

Critical analysis of Section – 68

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CASH CREDITS

68. Where **any sum** is found **credited in the book** 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**:

Ingredients of section 68

- 1) A sum is credited into the books of the assessee
- 2) Maintained for the previous year
- 3) Assessee does not give any explanation about the source of the sum
- 4) Assessee does not give any explanation about the nature of the sum
- 5) The answer by the Assessee does not satisfy the Income Tax Officer
- 6) The sum credited is chargeable to income tax
- 7) If the above conditions are satisfied, sum is credited to the income of the assessee in the previous year

Cont Section-68

Provided that where the assessee is a company, not being a company in which the 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 -

Cont Section-68

- 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 aforesaid has been found to be satisfactory:

Provided further that 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.

Cont. Section-68

Explanation about source of source - The explanation is required about the nature and source of the said sum in the hands of the resident person. Thus, the company is required to explain 'source of source'. This shifts the burden under section 68 and overrides the earlier position, namely, that the assessee can only be asked to explain source of credit in its own books of account but not 'source of source' [Tolaram Daga v. CIT [1966] 59 ITR 632 (Assam); Sarogi Credit Corpn. v. CIT [1976] 103 ITR 344 (Pat.)].

This concept of source of source has been negated by various jurisdictional courts.

- a) CIT Vs Daulat Ram Rawatmull 87 ITR 349 (SC)
- b) Anil Rice Mills Versus Commissioner of Income Tax, (2006) 282 ITR 0236
- c) DCIT Vs Rohini Builders 256 ITR 360

OBJECTIVE OF THE AMENDMENT

In the case of closely held companies, investments are made by known persons.

Therefore, a higher onus is required to be placed on such companies besides the general onus to establish identity and creditworthiness of creditor and genuineness of transaction.

This additional onus, needs to be placed on such companies to also prove the source of money in the hands of such shareholder or persons making payment towards issue of shares before such sum is accepted as genuine credit.

If the company fails to discharge the additional onus, the sum shall be treated as income of the company and added to its income".

Sum...

very exhaustive in nature

Credited into the accountany from and nature.

Applied to all the creditswhatevernamecalled.

credited in the book of an assessee maintained for any previous year

Section 2 clause (12A) defines "books or books of account" and 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";

Sec 44AA -maintenance of accounts by certain persons carrying on profession or business.

Hon'ble Bombay High Court in the case of Shri Bhaichand N. Gandhi, [1982] 11 Taxman 59/141 ITR 67 (Bom.) hold that the bank Pass Book or bank statement cannot be construed to be a book maintained by the assessee for any previous year as understood for the purposes of section 68 of the Act

obligation to prove

Hon'ble Calcutta High Court in case CIT vs. Precision Finance Pvt. Ltd. (1994)208 ITR 465 (Cal)

Laid down the following criteria:-

1. Identity of his creditors;
2. Capacity of creditors to advance money; (man of means) and
3. Genuineness of transaction.

Identity:

- Copy of PAN Card
- Documentary Evidence of Regd. Address of the Investor Entity;
- Master Data Sheet downloaded from the official site of MCA, showing the active status and reflecting CIN No. and all other particulars of the investor entity.
- Copy of Memorandum of Association & Articles of Association of Investor Entity.
- CIN No.,
- Income Tax Particulars - Copy of ITR

Genuineness:

- (i) Copy of Confirmation from the Investor Entity;
- (ii) Copies of Share Certificates;
- (iii) Certified Copy of Board Resolution of the assessee company, duly authorizing the subscription in the share capital by the investor entity;
- (iv) Copy of Allotment Letter;
- (v) Copy PAC 3 Return filed with Roc, duly evidencing the allotment of shares to the investor entity;
- (vi) Copies of Share Valuation Report under Section 56(2) (viib) read with Rule 11UA(2)(a) of Income Tax Rules;
- (vii) Copy of the Bank Statement of the investor entity duly reflecting the investment in share capital of the assessee company;
- (viii) Copy of Audited Balance Sheet of the investor entity, duly reflecting the investment in the share capital of the appellant company

Creditworthiness:

- Copy of the Bank Statement of the investor entity duly evidencing the availability of sufficient funds at the time of making investments in the share capital of assessee company;
- Copy of Audited Balance Sheet of the investor entity, duly evidencing the availability of sufficient funds in the form of share capital / reserves and surplus and borrowings, for making investment in the share capital of the assessee company;
- Copy of ITR of the investor entity

Human Probability Test

The Human Probability Tests were laid down for the first time in the case of CIT vs. Durga Prasad More (1971) 82 ITR 540 (SC) as:

“11.The Tribunal disbelieved the story, which is, prima facie, a fantastic story. It is a story that does not accord with human probabilities. It is strange that the High Court found fault with the Tribunal for not swallowing that story. If that story is found to be unbelievable as the Tribunal has found, and in our opinion rightly, then the position remains that the consideration for the sale proceeded from the assessee and, therefore, it must be assumed to be his money.”

Human Probability Test.....

It was also followed in the case of Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC) as:

“The majority opinion after considering surrounding circumstances and applying the test of human probabilities has rightly concluded that the appellant's claim about the amount being her winning from races is not genuine.”

Thus, the Court has laid down a test to analyze the genuineness of the entry through the logical analysis. The Human Probability Test could be applied when the Assessee makes the Officer to believe his/her story as a valid event. The false claims of the Assessee cannot sustain before the test of Human Probabilities.

Cont. Section-68

based-on decisions settled legal position was which is applicable to any 'cash credit', like, loans, deposits, advances, share capital or others, that:

- Primary onus is on assessee;
- an Assessee does not have to establish source of source; except share capital on close held company
- if primary onus is discharged, burden shifts to Tax Department;
- AO needs to discharge his burden and reach an objective satisfaction;
- AO has a discretion to assess cash credits;
- in a given case the amount can be assessed in the hands of investor/lender under other applicable provisions of law, like, section 69.

Re-assessment cases – on the basis of investigation wing report

Share capital cases of A.Y 2012-13

Share capital cases of A.Y 2013-14 onward

Unsecured loans

Cash deposit in demonetization

Notice u/s 133(6)

Notice u/s 131

Importance of affidavit

Information from investigation wing :

- **Adequacy/sufficiency of information**
- **No independent inquiries by AO, simply relied on information and addition made**
- **Justification of reassessment**

Inquiries made by AO on identity of investors :

- **Investor not found on the address given**
- **Investors responded to the AO/Parties did not respond to the AO**
- **Investors did not appear before AO**
- **Nexus of the information with the assessee**

➤ Low income of investing companies

AO relied on statement of the head of entry providers

➤ The deponent not offered for cross examination

➤ The deponent did not take the name of assessee

➤ No Examination of bank account of the investors by AO

➤ **Addition on the basis of suspicion**

➤ Unless an appropriate authority like MCA or AO of those companies declare paper/shell company,

➤ the inference of AO of third party that investor-company is shell company will not be sustainable.

sum – key points

The addition simply on the basis of report of investigation wing that loan/share capital is obtained from companies of accommodation entry provider will not be sustainable unless:

- (i) there is corroborative evidence in addition to information from investigation wing,
- (ii) there is linkage of the assessee with the accommodation entry,
- (iii) there is unexplained cash deposit entry in the bank account of lender,
- (iv) the deponent on whose statement reliance is placed against the assessee is offered for cross examination.
- (v) it is not established that investing companies are shell companies,
- (vi) investment into assessee company by the investing companies has been made from their own resources,
- (vii) identity of the investing companies is established,
- (viii) there is no cash deposit in the bank account of investing companies,
- (ix) credit entries in the bank account of investing companies are explained,
- (x) there is no evidence that money of the assessee-company is routed through investing company for making investment into assessee-company, then the principles laid down by the Hon'ble Apex Court in CIT v. Lovely Exports (P.) Ltd. [2009] 319 ITR 5 cannot be ignored

SECTION-115BBE

TAX ON INCOME REFERRED TO IN SECTION 68 OR SECTION 69 OR SECTION 69A OR SECTION 69B OR SECTION 69C OR SECTION 69D

1) **115BBE** Where the total income of an assessee ,-

- 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

- a) **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),**

Cont. Section-115BBE

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 60%** ; 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) .
- 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) of sub-section(1).

- In addition to the **tax @ 60%**, **surcharge is payable @ 25%** of such tax. Surcharge is payable by all assesseees irrespective of their legal status or residential status or quantum of income.
- In addition to tax @ 60% and surcharge @ 25% of the tax payable, **Education Cess is also payable.**
- Thus, the total incidence of tax in respect of income of the nature referred to in **specified sections is 77.25%.**
- **If penalty** under section 271AAC is also levied then the incidence of tax works to **83.25%**

Section 271AAC

Penalty under section 271AAC is leviable if the following conditions are satisfied –

the total income determined includes any income referred to in the specified sections;

➤ And the **income referred to in the specified sections has not been included in the return of income furnished under section 139;**

And

➤ **tax on income referred to in specified sections, in accordance with provisions of section 115BBE(1)(i) has not been paid on or before the end of the relevant previous year.**

ten percent of the tax payable u/s 115BBE(1)(i)

Section 271AAC in the Act.....Contd.

If the above conditions are satisfied then the AO may direct that the assessee shall pay a penalty in addition to tax payable under section 115BBE.

The quantum of penalty will be **ten percent** of the tax payable under clause (i) of sub-section (1) of section 115BBE.

SECTION-69

UNEXPLAINED INVESTMENTS- SECTION 69

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.

SECTION-69A

UNEXPLAINED MONEY, ETC. SECTION 69A

Where in any financial year the assessee is found to be the owner of any money, bullion, jewelry or other valuable article and such money, bullion, jewelry or valuable article is 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 acquisition of the money, bullion, jewelry or other valuable article, or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the money and the value of the bullion, jewelry or other valuable article may be deemed to be the income of the assessee for such financial year.

SECTION-69B

AMOUNT OF INVESTMENTS, ETC., NOT FULLY DISCLOSED IN THE BOOKS OF ACCOUNT - 69B

Where in any financial year the assessee has **made investments or is found to be the owner of any bullion, jewelry or other valuable article**, and the Assessing Officer finds that **the amount expended on making such investments or in acquiring such bullion, jewelry or other valuable article exceeds the amount recorded in this behalf in the books of account maintained** by the assessee for any source of income, and the assessee offers **no explanation** about such excess amount or **the explanation offered by him is not**, in the opinion of the Assessing Officer, **satisfactory**, the excess amount may be **deemed to be the income of the assessee for such financial year.**

SECTION-69C

UNEXPLAINED EXPENDITURE,ETC. -69C

Where in any financial year an assessee has incurred any expenditure and he offers no explanation about the source of such expenditure or part thereof, or the explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory, the amount covered by such expenditure or part thereof, as the case may be, may be deemed to be the income of the assessee for such financial year.

Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction under any head of income.

SECTION-69D

AMOUNT OF BORROWED OR REPAYED ON HUNDI -

69D

Where any amount is borrowed on a hundi from, or any amount due thereon is repaid to, any person otherwise than through an account payee cheque drawn on a bank, the amount so borrowed or repaid shall be deemed to be the income of the person borrowing or repaying the such amount. It will be treated as income for the year in which it was borrowed or repaid, as the case may be.

Provided that , if in case of any amount borrowed on a hundi has been treated as income of any person by virtue of section 69D, than such person shall not be liable to be assessed again in respect of the same amount on repayment thereof.

Explanation.-For the purpose of this section ,the amount repaid shall include the amount of interest paid on the amount borrowed.

Thanks

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