Issues arising consequent to amendments made post demonetisation – Sections 115BBE, 271AAC, 271AAB(1A), 269ST, 271DA

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Please both – the Deity (the Act) and the Priest (AO)

- The Hon'ble Bombay High Court in the case of **Group M. Media India Pvt. Ltd. v. Union of India & Others [(Bom. HC) WP No. 2067 of 2016; A.Y. : 2015-16; Order dated 15.10.2016]** was dealing with the case where the assessee had filed return on 29th November, 2015 yet the AO, without reason, had not processed the refund or taken a decision to grant or not to grant a refund under Section 143(1D) of the Act. The Court observed as under –
  - "This attitude on the part of the Assessing Officer leaves us with a feeling (not based on any evidence) that the Officers of the Revenue seem to believe that it is not enough for the assessee to please the deity (Income Tax Act) but the assessee must also please the priest (Income-tax Officer) before getting what is due to him under the Act. The Officers of the State must ensure that their conduct does not give rise to the above feeling even remotely."

Narayan Das Kedarnath v. *Commissioner of Income-tax, Central* [1952] 22 ITR 18,

- Chagla, C. J., in *Narayan Das Kedarnath* v. *Commissioner of Income-tax, Central* [1952] 22 ITR 18, observed:
  - " It is true that we are as anxious as the Department to see that there is no dishonest evasion of payment of income-tax but I take it that there are at least some honest assessees in this State, and we have got also to think of those honest assessees. There may be a genuine case where a partner or a stranger may bring in moneys to the credit of the firm and the partner or the stranger may have come into those moneys by thoroughly dishonest means, but it is not for the firm which is being assessed to satisfy the Department that the moneys which it received from the partner or the stranger were moneys which the partner or the stranger obtained by honest means. In my opinion that would be throwing too heavy a burden upon the assessee."

Introduction about Section 115BBE

- Section 115BBE has been introduced in the statute by the Finance Act, 2012 with effect from 1.4.2013. In other words, the provisions of Section 115BBE are applicable with effect from assessment year 2013-14.
- Section 115BBE is a Section contained in Chapter XII of the Act titled “Determination of Tax in Certain Special Cases”.
- Title of Section 115BBE is “Tax on income referred to in Section 68 or Section 69 or Section 69A or Section 69B or Section 69C or Section 69D”. These sections are hereinafter in this presentation collectively referred to as “Specified Sections”.

Explanatory Memorandum to Finance Bill, 2012

C. MEASURES TO PREVENT GENERATION AND CIRCULATION OF UNACCOUNTED MONEY

- **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.

Explanatory Memorandum to Finance Bill, 2012

- **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]

Provisions of Section 115BBE as applicable upto AY 2016-17

- For assessment years 2013-14 to 2016-17, Section 115BBE provides for a tax rate of 30% if the total income includes income referred to in Section 68, 69, 69A, 69B, 69C or 69D [clause (a) of section 115BBE(1)]
- The balance total income will be chargeable to tax at normal rates [clause (b) of Section 115BBE(1)]
- While computing income of the nature referred to in clause (a), no deduction in respect of any expenditure or allowance shall be allowed to the assessee.
- However, there was no denial of set off of loss.
- In addition to tax at the rates mentioned in Section 115BBE, assessee is liable to pay surcharge and cess as may be applicable from year to year.
- The rates of surcharge applicable, depending on legal status of the assessee for each of the assessment years from 2013-14 to 2019-20 is as follows -

Provisions of Section 115BBE as applicable upto AY 2019-20

- The rates of surcharge applicable, depending on legal status of the assessee for each of the assessment years from 2013-14 to 2019-20 are as follows –

Asst Year	Individual /HUF	Firm	Domestic Co	Foreign Co
2013-14	Nil	Nil	5% (TI > 1 crore)	5% (TI > 1 crore)
2014-15	10% (TI > 1 crore)	10%	5% (TI > 1 < =10 crore) 10% (TI > 10 crore)	5% (TI > 1 < =10 crore) 10% (TI > 10 crore)
2015-16	10% (TI > 1 crore)	10%	5% (TI > 1 < =10 crore) 10% (TI > 10 crore)	5% (TI > 1 < =10 crore) 10% (TI > 10 crore)
2016-17	12% (TI > 1 crore)	12% if TI > 1 crore	7% (TI > 1 < =10 crore) 12% (TI > 10 crore)	2% (TI > 1 < =10 crore) 5% (TI > 10 crore)
2017-18	15% (TI > 1 crore)	12% if TI > 1 crore	7% (TI > 1 < =10 crore) 12% (TI > 10 crore)	2% (TI > 1 < =10 crore) 5% (TI > 10 crore)
2018-19	10% (TI > 50 lakh < =1 crore) 15% (TI > 1 crore)	12% if TI > 1 crore	7% (TI > 1 < =10 crore) 12% (TI > 10 crore)	2% (TI > 1 < =10 crore) 5% (TI > 10 crore)
2019-20	10% (TI > 50 lakh < =1 crore) 15% (TI > 1 crore)	12% if TI > 1 crore	7% (TI > 1 < =10 crore) 12% (TI > 10 crore)	2% (TI > 1 < =10 crore) 5% (TI > 10 crore)

Provisions of Section 115BBE as applicable upto AY 2019-20

- The rate of surcharge for Local Authority and Co-operative Society are the same as those for Firm.
- In addition to surcharge as mentioned above, cess @ 3% was applicable for each of the assessment years from 2013-14 to 2018-19.
- For AY 2019-20, Cess is payable @ 4%
- Thus, for AY 2016-17, the tax incidence on the income referred to in Specified Sections was @ 30.90% to 36.608%, in case of individuals.

Reasons for amendment of Section 115BBE by Amendment Act

- Prior to the amendment by the Taxation Laws Amendment Act, 2016 (hereinafter in this presentation referred to as "Amendment Act") it could have been debated as to whether an assessee could, in the return of income, include in his total income amounts of the nature referred to in Sections 68, 69, 69A, 69B, 69C or 69D of the Act.
- Consequent to de-monetisation, views were expressed by professionals that the undisclosed income held in the form of demonetized currency can be deposited in the bank and the said amount can be offered for taxation under Specified Sections and tax thereon paid at the rates mentioned in Section 115BBE i.e. 30% plus applicable surcharge and cess. If this was done, the pre-ponderant legal view was that the person doing so would not be liable to any penalty under the Act.
- It was with a view to prevent such a disclosure and to overcome the views expressed that the Taxation Laws Amendment Act, 2016 amended the provisions of Section 115BBE of the Act.

Amendments to Section 115BBE

- The amendments made by the Amendment Act are applicable with effect from AY 2017-18 and therefore, for AY 2017-18, though Amendment Act was enacted on 15.12.2016, the amendments apply to–
  - income under Specified Sections from 1st April, 2016 to 8.11.2016;
  - income under Specified Sections during 8th November, 2016 to 30th December, 2016 but not on account of demonitised notes;
- The amended Section also applies to all assessees –
  - irrespective of the legal status i.e. it applies to individuals, HUFs, firms, LLP, co-operative society, AOP, BOI, political party, etc. ;
  - irrespective of their residential status i.e. it applies to residents as well as non-residents
  - including those covered by COFEPOSA, IPC, PMLA, etc.
  - including those covered by presumptive taxation under Sections 44AD / 44ADA / 44AE

Amendments to Section 115BBE

- The Section applies irrespective of the minimum threshold i.e. the Section applies to even a small amount of Rs. 5,000 if the amount is chargeable as income under the provisions of the Specified Sections.
- Since the amendment made by the Amendment Act is w.e.f. AY 2017-18, the income under Specified Sections for earlier years will continue to be governed by the pre-amended provisions irrespective of the fact that the assessments of such years are completed after the amendment.
- The provisions of Section 115BBE will continue to apply for assessment years subsequent to Assessment Year 2017-18.

Provisions of amended Section 115BBE …

- Clause (a) of sub-section (1) of Section 115BBE deals with income referred to in Specified Sections and which is included in the return of income furnished under Section 139.

- Clause (b) of sub-section (1) of Section 115BBE deals with income referred to in Specified Sections and which is determined by the AO if such income is not covered under clause (a)

- Irrespective of whether the case of the assessee falls under clause (a) or clause (b), the rate of tax is 60% plus surcharge plus cess. However, the levy of penalty depends on whether the case of an assessee falls under clause (a) or clause (b) of 115BBE(1).

Amendments to Section 115BBE …

- Sub-section (2) of Section 115BBE begins with a non-obstante clause and provides that 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).

- Position prior to AY 2017-18 was that the set off of loss was allowed to the assessee though deduction in respect of any expenditure or allowance was not allowed.

- It was debatable and continues to be a debatable question as to whether deductions under Chapter VI-A are allowable against such income.

Amendments to Section 115BBE …

- Clause (a) covers income referred to in Specified Sections which has been reflected in return of income furnished under Section 139. Such income reflected in a belated return or in a revised return furnished under Section 139(5) would certainly be covered by clause (a).
- Return furnished under Section 153A of the Act is regarded as if it is a return filed under Section 139 of the Act and therefore it appears to be arguable proposition that a disclosure in the return filed under Section 153A would be regarded as covered by clause (a).
- However, for a return filed in response to a notice issued under Section 153C, it would be debatable as to whether it is to be regarded as a return under Section 139.
- Pre-requisite for revising a return of income is "discovery" of omission or any wrong statement in the return of income filed by the assessee. Consequently, income covered by Specified Sections which is reflected in revised return after issue of notice by the AO may not be regarded being covered by clause (a).

Amendments to Section 115BBE …

- However, income referred to in Specified Sections which has been reflected in returns furnished under Section 148 will not be covered by clause (a).
- Tax rate of 60% is on income under Specified Sections "included" in total income. If donations are given which donations qualify for deduction under Section 80G, a question arises as to whether tax is payable on gross income under Specified Sections or net income [**See Distributors (Baroda) Pvt. Ltd. v. UOI (1985) 155 ITR 120 (SC); CBDT Circular under Section 112**]
- In addition to the tax @ 60%, surcharge is payable @ 25% of amount of tax. Surcharge is payable by all assessees irrespective of their legal status or residential status or quantum of income. Thus, a person having income of Rs. 5,000 covered by Specified Sections will also be liable to pay surcharge @ 25% of tax of 60%.
- In addition to tax @ 60% and surcharge @ 25% of the tax payable, Cess, as applicable is also payable [3% upto AY 2018-19 and 4% w.e.f. AY 2019-20]

Amendments to Section 115BBE …

- Assessee will be liable to pay interest under Section 234C of the Act, if assessee in his return of income declares income under Specified Sections but does not pay advance tax in accordance with the provisions of the Act.
- Belated returns will be subject to payment of interest under Section 234A and default in payment of advance tax will trigger interest under Section 234B.
- In a case where advance tax paid is more than 90% of the tax payable but less than 100% of the tax payable, interest under Section 234B may not be leviable but the assessee will not be entitled to claim immunity from penalty.

Is the amendment to sub-Section (2) made by FA, 2016 retrospective

- Prior to the amendment sub-Section (2) did not prohibit set off of loss against amounts taxed by virtue of provisions of Specified Sections.
- As stated earlier, Finance Act, 2016 has, w.e.f. AY 2017-18, amended the provisions of sub-section (2) of Section 115BBE and now it is explicitly provided that no loss can be set off against amounts taxed by virtue of provisions of Specified Sections.
- The Explanatory Memorandum explains the reasons for amending the provisions of sub-section (2) of Section 115BBE is captioned `**Clarification regarding set off of loss against deemed undisclosed income**'. It also states that the current language does not express the desired intention and as a result matter is to be litigated. It states, that the amendment is to avoid unnecessary litigation.
- A question arises as to whether the amendment is retrospective and will apply to earlier years as well or is prospective and will apply for AY 2017-18 and subsequent years.

Explanatory Memorandum to FB, 2016

- **Clarification regarding set off losses against deemed undisclosed income**

- 46.1 Section 115 BBE of the Act, *inter alia* provides that the income relating to Section 68 or Section 69 or Section 69A or Section 69B or Section 69C or Section 69D is taxable at the rate of thirty per cent and further provides that no deduction in respect of any expenditure or allowances in relation to income referred to in the said Sections shall be allowable.
- 46.2 Currently, there is uncertainty on the issue of set-off of losses against income referred in Section 115BBE of the Act. The matter has been carried to judicial forums and courts in some cases has taken a view that losses shall not be allowed to be set-off against income referred to in Section 115BBE. However, the current language of Section 115BBE of the Act does not convey the desired intention and as a result the matter is litigated. In order to avoid unnecessary litigation, it is proposed to amend the provisions of the sub-section (2) of Section 115BBE to expressly provide that no set off of any loss shall be allowable in respect of income under the Sections 68 or Section 69 or Section 69A or Section 69B or Section 69C or Section 69D.
- 46.3 This amendment will take effect from 1st April, 2017 and will, accordingly, apply [illegible] assessment year 2017-18 and subsequent years.

Is the amendment to sub-section (2) made by FA, 2016 retrospective

- The Tribunal has, in the following cases, held that the denial of set off as provided in Section 115BBE(2) w.e.f. 1.4.2017 is prospective in nature –
  - Pumarth Properties & Holding (P.) Ltd. v. DCIT [(Indore ITAT) ITA No. 954/Ind/2016; Assessment Year : 2013-14; Order dated 31.1.2018]
  - DCIT v. Marshal Machines (P.) Ltd. [(Chandigarh ITAT) ITA No. 57 (Chd.) 2017, Order dated 22.5.2018]
  - Sanjay Bairathi Gems Ltd. [(Jaipur ITAT) ITA No. 157/JP/2017, Order dated 08.08.2017]
  - Pitamber Commodity Futures (P.) Ltd. v. ACIT [(Jaipur ITAT) ITA No. 863 (Jp.) of 2017; Order dated 21.3.2018]
  - Gaurish Steels (P.) Ltd. v. ACIT [(2017) 82 taxmann.com 337 (Chd.)]
  - Femina Knit Fabs v. ACIT [(2019) 104 taxmann.com 306 (Chd.)]

Is the amendment to sub-section (2) made by FA, 2016 retrospective

- The Tribunal in the case of **Pumarth Properties & Holding (P.) Ltd. v. DCIT** [(Indore ITAT) ITA No. 954/Ind/2016; Assessment Year : 2013-14; Order dated 31.1.2018] was dealing with a case where the CIT(A) had considering the above mentioned Explanatory Memorandum held the amendment to be clarificatory and therefore, retrospective. The Tribunal reversed the finding of CIT(A)in view of the fact that the Explanatory Memorandum itself states that amendment takes effect from 1.4.2017 and would accordingly be applicable from AY 2017-18 and subsequent years.

- CBDT has in Circular No. 11/2019 dated 19th June, 2019 clarified that the amendment is prospective and applies w.e.f. 1.4.2017 i.e. AY 2017-18 onwards.

- In view of the above, upto AY 2016-17, assessee is entitled to claim set off of losses against income assessed as deemed income under Specified Sections as per provisions of S. 115BBE as it stood prior to the amendment by FA, 2016.

What do Specified Sections deal with?

- Sections 68, 69, 69A, 69B, 69C and 69D of the Act deal with –

Section	Heading of the Section
68	Cash credits
69	Unexplained investments
69A	Unexplained money, etc.
69B	Amount of investments, etc., not fully disclosed in books of account
69C	Unexplained expenditure, etc.
69D	Amount borrowed or repaid on hundi

Text of Section 68

Cash credits.

68. 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 :

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—

Text of 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.

The two provisos have been introduced by the Finance Act, 2012 with effect from 1.4.2013 i.e. Assessment Year 2013-14.

Text of Section 69

Unexplained investments.

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.

Text of Section 69A

Unexplained money, etc.

69A. Where in any financial year the assessee is found to be the owner of any money, bullion, jewellery or other valuable article and such money, bullion, jewellery 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, jewellery 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, jewellery or other valuable article may be deemed to be the income of the assessee for such financial year.

Text of Section 69B

Amount of investments, etc., not fully disclosed in books of account.

69B. Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, and the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery 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.

Text of 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.

Penalty under Section 271AAC

- Amendment Act has w.e.f. 1.4.2017 introduced Section 271AAC in the Act.
- 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;

    or
  - 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.

- 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.

Penalty under Section 271AAC …

- A question could arise as to whether the ten per cent is on tax rate of 60% or on the aggregate of tax rate (of 60%) plus surcharge (25% of 60%) and applicable cess thereon (3% or 4% of 75%) i.e. whether the ten per cent is to be computed on 60% or 77.25% or 78%, as the case may be.

- Supreme Court has in the case of **CIT v. K Srinivasan [83 ITR 346 (SC)]** held that "tax includes surcharge".

- Considering the language of the provision which reads as under –

  "….. 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"

  it appears that the rate of 10% is to be applied to tax of 60%.

Penalty under Section 271AAC …

- The Kolkata Bench of the Tribunal has in **Bhagwati Oxygen v. ACIT [(2017) 167 ITD 645 (Kol.)]** in the context of calculating interest under section 234B on assessed tax has held that payment of entire taxes (including surcharge and cess) is eligible for MAT credit under Section 115JAA meaning thereby that assessed tax shall be determined after reducing entire MAT credit under Section 115JAA for the purpose of calculating interest under section 234B.

- The Kolkata Bench has followed the decision of the Hyderabad Bench of the Tribunal in the case of **Virtusa (India) Pvt. Ltd. v. DCIT [157 ITD 1160 (Hyd.)]**. The Hyderabad Bench had rendered its decision by considering the decision of the Delhi Tribunal in the case of **Richaa Global Exports Pvt. Ltd. [25 taxmann.com 1 (Delhi)]** which is against the assessee and also the decision of the Supreme Court in the case of **CIT v. K Srinivasan [83 ITR 346 (SC)]**

Penalty under Section 271AAC …

- The provisions of this Section are notwithstanding anything contained in the Act other than provisions of Section 271AAB. In other words, where penalty is levied under Section 271AAB penalty under this Section may also be levied.

Penalty under Section 271AAC …

- Penalty under Section 270A of the Act shall not be imposed upon the assessee in respect of income referred to in sub-section (1) i.e. the income referred to in Specified Sections – [Section 271AAC(2)]

- The provisions of Sections 274 (dealing with `Procedure for levy of penalty' ) and 275 (dealing with `Bar of limitation for imposing penalty') are made applicable to levy of penalty under this Section – [Section 271AAC(3)]

- Consequential amendment has not been carried out to the provisions of Section 273B of the Act to include this Section thereby implying that the penalty under this Section may be leviable even if there is reasonable cause for failure.

Penalty under Section 271AAC …

- While at first blush it appears that there is no consequential amendment providing for provision to file an appeal against levy of penalty under Section 271AAC to the CIT(A) or the Tribunal it is not so. An appeal against an order levying penalty under this Section will lie to the CIT(A) under Section 246A(1)(q) which deals with "**an order imposing a penalty under Chapter XXI;**", and an appeal to the Tribunal will lie under Section 253 dealing with appeals to the Tribunal, which provides for an appeal against order of CIT(A) under Section 250 of the Act. Order by CIT(A) will be under Section 250 of the Act.

- ***In search cases, for "specified previous year", penalty in respect of income referred to in Specified Sections may be levied by the AO's under Sections 271AAB and also Section 271AAC. However, it is strongly arguable that for the same offence penalty cannot be levied twice.***

General Propositions

- The word `may' used in Section 68 provides discretion to the AO. In general, the word `may' is an auxillary verb clarifying the meaning of another verb of expressing an ability, contingency, possibility or probability. *When used in a statute in its ordinary sense the word is permissive and not mandatory. But when certain conditions are provided in the statute and on the fulfillment thereof a duty is cast on the authority concerned to take an action, then on fulfillment of those conditions the word `may' takes the character of `shall' and then it becomes mandatory. In Section 68, there are no such condition on the fulfillment of which the AO is duty bound to make the addition. The word `may' denotes the discretion of the AO that he can make an addition or cannot make an addition*. – ***Umesh Electricals v. ACIT [(2011) 131 ITD 127(Agra Trib)(TM)].***
- The word "may" in Section 68 cannot be interpreted to mean "shall", where adequate opportunity is not given, addition cannot be made **[Jindal Udyog v. ITO (2003) 263 ITR (AT) 123 (Chand.)]**

General Propositions

- The word `may' has been used in all of these Sections, thereby giving the discretion to the assessing officer to treat a particular sum as income or not; therefore, even if the assessee does not provide an explanation, or provides one that is unsatisfactory, it is not necessary in all cases for the amount to be treated as the assessee's taxable income – **CIT v. Noorjahan [237 ITR 570 (SC)]**, affirming **CIT v. Noorjehan [123 ITR 3]** (s. 69); **CIT v. Moghul Darbar [216 ITR 301]** (s. 69); **DCIT v. Rohini Builders [256 ITR 360]** (s. 68); **Mitesh Rolling v. CIT [258 ITR 278]**
- Further, while considering the explanation of the assessee, the assessing officer cannot act unreasonably, and his satisfaction that a particular transaction is not genuine must be based on relevant factors and on a just and reasonable inquiry – **Sumati Dayal v. CIT [214 ITR 801 (SC)]**; **Khandelwal Constructions v. CIT [227 ITR 900]**; **Rajshree v. CIT [256 ITR 331]**

General Propositions

- The provisions of Sections 69, 69A, 69B and 69C treat unexplained investments, unexplained money, bullion, etc, and unexplained expenditure as deemed income where the nature and source of investment, acquisition or expenditure, as the case may be, have not been satisfactorily explained. In these cases, the source not being known, such deemed income will not fall even under the head `Income from Other Sources' and the deductions that are applicable to the incomes under any of the heads will not be attracted – **Fakir Mohmed v. CIT [247 ITR 290]**; **Manharlal v. CIT [215 ITR 634]**; **CIT v. Ramkant [252 ITR 210]**; **Bijjala v. CIT [253 ITR 105]**. See also proviso to s. 69C.

Can an amount which is credited to P & L Account be taxed under Section 68?

Can cash sales be taxed under Section 68?

- Generally, certain sectors like jewellery, liquor, sweets have high cash sales. Moreover in their cases they do not even have details of the customer to whom sales were made. Ofcourse, now, sales of jewellery above a threshold require the seller to collect PAN, etc. but that is with effect from 1.7.2011. Question arises as to whether on account of name of the customer, his address and his PAN not being known, can the sales, which have been entered into the books of account and considered on the credit side of P & L be taxed under section 68 of the Act.

- There is no law requiring a person to keep details of name of the customer or his address and PAN and consequently, an assessee may argue that he does not have any such data. Will such a response by the assessee cause the AO to trigger the provisions of Section 68.

Can cash sales be taxed under Section 68?

- Sections 68 to 69D are to tax something clandestine, some thing which has been hidden by the assessee. Not something which is apparent, not something which has been credited to P & L Account. It should be items of Balance Sheet which can be covered under Section 68.
- In the context of cash sales where the quantum of cash deposits are large, AO's have a tendency to ask for name and address of the customer and upon failure of the assessee to furnish the same, the cash sales considered on the credit side of P & L Account are charged to tax under Section 68. This is an erroneous view of the matter. An assessee is not obliged to maintain names and addresses of the customers to whom goods have been sold in cash. The object of Section 68 is to bring items which are not offered for taxation to tax as income and this object is evident from the language of Section 68 which reads *"……..the sum so credited* ***may be charged to income-tax as the income of the assessee of that previous year :"***

Can cash sales be taxed under Section 68?

- 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 – **R. B. Jessaram Fatehchand (Sugar Dept.) v. CIT [(1970) 75 ITR 33 (Bom.)]**

- If sale was not proved to have been made outside the books of account, disallowance of sales would result in an increase in closing stock.

Can cash sales be taxed under Section 68?

- Delhi High Court in the case of **CIT v. Jindal Dyechem Industries Pvt. Ltd.** has held that there is no requirement in law for recording the purchase of the bullion to whom the cash sales were made. Operative part of the judgment is as under –
  - We may also point out that we had enquired from the learned counsel for the appellant as to whether there was any requirement in law of recording the names of the purchasers of bullion to whom the cash sales of gold and silver were made. The learned counsel for the revenue stated that there was no such requirement in law at the relevant time. Consequently, **no adverse inference could have been drawn by the AO on account of the fact that the assessee was not in a position to furnish the names of the persons to whom the cash sales of the bullion were made**."

Can cash sales be taxed under Section 68?

- Delhi Bench of the Tribunal has in the case of **Kishore Jeram Bhai Khaniya 220/Del./2011 & Ors; Order dated 13.5.2014]** has held that –
- (i) sales can be in cash and it is hardly necessary for the seller to bother about the name and address of the purchaser ;
- (ii) so long as the availability of stock is there and there is nothing adverse against the cash memos issued by the assessee, such cash sales cannot be doubted;
- (iii) It is but natural that if a customer makes cash purchase and lifts the goods there is no duty cast upon the seller to insist for the address of the purchaser;
- (iv) 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, it cannot be again considered u/s 68 of the Act**;
- (v) thus, any addition cannot be made by treating cash sales as bogus.

Can cash sales be taxed under Section 68?

- In this connection, observations of the Delhi HC in the case of **DIT(E) v Keshav Social and Charitable Foundation (2005) 278 ITR 152** are worth noting:

> "*Further section 68 had no application to the facts of the instant case because the assessee had in fact disclosed the donations as its income and it could not be disputed that all receipts, other than corpus donations, would be income in the hands of the assessee.*"

- Allahabad High Court has in the case of **CIT v. Uttaranchal Welfare Society [2014] 42 taxmann.com 361 (Allahabad)** has held that section 68 has no application where assessee had disclosed donations as its income.

Naresh Dayachand Chandnani v. ACIT [ITA No. 5339/Del/2017; AY 2012-13; Order dated 25.5.2018]

- In this case assessee deposited cash of Rs 2,24,99,000 in his bank account towards cash sales of gold on two dates viz. 4.5.2011 and 5.5.2011.
- CIT(A) while deciding the appeal in the context of Section 36(1)(iii) enhanced the income of the assessee and taxed this sum of Rs. 2,24,99,000 as "cash credit" under section 68.
- He noted that the gold purchased has been sold on the same day and trading has been done apparently for a loss of Rs. 3,600.
- The books of accounts were audited and the book results were not rejected nor was any transaction recorded therein disputed by the AO or CIT(A).
- The only reason for addition was that the assessee has failed to record the detailed address of the persons to whom gold was sold.

Naresh Dayachand Chandnani v. ACIT [ITA No. 5339/Del/2017; AY 2012-13; Order dated 25.5.2018]

- He observed that "the business transactions of jewellery and bullion dealers are highly cash intensive in nature and it is always apprehended that they could be used for flow of black money into the system".
- The CIT(A) referred to Section 115BBE of the Act.
- He had in his order observed that "during the year under assessment, mention of PAN was made mandatory w.e.f. 1.7.2011 for bullion purchase of Rs. 5,00,000 or more at a time. Interesting and coincidentally, in our case, the appellant has undertaken these transactions just before that".
- He added the sum of Rs. 2,24,99,000 to the income of the assessee on account of sales in cash of bullion being unexplained in the absence of detail and corroboration.

Naresh Dayachand Chandnani v. ACIT [ITA No. 5339/Del/2017; AY 2012-13; Order dated 25.5.2018]

- The Tribunal observed that the sole question for its determination is whether cash sales of gold by the assessee is a part of trading transaction and the trader buying gold would fall u/s 40A(3) of the Act?"

- The Tribunal following the ratio of the decision of the Delhi High Court in the case of CIT v. Jindal Dyechem Industries Pvt. Ltd. and Co-ordinate Bench of the Tribunal in the case of Kishore Jeram Bhai Khaniya, Prop. M/s Poonam Enterprises, Mp – 83 v. ITO [ITA No. 1220/Del/2011 & Ors. Dated 13.5.2014] held that the income of the assessee has been enhanced by CIT(A) on the basis of surmises which is not sustainable in the eyes of law. The Tribunal deleted the addition made by CIT(A)

ITO v. Smt. Nayana Gupta [ITA No. 6200/Del/2014; AY 2010-11; Order dated 21.3.2018]

- In this case the AO found that the assessee had sold her jewellery. The assessee in her revised return of income claimed that capital gain arising on sale of jewellery was exempt under Sections 54EC and Section 54F of the Act.

- The AO completed the assessment by adding sale proceeds of jewellery as unexplained income and also making an addition of Rs. 6,17,960 as commission. The AO held that assessee has failed to establish the identity, genuineness and creditworthiness of parties to whom jewellery had been sold leading to conclusion that the transactions were sham and entered into with accommodation entry operators by paying cash and thereafter avoiding tax.

- He gave as many as 35 reasons for disbelieving the claim of the assessee regarding the sale of jewellery.

ITO v. Smt. Nayana Gupta [ITA No. 6200/Del/2014; AY 2010-11; Order dated 21.3.2018]

- The CIT(A) allowed the appeal filed by the assessee. He held that the AO had not substantiated the allegation that the assessee had paid cash in lieu of payments received through normal banking channels. He also held that the assessee had successfully discharged the onus of proof of receipt of Rs. 3,08,98,000. CIT(A) had found that the bank accounts of the persons to whom jewellery were sold were running accounts having substantial transactions and substantial bank balances.

- The Tribunal held that there was no material on record on the basis of which it could be suggested that the assessee had paid cash in view of receiving these payments through normal banking channels.

Will income surrendered in a survey / search be taxed under Specified Sections and therefore attract rate of tax mentioned in S. 115BBE?

Will income surrendered in survey be taxed under Specified Sections and therefore attract rate mentioned in S. 115BBE?

- In the course of survey / search, incriminating documents / certain assets are found which are not disclosed in the books of accounts and resultantly the assessee surrenders and offers certain amounts as income. A question arises as to whether the amounts surrendered on the basis of incriminating papers / assets found are chargeable to tax by virtue of provisions of Specified Sections and therefore attract the rate of tax mentioned in S. 115BBE or is it that these amounts are taxable under the head `Profits & Gains of Business or Profession' or `Income from Other Sources'.

- If the assessee, in his statement offering the amounts, mentions them as having been earned from the business, will the statement be taken at face value or will the assessee be required to establish something more. Will the assessee have to prove that the amounts are earned in the course of business or will it be for the Department to prove that the amounts are not earned by the assessee in the course of his business.

Will income surrendered in survey be taxed under Specified Sections and therefore attract rate mentioned in S. 115BBE?

- A perusal of Sections 69 to 69C reveals that any investments, moneys and expenditure which are not disclosed in the books of the assessee, if any, maintained by it and the source of which has also been not explained satisfactorily by the assessee are treated as deemed incomes of the assessees.
- Thus, the amounts to be treated as deemed incomes are investments, moneys, or expenditure fulfilling the twin criteria of –
  - (a) not being recorded in the books, if any, maintained; and
  - (b) the source of which the assessee is not able to explain satisfactorily.
- In other words, to put it simply, the unrecorded investments / assets / expenditures 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 u/s 69/69A/69B/69C of the Act. And establishing the source of income is a factual matter.

D.C. Auddy & Brothers v. CIT [(1955) 28 ITR 713 (Calcutta)]

- If ITO finds good reason to take the view that the cash credits really represent a part or the whole of the suppressed profits of the known source of income, he will assess it as a part of the income from that source, taking into account the extent of the capacity of that source to yield profit; if he does so, the amounts of the cash credits while remaining concealed profits, will no longer remain concealed profits from undisclosed sources; if, on the other hand, the ITO think that the deposits cannot be properly related to the known source to which the accounts relate, he will be quite entitled to treat them as they are, namely, merely as undisclosed profits from some source which is not known to him or, in other words, as concealed profits from undisclosed other sources

D.C. Auddy & Brothers v. CIT [(1955) 28 ITR 713 (Calcutta)]

- Unless there be strong reasons to connect unexplained cash credits with the undisclosed profits derived from a known source of income, it is not possible to see how the taxing authorities can follow any course other than bringing them under assessment as income from other undisclosed sources.

- It is the assessee who is in full possession of facts regarding the true character of the amounts and the sources from which they were derived and section 106 of the Evidence Act casts on him the burden of proving what lies within his special knowledge.

- It is unrealistic to demand that the AO should find out that some source other than the disclosed ones, in fact, existed and should indicate what the source is before he can permit himself to bring the amounts under assessment as undisclosed profits.

Income surrendered held to be business income

- In the following cases income surrendered / detected the course of survey was held to be taxable as Business Income –
  - Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]
  - SAB Industries Limited v. DCIT [ITA No. 848/Chd./2017; Assessment Year: 2013-14; Order dated 28.3.2018]
  - DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]
  - Radheshyam Totaram Narayani v. ACIT [ITA No. 1491/Pun/2015; AY 2010-11; Order dated 21.3.2018]

Income surrendered held to be business income

- To the similar effect is the ratio of the decisions of various Courts rendered in the context of Sections 80IB(10) / 80HHC / allowability of remuneration to partners where the income detected / surrendered in the course of survey / search was held to be "business income" and assessee entitled to claim deduction under these sections –
  - CIT v. Sheth Developers Private Limited [25 taxmann.com 173 (Bom. HC)]
  - CIT v. S. K. Srigir & Bros. [171 Taxman 264 (Kar. HC)]

Income surrendered held to be business income

- In the following cases it has been held that income detected / surrendered in the course of search / survey is taxable under Specified Sections –
  - Radheshyam Totaram Narayani v. ACIT [ITA No. 1491/Pun/2015; AY 2010-11; Order dated 21.3.2018]
  - Kim Pharma Pvt. Ltd. v. CIT [35 taxmann.com 456 (P & H. HC)]
  - Satish Kumar Goyal v. JCIT [70 taxmann.com 382 (Agra-Trib.)]

  In each of the above mentioned cases, the assessee was not in a position to explain the source of cash found.

Ratio of certain decisions

- Total sale cannot be regarded as profit and the sale proceeds cannot be added as income - **Manmohan Sadani v. CIT [304 ITR 52)** and **CIT v. Balchand Ajit Kumar 263 ITR 610 (MP HC)**.

- While dealing with an assessee who disclosed additional income consequent upon a search and seizure action, the Bombay High Court affirmed that such additional income is earned in the course of his carrying out its business activities as a builder and also held it to be eligible for grant of deduction under section 80IB. The Court held –
  - "Builders receiving undisclosed income in the course of its business, is entitled to benefit of deduction under section 80IB."
  - **CIT v. Sheth Developers Pvt. Ltd.**,

Ratio of certain decisions

- The decision of Pune Bench in the case of **Radhesham Totaram Narayani v. ACIT [ITA No. 1491/Pun/2015; Assessment Year : 2010-11; Order dated 21.3.2018]** is relevant for the proposition of allowing of set off of brought forward losses against such additional income offered under section 133A of the Act. The Tribunal found that **barring the additional income by virtue of excess cash, other items relatable to the business activities are found eligible for set off of the brought forward losses against the said business activities / additional income**.

Ratio of certain decisions

- The additional income surrendered during survey will not constitute business income in case where the same is not accounted in the books of account and the sources of the said income was not successfully linked to the business activities of the assessee **- Kim Pharma Pvt. Ltd. [(2013) 258 CTR 454 (Punjab & Haryana)]**

- Applicability of Section 115BBE of the Act to case of excess stock found in survey is highly debatable- **Jodhpur Bench (SMC) in ITA No. 143/Jodh./2018 and Others and Lovish Singhal, Sriganganagar & Ors. V. ITO for AY 2014-15**; Order dated 25.5.2018 wherein it was held that a surrender of excess stock was not subjected to tax under section 115BBE of the Act.

Ratio of certain decisions

- Rajasthan high court in the case of **Bajrang Traders in Income Tax Appeal No. 258/2017 dated 12/09/2017** has held that excess stock found during the course of survey and surrender made thereof is taxable under the head 'business and profession'.

- Contents of the loose papers are to be accepted in toto - **Chander Mohan Mehta v. ACIT 71 ITD 245 (Pune)**

- When the department relies on the seized record for estimating undisclosed income there is no reason why the expenditure stated therein should be disbelieved merely because there is no written agreement and that payments were not made through cheques or demand drafts. - **CIT v. P D Abraham [349 ITR 442 (Ker. HC)]**

Ratio of certain decisions

- The AO is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return. The order passed by the AO becomes erroneous when an enquiry has not been made before accepting the claim made by the assessee – **Bhima Jewellers v. Pr. CIT [ITA No. 208/Coch./2018; AY : 2013-14; Date of Order: 20.8.2018]**

Ratio of certain decisions

- Allahabad High Court has affirmed the decision of the Tribunal, that no disallowance could be made in view of the provisions of Section 40A(3) read with Rule 6DD(j) of the Income-tax Rules, 1962 as no deduction was allowed to and claimed by the assessee. When the gross profit rate was applied, that would take care of everything and there was no need for the AO to make scrutiny of the amount incurred on the purchases made by the assessee – CIT v. Banwari Lal Banshidhar [(1998) 229 ITR 229 (All. HC)]

- When AO rejected the books of account of the assessee and applied gross profit rate on suppressed sales, AO cannot make separate addition on account of unexplained investment, undisclosed income and even the provisions of Section 40A(3) could not be invoked – Deepak Mittal v. ACIT [ITA No. 4709/Del./2017; A.Y. : 2013-14; Order dated : 23.3.2018 quotes this para as ratio of decisions of several High Courts]

Ratio of certain decisions

- The authorities below have not found any material to indicate that assessee made investments outside the books of account to make the sales. The entire sales could not represent income of the assessee, on which CIT(A) has already given a finding to add the profit only on such unrecorded sale – CIT v. Banwari Lal Banshidhar [(19980 229 ITR 229 (All. HC)]; President Industries [(2002) 258 ITR 654 (Guj. HC)]; CIT v. Samir Synthetics Mills [326 ITR 410 (Guj. HC)]

- When books of account of the assessee are not reliable and rejected by the authorities below under section 145(3) of the Act and there is no challenge to these findings of the authorities below, there is no reason for the authorities below to rely upon the same books of account for the purpose of making addition under section 40A(3) of the Act as well as to make addition of peak under section 68 of the Act. - Deepak Mittal v. ACIT [ITA No. 4709/Del./2017; A.Y. : 2013-14; Order dated : 23.3.2018]

Will income surrendered in survey be taxed under Specified Sections and therefore attract rate mentioned in S. 115BBE?

- The assessee, in the case before Punjab & Haryana High Court has in the case of **Pr. CIT v. Khushi Ram & Sons Foods (P.) Ltd. [ITA Appeal No. 126 of 2015, Order dated 29.7.2016]** had set off unabsorbed losses u/s 70 and 71 against income surrendered on account of building renovation, office equipment and sundry receivable, to which the Court had held that ***it is for the assessee to establish that the source of the surrendered income was from the business to claim it as such and set off business losses against the same***.

- Can the ratio of the above decision held to be not applicable in view of the fact that sub-section (2) of Section 115BBE begins with a non-obstante clause. It appears that the ratio of the above decision will continue to apply as the provisions of S. 115BBE would operate only if the income is taxed as deemed income under Specified Sections and not if the income is taxed under a particular head of income.

SAB Industries Limited v. DCIT [ITA No. 848/Chd./2017; Assessment Year: 2013-14; Order dated 28.3.2018]

- This case has an interesting proposition. This is a case of an assessee carrying on business of real estate. In the course of search the assessee surrendered Rs. 1,21,85,000. The surrender was made with a narration "offered as business income to cover any discrepancies in all the seized documents is found and seized during the course of search, if any." The assessee indulged in unrecorded sale transactions. The assessee had not retained the documents and the transactions were claimed to be through irregular brokers. Acting on the apprehension that there may be certain other documents which may demonstrate that surrender amount was not adequate in the peculiar facts and circumstances of the present case, the assessee specifically to cover up any discrepancies came up with the said offer. The Tribunal observed that –
- **(i)** the said action cannot be said to be outlandish or not relevant. The hyper cautious approach taken in the circumstances of the case does not warrant in peculiar facts of the present case for the department to conclude that it was deemed income;
- (ii) the income is business income relatable to property business;

SAB Industries Limited v. DCIT [ITA No. 848/Chd./2017; Assessment Year: 2013-14; Order dated 28.3.2018]

- While the department tried to argue its case for taxability of the amount surrendered as "deemed income", the Bench raised a query to the DR that "as admittedly search & seizure operation has been carried out, whether there was any other business of the assessee disclosed or undisclosed as to the nature of the assessee's business". In response the DR stated that the assessee is in real estate business.

SAB Industries Limited v. DCIT [ITA No. 848/Chd./2017; Assessment Year: 2013-14; Order dated 28.3.2018]

- On behalf of the assessee, a new argument was developed by drawing attention of the Bench to section 69A of the Act, it was submitted that the AO has applied section 69 which talks of unexplained investment but even if section 69A is considered it talks of unexplained money, bullion and jewellery, etc found not recorded in the books of the assessee. However, in the facts of the present case, no money, bullion, or jewellery, etc have been found or discovered. The addition, it was submitted, is purely on account of surrender of the assessee. It was his submission that it is an admitted fact which has been admitted even by CIT DR that the assessee is in the business of real estate and the assessee admits the fact and manner of earning is evident that it is from real estate. No document relatable to it has been found it has been accepted as business income by the assessee. As nothing has been found linking it to any article or thing inviting attention to the decision of ITAT in the case of Gaurish Steel 43 ITR Trib 414 it was submitted that Kim Pharma's decision has been distinguished by ITAT in the said decision on which heavy reliance was being placed.

SAB Industries Limited v. DCIT [ITA No. 848/Chd./2017; Assessment Year: 2013-14; Order dated 28.3.2018]

- The Tribunal held that the surrender admittedly was made qua the biana received by the assessee allegedly for the five specific properties which had not been reflected and recorded in the regular books of accounts of the assessee. The consistent stand of the assessee is that records have been destroyed after the deals were done as would be evident from specific question No. 6 put by the Investigation Wing to the assessee. The transaction as per reply to question no. 5 was also through irregular market brokers whose address had not been retained and records were also not retained. The surrender, admittedly was on account of property transactions. In the face of the material available on record where the surrender is made on account of seized documents and the stated business of the assessee being only real estate business the Tribunal found no good reason to vary the conclusion arrived at by CIT(A). Being satisfied with the consistent explanation offered by the assessee which stood unrebutted and considering the legal position thereon, the departmental ground was dismissed.

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- Facts: The assessee, a company engaged in construction of properties filed its return of income for AY 2005-06 declaring Nil income by setting off brought forward losses and claimed Rs. 1,26,14,888 to be carry forward to the next year. There was a survey action u/s 133A on 24.1.2007. During the course of survey certain incriminating documents indicating cash receipts and cash payments were found and impounded. Survey resulted in disclosing additional income of Rs. 58 lakh for AY 2005-06 and Rs. 73 lakh for AY 2006-07. The assessee offered the same in return of income but in computation it is observed that the assessee had brought forward losses from earlier years and the same were set off against the said additional income in both the years invoking provisions of section 70, 71 and 72 of the Act. In the process, the assessee considered additional income as business income of the assessee and treated it as eligible for set off.

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- The AO disallowed the set off by holding that the additional income offered by the assessee over and above the regular income was treated as unexplained money and the same was taxed as "income from other sources". He held that deemed income was not available for set off against brought forward losses as claimed by the assessee in his revised return of income.

- CIT(A) held that income admitted in the course of survey is assessable as "deemed income" under section 69C of the Act and confirmed the AO's decision in denying the benefit of set off of the brought forward business losses against such deemed income. He held that deemed income offered during survey is not in the nature of income taxable under any head of income and therefore set off of losses is not available. He relied on decisions – (i) Fakir Mohamed Haji Hasan v. CIT 247 ITR 290 (Guj.); (ii) Liberty Plywoods (P.) Ltd. v. ACIT 29 taxmann.com 268 (ITAT Chd.); (iii) ITO v. Dulari Digital Photo Services (P.) Ltd. 53 SOT 210 (ITAT Chd.).

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- Before the Tribunal, the assesse contended that –
- (i) additional income offered by the assesse is part of unexplained income (receipts / expenditure) of the assessee and, all of it, is directly related to the business activities of the assessee. As per assessee, additional income constituted business income although the same is earned outside the books of account;
- (ii) on issue of allowing benefit of statutory deductions out of said deemed income / additional income offered during any search and seizure / survey action, reliance was placed on the decision of the Bombay High Court in the case of CIT v. Sheth Developers Pvt. Ltd. [25 taxmann.com 173 (Bom.)];
- (iii) counsel for the assessee demonstrated that the additional income offered during search and survey action constitutes business income;

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- Before the Tribunal, the assesse contended that –

- (iv) for deduction out of business income offered as additional income reliance was placed on decision of Karnataka High Court in the case of CIT v. S. K. Srigiri & Bros. 171 Taxman 264 (Kar. HC).

- (v) reliance was placed on various decisions to demonstrate the above stated legal position and cases where claim of deduction under section 80IB(10) was allowed as well as cases where claim of remuneration under section 40(b) was allowed from additional income were filed. Taking parallel from these decisions it was submitted that since additional income offered is business income, statutory deductions are allowable against the said business income.

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- **HELD**: The Tribunal observed that additional income was offered on the basis of documents impounded during the course of survey.

- (i) the entries available on impounded material suggest the business nexus of the additional income. Therefore, the income in question is derived from the business activities of the assessee although they are outside the books of account of the assessee. Considering the existence of business nexus, the tribunal held that there is no reason why such income be taxed as `income from other sources' when the source for the same is business activity, is already demonstrated by the assessee during the proceedings before assessment / appellate authorities.

- (ii) unaccounted receipts / expenditure constitutes business receipts / expenditure.

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- **HELD**: The Tribunal observed that additional income was offered on the basis of documents impounded during the course of survey.

- (iii) Judgment of Bombay High Court in the case of CIT v. Sheth Developers Pvt. Ltd., while dealing with an assessee in whose case there was search and seizure action disclosed additional income. The Court affirmed that income is required to be taxed as `business income' and also held it to be eligible for grant of deduction under section 80IB. The Court held –

  "Builders receiving undisclosed income in the course of its business, is entitled to benefit of deduction under section 80IB."

- (iv) in principle, granting statutory deductions out of such additional income arising out of business activities is sustainable.

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

(v) the Tribunal examined the decision of Pune Bench in the case of Radhesham Totaram Narayani v. ACIT [ITA No. 1491/Pun/2015; Assessment Year : 2010-11; Order dated 21.3.2018] which decision is relevant for the proposition of allowing of set off of brought forward losses against such additional income offered under section 133A of the Act and found that **barring the additional income by virtue of excess cash, other items relatable to the business activities are found eligible for set off of the brought forward losses against the said business activities / additional income**.

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- (vi) The Judgment in the case of Kim Pharma Pvt. Ltd. (supra) is relevant to the proposition that **the additional income surrendered during survey will not constitute business income in case where the same is not accounted in the books of account and the sources of the said income was not successfully linked to the business activities of the assessee**.

- (vii) The AO erred in taxing unexplained money when the same is actually explained qua the sources of income.

- (viii) Where the assessee discharged the onus of linking the additional income to the business activities of the assessee, the fairness demands that such additional income should be considered not as "deemed income" taxable under the head `Income from Other Sources'.

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- In Radhesham Totaram Narayani v. ACIT [ITA No. 1491/Pun/2015; Assessment Year : 2010-11; Order dated 21.3.2018] the Pune Bench was dealing with a case where survey action u/s 133A of the Act resulted in the discovery of the said excess cash and there was no dispute about it. Further, it was also undisputed that **the assessee failed to explain the manner of earning the said excess cash linked to unaccounted sales of ITC products**. **Assessee failed to explain the modus-operandi of earning such excess cash from business sources of any kind**. Therefore, the Tribunal was of the opinion that it is reasonable to presume that assessee failed to discharge the onus on this aspect of establishing the business nature of excess cash. The Tribunal observed that this view of the Bench is fortified by the legal proposition laid down by the Hon'ble Punjab & Haryana High Court in the case of Kim Pharma Pvt. Ltd. v. CIT [35 taxmann.com 456 (P & H HC)]. The said judgment, according to the Pune Bench, is relevant for the following ratio:

Construction Portal Pvt. Ltd. v. ITO [ITA Nos. 1607 & 1608/Pun/2014; Assessment Years: 2005-06 & 2006-07; Order dated 6.6.2018]

- "where amount surrendered during survey was not reflected in the books of account and no source from where it was derived was declared by the assessee, it was assessable as deemed income of the assessee u/s 69A and not as business income."
- Pune Bench has also observed that the Agra Bench of the Tribunal in the case of **Satish Kumar Goyal v. JCIT 70 taxmann.com 382 (Agra-Trib.)** has also laid down similar legal proposition. The conclusion of the Tribunal reads as under –
  - "Where **assessee received certain amount in cash**, since he **failed to explain nature and source of said receipt**, same was to be **treated as income under section 68** assessable under the head "**income from other sources** and as per provisions of section 71, business losses of assessee could be set of against said income."

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- **Facts**: On 15.6.2012 a survey action under section 133A of the Act was conducted in the premises of the assessee. During survey, Sunil Jain, Director of the assessee admitted undisclosed income of Rs. 4,41,88,232 in the hands of DTHRI Hospital for AY 2013-14 on account of out of books income from health camp receipts and expenses.
- The assessee filed its return of income declaring total income of Rs. 1,91,64,270.
- During the course of assessment proceedings, the AO observed that the assessee declared income of Rs. 2,11,29,807 against Rs. 4,41,88,232 declared in the course of survey. The reason for offering lower amount for taxation was that there was an arithmetical error in admitting the income against particular sheet on the basis of which undisclosed income was admitted.

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- There were three figures of which one was income from health camp of Rs. 3,26,00,730 and remaining two figures at Rs. 65,19,150 (expenses incurred in organizing health camp) and Rs. 50,68,352 (material used for organizing health camp) appearing in loose paper related to expenses incurred in organizing health camp. It was submitted that during survey, inadvertently, while admitting undisclosed income the two figures representing expenditure were added to the gross receipt from health camp which were required to be deducted from gross receipt. The actual income from undisclosed health camp was only Rs. 2,11,29,807 but assessee wrongly admitted it as Rs. 4,41,88,232.

- Assessee wrote a letter dated 12.3.2013 to the AO a copy of which was marked to JCIT and CIT wherein above facts were stated and it was mentioned that return of income was filed accordingly taking correct income from the papers found during the course of survey. It was explained that the mistake happened as Director, Shri Sunil Jain, was a doctor by profession and was not conversant with technical implication of income and accepted the entire amount noted in the papers as undisclosed income as these were not recorded in the books of account.

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- AO rejected the contentions on the following grounds –
- (i) Sunil Jain was educated enough to understand that if expenses are related to the same receipts these are to be deducted to arrive at income subject to tax; and it cannot be said that there was any mistake / error in admitting the undisclosed income;
- (ii) the statement was given under oath and had evidentiary value; and
- (iii) letter clarifying mistake was filed after 8 months and therefore was only an after thought as it was not supported by any documentary evidences.
- (iv) even otherwise expenses were unexplained expenses and hence were deemed to be income under Section 69C of the Act and not eligible for deduction in view of Section 115BBE of the Act;
- (v) no nexus has been established by the appellant between the income and expenses and no documentary evidence was filed that the expenditure was incurred as Health Camp expenses;

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- (vi) the AO also doubted not only the expenditure incurred in the absence of documentary evidences to establish that such expenses were actually incurred at the time of organizing health camps, but also doubted the fact of holding the health check-up camps by observing that no evidences were filed to show that permission was taken for holding such large camps.

- The AO rejected the claim of deduction of expenses and treated the entire receipt and expenses as undisclosed income of the assessee. He gave only benefit of deduction of web-site advertisement expenditure of Rs. 53,086 and made addition for remaining income admitted during the survey as against income declared in income-tax return at Rs. 2,30,53,039. He did not even allow set off of expenses claimed at Rs. 19,17,923 against income disclosed on account of survey proceedings observing that such set off is not allowed under Section 115BBE. He assessed income at Rs. 4,41,88,232.

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- CIT(A) gave relief to the assessee.
- The Tribunal noted the following undisputed facts –
- (i) the addition is a result of survey under section 133A and basis of addition is the material found at the time of survey which was identified. The entire addition has been made on the basis of these papers and there is no independent information or enquiry to support or disprove the contents for the papers found except the Statement of Dr. Sunil Jain, Director of the appellant company. Scrutiny of papers show that on the one hand the papers record the receipts which are not accounted and on the other hand the papers record the details of expenditure relatable to the receipts as recorded in the papers found. The unrecorded receipts are shown to be from holding of Health check-up camps and unaccounted expenditure is shown to be on holding of such camps;

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- Before the tribunal, it was argued that since both receipts and expenses are noted in the papers found only the net income should have been taken as undisclosed income and statement given at the time of survey was thus erroneous as it did not take into consideration this principle that Dr. Sunil Jain was a medical professional unaware of the technicality. Reliance was placed on the decision of Pune Bench of Tribunal in the case of **Chander Mohan Mehta v. ACIT 71 ITD 245 (Pune)** for the proposition that the contents of the loose papers are to be accepted in toto.
- The Tribunal observed that –
- (i) the entire case revolves around the papers found at the time of survey and the statement of Dr. Sunil Jain.
- (ii) There is no other material which has been relied upon.

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- (iii) The papers clearly show that the unaccounted receipts were from holding of Health Check-up camps and expenditure was on organizing these camps which included reimbursement of expenses, TA / DA and payment of salary / fee to field staff / doctors, medicines to be provided to patients, tents and local publicity expense and other miscellaneous expenses.
- (iv) It is well settled legal principle that the documents have to be considered in entirely and not choosing only the parts which were beneficial to he revenue.
- (v) Even otherwise it is only the income which has to be taxed and not the gross receipts;
- (vi) The statement has evidentiary value no doubt and it is an established legal principle that an admission is the best evidence that an opposing party can rely upon and though not conclusive, is decisive of the matter unless successfully withdrawn or proved erroneous.

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- (vi) The AO was justified in holding that the statement was binding however, it is to be noted that the statement made during the course of survey was modified by way of letter filed by the appellant explaining the mistake made at the time of recording of statement in the light of the papers found at the time of survey. The statement was to be read with the papers found at the time of survey. It is not in dispute that there was any other independent evidences to show that the gross receipts were more or less than Rs. 3,26,00,730 or to show that expenses were not incurred from the gross receipts.
- (vil) Supreme Court has in the case of **CIT v. Durga Prasad More 82 ITR 540 (SC)** observed that –

  "In a case where party relied on self-serving recitals in documents, it was for the party to establish the truth of these recitals – the taxing authorities were entitled to look into the surrounding circumstances and find out the realtiy of such recitals."

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- (viii) No other surrounding circumstances or material is brought on record to disprove the contention of the appellant as to the actual quantum of undisclosed receipts.
- (ix) Kerala High Court has in the case of **CIT v. P D Abraham [349 ITR 442 (Ker.)]** has given the following finding –
  - "When the department relies on the seized record for estimating undisclosed income there is no reason why the expenditure stated therein should be disbelieved merely because there is no written agreement and that payments were not made through cheques or demand drafts."
- This also leads to the inference that undisclosed income has to be arrived at by considering the seized documents in toto and there can be no pick and choose in the matter.

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- (x) Jurisdictional High Court has in the case of **Manmohan Sadani v. CIT [304 ITR 52)** and **CIT v. Balchand Ajit Kumar 263 ITR 610** has held that the total sale cannot be regarded as profit and the sale proceeds cannot be added as income.
- In view of the above, the AO was not justified in holding the entire receipts were income of the appellant.
- The Tribunal, in connection with taxability of expenses under Section 69C of the Act observed that –
- (i) As regards the question as to whether the assessee has failed to offer any explanation regarding the source of the expenses, the Tribunal observed that it cannot be said that the assessee has failed to offer any explanation regarding the source of expenses since both the receipts and expense are not recorded in the books of accounts but these are recorded in the papers found at the time of survey. The explanation regarding the source of expenses has been given by the appellant as being from the receipts recorded in the papers found at the time of survey.

DCIT v. Dthri Health Care [ITA No. 604/Ind/2017; AY 2013-14; Date of Order : 2.1.2019]

- (ii) The objections of the AO are in the realm of presumptions and conjectures
- (iii) If the view of the AO is to be subscribed to then there is no basis to even hold that the appellant had any income. If there were no health check-up camps there was no income as there was no other evidence on record other than the papers found at the time of survey which categorically recorded the receipts from holding of health check-up camps and side by side the expenses on the check-up camps so organized which has been duly admitted in the statement of Dr. Sunil Jain
- The Tribunal, considering the above and also various judicial precedents, held that it cannot be upheld that the expenditure recorded in the papers found at the time of survey was unexplained as to the source of such expenditure and was covered within the scope of Section 69C of the Act.

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- The Tribunal observed that the AO had invoked the provisions of Section 115BBE of the Act to reject the claim of the appellant for set off of expenditure against the gross receipts. Having noted the provisions of Section 115BBE, the Tribunal held that –
- (i) The provisions of Section 115BBE are attracted only if any additions are made to the total income under Sections 68 to 69D of the Act;
- (ii) On facts, the impugned income has been assessed on the basis of certain papers found during the course of survey;
- (iii) The gross receipts and the expenses noted in the papers have been added as income and both the receipts and the income are admitted to be not recorded in the books of accounts;
- (iv) Gross receipts cannot be considered as income and the income has to be arrived at by considering the details recorded in the papers found in toto. Therefore, the expenses recorded in the papers are to be first deducted from the gross receipts to arrive at the income;

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- (v)Therefore, the deeming provisions of various sections cited above are therefore, not attracted.
- (vI) Provisions of section 69C of the Act are not applicable to the facts of the case;
- (vii) AO was not justified in disallowing the claim of set off of expenses under section 15BBE of the Act.
- As regards appeal of the Department on the ground that CIT(A) erred in allowing the deduction of Rs. 19,70,923 towards expenses recorded in the books of account for organizing health check-up camps. The Tribunal relied on its findings while deciding the appeal of the assessee and also observed that these expenses are recorded in the books of accounts and mainly consist of salary to Dr. Sunil Jain who has paid tax at maximum rate. Also, during the year under consideration the appellant had not carried out any other activity other than organizing health check-up camps in which professional services were rendered by Dr. Sunil Jain for which services he was paid salary. The expenditure was thus held to be directly related to income admitted from [illegible] camps and set of such expenses allowed by CIT(A) was upheld.

Propositions from precedents

- Once Tribunal had come to the conclusion that additional income was from business, remuneration paid to partners had to be deducted while considering profit and loss. – **CIT v. S. K. Srigir & Bros. [(2008) 171 Taxman 264 (Kar.)]**

- Since, income declared in survey falls under one of the heads of income, current year losses can be set off against such undisclosed income **– CIT v. Shilpa Dyeing & Printing Mills (P.) Ltd. [(2013) 39 taxmann.com 3 (Gujarat)]**

- Where amount surrendered during survey was not reflected in books of account and no source from where it was derived was declared by assessee, it was assessable as deemed income of assessee under Section 69A and not business income **– Kim Pharma (P.) Ltd. v. CIT [(2013) 35 taxmann.com 456 (Punjab & Haryana)]**

Propositions from precedents

- The Chandigarh bench of the Tribunal in the case of **Gaurish Steels (P.) Ltd. v. ACIT [(2017) 82 taxmann.com 337 (Chandigarh – Trib.)]** considered the fact that AO, has nowhere in the assessment order been able to bring on record the fact that the income surrendered during the course of survey was not out of the business of the assessee. Also, nowhere has he objected to the heads under which the assessee had surrendered these amounts, i.e. cash, construction of building, discrepancy in stock and discrepancy in advances and receivable. Further, even the survey team has not found any source of income except business income. The Tribunal, following the decision of the jurisdictional High Court, in the case of Kim Pharma (P.) Ltd. held that it can safely infer that apart from cash all other income surrendered may be brought to tax under the head `business income' while the cash has to be taxed under the head deemed income under S. 69A.

Propositions from precedents

- SC has in the case of **Bengal Immunity Co. Ltd. v. State of Bihar [(1955) 2 SCR 603 (SC)]** observed that legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field. In the present case, the fiction is limited to the cases provided in the Sections 69B / 69C and cannot be extended further to hold that income is to be assessed under the head `Other Sources' or `Profits and Gains of Business or Profession'. Consequently, the assessee's claim of set off of current and brought forward depreciation against such income is not tenable – **Gujarat Infrapipes Pvt. Ltd. v. ITO [ITA No. 1036/Ahd./2007; Assessment Year: 2003-04; Order dated 18.12.2009]**

- Even where based on assurance of survey party that return of income would not be taken up for scrutiny, petitioner disclosed additional income, AO was still empowered to select it for scrutiny assessment – **Ajay v. DCIT [(2014) 42 taxmann.com 210 (Bombay HC)]**

Propositions from precedents

- Where amount surrendered by assessee was on account of excess / undisclosed amount invested in business of assessee, same was to be assessed under head `income from business and profession' and set off of unabsorbed and current business losses was allowable– **Prashanti Surya Construction Co. P. Ltd. v. DCIT [(2017) 88 taxmann.com 804 (Chandigarh – Trib.)]**

- Statement recorded under Section 133A on oath during survey could not be relied as evidence **– Unique Art Age v. ACIT [(2014) 50 taxmann.com 194 (Jaipur – Trib.)]**

- AO could not make additions to income of assessee-company only on basis of sworn statement of its managing director recorded under Section 131 during course of survey without support of any corroborative evidence **– ITO v. Toms Enterprises [(2019) 103 taxmann.com 289 (Cochin – Trib.)]**

Propositions from precedents

- During survey, books of account were impounded and statements were recorded and consequent to survey, reassessment was initiated without mentioning which part of statement and what material impounded led to escapement of income, reassessment notice was issued without application of mind and, hence, liable to be quashed – **DCIT v. Dr. M. J. Naidu [(2017) 85 taxmann.com 206 (Vishakapatnam – Trib.)]**

- It is not necessary that the surrendered amount is from business income. It could be on account of any other transaction legal or otherwise. Merely because an assessee carries on certain business, it does not necessarily follow that the amounts surrendered by him are on account of its business transactions. There is no presumption that absent anything else an amount surrendered by an assessee is his business income. **It is for the assessee to establish the source of such surrendered amount** – **Pr. CIT v. Khushi Ram and Sons Foods (P.) Ltd. [ITA No. 126 of 2015; Assessment Year: 2010-11; Order dated 21.7.2016; Punj. & Har.**

Propositions from precedents

- Where pursuant to survey proceedings, assessee-company filed revised return declaring additional income in form of unexplained investment in purchase of agricultural land, penalty order passed under Section 271(1)(c) in respect of said addition was to be confirmed – **Grass Field Farms & Resorts (P.) Ltd. v. DCIT [(2016) 70 taxmann.com 176 (Jaipur – Trib.)(TM)]**
- Levy of penalty u/s 271(1)(c) was justified where it was only when faced with statements as also unrecorded / recorded documents found at business premises of assessee during survey, that assessee came with a surrender and even in penalty proceedings it did not establish its bonafides - **Grass Field Farms & Resorts (P.) Ltd. v. DCIT [(2017) 79 taxmann.com 426 (Raj. HC)]**
- Amendment made to Section 115BBE w.e.f. 1.4.2017 denying set off of losses is prospectively applicable; assessee could claim set off of losses, both current and brought forward, against its business income as well as deemed income under Sections 68 to 69C in assessment years prior to 1.4.2017 – **Famina Knit Fabs v. ACIT [(2019) 104 taxmann.com 306 (Chandigarh – Trib.)]**

Propositions relevant to argue cases where capital gains arising on transfer of penny stocks is taxed u/s 68

Burden of Proof / Rules of Evidence

- The onus to prove that apparent is not real is on the party who claims it to be so**. CIT (Central) v. Daulat Ram Rawatmull [87 ITR 349 (SC)]**

- The burden of providing that income was subject to tax is on the revenue but to show that the transaction was genuine, burden was primarily on the assessee - **Som Nath Maini Vs. CIT (306 ITR 414)(P & H HC)**

- The burden of proving a transaction to be bogus has to be strictly discharged by adducing legal evidences, which would directly prove the fact of bogusness or establish circumstance unerringly and reasonably raising an inference to that effect. **- Puja Gupta v. ITO [ITA No. 6890/Del./2018; AY : 2014-15; Order dated : 2.4.2019]**

Burden of Proof / Rules of Evidence

- It is well settled that any document relied upon by the AO for making an addition has to be supplied to the assessee and an opportunity should be provided to the assessee to rebut the same. In this case, general statements have been made by the AO and the addition is made based on generalizations. The assessee has not been confronted with any of the evidence collected in the investigation done by the DIT(Inv.) Kolkata. Evidence collected from third parties cannot be used against the assessee without giving a copy of the same to the assessee and thereafter giving him an opportunity to rebut the same – **Prakash Chand Bhutoria v. ITO [ITA No. 2394/Kol./2017; A.Y.: 2014-15; Order dated 27.6.2018 (Kol. Trib)]**

Absence of broker-client agreement not fatal

- As regards the point raised by the AO that there was absence of broker-client agreement, the Tribunal accepted the submission of the assessee that the genuineness of the transaction was already proved by the contract notes for sale and purchase, the bank statement of the broker, the Demat Account showing transfer in and out of shares, as also abstract transactions furnished by the CSE – CIT v. **Himan M. Vakil [(2014) 41 taxman.com 425 (Guj. HC)]**

Suspicion howsoever strong cannot take the place of evidence

- No addition can be made on the basis of surmises, suspicion and conjectures - **Omar Salav Mohamed Sait [(1959) 37 ITR 151 (SC)]**
- Suspicion howsoever strong cannot take the place of evidence - **Umacharan Shah & Bros. v. CIT [37 ITR 271 (SC)]**
- Assessment could not be based on background of suspicion and in absence of any evidence to support the same – **Lalchand Bhagat Ambica Ram v. CIT [(1959) 37 ITR 288 (SC)]**
- The transaction fully supported by documentary evidences could not be brushed aside on suspicion and surmises. It was held that the transactions of share are genuine. Therefore, we do not find that there is any reason to hold that there is any substantial question of law involved in this matter. **Appeal being ITA No. 620 of 2008 is dismissed** –

Claim cannot be disregarded on the basis of presumption and surmises

- Effect of a transaction which is supported by documentary evidence cannot be brushed aside on suspicion or probabilities without pointing out any defect therein – **Puja Gupta v. ITO [ITA No. 6890/Del./2018; AY : 2014-15; Order dated : 2.4.2019]**
- The claim of the assessee cannot be rejected based on mere conjectures unverified by evidence under the pretentious garb of preponderance of human probabilities and theory of human behavior by the department **– Navneet Agarwal v. ITO [ITA No. 2281/Kol./2017; Assessment Year : 2014-15 and Puja Gupta v. ITO [ITA No. 6890/Del./2018; AY : 2014-15; Order dated : 2.4.2019]**

Claim cannot be disregarded on the basis of presumption and surmises

- In the light of the decisions of the Hon'ble Supreme Court in the case of Andaman Timber Industries (supra) and considering the facts in totality, **the claim of the assessee cannot be denied on the basis of presumption and surmises in respect of penny stock by disregarding the direct evidences on record** relating to the sale/purchase transactions in shares supported by broker's contract notes, confirmation of receipt of sale proceeds through regular banking channels and the demat account – **Smt. Sunita Jain v. ITO [ITA Nos. 501 & 502/Ahd/2016; AY 2008-09; Order dated 9.3.2017]**

Cogent evidence required to reject a transaction

- True it is that several suspicious circumstances were indicated by the AO but then, the findings as ultimately recorded by him had been based more on presumptions rather than on cogent proof. As found concurrently by the CIT(A) and the ITAT, the AO had failed to show that the material documents placed on record by the assessee like broker's note, contract note, relevant extract of cash book, copies of share certificate, demat statement, etc were false, fabricated or fictitious. The appellate authorities have rightly observed that the facts as noticed by the AO like the notice under Section 136 to the company having been returned unserved, delayed payment to brokers, and dematerialization of shares just before the sale would lead to suspicion and call for detailed examination and verification but then, for these facts alone, the transaction could not be rejected altogether, particularly in the absence of any cogent evidence – **CIT v. Smt. Sumitra Devi – [ITA No. 54/2012 (Raj. HC)]**

Material to be brought on record by AO

- Revenue has brought no material on record to show that the assessee actually indulged in some manipulation and paid cash in lieu of cheque received against sale of shares **- Puja Gupta v. ITO [ITA No. 6890/Del./2018; AY : 2014-15; Order dated : 2.4.2019]**

- Modus operandi, generalization, preponderance of human probabilities cannot be the only basis for rejecting the claim of the assessee. Unless specific evidence is brought on record to controvert the validity and correctness of the documentary evidences produced, the same cannot be rejected **- Puja Gupta v. ITO [ITA No. 6890/Del./2018; AY : 2014-15; Order dated : 2.4.2019]**

Material to be brought on record by AO

- Even on facts of the case, the orders of the authorities below cannot be accepted. There is no denying that consideration was paid when the shares were purchased. The shares were thereafter sent to the company for the transfer of name. The company transferred the shares in the name of the assessee. **There is nothing on record which could suggest that the shares were never transferred in the name of the assessee. There is also nothing on record to suggest that the shares were never with the assessee.** On the contrary, the shares were thereafter transferred to demat account. The demat account was in the name of the assessee, from where the shares were sold. In our understanding of the facts, if the shares were of some fictitious company which was not listed in the Bombay Stock Exchange/National Stock Exchange, the shares could never have been transferred to demat account - **Smt. Sunita Jain v. ITO [ITA Nos. 501 & 502/Ahd/2016; AY 2008-09; Order dated 9.3.2017]**

Material to be brought on record by AO

- Merely on the basis of preponderance of human probabilities, the addition cannot be made in the hands of the assessee without disapproving the various documents filed by the assessee **– Sanjeev Jain v. ITO [ITA No. 3381/Del./2017; AY: 2013-14; Order dated 15.1.21019]**

- It is not possible to state that the view adopted by the Tribunal is, in any manner, unreasonable or perverse. Besides, the learned counsel for the appellant (in this case revenue was the appellant) is not in a position to show that the Tribunal has placed reliance upon any irrelevant material or that any relevant material has been ignored, nor is he able to point out any material to the contrary so as to dislodge the concurrent findings of fact recorded by the Tribunal – **CIT v. Maheshchandra G. Vakil [(2013) 40 taxmann.com 326 (Guj.)]**

Increase in price without financial performance

- Issue of substantial number of shares by way of preferential allotment and movement in price of shares of the company without backing of financial performance of the company are, at best, a pointer or cause for a careful scrutiny of the transactions by the AO but from this it cannot be concluded that the transactions were sham. It is a matter of common knowledge that prices of shares in the share market depends upon innumerable factors and perception of the investor and not alone on the financial performance - **Puja Gupta v. ITO [ITA No. 6890/Del./2018; AY : 2014-15; Order dated : 2.4.2019]**

Increase in price without financial performance

- If the shares were already shown in earlier balance sheet submitted by the assesse and the revenue does not dispute that, in that situation, the Court observed that **How the revenue condemned the transaction even on the ground of steep rise in the shares**. If within a period of one year, the share price has risen from Rs. 5 to Rs. 55 and from Rs. 9 to Rs. 160 and one person was holding the shares much prior to that start of rise of the share, then **how it can be inferred that such person has entered into sham transaction few years ago and prepared for getting the benefit after few years when the share will start rising steeply - CIT v. Arun Kumar Agarwal (HUF) & Ors. [Appeal No. 13 of 2011; Order dated 13.7.2012; since reported in (2013) DTR 219 (Jharkhand)]**

Increase in price without financial performance

- The AO relied on sharp increase of 31000% of the value of shares over the period of 2 years. Though this is highly suspicious, it cannot take the place of evidence. The Hon'ble Supreme Court has stated that suspicion however strong cannot be the basis for making an addition. The evidence produced by the assessee listed above proves his case and the AO could not controvert the same by brigning on record any evidence. The evidence said to have been collected by the DIT (Inv.), Kolkata and the report is not produced before this Bench - **Prakash Chand Bhutoria v. ITO [ITA No. 2394/Kol./2017; A.Y.: 2014-15; Order dated 27.6.2018 (Kol. Trib)]**
- It is not the case that the shares which were sold on the date mentioned in the contract note were not traded price on that particular date. The AO doubted the transactions due to high rise in the stock price but for that**, assessee could not be blamed and there was no evidence to prove that the assessee or anyone on his behalf was manipulating the stock prices - ITO v. Shaleen Khemani [ITA No. 1945/Kol./2014; Order dated 18.10.2017]**

Tainted broker / Manipulation by broker / intermediary proved

- Simply because in the shares of M/s _____ some manipulation was made by few persons it cannot be concluded that all the transactions which took place in the shares of the said company were manipulated and all the persons who transacted in the shares of the said company indulged in sham transaction - **Puja Gupta v. ITO [ITA No. 6890/Del./2018; AY : 2014-15; Order dated : 2.4.2019]**

- Fact of tainted broker may be relevant for suspicion but it alone necessarily does not lead to conclusion of all transactions of that broker as tainted. In such circumstances, further enquiry is needed and that is for individual case. Such further enquiry was not conducted in that case - **CIT v. Arun Kumar Agarwal (HUF) & Ors. [Appeal No. 13 of 2011; Order dated 13.7.2012; since reported in (2013) DTR 219 (Jharkhand)]**

Tainted broker / Manipulation by broker / intermediary proved

- Even in a case where the share broker was found involved in unfair trade practice and was involved in lowering and rising of the share price, and any person, who himself is not involved in that type of transaction, if purchased the share from that broker innocently and bonafidely and if he shows his bonafide in transaction by showing relevant material, facts and circumstances and documents, then merely on the basis of the reason that share broker was involved in dealing in the share of a particular company in collusion with others or in the manner of unfair trade practices against the norms of SEBI and Stock Exchange, then merely because of that fact a person who bonafidely entered into share transactions cannot be held to be a sham transaction **– CIT v. Arun Kumar Agarwal (HUF) & Ors. [Appeal No. 13 of 2011; Order dated 13.7.2012; since reported in (2013) DTR 219 (Jharkhand)]**

Tainted broker / Manipulation by broker / intermediary proved

- Shri Mukesh Choksi may have been providing accommodation entries to various persons but so far as the facts of the case in hand suggest that the transactions were genuine and therefore, no adverse inference should be drawn. **Ahmedabad Bench in ITA Nos. 501 & 502/Ahd/2016**

Additional factors

- The assessee pleaded that substantial shares were still retained by the assessee as all shares were not sold which shows bonafide of assessee that she entered into genuine transaction. Thus, principle of preponderance of probabilities will not apply to the case **- Puja Gupta v. ITO [ITA No. 6890/Del./2018; AY : 2014-15; Order dated : 2.4.2019]**

Additional Factors

- The Stock Exchange and SEBI are the authorities appointed by the Government of India to ensure that there is no stock rigging or manipulation. The AO has not brought any evidence on record to show that these agencies have alleged any stock manipulation against the assessee and or the brokers and or the company. In absence of any evidence it cannot be said that merely because the stock price moved sharply, the assessee was to be blamed for bogus transactions. It can also be seen that in this case the shares were held by the Donors from 2003 and sold in 2010 thus there was a holding period of 7 years as per Section 49 of the Act and it cannot be said that the assessee and the Donors were making such plans for the last 7 years to rig the stock price to generate bogus capital gains that too without any evidences whatsoever - **ITO v. Shaleen Khemani [ITA No. 1945/Kol./2014; Order dated 18.10.2017]**

Frame your Grounds of Appeal carefully

- The assessee has not raised any legal ground and argued only on merit for which assessee has failed to substantiate his claim before the lower revenue authorities as well as before this Bench – **Udit Kalra v. ITO [ITA No. 6717/Del/2017; AY : 2014-15; Order dated 8.1.2019 – Delhi Trib.]**

Propositions from Judicial Precedents

- The Assessing Officer was to apply the test of human probabilities for deciding genuineness or otherwise of a particular transaction. Mere leading of the evidence that the transaction was genuine, could not be conclusive. It was further held that genuineness of the transaction could be rejected in case the assessee led evidence which was not trustworthy and the department did not lead any evidence on such an issue. Similar view was taken by the Hon'ble Punjab and Haryana High Court in the case of ACIT Vs. Balbir Chand Mani (111 TTJ 160) - **Som Nath Maini Vs. CIT (306 ITR 414)(P & H HC)**

Off market transactions not a ground to treat transactions as sham transactions

- The fact that the assessees in the group have purchased and sold shares of similar companies through the same broker cannot be a ground to hold that the transactions are sham and bogus, especially when documentary evidence was produced to establish the genuineness of the claim. From the documents produced, it is seen that the shares in question were in fact purchased by the assessees on the respective dates and the company has confirmed to have handed over the shares purchased by the assessees. Similarly, the sale of the shares to the respective buyers is also established by producing documentary evidence. It is true that some of the transactions were off-market transactions. However, the purchase and sale price of the shares declared by the assessees were in conformity with the market rates prevailing on the respective dates as is seen from the documents furnished by the assessees. Therefore, **the fact that some of the transactions were off-market transactions cannot be a ground to treat the transactions as sham transacti**ons. COMMISSIONER OF INCOME TAX vs. SMT. JAMNADEVI AGRAWAL & ORS. HIGH COURT OF BOMBAY : NAGPUR BENCH dated 23rd September, 2010 reported in (2010) 236 CTR (Bom) 32 : (2010) 328 ITR 656 :

Off market transactions now unlawful

- We find that the issue is covered by the decision of the Tribunal in the case of Mukesh R.Marolia wherein it has been held that off market transaction is not an unlawful activity and there is no relevance in seeking details of share transaction from stock exchange when the sale was not on stock exchange and relying upon it for making addition – **ACIT v. Ravindrakumar Toshiwal [ITA No. 5302/Mum/2008 (Mum.-Trib.)]**

Sanjay Bimalchand Jain distinguished by Raipur Bench of Tribunal

- Raipur Bench of the Tribunal has in the case of DCIT v. Rakesh Saraogi & Sons (HUF) [Order dated 8.12.2018] has distinguished the decision of the Bombay High Court in the case of Sanjay Bimalchand Jain as follows–
  - We find that the facts are totaling different from the facts of the case in hand. Firstly, in that case, the purchases were made by the assessee in cash for acquisition of shares of companies and the purchase of shares of the companies was done through the broker and the address of the broker was incidentally the address of the company. The profit earned by the assessee was shown as capital gains which was not accepted by the A.O. and the gains were treated as business profit of the assessee by treating the sales of the shares within the ambit of adventure in nature of trade. Thus, it can be seen that in the decision relied upon by the ld. DR. The dispute was whether the profit earned on sale of shares was capital gains or business profit.

Where profit was declared by the assessee under presumptive taxation as provided u/s 44AD, AO could not make separate addition by invoking S. 69C

Where profit was declared by the assessee under presumptive taxation asprovided u/s 44AD, AO could not make separate addition by invoking S. 69C

- The Chandigarh Bench of the Tribunal in the case of **Nand Lal Popli [(2016) 71 taxmann.com 246 (Chandigarh – Trib.)]** was dealing the case of an assessee who was a civil contractor and declared its profits (Rs. 3,02,050) under S. 44AD @ 8% of gross receipts (Rs. 37,75,444).
- The AO on the basis of these figures inferred that the assessee has incurred expenses of Rs. 34,73,394 (Rs. 3775444 – 302050). However, he observed that it is contrary to the expenses shown in cash flow statement of Rs. 18,49,264. The assessee submitted that an amount of Rs. 16,24,130 was paid from bank account on various dates which was not reflected in cash flow statement.
- Since no documentary evidence was filed to prove that these payments were towards contract work, the AO made addition of Rs. 32,24,130 (Rs. 34,73,394 – Rs.2,49,264)
- CIT(A) dismissed the appeal filed by the assessee. Before the Tribunal the assessee contended that having taxed on presumptive basis, the AO was not justified in asking

Where profit was declared by the assessee under presumptive taxation asprovided u/s 44AD, AO could not make separate addition by invoking S. 69C

- the assessee to substantiate the expenditure incurred by him.
- The Tribunal held as follows -
- 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]

Where profit was declared by the assessee under presumptive taxation asprovided u/s 44AD, AO could not make separate addition by invoking S. 69C

- 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]
- Further, on the reading of the substantive part of the provision, it is quite clear that an **assessee availing the benefit of such presumptive taxation can claim to have earned income at the rate of 8 per cent or above of the gross receipts**. In that case, the provisions of sub-section (5) of the said Section will be applicable to it. [Para 12]

Where profit was declared by the assessee under presumptive taxation asprovided u/s 44AD, AO could not make separate addition by invoking S. 69C

- 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]

Where profit was declared by the assessee under presumptive taxation asprovided u/s 44AD, AO could not make separate addition by invoking S. 69C

- 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]

Where profit was declared by the assessee under presumptive taxation asprovided u/s 44AD, AO could not make separate addition by invoking S. 69C

- 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.

Where profit was declared by the assessee under presumptive taxation asprovided u/s 44AD, AO could not make separate addition by invoking S. 69C

- 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]

Please both – the Deity (the Act) and the Priest (AO)

- The Hon'ble Bombay High Court in the case of **Group M. Media India Pvt. Ltd. v. Union of India & Others [(Bom. HC) WP No. 2067 of 2016; A.Y. : 2015-16; Order dated 15.10.2016]** was dealing with the case where the assessee had filed return on 29th November, 2015 yet the AO, without reason, had not processed the refund or taken a decision to grant or not to grant a refund under Section 143(1D) of the Act. The Court observed as under –
  - "This attitude on the part of the Assessing Officer leaves us with a feeling (not based on any evidence) that the Officers of the Revenue seem to believe that it is not enough for the assessee to please the deity (Income Tax Act) but the assessee must also please the priest (Income-tax Officer) before getting what is due to him under the Act. The Officers of the State must ensure that their conduct does not give rise to the above feeling even remotely."

Section 271AAB(1A)

Comparison of Sections 271AAA, 271AAB(1) and 271AAB(1A)

	Section		
Conditions & Applicability	271AAA	271AAB(1)	271AAB(1A)
Applicable to search initiated under section 132	between 1.6.2007 to 30.6.2012	between 1.7.2012 to 14.12.2016	on or after 15.12.2016
Penalty levied at the rate of	10% of undisclosed income of specified previous year subject to immunity provision	Minimum 10% and maximum 90% [maximum 60% w.e.f. 1.4.2017] of undisclosed income of specified previous year	Minimum 30% and maximum 60% of undisclosed income of specified previous year
Immunity from penalty provided	Fully	Partially	Partially

Conditions for immunity / rate of penalty under Sections 271AAA, 271AAB(1) and 271AAB(1A)

	Section		
Conditions	271AAA	271AAB(1)	271AAB(1A)
(a) In a statement recorded under section 132(4), undisclosed income is admitted, manner of earning specified and substantiates the manner of earning undisclosed income and pays tax together with interest in respect of undisclosed income	100% immunity	Penalty levied at 10% with additional condition of filing return of income on or before due date under section 139(1) declaring such undisclosed income	Penalty levied @ 30% with additional condition of filing return of income on or before due date under section 139(1) declaring such undisclosed income

Conditions for immunity / rate of penalty under Sections 271AAA, 271AAB(1) and 271AAB(1A)

	Section		
Conditions	271AAA	271AAB(1)	271AAB(1A)
(b) If condition of manner of earning undisclosed income and substantiation thereof is not fulfilled then,	No immunity – penalty @ 10% of undisclosed income	Penalty levied @ 20% as against 10% stated in (a) above	Penalty levied @ 60% as against 30% stated in (a) above
(c) If none of the conditions specified in above clauses (a) or (b) fulfilled, then	No immunity – penalty @ 10% of undisclosed income	Penalty levied between 30% and 90% of undisclosed income – upto 31.3.2017 AND 60% from 1.4.2017	Penalty levied at 60% of undisclosed income

Definitions under Sections 271AAA, 271AAB(1) and 271AAB(1A)

	Section		
	271AAA	271AAB(1)	271AAB(1A)
Specified date	Not defined and not applicable since filing return within due date under section 139 not mandatory to get immunity	Return to be filed within due date provided under section 139(1) or date specified in notice under section 153A for filing return, as the case may be	Return to be filed within due date provided under section 139(1) or date specified in notice under section 153A for filing return, as the case may be
Specified previous year means	(i) Previous Year ending before date of search and due date of filing return of income under section 139(1) has not expired before date of search and no return of income is filed till date of search; OR (ii) Year of search		
Undisclosed income	As given in earlier slides – same for all sections		

Text of section 269ST

- **Mode of undertaking transactions.**
- **269ST.** *No person shall receive an amount of two lakh rupees or more—*
  - *(a) in aggregate from a person in a day; or*
  - *(b) in respect of a single transaction; or*
  - *(c) in respect of transactions relating to one event or occasion from a person,*

  Explanations (i)/(ii) of section 269SS read as follows:
- *otherwise than by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account:*
- **Provided** *that the provisions of this section shall not apply to—*
  - *(i) any receipt by—*
    - *(a) Government;*
    - *(b) any banking company, post office savings bank or co-operative bank;*

Text of section 269ST

- *(ii) transactions of the nature referred to in section 269SS;*
- *(iii) such other persons or class of persons or receipts, which the Central Government may, by notification in the Official Gazette, specify.*

- Explanation.—*For the purposes of this section,—*
- *(a) "banking company" shall have the same meaning as assigned to it in clause* (i) *of the* Explanation *to section 269SS;*
- *(b) "co-operative bank" shall have the same meaning as assigned to it in clause* (ii) *of the* Explanation *to section 269SS.*

S. 269ST – Analysis of clauses

- No **person** shall receive an amount of Rs. 2,00,000 or more

Clause	Qua	Irrespective of
(a) in aggregate from a person in a day	No. of persons – 1 No. of days – 1	Number of transactions
(b) in respect of a single transaction,	No. of transactions - 1	Number of persons Number of days
(c) in respect of transactions relating to one event or occasion from a person	No. of persons – 1 No. of event / occasion - 1	Number of days Number of transactions

Restriction on cash transactions …

- The restriction is on the recipient and not on the payer.
- The Notes on Clauses mention that the restriction under section 269ST shall not apply to *"any receipt from sale of agricultural produce by any person being an individual or HUF in whose hands such receipts constitute agricultural income*". No such exception is found in the text of the provision.

How have dictionaries explained `amount'

- **Amount**
- (a) The restriction is on receipt of amount. The term "amount" has been explained as follows:
- "1. Aggregate sum; 2. Quantity; 3. To come up to, resulting; 4. Equalling in effect."
- [*Legal Glossary* published by the Government of India (1992 Edition)]
- (b) "Aggregate sum; quantity; to come up to; resulting; equalling in effect."
- (*College Law DictionarybyDr. Avtar Singh*, 22nd Edn.)
- (c) "The substance, or result of a thing; the total or aggregate sum. Quantity; to come up to, resulting; equalling in effect."
- (*P. Ramanatha Aiyar's The Law Lexicon*, 3rd Edn., 2012)
- (d) "1. The sum, total of two or more quantities or sums; aggregate. 2. the sum of the principal and interest of a loan. 3. quantity; measure a great amount of resistance."
- (*Random House Compact Unabridged Dictionary*, 2nd Edn.)

What does Explanatory Memorandum say?

- Further, the Explanatory Memorandum refers to cash transactions, suggesting that the emphasis is in respect of cash transactions.

- In view of the above, receipt in kind may not be regarded as receipt of amount within the meaning of section 269ST.

Text of section 271DA

- **Penalty for failure to comply with provisions of section 269ST.**
- **271DA.** *(1) If a person receives any sum in contravention of the provisions of section 269ST, he shall be liable to pay, by way of penalty, a sum equal to the amount of such receipt:*
- **Provided** *that no penalty shall be imposable if such person proves that there were good and sufficient reasons for the contravention.*
- *(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner.*

Penalty for failure to comply with provisions of section 269ST [Section 271DA]

- **Penalty for failure to comply with provisions of section 269ST [Section 271DA]**

- Section 271DA provides for levy of penalty. If a person receives any sum in contravention of the provisions of section 269ST, he shall be liable to pay, by way of penalty, a sum equal to the amount of such receipt. However, penalty shall not be imposable if such person proves that there were good and sufficient reasons for the contravention. Penalty under this section shall be imposed by the Joint Commissioner.

Good and sufficient reasons

- **Good and sufficient reasons**
- The words "good and sufficient reasons" only mean "appropriate" or "suitable" or "satisfactory" or "fit" and "enough" or "adequate" reasons for cancelling the registration [*DCST* v. *Imperial Trading Company* (1990) 76 STC 183 (Ker)[1]]. A similar meaning may apply in section 271DA.

- Whether the reason is good and sufficient or not has to be seen from the perspective of the recipient [*Maharaja Shri Devi Singh Ji of Jodhpur* v. *WTO* [1985] 14 ITD 445 (JP. - Trib.)(TM)[2]]. To illustrate, if the payer's cheque has been returned unpaid due to insufficient funds, the recipient may not be inclined to again take a cheque from him and may not want to even wait for a wire transfer or draft from the payer. In such circumstances, if he accepts cash in lieu of his debt, it may be possible to argue that there were good and sufficient reasons for receiving cash.

Reasonable cause v. Good and sufficient reason

- **CIT v. Triumph International Finance (I) Ltd. [2012] 345 ITR 270 (Bom. - HC)**

> *"23. The expression 'reasonable cause' used in Section 273B is not defined under the Act. Unlike the expression 'sufficient cause' used in Section 249(3), 253(5) and 260A(2A) of the Act, the legislature has used the expression 'reasonable cause' in Section 273B of the Act.* ***A cause which is reasonable may not be a sufficient cause. Thus, the expression 'reasonable cause' would have wider connotation than the expression 'sufficient cause'."***

Appeal

- **Appeal**
- Section 253(1)(a) provides for appeal to the Tribunal against order passed by CIT(A). The said section has not been amended to cover an order under section 271DA.
- *Before CIT(A)*
- Section 246A(1)(*q*) provides as follows:
  - "(1) Any assessee or any deductor or any collector aggrieved by any of the following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals) against .....
  - (*q*)... an order imposing a penalty under Chapter XXI"

Appeal …

- Now, section 271DA is an order under Chapter XXI. However, unless the recipient is an assessee, he cannot file an appeal against the penalty order. To illustrate, suppose an agriculturist who is not liable to tax, receives the specified amount in respect of transactions other than those which are exempt. In such a case, can the agriculturist be regarded as an assessee within the meaning of section 246A? According to one view, section 246A does not apply on account of following reasons:
- (a) Section 246 applies to penalty order on a person in his capacity of assessee. Here, the person penalized does not receive the penalty order in his capacity as an assessee. Hence, the order is not appealable.
- (b) If the term "assessee" was to cover any tax payer then, there was no need to add the terms "tax deductor" or "tax collector" in section 246A. Even, a tax deductor or tax collector could be an assessee; but it was necessary to make a special reference to them only because the expression "assessee" did not cover defaults in other capacities such as "tax deductor" or "tax collector".
- (c) If there is no appeal against order by CIT(A), by parity of reasoning, there ought not be an appeal against the penalty order by the AO.

Appeal …

- The other view is that a person who is penalized is an assessee for the purpose of section 271DA:
  - (a) The term 'assessee' has been defined in section 2(7) as "a person by whom any tax or any other sum of money is payable under this Act". The person on whom penalty has been levied under section 271DA is clearly a person by whom a sum of money is payable under the Act. Hence, he is an assessee within the meaning of section 2(7) [Also *see B. Shah Mahmood* v. *Asstt. Commissioner* [1963] 47 ITR 55 (Mys.) where the Court observed that an employer who neglected to deduct the tax payable by his employee may, nevertheless, file an appeal because he is to be deemed an assessee].

Appeal ...

(b) The general principles regarding appeal are as follows:

(i) It is true that there is no inherent right of appeal to any assessee and that it has to be spelt from the words of the Statute, if any, providing for an appeal. But it is an equally well settled proposition of law that, if there is a provision conferring a right of appeal it should be read in a reasonable, practical and liberal manner. [CIT v. Asoka Engineering Co. [1992] 63 Taxman 510 (SC)1].

(ii) The right of appeal is by way of a remedy provided by the statute and should not ordinarily be denied to the assessee unless the law prohibits it. [*Patel & Co.* v. *CIT* [1986] 24 Taxman 203 (Guj.)].

(iii) A statutory provision conferring a right of appeal should, in case of doubt, be liberally construed. [*Durgaprasad Rajaram Adatiya* v. *CIT* [1982] 134 ITR 601 (MP)].

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