, trustee, employee or any other person who may at that time and place be attending in any manner to, or helping in, the carrying on of such business or profession or such activity for charitable purpose—

- (i) to afford him the necessary facility to inspect such books of account or other documents as he may require and which may be available at such place,
- (ii) to afford him the necessary facility to check or verify the cash, stock or other valuable article or thing which may be found therein, and
- (iii) to furnish such information as he may require as to any matter which may be useful for, or relevant to, any proceeding under this Act.

Explanation.—For the purposes of this sub-section, a place where a business or profession (or activity for charitable purpose) is carried on shall also include any other place, whether any business or profession (or activity for charitable purpose) is carried on therein or not, in which the person carrying on the business or profession or activity for charitable purpose states that any of his books of account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession or activity for charitable purpose are or is kept.

In a recent decision in *Hillwood Imports and Exports Pvt. Ltd. v. CIT* [2023] 21 ITR-OL 634 (Ker), para 14 breaks down the above explanation as follows:

14. Keeping the said purpose of an Explanation in our perspective, we have to interpret section 133A(1). According to the Explanation, a place (a) where a business or profession or activity for charitable purpose is carried on, (b) shall also include any other place where any business or profession and activity for charitable purpose is carried on or not.

And it stops here. In the explanation this would mean incomplete sentence as the remaining portion of the explanation reads as under:

"...is carried on therein or not, in which the person carrying on the business or profession or activity for charitable purpose states that any of his books of account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession or activity for charitable purpose are or is kept."

There is a comma after "carried on or not" which is omitted to be read. The elementary rule of interpreting is that ordinary derivative and the grammatical construction of the law should be abided by in the first instance and this has been upheld by the courts in numerous cases like *Madan Lal Fakirchand v. Shree Changdeo Sugar Mills Ltd.* AIR 1962 SC 1543 and then comes the Golden Rule. The golden rule solves all the problems of interpretation. The rule says that to start with we shall go by the literal rule, however, if the interpretation given through the literal rule leads to some or any kind of ambiguity, injustice, inconvenience, hardship, inequity, then in all such events the literal meaning shall

be discarded and interpretation shall be done in such a manner that the purpose of the legislation is fulfilled. But for that the entire text is to be read and not part of it. Since the explanation is very clear and use of word "**states**" leaves no doubt of confusion, there is no need to apply the Golden Rule.

The following question of law was put up before the Court: -

"Question No. 1: Whether the Appellate Tribunal should not have found that the survey conducted on July 14, 2014 at the residential house of Sri Riyaz violated the provisions of section 133A of the Income-tax Act ?

In this case in an offshoot of search action the department also carried out survey at the residential premises of one ex-employee of the assessee and recovered/impounded a few account statements/ledger and three pen drives from his custody which was objected to with the stance that the survey conducted at the residential house violate the provisions of section 133A.

Drawing their conclusion from the reading of explanation to section 133A misreading it as having been introduced w.e.f. April 1, 2017 the Court held that the words

'place of survey would also include any other place where any business or profession and activity for charitable purpose is carried on or not'

suggests that there is no exception for residence.

Whereas the clear reading of explanation to section 133 A states that

"...in which the **person carrying on the business or profession states** that any of his books of account or other documents or any part of his cash or stock or other valuable article or thing relating to his business or profession are or is kept."

So unless the person **states** that books of account or other documents are kept in his residence, the word "residence" cannot be dragged to fall under "any other place". There is an underlying pre-condition for inclusion in "any other place" and it does not automatically in "any other place" category and for that any other place can only be searched after the person carrying on business or profession states that the books of account are kept there.

The SC has also summarily dismissed the SLP filed in this case. *Hillwood Furniture (P.) Ltd. v. CIT* [2023] 453 ITR 749 (SC)

These judgements thus overlook the following: -

1. the age old department circular No 7-D (LXII) dated 3-5-1967 whereby the place where an entry can be made u/s 133A must not be a place where the assessee business does not carry on any business.
2. That the Explanation in 133A is not introduced by Finance Act, 2017 with effect from April 1, 2017 but only "activity for charitable purpose" is also inserted w.e.f. April 1, 2017 to widen its scope.

However, in these WFH times to gain entry even into residential premises of the employees may be inevitable though still trammelled by the exception when the person himself states so (*supra*) but cannot act *ex debito justitiae*. The sum and substance of the above deliberation and analysis of the law cited leads us to an irresistible conclusion* that when the Circular so limits the survey to business premises and exclude residential premises out of the ambit of section 133A, holding it otherwise to include place of residence within its scope just after inclusion of words "**or activity for charitable purpose**" and

missing to read the entire text and the word "states" is an error of law requiring a review.

***This is author's personal opinion.**

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