

**Issues u/s 68, 69 & 115BBE  
wrt Cash deposits post  
demonetisation, Penny  
stock, Share Capital etc**

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AGFTC, RTCS & Rajkot Branch of WIRC of ICAI**

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## **S.68 – Cash credits**

- S.68 contemplates an addition in a case where –
  - Any sum is found credited in the books; and
  - Assessee offers no explanation about the nature and source thereof OR the explanation offered by the assessee is not satisfactory in the opinion of AO.
- Addition u/s 68 shall not be made if assessee establishes the followings:
  - Identity of lender;
  - Creditworthiness of lender;
  - Genuineness of transaction;

- Two provisos were inserted to S.68 by the Finance Act, 2012 w.e.f. 01.04.13.
- *As per the 1<sup>st</sup> proviso, where assessee is a “company” (not being a company in which public are substantially interested) 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 assessee-company shall be deemed to be not satisfactory, unless –*
  - 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
  - Such explanation in the opinion of the AO aforesaid has been found to be satisfactory;

- *As per the 2<sup>nd</sup> proviso, nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.*
- Hon'ble the Bombay High Court has, in the case of **“CIT vs. Gagandeep Indrastructure (P.) Ltd. – 394 ITR 680 (Bom)”**, held that Provisos to S.68 introduced by Finance Act, 2012 w.e.f. 01.04.13 would not have retrospective effect (*i.e. such provisos would apply prospectively*).

# Basics

- Basic Burden –
- Identity + Genuineness + Creditworthiness
- Name, Address, PA No., Ward/GIR where assessed, if assessed to tax, copy of last return, nature of advance with terms thereof, confirmation letter, source of the money lent, also state the willingness to come for personal examination.

# Basics

- Once name, address and PAN/GIR of a creditor is furnished, preliminary onus of explaining the credit is fulfilled by the assessee:
  - CIT vs Orissa Corporation Pvt. Ltd. 159 ITR 78 (SC)
  - CIT vs U M Shah 90 ITR 396 (Bom)
  - E M C (Works) Private Ltd. vs ITO 49 ITR 650 (All)
  - Shri Jagdish Saran Shukla vs CIT 171 ITR 694 (All)
  - CIT vs C P Adam 105 ITR 465 (Ker)
  - Shri Krishna Rice & Oil Mills vs ITO 106 ITR 331 (Bom)

# Basics

- Assessee is under no obligation to prove source of source of the credit appearing in his books of a/c
  - DCIT vs Rohini Builders 256 ITR 360(Guj)
  - CIT vs Pragati Co op Bank Ltd. 278 ITR 170 (Guj)
  - Murlidhar Lahorimal vs CIT 280 ITR 512 (Guj)

# Basics

- In case when creditor is non cooperative or untraceable the remedy is to avail the in built opportunity in section 68 of requesting the assessing officer to issue summons u/s 131 to secure attendance of such depositor. CIT vs Kamdhenu Vyapar Co. Ltd. 263 ITR 692 (Cal)

# Basics

- Section 68 confers discretionary powers to the Assessing officer to make addition keeping in view the facts and circumstances of every case. CIT vs Smt P. K. Noorjahan 237 ITR 570 (SC)

# Some Interesting Issues

- Share application money not to be treated as cash credit if the name of the share holder along with his share application for is placed on record. Lovely Exports 216 CTR 195 (SC) (Prior to 01/04/2013)
- There is no distinction to be made between a private limited company and a public limited company so far introduction of share capital is concerned.: Uma Polymers Pvt. Ltd. vs DCIT 284 ITR (AT) 1 (Jodh) TM; Shree Barkha Synthetics Ltd. vs ACIT 283 ITR 377 (Raj)
- In case of contra account, if A's account is credit by the other party, burden is on the department to prove that such amount belong to the A. 174 Taxman 372 (Guj)

# Some Interesting Issues

- **Credit in Partner's account and addition in the hands of Firm**
  - 299 ITR 53 (P&H)
  - 252 ITR 344 (P & H)
  - 42 ITD 450 (Ahd)
  - 171 ITR 532 (P & H)
  - Pankaj Dyestuff Industries (IT reference # 241/1993) (Guj)
- **Cash Credit vis-à-vis telescoping:**
  - 123 ITR 457 (SC)
  - 149 ITR 127 (Mad)
  - 86 ITR 724 (P&H)
  - 190 ITR 133 (Gau)

# Some Interesting Issues

- Cash Credit vis-à-vis Gift
  - No blood relations are necessary for proving the Gifts to be genuine. 215 CTR 303 (Raj)
  - CIT vs. P. Mohanakala (291 ITR 278)

## **S.69 – Unexplained investments**

- S.69 contemplates an addition in a case where –
  - Assessee has made certain “*Investments*” in the relevant financial year;
  - Such investments are not recorded in the books of accounts; and
  - Assessee offers no explanation about nature and source of such investments OR the explanation offered by the assessee is not satisfactory in the opinion of AO.
- Under such circumstances, “value of investments” may be deemed to be income of the assessee of the said financial year.

## **S.69A – Unexplained money, etc.**

- S.69A contemplates an addition in a case where –
  - Assessee is found to be owner of any “*money, bullion, jewellery or other valuable article*” in the relevant financial year;
  - Such “money, bullion, jewellery or other valuable article” is not recorded in the books of accounts; and
  - Assessee offers no explanation about nature and source of acquisition of the same OR the explanation offered by the assessee is not satisfactory in the opinion of AO.
- Under such circumstances, “money and value of bullion, jewellery or other valuable article” may be deemed to be assessee’s income of such financial year.

## **S.69B – Amount of investments, etc. not fully disclosed in books of account**

- S.69B contemplates an addition in a case where –
  - Assessee has made “*investments*” or is found to be owner of any “*money, bullion, jewellery or other valuable article*” in the relevant financial year;
  - AO finds that amount expended on making such “investments” or in acquiring such “money, bullion, jewellery or other valuable article” exceeds the amount recorded in the books; and
  - Assessee offers no explanation about such excess amount OR the explanation offered by the assessee is not satisfactory in the opinion of AO.
- Under such circumstances, “excess amount” may be deemed to be assessee’s income of such financial year.

## **S.69C – Unexplained expenditure, etc.**

- S.69C contemplates an addition in a case where –
  - Assessee has incurred any “*expenditure*” in the relevant financial year; and
  - Assessee offers no explanation about the source of such expenditure or part thereof OR the explanation offered by the assessee is not satisfactory in the opinion of AO.
- Under such circumstances, “amount covered by such expenditure or part thereof, as the case may be” may be deemed to be assessee’s income of such financial year.

## **S.69D – Amount borrowed or repaid on hundi**

- Where any amount is borrowed on a *hundi* from, or any amount due thereon is repaid to, any person otherwise than through account payee cheque, “*amount so borrowed or repaid*” shall be deemed to be income of the person borrowing or repaying the amount aforesaid for the previous year in which the amount was borrowed or repaid, as the case may be.
- However, if in any case any amount *borrowed* on a *hundi* has been deemed to be income of any person under this section, such person shall not be liable to be assessed again in respect of such amount under this section on *repayment of such amount*.
- Amount “repaid” shall include amount of “interest paid on the amount borrowed”.

# Issues

- Undisclosed stock found during the course of the Survey – its treatment;
- Law laid down in Fakir Mohamed (247 ITR 290) is not correct law in view of the following reasons:
  - Decision did not consider Modi's decision (61 ITR 421);
  - Later, Supreme Court in **273 ITR 1 (SC)** explained that there can never be any headless income;
  - In the case of **Krishna Textile (174 Taxman 372)**, Fakir Mohamed has been distinguished and explained.
  - **Gujarat High Court in (294 ITR 438)** has explained that addition u/s 69C is compensated by deduction u/s 37(1) of the Act.

## **S.115BBE – Tax on income referred to in S.68/69/69A/69B/69C/69D**

- S.115BBE was inserted vide **Finance Act, 2012 w.e.f. 01.04.13.**
- "White Paper on Black Money" was tabled in the Loksabha on 21/05/2012 wherein laundering of unaccounted money by taking advantage of basic exemption limit was highlighted.
- Relevant extract of the **Speech** of the Finance Minister is reproduced hereunder:

***155. I propose a series of measures to deter the generation and use of unaccounted money. To this end, I propose -***

***XXX...***

- ***Taxation of unexplained money, credits, investments, expenditures etc., at the highest rate of 30 per cent irrespective of the slab of income.***

- Relevant extract of **Memorandum explaining the Finance Bill, 2012** is reproduced hereunder:

**Taxation of cash credits, unexplained money, investments etc.**

- **Under the existing provisions of the Income-tax Act, certain unexplained amounts are deemed as income under section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act and are subject to tax as per the tax rate applicable to the assessee. In case of individuals, HUF, etc., no tax is levied up to the basic exemption limit. Therefore, in these cases, no tax can be levied on these deemed income if the amount of such deemed income is less than the amount of basic exemption limit and even if it is higher, it is levied at the lower slab rate.**

- **In order to curb the practice of laundering of unaccounted money by taking advantage of basic exemption limit, it is proposed to tax the unexplained credits, money, investment, expenditure, etc., which has been deemed as income under section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of 30% (plus surcharge and cess as applicable). It is also proposed to provide that no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of the Act in computing deemed income under the said sections.**
- ***This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent assessment years.***
- ***[Clause 45]***

- S.115BBE was, thereafter, amended by –
  - **Finance Act, 2016 w.e.f. 01.04.17 (prohibition of set off of loss against deemed income);**
  - **Taxation Laws (Second Amendment) Act, 2016 w.e.f. 01.04.17;**
- Even the **proposed Finance Bill, 2018** provides for an amendment to S.115BBE **w.e.f. 01.04.17.**

# Salient Features of The Taxation Laws (Second Amendment) Act, 2016

- **Amendment to The Income-tax Act, 1961:**
- Tax payable u/s **115BBE** increased from 30% to 60% (Income assessable u/s 68, 69, 69A, 69B, 69C or 69D);
- Surcharge on income taxable u/s 115BBE @ 25% of tax payable;
- Apart from higher tax, Penalty under newly inserted **S.271AAC** @ 10% on the tax taxable u/s 115BBE;
- No penalty if income reflected in the return of income furnished under section 139 AND Tax Paid before end of the PY;
- No penalty u/s 270A on such income;

**Provisions of S.115BBE, as inserted by  
Finance Act, 2012 w.e.f. 2013  
*[Pre-amendment]***

- (1) Where total income includes any income referred to in S.68/69/69A/69B/69C/69D (i.e. “specified sections” for short), income-tax payable shall be aggregate of –
- (a) Tax @ **30%** on income referred in specified sections; *and*
- (b) Tax that would have been chargeable had total income been reduced by amount of income referred in clause (a).

**Provisions of S.115BBE, as amended by  
Taxation Laws (Second Amendment) Act,  
2016 w.e.f. 01.04.17  
*[Post-amendment]***

- (1) Where total income –
- (a) includes any income referred to in S.68/69/69A/69B/69C/69D (i.e. “specified sections” for short) and reflected in return of income; OR
- (b) determined by AO includes any income referred to in “specified sections”, if such income is not covered in clause (a),

Tax shall be aggregate of -

- (i) Tax @ **60%** on income referred in clause (a) and clause (b); *and*
- (b) Tax that would have been chargeable had total income been reduced by amount of income referred in clause (i).

Pre-amendment	Post-amendment
<p>(2) Notwithstanding anything contained in this Act, no deduction in respect of followings shall be allowed under any provisions of this Act in computing income referred to in clause (a) of ss.(1) –</p> <ul style="list-style-type: none"> <li>➤ any expenditure; or</li> <li>➤ any allowance;</li> </ul>	<p>(2) Notwithstanding anything contained in this Act, no deduction in respect of followings shall be allowed under any provisions of this Act in computing income referred to in clause (a) <b><u>and clause (b)</u></b>* of ss.(1) –</p> <ul style="list-style-type: none"> <li>➤ any expenditure; or</li> <li>➤ any allowance; or</li> <li>➤ <b>set-off of any loss **;</b></li> </ul> <p><i>* As per proposed Finance Bill, 2018 w.e.f. 01.04.17.</i></p> <p><i>** Inserted by Finance Act, 2016 w.e.f. 01.04.17</i></p>

# Retrospective!!

- Amendments relating to S.115BBE, S.271AAB, S. 271AAC and levy of Surcharge @ 25% were introduced by Taxation Laws (Second Amendment) Act, 2016 wef 01/04/2017 i.e. AY 2017-18 relevant to PY 2016-17.
- The said Amendment Act of 2016 received President's assent on 15/12/2016. Therefore, to the extent of transactions entered into between 01/04/2016 to 14/12/2016 and hit by these provisions, the operation of the law is retrospective.

## **“Surcharge” on tax computed u/s 115BBE**

- **Chapter II** (Rates of Income-Tax) of **Finance Act, 2017** further provides that in respect of any income chargeable to tax under clause (i) of sub-section (1) of section 115BBE, amount of income-tax shall be increased by a surcharge calculated at 25% of such “income-tax”.
- Thus, since rate of “income-tax” in respect of any income chargeable to tax under clause (i) of sub-section (1) of section 115BBE is 60%, **surcharge** on the same would be **15%** (i.e. 25% of “60%”).

## **Effective rate of tax (including penalty) on income referred to in “specified sections ”**

- The effective rate of tax (including penalty) on the income referred to in the “specified sections” (i.e.68/69/69A/69B/69C/69D) is as follows:

Basic Tax Rate u/s 115BBE	: 60%
Surcharge (25% of “tax”)	: 15%
EC & SHEC	: <u>3%</u>
Effective Rate of Tax	: 77.25
Penalty u/s 271AAC (10% of “tax”)	: <u>6%</u>
<b>Effective rate</b>	<b>83.25%</b>

## **S.271AAC – Penalty in respect of certain income**

- Penalty u/s 271AAC at “ten percent” of “tax payable under clause (i) of S.115BBE(1)”. Since “rate” of income-tax under clause (i) of S.115BBE(1) is 60%, **penalty u/s 271AAC** on the same would be 6% (*i.e. 10% of “60%”*).
- No penalty u/s 271AAC if -
  - Income is included in return of income u/s 139;  
*and*
  - tax is paid on or before the end of previous year.

- No penalty u/s 270A in respect of income referred to in sub-section (1) of S.271AAC.
- However, if penalty u/s 271AAB is leviable, the same shall be levied instead of penalty u/s 271AAC.
- Appeal against penalty u/s 271AAC

# **Colourable Devices**

- Penny Stock
- Shell Company
- Accommodation Entries in the form of Loan or Share Capital
- Bogus / Accommodation Bills

# Issues

- Treatment of Deposits upto Rs.2.5 lacs and Basic Exemption
- Cash Credits other than in old currency Notes
- Cash Credits prior to 09/11/2016
- Additions u/s 69 69A/B/C/D for the period after AY 17-18

# Issues

- Credit on account of Sales / professional receipts vs. cash credit u/s 68 of the Act?
  - CIT vs Vishal Exports Overseas Limited (Tax Appeal No.2471 of 2009)
  - Nitisha Silk mills Pvt. Ltd. vs. ITO (ITA No. 896/Ahd/2011)
  - ITO vs Jethu Ram P:rem Chand [2001] 114 TAXMAN 219 (DELHI)(MAG.)
  - Harish Kumar *vs.* DCIT [2003] 85 ITD 366 (HYD.)

# Issues

- Whether income from specified source be declared under belated [139(4)] or revised [139(5)] return of income so as to fall u/s 115BBE(1)(a)
- Whether income from specified source be declared while filing RoI u/s 153A/153C/148

# Issues

- Presumptive Taxation vis-à-vis 115BBE
- Gross vs Net specified Income
- Set off of losses / depreciation against income from specified sources (for the period prior to AY 17-18)
- Whether Chapter VI-A deductions are available against specified income u/s 115BBE

# Thank You