Discussion on demonetisation related additions u/s. 68 & 69 w.r.t 115BBE of IT Act, 1961 - Way forward in appeal

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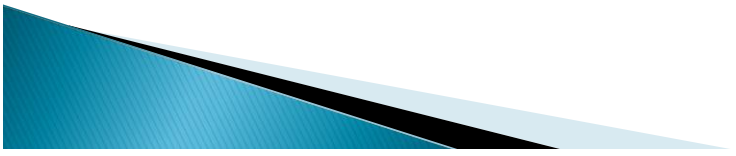
Overview

Government has initiated various measures to curb black money / Corruption



1. Black Money (Undisclosed Foreign Income And Assets) and Imposition of Tax Act, 2015.

Sl No	Subject	Undisclosed Foreign Income and Assets and Imposition of Tax Act, 2015
1	Number of declarants	638
2	Total amount declared (in Rs Crore)	4,147/-
3	Amount to the government as tax and penalty (in Rs. Crores)	2488
4	Compliance period	3 months
5	Tax rate	30% of tax + 30% penalty (Total 60%)
6	Immunity	From prosecution under the IT Act,Wealth Tax Act, Companies Act and Customs Act
7	Applicable to	Undisclosed assets located outside India

2. Income Declaration Scheme 2016. (Declaration to be made from 1st June,2016 to 30th September, 2016.)

Particulars	Original Figures	Revised Figures
No of declarants	64,275	67,382
Amount declared	65,250	71,726
Tax at 45%	29,362.5	32,276.7

3. The Benami Transactions (Prohibition) Amendment Act,2016 (Amendment to Benami Act).

As on Jan 29, 2019, provisional attachments have been made in transactions involving benami properties valued at over Rs 6,900 crore.

Set up 24 dedicated Benami Prohibition Units across India.

4. Demonetization banning of Rs. 500 & Rs. 1000 notes.(People holding these notes could deposit the same in their bank and post office accounts from November 8 till December 30)

- Demonetization was announced by the Prime Minister on 08/11/2016. The Prime Minister declared that use of all Rs. 500 and Rs.1000 bank notes would be invalid post midnight of 08/11/2016.
- Demonetization resulted in cash deposits in large magnitude. General Public was allowed to deposit the demonetised bank notes between the period 09/11/2016 to 30/12/2016.
- For Indians abroad during the specified period deposit of demonetized notes were permitted upto 31/03/2017 at the offices Reserve Bank of India.

(Rs 16,000 cr out of demonetised notes of Rs.15,44,000 cr did not come back to RBI. That is 1 percent).

5. Pradhan Mantri Garib Kalyan Yojana, 2016 (PMKGY-Valid from December 16, 2016 to March 31,2017)

(PMGKY), 2016, started on December 17 and remained open until March 31 2017. Those who declare undisclosed income in the form of cash or deposits in an account with bank or post office or specified entity, will be levied a charge of 49.9%, which breaks down into 30% tax, 33% surcharge and 10% penalty. In addition to this, 25% of the amount declared will go into the noninterest-bearing Pradhan Mantri Garib Kalyan Deposit Scheme, 2016, for four years

Particulars	Figures
No of Declarations	21000
Disclosure	4900 Crores
Tax Collected	2,451 Crores

6. The Specified Bank Notes (Cessation of Liabilities) Act, 2017. w.e.f 28-02-17 appointed date 31st December, 2016.

STATEMENT OF OBJECTS AND REASONS

In order to eliminate the unaccounted money and fake Indian currency notes from the financial system, the Government, on the recommendations of the Central Board of the Reserve Bank, *vide its notification number S.O. 3407(E), dated the 8th November, 2016,* declared that the existing series of the bank notes of the denominational value of five hundred rupees and one thousand rupees as not legal tender with effect from the 9th November, 2016 to the extent specified in the said notification.

2. Subsequent to the issuance of the aforesaid notification, it was felt necessary to provide clarity and finality on the following issues—

(*a) sub-section (1) of section 34 of the Reserve Bank of India Act, 1934 provides* that the liabilities of the Reserve Bank shall be an amount equal to the total of the amount of the currency notes of the Government of India and bank notes for the time being in circulation. Since the Reserve Bank cannot discharge its liabilities on its own for such notes, it necessary by law to discharge such liabilities;

(*b) sub-section (1) of section 26 of the Reserve Bank of India Act, 1934 provides* that every bank note shall be guaranteed by the Central Government. Though the legal tender character of the Specified Bank Notes has ceased by the aforesaid notification issued by the Government of India, it is necessary by law to withdraw the said guarantee; and

(*c) there is possibility of running in a parallel economy by unscrupulous elements* with Specified Bank Notes unless the possession of such note is declared illegal.

3. In view of the above, it was necessary to bring a legislation on Specified Bank Notes. As Parliament was not in session and an urgent legislation was required to be made, the President promulgated the Specified Bank Notes (Cessation of Liabilities) Ordinance, 2016 (Ord. 10 of 2016) on 31st December, 2016 for cessation of liabilities in the Specified Bank Notes.

4. The Specified Bank Notes (Cessation of Liabilities) Ordinance, 2016, *inter alia*, provides the following, namely:—

(*a) to provide that the specified bank notes which have ceased to be legal tender* shall cease to be liability of the Reserve Bank of India and the Central Government;

(*b) to provide that a citizen of India (who makes a declaration that he was* outside India between 9th November to 30th December, 2016) holding specified bank notes on or before the 8th November, 2016 shall be entitled to tender within the grace period with such declarations or statements, at such offices of the Reserve Bank or in such other manner as may be specified by it;

(*c) to prohibit the holding, transferring or receiving of the Specified Bank Notes* from the appointed day *i.e. the 31st December, 2016;*

(*d) to impose penalty for contravention of provisions of the proposed Ordinance* and to confer power upon the court of a first class Magistrate to impose such penalty.

5. The Bill seeks to replace the aforesaid Ordinance.

NEW DELHI; ARUN JAITLEY
The 30th January, 2017

7. Verification check list for assistance of AO's for OCM cases and framing of assessment in demonitisation related cases.

Instructions and SOP's and Internal guidance note.

1. **Instruction No. 3/2017 dated 21.02.2017 issued vide F.No. 225/100/2017ITA-II.**
2. **Instruction No. 4/2017 dated 03.03.2017 issued vide F.No. 225/100/2017ITA-II.**
3. **SOP dated 15.11.2017 issued vide F.No. 225/363/2017/ITA-II.**
4. **SOP dated 03.03.2019 issued vide F.No. 225/363/2017/ITA-II.**
5. **Internal Guidance Note dated 13.06.2019 issued vide F.No.225/145/2019/ITA-II.**

Instruction No. 3/2017 dated 21.02.2017 issued vide F.No. 225/100/2017ITA-II

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
CENTRAL BOARD OF DIRECT TAXES
NEW DELHI
Instruction No. 3/2017

February 21, 2017

Subject : Standard Operating Procedure (SOP) to be followed by the Assessing Officers in verification of Cash transactions relating to demonetisation - regd.

Post demonetisation of Rs. 500 and Rs. 1000 notes on November 8, 2016, several malpractices has been noticed. The Income Tax Department is enquiring/seeking information and analysing instances of deposits to identify cases involving risk of tax evasion. Based upon vast amount of information of cash deposits collected and analysed by CBDT, a number of persons have been identified in whose case the cash transactions did not appear to be in line with their profile available with the Income-tax Department ('ITD'). In such cases, it has been decided to undertake online verification of select transactions through jurisdictional Assessing Officers ('AOs').

2. OVERVIEW OF ONLINE VERIFICATION

The online verification has been enabled on e-filing portal (for persons under verification) which will be synchronized with the internal verification portal (AIMS module of ITBA) of ITD. The salient features of online verification mechanism are as under:

2.1 ITD has enabled online verification of these transactions to reduce compliance cost for persons under verification while optimizing its resources. The information in respect of these cases has been made available in the e-filing window of the PAN holder (after log in) at the portal https://incometaxindiaefiling.gov.in. The PAN holder can view the information using the link 'Cash Transactions 2016' under 'Compliance' section of the portal. The person under verification will be able to submit online explanation without any need to visit Income Tax office.

2.2 Email and SMS were sent to the persons under verification for submitting online response on the e-filing portal. Such persons who are not yet registered on the e-filing portal (at https://incometaxindiaefiling.gov.in) should register immediately by clicking on the 'Register Yourself link. Registered taxpayers should verify and update their email address and mobile number on the e-filing portal to receive electronic communication.

2.3 The user guide, quick reference guide and frequently asked questions ('FAQs') are available on the portal for assisting the person under verification for submitting online response.

2.4 Cases meeting the low risk criteria will be closed centrally. Cases which are not closed automatically will be pushed in batches to the AO for verification.

2.5 The AO will be able to view each information record, information as submitted by the person under verification for each record and also capture the verification result. In case additional information is required, the AO will be able to send a request for additional information electronically. The person concerned will also be automatically informed about the request for additional information by email and SMS. The information request will be visible to the person under verification with a hyperlink for uploading information. All the additional documents (including supporting evidence) are required to be submitted online.

2.6 The response filed by person under verification will be appraised against available information. The uploaded information can be downloaded by the Assessing Officer. In case explanation of source of cash is found justified, the verification will be closed by the AO electronically without any physical interface with the person concerned.

3. REFERENCE DOCUMENTS

A Cash Transactions 2016 User Guide and Frequently asked Questions ('FAQs') has been prepared to help the persons under verification so that the process of furnishing online information is clearly understood (available in the help section of the e-filing portal home page). Further, a 'User Guide for Verification of Cash Transactions on ITBA - AIMS Module' (Verification Guide) has also been prepared for assisting the AOs involved in the verification process. It is advised that all stakeholders may go through the documents before filing response/initiating action.

4. ENSURING ONLINE RESPONSE

It is seen that many persons in the target segment have still not registered with e-filing portal. Further many registered persons who are under verification have not yet submitted online response. Pr. CCIT/CCIT/Pr. CIT/Range Heads are expected to give publicity and organize meetings with the taxpayer community and CAs/Bar Associations to educate them about the online verification facility and its benefits. So far, communication with the person under verification has been made under section 133C of the Income-tax Act, 1961 ('Act'). In cases where online response has not been submitted, AO shall generate a letter from the Verification portal on ITBA to the person under verification for submission of online response (except when immediate survey is contemplated) on the e-filing portal and ensure its service. This process should be completed within 7 days of availability of information on the portal.

5. CONDUCTING VERIFICATION

At the outset, it should be clearly understood that this exercise relates to preliminary verification of information only and the same should not be construed as conducting scrutiny or in-depth authentication. The entire process envisages end-to-end e-verification in which the concerned person would be required to electronically file his response on e-filing portal which shall be examined and monitored electronically by the tax department through Online Verification platform (ITBA). The two systems are harmonized in a manner so that the person under verification is not required to attend the Income-tax office personally under any circumstance and at any stage during the verification exercise. It has been endeavour of CBDT to identify and target the potential cases through e-verification so that possible instances of grievances arising from the process of verification are minimized.

5.1 The online verification should be focussed and limited to the issue under verification the outcome of which is either 'Acceptable' or 'Non-Acceptable'. The queries raised should be relevant and limited in number since this is a preliminary verification process only.

5.2 The Assessing Officer is required to verify each information record individually and take a decision about each record being 'Acceptable' (where the nature and source of cash deposit for that particular record is explained by the person under verification to the prima-facie satisfaction of the Assessing Officer) or 'Non-Acceptable' (where the Assessing Officer is not satisfied with the explanations offered by the person under verification based on the information available). For each 'Non-Acceptable' information record, the undisclosed income will have to be ascertained and recorded along with verification remarks on the portal [the format has been reproduced in the Verification Guide].

5.3 The information relating to cash transactions and response submitted by the person under verification will be visible to the Assessing Officer and his supervisory officers.

5.4 The Assessing Officer will also be able to send a request for additional information, if required. The information request would be communicated to the PAN holder with a Hyperlink for uploading the information. The uploaded information can also be downloaded by the Assessing Officer.

5.5 It is reiterated that no independent enquiry or third party verifications are required to be made by the Assessing Officer outside the online portal. Whatever information is necessary during verification, the same has to be collected through the person under verification using online platform only. Even telephonic queries are to be avoided.

5.6 While conducting verification, seeking additional information and drawing inference regarding source of deposits in bank or other accounts, for general and broad guidance of the AOs, the source specific verification guidelines has been given in the Annexure with a view to maintain consistent approach during verification. If the sources informed by the person under verification are other than those indicated in the Annexure, suitable parameters should be decided by the AO in consultation with the range head and Pr. CIT concerned.

5.7 It should be ensured that the communications made online with the persons under verification should be in very polite language without containing any element of threat or warning. No show cause of any kind should be given.

5.8 The verification of a particular case shall be complete only when:

(a) each information record reflected in that case gets verified and has been marked either as 'Acceptable' or 'Non-Acceptable' (with mentioning of undisclosed income in the latter category); and

(b) Approval has been given by the supervisory authority as prescribed at Para 7 of this instruction.

5.9 If no satisfactory explanation is provided, the undisclosed income may be quantified considering the facts of the case. Brief summary of verification may be mentioned under verification remarks.

5.10 The cases under the 'Non Acceptable' category would get escalated back to the Directorate of Systems and may lead to advance processing of such cases for further handling as cases involving possible tax - evasion.

5.11 In case the person under verification does not respond within the time frame prescribed, it might lead to a possible inference that the cash deposit under verification is prima-facie undisclosed and consequently the AO may treat these cases under the 'Non Acceptable' category with relevant remarks.

5.12 A holistic view should be adopted looking into the various aspects of the circumstances leading to deposit of cash (e.g. family-size, financial status and background of person) and uniformity in approach must be adopted while forming a view about quantum of undisclosed income.

6. ADHERENCE TO THE TIME-LIMIT DURING VERIFICATION

6.1 It shall be necessary to complete the process of online verification as quickly as possible so that the option to avail the benefits under the Prime-Minister Garib Kalyan Vojana, 2016 ('PMGKY') can be exercised by the persons under verification by the prescribed date for the said scheme. It will be desirable if the additional information required from the person under verification is communicated to the taxpayer within 5 working days (wherever considered necessary), from the receipt of online information from such person.

6.2 The Pr. CIT concerned should frame the intervening timelines depending upon the number of cases and content of information handled by the Assessing Officer in the charge.

6.3 The Additional/Joint CIT will monitor the adherence to the above time schedule and guide AOs wherever required.

7. APPROVAL FROM HIGHER AUTHORITIES

7.1 After all information records of a particular person have been verified by the AO, he would be required to take approval for closure of verification from the prescribed approving authority.

7.2 If the total value of transactions is below Rs. 10 lakh (Rs.25 Lakh in Delhi, Mumbai, Kolkata, Chennai, Bangalore, Pune, Hyderabad and Ahmedabad), the prescribed approving authority will be Additional/Joint CIT heading the Range. For cases where the total value of transactions in a particular case exceeds the above limits, the prescribed approving authority will be the Pr. CIT concerned.

7.3 The above approvals would be through online portal only for which the procedure has been specified in the Verification Guide.

7.4 The time-frame prescribed above in Para 6 will be inclusive of the time involved in granting approval by the prescribed approving authority.

8. DEALING WITH NON-COMPLIANCE

In cases where online response has not been submitted even after service of letter, the ITS profile of such PAN holders may be viewed to access information reported in earlier returns and under TDS/AIR/CIB. In case the cash deposit is not in line with the earlier return or information profile of the person under verification, necessary facts may be collected inter-alia by exercising the powers under section 133(6) with the approval of prescribed authority. In appropriate cases depending upon the online response or otherwise, survey action u/s 133A can be considered. During survey, where there is suspicion of back dating or fictitious cash transactions, CCTV recording of the cash counter at relevant banks may also be checked, if necessary. Reference can also be sent to the Investigation wing in appropriate cases.

In cases of intrusive actions [133(6)/133A/ref. to Inv. Wing], the outcome needs to be reported by the AO in the online portal also.

9. INITIATION OF PENALTY PROCEEDINGS UNDER SECTIONS 269SS/269T OF THE ACT

In case, the transaction being loan received/repaid in cash above the permissible threshold comes to notice, the AO may consider initiation of penal proceedings under the relevant provisions separately.

10. FACILITATION

10.1 DIT(I&CI) has been designated as the local resource person for supporting the field formation in the e-verification process.

10.2 In case of technical difficulty, ITBA helpdesk and contact persons given in ITBA instruction may be contacted.

10.3 Further, clarifications would be issued by CBDT as and when required.

11. The above may be brought to the notice of all concerned.

F.No.225/100/2017/ITA-II
(Rohit Garg)
Director-ITA.II, CBDT
Annexure

Source Specific General Verification Guidelines

1. Cash out of earlier income or savings

1.1 In case of an individual (other than minors) not having any business income, no further verification is required to be made if total cash deposit is up to Rs. 2.5 lakh.

In case of taxpayers above 70 years of age, the limit is Rs. 5.0 lakh per person.

The source of such amount can be either household savings/savings from past income or amounts claimed to have been received from any of the sources mentioned in Paras 2 to 6 below.

Amounts above this cut-off may require verification to ascertain whether the same is explained or not.

The basis for verification can be income earned during past years and its source, filing of ROI and income shown therein, cash withdrawals made from accounts etc.

1.2 In case the individual claims that cash deposit includes savings of other person(s), the necessary information is required to be submitted under Para 4 or Para 5 below, as the case may be.

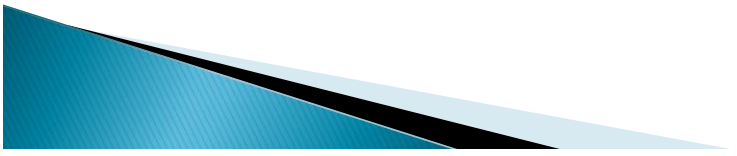
1.3 **In case of an individual having no business income, if the cash out of earlier income or savings exceeds the above mentioned threshold**, the AO needs to consider the remarks provided by the person under verification and seek further relevant information.

During verification, **the AO needs to consider the information provided by the person concerned, income earned during past years, source of such income, filing of ROI and income shown therein, cash withdrawals made from accounts etc. before quantifying the undisclosed amount, if any.**

In case the person under verification has filed return of Income, a reasonable quantum can be considered as explained while quantifying the undisclosed amount, if any.

1.4 **In case of persons engaged in business or requirement to maintain books of accounts, no additional information is required to be submitted by the person under verification if total cash out of earlier income or savings (sum of responses for all cash transactions) is not more than the closing cash balance as on 31st March 2016 in the return for AY 2016-17.**

However, if the AO has reason to believe that the closing cash balance as on 31st March 2016 has been increased by revising the return or backdating transactions in the books of account, further verification may be carried out.

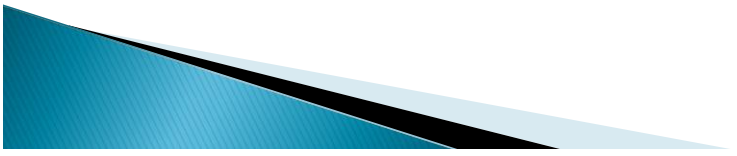


1.5 In case of persons engaged in business or required to maintain books of accounts, if total cash out of earlier income or savings (sum of responses for all cash transactions) is more than the closing cash balance as on 31st March 2016 in the return for AY 2016-17, the AO needs to consider the remarks provided by the taxpayer and seek relevant information, i.e. closing balance as on 31st March 2016 as reflected in the books of account.

During verification, the AO may consider the information provided by the person under verification, income earned during past years, source of such income, filing of ROI and income shown therein, cash withdrawals made from accounts etc. before quantifying the undisclosed amount, if any.

1.6 **If the person under verification has claimed that the cash deposit has been disclosed in IDS 2016 and if the same is found to be correct, no further verification should be made.**

1.7 In case, there is information or apprehension/suspicion that a particular bank account(s) has been misused for money laundering/tax evasion/entry operations in shell companies, the monetary cut-off or cash-balance based cut off prescribed in clauses above requiring no-verification, shall not be applicable.



2. Cash out of receipts exempt from tax

2.1 If the cash is explained to be out of receipts exempt from tax, and the same is not in line with the earlier returns filed by the person under verification, the AO needs to consider the remarks provided by the person and seek relevant information (e.g. records of land-holding and other relevant evidences etc. in case of agricultural income), to form appropriate view and quantify unexplained income.

3. Cash withdrawn out of bank account

3.1 The AO needs to consider the remarks provided by the person under verification and seek relevant information i.e. copy of bank statement/passbook to form appropriate view and quantify unexplained income.

3.2 Bank statement/passbook may be verified to confirm the name of the account holder.

The date and amount of cash withdrawals and cash deposits in the bank account may be matched to verify whether claim that the cash deposited is out of cash withdrawn out of bank account is acceptable.

Further removed in time the withdrawal is from the date of demonetization i.e. 8th November, 2016, the more suspicious it looks.

The AO should take a balanced view in analyzing the time gap from the point of view of normal human behaviour and specific circumstances of the case.

4. Cash received from identifiable persons (with PAN)

4.1 No additional information is required to be submitted by the person under verification as the information will be pushed to the AO of the identifiable persons (with PAN).

4.2 In case the identifiable person (with PAN) does not confirm the transaction, the response will be referred back for further verification.

4.3 In case of a gift, it may be seen whether the same is taxable in the hands of the recipient under section 56(2) of the Act.

5. Cash received from identifiable persons (without PAN)

5.1 The AO needs to verify if the cash receipts are not in line with the normal practices of concerned business as mentioned in the earlier returns of Income after considering the remarks provided by the taxpayer, nature of business and earlier history before seeking additional information.

5.2 In case of other cash receipts, strategies for verification may be made in consultation with the Pr. CIT so that consistency is maintained in the entire charge based on nature of transaction.

6. Cash received from un-identifiable persons

6.1 The AO needs to verify if the cash transactions or its quantum are not in line with the normal practices of concerned business as mentioned in the earlier returns of Income.

6.2 **During verification, the AO may seek relevant information e.g. monthly sales summary (with breakup of cash sales and credit sales), relevant stock register entries, bank statement etc. to identify cases with preliminary suspicion of back-dating of cash sales or fictitious sales.**

Some indicators for suspicion of back dating of cash sales or fictitious sales could be ;

i. Abnormal jump in the cash sales during the period Nov to Dec 2016 as compared to earlier history.

ii. Abnormal jump in percentage of cash sales to unidentifiable persons as compared to earlier history.

iii. More than one deposit of specified bank notes in the bank account late in the demonetization period.

iv. Non-availability of stock or attempts to inflate stock by introducing fictitious purchases.

v. Transfer of deposited cash to another account/entity which is not in line with earlier history.

6.3 In case of receipt of cash on account of donation, indicators similar to above may be kept in mind.

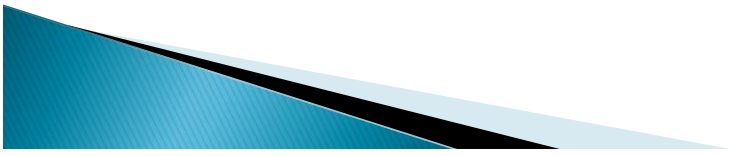
6.4 In case of other cash receipts, strategies for verification may be made in consultation with the Pr. CIT.

7. Cash Disclosed/To be disclosed under PMGKY

7.1 In case the taxpayer mentions that the Cash Disclosed/to be disclosed under PMGKY, the same may be verified.

7.2 If the process of disclosure is informed to be pending, verification can be kept pending till the evidence is furnished.

7.3 The verification should be closed on the basis of evidence of disclosure made under PMGKY.



Instruction No. 4/2017 dated 03.03.2017 issued vide F.No. 225/100/2017ITA-II.

Instruction No. ...4.../2017

Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes

North Block, New Delhi dated the 3rd of March, 2017

Subject: - Issue of notice under section 133(6) of the Income-tax Act, 1961 for verification of cash deposits under 'Operation Clean Money'-regd.-

Vide Instruction No. 3/2017 dated 21.02.2017, in file of even number, CBDT has issued a SOP to be followed by the Assessing Officer(s) for Online Verification of Cash Transactions pertaining to the demonetisation period. In continuation thereof, the Board hereby prescribes a Template, to be used for issue of notices under section 133(6) of the Income-tax Act, 1961 ('Act') in appropriate cases, for Online Verification of Cash Deposits. The format is enclosed herewith as Annexure.

2. Following issues may kindly be kept into consideration while issuing notices under section 133(6) of the Act, in applicable cases:

i. Notice under section 133(6) of the Act is required to be issued, after obtaining prior approval of Pr. CIT/CIT/Pr. DIT/DIT as provided in the Act, in cases where the 'person under verification' fails to file Online response in a timely manner in spite of issue of reminder by the Assessing Officer. The approval would be taken Online once the facility in ITBA module gets operationalised;

ii. Notice shall be generated through the ITD System only. Hence, no hand written/typed notice is required to be issued by the Assessing Officer in an individual case;

iii. Response to notice under section 133(6) of the Act has to be furnished within the stipulated period by the 'person under verification' only through the Online mode;

iv. It is re-iterated that verification under 'Operation Clean Money' is to be made through the Online Verification Portal only in accordance with SOP dated 21.02.2017;

v. In case no response is furnished within the specified timeframe, Assessing Officer may form a view that 'person under verification' has no plausible explanation to offer regarding the cash deposits in his/her bank account(s) and consequentially, the case may be escalated as 'Not-Acceptable' for further action in accordance with

the procedure prescribed in the SOP of CBDT vide Instruction No. 3/2017 dated 21.02.2017.

3. This may be brought to the notice of all for necessary compliance.

4. Hindi version to follow.

Enclosure: as above

Rg

(Rohit Garg)
Director (ITA.II), CBDT

(F.No. 225/100/2017-ITA.II)

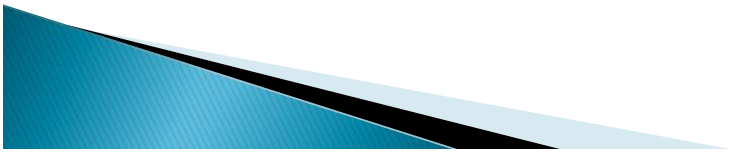
Copy to:

i. Chairman (CBDT) and all Members of CBDT
ii. All Pr.CCsIT/Pr.DsGIT
iii. Pr. DGIT (Systems) with request to take necessary measures to implement this order
iv. Web-manager for uploading on Departmental website and placing the order in public domain
v. All Officers and Technical Sections of CBDT
vi. ITCC Division of CBDT (3 copies)
vii. Addl. CIT, Database Cell for uploading on IRS Officers website
viii. ADG (PR, PP & OL) with request for placing on official handle of the department
ix. Guard File

Rg

(Rohit Garg)
Director (ITA.II), CBDT

SOP dated 15.11.2017 issued vide F.No. 225/363/2017/ITA-II



F.No. 225/363/2017-ITA.II
Government of India
Ministry of Finance
Department of Revenue (CBDT)

North Block, N.Delhi, dated the 15th of November, 2017

To

All Principal Chief-Commissioners of Income-tax/All Principal Directors-General of Income-tax

Sir/Madam,

Subject: SoP for issue of notice u/s 142(1) of Income-tax Act in cases related to substantial cash deposit during the demonetisation period-regd.-

On the basis of data analytics and information gathered during the first phase of online verification under 'Operation Clean Money', a list of assessees who had deposited substantial Cash in bank account(s) during the demonetisation period (8th November, 2016 to 30th December, 2016) but have not yet filed Income-tax return for Assessment Year 2017-2018 till date has been generated for further follow up action by the Income-tax Department.

(2) The list of such Non-Filers of income-tax returns is being made available in a phased manner to the jurisdictional income-tax authorities in AIMS module of ITBA under *"Notice u/s 142(1) for AY 2017-18"*.

(3) These cases would be handled as per the following Standard Operating Procedure ('SoP'):

(i) While Government PANs (using 4th character) have not been flagged in the list, it is possible that a particular PAN might pertain to an entity which is not obliged to file the return (e.g. CSD Canteens, Army Hospitals etc.). Such cases should be marked as *"No Return Required"* by using the functionality provided in AIMS module of ITBA by the concerned Assessing Officer.

(ii) Thereafter, in remaining cases under *"Notice u/s 142(1) for AY 2017-18"*, the jurisdictional Assessing Officer shall issue notice u/s 142(1) of the Income-tax Act, 1961 ('Act') to the concerned assessees for filing return of income for Assessment Year 2017-2018.

(iii) To facilitate service of notice, information regarding addresses in PAN database and earlier ITRs is available in ITBA portal.

(iv) The notice should be generated through the ITBA System only.

(v) Notice u/s 142(1) shall be issued electronically as well as through postal authorities. The evidence of service of notice as well as postal remarks (in case of return of notice) should be preserved carefully. Where notice could not be served either electronically or through the postal authorities, then, personal service through departmental ITIs/Notice-servers should be made.

(vi) In cases where difficulties are faced in service of 142(1) notice, ITIs may make local enquiries to trace the concerned assessee and serve the notice upon him. As a final alternative, as far as possible, notice by affixation with due procedure should also be done. In all cases of affixture, information should be captured in the system by selecting the appropriate option in ITBA. However, where notice could not be served even by by affixture because of fictitious/non-existent address, this information should also be captured in the system against the appropriate option available in ITBA.

(4) All information regarding date(s) of service of notice u/s 142(1) upon the addressee has to be captured using the functionality provided in ITBA for this purpose. The process of service of notice under section 142(1) should be completed by 31st December, 2017.

Ankita 15.11.17

(Ankita Pandey)
Under Secretary-ITA.II, CBDT

Copy to:-

1. Chairman, CBDT & All Members, CBDT
2. JCIT (Database Cell) for uploading on departmental website

SOP dated 05.03.2019 issued vide F.No. 225/363/2017/ITA-II.

F. No. 225/363/2017-ITA.II
Government of India
Ministry of Finance
Department of Revenue (CBDT)

North Block, N.Delhi, dated the 5th of March, 2019

To

All Principal Chief-Commissioners of Income-tax/
All Principal Directors General of Income-tax

Subject: SOP for handling of cases related to substantial cash deposit during the demonetisation period in which notice under section 142(1) of the Income-tax Act, 1961 has not been complied-regd.-

Sir/Madam,

In cases related to substantial cash deposits during the demonetisation period, vide letter dated 15.11.17 in file of even no., Board had issued an SOP for issuance of notice under section 142(1) of the Income-tax Act 1961 (Act) for filing of returns of income pertaining to assessment year 2017-18. The list of the targeted Non-Filers was made available to the jurisdictional income-tax authorities in AIMS module of ITBA & thereafter notice under section 142(1) of the Act was issued in around 3 lakh cases. It has been reported that in around 87,000 cases out of these cases, assessees concerned have not filed their return of income in response to the notice issued under section 142(1) of the Act.

2. Upon consideration of the matter, it has been decided that cases in which notices under section 142(1) of the Act has remained non-complied with, would be handled in the following manner:

2.1 An updated information regarding address, bank-account, transaction detail, etc. in the identified cases would be provided to the jurisdictional Assessing Officer (AO) by the Pr. DGIT (Systems). Further, an internal Guidance Note for assistance of AOs for verification of cash deposits and framing of assessments in demonetisation related cases shall also be issued subsequently by the Pr. DGIT (Systems).

2.2 In these cases, AO would proceed with completion of the 'best judgement assessment' under section 144 of the Act. The summarised form of relevant provision i.e. section 144(1)(b) of the Act is: *"If any person fails to comply with all the terms of a notice issued under section 142(1), the AO after taking into account all relevant material which the AO has gathered shall after giving the assessee an opportunity of being heard, make the assessment of total income or loss to the best of his judgement....."*

2.3 It has been decided that in 'best judgement assessment' order being framed under this SOP, the Range Head shall mandatorily issue directions from time to time under section 144A of the Act. Further, Range Head would also monitor framing of the final assessment order.

2.4 Through local enquiries, AOs should endeavour to identify possible addresses of the assessee as per the modes prescribed in the second proviso to Rule 127 of the Income tax Rules, 1962. The results of these enquiries are to be captured on ITBA in accordance with modalities to be provided by the Pr. DGIT (Systems).

2.5 While gathering material, section 133(6) of the Act should be suitably invoked by the AO so as to gather additional information about persons, transactions and fund flow from the banks where the suspected transactions took place. Such notices would be issued by the concerned AO after a careful appraisal of information at his disposal so that maximum possible additional information can be culled out. Further, a detailed analysis of past income tax returns, if available, should also be made to form an opinion regarding nature of transactions related to demonetisation.

2.6 On the basis of all material and evidence gathered by the AO, during the course of assessment proceedings, assessee would be duly provided with an opportunity to explain his/her case.

2.7 In cases where ultimate beneficiary of a transaction has been established, the concerned AO shall forward the material available at his/her disposal to the AO having jurisdiction over the ultimate beneficiary so that appropriate action can be initiated in that case as per relevant provisions of the Act. Further, information regarding the entry operators in a particular chain should also be forwarded to the concerned jurisdictional AO for taxing the unaccounted commission receipts. The information to other income-tax authorities shall be routed through the ITBA.

3. The Board desires that wherever possible, the assessments in cases covered in this SOP may be completed by 31st March, 2019 and in any case by the first quarter of the next financial year i.e. by 30th June, 2019.

-Sd-

(Rajarajeswari R.)
Under Secretary-(ITA.II), CBDT

Copy to:-

i. PS to FM/OSD to FM/PS to MoS(F)/OSD to MoS(F)
ii. PS to Secretary (Revenue)
iii. Chairman, CBDT & All Members, CBDT
iv. All Pr.DsGIT /Pr.CCsIT
v. All Joint Secretaries/CsIT, CBDT
vi. CIT (M&TP), Official Spokesperson of CBDT
vii. O/o Pr. DGIT(Systems) for uploading on official website
viii. Addl. CIT (Database Cell) for uploading on departmental website

Rajarajeswari 03/19.

(Rajarajeswari R.)
Under Secretary-(ITA.II), CBDT

Internal Guidance Note dated 13.06.2019 issued vide F.No.225/145/2019/ITA-II.

USE

F.No.225/145/2019-ITA-II
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Tax
****

North Block, New Delhi,
Dated, The 9th August , 2019

To

All Principal Chief-Commissioners of Income-Tax/
All Principal Director Generals of Income-Tax

Sir/Madam,

Subject: - Verification check list for assistance of AOs for OCM cases and framing of assessment in demonetisation related cases-reg

Reference:-
1. **Instruction No. 3/2017 dated 21.02.2017 issued vide F.No. 225/100/2017ITA-II.**
2. **Instruction No. 4/2017 dated 03.03.2017 issued vide F.No. 225/100/2017ITA-II.**
3. **SOP dated 15.11.2018 issued vide F.No. 225/363/2017/ITA-II.**
4. **SOP dated 03.03.2019 issued vide F.No. 225/363/2017/ITA-II.**
5. **Internal Guidance Note dated 13.06.2019 issued vide F.No.225/145/2019/ITA-II.**

****

Kindly refer to the above

2. In this regard, I am directed to state that the Board has earlier issued above referred SOPs/Instruction/Internal Guidance Note regarding handling of cases related to demonetisation. In continuation of the same, a Verification Checklist-cash deposits is enclosed herewith for providing assistance to AOs for verification of cash deposits and framing of assessment in demonetisation related cases.

3. This checklist-cash deposits may be filled up in all the cases and uploaded in system in the suitable format (to be prescribed by system directorate) so that the deviant cases can be taken up for further study.

Yours faithfully,

Encl: As above.

(Rajarajeswari R)
Under Secretary (ITA.II), CBDT.
mail Id: raja.rajeswari@gov.in
Fax No: 23095489

Copy to:

1. The Pr. DGIT(Systems) with a request to enable this verification checklist in OCM cases in ITBA.

Verification Checklist - Cash Deposit

General

#	Particulars	Response	Remarks
1.1	Feedback on correctness of information	☐ Information was correct ☐ Information was partly correct ☐ Information was wrong	Select Response
1.2	Cash Deposit between 9th Nov to 31st Dec 2016		If taxpayer disputes the amount, mention correct amount after verification from bank
1.3	Taxpayer Type	☐ Non-Business Case ☐ Business Case	Select Response

Non- Business Case

#	Particulars	Response	Remarks
2.1	Return filing Compliance	☐ First time return filer ☐ Return filed first time one year before ☐ Return filed first time two years before ☐ Returns filed for last 3 year ☐ None of the above	
2.2	Total Income of the taxpayer in FY 2016-17		
2.3	Gross Total Income (including exempt income) of the taxpayer in FY 2016-17		
2.4	% of Cash Deposit to Gross Total Income (including exempt income)		Value = (1.2/2.3)
2.5	**Nature of Deposit**		
		☐ Out of loan received	
		☐ Out of repayment of loan	
		☐ Gift	
		☐ Sale or advance for sale of land or any other capital asset	
		☐ Cash received for services rendered	
		☐ Other exempt income	
		☐ Cash in hand	
		☐ Any other	
2.6	Assessment of explanation provided by the taxpayer	☐ Explanation was acceptable ☐ Explanation was partially acceptable ☐ Explanation was not acceptable	Select Response
2.7	Quantum of Unaccounted Deposits as determined by the AO.		

Business Case

#	Particulars	Response	Remarks
3.1	Regularity of Business	☐ First time business return filer ☐ Return filed first time one year before ☐ Return filed first time two years before ☐ Business Returns filed for last 3 year ☐ None of the above	Select Response
3.2	Nature of Business		Select from standard list of Nature of Business
	Overall Assessment		
3.3	Whether Cash Deposits appear in line with earlier Sales Profile	☐ Very High ☐ High ☐ In line ☐ Low ☐ Very Low	Select Response
3.4	Result of Evaluation of Stock Register	☐ Stock register is not maintained ☐ Stock register is maintained in adhoc manner ☐ Stock register is integral part of accounting software	Select Response
3.5	Result of Evaluation of Internal Controls	☐ Books of account are not maintained ☐ It is possible to back date transactions ☐ It is not possible to back date transactions	Select Response
3.6	Result of Evaluation of books of account and Internal Controls	☐ Books of account are properly maintained ☐ Books of account are being rejected	Select Response
3.7	Quantum of Unaccounted Deposits as determined by the AO		

4. Cash Deposits in Bank

4.1.	(a) Total cash deposit in Bank in F.Y. 2015-16	
	(b) Total cash deposit in Bank from 01.04.2015 to 08.11.2015	
	(c) Total cash deposit in Bank from 09.11.2015 to 31.12.2015	
4.2.	(a) Total cash deposit in Bank in F.Y. 2016-17	
	(b) Total cash deposit in Bank from 01.04.2016 to 08.11.2016	
	(c) Total cash deposit in Bank from 09.11.2016 to 31.12.2016	
4.3.	(a) Percentage increase between 4.2(a) and 4.1(a)	
	(b) Percentage increase between 4.2(b) and 4.1(b)	
	(c) Percentage increase between 4.2(c) and 4.1(c)	

5. Cash Sales

5.1	(a) Total cash sales in F.Y. 2015-2016	
	(b) Total cash sales from 01.04.2015 to 08.11.2015	
5.2	(a) Total cash sales in F.Y. 2016-2017	
	(b) Total cash sales from 01.04.2016 to 08.11.2016	
5.3	(a) Percentage increase between 5.2(a) and 5.1(a)	
	(b) Percentage increase between 5.2(b) and 5.1(b)	

6. Analysis of month wise cash sales and cash deposits from 01.04.2015 to 08.11.2015

Month wise	Op. cash in hand	Cash sales	Cash deposited in Bank	Cash withdrawal from the bank	Closing cash on hand
April, 2015					
May, 2015					
June, 2015					
July, 2015					
August, 2015					
September, 2015					
October, 2015					
November till 08.11.2015					

7. Analysis of month wise cash sales and cash deposits from 01.04.2016 to 08.11.2016

Month wise	Op. cash in hand	Cash sales	Cash deposited in Bank	Cash withdrawal from the bank	Closing cash on hand
April, 2016					
May, 2016					
June, 2016					
July, 2016					
August, 2016					
September, 2016					
October, 2016					
November till 08.11.2016					

S.No.	Further verification	Remarks (Yes/No)
8	Whether reason for mounting cash in hand in F.Y. 2016-2017 till 08.11.2016 has been obtained	
9	Whether small part of the cash is deposited in or withdrawn from the Bank despite having huge cash in hand.	
10	Whether the quarterly VAT Return is revised in the post-demonetisation period.	
11	Whether the reason for the revision has been obtained.	
12	Whether there are large changes in the purchase and sales figures between the original and the revised VAT returns.	
13	Whether the changes are for genuine reasons.	

Assessment Procedure

S.No.	Further verification	Remarks (Yes/No)
14	Whether the books of accounts have been rejected	
15	Whether the additions have been made u/s 68 to 69D. please mention the section.	
16	Whether tax is calculated as per section 115BBE	
17	Whether penalty u/s 271AAC has been levied	


IMPACT OF DEMONETIZATION


STATUTORY DISCLOSURES

DICLOSURES REQUIRED UNDER THE COMPANIES ACT, 2013

- Notification No. G.S.R. 308(E) dated 30th March 2017 issued by MCA required the **companies to disclose the Details of Specified Bank Notes (SBN) held and transacted during the period from 8th November, 2016 to 30th December, 2016 .**

- Notification No. G.S.R. 307(E) dated 30th March 2017 issued by MCA **required the auditor to incorporate in its audit report** the following :

"(d) whether the company had provided requisite disclosures in its financial statements as to holdings as well as dealings in Specified Bank Notes during the period from 8th November, 2016 to 30th December, 2016 and if so, whether these are in accordance with the books of accounts maintained by the company."

DISCLOSURES REQUIRED IN ITRs

- Disclosure of cash deposited during the period was required to be made in the ITR forms if the cash deposited was Rs.200,000 or more.

13	Details of all Bank Accounts held in India at any time during the previous year (excluding dormant accounts)				
Sl No	IFS Code of the Bank	Name of the Bank	Account Number *(the number should be 9 digits or more as per CBS system of the bank)*	Indicate the account in which you prefer to get your refund credited, if any (tick one account ☑)	Cash deposited during 09-11-2016 to 30-12-2016 (if aggregate cash deposits during the period ≥ Rs.2lakh)

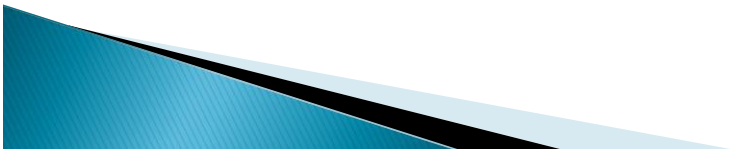
Details of all Bank Account held outside India by Non-Resident (excluding dormant accounts)				
Sl.	IBAN/SWIFT Code	Name of the Bank	Account Number	Country Name

Rule 114E : Furnishing of Statement of Financial Transaction (inserted w.e.f. 15.11.2016)

Sr No.	Nature and Value of Transaction	Reporting person
i.	Cash deposit during the period 09.11.16 to 30.12.16 aggregating to - (i) Twelve lakh fifty thousand rupees or more, in one or more current account of a person; or (ii)Two lakh fifty thousand rupees or more, in one or more accounts(other than a current account) of a person.	i.) A banking company or a co-operative bank to which the Banking Regulation Act, 1949 applies; ii.)Post Master General as referred to in clause (j) of Section 2 of the Indian Post Office Act, 1898.
ii.	Cash deposits during the period 01.04.16 to 09.11.16 in respect of accounts that are reportable under Sr. No. 12	i.) A banking company or a co-operative bank to which the Banking Regulation Act, 1949 applies; ii.)Post Master General as referred to in clause (j) of Section 2 of the the Indian Post Office Act, 1898 (6 of 1898).

CASH CREDITS

[SECTION 68]



Section. 68 : Cash credits

- Where any sum is **found credited**
- in the **books of an assessee** maintained for **any previous year**, and
- the assessee offers **no explanation** about
- the **nature** and
- **source** thereof or
- the **explanation offered** by him is **not**,
- in the opinion of the Assessing Officer, **satisfactory**,
- the sum so credited **may be charged** to income-tax as the **income** of the assessee of that previous year :

Credited ?

Cash credit always a liability in the Balance Sheet

Delhi ITAT – Racmann Springs (P.) Ltd vs DCIT [1995] 55 ITD 159 (DELHI)

- The realisations from the sundry debtors cannot be treated as cash credits.
- Cash credits always appear as a liability in the balance sheet of the assessee.
- Realisation from the sundry debtors would reduce the sundry debtors appearing on the "assets" side of the balance sheet.

Definitions.

2. In this Act, unless the context otherwise requires,—

(*12A*) "books or books of account" **includes**

- ledgers, day-books, cash books, account-books and other books,
- whether kept in the written form or
- as print-outs of data stored in a floppy, disc, tape or
- any other form of electro-magnetic data storage device;

Previous Year

Section 3

"Previous year" defined.

3. For the purposes of this Act, "previous year" means the financial year immediately preceding the assessment year :

Provided that, in the case of a business or profession newly set up, or a source of income newly coming into existence, in the said financial year, the previous year shall be the period beginning with the date of setting up of the business or profession or, as the case may be, the date on which the source of income newly comes into existence and ending with the said financial year.

Previous Year

Delhi HC-CIT vs Usha Stud Agricultural Farms Ltd[2009] 183 Taxman 277

Since it is a finding of fact recorded by the CIT(A) that this credit balance appearing in the accounts of the assessee, does not pertain to the year under consideration, under these circumstances, the Assessing Officer was not justified in making the impugned addition under section 68 of the Act.

Ivan Singh v. ACIT (Bom)(HC)(Goa Bench), www.itatonline.org

S. 68 : Cash credits -The expression "any previous year" does not mean all previous years but the previous year in relation to the assessment year concerned- If the cash credits are credited in the FY 2006-07, it cannot be brought to tax in a later AY.2009-10[S.3]

The question before the High Court was " On the facts and in the circumstances of the case and in law, whether the Tribunal was right in sustaining the additions made of old outstanding sundry credit balances" Allowing the appeal of the assessee the Court held that, the expression "any previous year" does not mean all previous years but the previous year in relation to the assessment year concerned. If the cash credits are credited in the FY 2006-07, it cannot be brought to tax in a later AY.2009-10 .Followed CIT v. Bhaichand H. Gandhi (1983) , 141 ITR 67 (Bom) (HC) CIT v. Lakshman Swaroop Gupta & Brothers (1975) , 100 ITR 222 (Raj) (HC) Bhor Industries Ltd v. CIT AIR 1961 SC 1100 (TA No. 29 of 013, dt. 14.02.2020) (AY. 2009 10)

Identity, credit worthiness and genuineness

In order to prove the above three factors cumulatively, the assessee can rely upon the following documents/statements:—

(a) PAN of the creditor,

(b) Return of Income for the concerned year of the creditor,

(c) Balance Sheet, Profit and Loss account of the creditor,

(d) Bank passbook showing receipts and corresponding payment of the creditor,

(e) Confirmation or affidavit of the creditor,

(f) Proof of receipt through Banking channel,

(g) The assessee can also produce the party before the Assessing Officer for giving a statement on oath.

SOP to apply provisions of section 68

The Central Board of Direct Taxes has issued a 'Standard Procedure for applying provisions of section 68' ("SOP") to its officers. As per this SOP, tax officers should adhere to the following sequence when applying provisions of section 68:

BOARD'S LETTER F. NO. 246/15V2017-A & PAC-1 DATED 10.01.2018

Subject : Standard Procedure for applying provisions of section 68 of Income-tax Act, 1961 – Regarding

Assessing Officers should follow the sequence as noted below for applying provisions of section 68 of the Act:—

Step 1: Whether there is credit of a sum during the year in the books of accounts maintained by the taxpayer.

Step 2: If yes, the assessee should be asked to explain the nature and source of such credit appearing in the books of accounts of the assessee.

Step 3: If the assessee offers no explanation, the sum so credited may be charged to income-tax as the income of the assessee at that previous year.

Step 4: If the assessee furnishes an explanation, the AO should examine whether the explanation so offered establishes the three ingredients i.e. identity of the creditor, creditworthiness of the creditor and genuineness of the transactions.

Step 5: Whether explanation of the assessee is reliable or acceptable? If yes, no further action is required and the sum so credited may not be charged to income-tax.

Step 6: If the explanation so offered by the assessee is not acceptable or reliable, the AO should give a detailed reasoning in the assessment order for not accepting the same.

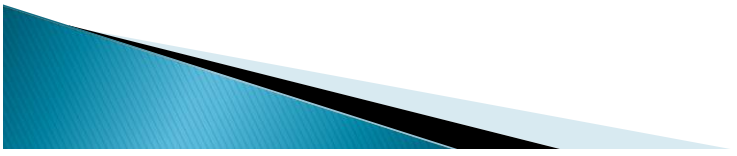
Step 7: The reasons for not accepting the explanation of the assessee should be communicated to the assessee.

Step 8: The order passed by the Assessing Officer should be speaking one bringing on record all the facts, explanation furnished by the assessee in respect of nature and source of the credit in its books of accounts and reasons for not accepting the explanation of the assessee. Relevant case laws should be relied upon wherever possible.

The above questions are not exhaustive but illustrative and the questions and sequence may vary depending upon facts of each case .

The above procedure to be brought to the notice of all officers working under your jurisdiction for compliance .

Sunita Verma
Director (A&PAC)
CBDT, Delhi



1.1 From the reading of section 68, following conditions should be met for applicability of section 68:

(i) Assessee should have maintained ‘books’.

(ii) There has to be credit of amounts in the books maintained by the taxpayer of a sum during the year.

(iii) The taxpayer should have offered no explanation about the nature and source of such credit found in the books or the explanation offered by the taxpayer in the opinion of the Assessing Officer is not satisfactory.

(iv) If the taxpayer is a closely held company and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such company shall be deemed to be not satisfactory, unless [As amended by Finance Act, 2012, with effect from 01.04. 2013].

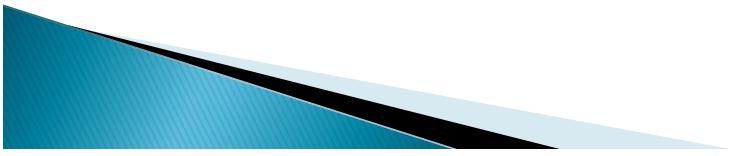
(a) The person, being a resident in whose name such credit is recorded in the books of such company, also offers an explanation about the nature and source of such sum so credited ; and

(b) Such explanation in the opinion of the Assessing Officer should have been found to be satisfactory.

If all the above conditions exist, sum so credited may be charged to tax as income of the taxpayer of that year.

UNEXPLAINED INVESTMENTS

[SECTION 69]



69. Unexplained investments.

- Where in the financial year immediately preceding the assessment year
- the assessee has made investments which are not recorded in the books of account, if any,
- maintained by him for any source of income, and
- the assessee offers no explanation about the nature and source of the investments or
- the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory,
- the value of the investments may be deemed to be the income of the assessee of such financial year.

Ingredients of section 69 — Unexplained investments

The following are the ingredients of section 69:—

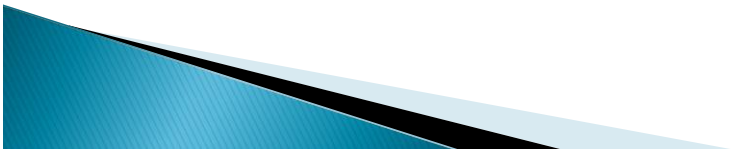
(i) there is an assessee;

(ii) the assessee has in the financial year immediately preceding the assessment year ("previous year") made investments;

(iii) such investments made by the assessee are not recorded in the books of account, if any, maintained by the assessee;

(iv) assessee offers no explanation about the nature and source of the investments; or the explanation offered by the assessee is not, in the opinion of the Assessing Officer, satisfactory.

If upon all the abovementioned conditions being cumulatively satisfied, the value of the investments may be deemed to be the income of the assessee of such previous year.



Difference between section 68 and section 69

The fundamental difference between these 2 sections is that in Section 68, there should be a credit entry in the books of account, whereas in Section 69, there may not be an entry in the books of account.

In the case of Section 69 only where investment has been made but has not been satisfactorily explained, the income should be treated to be the income of the assessee whereas in the case of Section 68, there should be a book entry and if that book entry is not satisfactorily explained, then it should be treated as income of the assessee.

Distinction between sections 68 & 69

Point of distinction	Section 68	Section 69
Record in Books of Account	Amount should be credited in the Books of Accounts, if not credited, then Section 68 is not applicable.	The investment should not be recorded in the Books of Accounts, if recorded, Section 69 is not applicable.
Maintenance of Books of Accounts	Compulsory	Optional since the words 'if any' used in the Section itself

Explanation to Assessing Officer	Assessing Officer can ask for explanation only in case any sum is credited in the books of accounts.	Assessing Officer can ask for explanation only if investment is not recorded in the books of accounts. Meaning thereby such investment should be outside the books of accounts, if any, maintained by the assessee.

ANALYSIS OF ADDITION MADE UNDER DIFFERENT SITUATIONS

1. Conversion of limited scrutiny to complete scrutiny without prior intimation to assessee and prior approval from higher authorities.
2. Requirement to give PAN – Rule 114B.
3. Cash sales recorded in books, added under section 68.
4. No addition of cash advances which were converted to sales by tax invoices.
5. Entire amount of sales by itself cannot represent the income of the appellant and that only the net profit embedded in sales should be treated as income of appellant.
6. Cash Balance is sufficient to justify the deposit during demonetisation period, addition of undisclosed income is not justified.
7. Recovery from debtor added u/s. 68.
8. Inordinate delay in deposit of cash from withdrawals from bank.
9. Real income theory.
10. Peak Credit theory.
11. Bank pass book cannot be regarded as a Books of Account.
12. Books of Account not maintained by the assessee. Under section 44AD no addition of cash deposits realised out of cash sales and forming cash balance as on 8th Nov 2016.
13. No addition can be made on the basis of Suspicion, Surmises, Rumour and Doubt.
14. Rejection of books of account.
15. 115BBE.
16. 271AAC.
17. Stay of demand u/s 220(6) of the Act.

ISSUE -1

Conversion of limited scrutiny to complete scrutiny without prior intimation to assessee and prior approval from higher authorities.

1.1. Delhi bench ITAT CBS international projects pvt ltd (order dated 28.02.2019) in ITA no 144/Del/2019

16. A perusal of the aforesaid instruction shows that ***the Assessing Officer can widen the scope of scrutiny even if it is selected for scrutiny assessment under CASS. However, the condition precedent for such action of the Assessing Officer is that he has to seek prior approval of the higher authorities. A perusal of the assessment order shows that the Assessing Officer has not mentioned as to when the permission from the PCIT was sought to make further enquiries in the case of the assessee.*** *Considering the facts of the case in totality, in the light of the CBDT Instructions mentioned hereinabove, qua notice u/s 143(2) of the Act, we are of the considered opinion that the assessment order so framed by the Assessing Officer is not in consonance with Instruction of the CBDT and, therefore deserves to be quashed. The order of the ld. CIT(A) is accordingly set aside.*

17. Since we have quashed the assessment order, we do not find it necessary to dwell into the merits of the case

1.2. Jaipur bench ITAT Late Smt Gurbachan Kaur VS DCIT in ITA 692/JP/2019 (order dated 05.12.2019)

16. A perusal of the aforesaid instruction shows that the Assessing Officer can widen the scope of scrutiny even if it is selected for scrutiny assessment under CASS. However, the condition precedent for such action of the Assessing Officer is that he has to seek prior approval of the higher authorities. A perusal of the assessment order shows that the Assessing Officer has not mentioned as to when the permission from the PCIT was sought to make further enquiries in the case of the assessee. Considering the facts of the case in totality, in the light of the CBDT Instructions mentioned hereinabove, qua notice u/s 143(2) of the Act, we are of the considered opinion that the 15 assessment order so framed by the Assessing Officer is not in consonance with Instruction of the CBDT and, therefore deserves to be quashed.

The order of the ld. CIT(A) is accordingly set aside." ***Thus, if the A.O. has taken up the issue of determining fair market value of the property in question as on 01/4/1981 without converting the limited scrutiny to comprehensive scrutiny by taking the prior approval of the competent authority then the said order passed by the A.O. will be nullity as beyond his jurisdiction. The AO neither in the assessment order nor in the assessment proceedings sheet has mentioned about any proposal of converting the limited scrutiny to comprehensive scrutiny and consequential approval of the Competent Authority being Principal CIT/DIT. The ld. Counsel for the assessee has produced the certified copy of the assessment proceedings sheet which does not contain any such proposal of the AO for expanding the limited scrutiny to complete scrutiny.***

*Further, the revenue has also not produced anything to show that the AO has obtained the necessary approval from the Competent Authority for conversion of the **limited scrutiny to comprehensive scrutiny.** Accordingly, the issue which is taken up by the AO in the proceedings under section 154 is illegal and void being beyond his jurisdiction to frame the limited scrutiny assessment. Accordingly, we set aside and quash the order passed by the AO under section 154 of the Act.*

8. *Since we have quashed the order passed by the AO under section 154 of the Act for want of his jurisdiction on this issue, therefore, we do not propose to take up the other grounds raised by the assessee in this appeal.*
9. *In the result, appeal of the assessee is allowed.*

1.3. Jaipur bench ITAT Manju Kaushik in ITA no 1419/JP/2019 (order dated 09.12.2019)

16. A perusal of the aforesaid instruction shows that the Assessing Officer can widen the scope of scrutiny even if it is selected for scrutiny assessment under CASS. However, the condition precedent for such action of the Assessing Officer is that he has to seek prior approval of the higher authorities. A perusal of the assessment order shows that the Assessing Officer has not mentioned as to when the permission from the PCIT was sought to make further enquiries in the case of the assessee. Considering the facts of the case in totality, in the light of the CBDT Instructions mentioned hereinabove, qua notice u/s 143(2) of the Act, we are of the considered opinion that the 15 assessment order so framed by the Assessing Officer is not in consonance with Instruction of the CBDT and, therefore deserves to be quashed. The order of the ld. CIT(A) is accordingly set aside."

We fortify our view by the above cited decision of ITAT Delhi Bench. ***In the case in hand, though the AO has mentioned that approval was accorded by the Pr.CIT on 24-11-2016 and consequently he has initiated proceedings of complete scrutiny by issuing notice dated 25-11-2016. However, we find that said approval of Pr.CIT was communicated to the AO only on 29-11-2016. The relevant communication letter dated 28-11- 2016 which was received by the AO on 29-11-2016*** *is as under:- Smt. Manju Kaushik vs DCIT, Range-7, Jaipur Smt. Manju Kaushik vs DCIT, Range-7, Jaipur* ***Therefore, the notice u/s 142(1) issued on 25-11-2016 for initiation of complete scrutiny assessment proceeding is prior to the receipt of the approval accorded by the Pr.CIT and thus it is apparent that AO has initiated the proceedings for full/ complete/ comprehensive scrutiny in anticipation of approval to be accorded by the Pr.CIT. It is also mandated by CBDT Instructions that competent authority has to grant approval only after satisfying itself about the requirements of comprehensive scrutiny of the case.***

Further the AO is also required to intimate the assessee regarding conversion of limited scrutiny to the complete scrutiny in such cases. It is pertinent to note that in the proceedings for limited scrutiny the AO was satisfied with the source of increase in the capital of the assessee and even did not proceed further after the reply and documents filed by the assessee in response to the notice u/s 142(1) dated 4-07-2016. Only after dropping the said notice, the AO issued fresh notice u/s 142(1) on 25-11-2016. The AO has finally made addition only on account of disallowance of deduction u/s 54B of the Act. ***Therefore, at the time of initiating the complete scrutiny, the issue under limited scrutiny was not pending with the AO as he was satisfied with the reply and documentary evidence on the said issue. In the case in hand, the AO has not intimated Smt. Manju Kaushik vs DCIT, Range-7, Jaipur the assessee about the conversion of limited scrutiny to complete scrutiny which is a serious violation of the instructions issued by the CBDT****.*

Hence, we find that the AO has taken up the issue and initiated proceedings for complete scrutiny without necessary approval with him. ***Therefore, the issue taken up by the AO regarding disallowance of deduction u/s 54B is prior to the necessary approval communicated to the AO and therefore, in the absence of communication in writing to the AO about the approval, the assumption of jurisdiction by the AO is invalid.*** *Consequently, the addition made by the AO by denying the deduction u/s 54B is not sustainable and the same is deleted.*

3.6 Since we have deleted the addition on the legal ground, therefore, we do not propose to take up other issues raised by the assessee on the merits of the deduction u/s 54B of the Act.

4.0 In the result, the appeal of the assessee is allowed.

1.4. Lucknow bench ITAT Ravi Prakash Khandelwal (order dated 08.11.2019) in ITA No 665/LKW/2017

15. As per the assessment order, the case has been selected under Limited Scrutiny through CASS for scrutiny of (i) Large deduction claimed under section 54B, 54C, 54D, etc. and (ii) Large cash deposits in saving bank accounts.

16. Para 3 of the CBDT Instruction (supra) dated 30/11/2017 states that the jurisdiction of the Assessing Officer while making assessments in Limited Scrutiny cases, by initiating inquiries on new issues has to comply with mandatory requirements of the relevant CBDT Instructions dated 26.09.2014, 29.12.2015 and 14.07.2016, i.e. the approval of the PCIT.

17. As is evident from the assessment order, in the present case, we find that the same is beyond the intent purpose and scope of the jurisdiction of the Assessing Officer, as the assessment has been made, exceeding his jurisdiction, because the case has been selected for limited scrutiny only on two issues, i.e. (i) Large deduction under section 54B, 54C, 54D etc., and (ii) Large cash deposits in savings account of the assessee; whereas the additions have been made on the indexed cost of acquisition at Rs.17,59,545/- and indexed cost of improvement at Rs.20,90,319/-, which is covered under section 48 of the Act, and is outside the scope and purview of the reasons of limited scrutiny. Moreover, the approval of the PCIT is mandatorily required for converting the Limited Scrutiny to a Complete Scrutiny. So, the proper course for the AO before making these additional enquiries would have been to take approval from the administrative Commissioner to widen the scrutiny. This, however, was not done and therefore, the action of the AO is violative of the CBDT Instruction. Thus, the addition so made by the Assessing Officer, in gross violation of the CBDT Instruction, is liable to be deleted.

1.5. Mumbai G bench ITAT order in case of Su-Raj Diamod Dealers Pvt Ltd order dated 27.11.2019 in ITA NO. 3098/Mum/2019

8. We shall now in the backdrop of our aforesaid observations deliberate on the validity of the order passed by the Pr. CIT under Sec. 263. As observed by us hereinabove, the Pr. CIT had held the order passed by the A.O under Sec. 143(3), dated 08.12.2016 as erroneous, in so far it was prejudicial to the interest of the revenue, for the reason, that he had failed to carry out proper investigation as regards the issue of valuation of the "closing stock" as reflected in the audited accounts of the assessee. ***We are of a strong conviction that now when the case of the assessee was selected for limited scrutiny for the reasons viz. (i). Large other expenses claimed in the P&L A/c.; and (ii). Low income in comparison to High Loans/advance /Investment in shares, therefore, no infirmity could be attributed to the assessment framed by the A.O on the ground that he had failed to deal with other issues which though did not fall within the realm of the limited reasons for which the case was selected for scrutiny assessment.***

In other words, the Pr. CIT in the garb of his revisional jurisdiction u/s 263 cannot be permitted to traverse beyond the jurisdiction that was vested with the A.O while framing the assessment. In sum and substance, revisional jurisdiction cannot be exercised for broadening the scope of jurisdiction that was vested with the A.O while framing the assessment. As a matter of fact, what cannot be done directly cannot be done indirectly. Accordingly, in terms of our aforesaid observations, we are of the considered view that as the A.O had aptly confined himself to the issues for which the case of the assessee was selected for limited scrutiny, therefore, no infirmity can be attributed to his order, for the reason, that he had failed to dwell upon certain other issues which did not form part of the reasons for A.Y 2014-15 which the case was selected for limited scrutiny under CASS. *We thus not being able to concur with the view taken by the Pr. CIT that the order passed by the A.O under Sec. 143(3), dated 08.12.2016 is erroneous, therefore, „set aside" his order and restore the order passed by the A.O. As we have quashed the order passed by the Pr. CIT under Sec. 263 on the ground of invalid assumption of jurisdiction by him, therefore, we refrain from adverting to and therein adjudicating the contentions advanced by the ld. A.R on the merits of the case, which thus are left open.*

9. The appeal of the assessee is allowed in terms of our aforesaid observations.

1.6. Mumbai D bench ITAT order in case of R&H Property Developer Pvt Ltd order dated 30.07.2019 in ITA No. 1906/Mum/2019

8. We shall now in the backdrop of our aforesaid observations deliberate on the validity of the order passed by the Pr. CIT under Sec. 263. As observed by us hereinabove, the Pr. CIT had held the order passed by the A.O under Sec. 143(3), dated 10.10.2016 as erroneous, in so far it was prejudicial to the interest of the revenue, for the reason, that he had failed to carry out proper investigation as regards the allowability of the expenditure claimed by the assessee to have been incurred for the purpose of its business. ***We are of a strong conviction that now when the case of the assessee was selected for limited scrutiny for the reason viz. "large investment in property (AIR) as compared to total income", therefore, no infirmity could be attributed to the assessment framed by the A.O on the ground that he had failed to deal with other issues which did not fell within the realm of the limited reason for which the case of the assessee was selected for scrutiny assessment.***

1.7. [TS-5014-ITAT-2020(Bangalore)-O]

ITAT: AO cannot examine other issues during limited scrutiny assessment, unless approved by CIT/ Pr. CIT – ITAT rules in assessee`s favour, notes that case was selected for limited scrutiny with respect to cash deposits in bank account during demonetization period (9th Nov. to 30th Dec); ITAT holds that disallowance u/s 43B for non-payment of VAT is not within scope of limited scrutiny;

8. ***In other words, the Pr. CIT in the garb of his revisional jurisdiction u/s 263 cannot be permitted to traverse beyond the jurisdiction that was vested with the A.O while framing the assessment. To sum up, revisional jurisdiction cannot be exercised for broadening the scope of jurisdiction that was vested with the A.O while framing the assessment. As a matter of fact, what cannot be done directly cannot be done indirectly. Accordingly, in terms of our aforesaid observations, we are of the considered view that as the A.O had aptly confined himself to the issue for which the case of the assessee was selected for limited scrutiny, therefore, no infirmity can be attributed to his order, for the reason, that he had failed to dwell upon certain other issues which were clearly beyond the realm of the reason for which the case of the assessee was selected for limited scrutiny as per the AIR information.*** *We thus not being able to concur with the view taken by the Pr. CIT that the order passed by the A.O under Sec. 143(3), dated 10.10.2016 is erroneous, therefore, set aside his order and restore the order passed by the A.O. As we have quashed the order passed by the Pr. CIT under Sec. 263 on the ground of invalid assumption of jurisdiction by him, therefore, we refrain from adverting to and therein adjudicating the contentions advanced by the ld. A.R on the merits of the case, which thus are left open.*
9. *The appeal of the assessee is allowed in terms of our aforesaid observations.*

ISSUE - 2
Requirement to give PAN – Rule 114B

2.1. **Transactions in relation to which permanent account number is to be quoted in all documents for the purpose of clause (c) of sub-section (5) of section 139A.**

139A(5)(c) quote such number in all documents pertaining to such transactions as may be prescribed by the Board in the interests of the revenue, and entered into by him:

Provided that the Board may prescribe different dates for different transactions or class of transactions or for different class of persons.

114B. Every person shall quote his permanent account number in all documents pertaining to the transactions specified in the Table below, namely :-

Sl. No.	***Nature of transaction***	***Value of transaction***
(1)	***(2)***	***(3)***
1.	*Sale or purchase of a motor vehicle or vehicle, as defined in clause (28) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988) which requires registration by a registering authority under Chapter IV of that Act, other than two wheeled vehicles.*	*All such transactions.*
2.	*Opening an account [other than a time-deposit referred to at Sl. No.12 and a Basic Savings Bank Deposit Account] with a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act).*	*All such transactions.*
3.	*Making an application to any banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act) or to any*	*All such transactions.*

Sl.No.	***Nature of transaction***	***Value of transaction***
(1)	***(2)***	***(3)***
4.	*Opening of a demat account with a depository, participant, custodian of securities or any other person registered under sub-section (1A) of section 12 of the Securities and Exchange Board of India Act, 1992 (15 of 1992).*	*All such transactions.*
5.	*Payment to a hotel or restaurant against a bill or bills at any one time.*	*Payment in cash of an amount exceeding fifty thousand rupees.*
6.	*Payment in connection with travel to any foreign country or payment for purchase of any foreign currency at any one time.*	*Payment in cash of an amount exceeding fifty thousand rupees.*
7.	*Payment to a Mutual Fund for purchase of its units.*	*Amount exceeding fifty thousand rupees.*

Sl.No.	*Nature of transaction*	*Value of transaction*
(1)	*(2)*	*(3)*
8.	*Payment to a company or an institution for acquiring debentures or bonds issued by it.*	*Amount exceeding fifty thousand rupees.*
9.	*Payment to the Reserve Bank of India, constituted under section 3 of the Reserve Bank of India Act, 1934 (2 of 1934) for acquiring bonds issued by it.*	*Amount exceeding fifty thousand rupees.*

10.	*Deposit with,—*		*Cash deposits,—*
	(i)	*banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act);*	*exceeding fifty thousand rupees during any one day; or*
	(ii)	*Post Office.*	*aggregating to more than two lakh fifty thousand rupees during the period 09th November, 2016 to 30th December, 2016.*

11.	*Purchase of bank drafts or pay orders or banker's cheques from a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act).*	*Payment in cash for an amount exceeding fifty thousand rupees during any one day.*
12.	*A time deposit with,—* *(i) a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act);* *(ii) a Post Office;* *(iii) a Nidhi referred to in section 406 of the Companies Act, 2013 (18 of 2013); or* *(iv) a non-banking financial company which holds a certificate of registration under section 45-IA of the Reserve Bank of India Act, 1934 (2 of 1934), to hold or accept deposit from public.*	*Amount exceeding fifty thousand rupees or aggregating to more than five lakh rupees during a financial year.*

13.	*Payment for one or more pre-paid payment instruments, as defined in the policy guidelines for issuance and operation of pre-paid payment instruments issued by Reserve Bank of India under section 18 of the Payment and Settlement Systems Act, 2007 (51 of 2007), to a banking company or a co-operative bank to which the Banking Regulation Act, 1949 (10 of 1949), applies (including any bank or banking institution referred to in section 51 of that Act) or to any other company or institution.*	*Payment in cash or by way of a bank draft or pay order or banker's cheque of an amount aggregating to more than fifty thousand rupees in a financial year.*
14.	*Payment as life insurance premium to an insurer as defined in clause (9) of section 2 of the Insurance Act, 1938 (4 of 1938).*	*Amount aggregating to more than fifty thousand rupees in a financial year.*
15.	*A contract for sale or purchase of securities (other than shares) as defined in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956).*	*Amount exceeding one lakh rupees per transaction.*

16.	*Sale or purchase, by any person, of shares of a company not listed in a recognised stock exchange.*	*Amount exceeding one lakh rupees per transaction.*
17.	*Sale or purchase of any immovable property.*	*Amount exceeding ten lakh rupees or valued by stamp valuation authority referred to in section 50C of the Act at an amount exceeding ten lakh rupees.*
18.	***Sale or purchase, by any person, of goods or services of any nature other than those specified at Sl. Nos. 1 to 17 of this Table, if any.***	***Amount exceeding two lakh rupees per transaction:***

2.2. It is therefore clear from the above table that there is no requirement / compulsion as per Rule 114B to submit the PA number and address of the sales or purchase by any person below Rs. 2 lakhs.

Thus, the learned assessing officer could not / and should not have asked for the PAN and address of all sales or purchase below Rs. 2 lakhs.

2.3. **Where the act prescribes a rule, it has to be strictly and mandatorily followed and further if the statute has conferred a power to do an act and has laid down the method in which that power is to be exercised, it necessarily prohibits the doing of the act in any other manner than that has been prescribed. In support of such legal proposition, the following judicial pronouncements are relied upon** :

2.3.1. Bharat Hari Singhania ([1994] 207 ITR 1 (SC)): In this case, the Hon'ble Supreme Court of India was dealing with the validity of rule 1D of Wealth Tax Rules which prescribed break up method for valuation of unquoted equity shares for the purposes of valuing the net wealth of the assets of the assessee therein and the Hon'ble Supreme Court laid down the following principles which are relevant to our case:

(a) Rule 1D prescribed for the valuation of unquoted equity shares has necessarily to be followed and WTO has no option either to follow or not to follow the same and the question whether the rule is mandatory or directory does not arise.

(b) Valuation officer is as much bound by rules of valuation made under the Act as anybody else is. Since Rule 1D uses the word 'shall', it indicates its mandatory character.

2.3.2. Chandra Kishore Jha v. Mahavir Prasad [1999] 8 SCC 266 (SC): In this case, the Hon'ble Supreme Court was dealing with an election petition filed after the prescribed period of 45 days from the election and while examining the rules made for the said purpose and the appellants' compliance thereto, it was held that ***'it is a settled salutary principle that if a stature provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner***.'

2.3.3. Orissa Rural Housing Development Corpn. Ltd. vs ACIT [2012] 204 Taxman 673 (Orissa) (HC): "*Law is well settled that when the statute requires to do certain thing in certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on a legal maxim 'Expressio unius est exclusion alteris', meaning there by that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner and following of other course is not permissible."*

***2.3.4. Singhara Singh (1963 AIR 358, 1964 SCR(4) 485*) (SC)** : In this case the Hon'ble Supreme Court was dealing with the validity of a confession not recorded in accordance with the procedure prescribed u/s164 of the Criminal Procedure Code and held that 'if a statute has conferred a power to do an act and had laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed.

2.3.5. The hon'ble Hyderabad Bench of ITAT in the case of **Medplus Health Services (P.) Ltd. vs ITO reported in [2016] 48 ITR(T) 396 (Hyderabad - Trib.),** in the context of Rule 11UA has held that where a method of valuation has been prescribed by legislature under Rule 11UA, the same has to be followed for computation of fair market value.

2.4 Thus considered one could conclude that the learned Assessing Officer is bound by the rules of the Income Tax rules 1962 and should exercise his / her authority within the boundary of rules enshrined by parliament vis-à-vis income tax rules 1962.

ISSUE - 3

Cash sales recorded in books, added under section 68

3.1. Shree Sanand Textiles Industries Ltd. V. DCIT vide ITA No. 1166/AHD/2014 dated 06th January 2020

9.5 From the above, we note that the provisions of section 68 of the Act can be attracted where there is a credit found in the books of accounts and the assessee failed to offer any explanation or the offer made by the assessee is not satisfactory in the opinion of the assessing officer. The assessee has explained to the authorities below that the impugned amount represents the sale which has not been doubted by the authorities below. Thus in our considered view, the impugned amount cannot be treated as unexplained cash credit under section 68 of the Act merely on the ground that the assessee failed to furnish the details of the existence of the parties.

9.6. We also note that the provisions of section 68 cannot be applied in relation to the sales receipt shown by the assessee in its books of accounts. It is because the sales receipt has already been shown in the books of accounts as income at the time of sale only.

9.7. We are also aware of the fact that there is no iota of evidence having any adverse remark on the purchase shown by the assessee in the books of accounts. Once the purchases have been accepted, then the corresponding sales cannot be disturbed without giving any conclusive evidence/finding. In view of the above we are not convinced with the finding of the learned CIT(A) and accordingly we set aside the same with the direction to the AO to delete the addition made by him.

10. Now coming to the issue on the suppression of sales as alleged by the Revenue, in this regard we note that the learned CIT (A) has rejected the books of accounts under the provisions of section 145(3) of the Act. The rejection of the books of accounts of the assessee has not been challenged either by the assessee or the revenue. Thus the order of the learned CIT-A qua to the rejection of the books has reached to its finality. It is the settled law that once the books of accounts have been rejected the only option available to the revenue is to estimate the profit on scientific basis. In this regard we find support and guidance from the judgment of Hon'ble Gujarat High Court in the case of President Industries reported in 258 ITR 654 wherein it was held as under:

"The amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales. The sales only represent the price received by the seller of the goods for the acquisition of which it has already incurred the cost. It is the realisation of excess over the cost incurred that only forms part of the profit included in the consideration of sales. Therefore, unless there is a finding to the effect that the investment by way of incurring cost in acquiring goods which have been sold has been made by the assessee and that has also not been disclosed, the question whether entire sum of undisclosed sales proceeds can be treated as income, answers by itself in the negative."

10.2. We also note that the entire basis of the additions as discussed above was on the basis of the information received from the central excise department. We in this regard note that the proceedings of the central excise department has been dropped as evident from the order.

11. The learned DR at the time of hearing has not brought anything contrary to the finding of the central excise department as reproduced above. Thus in the absence of any assistance from the learned DR we have no alternate except to place the reliance in the aforesaid order true and correct. Furthermore, we also assume that the impugned order of the central excise department pertains to the year under consideration. In the result the appeal filed by the assessee is allowed and the appeal filed by the revenue is dismissed.

3.2. New Pooja Jewellers vs. ITO ITA NO: 1329/Kol/2018. Assessment Year: 2014-15, order dated 26/02/2020.

14. This explanation has not been rebutted with evidence by the AO. The claim of the AO is that, the assessee has conveniently and very cleverly filed his reply before few days, when the case is going to be time barred and hence the documents filed cannot be verified is factually incorrect. Just because there are problems of time and manpower to conduct verification and detailed examination of the claims of the assessee, an addition cannot be made by rejecting the claim of the assessee.

15. Be it as it may, in the normal course, we would have restored the issue to the file of the AO for fresh verification of the claim of the assessee that it had received advances from customers on the occasion of Ramnavami Nayakhata. In other words, we would have given the AO more time to conduct enquiries and investigation. ***In this case we find that these advances have subsequently been recorded as sales of the assessee firm and that these sales have been accepted as income by the AO during the year. He has not disturbed the sales of the assessee. When a receipt is accounted for as income, no separate addition of the same amount as income of the assessee under any other Section of the Act can be made as it would be a double addition****. In the result, we delete the addition made and allow its claim of the assessee.*

16. In the result, the appeal of the assessee is allowed.

3.3. SHRI VINOD BHANDARI vs PR. CIT, ACIT-2 (1), DCIT-2(1), INDORE ITAT Indore Bench decided on 20 March 2020 in ITA No.350/Ind/2017, ITA No.66/Ind/2017, ITA No.57/Ind/2019 Assessment year 2012-13

Assessee, who was a doctor by profession, surrendered an amount of Rs.7 crores on account of short term loans given by him to various persons. He entered the amount in books. Subsequently recovered in cash and deposited in bank account. He included the amounts in his income returned. The AO made further addition of Rs. 7.34 crores being amount of loans and interest thereon realised and deposited in bank account under section 68 of the Act.

Held that Ld AO merely on the basis of surmises and conjectures have taken this view. He ignored the fact that the assessee has surrendered ₹ 7 crores as unaccounted income during the year. it can be inferred that if there are two funds one which is already taxed and other has not and there was remittances during the accounting year for certain sum, the source of which is not indicated then the presumption is that the remittances should have been from the fund which has already suffered tax. It is noteworthy that the Ld. A.O has not rejected the books of accounts.

3.4. Kanpur Organics Pvt. Ltd Vs. Dy. CIT Lucknow Bench of ITAT ITA.675/LKW/2018 dated 10/01/2020 Assessment year 2016-17

Addition of Rs.1.51 crores on account of unrecorded sales stated during search, under section 69A which was subsequently entered in Books and return was filed accordingly. Additional ground was raised before ITAT for applicability of sections 69A and 115BBE. Contention accepted by ITAT and held that addition could not be made under section 69A for unrecorded sales, which were duly recorded by the assessee and income determined accordingly.

4.1 Learned A. R. invited our attention to an order of Hon'ble Rajasthan High Court in the case of ***Pr. CIT vs. Bajargan Traders*** *in ITA. Mo.258 of 2017, placed at pages 25 to 29 of the paper book, and submitted that similar question arose before Hon'bie High Court and Hon'ble High Court was pleased to decide the issue in favour of the assessee by dismissing the appeal of the Revenue. Our further attention was invited to an order of* ***SMC Bench of ITAT. Jodhpur in the case of Lovish Singhal and Others vs. Income Tax Officer*** *in I.T.A. No,143/Jodh/2018 where again the issue was decided by the Tribunal in favour of the assessee. We were also taken to an order of* ***Jaipur Tribunal in the case of ACIT vs. Sanjay Bairathi Gems Ltd****, in ITA NO.157/JP/2017 where again the Tribunal had decided the issue in favour of the assessee.* ***Therefore, in view of the above judicial precedents, it was argued that the assessee had rightly included the amount of surrender in the sales and offered the income arising out of it as business income and therefore, section 115BBE was not applicable.***

7.2 We find that provisions of section 115BBE are overriding provisions which provide for taxing the income referred to in section 68 and from section 69 to 69D at a flat rate of tax and do not allow any deduction in respect of expenditure or allowance under the provisions of the Act. Therefore, it is important for application of section 115BBE that the assessee should first fall in any of these sections. ***In our opinion, in the present case, the addition u/s 69A could have been made only if no explanation, regarding source of such income, was offered or the explanation offered by the assessee was not satisfactory in the opinion of the Assessing Officer. In the present case, as we have already noted that the assessee had given complete explanation regarding the source of entries recorded in the diary, which were explained to be part of unrecorded sales and Assessing Officer also did not object to the said explanation.*** *Therefore, addition cannot be made u/s 69A of the Act and if the addition cannot be made u/s 69A, the provisions of section 115BBE will not be applicable.*

7.3 ***We find that in a similar situation, the Hon'ble Rajasthan High Court in the case of Pr. CIT vs. Bajargan Traders In I.T.A. No.258 of 2017, vide judgment dated 12/09/2017, had dismissed the appeal of the Revenue. The relevant question framed by Hon'ble High Court and its findings are reproduced below:***

2.10. We have heard the rival contentions and perused the material available on record. ***During the course of survey, the assessee has surrendered an amount of Rs. 70,04,814/- towards investment in stock of rice which had not been recorded in the books of accounts. Subsequently, in the books of accounts, the assessee has incorporated this transaction by debiting the purchase account and crediting the income from undisclosed sources. In the annual accounts, the purchases of Rs. 70,04,814/- were finally reflected as part of total purchases amounting to Rs. 33,47,19,658/- in the profit and loss account and the same also found included as part of the closing stock amount to Rs.1,94,42,569/- in the profit/loss account since the said stock of rice was not sold out. In addition to the purchase and the closing stock, the amount of RS. 70,04,814/- also found credited in the profit and loss account as income from undisclosed sources.***

The net effect of this double entry accounting treatment is that firstly the unrecorded stock of rice has been brought on the books and now forms part of the recorded stock which can be subsequently sold out and the profit/loss there from would be subject to tax as any other normal business transaction. Secondly, the unrecorded investment which has gone in purchase of such unrecorded stock of rice has been recorded in the books of accounts and offered to tax by crediting the said amount in the profit and loss account. Had this investment been made out of known source, there was no necessity for assessee to credit the profit/loss account and offer the same to tax. Accordingly, we do not see any infirmity in assessee's bringing such transaction in its books of accounts and the accounting treatment thereof so as to regularise its books of accounts. In fact, the same provides a credible base for Revenue to bring to tax subsequent profit/loss on sale of such stock of rice in future.

2.11. ***Having said that, the next issue that arises for consideration is whether the amount surrendered by way of investment in the unrecorded stock of rice has to be brought to tax under the head "business income" or "income from other sources".*** *In the present case,* ***the assessee is dealing in sale of foodgrains, rice and oil seeds,*** *and the* ***excess stock which has been found during the course of survey is stock of rice. Therefore, the investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee.*** *The decision of the Co-ordinate Bench in case of Shri Ramnarayan Birla (supra) supports the case of the assessee in this regard. Therefore,* ***the investment in the excess stock has to be brought to tax under the head "business income" and not under the head income from other sources".*** *In the result, ground No. 1 of the assessee is allowed.*

7.4 Similar is the findings of Tribunal in the other case laws relied on by the assessee, a copy of which is placed at pages 30 to 72 of the paper book. Therefore, in view of the judicial precedents and in view of the facts and circumstances of the present case, we hold that the ***addition sustained by learned CIT(A) u/s 115BBE is not in accordance with law and the surrendered income has rightly been included in the sales of the assessee and all the expenses have rightly been set off against the surrendered income and therefore, being business income, the assessee is also eligible for deduction u/s 80JJA of the Act.***

3.5. M/s.Singhal Exim Pvt.Ltd ITA No.6520/Del/2018 THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH 'G' dated 12.04.2019

In the first paragraph above, the Assessing Officer mentioned "the amount of Rs.59,11,29,517/- is hereby disallowed u/s 68 of the Act and added back to the total income of the assessee company". **It seems that the Assessing Officer has probably not understood the scope of Section 68. Section 68 is not for the purpose of allowability or disallowability of any deduction and moreover, the question of disallowance may arise in respect of any expenditure or allowance claimed by the assessee. In respect of a sale consideration, there cannot be any question of any disallowance. In the second paragraph above, the Assessing Officer has alternatively applied Section 69C. Section 69C is also for unexplained expenditure. Admittedly, there is no question of any unexplained expenditure in the case under appeal before us and therefore, Section 69C is also not applicable.**

3.6. M/s.Singhal Exim Pvt.Ltd ITA No.6520/Del/2018 THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH 'G'

In view of the above, we hold that the Assessing Officer was not right in concluding that the high sea sales are not genuine.

Moreover, Section 68 would also not be applicable in respect of recovery of sales consideration.

Once the assessee sold the goods, the buyer of the goods becomes the debtor of the assessee and any receipt of money from him is the realisation of such debt and therefore, we are of the opinion that in respect of recovery of sale consideration, Section 68 cannot be applied.

In view of the above, we find no justification for upholding the addition of Rs.59,51,29,517/-. The same is deleted

3.7. Agson Global Pvt Ltd Vs. ACIT. ITA NO: 3741-3746/Del/2019. Order dated 31/10/2019.

126. ……..xiv. With respect to the deposit of the cash on hand with the various bank, the explanation of the assessee that no such bank was accepting such a huge cash at one go and therefore assessee had to deposit the cash in various banks. The assessee also submitted that that in the same bank assessee has deposited cash in its 2 different branches which itself proves that the banks were not accepting such a huge deposit. Even otherwise, it was submitted correctly that merely because the cash holding as on 8/11/2016 was not deposited immediately cannot lead to conclusion that assessee did not have that cash. It can merely lead to a suspicion but based on this addition cannot be made without making further enquiry and conclusively proving that assessee did not have that kind of cash available with it. *Even otherwise, if the assessee had to introduce his unaccounted money he would have deposited it at the first instance.*

xv. ***Assessee also filed its VAT returns, which are not found to be in variance with the accounting and tax records. Therefore, it cannot be substantiated that the assessee has backdated the transactions of the sale.***

xvi. The another claim of the learned assessing officer is that assessee has huge cash in hand but a large amount of bank loans are outstanding and therefore, the claim of the assessee that it was having a huge cash is unacceptable. On careful analysis of the balance sheet of the assessee company for the year ended on 31st of March 2017 it is apparent that assessee has long-term borrowing in the form of secured loans, which are Term loan. These loans are payable at regular installments and have the commitment charges. Therefore, it could not have been paid by the assessee. The assessee further referred to note number 6 where short-term borrowings are explained. It is submitted that the most of the outstanding is bills payable under letter of undertaking and cash credit, which are backed by the closing stock of the assessee. Naturally, these funds are available to the assessee at a lesser rate of interest. Certain funds are also backed by hundred percent margins of fixed deposit receipts, which has very small amount of interest payout. The other advances received from banks in the form of packing credit are with respect to the export of garments. Therefore it was submitted that the funds available to the assessee are either repayable on a predefined term and or are having very small rate of interest. Therefore, it cannot have any relationship with the holding of cash on hand.

xvii. Now the cardinal issue that requires to be discussed is that the assessee is maintaining its books of account in Tally software. It also maintains its stock register in that software. The various pages of the appraisal report and the printouts found during the course of search shows that assessee maintains the books of account of the large number of companies of its group or associates in the tally software. At page number 123 of 198 of part a of appraisal report, at the time of the search the gross profit margin of the assessee was 4 – 6% only. It was also stated that since the figures reported in the audited balance sheet and ITR are not matching with the tally records, the authenticity of the books of accounts of the assessee company is doubtful. It also recorded that the debt or in respect of transaction's voluminous, there are large number of bank accounts, use cases thereby making it complex. Thus the appraisal report suggested the assessing officer to consider getting the books of accounts of the assessee company audited under section 142 (2A) of the act.

The issue also arose during the course of assessment that whether the sales of dry fruits by the assessee are backdated or not. To identify such backdating of the transaction the AO should have got the accounts of the assessee audited u/s 142 (2A) of the act as well as the forensic audit. In absence of these actions, it is impossible for the assessing officer to note that whether the assessee has backdated the transaction in the tally software or not. The tally software runs on ODBC and rarely one finds the audit Trail of the transactions, which are altered. If the assessee maintains its books of accounts on tally software and back dates the transactions in that particular software, it is impossible to trace them and find out whether they are backdated or not. The only option left with the revenue is to get the accounts of such assessee is subject to forensic audit to know that whether there is a back dating of such accounts or manipulation of the accounts or not.

In absence of this, it is impossible to catch hold of an assessee who can manipulate his accounts to suit his requirement. In many of the accounting, software there is an absence of any audit Trail and they can be easily erased, altered, backdated without any evidence or trace. The time has come to also look into usability of such accounting software by the regulator for filing the tax and financial results. Either this software's should be compliant of the audit trail or they may be regulated to provide such audit trails.

xviii. Even otherwise as per retraction letter dated 24/3/2017 of the managing director of the company which was submitted on 31/3/2017 where assessee has revised its disclosure from INR 50 crores to INR 30 crores under PMGKY. There is no whisper of further recording the statement of the managing director to show how the original disclosure was incorrect. In fact, revenue accepted the revised disclosure made by the managing director.

127. In view of above facts the additions sustained by the learned CIT - A of INR 73.13 crores are deleted thus ground number 5 of the appeal of the assessee for assessment year 2017–18 is allowed. Consequently, ground number 1 of the appeal of the learned assessing officer for the same assessment year 2017-18 is dismissed.

128. Accordingly, all these appeals are disposed off as 6 appeals of the assessee are partly allowed and 6 appeals of the ld AO are dismissed.

Order pronounced in the open court on 31 /10/2019.

3.8. CIT v. Kailash Jewellery House ITA No. 613/2010 decided by Delhi High Court on 09.04.2010

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE V K JAIN

3. The Commissioner of Income-tax (Appeals) had returned a finding that the stock and cash found at the time of search had been examined by the Assessing Officer and was compared with the stock and cash position as per books. ***The stock and cash position as per the books had been arrived at after the effect of the aforesaid cash sales****.* ***The stock position as well as the cash position as per the said books had been accepted by the Assessing Officer. The Commissioner of Income-tax (Appeals) also noted that the appellant had furnished the complete set of books of accounts and the cash books and no discrepancy had been pointed out. The Assessing Officer had doubted the aforesaid sales as bogus and had made the aforesaid addition****.* *However, the Commissioner of Income-tax (Appeals) as well as the Income-tax Appellate Tribunal returned findings of fact to the contrary.*

4. The Tribunal also noted that the departmental representative could not challenge the factual finding recorded by the Commissioner of Income-tax (Appeals). Nor could he advance any substantive argument in support of his appeal. ***The Tribunal also observed that it is not in dispute that the sum of Rs.24,58,400/- was credited in the sale account and had been duly included in the profit disclosed by the assessee in its return. It is in these circumstances that the Tribunal observed that the cash sales could not be treated as undisclosed income and no addition could be made once again in respect of the same.***

5. The findings of the Commissioner of Income-tax (Appeals) and the Tribunal, which are purely in the nature of the factual findings, do not require any interference and, in any event, no substantial question of law arises for our consideration. The appeal is dismissed.

3.9. R.B.Jessaram Fatehchand (Sugar Dept.) v. CIT (1970) 75 ITR 33 (Bom.)

3. ***In the case of a cash transaction where delivery of goods is taken against cash payment, it is hardly necessary for the seller to bother about the name and address of the purchaser. In our opinion, therefore, the rejection of the results of the assessee's cash book by the Income-tax Officer was not at all justified and the Appellate Assistant Commissioner, therefore, was right in deleting the addition made by the Income-tax Officer.*** *The Tribunal, it appears, has approached the matter on certain surmises and conjectures.....*

……According to the Tribunal, although the entries in the account books of the assessee appeared to be all right ostensibly, the assessee could not merely rely on the said entries but had further to show that the transactions as entered in these accounts were true and genuine. Since, in the present case, by reason of its failure to give the addresses of the customers, it had failed to establish adequately the genuineness of the transactions, the Income-tax Officer was right in taking the view that the book results shown by the assessee were not acceptable.

4. ***In our opinion, the assessee's account books are to be accepted, unless, on verification, they disclosed any faults or defects, which cannot be reasonably and satisfactorily explained by the assessee. All the other transactions, except the cash transaction, which were verifiable, have been verified and scrutinised by the Income-tax Officer and there is nothing wrong whatsoever found with them. As to the cash transactions also, the quantity of sugar sold has not been disputed. The rates at which sugar was sold were not such as would excite suspicion by reason of being lower than the prevailing market rates. The names of the customers are also entered in respect of the transaction. All that is not done is that the addresses are not entered and on enquiry the assessee was unable to supply the addresses. Since, having regard to the nature of the transaction and the manner in which they had been effected, there was no necessity whatsoever for the assessee to have maintained the addresses of cash customers, the failure to maintain the same or to supply them as and when called for cannot be regarded as a circumstance giving rise to a suspicion with regard to the genuineness of the transactions.*** *The Tribunal, therefore, was not right, in our opinion, in setting aside the order of the Appellate Assistant Commissioner and restoring that of the Income-tax Officer. There are no circumstances disclosed in the case nor is there any evidence or material on record which would justify the rejection of the book results.*

3.10. CIT v. Jaora flour and Foods Pvt. Ltd. (2012) 344 ITR 294 (MP)

6. So far as the issue of the deletion of Rs. 10 lakhs (rupees ten lakhs), which were added on account of cash found during the course of survey is concerned, during the survey on amount of Rs. 10 lakhs (rupees ten lakhs) was surrendered on account of unrecorded sale of bardana and further Rs.10 lakhs (rupees ten lakhs) were found as cash. The Tribunal has found that after completion of survey, the alleged unaccounted sale of bardana of Rs. 10 lakhs (rupees ten lakhs) was entered in the books of account by the assessee on December 27, 2001. The assessee's explanation has been accepted that cash of Rs. 10 lakhs (rupees ten lakhs) found during the course of survey were on account of realisation from above sale of bardana of Rs. 10 lakhs (rupees ten lakhs). Thus the amount of Rs. 10 lakhs cash found during the course of survey was duly entered in the books of account and the same did not remain unrecorded and it was not unaccounted. The Tribunal noted that the addition of the same amount again during the assessment proceedings amounted to double addition, since it was already shown in the books of account. The facts recorded by the Tribunal are not in dispute and the reasoning given by the Tribunal for deleting the addition of Rs. 10 lakhs (rupees ten lakhs) on the undisputed facts does not suffer from any error.

***7.** In view of the aforesaid analysis, we find that the appeal does not involve any substantial question of law. The issue raised by the appellant is concluded by the question of fact. The appeal is accordingly dismissed in limine.*

3.11. CIT v. Vishal Exports Overseas Ltd., Tax Appeal No. 2471 of 2009 decided by Gujarat High Court on 03.07.2012

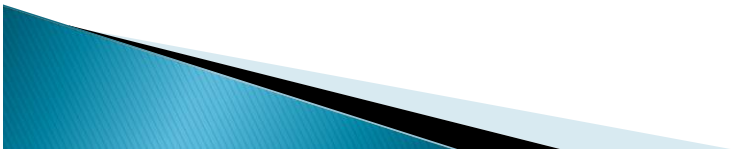
HONOURABLE MR. JUSTICE AKIL KURESHI

4. *The assessee carried the issue in appeal. The Commissioner (Appeals) vide his order dated 22-12-2004 allowed the appeal. He upheld the assessee's contention that the addition of Rs.70 lakhs in respect of bogus exports was not justified. He, in fact, held that there was no cogent evidence in possession of the Assessing Officer to hold that such sales were bogus. The C.I.T. (Appeals) on facts thus reversed the finding of the Assessing Officer that the amount of Rs.70 lakhs represented bogus sales of the assessee. He, therefore, while deleting the additions under section 68 of the Act, further directed granting of deduction under section 80HHC of the Act with respect to such amount also.*
5. *Revenue carried the matter in appeal before the Tribunal. The Tribunal did not address the question of correctness of the C.I.T. (Appeals)'s conclusion that amount of Rs.70 lakhs represented the genuine export sale of the assessee. The Tribunal however, upheld the deletion of Rs.70 lakhs under section 68 of the Act observing that when the assessee had already offered sales realisation and such income is accepted by the Assessing Officer to be the income of the assessee, addition of the same amount once again under section 68 of the Act would tantamount to double taxation of the same income.*

3.12. DEWAS SOYA LTD, UJJAIN v/s Income Tax (Appeal No 336/Ind/2012) DT : 31.10.2012

6.19 The appellant is maintaining sales register and stock register day to day basis containing requisite details for the whole year, which were produced by the appellant during the appellate proceedings also. ***It was observed that appellant is maintaining complete quantitative records relating to purchase, production and sales and sales were properly accounted for in the sales register and same were reduced from the stock register****.*

6.20 The claim of the appellant that such addition resulted into double taxation of the same income in the same year is also acceptable because on one hand cost of the sales has been taxed (after deducting gross profit from same price ultimately credited to profit & loss account) and on the other hand amounts received from above parties has also been added u/s. 68 of the Act.



6.21 This view has been held by the Hon 'ble Supreme Court in the case of CIT vs Devi Prasad Vishwnath Prasad (1969) 72 ITR194 (SC) that "It is for the assessee to prove that even if the cash credit represents income, it is income from a source, which has already been taxed". The assessee has already offered the sales for taxation hence the onus has been discharged by it and the same income cannot be taxed again. Reliance is also placed on the decision of Hon'ble Supreme Court in the case of CIT vs Durga Prasad More (1969) 72 ITR 807 (SC) in which it was held "If the amount represented the income of the assessee of the previous year, it was liable to be included in the total income and an enquiry whether for the purpose of bringing the amount to tax it was from a business activity or from some other source was not relevant".

7. In view of aforesaid discussions, the additions made by the A.O. u/s. 68 of the Act at Rs.6,47,03,548/- by considering the sale proceeds as cash credits, cannot be sustained and the same is deleted in full.

8. In the result the appeal is allowed."

3.13. ITO vs. Surana Traders, (2005)93 TTJ 875: (2005)92 ITD 212

The relevant observation of the Mumbai Bench were as under :_ " So merely because for the reasons that the purchaser parties were not traceable, the assessee could not be penalized. In the sales documents, the assessee has made available all necessary details, i.e. the total weight sold as well as the rate per kilogram. Undisputedly, the assessee has maintained complete books of accounts along with day to day and kilogram to kilogram stock register. These were produced before the AO by the assessee. The assessee also submitted stock tally sheet along with the audited accounts. The audit report of the assessee also bears ample testimony in favour of the assessee. The factum of the assessee having maintained stock register and quantitative details have been mentioned by the AO in the assessment order. No mistake were pointed out by the AO in these records maintained by the assessee. Since the purchases have been held to be genuine, the corresponding sales cannot, by any stretch of imagination be termed as hawala transaction. It is the burden of the department to prove the correctness of such additions. When, in such like cases, a quantitative tally is furnished, even if purchases are not available no addition is called for."

3.14. IN THE ITAT, DELHI BENCH 'D', NEW DELHI ITA No. 1220/Del/2011 : Asstt. Year : 2006-07 Kishore Jeram Bhai Khaniya Date of Pronouncement : 13.5.2014

There is another dimension to this issue. The Assessing Officer made addition of Rs. 22.06 lacs **u/s 68** of the Act, which **contemplates the making of addition where any sum found credited in the books of the assessee is not proved to the satisfaction of the A.O. It is only when such a sum is not proved that the Assessing Officer proceeds to make addition u/s 68 of the Act. We are dealing with a situation in which the assessee has himself offered the amount of cash sales as his income by duly including it in his total sales. Once a particular amount is already offered for taxation, the same cannot be again considered u/s 68 of the Act. In fact, such addition has resulted into double addition.**

3.15. CIT vs Goverdhan India(P) Ltd 177 Taxman 29 Bombay (HC) 18thAugust 2008 AY 2001-02.

The assessee had recorded sale of goods to Ambrose International Corporation worth Rs.50.36 lakhs. On summons from AO, AIC sent a copy of account showing purchase of Rs.28.19 lakhs only. The difference of Rs.22.17 was added as unexplained cash credit. **The assessee's accounts were audited. The copies of the sale bills to AIC were countersigned by AIC. The sales to AIC stood proved. The sales were made to identified person. No addition under s.68 could be merely on copy of account filed by AIC. Further, assessee's request to cross examine AIC was not allowed. The tribunal rightly deleted the addition to income. S.68 of the Income Tax Act 1961.**

3.16. Racmann Springs (P) Ltd vs DCIT 55 ITD 159 ITAT (Delhi)

24. ***The Assessing officer held*** *in the assessment order dated 13-1-1992 that the* ***drafts deposited in the Bank of Tokyo*** *as per List-I are* ***actually undisclosed sales and treated the same as income of the assessee under section 68 of the Income-tax Act, 1961. This was really strange. Only unsubstantiated cash credits could be added under section 68 of the Income-tax Act, 1961. The said section does not permit the Assessing Officers to add undisclosed sales under that section. Further, the realizations from the sundry debtors cannot be treated as cash credits. Cash credit always appear as a liability in the balance sheet of the assessee. Realisation from the sundry debtors would reduce the sundry debtors appearing on the "assets" side of the balance sheet.***

25. As already stated ***the Assessing Officer has not brought any material on record to substantiate his allegation that the impugned amount of Rs. 15,59,845 represented undisclosed sales of the assessee. Even assuming that it represents undisclosed sales,*** *the whole of the said amount cannot be included in the total income of the assessee.* ***Only the net profit element in the alleged undisclosed sales of Rs. 15,59,845 can be included*** *in the total income of the assessee. For this proposition reference can be made to the order of the Tribunal in the case of Tarachand Shantilal (supra) (given at page 101 of paper book No. l) and also the judgment of the Calcutta High Court in the case of S. M. Omer (supra) given at page 102 of paper book No. 1.*

26. Even assuming that some amount is to be added in the total income of the assessee towards ***the profit element embedded in the alleged unaccounted sales, it can only be assessed under the head "Income from business"*** *and not as "Income from other sources" as has been done by the Assessing Officer.*

35. ***The CIT (Appeals) proceeds on the basis*** *that the impugned addition of Rs. 15,59,845 is made as* ***the assessee was not able to prove the cash credits.*** *This is evident from para 29 of his order.* ***He speaks of identity and creditworthiness of the creditors. The Assessing Officer never held that the said amount represents unproved credits. The Assessing Officer only held that it represents "undisclosed sales of the assessee". This shows the utter confusion in the mind of the CIT (Appeals) which led to the dismissal of the assessees appeal.***

36. ***Besides the total of the amounts of drafts*** *as per list-I reproduced in the assessment order dated 13-1-1992* ***comes only to Rs. 15,09,845/-. But the Assessing Officer had made an addition of Rs.50,000 more*** *by taking the figure to be added at Rs. 15,59,845/-.* ***Neither the assessees counsel nor the Departmental Representative have noticed this. This shows the light attitude taken by the Assessing Officer.***

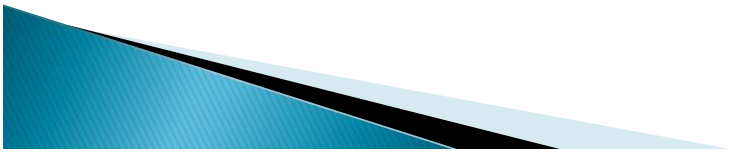
37. *In the above facts and circumstances of the case, we hold that the Assessing Officer is not at all justified in adding Rs. 15,59,845 towards undisclosed of the assessee and in applying section 68 of the Income-tax Act, 1961 to the same. We delete the sustained addition of Rs. 15,42,000/-.*

3.17 IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, AHMEDABAD ITA.No.1652/Ahd/2011 in the case of Shri Pavankumar Bhagatram Sharma Date of Pronouncement: 11/04/2016

8. 3.3. ***Since the books of accounts of the appellant are incorrect, and unreliable, the proper course to be adopted by the AO was to reject the books and estimate the income of the appellant on a reasonable basis. It is obvious that the deposits in the bank account are sale proceeds of the appellant. The mere fact that the books of accounts were not correct would not empower then addition of the entire deposits in the bank account as unaccounted income of the appellant u/s 68 of the IT Act.***

3.3(i) In view of the above, it is clear that the AO was not justified in making addition of Rs.50,48,055/- by invoking section 68 of the IT Act 1961. Since the books of accounts of the appellant are not reliable and do not show the correct profit the same are rejected. The income is estimated by taking the net profit to be 8% of the total turnover. From the Trading Account filed along with the audit report, it is seen that the turnover of the appellant is of Rs.43,77,5957-. Net profit at the rate of 8% of this amount works out to Rs.3,50,208/-.

The AO is directed to assess the income of the appellant at Rs. 3,50,210/-..



9. ……. ***In words, it has not brought to our notice that inference drawn by the ld.CIT(A) are factually incorrect. The ld.CIT(A) has rightfully observed that total amount appearing as a deposit in the account was not cash credits, rather sale proceeds of the assessee. Turnover of the assessee is to be computed on the basis of all these details and at the most, an estimated net profit can be computed as an income of the assessee. Accordingly, the ld.CIT(A) has confirmed an addition of Rs.3,50,208/-. We do not find any error in the detailed reasoning of the ld.CIT(A), and accordingly, the appeal of the Revenue is dismissed. For dismissal of this appeal, we do not require the presence of the assessee.***

3.18. Nitisha Silk Mills Pvt Ltd Vs. ITO. ITA NO 896/ Ahd/2011. Assessment year 2007-08, order dated 20/07/2012.

10. ……. Considering these facts of the present case, in its entirety, we are of the considered opinion that the claim of the assessee regarding cash sales under peculiar conditions that the assessee was discontinuing its business and therefore some sales were made in cash cannot be summarily rejected. We also find that it is observed by the Ld. CIT(A) on pages 51-52 of his order that the assessee could not provide even the names and addresses of those parties to whom cash sales were claimed to have been made. This is the main basis on which Ld. CIT(A) has confirmed the decision of the A.O. ***In our considered opinion, it cannot be said that in the case of cash sales, the assessee is bound to keep record of the names and addresses of the buyers. The judgement of Hon'ble Bombay High Court cited by the Ld. A.R. rendered in the case of R B Gurnam Fatehchand vs ACIT as reported in 75 ITR 33 also supports the case of the assessee. In that case also, the assessee was not in a position to give the addresses of the customers to whom cash sales were made. Under these facts, it was held by the Hon'ble Bombay High Court that this cannot be the basis to reject the book results****. Respectfully following the judgment of Hon'ble Bombay High Court, we delete this addition also. Ground No.2 is also allowed.*

11. In the result, appeal of the assessee is allowed.

ISSUE – 4

No addition of cash advances which were converted to sales by tax invoices.

4.1. Crystal Networks (P) Ltd Vs. CIT. ITA 158 of 2012. Assessment Year 1994-95, order dated 29/07/2010 (Cal HC) :

Assailing the said judgment of the learned Tribunal learned counsel for the appellant submits that ITO did not consider the material evidence showing credit worthiness and also other documents viz., confirmatory statements of the persons, of having advanced cash amount as against the supply of bidi. These evidences were duly considered by the CIT (Appeals). Therefore, the failure of the person to turn up pursuant to the summons issued to any witness is immaterial when material documents made available, should have been accepted and indeed in subsequent year the same explanation was accepted by the ITO. He further contended that when the Tribunal has relied on the entire judgment of the CIT (Appeals), therefore it was not proper to take up some portion of the judgment of the CIT (Appeals) and to ignore the other portion of the same. The judicial propriety and fairness demands that the entire judgment both favourable and unfavourable should have been considered. By not doing so the Tribunal committed grave error in law in upsetting the judgment in the order of the CIT (Appeals).

In this connection he has drawn our attention to a decision of the ***Supreme Court in the case of Udhavdas Kewalram vs. Commissioner of Income-Tax, Bombay*** *City reported in 66ITR 462 In this judgment it is noticed that the Supreme Court as proposition of law held that the Tribunal must in deciding an appeal, consider with due care, all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner in the light of the evidence and the relevant law.*

We find considerable force of the submissions of the learned counsel for the appellant that the Tribunal has merely noticed that since the summons issued before assessment returned unserved and no one came forward to prove. Therefore it shall be assumed that the assessee failed to prove the existence of the creditors or for that matter creditworthiness. As rightly pointed out by the learned counsel that the CIT (Appeal) has taken the trouble of examining of all other materials and documents viz., confirmatory statements, invoices, challans and vouchers showing supply of bidi as against the advance. Therefore, the attendance of the witnesses pursuant to the summons issued in our view is not important.

The important is to prove as to whether the said cash credit was received as against the future sale of the product of the assessee or not. ***When it was found by the CIT (Appeal) on fact having examined the documents that the advance given by the creditors have been established the Tribunal should not have ignored this fact finding****. Indeed the Tribunal did not really touch the aforesaid fact finding of the CIT (Appeal) as rightly pointed out by the learned counsel.*

The Supreme Court has already stated as to what should be the duty of the learned Tribunal to decide in this situation. In the said judgment noted by us at page 463, the Supreme Court has observed as follows :-

"The Income-tax Appellate Tribunal performs a judicial function under the Indian Income-tax Act. It is invested with authority to determine finally all questions of fact. The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all the contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law.“

The Tribunal must, in deciding an appeal, consider with due care all the material facts and record its finding on all contentions raised by the assessee and the Commissioner, in the light of the evidence and the relevant law. It is also ruled in the said judgment at page 465 that if the Tribunal does not discharge the duty in the manner as above then it shall be assumed the judgment of the Tribunal suffers from manifest infirmity.

Taking inspiration from the Supreme Court observation we are constrained to hold in this matter that the Tribunal has not adjudicated upon the case of the assessee in the light of the evidence as found by the CIT (Appeals). We also found no single word has been spared to upset the fact finding of the CIT (Appeals) that there are materials to show the cash credit was received from various persons and supply as against cash credit also made.

Hence the judgment and order of the Tribunal is not sustainable. Accordingly, the same is set aside.

We restore the judgment and order of the CIT (Appeal). The appeal is allowed.

4.2. Smt. Harshila Chordia vs ITO (2008) 298 ITR 349

Hon'ble Rajasthan High Court has held that "Addition u/s. 68 could not be made in respect of the amount which was found to be cash receipts from the customers against which delivery of goods was made to them."

4.3. M/s Heera Steel Limited vs ITO (2005) 4 ITJ 437

Hon'ble ITAT, Nagpur Bench has held that "Both the lower authorities failed to appreciate the case of the assessee that these were the trade advances and not cash credits and against such advance, the assessee has supplied the material in due time as per details available on record. In view of the above, there is no justification for the revenue authorities to treat these cash advances as unexplained cash credit u/s. 68".

ISSUE – 5

Entire amount of sales by itself cannot represent the income of the appellant and that only the net profit embedded in sales should be treated as income of appellant.

5.1. Deputy Commissioner of Income-tax *v.* HVAC Systems (P.) Ltd [2011] 44 SOT 81 (Bangalore) (URO)

Section 143 of the Income-tax Act, 1961 - Assessment - Addition to income - Assessment year 2005-06 - Assessee was engaged in business of servicing/works contract for air-conditioners - Assessee had a good amount of transactions with SCDL - On closing books of account, balance in personal account of SCDL as reflected in assessee's books was Rs. 1.68 crores - At same time, balance in books of SCDL was Rs. 2.53 crores - According to assessing authority, this difference in account balances was not reconciled by assessee - Thus, Assessing Officer made an addition of Rs. 85.73 lakhs towards suppression of turnover - Commissioner (Appeals) found that said turnover, as such, could not be treated as income of assessee, but income element attributable to that turnover alone could be treated as taxable income in hands of assessee - Whether since exact bill-wise reconciliation on account of difference in personal accounts was not completely administered by assessee at time of assessment, Commissioner (Appeals) was justified in accepting alternate contention advanced before him that if at all there could be a case of turnover suppression, profit element alone could be taxed - Held, yes - Whether, therefore, impugned order of Commissioner (Appeals) was to be upheld - Held, yes

5.2. Assistant Commissioner of Income-tax *v.* Rasna Industries [2009] 31 SOT 26 (Jodhpur) (URO)

I. Section 158BB, of the Income-tax Act, 1961 - Block assessment in search cases - Undisclosed income, computation of - Block period 1990-91 to 29-7-1999 - A search and seizure operation in case of 'B' and 'K' group of cases was carried out - Consequently, a notice under section 158BC was issued to assessee - During course of search, a detailed inventory of stock and related material was prepared and when it was compared with stock available in books of assessee it resulted into shortage of stock - Assessing Officer treated it as undisclosed sales and thereupon, made an addition - On appeal, assessee contended that when stock is found short, only profit element of sales, to extent of short stock, has to be added and not entire value of short stock - Commissioner (Appeals) accepted said contention and adopted gross profit rate at 10.5 per cent as declared by assessee and, thus, reduced addition - Whether Commissioner (Appeals) was justified in his view - Held, yes

II. Section 158BB of the Income-tax Act, 1961 - Block assessment in search cases - Undisclosed income, computation of - Block period 1990-91 to 29-7-1999 - Pursuant to a search various documents in form of diaries and loose paper regarding details of trade of rasgullas were found and seized - When assessee was asked to explain nature of transaction recorded in seized documents, it explained that seized documents related to trade of rasgullas, which was not accounted for in regular books of account - On basis of assessee's explanation, Assessing Officer made huge addition by taking sample of sale of rasgulla for one month, and, accordingly, estimated undisclosed sales at rate of 28 per cent over entire block period in question - Whether since sample of sales taken from one month could not be treated as representative of undisclosed trading activity of entire block period as there could not be uniformity in sale throughout a year, there was no justification for applying ratio of 28 per cent over entire block period for computing undisclosed sales - Held, yes

5.3. Commissioner of Income-tax *v.* Gurubachhan Singh J. Juneja [2008] 171 Taxman 406 (Gujarat)

Section 69 of the Income-tax Act, 1961 - Unexplained investments - Assessment year 1984-85 - In course of search carried out at assessee's residential and business premises, certain documents were found and seized which showed that he had made unaccounted sales of certain amount during course of his trading business - Assessing Officer made addition of that amount but same was deleted by Tribunal holding that assessee could not be taxed on entire amount, but was liable to be taxed only on gross profit earned on said sales because all purchases were made from reputed companies and/or their dealers and such purchases were fully vouched for - Whether in absence of any material on record to show that there was any unexplained investment made by assessee, which was reflected by alleged unaccounted sales, finding of Tribunal that only gross profit on said amount could be brought to tax did not call for any interference - Held, yes

5.4. JANTA TILES v. ASSISTANT COMMISSIONER OF INCOME-TAX [2000] 66 TTJ 695 (PUNE)

Where addition of Rs. 1,96,924 was made to the assessees income on account of the stock found at the time of search being less than stock as per books:

Held that the stock found at the time of search was less than the stock as per books. That meant, the difference of Rs. 1,96,924 represented suppressed sales. If the Trading a/c was recasted, the sales declared by the assessee would have to be increased by the sum of Rs. 1,96,924 and the stock declared by the assessee shall be decreased by Rs. 1,96,924. Thus, no addition would be called for on this account. However, it would amount to suppression of gross profit arising out of the suppressed sales. Keeping in view the past history and the G.P. rate taken by the search party, the only addition which was called for would be 15 per cent of the stock itself. Therefore, addition had to be restricted to Rs. 30,000 only. Balance of addition was to be deleted

5.5. WAZIR SINGH V. ASSISTANT COMMISSIONER OF INCOME-TAX [2000] 108 TAXMAN 290 (CHD.) (MAG.)

Section 158BB of the Income-tax Act, 1961 - Block assessment in search cases - Computation of undisclosed income - Assessment years 1986-87 to 1995-96 - During course of search operations at residence of assessee, revenue found (i) undisclosed investment in hotel business, (ii) FDRs in names of children, (iii) low withdrawals for household expenditure, (iv) heavy expenses on daughter's marriage and (v) assessee was not maintaining any books of account - Whether addition on account of hotel business was to be made in accordance with additions made in case of his brother - Held, yes - Whether while making addition on account of shortage of stock it would be just and fair to apply gross profit rate of 15 per cent on reported shortage in stock - Held, yes - Whether children having no independent source of income and having not been assessed to tax, investment made in FDRs in their names was liable to be assessed in hands of assessee - Held, yes - Whether comparing household expenditure with that of withdrawals statement, addition made on account of difference between expenditure and withdrawals was justified - Held, yes - Whether in view of facts that Tribunal in case of assesses's brother sustained an addition of Rs. 1 lakh on account of daughter's marriage, same amount was assessable in hands of assessee as undisclosed income - Held, yes.

5.6. President Industries, 258 ITR 654 (Guj)

Section 69B, read with section 256, of the Income-tax Act, 1961 - Undisclosed investments - Assessment year 1994-95 - Whether amount of sales by itself cannot represent the income of the assessee who has not disclosed the sales - Held, yes - During survey it was found that assessee had not disclosed certain sales in books of account - Whether Tribunal was justified in holding that unless there was a finding that investment by way of incurring cost in acquiring goods which had been sold, had been made by assessee and that had also not been disclosed, only net profits embedded in sales, and not wholesale proceeds itself, would be treated as undisclosed income of assessee - Held, yes

5.7. Samir Synthetics Mill 326 ITR 410 (Guj)

- Section 143 of the Income-tax Act, 1961 - Assessment - Addition to income - Where assessee could not even be able to reconcile production, sales and closing stock although specific opportunity was provided by Assessing Officer, addition was justified on account of suppression of sale consideration but only to the extent of profit [In favour of assessee].

5.8. Balchand Ajitkumar 186 CTR 419 (MP);

Section 143 of the Income-tax Act, 1961 - Assessment - Additions to - Assessing Officer on account of credit sales made by assessee outside account books made addition towards sales profit of assessee - Whether total sales could not be regarded as profit of assessee and net profit rate had to be adopted on those sales while making addition - Held, yes

5.9. Manmohan Sadani 304 ITR 52 (MP)

Section 143 of the Income-tax Act, 1961 - Assessment - Additions to income - Assessment year 1997-98 - total sales cannot be regarded as profit of assessee; it is net profit rate which has to be adopted in such cases. The total sales cannot be regarded as profit of the assessee; on the contrary it is the net profit rate which has to be adopted in such cases.

5.10. Gurubachhan Singh J. Juneja, (2008) 302 ITR 63 (Guj.)

Section 69 of the Income-tax Act, 1961 - Unexplained investments - Assessment year 1984-85 - In course of search carried out at assessee's residential and business premises, certain documents were found and seized which showed that he had made unaccounted sales of certain amount during course of his trading business - Assessing Officer made addition of that amount but same was deleted by Tribunal holding that assessee could not be taxed on entire amount, but was liable to be taxed only on gross profit earned on said sales because all purchases were made from reputed companies and/or their dealers and such purchases were fully vouched for - Whether in absence of any material on record to show that there was any unexplained investment made by assessee, which was reflected by alleged unaccounted sales, finding of Tribunal that only gross profit on said amount could be brought to tax did not call for any interference - Held, yes

5.11. Abhishek Corporation– I.T.R No. 15 of 2003 dated 7.11.2014 (Guj.)

Assessee had collected a sum of Rs.1,88,59,400/- as "on money"/premium and disclosed Rs.30,00,000/- as undisclosed income being net income earned in the concerned project.

The moot issue was whether the gross receipts collected as on money need to be taxed or only the income component therein.

Held:

Hon'ble High Court observed that in the following cases it was held that what can be taxed in hands of an assessee is only "Income" and not "gross receipts":

- CIT vs. President Industries – 258 ITR 654
- CIT vs. Gurubachhan Singh J. Juneja – 302 ITR 63
- CIT vs. Samir Synthetics Mill – 326 ITR 410

In view of the aforesaid legal position, it was held that not the entire receipts, but only the profit element embedded in such receipts can be brought to tax.

5.12. Panna Corporation 74 DTR 89 (Guj.)

In view of the legal position that not the entire receipts, but the profit element embedded in such receipts can be brought to tax, in our view, no interference is called for in the decision of the Tribunal accepting such element of profit at Rs.26 lakhs out of total undisclosed receipt of Rs.62 lakhs. In other words, we accept the legal proposition, the Tribunal accepting Rs.26 lakhs disclosed by the assessee as profit out of total undisclosed receipt of Rs.62 lakhs, would not give rise to any question of law. In the result, the tax appeals are dismissed.

5.13. Delhi ITAT – ITO Vs. Shri Pankaj Aggarwal [ITA No. 7091/Del/2014] dated : 16-05-2018

Only margin to be added if cash deposit was from cash sales

➢There is no dispute that there were frequent deposits and withdrawal from the bank accounts. There is also no dispute in so far as the business of the assessee is concerned.

➢Considering the nature of business of the assessee it can be safely concluded that the **cash deposited by the assessee were out of his cash sales.**

➢In ourconsidered opinion o**nly margin of profit should be added on such cash deposit,** therefore, we do not find any error or infirmity in the finding of the Ld. CIT(A).

ISSUE – 6

Cash Balance is sufficient to justify the deposit during demonetisation period, addition of undisclosed income is not justified.

6.1 Laxmi Rice Mills Vs. CIT (97 ITR 258) (Pat.HC)

Section 69A of the Income-tax Act, 1961 – Unexplained moneys – Assessment year 1946-47 – Whether when books of accounts of assessee were accepted by revenue as genuine, and cash balance shown therein was sufficient to cover high denomination notes held by assessee, assessee was not required to prove source of receipt of said high denomination notes which were legal tender at that time – Held, yes.

6.2 CIT Vs. Associated Transport Pvt Ltd (1995) 212 ITR 417 (Cal.HC)

Section 69A of the Income-tax Act, 1961 - Unexplained moneys - Assessment year 1979-80 - Assessing Officer treated high denomination notes worth Rs. 81,000 as unexplained money, disbelieving assessee's explanation as to how he came into possession of same and added same in income of assessee and also imposed penalty - Tribunal found that assessee had sufficient cash in hand and in books of account of assessee cash balance was usually more than Rs. 81,000 - It, deleted addition and cancelled penalty - Whether finding of Tribunal being on basis of appreciation of facts against which no question of perversity had been raised, Tribunal was right in deleting addition and consequent penalty - Held, yes

6.3 BaI Velbai Vs. CIT (1963) 49 ITR 130 (SC)

Section 69A of the Income-tax Act, 1961 - Unexplained moneys - Assessment year 1947-48 - Assessee received certain amount by encashment of high denomination notes - ITO held that only part of said sum could be treated as savings of assessee and, therefore, assessed balance as income of assessee from undisclosed sources - Tribunal upheld order of ITO - Tribunal, however, did not consider case of assessee as regards her explanation as to source from which municipal debentures were acquired - Tribunal also failed to consider what was withdrawals which assessee had made in cash from capital accounts in her different businesses in earlier years - Whether question of law arose out of Tribunal's order - Held, yes

Section 256 of the Income-tax Act, 1961 [Corresponding to section 66(1) of the Indian Income-tax Act, 1922] - High Court - Reference to - Assessment year 1947-48 - Whether finding of fact does not alter its character as one of fact merely because it is itself an inference from other basic facts - But a finding on question of fact is open to attack under-section 66 of 1922 Act as erroneous in law when there is no evidence to support it or if it is perverse or has been reached without due consideration of several matters relevant for such determination - Held, yes

6.4 Madhuri Das Narain Das Vs. CIT (1968) 67 ITR 368 (All.HC)

Section 4 of the Income-tax Act, 1961 [Corresponding to section 3 of the Indian Income-tax Act, 1922] – Income - Chargeable as - Assessment year 1947-48 - Assessee encashed 28 high denomination notes of Rs. 1,000 each after issuance of High Denomination Bank Notes (Demonetisation) Ordinance, 1946 - When asked to explain source of said notes, assessee submitted that same had come out of closing cash balance of its business – ITO disbelieved explanation and treated entire amount as assessee's income from an undisclosed source – Tribunal accepted that 22 notes could have come out of cash balance of Rs. 38,000 and odd, and remaining 6 notes could not have formed such balance – Whether finding of Tribunal, being based upon surmises and conjectures, could not be upheld - Held, yes

Books of account found genuine and balance in the book is sufficient to cover the amount deposited in the bank . Addition is not justified.

6.5 Mehta Parikh & Co. Vs. CIT (1956) 30 ITR 181 (SC)

Section 143 of the Income-tax Act, 1961 [Corresponding to section 23 of the Indian Income-tax Act, 1922] - Assessment - Additions to income - Assessment year 1947-48 - on promulgation of High Denomination Bank Notes (Demonetisations) Ordinance, 1946, Assessee firm encashed 61 high denomination notes of Rs. 1,000 each - When asked to prove, assessee submitted books of account showing relavant entries showing payment being made to them which resulted in said cash in their hand - It also submitted affidavits of payers - Revenue authorities held that it was not possible that all payments after a particular date were being made in multiples of Rs. 1000 - They held a part of this amount to be assessee's income from undisclosed sources -

Whether it was not enough without further scrutiny to dislodge position taken up by assessee which was supported by entries in cash books and affidavits put in by assessee - Held, yes - Whether, treating a part of case balance as assessee's income from undisclosed sources was based on pure surmise and based on no evidence and, hence, to be quashed - Held, yes

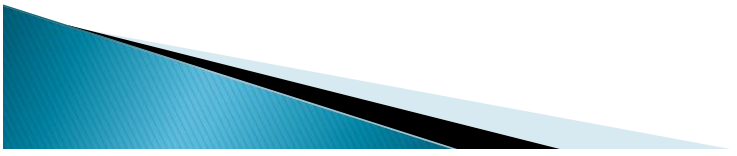
Section 256 of the Income-tax Act, 1961 [Corresponding to section 66 of the Indian Income-tax Act, 1922] - High Court - Reference to - Assessment year 1947-48 - Whether facts proved or admitted may provide evidence to support further conclusions to be deduced from them which conclusions may themselves be conclusions of fact and such inferences from facts proved or admitted could be matters of law - Held, yes - Whether on reference, High Court may be entitled to intervene if it appeared that facts finding authority had acted without any evidence or upon a view of facts, which could not reasonably be entertained or facts found are such that no person acting judicially and properly instructed as to relevant law would have come to determination in question - Held, yes

6.6 Lalchand Bhagat Ambica Ram Vs. CIT (1959) 37 ITR 288 (SC)

Section 143 of the Income-tax Act, 1961 - Assessment - Addition to income - Assessment year 1946-47 - Assessee carried on extensive business in grain as merchant and commission agent - Assessee maintained its books of account according to mercantile system and there were maintained in its cash books two accounts: one showing cash balances from day to day and other known as "Almirah account" wherein were kept large balances which were not required for day-to-day working of business - It filed its return showing loss in business - However, ITO noticed that assessee had encashed high denomination notes of value of Rs. 2.91 lakhs on 19-1-1946 - Assessee's explanation that those notes formed part of its cash balances including cash balances in Almirah account was rejected by ITO who took into account several surrounding circumstances and included said sum in its total income -

ITO also found that portions of entries in assessee's accounts to effect that money's had been received in high denomination notes were subsequent interpolations - Before Tribunal assessee stated that said entries were made in nervousness after coming into force of High Denomination Bank Notes (Demonetization) Ordinance, 1946 on 12-1-1946, as it did not know it had specific proof in its possession of having high denomination notes as part of its cash balances - Tribunal accepted assessee's explanation in respect of said interpolations and held that there was no other reason to suspect genuineness of account books - It was also found that as per book entries cash balance on 12-1-1946 aggregated to more than Rs. 3.1 lakh - However, examining cash book and taking into account all circumstances adverted to by ITO, Tribunal held that assessee might be expected to have possessed as part of its business cash balance of at least Rs. 1.5 lakhs in shape of high denomination notes on date when said ordinance was promulgated but nature of source from which it derived remaining high denomination notes remained unexplained.

Accordingly, Tribunal reduced addition - Whether when entries in books of account in regard to cash balances were held to be genuine, there was no escape from conclusion that assessee had offered reasonable explanation as to source of all high denomination notes which it encashed on 19-1-1946 and it was not open to Tribunal to accept genuineness of those books and accept assessee's explanation in part and reject same in regard to balance sum - Held, yes - Whether, therefore, it was clear that Tribunal in arriving at its conclusion indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of facts which could not reasonably be entertained or finding was perverse which could not be sustained and Supreme Court was entitled to interfere with such finding - Held, yes - Whether, therefore, addition made was liable to be deleted - Held, yes

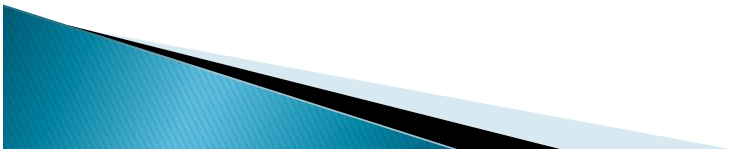


6.7 [TS-8316-ITAT-2019(Hyderabad)-O]

Merely because of cash deposits in bank account during demonetization period (Nov-Dec 2015), cash in hand as on 31-03-2016 cannot be doubted – ITAT notes that assessee is engaged in money lending business and therefore cannot be expected to be without any cash in hand at the end of the relevant assessment years (AYs); The assessee has been showing closing balance of cash in hand even for the earlier AYs and sundry debtors were shown in the Balance Sheet ended 31st March, 2015, hence cash flow statement demonstrates the sources of the funds with the assessee; ITAT further notes that the return of income filed by Assessee has been accepted by the Department and was not picked up for scrutiny; ITAT deletes the addition, holds that cash in hand of as on 31-03-2016 cannot be doubted;

ISSUE – 7

Recovery from debtor added u/s. 68



7.1. IN THE INCOME TAX APPELLATE TRIBUNAL HYDERABAD BENCH "A", HYDERABAD ITA No. 264/Hyd/2011 in the case of S.B. Steel Industries, Date of pronouncement : 13 -11-2013

7. ***It is an established fact that only cash credits can only be considered u/s 68, but, not trade receipts. The coordinate bench of ITAT in the case of ITO Vas. Rajendra Kumar Taparia, 106 TTJ 712 (Jodh.) has held that "cash credits standing in the names trade creditors, all income-tax Assessees, could not be treated as nongenuine when they have confirmed the transactions by filing affidavits and deposing before the AO, and the addition could not be made in respect of cash credits or interest paid thereon". In the present case, the amounts received by Assessee are not cash credits but the same were recovery of the debtors, which are available in the books of account. Since Assessee furnished details of debtors and also the entries made in the books of account, we are of the opinion that both the AO and the CIT(A) have erred in considering recoveries from deposits as cash credits. the corresponding sales in earlier years have been accepted, as there is no dispute with reference to the entries in the books of account in any of the earlier years. Therefore, we are of the view that the principles laid down for invoking provisions of section 68 cannot be applied to the trade recoveries made by Assessee during the year.***

7.2. SALEM SREE RAMAVILAS CHIT CO. Pvt. LIMITED vs. DEPUTY COMMISSIONER OF INCOME TAX HIGH COURT OF MADRAS W.P.No.1732 of 2020 decided on Feb 4, 2020 (2020) 107 CCH 0322 Chen HC Assessment year 2017-18

Writ filed against order of assessment challenging addition of account of cash deposit in bank of 67 lacs under section 69A and applying section 115BBE. Assessee explained that deposits were out of cash balances and collections made from debtors. HC set aside the order and remanded the matter to examine the details submitted.

ISSUE – 8

Inordinate delay in deposit of cash from withdrawals from bank

8.1. Sri.Dhruva Mungamuri vs. The Income Tax Officer in ITA No.2668/Bang/ 2019 : Asst Year 2013-2014 19 February, 2020

5.1. The CIT(A) accepted only a sum of Rs.10.70 Lakh as available to the assessee to redeposit into the bank accont and for the balance amount of Rs.10.10 Lakh, he confirmed the addition. It was the plea of the assessee that the assessee has withdrawn the money for the admission of his son in a medical college, for which the assessee has also produced evidence like copies of admission letter, demand draft etc., before the CIT(A). Thus, it was explained by the assessee that the amount was withdrawn for the admission of his son in a medical college. Since the admission was not materialized, the assessee has re-deposited the amount to the bank. These facts were not disputed by the department. However, according to the CIT(A), the withdrawals were made in June 2012 and the assesse has deposited the same into the bank account in November 2102. There was a long time gap ranging from June to November, the CIT(A) has given relief only to the extent of Rs.10.70 Lakh. However, the department has no material to show that the earlier withdrawals made by the assessee has been spent 10% any specific purposes and not the said amount available with the assessee to redeposit into the bank account.

There is also no evidence that the assessee has made withdrawals on various dates for any other purposes than purposes than the admission of assesse's son in a medical college. In such circumstances, it cannot be said that the withdrawals have not been utilized to redeposit with the bank account. Therefore, it has to be presumed that the assessee has withdrawn the cash and the same remained to be unutilized for one reason or the other, and the cash remained with the assessee. In such circumstances, due credit has to be given for such withdrawal of cash by the assessee. In my opinion, similar view was taken by the Cochin Bench of the Tribunal in the case of Sri. Mathew Philip v. ITO [ITA No. 443/Coch/2019 – order dated 29.11.2019] wherein it was held as under :-

"10. We have heard the rival submissions and perused the material on record. In the present case, the dispute is with regard to cash deposit of Rs.32.5 Lakhs intot he various bank accounts of the assessee. The main plea of the assessee is that the assessee had withdrawn cash of Rs.50 Lakhs on 26.09.2014. The assessee had withdrawn cash on various dates ate 68 Lakhs as narrated in Para 5 of this order.

10.1. These amounts were redeposited into Bank accotns on various dated as follows:

02/04.2014 Rs.3,00,000/-, 27.08.2014 Rs.1,50,000/-, 26.09.2014 Rs.50,00,000/-

11. The Assessing Officer has given credit of Rs.23.50 Lakhs towards cash in hand for depositing it into bank account of the assessee. The Assessing Officer treated Rs.28.5 Lakhs as unexplained sources. Thus, he treated the following amounts as unexplained cash deposits of the assessee Rs. 3 Lakhs, Rs.1 Lakh, Rs.28.5 lakhs. Total Rs.32.5 Lakhs.

11.1. The assesee explained that during the assessment year 2012-13, the assessee had an ailment of cancer and he could not attend to business and financial matters and kept the cash withdrawn from bank on 31.12.2013 for medical treatment and other expenses and deposited the amount in Bank only on 26.09.2014. In support of his claim, the assessee has produced discharge summary dated 06.11.2013 from Lourde Hospital, Ernakulam before AO. He has also produced CT scan report dated 11.07.2013 which is not disputed by the lower authorities. The Assessing Officer has not accepted the contention of the assesee that he has kept the cash idly in his hands on the reason that he has not filed the wealth tax return showing the cash in hand. The Assessing officer has not doubted the withdrawal of cash. However, the fact is that the assessee has withdrawn cash of Rs.50 Lakhs on 31.12.2013. There is no evidence brought on record to show that these withdrawal made from the bank account were used for household expenses or any other investment.

In such circumstances, it cannot be disputed that the withdrawals have been used for redeposit into the bank account of the assessee. In other words, the Assessing Officer has not disputed the existence of bank accounts and withdrawal from the same. The earlier withdrawal of Rs.50 Lakhs form the Bank account on 31.12.2013 or withdrawals from various bank account on different dates is not disputed. The assessee might have kept the cash withdrawals with him and re-deposited into various bank accounts on a later date. It is quite possible that the assesee might have withdrawn the cash for same purpose but the same remains to be utilized for one reason or the other and the cash continues to be remained with him. Sometimes it may also happen that he cash withdrawals from bank account continues to remain as cash balance with the assessee even for many months and sometimes cash withdrawn is utilized on the same day. All these probable aspects of the matter cannot simply be ignored or brushed aside but the fact remains that the cash has been withdrawn from the bank and that is not at all disputed. In view of this, the explanation of the assesee deserves to be accepted, unless contrary is brought on record which has not been done in this case. Considering the totality of the facts and circumstances of the case and in view of the discussions above, the cash deposits made by the assessee on various dated should be reasonably presumed that it is from earlier withdrawals made by the assessee on various dates. Accordingly, we delete the entire addition of Rs.32.5 Lakhs made by the Assessing Officer."

5.2. In view of the above, I am inclined to delete the impugned addition.

6. In the result, the appeal filed by the assessee is allowed.

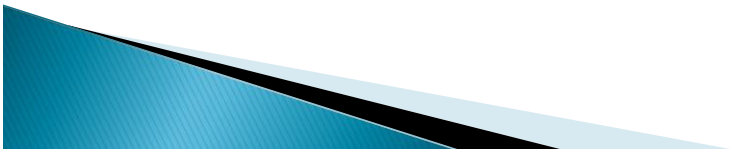
No Addition if Delay in Depositing Cash withdrawn was explained by way of Oral Evidence - Cash withdrawn from Bank was re-deposited after seven months, addition cannot be made as cash credits

8.2.[Jaya Aggarwal v. ITO (2018) 302 CTR 241 : 254 Taxman 398 : 165 DTR 97 (Del)]

Allowing the appeal of the assessee the Court held that; Cash withdrawn from Bank was re-deposited after seven months, addition cannot be made as cash credits. Explanation given by assessee that deposit was made out of sum withdrawn earlier was not fanciful and sham story and it was perfectly plausible.

The Delhi High Court annulling the decisions of Income Tax Appellate Tribunal (ITAT) and Commissioner of Income Tax (Appeals) held that if there is a delay in depositing withdrawn cash to the assessee's bank account and the assessee has offered sufficient oral evidence to justify the delay, the same cannot be added as unexplained income under Section 68 of the Income Tax Act. The issue in the matter in hand was that whether the ITAT was right in confirming the addition under Section 68 of the Income Tax Act for deposit of cash by the assessee out of cash withdrawn by her from the same bank account for the purchase of immovable property. This addition of cash in the assessee's bank account who declared a loss for the same assessment year was questioned by the Assessing Officer. It was contended on behalf of the assessee that she withdrew cash from her bank account as on May 2nd, 1997 to buy property for which earnest money in cash was to be paid. Further, this withdrawn amount was re-deposited in the bank on January 13th, 1998 since the deal could not be concluded.

The Assessing Officer rejected this explanation on the only ground of unjustifiable duration between the date of withdrawal and deposit which was more than 7 months. He hence treated the amount as unexplained cash credit adding the same under Section 68. On appeal, the ITAT upheld the decision of CIT (A) reasoned that no prudent man would keep such a huge amount at the residence to negotiate a property deal. While allowing the appeal filed by the assessee, the High Court relying upon the 'Prudent Man's Behavior Test 'and 'Principle of Preponderance of Probability held that an oral evidence cannot be disregarded being the only evidence relied upon by a party. The Court while referring to Murray's English Dictionary went on further to explain the meaning of 'Probability' as, "likelihood of anything to be true. Probability refers to the appearance of truth or likelihood of being realized which any statement or event bears in light of the present evidence." The Court ruling in favor of the assessee directed that the addition made under Section 68 should be deleted. (Related Assessment year 1998-99).



8.3. [Rajinder Singh v. ACIT (2018) TaxPub(DT) 1368 : 63 ITR (Trib) 550 (ITAT Delhi)]

Addition under section 68 - Unexplained deposits - Since Assessing Officer had not brought on record that cash-in-hand available with assessee was not utilized for making impugned deposit particularly when The Assessing Officer himself accepted deposits in various bank accounts out of said cash in hand available with the assessee, so there was no occasion to doubt impugned deposits and no addition could be made under section 68

Assessing Officer required assessee to explain source of bank deposit. Assessee explained the same to be cash-in hand available with him from earlier years which was claimed to be generated from time to time by withdrawals from bank accounts and sale of the properties from which short-term capital gain was earned by the assessee. However, Assessing Officer made additions on the ground that assessee had not filed Wealth Tax Returns.

Held: Assessing Officer had not brought on record that cash-in-hand available with assessee was not utilized for making impugned deposit particularly when the Assessing Officer himself accepted deposits in various bank accounts out of said cash in hand available with the assessee, so there was no occasion to doubt impugned deposits and no addition could be made.

8.4. [Hemant Kumar Pradhan v. /TO (2018) 62 ITR 57 (ITAT Cuttack)].

Unexplained money- Cash deposit in the bank account of the assessee - Source of such cash deposit was cash withdrawal from the account of one contractor - Held, entire cash deposit cannot be taxed - Such cash deposit is part of business receipts- Held, to meet the interest of justice 8% taxable.

The assessee was associated with a contractor K. Such contractor was awarded construction work of road under a Government scheme. There was cash deposits in the bank of the assessee which was explained to be from the cash withdrawal from the bank of K. Owing to failure of K to reply to summons, entire cash deposited added to total income. The Tribunal held that, source of cash withdrawal in K's account was the business receipts on account of road construction. Thus, cash deposits in the assessee's account were his business receipts and such business receipts can be taxed only to the extent of profits earned. In the interest of justice, the Tribunal held that 8% of such receipts were taxable. (Related Assessment year 2009-10).

8.5. [DCIT v. Smt. Veena Awasthi Appeal Number : IT A No.215/LKW/2016 Date of Judgement Order : 30.11.2018 (ITAT Lucknow)] (AY 2011-12)

5.3 In view of the above facts, it is amply clear that the addition of Rs. 1,35,61,000/- made by AO treating the deposits made in - the bank account of appellant and her minor son cannot be said proper and justified. The appellant has furnished the written submission alongwith supporting evidences to prove the deposits in these bank accounts during the assessment proceedings as well as appellate proceedings. I found much force in the argument of appellant that the AO could not treated the genuine deposits in the bank account of appellant and her minor son of Rs.1,35,61,000/- as unexplained deposits made out of undisclosed source of income, specifically when the entire deposits on different dates were made out of earlier deposits on each occasion. The AO himself admitted the fact that each deposits in the bank account of appellant are backed by availability of cash in hand with the appellant, which represented earlier withdrawals of her bank accounts.

I have also found much force of appellant that the doubt and suspicion on any transaction of appellant by AO cannot be a valid basis to treat the genuine transaction as non genuine i.e. withdrawals and deposits in the bank account of appellant in present case. The appellant has also filed copy of ITR for A.Y. 2009-10 and computation of income of A.Y 2009-10 in which she had disclosed income of Rs. 2,64,00,000/- and paid tax thereon. I find force in the argument of appellant that said money on which the appellant had paid due tax thereon in earlier years i.e. A.Y. 2009-10 are in the possession of appellant as circulating money in subsequent years including A.Y. under consideration.

The AO did not bring any material on record which could prove the destination /utilization of the money which were disclosed in her ITR, were elsewhere rather than transaction reflected in her bank accounts.

The revenue cannot justifiably claim to put itself in the arm chair of the businessman or in the position of board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. No business man can be compelled to maximize its profit The Income-tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authority must not look at the matter from their own view point out of a prudent businessman.

Reliance is placed on the decision of SA builders Ltd. vs CIT (2007) 158 Taxman 82 (SC)" It has been held by hon'ble Supreme Court that One has to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount is advanced for earning profits.

5.4 In view of above discussion, I hold that the AO was not justified in treating the deposits of Rs. 1,35,61,000/- as unexplained deposits in the hands of the appellant and the addition made by the AO at Rs. 1,35,61,000/- is unjustified and contrary to the provisions of the I.T. Act and same liable to be deleted. Thus, the addition of Rs. 1,35,61,000/- made by AO is therefore, deleted. Ground no. 1& 2 are allowed."

6. *The ld. D.R. placed heavy reliance on the order of the Assessing Officer and conceded that sufficient cash was available with the assessee for deposit in the bank account. It was only peculiar pattern of behavior that was in doubt.*
7. *Ld. A.R. of the assessee per contra placed reliance on the order of ld. CIT(A) and reiterated the submissions as made before the subordinate authorities emphasizing that entire bank statements and source of cash withdrawal/deposits have been furnished before the Department. Nowhere Assessing Officer has come out with the finding that withdrawal of cash by the assessee was utilized to procure any asset or has been invested elsewhere and that cash deposit in the account was from other sources. Assessing Officer has simply doubted behavioral patter accepting the fact that assessee was having her own cash which has been frequently deposited and withdrawn from her bank account. At threshold, submissions of the ld. A.R. of the assessee, therefore, was that the order of ld. CIT(A) may be upheld and relief granted may be sustained.*

*8. We have perused the case record and heard the rival contentions. We find that addition has been made by the Assessing Officer, as is evident from his order, on the ground that he has come to the conclusion that cash deposits were from some other source of income which is not disclosed to the Revenue**. Assessing Officer nowhere in his order has brought out any material on record to show that assessee is having any additional source of income other than that disclosed in the return nor Assessing Officer could spell out in his order that cash deposits made by the assessee was from some undisclosed source.** All throughout Assessing Officer has raised suspicion on the behavioral pattern of frequent withdrawal and deposits by the assessee. **There is no law in the country which prevents citizens to frequently withdraw and deposit his own money.***

Documentary evidences furnished before the Revenue clearly clarifies that on each occasion at the time of deposit in her bank account, assessee had sufficient availability of cash which is also not disputed by the Revenue. Entire transaction of withdrawals and deposits are duly reflected in the bank account of the assessee and are verifiable from relevant records. Assessing Officer himself admitted that assessee had sufficient cash balance on each occasion at the time of deposit in her bank account on different dates during the assessment year under consideration. We have also examined the order of ld. CIT(A) and we find that his decision is based on facts on record and is supported by adequate reasoning and, therefore, we do not want to interfere with the order of ld. CIT(A) and accordingly we uphold the findings of the ld. CIT(A) sustaining relief granted to the assessee.

9. In the result, appeal of the Revenue is dismissed."

8.6. In a recent decision the Ld Delhi Tribunal in the case of **Gordhan, Delhi v/s DCIT dated 19/10/2019 (Delhi Trib.)** held that " no addition can be made u/s 68 on the sole reason that there is a time gap of 5 months between the date of withdrawals from bank account and redeposit the same in the bank account , Unless the AO demonstrate that the amount in question has been used by the assesse for any other purpose. In my view addition is made on inferences and presumptions which is bad in law."

8.7. Likewise, the case of **ACIT vs Baldev Raj Chawla 121 TTJ 366 (Delhi)** also held that merely because there was a time gap between withdrawal of cash and cash deposits explanation of the assessee could not be rejected and addition on account of cash deposit could not be made particularly when there was no finding recorded by the assessing officer or the Commissioner that apart from depositing this cash into bank as explained by the assessee, there was any other purposes it is used by the assessee of these amounts. In view of above facts, the ground number 1 of the appeal of the assessee is allowed and orders of lower authorities are reversed.

8.8. One can also place his reliance on the decision of Ld. **Delhi High Court in the case of CIT vs Kulwant rai in 291 ITR 36** wherein the honourable Delhi High Court has held as under:-

"This cash flow statement furnished by the assessee was rejected by the AO which is on the basis of suspicion that the assessee must have spent the amount for some other purposes. The orders of AO as well as CIT(A) are completely silent as to for what purpose the earlier withdrawals would have been spent. As per the cash book maintained by the assessee, a sum of Rs. 10,000 was being spent for household expenses every month and the assessee has withdrawn from bank a sum of Rs. 2 lacs on 4th Dec., 2000 and there was no material with the Department that this money was not available with the assessee. It has been held by the Tribunal that in the instant case the withdrawals shown by the assessee are far in excess of the cash found during the course of search proceedings. No material has been relied upon by the AO or CIT(A) to support their view that the entire cash withdrawals must have been spent by the assessee and accordingly, the Tribunal rightly held that the assessment of Rs. 2.5 lacs is legally not sustainable under s. 158BC of the Act and the same was rightly ordered to be deleted."

8.9. On the basis of this judgement the Ld Delhi tribunal recently deleted the addition made for inordinate delay in cash deposit in the case of **NEETA BREJA v/s ITO (ITA No 524/D/17/25-11-2019), in which the Honourable ITAT Delhi Bench "E": New Delhi** held as follows **:**

11. We have carefully considered the rival contention and perused the orders of the lower authorities. In the present case it is not disputed that the amount of cash was explained as available with the assessee in the hands to deposit in the bank. Assessee has substantiated the availability of the cash by producing the cash flow statement, day-to-day cash book, Ledger account of the Bank with narration and the complete bank statement. Same were disbelieved by the learned assessing officer for the only reason that there is an inordinate delay in deposit of the cash in the bank account.

Identical issue arose before the honourable Delhi High Court in case of CIT vs Kulwant rai in 291 ITR 36 wherein the honourable Delhi High Court has held as under:-

16. This cash flow statement furnished by the assessee was rejected by the AO which is on the basis of suspicion that the assessee must have spent the amount for some other purposes. The orders of AO as well as CIT(A) are completely silent as to for what purpose the earlier withdrawals would have been spent. As per the cash book maintained by the assessee, a sum of Rs. 10,000 was being spent for household expenses every month and the assessee has withdrawn from bank a sum of Rs. 2 lacs on 4th Dec., 2000 and there was no material with the Department that this money was not available with the assessee. It has been held by the Tribunal that in the instant case the withdrawals shown by the assessee are far in excess of the cash found during the course of search proceedings. No material has been relied upon by the AO or CIT(A) to support their view that the entire cash withdrawals must have been spent by the assessee and accordingly, the Tribunal rightly held that the assessment of Rs. 2.5 lacs is legally not sustainable under s. 158BC of the Act and the same was rightly ordered to be deleted.""

12. In the present case also the learned assessing officer or the learned CIT A did not show that above cash was not available in the hands of the assessee or have been spent on any other purposes. Further the coordinate bench in ACIT vs Baldev Raj Charla 121 TTJ 366 (Delhi) also held that merely because there was a time gap between withdrawal of cash and cash deposits explanation of the assessee could not be rejected and addition on account of cash deposit could not be made particularly when there was no finding recorded by the assessing officer or the Commissioner that apart from depositing this cash into bank as explained by the assessee, there was any other purposes it is used by the assessee of these amounts. In view of above facts, the ground number 1 of the appeal of the assessee is allowed and orders of lower authorities are reversed.

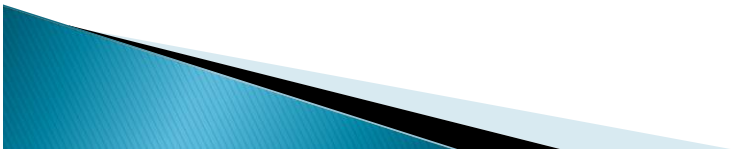
13. In the result appeal of the assessee is allowed."

8.10. <u>Sri Sri Nilkantha Narayan Singh vs. CIT (1951) 20 ITR 8</u>

The assessee furnished withdrawal details of past 7 years. The explanation of the assessee cannot be rejected that the cash was deposited from accumulated past savings.

ISSUE – 9

Real income theory



[2018] 92 taxmann.com 385 (SC) SC DCIT, Chennai *v.* T. Jayachandran

The income that has actually accrued to the respondent is taxable. What income has really occurred to be decided, not by reference to physical receipt of income, but by the receipt of income in reality. Given the fact that the respondent had acted only as a broker and could not claim any ownership on the sum of Rs. 14.74 crores and that the receipt of money was only for the purpose of taking demand drafts for the payment of the differential interest payable by Indian Bank and that the respondent had actually handed over the said money to the Bank itself, it is to be held that the respondent held the said amount in trust to be paid to the public sector units on behalf of the Indian Bank based on prior understanding reached with the bank at the time of sale of securities and, hence, the said sum of Rs. 14.74 crores cannot be termed as the income of the respondent. In view of the above discussion, the decision rendered by the High Court requires no interference. [Para 13]

In view of the above discussion, the appeal is hereby dismissed. All the connected appeals are also disposed of accordingly. [Para 14]

Peerless General Finance and investment Co. Ltd. v. CIT(2019) 416 ITR 1/ 265 Taxman 413/ 309 CTR 321/180 DTR 97 (SC), www.itatonline.org.Editorial : From the judgement in CIT v Peerless General Finance and investment Co. Ltd (2006) 282 ITR 209/ 204 CTR 198 (Cal) (HC)

S. 4 : Charge of income-tax -Deposit -Subscription receipt -The primary liability and onus is on the Dept to prove that a certain receipt is liable to be taxed-.Deposits collected by a finance company are capital receipts and not revenue receipts-.The fact that the deposits are credited to the profit and loss account is irrelevant-.The true nature of the receipts have to be seen and not the entry in the books of account .[S.145]

Assessee treated subscription receipts as income. However the receipts in question were capital receipts and not income. Tribunal decided the issue in favour of the assessee. High Court reversed the order of the Tribunal . On appeal the Court held that the primary liability and onus is on the Dept to prove that a certain receipt is liable to be taxed-.Deposits collected by a finance company are capital receipts and not revenue receipts-.The fact that the deposits are credited to the profit and loss account is irrelevant-.The true nature of the receipts have to be seen and not the entry in the books of account . Order of High Court is set aside and order of the Tribunal is affirmed . (CA No 1265 of 2007,dt.09.07.2019) (AY. 1985 -86 , 1986 -87)

ISSUE – 10

Peak Credit theory

- Various cases are observed wherein the A.O. had added entire credits of bank statement without considering debit entries in the bank account. The principle of peak credit comes into play where there are several credit and debit entries in one bank account. The funds operated from such account is taken to be one and the same and only the highest or peak of the amounts in that account is taxed as unexplained cash credit.
- Peak credit theory can be applied in a case where there is only rotation of funds whereby the funds withdrawn on earlier dates were deposited back subsequently and there were no fresh deposits.

Case laws:

- **CIT v Tirupati Construction Company: 230 Taxman 198 (Guj.)**
- **CIT v Purushottam Jhawar: 220 Taxman 74 (AP)**
- **CIT v Fertilizer Traders: 222 Taxman 162 (All.)**
- **ITO v Pawan Kumar: 153 ITD 448 (Delhi Trib.)**

ISSUE – 11

Bank pass book cannot be regarded as a Books of Account

11.1. Sri Girish V.Yalakkishettar vs.The Income Tax officer (ITA No. 354/ Bang/ 2019) (Dtd. 27.01.2020) (SMC) (Bangalore)

14.6 ***Even otherwise, in the present case, the Assessing Officer found certain deposits as unexplained in the bank account of the assessee with ICICI Bank, Dharwad branch at Rs.36.26 lakh. In my opinion, when moneys are deposited in the bank account, the relationship that is constituted between the banker and the customer is one of the debtor and creditor and not of trustee and beneficiary. Applying this principle, the bank statements supplied by the bank to its constituent is only a copy of the constituent's account in the books maintained by the bank. It is not as if the bank statements are maintained by the bank as the agent of the constituent, nor can it be said that the pass book is maintained by the bank under the instructions of the constituent. Therefore, the bank statements supplied by the bank to the assessee in the present case could not be regarded as a book of the assessee, nor a book maintained by the assessee or under his instructions. As such, addition u/s 68 of the Act of the amount entered only in the bank statements was not justified.***

*My this view is fortified by the judgment of the **Hon'ble Bombay High Court in the case of CIT v. Bhaichand H. Gandhi [141 ITR 67 (Bom.)]** and also the judgment of the **Hon'ble Allahabad High Court in the case of Smt.Sarika Jain v. CIT (407 ITR 254).** The Hon'ble Allahabad High Court held that the Tribunal is not competent to sustain the addition u/s 69A of the Act after deleting the said addition made by the A.O. and confirmed by the CIT(A) u/s 68 of the Act, the entire order of the Tribunal stands vitiated in law. Being so, the amount found credited in the bank account of the assessee cannot be made an addition u/s 68 of the Act. Accordingly, I am inclined to delete the addition made u/s 68 of the I.T.Act.*

15. In the result, both the appeals filed by the assessee are partly allowed.

Similarly held in the following case laws:

- CIT vs. Bhaichand N. Gandhi (1982) (141 ITR 67) (Bom)
- Mehul V. Vyas vs. Income Tax Officer, 23(2)(3), Mumbai [2017] 80 taxmann.com 311 (Mumbai – Trib)
- MadhuRaitani vs. ACIT [2011] 45 SOT 231 (Gauhati)
- Nirmala Yadav vs. Income Tax Officer [2017] 88 taxmann.com 870 (Jodhpur – Trib) Privacy – Terms
- ITO vs. Kamal Kumar Mishra [2013] 33 taxmann.com 610 (Lucknow - Trib.)

ISSUE – 12

Books of Account not maintained by the assessee. Under section 44AD no addition of cash deposits realised out of cash sales and forming cash balance as on 8th Nov 2016.

CIT Vs. Surinder Pal Anand (2010) 192 Taxman 264 (P&H HC)

FACTS

The assessee filed his return of income showing certain business income under section 44AD. The Assessing Officer did not accept the return and made an addition in respect of the cash deposited in the bank account during the year. On appeal, the Commissioner (Appeals) held that the assessee was not required to maintain regular books of account as the return had been filed under section 44AD and the turnover was below Rs. 40 lakhs. It was also recorded that since the cash deposits in the bank statement were lower than the business receipts shown by the assessee and in the bank statement there were withdrawals as well as deposits, the addition was unjustified. The Tribunal upheld the order of the Commissioner (Appeals).

On the revenue's appeal to the High Court :

HELD

Sub-section (1) of section 44AD clearly provides that where an assessee is engaged in the business of civil construction or supply of labour for civil construction, income shall be estimated at 8 per cent of the gross amount paid or payable to the assessee in the previous year on account of such business or a sum higher than the aforesaid sum as may be declared by the assessee in his return of income notwithstanding anything to the contrary contained in sections 28 to 43C. This income is to be deemed to be the profits and gains of said business chargeable of tax under the head 'Profits and gains of business or profession'. However, the said provisions are applicable where the gross amount paid or payable does not exceed Rs. 40 lakhs. [Para 7]

Once under the special provision, exemption from maintenance of books of account has been provided and presumptive tax at the rate of 8 per cent of the gross receipt itself is the basis for determining the taxable income, the assessee is not under any obligation to explain individual entry of cash deposit in the bank, unless such entry has no nexus with the gross receipts. In the instant case, the stand of the assessee before the Commissioner (Appeals) and the Tribunal that the amount in question was on account of business receipts had been accepted. The revenue could not show with reference to any material on record that the cash deposits were unexplained or undisclosed income of the assessee. [Para 8]

Therefore, no question of law arose from the Tribunal's order and the revenue's appeal was to be dismissed. [Paras 9 and 10]

Nanda Pal Lal Popli Vs. DCIT (2016) 160 ITD 413 (Chd Trib)

FACTS-I

The assessee was a civil contractor. He had declared its profits under section 44AD at the rate of 8 per cent against the gross receipts.

During assessment proceedings, the assessee explained that he had made payments from the bank account on various dates which were not reflected in the cash flow statement. Since no documentary evidence was filed to prove that those payments were towards contract work, the Assessing Officer made addition of said amount to assessee's income under section 69C.

The Commissioner (Appeals) confirmed said addition.

On second appeal:

HELD-I

The provisions of section 44AD are quite unambiguous to the effect that in case of an eligible business based on the gross receipts/total turnover, the income under the head 'profits & gains of business' shall be deemed to be at the rate of 8 per cent or any higher amount. **The first important term here is 'deemed to be', which proves that in such cases there is no income to the extent of such percentage, however, to that extent, income is deemed. It is undisputed that 'deemed' means presuming the existence of something which actually is not. Therefore, it is quite clear that though for the purpose of levy of tax at rate of 8 per cent or more may be considered as income, but actually this is not the actual income of the assessee. This is also the purport of all provisions relating to presumptive taxation. [Para 10]**

Putting the above analysis, in converse, it can be easily inferred that the same is also true for the expenditure of the assessee. **If 8 per cent of gross receipts are 'deemed' income of the assessee, the remaining 92 per cent are also 'deemed' expenditure of the assessee. Meaning thereby that actual expenditure may not be 92 per cent of gross receipts, only for the purposes of taxation, it is considered to be so. To take it further, it can be said that the expenditure may be less than 92 per cent or it may also be more than 92 per cent of gross receipts. [Para 11]**

From the combined reading of sub-section (1) and sub-section (5), it is apparent that the obligation to maintain the books of account and get them audited is only on the assessee who opts to claim the income being less than 8 per cent of the gross receipts. [Para 13]

Applying the above to the facts of the present case, it is observed that the Assessing Officer, for making the impugned addition has started with the presumption that an amount to the extent of 92 per cent of the gross receipts is the expenditure incurred by the assessee, which is a totally wrong premise. If the income component is estimated, how the expenditure component on the basis of said income can be considered to have been 'actually' incurred. This is not a case, where the Assessing Officer has doubted the gross receipts or gross turnover of the assessee. In fact, accepting the same, estimating income at the rate of 8 per cent on the same at presumptive rate, he preferred to make further addition under section 69C of the Act. The argument of the revenue that the turnover of the assessee has been doubted by the Assessing Officer is totally ill-found, in view of the same. [Para 14]

Further, it is a fact on record that the assessee had not maintained books of account that is why he opted for 8 per cent income as per section 44AD of the Act. The section also does not put obligation on the assessee to maintain books of account, more so, in view of the fact that his income has been assessed as per section 44AD of the Act, he cannot be punished for not maintaining the same. **The argument of the revenue that the assessee was in fact, maintaining books of account is untenable**. **Keeping or preparing a cash flow statement cannot be considered as keeping the books of account. [Para 15]**

Coming to the argument of the revenue that the addition has been made under section 69C, on which there is no bar under section 44AD, one is quite in agreement with the same. The only fetter provided under section 44AD are the applicability of provisions of sections 30 to 38 of the Act. [Para 16]

The crucial words in section 69C for the purposes of present appeal are 'any financial year an assessee has incurred any expenditure'. But can one say on the facts and circumstances of the present case that the assessee has 'incurred' any expenses. From an analysis of section 44AD it has already been held that the assessee had not incurred the expenses to the extent of 92 per cent of the gross receipts. Therefore, in the present case, the provisions of section 69C cannot be applied. Asking the assessee to prove to the satisfaction of the Assessing Officer, the expenditure to the extent of 92 per cent of gross receipts, would also defeat the purpose of presumptive taxation as provided under section 44AD or other such provision.

Since the scheme of presumptive taxation has been formed in order to avoid the long drawn process of assessment in cases of small traders or in cases of those businesses where the incomes are almost of static quantum of all the businesses**, the Assessing Officer could have made the addition under section 69C, once he had carved out the case out of the glitches of the provisions of section 44AD. No such exercise has been done by the Assessing Officer in this case. [Para 17]**

As already held in the preceding paragraph, the **Assessing Officer himself while computing the income of the assessee has made the business income to be taxable at the rate of 8 per cent of the gross receipts as provided under section 44AD of the Act**. In such circumstances, this ground of appeal is allowed. [Para 18]

Thomas Eapen Vs. ITO (2020) 180 ITD 741 (Cochin Trib) / 113 Taxmann.com 268 (Cochin – Trib)

Section 44AD, read with section 69A, of the Income-tax Act, 1961 - Presumptive taxation (Scope of provision) - Assessment year 2015-16 - Assessee, a small trader in medicine, declared return of income under section 44AD at 8 per cent of his turnover - Assessing Officer made addition under section 68 in respect of unexplained cash credit found in assessee's bank - On appeal, Commissioner (Appeals) held that since assessee did not maintain books of account, said unexplained deposits could not be taxed under section 68 but under section 69A - Whether since scheme of presumptive taxation had been formed in order to avoid long drawn process of assessment in case of small traders or in case of businesses where incomes were almost of static quantum of all businesses, Assessing Officer could have made addition under section 69A, once he carved out case out of glitches of provisions of section 44AD, and in instant case no such exercise being done by Assessing Officer, addition made under section 69A was to be deleted - Held, yes [Para 9.6] [In favour of assessee].

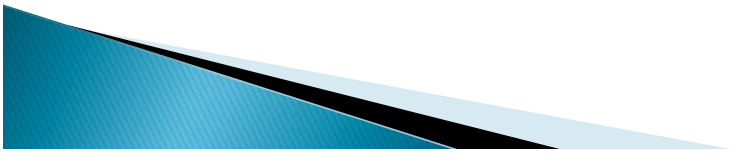
[TS-6380-ITAT-2019(DELHI)-O]

Cash deposit during demonetization period - ITAT: Insufficient evidence to consider sales as bogus or to make addition of cash in hand – ITAT notes that Assessee, a small trader, declared return of income under presumptive provisions u/s 44AD and case was selected under limited scrutiny for cash deposit during demonetization period from 09.11.2016 to 30.12.2016; The fact that during assessment, the assessee submitted a copy of his balance-sheet does not prove that the assessee maintained books of account; AO made addition u/s 68 on account of unexplained cash credits due to bogus sales;

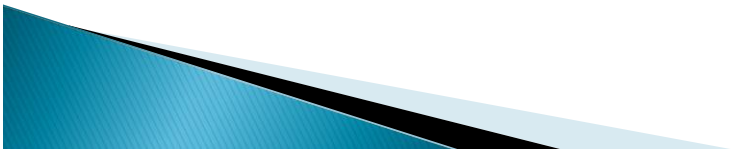
On appeal, CIT(A) restricted addition to the extent of cash in hand, which was considered as unaccounted; ITAT ruled in Assessee`s favour and delete the entire addition, notes that “If there is no creditor in the books of account and no books of account have been maintained, there is no question of considering it to be cash credit”; Assessee had filed details of sales & purchase before AO giving names, telephone number and address of parties; held that if the AO had any doubt, he could have made direct inquiry; ITAT held that there was no justification to consider the assesee’s sales to be bogus or to make addition of cash in hand as per details submitted; AO did not bring any sufficient evidence on record to justify the addition;

[TS-8507-ITAT-2019(Agra)-O]

Income declared u/s 44AD - Addition u/s 69 – ITAT : Cash deposit in bank account a trading receipt - Assessee derived income from remuneration and interest from three partnership firms and also derived income from glass bangle business; AO felt that the assessee failed to prove that cash deposit represented his business turnover. An addition of Rs. 7,99,950/- was made u/s 69 after allowing credit of the business income of Rs. 70,050/- as shown by the assessee u/s 44AD



On appeal Ld. CIT(A) rejected all contentions of the assessee; ITAT notes that the CIT(A), in AY 2011-12, had chosen to hold cash deposits as sale consideration of trading business, hence even if explanation of business is found to be untrue, following the findings for AY 2011-12, net profit rate had to be applied; ITAT following co-ordinate Bench order in assessee's own case for the AY 2011-12, directs AO to apply net profit rate of 5% on bank deposits of Rs.8,70,000/- giving credit to the income of Rs.70,050/- already shown under section 44AD of the Act;



[TS-10314-ITAT-2018(Ranchi)-O]

Return of income filed u/s 44AD – Assessee failed to explain source of cash deposits before lower authorities, income came to be estimated by accepting deposits made in bank accounts as trade deposits; ITAT partly allow assessee's appeal, modifies CIT(A) order and estimated income at 4% of cash deposits into bank accounts;

[TS-6983-ITAT-2019(Kolkata)-O]

Presumptive taxation u/s 44AD – can addition be made u/s 68 when income/ profit is estimated – neither AO nor CIT(A) have given any reason as to why s. 44AD is not applicable; ITAT holds that AO cannot examine statement of accounts in such cases, or make additions towards undisclosed purchases, undisclosed expenditure, undervaluation of closing stock, etc. The turnover declared by the assessee is accepted by the Revenue, and such additions go against the spirit of the Act;

[TS-8936-ITAT-2017(Mumbai)-O]

ITAT upholds CIT(A)'s order, sets aside addition u/s 69 for cash deposits in bank account; AO treated the deposits as unexplained investment, as return of income was filed in ITR–2 wherein there is no option for offering income u/s 44AD, and had also offered income under the head income from other sources; the CIT(A) deleted the addition by observing that merely because option to offer income u/s 44AD is not present in Form ITR-2 was no reason for rejecting the appellant's return; the CIT(A) applied presumptive rate of tax of 8% on cash deposited;

ITAT notes that AO, in the preceding AY 2010–11, has accepted the assessee's aforesaid claim and the CIT(A)'s finding that cash deposits are from his cosmetics and merchandise business, set aside addition u/s 69; ITAT cautions assessee that "he should not take advantage of his ignorance by repeatedly committing same mistake. If he intends to avail the benefit of presumptive tax u/s 44AD, he has to comply with requirement of the relevant statutory provisions" ;

[TS-221-HC-2013(ALL)-O]

HC: Upholds AO's right to tax unexplained sundry creditors, places onus on assessee - Onus to prove genuineness of sundry creditors on assessee; AO rejected book results and estimated net profit rate of 8% u/s 44AD and made certain additions u/s 68 in respect of unexplained cash credits; the CIT(A) deleted the addition, observing that since 8% net profit rate was estimated u/s 44AD, no separate addition could be made; HC held that in absence of proof that creditors represent income from a source that is already taxed, AO is empowered to tax unexplained sundry creditors as well as estimated business income; Where sundry creditors are not relatable to business whose income was taxed on estimate basis, AO is empowered to make additions;

[TS-5139-ITAT-2010(Ahmedabad)-O]

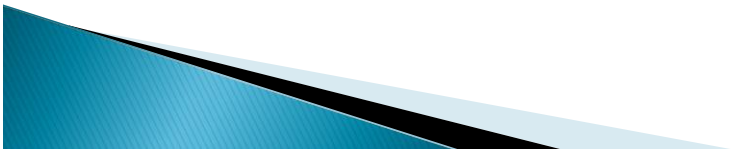
ITAT: AO found no correlation between entries in books of accounts with vouchers / supporting documents, hence rejected books of account and applied sec. 69. Subsequently, AO made additions based on differences in creditors' account balances, and credits in bank accounts. HC stated since assessment is based on 'best judgement', differences in account balances is an application of the income, and does not warrant another addition. Deposits into bank tantamount to application of income. Hence, separate addition is not called for. Further, once AO has rejected the books of account, he cannot take recourse to them to find out income therefrom and make addition/ disallowance;

[TS-5365-ITAT-2004(AHMEDABAD)-O]

ITAT : Provisions of ss. 28 to 43C not applicable, if assessee is assessed u/s 44AF – ITAT rules in Assessee's favour, directs AO to apply 5% of net profit on total turnover and delete addition made u/s 40A(3);

ISSUE – 13

No addition can be made on the basis of Suspicion, Surmises, Rumour and Doubt



No addition can be made on the basis of Suspicion, Surmises, Rumour and Doubt.

13.1 Lalchand Bhagat Ambica Ram Vs. CIT (1959) 37 ITR 288 (SC)

HELD

It was clear on the record that the appellant maintained its books of account according to the mercantile system and there were maintained in its cash books two accounts: one showing the cash balances from day to day and the other known as "Almirah account" wherein were kept large balances which were not required for the day-to-day working of the business. Even though the appellant kept large amounts in bank deposits, securities monies were required at short notice at different branches of the appellant. There were also collections made from various beoparees *or merchants and monies were also required for doing the grain purchase work on behalf of the Government.*

These monies were credited in the Almirah account which showed heavy cash balances from time to time. In the books of account for previous years it was the practice of the appellant to give details of the notes of high denominations giving the distinctive numbers of these notes received or paid or at least other description, e.g., *"so many notes" of Rs. 1,000 each. In the assessment year, however, this practice did not appear to have been followed but entries continued to be made of monies thus received from the banks, different branches,* beoparees *etc., without any such details being filled therein.*

The books of account of the appellant were not challenged in any other manner except in regard to the interpolations relating to the number of high denomination notes of Rs. 1,000 each obviously made by the appellant in the accounts for the assessment year in question in the manner aforesaid and even in regard to these interpolations the explanation given by the appellant in regard to the same was accepted by the Tribunal.

Even though the ITO made capital out of the interpolations and subsequent insertions in the books of account and styled the evidence furnished by them as created or manipulated evidence thus discounting the story of the appellant in regard to the source of these high denomination notes, the Tribunal was definitely of opinion that there was no other reason to suspect the genuineness of the account books in which these interpolations were found. As a matter of fact the Tribunal accepted these books of account as genuine and worked up its theory on the basis of the entries which obtained in these books of account. The Tribunal had before it the statement, of large amounts received by the appellant from the banks, different branches of the appellant and its beoparees *or merchants which showed that between 6-2-1945, and 11-1-1946, amounts exceeding Rs. 1,000 aggregating to Rs. 5,04,713 had been received by the appellant. Even though large amounts might have been paid out by the appellant in this manner between the said dates, the entries of the balance in Rokar and the balance in Almirah showed that on 12-1-1946, the balance in Rokar was Rs. 29,234-3-9 and balance in Almirah was Rs. 2,81,397-10-0 the total cash balance thus aggregating to Rs. 3,10,681-13-9.*

Nobody had any inkling of the promulgation of the High Denomination Bank Notes (Demonetization) Ordinance, 1946, on 12-1-1946, and if in the normal course of affairs and situated as the appellant was, the appellant kept these large cash balances in high denomination notes of Rs. 1000 each, there was nothing surprising or improbable in it. If the appellant had to disburse such large sums of monies at short notices at the different branches of the appellant and also to its beoparees *apart from financing the Government for grain purchase work which it used to carry on, it would be convenient for it to handle these large sums of moneys in high denomination notes of Rs. 1,000 each and the most natural thing for it to do was to keep these cash balances in as many high denomination notes as possible. The Tribunal in fact took count of this position and after giving due weight to all the circumstances arrived at the conclusion that the appellant might be expected to have possessed as part of its business cash balance of at least Rs. 1,50,000 in the shape of high denomination notes on 12-1-1946, when the Ordinance above-mentioned was promulgated. This conclusion of the Tribunal could only be arrived at on the basis that the entries in the books of account in regard to the balance in Rokar and the balance in Almirah were correct and represented the true state of affairs, in spite of the interpolations and subsequent insertions which had been made to bolster up the true case.*

If these were the materials on record which would lead to the inference that the appellant might be expected to have possessed as part of its cash balance at least Rs. 1,50,000 in the shape of high denomination notes on 12-1-1946, when the Ordinance was promulgated, was there any material on record which would legitimately lead the Tribunal to come to the conclusion that the nature of the source from which the appellant derived the remaining 141 high denomination notes of Rs. 1,000 each remained unexplained to its satisfaction. If the entries in the books of account in regard to the balance in Rokar and the balance in Almirah were held to be genuine, logically enough there was no escape from the conclusion that the appellant had offered reasonable explanation as to the source of the 291 high denomination notes of Rs. 1,000 each which it encashed on 19-1-1946. It was not open to the Tribunal to accept the genuineness of these books of account and accept the explanation of the appellant in part as to Rs. 1,50,000 and reject the same in regard to the sum of Rs. 1,41,000. Consistently enough, the Tribunal ought to have accepted the explanation of the appellant in regard to the whole of the sum of Rs. 2,91,000 and held that the appellant had satisfactorily explained the encashment of the 291 high denomination notes of Rs. 1,000 each on 19-1-1946.

The Tribunal, however, appeared to have been influenced by the suspicions, conjectures and surmises which were freely indulged in by the ITO and the AAC and arrived at its own conclusion, as it were, by a rule of thumb holding without any proper materials before it that the appellant might be expected to have possessed as part of its business, cash balance of at least Rs. 1,50,000 in the shape of high denomination notes on 12-1-1946,—a mere conjecture or surmise for which there was no basis in the materials on record before it.

The ITO had indented in support of his conclusion the surrounding circumstances.

The AAC also emphasized the said aspect but based his conclusion mainly on the ground that the appellant had failed to prove that the high denomination notes had their origin in capital and not in profit and held that the Income-tax Officer was justified in treating the sum of Rs. 2,91,000 as secreted profits.

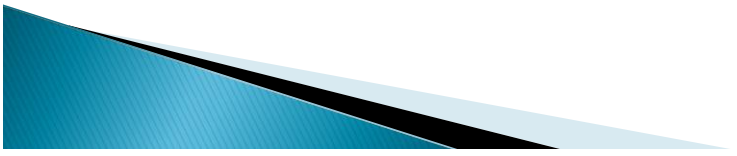
This was the background against which the Tribunal came to its own conclusion. Even though it recognised that it was not improbable that when very large sums, say in excess of Rs. 10,000 at a time, were received, a fairly good portion thereof consisted of high denomination notes and as high denomination notes were valid tender and nobody could have foreseen that they would be demonetised suddenly in January, 1946, there was nothing out of the way in persons dealing with tens of thousands of rupees and whose balances ran to lakhs, being in possession of a fair proportion of their balances in the shape of high denomination notes. While recognising this probability of the appellant having been in possession of a fair proportion of its balances in the shape of high denomination notes, the Tribunal, unconsciously though it was, fell into an error when it held that the appellant might be expected to have possessed at least Rs. 1,50,000 in the shape of high denomination notes as part of its cash balance, thus treating the remaining Rs. 1,41,000 in the high denomination notes of Rs. 1,000 each as outside the purview of these cash balances.

Unless the Tribunal had at the back of its mind the various probabilities which had been referred to by the ITO it could not have come to the conclusion it did that the balance of Rs. 1,41,000 comprising of the remaining 141 high denomination notes of Rs. 1,000 each was not satisfactorily explained by the appellant.

If the entries in the books of account were genuine and the balance in Rokar and the balance in Almirah on 12-1-1946, aggregated to Rs. 3,10,681-13-9 and if it was not improbable that a fairly good portion of the very large sums received by the appellant from time to time, say in excess of Rs. 10,000 at a time, consisted of high denomination notes, there was no basis for the conclusion that the appellant had satisfactorily explained the possession of Rs. 1,50,000 in the high denomination notes of Rs. 1,000 each leaving the possession of the balance of 141 high denomination notes of Rs. 1,000 each unexplained. Either the Tribunal did not apply its mind to the situation or it arrived at the conclusion it did merely by applying the rule of thumb in which event the finding of fact reached by it was such as could not reasonably be entertained or the facts found were such as no person acting judicially and properly instructed as to the relevant law could have found, or the Tribunal in arriving at its findings was influenced by irrelevant considerations or indulged in conjectures, surmises or suspicions in which event also its finding could not be sustained.

Adverting to the various probabilities which weighed with the ITO might be observed that the notoriety for smuggling food grains and other commodities to Bengal by country boats acquired by 'S' and the notoriety achieved by 'D' as a great receiving centre for such commodities were merely a background of suspicion and the appellant could not be tarred with the same brush as every arhatdar and grain merchant who might have been indulging in smuggling operations, without an iota of evidence in that behalf. The mere possibility of the appellant earning considerable amounts in the year under consideration was a pure conjecture on the part of the ITO and the fact that the appellant indulged in speculation (in Kalai account) could not legitimately lead to the inference that the profit in a single transaction or in a chain of transactions could exceed the amounts, involved in the high denomination notes,—this also was a pure conjecture or surmise on the part of the ITO. As regards the disclosed volume of business in the year under consideration in the head office and in branches the ITO indulged in speculation when he talked of the possibility of the appellant earning a considerable sum as against which it showed a net loss of about Rs. 45,000.

The ITO indicated the probable source or sources from which the appellant could have earned a large amount in the sum of Rs. 2,91,000 but the conclusion which he arrived at in regard to the appellant having earned this large amount during the year and which according to him represented the secreted profits of the appellant in its business was the result of pure conjectures and surmises on his part and had no foundation in fact and was not proved against the appellant on the record of the proceedings. If the conclusion of the ITO was thus either perverse or vitiated by suspicions, conjectures or surmises, the finding of the Tribunal was equally perverse or vitiated if the Tribunal took count of all these probabilities and without any rhyme or reason and merely by a rule of thumb, as it were, came to the conclusion that the possession of 150 high denomination notes of Rs. 1,000 each was satisfactorily explained by the appellant but not that of the balance of 141 high denomination notes of Rs. 1,000 each.



It was, therefore, clear that the Tribunal in arriving at the conclusion it did in the present case indulged in suspicions, conjectures and surmises and acted without any evidence or upon a view of the facts which could not reasonably be entertained or the facts found were such that no person acting judicially and properly instructed as to the relevant law could have found, or the finding was, in other words, perverse and the Supreme Court was entitled to interfere.

Therefore, the High Court was clearly in error in answering the referred question in the affirmative. The proper answer should have been that the sum in question did not constitute secreted profits for the purposes of assessment.

Note: The case was decided in favour of the assessee.

13.2 Omar Salay Mohamed Sait Vs. CIT (1959) 37 ITR 151 (SC)

HELD

The Tribunal had not applied its mind to the evidence which was there on the file of the appellant in the shape of information gathered subsequently and it had improperly rejected that evidence. That being the position the revenue could not very well resist the order which the Supreme Court proposed to made, setting aside the order of the Tribunal and remanding the matter back to it for dealing with the same in accordance with law, after taking into consideration all the circumstances, the whole evidence which was available in the file of the appellant and such further evidence as the parties might be advised to lead before it. The Tribunal is a fact finding Tribunal and if it arrives at its own conclusions of fact after due consideration of the evidence before it the Supreme court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due case and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it.

The conclusion reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicion, conjectures or surmises and if it does anything of the sort, its findings even though on questions of fact, will be liable to be set aside by the Supreme Court. In the result, the order of the Tribunal was set aside and the matter was remanded back to the Tribunal to reconsider the same in accordance with law.

Both the parties i.e. the Revenue as well as the assessee would have liberty to adduce before the Tribunal such further evidence as they might be advised.

The matter was remanded to the Tribunal.

13.3 GTC Industries Ltd Vs. ACIT (2017) 164 ITD 1 (Mum.ITAT) (SB)

HELD

The core issue came up for consideration is, whether this amount of premium generated through alleged twin branding mechanism has flown back to the assessee or not; or is there any material to show that the assessee was the sole beneficiary of the entire amount or part of the amount. [Para 43]

From the materials and evidences as discussed above, following inference can be deduced:-

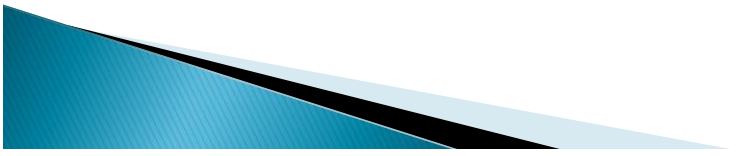
Firstly, some kind of premium was generated under alleged 'twin branding mechanism', that, is, price higher than the declared/printed MRP on the sale of various brands of cigarettes was collected by small retailers from customers who were unknowingly paying extra money for lower brand cigarette presuming to be higher brand due to deceptive packet designs. However, to presume that for every single sales made across the country for every packet or loose cigarette, necessarily extra money was charged from the customers by all the retailers/ pan-wallas would be an implausible situation and then again to consider that the entire extra money so collected without any pilferage in between for the purpose of estimation and addition in the hands of assessee would be too far-fetched.

Secondly, from the detailed discussion in the impugned orders based on enquiries and information it can be inferred that the alleged premium to a large extent was collected, (that is, extra money over and above the MRP price) through a chain of salesmen and pan-wallas which was passed on to the retailers and from retailers to wholesale buyers/dealers. From the wholesale buyers (WBs) cash premium collected through the said chain is then converted into drafts which have been sent to fictitious bank accounts. These bank accounts are in the benami names where this alleged money so collected is deposited. However, to draw inference that universally all the wholesale buyers who collected the premium amount had sent the entire collection of premium to these bank accounts which was wholly and exclusively under the control of the assessee is not proved conclusively. The evidence and material on record only indicate or highlight that in some clandestine manner; the wholesale buyers have sent the money to the fictitious bank accounts standing in benami names, but to say that it was meant only for discharging the liability or benefit of assessee is again *sans* any material having live link nexus to implicate assessee.

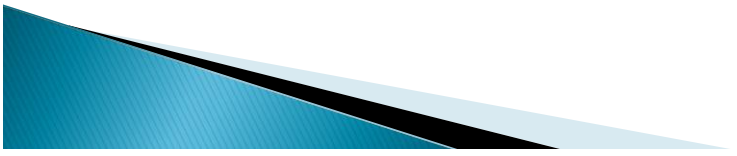
Thirdly, from the careful analysis of the impugned assessment orders and the material as discussed above, it can be seen that nowhere it has been brought on record that any wholesale buyer was confronted or has admitted that either the assessee or its officials were in the helm of such collection of premium; or these benami bank accounts were either under direct or indirect control of GTC; or they were depositing the DDs on the direction or behest of GTC; or GTC was operating these bank accounts. No concrete material has been brought on record to suggest that assessee-company or its employees were operating said bank accounts or the accountholders were introduced by anyone from the assessee-company. Nowhere has it been ascertained by the Assessing Officer that the GTC or its employees had the actual control of the said benami bank accounts or the amount deposited in said bank accounts has gone to the coffers of the assessee. In various investigations/searches carried out by the DRI as well as survey/searches conducted by the department, not a single material has been unearthed or any statement has been given that GTC company had control over the premium amount generated all over the country.

Fourthly, the material and evidences gathered by the revenue does show that the money deposited in the Benami accounts were used in post-manufacturing expenses including advertisement of the brands and products of GTC. Transaction of some few lakhs of rupees have also been found to be undertaken from these bank accounts from where payment to certain advertising agencies has been made. On this information it can be presumed that advertising expenses have been incurred from these bank accounts. However, merely because the advertisement expenses have been incurred from Benami bank accounts, can it be held that the said bank accounts belong to the assessee and therefore, can lead to an inference that entire premium collected all over the country is the undisclosed income of the assessee. As stated earlier, there has to be some clinching or direct evidences nailing the assessee that the money from these bank accounts had either flown back in the books of the assessee or it has come into its account in some form or the other. If there is a huge generation of cash all across the country then there has to be some live link material that it has gone into the coffers of the assessee-company.

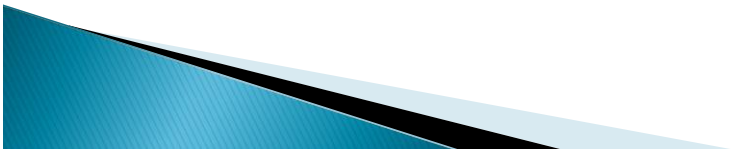
Fifthly, the statements of various employees of wholesale buyers only go to show that certain amount of premium was collected and draft was prepared on the direction of their employers, *i.e.*, wholesale buyers and the drafts were sent to these fictitious accounts; however, none of the employee/s have even uttered the name of GTC or its employee, that for collecting the premium amount and sending it to the fictitious bank accounts there was some role of GTC or was done at the behest of GTC. *Albeit,* these employees have taken the name of the wholesale buyers on whose directions they were collecting the premium amount. Despite their admissions the revenue did not proceed further to confront the wholesale buyers to ascertain the truth, whether all these collections were done at the direction of GTC or every transaction was under the control of GTC and these wholesale buyers are merely a conduit



Lastly, the statements and materials relating to payment of advertisement expenses only go to show that the GTC acted more like a central/co-ordinating agency which guided the nature and content of the advertisement and burden/liability of such expenses were borne out by the wholesale buyers. This is evident from the material collected from Source Marketing, H. Printers, 'R' etc. All these persons have categorically deposed that though the advertisement and radio jingles were done at the behest of GTC but bills were sent to wholesale buyers who borne the expenses and some of WB have even showed it in their books of account. Thus, Assessee-Company may have the control over the contents of advertisement at all India level but there is no material on record to prove that it was the liability of the assessee to incur such expenditure.



Even if it is remotely accepted that these fictitious bank accounts were opened for incurring the advertisement expenses, but to hold that this was the liability only of the assessee is far-fetched *sans* any direct material or evidence on record. Though the Assessing Officer has very diligently carried out enquiries all across the country in various assessment years however, he could not collect any information or material that advertisement expenses were directly borne by the assessee or the assessee had full control of the bank accounts or these bank accounts are benami of assessee. All his enquiries only prove that premium money was collected on sale of cigarettes which found its way through series of chains to fictitious bank accounts. [Para 45]

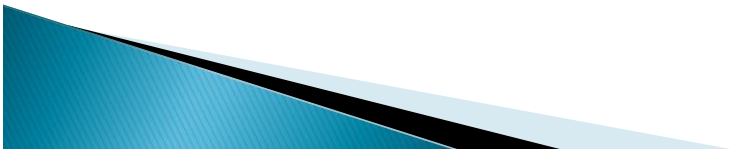


In situations like this case, one may fall into realm of 'preponderance of probability' where there are many probable factors, some in favour of the assessee and some may go against the assessee. But the probable factors have to be weighed on material facts so collected. Here in this case the material facts strongly indicate a probability that the wholesale buyers had collected the premium money for spending it on advertisement and other expenses and it was their liability as per their mutual understanding with the assessee. Another very strong probable factor is that the entire scheme of 'twin branding' and collection of premium was so designed that assessee-company need not incur advertisement expenses and the responsibility for sales promotion and advertisement lies wholly upon wholesale buyers who will borne out these expenses from alleged collection of premium.

The probable factors could have gone against the assessee only if there would have been some evidence found from several searches either conducted by DRI or by the department that assessee-company was beneficiary of any such accounts. At least something would have been unearthed from such global level investigation by two Central Government authorities. In case of certain donations given to a Church, originating through these benami bank accounts on the behest of one of the employees of the assessee-company, does not implicate that GTC as a corporate entity was having the control of these bank accounts completely. Without going into the authenticity and veracity of the statements of the witnesses this one incident of donation through bank accounts at the direction of one of the employee of the company does not implicate that the entire premium collected all throughout the country and deposited in Benami bank accounts actually belongs to the assessee-company or the assessee-company had direct control on these bank accounts.

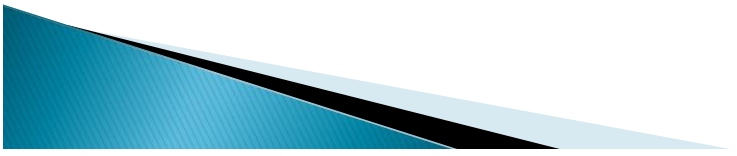
Ultimately, the entire case of the revenue hinges upon the presumption that assessee is bound to have some large share in so-called secret money in the form of premium and its circulation. However, this presumption or suspicion how strong it may appear to be true, but needs to be corroborated by some evidence to establish a link that GTC actually had some kind of a share in such secret money. It is quite a trite law that suspicion howsoever strong may be but cannot be the basis of addition except for some material evidence on record. The theory of 'preponderance of probability' is applied to weigh the evidences of either side and draw a conclusion in favour of a party which has more favourable factors in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of facts that might go against assessee. Once nothing has been proved against the assessee with aid of any direct material especially when various rounds of investigation have been carried out, then nothing can be implicated against the assessee. [Para 46]

It is well-settled that without any corroborative material; it would be difficult to appreciate the stand of the revenue that the assessee was beneficiary of the premium money or relate the flow back of the money to the assessee. It appears that the charging of premium amount over and above the MRP by the retailers and wholesale buyers may be keeping the assessee in loop to co-ordinate for meeting out certain expenses which also included advertisement and sales promotional expenses. The entire scheme was so designed that the liability of sales and promotion expenses or advertisement lies with the wholesale buyers and not on the assessee and assessee merely acts as a co-ordinating/managing central agency. But such a managing and co-ordinating of advertisement does not implicate the assessee that it is the sole beneficiary or owner of the entire premium money MRP. Thus, on this account also the revenue's case fails.[Para 49]

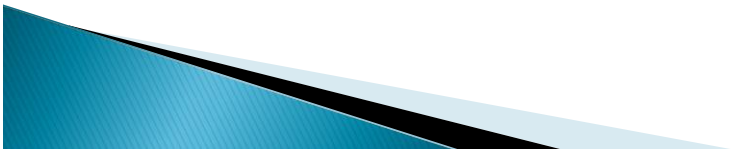


Now coming to the issue of rejection of books of account as well as the estimation of income by multiplying the volume of sales of lower price brand with the differential price of higher price brand on account of theory of 'twin branding mechanism' and thereby giving an ad hoc reduction of 10 per cent on the ground that some of the share in premium money belonged to the wholesale buyers, first of all, it is noticed that, the basis of rejection of books of account by the Assessing Officer under section 145(2) is that, *firstly*, assessee has maintained bank accounts in fictitious names outside the books and has otherwise incurred expenses which are not reflected in books of account; and *secondly*, assessee has been maintaining cash in bank accounts outside the books.

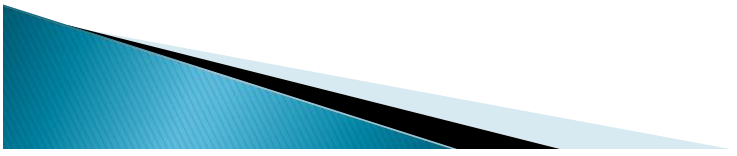
The Commissioner (Appeals) has further added one more ground that, bank accounts appearing to be channel for circulating such premium or assessee is bound to have a large share in such secret money and its circulation. First of all the first allegation of the Assessing Officer that it is proved beyond doubt that assessee has maintained bank accounts in fictitious names outside the books, the same is not tenable because as already held above, it has not been proved through any direct or indirect material or evidence that bank accounts belong to the assessee-company. Though the premium was collected by the wholesale buyers which were deposited in the fictitious bank accounts from where certain advertisement expenses and other expenses were incurred, but there is no material as such or any statement implicating the assessee that those bank accounts had been either maintained by the assessee or was under the control of the assessee or was benami of the assessee. If that is so, then the entire premise for rejecting the books of account gets vitiated.



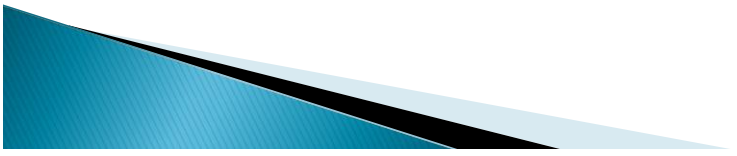
Once it is held that there is no material to implicate the assessee then the presumption that assessee is maintaining cash in bank account outside the books also fails because this allegation too is not flowing from the first premise of the Assessing Officer. The additional reason cited by the Commissioner (Appeals) falls within the realm of suspicion and surmises and based on such suspicion and surmise *sans* any direct material, the same cannot be upheld. As stated above, there is no finding or any cogent material to establish that extra amount collected in cash by shopkeepers/retailers have been passed on further from wholesale buyers/ super buyers to the manufacturer, *i.e.*, assessee; and once that is so, the presumption of indirect flow back cannot be made the basis for such addition or estimation of income. [Para 50]



Even though it has been held that Assessing Officer and Commissioner (Appeals) were not correct in law and on facts to reject the books of account, however for the sake of completeness, it is fit to deal with issue of estimation as has been made by Assessing Officer in brief. The estimation made by the Assessing Officer for assessing the income is very faulty because, it is based on high degree of presumption and hypothesis that on each and every sale of lower brand cigarette all across the country made to millions of consumers through millions of retailers, there has been collection of extra money equivalent to the price of high brand value cigarettes and then such collection of money has cent per cent flown back to the assessee directly; and out of that premium money some minor share pertains to the wholesale buyers. Such a wild speculation or basis for estimation on the facts of the present case is very far-fetched and implausible.



The best judgment does not entail wild guesswork or huge additions should be resorted to, *albeit* it lays down the determination of income based on fair and reasonable analysis based on some tangible material. The framing of the best judgment though entails some kind of fair and honest estimation but at the same time it should be based on material and information on record. The best judgment is not a provision to penalize the assessee and resort to wild estimate but it is a machinery provision which is to be based on assessing the correct income and that too based on material and evidence having live link nexus with the income which is to be assessed. Thus, on this count also, the kind of estimation or addition which has been made by the Assessing Officer and sustained by the Commissioner (Appeals) cannot be upheld. Accordingly, the Assessing Officer is directed to delete the entire addition. [Para 51]



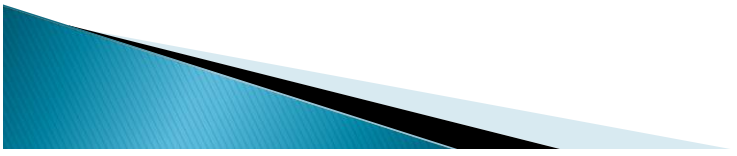
In the result, the entire addition as sustained by the Commissioner (Appeals) is deleted and assessee's appeal is allowed. [Para 53]

Suspicion however strong can not take the place of proof.
13.4 Uma Charan Shaw & Bros. Vs. CIT (1959) 37 ITR 271 (SC)

HELD

There was no evidence that the excise licences were transferred or sub-let. The shops, it appeared, were managed separately and their accounts were kept distinct. There was thus nothing which militated against the partnership and it could not be said that this affected the genuineness of the agreement. The Bati Khata *showed the capital account of the partners, their drawings from time to time and their profits separately. There was nothing to show that the entries in the* Bati Khata *were different from the other account books and the* Bati Khata *served as an abstract of all the business of the partnership.*

That it was not shown to the excise authorities did not prove that the book was not genuine. This account had been in existence ever since the first partnership agreement, and nothing had been said to establish that it was not regularly maintained in the ordinary course of business. Similarly, the bank accounts were left in the names of the licensees in order to keep the various businesses separate and distinct. The partnership deed provided for this, and there was nothing which made the partnership doubtful. The maintenance of these bank accounts could not be said to furnish a veneer of partnership while underneath the family continued undisturbed.



No doubt, the family continued as HUF for nearly three decades, but there was nothing to prevent a family from disrupting and forming a partnership. The earlier decision was not res judicata, *and the family could on a subsequent date enter into a fresh agreement with new partners and ask for its registration. This was what was done in 1947, and the occasion was the death of U in that year. It must not be forgotten that U was the eldest and must have been the senior partner. With his death the need for further adjustments arose, and a fresh document was executed.*

There was an arrangement in the deed itself for drawings, and looking at the circumstances of the family the drawings during a year could not be said to be too extensive as others had withdrawn large sums also in their turn.

Taking into consideration the entire circumstances of the case, we are satisfied that there was no material on which the ITO could come to the conclusion that the firm was not genuine.

There were many surmises and conjectures, and the conclusion was the result of suspicion which could not take the place of proof in these matters.

The result was that the order of the Tribunal was reversed.

The firm should be registered under section 26A of the 1922 Act for the assessment year 1948-49.

Note: The case was decided in favour of the assessee.

13.5 CIT Vs. Anupam Kapoor (2008) 229 ITR 179 (P&H HC)

HELD

The assessee had made investment in a company in which he was neither a director nor was he in control of the company. The assessee had taken shares from the market, the shares were listed and the transaction took place through a registered broker of the stock exchange. There was no material before the Assessing Officer, which could have lead to a conclusion that the transaction was simplicitor a device to camouflage activities, to defraud the revenue. No such presumption could be drawn by the Assessing Officer, merely on surmises and conjectures. It was for the Assessing Officer, who had reopened the assessment to have sought some evidence on record, to substantiate his formulation of consideration that the assessee has not filed a return bona fide. *In the absence of any cogent material in this regard, having been placed on record, the Assessing Officer could not have reopened the assessment. The assessee had made an investment in a company, evidence whereof was with the Assessing Officer. Therefore, the Assessing Officer could not have added income, which was rightly deleted by the Commissioner (Appeals) as well as the Tribunal.* [Para 4]

13.6 CIT Vs. Lakshmangarh Estate and Trading Co.Ltd (2013) 43 taxmann.com 438 (Cal HC)

HELD

On the basis of a suspicion howsoever strong it is not possible to record any finding of fact. As a matter of fact, suspicion can never take the place of proof.

The finding arrived at by the Tribunal that both the sale and purchase were genuine transactions was not even alleged by the revenue to have not been based on evidence. In the teeth of the aforesaid findings made by the Tribunal on the basis of evidence, it was difficult, if not impossible, to hold that the transaction of buying and selling of shares of Hindustan Development Corporation Ltd. was a colourable transaction or was restored to with any ulterior motive of reducing the tax payable for long term capital gain. [Para 6]

Since the finding of the Tribunal was factually correct, the Tribunal had no option but to direct the Assessing Officer to give the benefit of the losses suffered by the assessee, which he had disallowed. [Para 7]

In the instant case, in order to show genuineness of the transaction, more than 10 grounds had been assigned by the Income Tax Appellate Tribunal and not one of them was even commented upon by assessee. [Para 8]

Thus, the appeal did not raise any question of law and was therefore, not to be admitted. [Para 9]

Addition under deeming provisions (Sec 68 or Sec 69 family) can not be made on mere suspicion, conjectures or perceptions basis.

13.7 CIT Vs. Jawahar Lal Oswal (2016) 382 ITR 453 (P&H HC).

HELD

A perusal of the impugned order reveals that the Tribunal has, after an appraisal of the evidence, the questions put and answers offered by the assessee, the material received from the bank statements, the documents received from the Inland Revenue Service, Great Britain, the statement made by 'O' before the authorities and statement made by 'B' before the Inland Revenue, affirmed the deletion made by the Commissioner (Appeals) on account of the gift made by 'O' and deleted the addition on account of the gift made by 'B'.

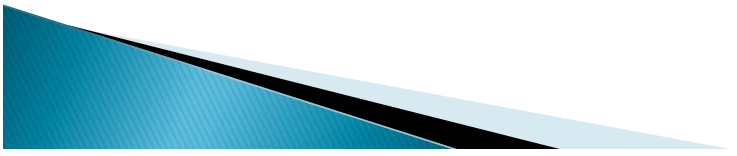
The principle that governs a deeming provision is that the initial onus lies upon the revenue to raise a *prima facie* doubt on the basis of credible material. The onus, thereafter, shifts to the assessee to prove that the gift is genuine and if the assessee is unable to offer a credible explanation, the Assessing Officer may legitimately raise an inference against the assessee. If, however, the assessee furnishes all relevant facts within his knowledge and offers a credible explanation, the onus reverts to the revenue to prove that these facts are not correct. [Paar 18]

The first substantial question of law, is, whether the assessee has discharged the onus of establishing that the gifts are genuine. Admittedly, the gifts were received by the assessee for and on behalf of his daughters, while he was in London. Alleging that the gifts were the deemed income of the assessee, the Assessing Officer called upon the assessee to show cause why the gifts be not treated as his income. The Assessing Officer also initiated a protective assessment against the daughters. The Assessing Officer may have been right in serving a notice and initiating an investigation as these large monetary gifts would raise suspicion about their genuineness but was apparently so convinced of the nature of the funds that he forgot that he is dealing with a deeming provision and proceeded to initiate an inquisition instead of an inquiry. [Paar 22]

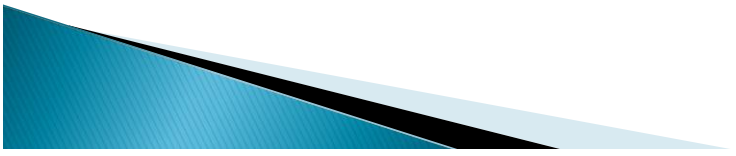
The assessee replied to the queries, addressed by the Assessing Officer, disclosed the identity of donors and denied that the gifts were his income. The assessee produced 'O', before the Assessing Officer, who stated that he had an annual income of $ 12,0000. The Assessing Officer was dissatisfied and sought information through the Central Board of Direct Taxes, which, in turn, sought information from the Inland Revenue Service, Great Britain. The information received, confirmed that 'O' and 'B' had accounts in 'M' Bank, United Kingdom and the demand drafts were prepared by said bank. The income of 'O' was verified. 'O' appeared before the Assessing Officer and admitted the gift. As regards the gift made by 'B', did not appear before the Assessing Officer but his account was verified from the Inland Revenue Service, Great Britain. [Paar 23]

The question that arises from an examination of the material on record, is whether the assessee has discharged his onus to prove that gifts are valid and said gifts cannot be treated as his deemed income under section 69A. As already recorded, the Tribunal has, after examining the entire material, in detail, recorded a finding that the assessee has discharged onus to prove that the gifts are genuine, thereby affirming the opinion recorded by the Commissioner (Appeals), as regards the gift made by 'O' but reversing the opinion as regards the gift made by 'B'.

The findings are neither perverse nor arbitrary and may, if at all, be debatable. 'O' appeared before the Assessing Officer, his income and accounts were verified from the Inland Revenue Service, Great Britain but the Assessing Officer drew an inference against the assessee as 'O' could not disclose his account number, his answers were held to be vague and there does not appear to be any such relationship between the parties that would warrant such a large gift. As 'O' Gill appeared before the Assessing Officer, admitted that it was his money and admitted the gift, his accounts and income were verified, his failure to remember his account number, which was already known to the revenue, could not justify the raising of an inference against the assessee. [Paar 24]

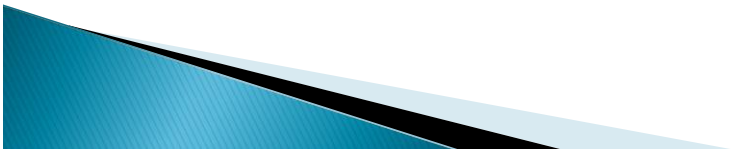


A question may, however, legitimately arise that such a large amount could not be given as a gift on the marriage of the assessee's daughter but this question is speculative and cannot form the basis for raising an inference against an assessee. The Assessing Officer was apparently over-awed by the amount of the gift and, therefore, proceeded to base his opinion on his perception that no one would gift such a large amount. A deeming provision requires the Assessing Officer to collect relevant facts and then confront the assessee, who is thereafter, required to explain incriminating facts and in case he fails to offer a credible information, the Assessing Officer may validly raise an inference of deemed income under section 69A of the Act.



As already held, If the assessee offers an explanation and discloses all relevant facts within his knowledge, the onus reverts to the revenue to adduce evidence and only thereafter, may an inference be raised, based upon relevant facts, by invoking the deeming provisions of section 69A of the Act. It is true that inferences and presumptions are integral to an adjudicatory process but cannot by themselves be raised to the status of substantial evidence or evidence sufficient to raise an inference.

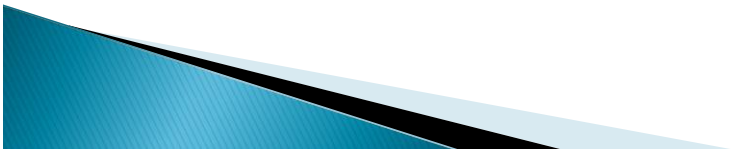
A deeming provision, thus, enables the revenue to raise an inference against an assessee on the basis of tangible material and not on mere suspicion, conjectures or perceptions. It would also be necessary to reiterate that it is not perceptions but concrete facts that underline quasi-judicial determinations and where concrete facts are not available, relevant facts, as would raise a credible inference of culpability requiring an assessee to rebut the inference so raised. More often than not, revenue authorities, for want of relevant material, institute "inquisitions", as opposed to inquiries and by addressing questions that the more inculpatory in nature, seek to build their case, from answers proffered by an assessee. The findings of fact recorded by the Commissioner (Appeals) and the Tribunal regarding the gift made by 'O' are plausible, though debatable, do not call for interference. [Paar 25]



As regards the gift made by 'B', a perusal of orders passed by the Assessing Officer and the Commissioner (Appeals) reveal that the reasons assigned by them for rejecting the gift made by 'B' are, firstly, failure to produce 'B', secondly that 'B' stated that the money was given to him by 'V' and other reasons that are similar to the reasons assigned in the case of 'O'.

The Assessing Officer and the Commissioner (Appeals) ignored the fact that the drafts were prepared from the account of 'B' and if the Assessing Officer was to rely upon the statement made by 'B' that he had received the money from 'V' of Moscow, the onus lay upon the revenue to pursue this lead and trace 'V' but, unfortunately, no further enquiry was carried out but instead the assessee was asked to disclose the whereabouts and his connection with 'V'. The assessee denied any association, business or otherwise with 'V' but admitted that 'V' was known to him.

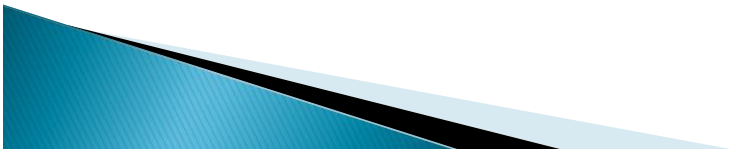
The onus, therefore, shifted to the revenue to prove that 'V' was an associate or an employee and only thereafter could the revenue raise an inference that the assessee had routed his funds through 'V', in the garb of a gift drawn in the name of his daughters. A perusal of the record reveals that the Assessing Officer did not pursue the matter any further and merely based his opinion on an assumed connection between the assessee and 'V' and has failed to refer to any material, howsoever perfunctory, that would indicate that 'V' was an employee or an associate of the assessee. The Assessing Officer, thus, drew an adverse inference against the assessee for his failure to "disprove" his relationship with 'V'. [Paar 26]



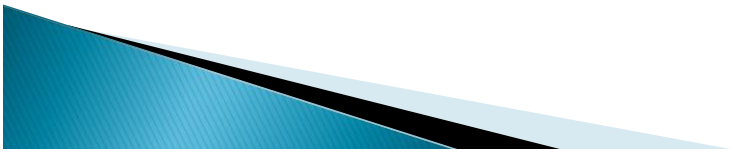
An arrangement between a donor and another is an arrangement between the donor and his source of money. The onus to probe and prove this aspect lies upon the revenue and not upon the assessee, particularly where the income is being dealt with under a deeming provision. A person who receives a gift, is not required to prove the source of the money of his donor. [Paar 27]

A suspicion may, however, arise that 'V' was in some way connected with the assessee. The Assessing Officer was required to investigate this matter but for reasons that have not been spelt out or explained whether in the assessment order or by the revenue, did not investigate the matter any further and raised an inference against the assessee. The assessee having denied any connection or any knowledge about the whereabouts of 'V', the onus squarely fell upon the Assessing Officer to enquire into the matter and then by reference to some material establish the link between 'V' and the assessee, to raise a valid inference that the gifts reflect the income of the assessee. [Paar 28]

The revenue may have a credible argument based upon the fact that 'B' did not appear before the Assessing Officer or that he has stated that he has received money from one 'V', but it was for the revenue, to establish a link between 'V' and the assessee, which, as already, recorded, it has failed to establish. At this stage, it would be appropriate to point out that to a specific query addressed to for the revenue to point out any material on record that proves a link between the assessee and 'V'. The answer by revenue is in the negative. A perusal of the assessment order and the record produced before this Court reveals that it is bereft of any material that could even *prima facie* prove a link between the assessee and 'V'.



As already noticed, an inference under a deeming provision, has to be based upon relevant facts. The assessee disclosed the identity of the donors, the Assessing Officer collected information from the Inland revenue, 'B' made a statement that 'V' gave him the money, the assessee was asked to disclose the whereabouts of 'V' but the Assessing Officer rejected the gift by holding that 'V' is an associate of the assessee, without reference to any material or evidence before him. The Assessing Officer would have been justified in raising such an inference if there was a shred of material to link 'B' and 'V' to the assessee. [Paar 29]



The Tribunal has held that there is no evidence or material to link 'V' to the assessee and that findings have been recorded on mere suspicion, conjectures and surmises. The Tribunal has also held that the assessee, who accepted the gift for and on behalf of his daughters, was not privy to any information regarding the source of funds with 'B'. One cannot be oblivious to the fact that such a large gift received from a foreign country is bound to raise suspicion but can not disregard the fact that suspicion and doubt cannot replace proof or translate into reasons, much less reasons for invoking a deeming provision to hold that gifts represent the income of the assessee, particularly in the absence of relevant facts. [Paar 30]

- A further perusal of orders passed by the Assessing Officer reveals that he proceeded as if the entire onus lay upon the assessee, ignored the material received from the Central Board of Direct Taxes from the Inland Revenue Service, Great Britain and failed to follow the matter any further with respect to 'V' and on the basis of suspicion, held that gifts are not genuine. Having already held that it was for the revenue to proceed to investigate the matter further, there is no error in the opinion recorded by the Tribunal. [Paar 31]

- In view of aforesaid, revenue's appeal is dismissed.

Rajesh Katoch, Adv. *for the Appellant.* **Sanjay Bansal**, Sr Adv. and **B.M. Monga**, Adv. *for the Respondent.*

13.8 Aurobindo Sanitary Stores Vs. CIT (2005) 276 ITR 549 (Orissa HC)

HELD

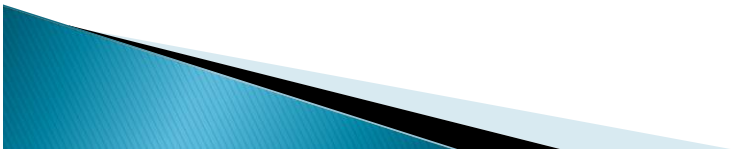
The view taken by the Commissioner (Appeals) and the Tribunal was correct that if there was a substantial difference in the figures of liabilities towards sundry creditors in the party ledgers of the assessee-firm and the figures of liabilities towards sundry creditors in the balance sheet of the assessee for the previous year relevant to the assessment year 1989-90, the Assessing Officer might have a reason to believe that income of the assessee had escaped assessment so as to warrant initiation of action under section 147. [Para 6]

The materials on the basis of which the assessment of the assessee had been reopened under section 147 were the party ledgers of the assessee seized which revealed an amount of Rs. 2,66,612.60 paise in the account of the sundry creditors whereas the balance sheet filed by the assessee at the time of the original assessment revealed that sum of Rs. 5,47,684.71 paise was in the account of sundry creditors. The instant case thus was a case where the balance sheet figures of the liability of the assessee towards sundry creditors did not tally with the figures of the liability of the assessee towards sundry creditors in the books of the assessee . Those materials did have a direct link and nexus for formation of a belief by the ITO that the same income of the assessee had escaped assessment because of his failure to disclose fully and truly all material facts necessary for the assessment of the assessee .

It could not be held that the materials in the instant case on the basis of which action had been taken under section 147 were wholly vague, indefinite, far-fetched or remote to the formation of the belief that some income of the assessee had escaped assessment for the assessment year 1989-90 because of the failure of the assessee to disclose fully and truly all material facts necessary for the assessment of the appellant for that assessment year. Therefore, in the facts and circumstances of the case, the re-opening of the assessment under section 147 was justified and legal. [Para 9]

So far as the issue relating to addition of Rs. 2,70,421 as inflated liabilities under section 69, read with section 68 was concerned, it was clear from the order of assessment passed by the Assessing Officer, for the assessment year 1989-90 that it was not the case of the department that any sum was found credited in the books of the assessee maintained for the previous year relevant to the assessment year 1989-90 and the appellant had not offered any explanation for such false or bogus credit in the books of account. The case of the department on the other hand was that whereas in the party ledgers of the assessee for the previous year relevant to the assessment year 1989-90, a sum of Rs. 2,66,612.60 paise had been shown on account of sundry creditors, in the balance sheet that had been filed by the assessee in response to the letter of the Assessing Officer at the time of the original assessment a sum of Rs. 5,47,684.71 paise had been shown on the account of sundry creditors. Hence, section 68 was not at all attracted and could not be applied. The Assessing Officer had in fact not applied section 68 and had applied only section 69. [Para 12]

For applying section 69, the Assessing Officer must first come to a finding that the assessee has made investments which are not recorded in the books of account and thereafter call for an explanation from the assessee about the nature and source of the investments and if he finds that no such explanation is furnished by the assessee or the explanation offered by him is not satisfactory, he can treat the value of the investments to be the income of the assessee of the financial year in which he has made the investments. It appeared from the impugned assessment order that the Assessing Officer had sought to come to a finding that the appellant had during the financial year 1988-89 previous to the assessment year 1989-90 made an investment to the tune of Rs. 2,70,421 only on the basis of the differences in the figure of liabilities towards sundry creditors shown in the party ledgers seized from the custody of the said partner of the assessee and the figure of liabilities towards sundry creditors in the balance sheet filed by the assessee at the time of original assessment.



- *The assessment order showed that the Assessing Officer had come to conclusion that the assessee had made an investment of Rs. 2,70,421 during the financial year 1988-89 previous to the assessment year 1989-90 only on an analysis of different figures of assets and liabilities taken from the balance sheet and the party ledgers and not on the basis of any material or information that the assessee had in fact made investment of Rs. 2,70,421 in some form or the other such as immovable and movable assets which were not recorded in the books of the assessee, the source and nature which the assessee had failed to explain to the satisfaction of the Assessing Officer.*

- *The addition of Rs. 2,70,421 made by the Tribunal was not correct because section 69 by a deeming provision provides for treating an unexplained investment made by an assessee during a financial year to be income of the assessee of the financial year for the purpose of assessment and unless the requirements of the section 69 are strictly satisfied by a finding by the Assessing Officer on relevant materials that the assessee had actually made some unexplained investments in stock-in-trade during the financial year 1988-89 to the tune of Rs. 2,70,421, section 69 could not be applied to treat the said sum of Rs. 2,70,421 as income of the assessee for the assessment year 1989-90. In the facts and circumstances of the case, therefore, the addition of Rs. 2,70,421 by applying section 69 was not legal and justified.* [Para 13]
- *The appeal was allowed accordingly.*

ISSUE – 14

Rejection of books of account

14.1 St. Teresa Oil Mills Vs. State of Kerala CIT (1970) 76 ITR 365 (Kerala.HC):

AO has to prove that books of account maintained by the assessee is unreliable, incomplete or incorrect for rejection. Books of accounts regularly maintained by the assesse has to be taken as correct unless there is strong reasons to declare the same as unreliable . The rejection of books is not a matter to be done light-heartedly.

14.2 Ashoke Refractories Pvt Ltd Vs. CIT (2005) 279 ITR 457 (Cal.HC):

Opinion of AO after considering every factors that accounts is not essential reflecting true income is for rejection of books of account.

14.3 CIT Vs. Vikas Plastics (1999) 239 ITR 161 (Guj.HC):

Without finding that books of account is not showing correct income AO cannot reject books of account.

14.4 Pandit Bros. Vs. CIT (1954) 26 ITR 159 (P& H HC):

For rejection of books of account u/s 145 relevant material should be in possession of the AO to establish that method of accounting followed by the asesseee is not showing correct profitability.

5. **CIT Vs. Paradise Holidays (2010) 325 ITR 13 (Del.HC):**
   Audited accounts with out any disqualification from the Auditor normally held as reliable. For rejection AO has to point out categorical finding that books of account maintained by the assesseee is either incomplete or incomplete causing not reflecting true profits.

6. **CIT v. Rajnikanth Dave – (2006) 281 ITR 6 (All. HC):**

The Court held that the Assessing Officer is not justified in rejecting the books results without any allegation that the method of accounting adopted by the Assessee is such that the income cannot be properly deduced.

7. **Madnani Construction Corpn (P) Ltd. v. CIT (2008) 296 ITR 45 (Gau. HC):**

When the Assessing Officer has neither expressed his dissatisfaction about the correctness or completeness of the accounts nor any error is pointed out in P&L A/C and Audited report, rejection of books of account is not justified and the powers of best judgment cannot be invoked.

8. **Dy. CIT v. Associated Petroleum Corpn. (2011) 44 SOT 45 (Ahd. ITAT):**

AO to give a finding either method of accounting followed by the assessee or books of account maintained by the assesseee is not correct enabling AO to work out true income of the assessee .

9. **Saurashtra Ball Pen (P) Ltd. v. DCIT – (2208) 24 SOT 556 (Mum. ITAT)**

AO to be satisfied after considering every material before him that either accounts are maintained not accurately or not complete for rejecting books of account u/s 145(3).

Once books of account is rejected same can not be referred for making addition as undisclosed income:

- Indwell Constructions Vs. CIT (1998) 232 ITR 776 (AP.HC)
- Amitabh Construction P.Ltd Vs. Addl.CIT (2011) 335 ITR 523 (Jharkhand.HC)
- Manipal House of Stones Vs. CIT (2017) 395 ITR 385 (Raj.HC)
- CIT Vs. Dulla Ram, Labour Contractor (2014) 42 taxmann.com 349(P&H. HC)

Once books of account has been rejected AO has to made a fair estimate of profit.

- Kachwala Gems Vs. CIT (2007) 288 ITR 10 (SC)

On rejection of books of account AO has to estimate the profit of the current year considering net profit of the immediately preceding year:

- CIT Vs. K.Y.Pilliah (1967) 63 ITR 411 (SC)
- ITO Vs. OM Silk Mills (2015) 55 taxmann.com 295 (Guj. HC)
- Prasant Oil Mills Vs. ITO (2016) 72 taxmann.com 136 (Guj. HC)

Books of account is rejected from estimated net profit computed by AO depreciation u/s 32 has to be allowed.

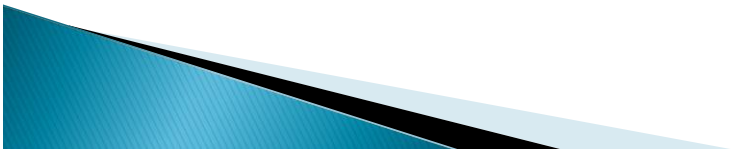
- Lali Constructions Vs. ACIT (2015) 54 taxmann.com 68 (P&H. HC)
- ACIT Vs. J.S Grover Constructions (2016) 181 TTJ 23 (Asr.ITAT)

Source of money was explained and accepted by Dptt., there is no need to prove that assessee was in possession of currency notes in particular denomination.

- Narendra G.Goredia Vs. CIT (234 ITR 571) (Bom.HC)

ISSUE – 15

SECTION 115BBE



15.1. THE TAXATION LAWS (SECOND AMENDMENT) ACT,2016

Amended provisions of section 115BBE brought in by the 'Taxation Laws (Second Amendment Act), 2016' whether applicable prospectively or retrospectively

Statement of Objects & Reasons by Finance Minister Arun Jaitley on 26th November, 2016 :

- *Evasion of taxes deprives the nation of critical resources which could enable the Government to undertake anti-poverty and development programmes. It also puts a disproportionate burden on the honest taxpayers who have to bear the brunt of higher taxes to make up for the revenue leakage. As a step forward to curb black money, bank notes of existing series of denomination of the value of five hundred rupees and one thousand rupees (hereinafter referred to as specified bank notes) issued by the Reserve Bank of India have been ceased to be legal tender with effect from the 9th November, 2016.*
- *Concerns have been raised that some of the existing provisions of the Income-tax Act, 1961 could possibly be used for concealing black money. It is, therefore, important that the Government amends the Act to plug these loopholes as early as possible so as to prevent misuse of the provisions.* ***The Taxation Laws (Second Amendment) Bill, 2016, proposes to make some changes in the Act to ensure that defaulting assessees are subjected to tax at a higher rate and stringent penalty provision.***

15.2. Sec. 115BBE

OLD	NEW
Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.	**Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.**
(1) Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of -	(1) Where the total income of an assessee -
(*a*) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty per cent; and	(a) includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the return of income furnished under section 139; or

15.2. Sec. 115BBE

OLD	NEW
Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.	**Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.**
(*b*) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (*a*).	(b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a), the income-tax payable shall be the aggregate of - (i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and (ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).

15.2. Sec. 115BBE

OLD	NEW
Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.	**Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D.**
(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (*a*) of sub-section (1).	(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) and clause (b) of sub-section (1).

15.3. Imposition of higher tax rate by the amended provisions of section 115BBE through enactment of the 'Taxation Laws (Second Amendment Act),2016', can it be applicable retrospectively to cover the transactions from 1st April, 2016?

'Taxation Laws (Second Amendment Act),2016' received assent of the President on 15th December,2016 accordingly changes brought in section 115BBE for imposing higher rate of 60% plus surcharge 25% with applicable cess ideally should be made applicable prospectively to cover those transactions happened from 15th December, 2016 on wards.

Amended provisions of section 115BBE was enacted in the IT Act 1961 on 15th December, 2016 cannot be applicable retrospectively to cover transactions from 1st April,2016 to 14th December,2016 to tax at higher rate of 60% plus surcharge 25% with applicable cess where income was assessed under section 68 or section 69, 69A, 69B, 69C and 69D.

15.4. Judicially it was well settled under the Income Tax Act,1961 that amended provisions which modify accrued rights or which impose obligations or create new liabilities or attach new disability have to be treated as prospective unless the language of the statute is clear that it has retrospective operation.

The above proposition regarding operation of the amended provision was accepted by the Apex Court and that of High Courts in plethora of judgments.

Reliance is placed upon the following land mark legal precedents :

1) **CIT Vs. Vatika Township (P.) Ltd(2014) 367 ITR 466 (SC).**
2) **CIT Vs. Walfort Shares & Stock Brokers (P.) Ltd (2010) 326 ITR 1 (SC).**
3) **CIT Vs. Gold Coin Health Food (P.) Ltd (2008) 304 ITR 308 (SC).**
4) **Sedco Forex International Drill Inc. Vs. CIT (2005) 279 ITR 310 (SC).**
5) **CIT Vs. Hindustan Electro Graphites Ltd (2000) 243 ITR 48 (SC).**
6) **P.Ram Gopal Varma Vs. Dy.CIT (2013) 357 ITR 493 (AP.HC)**
7) **Modern Fibotex India Ltd Vs. Dy.CIT (1995) 212 ITR 496 (Cal.HC).**
8) **Govind Das Vs. ITO (1976) 103 ITR 123 (SC).**

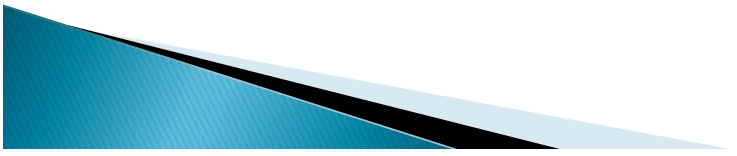
15.4.1. In the case of **'CIT Vs. Vatika Township (P.) Ltd (supra)** it was held as under:

"Of the various rules guiding how legislation has to be interpreted, one established rule is that unless a contrary intention appears, legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's background adjustment of it. Our belief in the nature of the law is founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset.

This principle of law is known as lexprospicit non respicit: law looks forward not backward. As was observed in Phillips vs. Eyre: a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

15.4.2. In the case of **'CIT Vs.Walfort Shares & Stock Brokers (P.) Ltd (supra)** the Apex Court opined as follows:

"Retrospective operation of law should not be given so as to effect, alter or destroy an existing right and to create new liability or obligation. New liability can not be created by a subsequent amendment in respect of a transaction when such law was not in the Statute book.

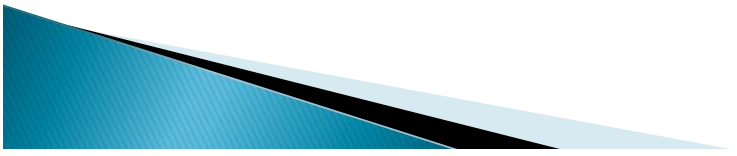


15.4.3. In the case of **'CIT Vs. Gold Coin Health Food (P.) Ltd (supra)** it was held as under :

"It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations."

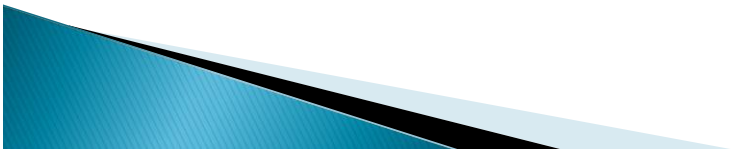
15.4.4. In the case of **'Sedco Forex International Drill Inc. Vs. CIT (supra)** the Apex Court thus held as under:

"Taxing provision imposing extra liability upon the assessee shall not be held as applicable retrospectively. A provision must be read subject to the rule that in the absence of an express provision or clear implication, the Legislature does not intend to attribute the amending provision, a greater retrospectively than is expressly mentioned. It is settled law that a taking provision imposing liability is governed by the normal presumption that is not retrospective."



15.4.5. In the case of **Govinddas Vs. ITO (1976) 103 ITR 123 (supra)** it was held as under:

"Now, it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."



15.4.6. In the case of **'CIT Vs. Hindustan Electro Graphites Ltd (supra)** it was held as under :

"Retrospective Amendment of law could not compel the assessee to deposit tax on additional income."

15.4.7 The principles that emerge from the aforesaid decisions indicate as follows:

(i) A statute is prima facie prospective in operation, but it may be given retrospective operation expressly or by necessary implication.

(ii)If a statute affects a vested right or creates a new obligation , it is prospective in nature.

(iii)If a statute changes the existing legal position and creates new obligation or liability then it is not retrospective unless it is declared to be so.

(iv)An intention to enact a retrospective statute must be clearly expressed. The mere use of words conveying such an intention is not by itself sufficient to held operation retrospectively.

15.5. SECTION 115BBE BEING MACHINERY PROVISION HAS TO BE INTERPRETED LIBERALLY:

The Income Tax Act is a self contained code consists of both charging and machinery sections.

Charging sections are those sections by which liability is created or fixed.

Machinery sections are those sections which ensures quantification, imposition and collection of tax created by the 'charging sections'.

Thus 'Machinery Provisions' are basically subordinates to the charging section.

On applying the above principles section 115BBE is categorized as 'machinery provision' which is subordinate to the charging sections 68 and section 69 family.

There is a very practical **rule in the interpretation of taxing Statutes that 'charging provisions' are interpreted strictly while the 'machinery provisions' are interpreted liberally**.

The above criteria of interpretation of the 'Statute' is supported by several judicial precedents.

15.6. Some land mark judicial precedents are as under:

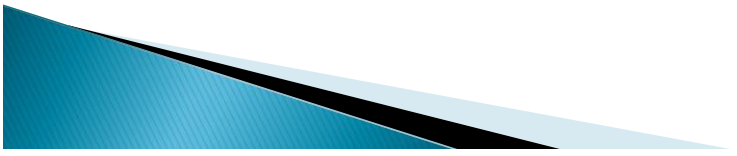
1) **J.K. Synthetics Ltd Vs. The Commercial Tax Officer (1994) 1994 taxmann.com 370 (SC).**
2) **Gurshai Saigal Vs. CIT (1963) 48 ITR 1 (SC).**
3) **India United Mills Ltd Vs. CEPT (1955) 27 ITR 20 (SC).**
4) **CIT Vs. Mahaliram Ramjidas (1940) 8 ITR 442(PC).**

15.6.1. The Hon'ble Supreme Court in the case of **J.K.Synthetics Ltd Vs. The CTO**' (supra) held as under:

"It is well-known that when a statute levies a tax it does so by inserting a charging section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. … Ordinarily the charging section which fixes the liability is strictly construed but that rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. *(Whitney* v. *Commissioners of Inland Revenue 1926 A C 37, CIT v. Mahaliram Ramjidas (1940) 8 ITR 42 (PC), Indian United Mills Ltd.* v. *Commissioner of Excess Profits Tax, Bombay, (1995) 27 ITR 20 (SC) and Gursahai Saigal* v. *CIT, Punjab,* [1963] 48 ITR 1 (SC)."

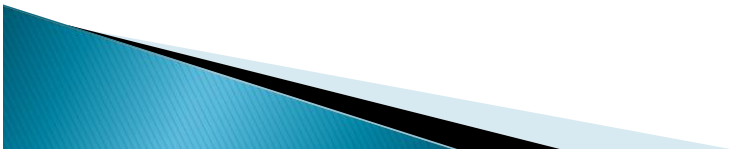
15.6.2. The Hon'ble Supreme Court in the case of **Gursahai Saigal Vs. CIT'** (supra) held as under:

"Those sections which impose the charge or levy should be strictly construed; but those which deal merely with the machinery of assessment and collection should not be subjected to a rigorous construction but should be construed in a way that makes the machinery workable."



15.6.3. The Hon'ble Supreme Court in the case of **'India United Mills Ltd Vs. CEPT' (supra)** applied the principles laid down by the Privy Council in the case of '**CIT Vs. Mahaliram Ramjidas (supra)'** held as under :

"Ordinarily, the charging section which fixes liability is strictly construed but the rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provision must, no doubt, be so construed as would effectuate the object and purpose of the Statute and not to defeat the same.



15.7. The law applicable with respect to income, should be the law as it stood on the first day of April of financial year 2016-17 i.e. 01.04.2016.

- Section 115BBE was originally inserted by the Finance Act, 2012 w.e.f. 01.04.2013.
- The said Section was substituted by the Taxation Laws (Second Amendment) Act, 2016, w.e.f. 01.04.2017.
- Taxation Laws (Second Amendment) Bill, 2016 was introduced in Lok Sabha on 28.11.2016 and received the Presidential assent on 15.12.2016.
- The relevant year under consideration is FY16-17 i.e. before the amendment of Section 115BBE by Taxation Laws (Second Amendment) Act, 2016.

- In other words, it is submitted as on the date of 01.04.2016 (the beginning of the financial year), the aforesaid amendment did not exist. Therefore, the law applicable with respect to income, should be the law as it stood on the first day of April of financial year 2016-17 i.e. 01.04.2016.
- It is settled law that, the law as it stood on the first day of April of any financial year must apply to the assessments of that year. Therefore, though the aforesaid Section is amended w.e.f. 01.04.2017, the same do not apply for the impugned AY 2017-18, as the said amendment did not exist as on 01.04.2016.

In this regard, one could rely on the following decisions:

15.7.1. In Karimtharuvi Tea Estate Ltd. v. State of Kerala [1966] 60 ITR 262 (SC), the Court held as under:

"10. ***Now, it is well-settled that the Income-tax Act, as it stands amended on the first day of April of any financial year must apply to the assessments of that year.*** *Any amendments in the Act which come into, force after the first day of April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force*."

15.7.2. In Krishna Mohan Agrawal v. CIT [2007] 295 ITR 190 (Allahabad), the Court held as under:

"The following question has been referred:

"Whether the Income-tax Appellate Tribunal was legally correct in holding that the amendment to section 64(1) of the Income-tax Act, 1961, brought about with effect from April 1, 1976, by the Taxation Laws (Amendment) Act, 1975, was applicable to the assessment year 1976-77 ?"

The amending Act known as the Taxation Laws (Amendment) Act, 1975, (Central Act No. 41 of 1975) received the assent of the President of India on August 7, 1975. By that Act one of the changes brought about was in section 64 of the Income-tax Act by virtue of section 13 of that Amendment Act.

As stated above, in this case the amendment relating to section 64 was enforced, by a notification with effect from April 1, 1976. Therefore, relying upon the decisions in Wallace Brothers and Co. Ltd. v. CIT [1948] 16 ITR 240 (PC), Kalwa Devadattam v. Union of India [1963] 49 ITR 165 (SC), Kesoram Industries and Cotton Mills Ltd. v. CWT [1966] 59 ITR 767 ; AIR 1966 SC 1370 and Chief CIT v. Rama Shanker [2005] 277 ITR 69 (All), we hold that the ***Tribunal was legally not correct in holding that the amendment in question enforced with effect from April 1, 1976, was applicable to the assessment year 1976-77 which would be relatable to the previous year 1975-76 inasmuch as that previous year was already over on the date of enforcement of the amendment.****"*

15.7.3. In PIU Ghosh v. Dy. CIT [2016] 386 ITR 322 (Calcutta), the Court held as under:

‘‘1.1 The question formulated on 12th August, 2009 when the appeal was admitted reads as follows :-

"Whether the Tribunal below substantially erred in law in applying provision of Section 40(a)(ia) of the Income Tax Act, 1961 in the present case pertaining to Assessment Year 2005-06 when the provisions were substituted by the Finance Act, 2004 with effect from April 1,2005 ?"

2. The Finance (No.2) Act,2004, No.23 of 2004 got Presidential assent on 10th September, 2004. Sub-section 2 of Section 1 of the aforesaid Act provides as follows:-

"(2) Save as otherwise provided in this Act, sections 2 to 65 shall be deemed to have come into force on the 1st day of April, 2004."...

*8. **Admittedly, the Finance Act, 2004 got presidential assent on 10th September, 2004. The assessee could not have foreseen prior to 10th September, 2004 that any amount paid to a contractor without deducting tax at source was likely to become not deductible under Section 40. It is difficult to assume that the legislature was not aware or did not foresee the aforesaid predicament. The legislature therefore provided that the act shall become operative on 1st April, 2005. Any other interpretation shall amount to "punishing the assessee for no fault of his" following the judgment in the case of Hindusthan Elector Graphites Ltd. (supra).”***

15.7.4. In CIT v. Avery India Ltd. [1980] 124 ITR 856 (Calcutta), the Court held as under:

"The facts admitted and/or not disputed are as follows: There is an Act called the Super Profits Tax Act, 1963, which received the assent of the President on the 4th May, 1963.

The admitted position in this case is that if this amount cannot be treated as a reserve then this has got to be excluded for the purpose of computation of basic capital for the purpose of ascertaining the standard deduction. There is no dispute regarding this. Therefore, the only question is whether it is to be treated as a reserve. What is known as reserve has been discussed in the various decisions of this court and also the Supreme Court. ***In the present case, we are not in a position to accept that on the relevant date April 3, 1963, there was any known liability, whether contingent or otherwise. There was no Act at that point of time. Merely there was a Bill. A Bill might or might not be changed into an Act. We are unable to aecept the contention of the revenue that the Bill mast be treated as a contingent liability. A Bill introduced in Parliament cannot create any liability, contingent or otherwise. In the present case, when this amount was earmarked on April- 3, 1963, or a little earlier as found by the Tribunal there was no such Act"'***

15.7.5. In Loknath Goenka v. CIT [2019] 417 ITR 521 (Patna) (FB), it was held as under:

2. The point for consideration in the reference is whether the Appellate Tribunal was correct in law in holding that the share income of minor sons of the assessees, including the share in interest on capital credited to the minor sons out of the partnership firm was to be computed in the hands of their father under Section 64(1)(iii) in the Assessment year 1976-77. ***The said provision was introduced in the Income Tax Act by the Taxation Law (Amendment) Act 1975 with effect from 1.4.1976, whereas the accounting year of the assessee(s) in the instant case(s) came to an end on 10.8.1975 and on 31.12.1975 in Taxation Case No. 126 of 1983 and Taxation Case No. 28 of 1986 respectively.***

17. Reading the judgment of the Apex Court in the case of Kesoram Industries and Cotton Mills Ltd. (supra)harmoniously with the Constitution Bench judgment of the Apex Court in the case of Karimtharuvi Tea Estate Ltd. (supra), this Court would observe that the argument advanced by Counsel for the assessees (Amicus Curriae) as well as the Department can be made only in respect of a rate prescribed under a Finance Act or an Act providing a surcharge if the same is brought into force on the lst of April of the assessment year in which assessment for the previous year is being done as the same would only provide for ascertaining the rate, for existing liability under the Income Tax Act. But that is not the case here. Under the new provision, i.e. Section 64(1)(iii) a new liability has been prescribed and not the rate for ascertaining the liability. Such new liability under the Income Tax Act cannot (Sic. cannot) be given a retrospective effect. Such liability can only be fastened on an individual if the same was existing at the time of accrual and not at the time of assessment. The observations of the Apex Court in paragraph 33 of the judgment in the case of Kesoram Industries and Cotton Mills Ltd. (supra), clarifies this position.

18. In view of the judgments of the Apex Court in the case of Kesoram Industries and Cotton Mills Ltd. (supra) as well as Karimtharuvi Tea Estate Ltd. (supra) this Court would have no hesitation in holding that for deciding the liability of a particular provision of the Income Tax Act, the date of accrual of income would be relevant. If the provision comes into force in a particular financial year, it would apply to the assessment for that year but cannot be made applicable in respect of assessment for a previous year.

19. The Amending Act introduced a new Section 64(1) (iii) in the Income Tax Act with effect from 1.4.1976. The tax liability under the said provision could therefore be charged on the assessee, in the assessment which was to be made for that accounting year i.e. 1976-77, which would be done in the assessment year 1977-78. The Amending Act introducing a new tax liability which came into force with effect from 1.4.1976 could not be given a retrospectivity and be made applicable to the previous accounting year i.e. 1975-76 corresponding to the assessment year i.e. 1976-77.

20. In view of the foregoing discussions and conclusions arrived at by us, I am of the considered opinion that the judgment rendered in the case of Badri Prasad (supra) does not lay down the correct law.

21. The issue of law having been clarified as aforesaid the reference stands answered. The matter is remanded to the Division Bench for disposing of the matter in terms of the law as considered by the Full Bench in the instant proceeding.

15.7.6. In CIT v. S.A. Wahab [1990] 182 ITR 464 (Kerala), it was held as under:

6. We are of the opinion that though the subject to the charge is the income of the previous year, the law to be applied is the law that is in force in the assessment year, unless the law is changed. In fact, what has to be looked into is the law of income-tax. ***The provision of the Act as it stands on the 1st April of a financial year must apply for that year. Further, since the law that has to be applied is the law as it stands on the 1st April of a financial year, any amendments in the Act, which come into force after 1st April of a financial year, would not apply to the assessment for that year, even if the assessment is actually made after the amendments come into force. This position has been made clear by the Supreme Court in CIT v. Scindia Steam Navigation Co. Ltd. [1961] 42 ITR 589 and*** *in Karimtharuvi Tea Estate Ltd. v. State of Kerala [1966] 60 ITR 262.*

15.7.7. In Andhra Cements Co. Ltd. v. CIT [1998] 232 ITR 364 (Andhra Pradesh), it was held as under:

7. The Tribunal proceeded on the basis that 1-4-1983 being Sunday, the rules were brought into force on 2-4-1983 as the first working day of the assessment year. To verify the correctness of the order of the Tribunal, we have called for the file from the Finance Ministry. On a perusal of the file we find that that is not the correct position. There is no reference to 1-4-1983 being a holiday and, therefore, bringing into force the amended rules with effect from 2-4-1983 as the first working day of the assessment year. The real reason is that the current pattern of the Finance Act is to notify the rates applicable one year in advance so that advance tax is calculated on the rates applicable for the next year. That was the reason why even in the budget speech the Finance Minister has calculated the loss arising out of this additional grant of depreciation for the financial year 1983-84 which is relevant to the assessment year 1983-84.

8. Therefore, the Tribunal is not right in holding that the assessee is entitled for the higher rates of depreciation for the assessment year 1983-84 as the amended rules came into force on 2-4-1983.

9. Following the above, the question referred at the instance of the revenue is answered in the negative and in favour of the revenue. Consequently, the Tribunal is right in holding that the assessee is not entitled at the higher rates for the earlier year, namely, 1982-83. The question referred at the instance of the assessee is answered in the affirmative and against the assessee.

The aforesaid decision is also considered in **Mather & Platt (I) Ltd. v. CIT [2012] 210 Taxman 509 (Bombay).**

15.8. Provision of section 115BBE are not applicable to business income

15.8.1. Shri Ram Swaroop Singhal & others Vs. ACIT Circle (ITA No. 145/Jodh/2018)

*13. I have heard the rival contentions and record perused. I have also carefully gone through the orders of the authorities below. I have also deliberated on the judicial pronouncements referred by the lower authorities in their respective orders as well as cited by the ld AR during the course of hearing before the ITAT in the context of factual matrix of the case**. From ITA 142 to 146/Jodh/2018 Vasu Singhal Vs ITO with 4 Ors. cases the record, I find that during the course of survey, income was surrendred by the assessee on account of stock, excess cash found out of sale of stock and also in respect of incriminating documents. As per judicial pronouncements cited by the ld. AR and also the decision of Hon'ble Rajasthan high court in the case of Bajrang Traders in Income Tax Appeal No. 258/2017 dated 12/09/2017 I observe that the Hon'ble High Court in respect of excess stock found during the course of survey and surrender made thereof was found to be taxable under the head 'business and profession'.***

Similarly in respect of excess cash found out of sale of goods in which the assessee was dealing was also found to be taxable as business income. Applying the proposition of law laid down in the judicial pronouncements as discussed above, I hold that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act. Thus, there is no justification for taxing such income U/s 115BBE of the Act.

14. So far as the surrender of income is on account of incriminating documents, it is not clear as to whether it was out of the business transaction, the assessee was carrying on in the regular course of business.

However, authorities had not given any finding on the nature of such incriminating documents nor with regard to income surrender with respect to these documents. Therefore, in the interest of justice, I restore the issue ITA 142 to 146/Jodh/2018 Vasu Singhal Vs ITO with 4 Ors. cases with regard to surrender of income arising out of incriminating documents to the file of the Assessing Officer to find out the nature of such income if arising out of the business transaction carried on by the assessee and to decide the issue afresh as per law. Needless to say that the assessee should be given due opportunity before deciding the issue.

15. In the result, all the appeals are allowed in part in terms indicated hereinabove.

15.8.2. Pr. CIT Vs. Bajrang Traders, C/o. Kalani and Co., ITA No.258/2017

3. The Tribunal while considering the matter has observed as under :-

*2.10. We have heard the rival contentions and perused the material available on record. During the course of survey, the assessee has surrendered an amount of Rs. 70,04,814/- towards investment in stock of rice which had not been recorded in the books of accounts. Subsequently, in the books of accounts, the assessee has incorporated this transaction by debiting the purchase account and crediting the income from undisclosed sources**. In the annual accounts, the purchases of Rs. 70,04,814/- were finally reflected as part of total purchases amounting to Rs. 33,47,19,658/- in the profit and loss account and the same also found included as part of the closing stock amount to Rs. 1,94,42,569/- in the profit/loss account since the said stock of rice was not sold out. In addition to the purchase and the closing stock, the amount of RS. 70,04,814/- also found credited in the profit and loss account as income from undisclosed sources. The net effect of this double entry accounting treatment is that firstly the unrecorded stock of rice has been brought on the books and now forms part of the recorded stock which can be subsequently sold out and the profit/loss therefrom would be subject to tax as any other normal business transaction. Secondly, the unreco4rded investment which has gone in purchase of such unrecorded stock of rice has been recorded in the books of accounts and offered to tax by crediting the said amount in the profit and loss account. Had this investment been made out of known source, there was no necessity for assessee to credit the profit/loss account and offer the same to tax.***

Accordingly, we do not see any infirmity in assessee's bringing such transaction in its books of accounts and the accounting treatment thereof so as to regularize its books of accounts. In fact, the same provides a credible base for Revenue to bring to tax subsequent profit/loss on sale of such stock of rice in future.

2.11. Having said that, the next issue that arises for consideration is whether the amount surrendered by way of investment in the unrecorded stock of rice has to be brought to tax under the head "business income" or "income from other sources". ***In the present case, the assessee is dealing in sale of foodgrains, rice and oil seeds, and the excess stock which has been found during the course of survey is stock of rice. Therefore, the investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. The decision of the Co-ordinate Bench in case of Shri Ramnarayan Birla (supra) supports the case of the assessee in this regard. Therefore, the investment in the excess stock has to be brought to tax under the head "business income" and not under the head income from other sources".***

In the result, ground No. 1 of the assessee is allowed.

15.8.3. Lakhmichand Baijnath v. CIT [1959] 35 ITR 416 (SC)

The position may thus be summed up : ***In the business accounts of the appellant we find certain sums credited. The explanation given by the appellant as to how the amounts came to be received is rejected by all the Income-tax authorities as untenable. The credits are accordingly treated as business receipts which are chargeable to tax.*** *In Govindarajudu Mudaliar v. Commissioner of Income-tax [1958] 34 ITR 807, this court observed :*

"There is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature."

That is precisely what the Income-tax authorities have done in the present case, and we do not find any grounds for holding that their finding is open to attack as erroneous in law.

(3) Lastly, the question was sought to be raised that even if the credits aggregating to Rs. 2,30,346 are held to be concealed income, no levy of excess profits tax can be made on them without a further finding that they represented business income, and that there is no such finding. When an amount is credited in business books, it is not an unreasonable inference to draw that it is a receipt from business. It is unnecessary to pursue this matter further, as this is not one of the questions referred under section 66(2).

In the result, the appeals fail and are dismissed with costs.

15.8.4. DCIT vs. Ramnarayan Birla ITA No. 482/JP/2015

4.2. On the contrary, ld. Counsel for the assessee reiterated the submissions as made in the written brief. ***He placed reliance on the decision of the Coordinate Bench in the case of Chokshi Hiralal Maganlal vs. DCIT, 141 TTJ (Ahd.) 1 wherein the Hon'ble ITAT after taking into consideration the judgment of Hon'ble Gujarat High Court in the case of Fakir Mohd. Hazi Hassan (supra) held that where in search excess stock is found which does not have an independent identity as an asset but as mixed part of overall stock found in survey/search then such excess stock would represent business income only. He further submitted that the issue is well settled that if excess stock found in search has no independent identity, in that event investment in unexplained assets by the assessee be assessed as income from business.***

4.3. We have heard rival contentions and perused the material available on record. Undisputed facts emerged from the record that at the time of survey excess stock was found. It is also not disputed that the assessee is engaged in the business of jewellery. During the course of survey excess stock valuing Rs. 77,66,887/- was found in respect of gold and silver jewellery. The Coordinate Bench in the case of Chokshi Hiralal Maganlal vs. DCIT, 131 TTJ (Ahd.) 1 has held that in a cases where source of investment / expenditure is clearly identifiable and alleged undisclosed asset has no independent existence of its own or there is no separate physical identity of such investment/expenditure then first what is to be taxed is the undisclosed business receipt invested in unidentifiable unaccounted asset and only on failure it should be considered to be taxed under section 69 on the premises that such excess investment is not recorded in the books of account and its nature and source is not identifiable. Once such excess investment is taxed as undeclared business receipt then taxing it further as deemed income under section 69 would not be necessary. ***Therefore, the first attempt of the assessing authority should be to find out link of undeclared investment/ expenditure with the known head, give opportunity to the assessee to establish nexus and if it is satisfactorily established then first such investment should be considered as undeclared receipt under that particular head***

It is observed that there is no conflict with the decision of Hon'ble Gujarat High Court in the case of Fakir Mohd. HajiHasan (supra) where investment in an asset or expenditure is not identifiable and no nexus was established then with any head of income and thus was not available for set off against any loss under any other head. ***Therefore, the Hon'ble Coordinate Bench held that where asset in which undeclared investment is sought to be taxed is not clearly identifiable or does not have independent identity but is integral and inseparable (mixed) part of declared asset, falling under a particular head, then the difference should be treated as undeclared business income explaining the investment. In the present case the excess stock was part of the stock. The revenue has not pointed out that the excess stock has any nexus with any other receipts. Therefore, we do not find any fault with the decision of the ld. CIT (A) directing the AO to treat the surrendered amount as excess stock qua the excess stock found.***

15.8.5. Chandigarh ITAT -Famina Knit Fabs vs ACIT [2019] 176 ITD 246

The unrecorded investments/assets/expenditure made out of unexplained sources are treated as deemed incomes of the assessee. The onus is on the assessee to establish the source of the surrendered income failing which it is to be categorized as deemed income under section 69/69A/B/C. In the case of Pr. CIT v. Khushi Ram & Sons Foods (P.) Ltd. in [IT Appeal No. 126 of 2015, dated 29-7-2016], the High Court had held that it is for the assessee to establish that the source of the surrendered income was from business to claim it as such and set off business losses against the same. [Para 16]

Further, the Legislature requires deemed incomes to be taxed on the gross amount so determined without setting off any expenditure or allowances against the same under section 115BBE. Subsequently the section was amended with effect from 1-4-2017 by the Finance Act, 2016, prohibiting set off of losses also against the said deemed income. [Para 17]

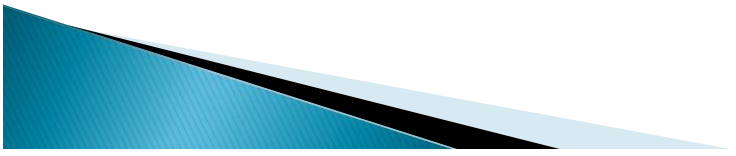
The income surrendered and to be assessed under sections 69, 69A, 69B and 69C is to be subjected to tax as per the provisions of section 115BBE. [Para 25]

The question as to whether the set off of losses is to be allowed against the same, which the revenue has vehemently contested saying that the amendment denying the set off of losses which was made by the Finance Act, 2016 with effect from 1-4-2017 was clarificatory in nature and was retrospective, thus entitling the assessee to claim set off losses against the income so surrendered. The assessee, on the other hand, relied on several decisions of the Tribunal, which have held the amendment to be prospective in nature. No contrary decision either of the Tribunal or of any higher judicial authority has been brought to our notice by the revenue. The decisions rendered by the Tribunal will, therefore, apply, following which, it is held that in the impugned year the assessee was entitled to claim set off of losses against the income assessed as deemed income under sections 68, 69, 69A, 69B and 69C as per the provisions of section 115BBE as it stood prior to the amendment by the Finance Act, 2016. [Para 26]

Thus, it is held that the income surrendered by the assessee is partly assessable as business income and partly assessable as deemed income and against both of them, the assessee was entitled to claim set off of business losses, both the current and brought forward. [Para 27]

ISSUE – 16

Section 271AAC.



271AAC. (1)

- The Assessing Officer may,
- notwithstanding anything contained in this Act other than the provisions of section 271AAB,
- direct that, in a case where the income determined includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D for any previous year,
- the assessee shall pay by way of penalty,
- in addition to tax payable under section 115BBE,
- a sum computed at the rate of ten per cent of the tax payable under clause (*i*) of sub-section (1) of section 115BBE:

Provided that no penalty shall be levied in respect of income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D to the extent such income has been included by the assessee in the return of income furnished under section 139 and the tax in accordance with the provisions of clause (*i*) of sub-section (1) of section 115BBE has been paid on or before the end of the relevant previous year.

(2) No penalty under the provisions of section 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (1).

(3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

16.1. (115BBE r.w.s 68)

Consider a scenario where an individual files his return of income, declaring income from tuition fees and avails the tax slab benefit. However, such individual is unable to substantiate the source of such income and the Assessing Officer rejects the explanation, being not properly explained to his satisfaction.

Under such circumstances, the Assessing Officer may now be tempted to trigger the provisions of Section 115BBE of the Act read with Section 68 of the Act. This means that such income, though already offered to tax by the taxpayer, would be taxable at flat rate of 60 per cent on gross basis (i.e., without any deduction / allowance), (plus surcharge @ 25% on such tax and cess, as applicable). Thus effectively the rate comes to 77.25 per cent if such income is reflected in the return of income furnished u/s. 139.

Whether it means that the Assessing Officer is vested with unfettered powers to reject any explanation, being not to his satisfaction? It may be noted that the Assessing Officer is required to act reasonable and just while framing any opinion surrounding the explanation offered by the taxpayer. At the same time the taxpayer is nevertheless saddled with the primary obligation to demonstrate the nature and source of any sum credited in books of account.

Some individuals file their return of income, offering income in the nature of Tution Fee, Commission, Brokerage, Embroidery, etc., and avail the benefit of exemption limit as well as benefit of tax slab. In the absence of requisite substance for proving nature and source in such transactions, one needs to consider the income-tax implications under amended Section 115BBE.

16.2. Application of 115BBE to 'income' which is already offered to tax as normal income

Section 68 basically applies to unexplained 'cash credit' like loans, deposits, advances, share capital, etc. The point to be considered is whether it will also apply to 'income' which is already offered to tax as normal income. If an Assessing Officer rejects taxpayer's explanation surrounding the head of taxation (say, House Property v. Business Income or Income from other source, Business Income v. Capital Gains), being not to his satisfaction, whether Section 115BBE of the Act can still be triggered, empowering the Assessing Officer to inter alia deny all bona fide expenses / allowances as per Income Tax Act?

In such a case, it may be argued that Section 115BBE of the Act is a machinery provision to levy tax on income and it should not enlarge the ambit of Section 68 of the Act to create a deeming fiction to tax any sum already credited / offered as income. Such recourse is unwarranted, keeping in view the objective of introducing Section 115BBE of the Act, which was only to curb the practice of laundering of unaccounted money by taking advantage of basic exemption limit.

So far tax laws are concerned, it is difficult to predict the precise stand of the department, but one can take adequate measures to safeguard himself from the possible complications or hindrances that may arise. Such safeguards may be an endeavour to demonstrate substance over form; maintain proper documentation evidencing the nature and source of income, Ensuring that transactions are routed through normal banking channel, which will lend due credence and it will help in proving nature and source of amount and to prove that the transaction is bona fide.

ISSUE – 17

Stay of demand u/s 220(6) of the Act.

Last aspect of stay of demand u/s 220(6) of the Act is concerned , tabulation of various notable decisions is made below to highlight as to how discretion on part of assessing officer and CIT-A is to be exercised pending disposal of first appeal:

The Madurai Bench of Madras High Court Dt: 07.03.2019
W.P.(MD).No.5328 of 2019 M/s.TVS Charities

Discussion:

10. It is an admitted case that the said tenants were the tenants of the petitioner right from the year 1973, when the petitioner's Trust was approved under Section 12A(a) of the Income Tax Act for exemption. It is only for the first time, during the assessment year 2016-2017, the Income Tax Department has raised an issue with the petitioner that they have to pay the tax as per the market rent payable by their tenants who are their associate companies. The petitioner has already deposited Rs.5,00,000/ before the Assessing Officer, even at the time of filing the appeal before the second respondent as against the assessment order dated 14.12.2018. If 20 % of the tax amount is calculated, as per the first respondent's internal circular in Instruction No.1914 dated 31.07.2017, the amount will come to Rs.16,50,000/-. Therefore, the sum of Rs.5,00,000/- deposited by the petitioner with the assessing officer for obtaining stay will work out to 30% of Rs.16,50,000/- which is the amount to be deposited as per the internal circular.

11. The Commissioner of Income Tax (Appeals) has got inherent powers to grant stay of recovery as per the assessment order pending disposal of the appeal. This Court has already considered the said issue and held in the decision reported in ***(2018) 409 ITR 33 (Mad)*** *referred to supra by the learned counsel for the petitioner that when a prima facie case has been made out, the Commissioner of Income Tax (Appeals) is not bound by the internal circular involving high pitched tax assessment. In the instant case also, it is an high pitched tax assessment as seen from the assessment order, which is subject matter of challenge before the Commissioner of Income Tax (Appeals).*

12. This Court is of the considered view that prima facie case has been made out by the petitioner since the Associate Companies who are their tenants from the date when the petitioner obtained exemption from payment of income tax under Section 12A(a) of the Income Tax Act right from the year 1973 onwards. In the instant case, the Income Tax Department has raised the issue only for the Assessment Year 2016-17 even though income tax returns were filed by the petitioner disclosing the tenancy, right from the date when they got exemption from payment of Income tax under Section 12A(a) of the Income Tax Act. The Assessing Officer ought to have considered all these aspects and should have granted stay of the impugned order.

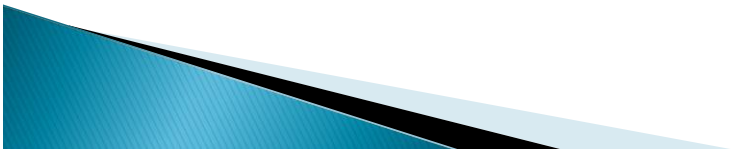
In the High Court of Judicature at Madras DT : 13.02.2019
W.P.No.3849 of 2019 Mrs.Kannammal

"12. The Circulars and Instructions as extracted above are in the nature of guidelines issued to assist the assessing authorities in the matter of grant of stay and cannot substitute or override the basic tenets to be followed in the consideration and disposal of stay petitions. The existence of a prima facie case for which some illustrations have been provided in the Circulars http://www.judis.nic.in themselves, the financial stringency faced by an assessee and the balance of convenience in the matter constitute the 'trinity', so to say, and are indispensable in consideration of a stay petition by the authority. The Board has, while stating generally that the assessee shall be called upon to remit 20% of the disputed demand, granted ample discretion to the authority to either increase or decrease the quantum demanded based on the three vital factors to be taken into consideration.

13. In the present case, the assessing officer has merely rejected the petition by way of a non-speaking order reading as follows:

'Kindly refer to the above. This is to inform you that mere filing of appeal against the said order is not a ground for stay of the demand.

Hence your request for stay of demand is rejected and you are requested to pay the demand immediately. Notice u/s.221(1) of the Income Tax Act, 1961 is enclosed herewith.'



14. The disposal of the request for stay by the petitioner leaves much to be desired. I am of the categoric view that the Assessing Officer ought to have taken note of the conditions precedent for the grant of stay as well as the Circulars issued by the CBDT and passed a speaking order. Of course the petition seeking stay filed by the petitioner is itself cryptic. However, as noted by the Supreme Court in the case of Commissioner of Income tax vs Mahindra Mills, ((2008) 296 ITR 85 (Mad)) in the context of grant of depreciation, the Circular of the Central Board of Revenue (No. 14 (SL- 35) of 1955 dated April 11, 1955) requires the officers of the department 'to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs. .... Although, therefore, the responsibility for claiming refunds and reliefs rests with the assessees on whom it is imposed by law, officers should draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other'. Thus, notwithstanding that the assessee may not have specifically invoked the three parameters for the grant of stay, it is incumbent upon the assessing officer to examine the existence of a prima facie case as well as call upon the assessee to demonstrate financial stringency, if any and arrive at the balance of convenience in the matter."

In the High Court of Judicature at Madras DT :16.07.2018
W.P.No.7410 of 2018 Kalaignar TV Private Limited

11. So far as the contention of the Revenue that Instruction No.96 dated 21.08.1969 has superseded Instruction No.1914 is concerned, the stand is incorrect in the light of the decision of this Court in the case of ***N.Jegatheesan Vs. Deputy Commissioner of Income-Tax,*** *cited supra. Identical plea was raised by the Revenue in the said case and the Court after taking into consideration several decisions, held that Instruction No.96 dated 21.08.1969 issued with the consent of the Informal Consultative Committee continues to hold the field. The relevant portion of the order reads as follows:*

16. It is the contention of the learned counsel for the petitioner that pending the appeal, the petitioner is entitled for stay of recovery of the demand amount, as his case falls within the ambit of Sections 220(3) & 220(6) of the IT Act. In view of the pendency of the appeal, the respondent ought to have passed an order treating him as not being in default in respect of the amount in dispute in the appeal, by placing reliance on CBDT Instruction No.95 dated 21.08.1969. But, according to the respondent, the said CBDT Instruction No.95 was superseded and as such, the respondent has exercised his power under subsequent Instruction No.1914 dated 02.12.1993. But, the learned counsel for the petitioner, by relying upon number of judgments submitted that CBDT Instruction No.95 is still in force.

17. Therefore, it would be appropriate to refer some of the decisions in this regard. In the case of Taneja Developers & Infrastructure Ltd., Vs. Assistant Commissioner of Income Tax, Delhi & ors in W.P.(C).No.6956 of 2009, dated 24.02.2009, the Division Bench of Delhi High Court has held as follows:

8. 'Relying upon the said Instruction No.1914 of 1993, Mr.Jolly submitted that all previous instructions stood superseded which included the supersession of said Instruction No.96. He further submitted that paragraph No.2(C), which deals with guidelines for staying demand, specifically requires that a demand be stayed only if there are valid reasons for doing so and that a mere filing of an appeal against the assessment order will not be a sufficient reason for staying recovery of a demand.

9. Having considered the arguments advanced by the learned counsel for the parties, we are of the view that although Instruction No.1914 of 1993 specifically states that it is in supersession of all earlier instructions, the position obtaining after the decision of this Court in Valvoline Cummins Ltd., (Supra) is not altered at all. This is so because paragraph No.2(A) which speaks of responsibility specifically indicates that it shall be the responsibility of the Assessing Officer and the TRO to collect every demand that has been raised ?except the following', which includes ?(d) demand stayed in accordance with the paras B and C below?. Para B relates to stay petitions. As extracted above, Sub-clause (iii) of para B clearly indicates that a higher/superior authority could interfere with the decision of the Assessing Officer/TRO only in exceptional circumstances. The exceptional circumstances have been indicated as - where the assessment order appears to be unreasonably high pitched or where genuine hardship is likely to be caused to the assessee.?.

The very question as to what would constitute the assessment order as being reasonably high pitched in consideration under the said Instruction No.96 and, there, it has been noted by way of illustration that assessment at twice the amount of the returned income would amount to being substantially higher or high pitched. In the case before this Court in Valvoline Cummins Ltd., (supra) that assessee's income was about eight (8) times the returned income. This Court was of the view that was high pitched. In the present case, the assessed income is approximately 74 times the returned income and obviously, this would fall within the expression unreasonably high pitched?. (Emphasis supplied).'

A reading of the above dictum would show that if assessment order is unreasonably high pitched or genuine hardship is likely to be caused to the assessee, then the assessee is entitled to be treated as not being in default in respect of the amount in dispute in the appeal.

In the case reported in (1997) 223 ITR 192 (Raj) [Maharana Shri Bhagwat Singhji of Mewar Vs. Income-Tax Appellate Tribunal, Jaipur Bench, and others), the Rajasthan High Court has held as follows:-

"accordingly, on the facts, that the factors which are relevant for deciding the stay applications primarily are a prima facie case, balance of convenience, financial status of the petitioner, hardship and also the interest Revenue. In the instant case there was an order of the court restraining the accountable person from alienating/disposing of the properties of the estate. The value of the estate which was determined by the authority was much more than twice the returned value. Hence, the Instruction No.96 of August 21, 1969, was applicable. It was also established that the accountable person had no cash belonging to the estate. A perusal of the order of the Tribunal indicated that the contention raised by the petitioner before the Tribunal for staying the total recovery was not contraverted and no relevant and convincing material regarding the financial status of the petitioner was placed before the Tribunal to establish that the petitioner was in a position to deposit 25 percent of the disputed duty. The recovery of the entire duty had to be stayed till the disposed of the appeal.

In the case in Kec International Ltd Vs. B.R.Balakrishnan and ors, reported in [2001] 251 ITR 158/119 Taxman 974, the Bombay High Court has held as follows:-

'Hence, we intend to lay down certain parameters which are required to be followed by the authorities in cases where a stay application is made by an assessee pending appeal to the first appellate authority.

(a)While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

(b)In cases where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

(c)In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.

(d)The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.

(e)We clarify that if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the Department like respondent No.2 herein need not once again give reasoned order.

In the judgment reported in 346 ITR 375 (M/s.Maheswari Agro Industries Vs. Union of India and others), it has been held by the Rajasthan High Court as follows:-

"The mandate of Parliament in sub-section (6) seems to be that the lower Assessing Officer should abide by and being bound by the decision of the appellate authority, should normally wait for the fate of such appeal filed by the assessee.

Therefore, his discretion of not treating the assessee in default, conferred under sub-section (6) should ordinarily be exercised in favour of assessee, unless the overriding and overwhelming reasons are there to reject the application of the assessee under Section 220(6) of the Act. The application under Section 220(6) of the Act cannot normally be rejected merely describing it to be against the interest of Revenue if recovery is not made, if tax demanded is twice or more of the declared tax liability. The very purpose of filing of appeal, which provides an effective remedy to the assessee is likely to be frustrated, if such a discretion was always to be exercised in favour of revenue rather than assessee.

The tendency of making high pitched assessments by the Assessing Officers is not unknown and it may result in serious prejudice to the assessee and miscarriage of justice & sometimes may even result into insolvency or closure of the business if such power was to be exercised only in a pro revenue manner. It may be like execution of death sentence, whereas the accused may get even acquittal from higher appellate forums or courts. Therefore, this Curt is of the opinion that such powers under sub-section (6) of Section 220 of the Act also have to be exercised in accordance with the letter and spirit of Instruction No.95 dated 21.08.1969, which even now holds the field and its spirit survives in all subsequent CBDT Circulars quoted above, and undoubtedly the same is binding on all the assessing authorities created under the Act."

From the reading of the above cited judgments, it is clear that it is incorrect to state that DBDT Instruction No.1914, dated 02.12.1993 supersedes all previous instructions. Although instruction No.1914 specifically states that it is in supersession of earlier instructions, the position obtaining after the decision of the case in Volvoline Cummins Limited Vs. DCIT (2008) 307 ITR 103 (Del) is not altered at all. This is so, the DBDT Instruction No.95, dated 21.08.1969 was issued with the consent of the informal consultative committee held on 13th May, 1969 formed under the business rules of the Parliament, which even now holds the field.

HIGH COURT OF CHHATTISGARH, BILASPUR Writ Petition (T) No.59 of 2018 M/s Aarti Sponge & Power Ltd

"*14. Thus, in the considered opinion of this Court, the assessing officer has to consider the case of the particular assessee on merits and if he comes to the conclusion that the assessee has a case for grant of stay, then subject to deposit of 20% of the disputed demand, the outstanding demand may be stayed and in certain cases where the assessee's case is covered by the decision of the Supreme Court and the deposit of 20% of the disputed demand may be reduced as per the discretion of the assessing officer, but the deposit of 20% of the disputed demand cannot be made condition precedent for hearing the application for stay. The condition of pre-deposit of 20% of the disputed demand is neither contemplated by the said memorandum nor there is legislative sanction mandating such deposit for hearing of an application for stay. Therefore, such a condition of pre-deposit cannot be imposed for hearing an application for stay of the disputed demand.*

15. The High Court of Gujarat in the matter of Jagdish Gandabhai Shah v. Principal Commissioner of Income Tax and others while dealing with the similar issue of pre-deposit of disputed demand qua the said memorandum while considering the application for stay by the said authority, held as under: -

"8.1.Therefore, the interpretation by the Assessing Officer that at the time of submitting stay application and/or before stay application is taken up for consideration on merits, the assessee is required to deposit 15% of the disputed demand as pre-deposit is absolutely based on misinterpretation and/or misreading of the modified Instructions dated 29th February 2016. What Clause-4 provides is that the Assessing Officer may/shall grant stay of demand till disposal of first appeal on payment of 15% of the disputed demand, unless the case falls in the category mentioned in para 4[B] of the modified instructions dated 29th February 2016. Under the circumstances, the impugned decision of the respondent No. 2 in rejecting the stay application and consequently directing the petitioner to deposit 100% of the disputed demand on the ground that the petitioner has not deposited 15% of the disputed demand as a predeposit before his application for stay is considered on merits cannot be sustained and the same deserves to be quashed and set-aside. The matter is required to be remanded to the Assessing Officer to consider the stay application in accordance with law and on merits, in light of the modified instructions dated 29th February 2016 and observations made by us in the present order.

Under the circumstances, for the reasons stated above, the impugned decision of the respondent No.2- Assessing Officer rejecting the stay application cannot be sustained and the same deserves to be quashed and set-aside. So far as the decision of the respondent No. 1 is concerned, it appears that after the decision rendered by the respondent No. 2, the assessee filed stay application before the respondent No. 1 and the respondent No. 1 has passed the impugned order mainly considering the order of the Assessing Officer. Therefore, first, the Assessing Officer is required to take appropriate decision on the stay application, as per the modified instruction dated 29th February 2016 and unless the case falls within Clause 4[B](a) & (b), he is required to pass appropriate order on the stay application, granting stay on payment of 15% of the disputed demand. In case, the Assessing Officer is of the opinion that the case falls within Clause 4[B](a) or (b), in that case, he is required to follow the procedure as observed hereinabove; more particularly, Clause 4[B] where the Assessing Officer is required to refer the matter to the administrative Principal CIT/CIT and thereafter, the Principal CIT/CIT to take appropriate decision."

16. *I am in respectful agreement with the view expressed by the Gujarat High Court in the above-stated judgment which squarely applies to the facts of the present case.*

18. In my opinion, the said question is no longer res integra and it has been well settled by a decision of the Bombay High Court in the matter of KEC International Ltd. v. B.R. Balakrishnan and others 4 in which S.H. Kapadia, J, as then His Lordship was speaking for the Bombay High Court, while considering the similar issue has laid down the following guidelines: -

"This is the consequence of an order being passed without giving any reasons. Hence, we intend to lay down certain parameters which are required to be followed by the authorities in cases where a stay application is made by an assesee pending appeal to the first appellate authority.

Parameters:

(a) While considering the stay application, the authority concerned will at least briefly set out the case of the assessee.

(b) In cases where the assessed income under the impugned order far exceeds returned income, the authority will consider whether the assessee has made out a case for unconditional stay. If not, whether looking to the questions involved in appeal, a part of the amount should be ordered to be deposited for which purpose, some short prima facie reasons could be given by the authority in its order.

(c) In cases where the assessee relies upon financial difficulties, the authority concerned can briefly indicate whether the assessee is financially sound and viable to deposit the amount if the authority wants the assessee to so deposit.

(d) The authority concerned will also examine whether the time to prefer an appeal has expired. Generally, coercive measures may not be adopted during the period provided by the statute to go in appeal. However, if the authority concerned comes to the conclusion that the assessee is likely to defeat the demand, it may take recourse to coercive action for which brief reasons may be indicated in the order.

(e) We clarify that if the authority concerned complies with the above parameters while passing orders on the stay application, then the authorities on the administrative side of the Department like respondent No.2 herein need not once again give reasoned order."

19. The aforesaid guidelines have been followed later-on again by the Bombay High Court in the matter of UTI Mutual Fund v. Income Tax Officer 19(3)(2) and others5 in which Dr. D.Y. Chandrachud, J (as then His Lordship was) while following the decision rendered in KEC International Ltd. (supra) again held some more guidelines as under: -

"These are, we may say so with respect, sage observations which must be borne in mind by the assessing authorities. Consistent with the parameters which were laid down by the Division Bench in KEC International and the observations in the judgment in Coca Cola, we direct that the following guidelines should be borne in mind for effecting recovery :

1. No recovery of tax should be made pending

(a) Expiry of the time limit for filing an appeal;

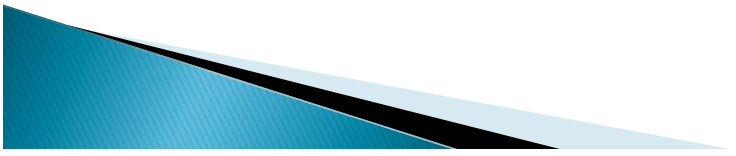
(b) Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.

2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in KEC International;

3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;

4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

5. In exercising the powers of stay, the Income Tax Officer should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the AO has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order: the matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue."



20. After having noticed the manner of disposing the appeal as highlighted by the Bombay High Court in the two judgments noticed herein-above and agreeing with the same, it would appear that the competent authority, in the instant case, while considering the application simply held that the appeal proceedings are separate and distinct from recovery proceedings and further proceeded to hold that 20% of the disputed demand has not been deposited in accordance with the guidelines dated 31-7-2017 and passed the order dated 7-3-2018. Thus, it is quite vivid that the application for stay of demand has not been considered in the manner it was required to be considered and dealt with. Deposit of 20% of the disputed demand has been made condition precedent for hearing the application for stay which is not contemplated either under the Act of 1961 or the CBDT guidelines dated 29-2-2016 modified by the office memorandum dated 31-7-2017. It is only when the competent authority is of the opinion that the assessee has made out a case for grant of interim relief, stay can be granted subject to deposit of 20% of the disputed demand. Likewise, there is a further clause in the circular for reduction of 20% deposit if the petitioner makes out a case, it has also not been considered. In straightway, direction of deposit of 20% of the disputed demand has been made which is not the correct way of deciding the application for stay of the disputed demand"

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 25.09.2019 Tax Case Appeal No.648 of 2019 Intimate Fashions (India) Private Limited

5. ……

Three relevant aspects should be always taken into consideration by all the Tribunals or civil Courts, while considering the stay applications, which are

(I) existence of prima facie case

(II) Irreparable injury aspect and

(III) Balance of convenience.

These are well settled and statutorily required parameters to be considered by dealing with stay applications.

6. The learned Tribunals or Civil Courts are bound to give their findings and reasons, even though tentative, with respect to the above three aspects of the matter while dealing with any stay applications before them.

In The High Court of Judicature at Bombay
Ordinary Original Civil Jurisdiction Writ Petition No. 2271 of 2019 General Insurance Corporation of India

"So far as Issue No.1 above is concerned, the Petitioner submits that same stands concluded in its favour by virtue of the decision dated 11 October 2017 of the Mumbai Bench of the Tribunal in DCIT Circle 3(1)(2) vs. ECGC IT No. 7657/Mum/2014 and the Kolkata Bench of the Tribunal in the case of DCIT v/s. Mutual Insurance Co. Ltd. 2016 (72) Taxmann.Com 116 in favour of the Petitioner. However, the impugned order still directed a deposit of 10% of disputed demand on this Court in view of the decision of Chennai Bench of the Tribunal in the case of United India Insurance v/s. JCIT (2018) 97 Taxmann.com 466. We note that the Chennai Bench decision of the Tribunal has ignored the co-ordinate bench decision of Mumbai and Kolkata benches of the Tribunal. Therefore, prima facie per incurium. In any case the CBDT Circular No. 530 dated 6 March 1989 states that stay of demand be granted where there are conflicting decisions of the High Court. This principle can be extended to the conflicting decisions of the different benches of the Tribunal. Thus, in the above facts the complete stay of the demand on the above head i.e. Item No.1 of the above chart was warranted in the Petitioner's favour."

On basis of above there should remain no iota of doubt that in **high pitched assessments creating sky touching tax demands** on basis of mechanical application of section 115BBE same needs to be stayed u/s 220(6) in favor of assessee as lot of judicial decisions are there which favors **assessee case on merits from various high courts and ITAT benches.**


Thank you
Thanks to my computer operator
Sri. N. Beeresh Kumar