Section 115BBE and penalty under S. 271AAC along with principles of applicability of Ss. 68, 69, 69A and 69B

Jagdish T Punjabi **May 4, 2019**

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 whereas for AY 2019-20, the corresponding tax incidence would be @ 78%.

Reasons for amendment of Section 115BBE by Amendment Act

- Prior to the amendment by the Taxation Laws Second 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-pondrant 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 Second 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.

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 in relation to the 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.
- The Tribunal in the case of **Femina Knit Fabs [(2019) 104 taxmann.com 306 (Chd.)]** observed that no contrary decision of the Tribunal or higher judicial authority was brought to notice of the Bench by the Revenue. Therefore, the decisions of the Tribunal will apply.
- 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.

The Explanatory Memorandum introducing the provisos stated as under -

Explanatory Memorandum to Finance Bill, 2012

- **Cash credits under Section 68 of the Act**
- Section 68 of the Act provides that if any sum is found credited in the books of an assessee and such assessee either –
- (i) does not offer any explanation about nature and source of money; or
- (ii) the explanation offered by the assessee is found to be not satisfactory by the Assessing Officer,
- then, such amount can be taxed as income of the assessee.

- The onus of satisfactorily explaining such credits remains on the person in whose books such sum is credited. If such person fails to offer an explanation or the explanation is not found to be satisfactory then the sum is added to the total income of the person. Certain judicial pronouncements have created doubts about the onus of proof and the requirements of this Section, particularly, in cases where the sum which is credited as share capital, share premium etc.

Explanatory Memorandum to Finance Bill, 2012

- Judicial pronouncements, while recognizing that the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company needs to be prevented, have advised a balance to be maintained regarding onus of proof to be placed on the company. The Courts have drawn a distinction and emphasized that in case of private placement of shares the legal regime should be different from that which is followed in case of a company seeking share capital from the public at large.
- In the case of closely held companies, investments are made by known persons. Therefore, a higher onus is required to be placed on such companies besides the general onus to establish identity and credit worthiness of creditor and genuineness of transaction. This additional onus, needs to be placed on such companies to also prove the source of money in the hands of such shareholder or persons making payment towards issue of shares before such sum is accepted as genuine credit. If the company fails to discharge the additional onus, the sum shall be treated as [illegible] company and added to its income.

Explanatory Memorandum to Finance Bill, 2012

- It is, therefore, proposed to amend Section 68 of the Act to provide that the nature and source of any sum credited, as share capital, share premium etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained by the assessee company in the hands of the resident shareholder. However, even in the case of closely held companies, it is proposed that this additional onus of satisfactorily explaining the source in the hands of the shareholder, would not apply if the shareholder is a well regulated entity, i.e. a Venture Capital Fund, Venture Capital Company registered with the Securities Exchange Board of India (SEBI).

- This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the assessment year 2013-14 and subsequent years.
- [Clause 22]

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 …

- The provision 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"

- 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.

- While at first blush it may appear that the rate of 10% is to be applied to tax of 60%. The ratio of the following judicial pronouncements needs to be kept in mind -

Penalty under Section 271AAC …

- The Supreme Court has in the case of CIT v. K. Srinivasan [(**[1972] 83 ITR 346 (SC)]** held that the term 'income-tax' as employed in section 2 of the Finance Act, 1964 includes surcharge and additional surcharge whenever provided.
- Section 115JAA grants tax credit in respect of tax paid on deemed income relating to certain companies provides that "where any amount of tax is paid under sub-section (1) of section 115JA by an assessee being a company for any assessment year, then, credit in respect of tax so paid shall be allowed to him in accordance with the provisions of this section."
- Section 115JAA grants tax credit in respect of tax paid on deemed income relating to certain companies provides that "where any amount of tax is paid under sub-section (1) of section 115JA by an assessee being a company for any assessment year, then, credit in respect of tax so paid shall be allowed to him in accordance with the provisions of this section."

Penalty under Section 271AAC …

- The Calcutta High Court in the case of **Srei Infrastructure Finance Ltd. v. DCIT [(2016) 72 taxmann.com (Calcutta HC)]** was dealing with a question as to whether The assessee had come up in appeal with a question of law that whether on the MAT Credit under section 115JAA brought forward from earlier years could be set off against tax on total income including surcharge and education cess instead of adjusting the same from tax on total income before charging such surcharge and education cess.. The Calcutta High Court held that "both surcharge and cess are part of the income tax though payable in addition to the Income Tax calculated at the rate provided in Section 115JB." The Court also held that "it cannot be contended that surcharge is anything other than income-tax".

Penalty under Section 271AAC …

- Vishakapatnam Bench of the Tribunal in the case of **ITO v. K. Ramabrahmam & Sons (P.) Ltd. [(2004) 88 ITD 48 (Vishakhapatnam Trib.)(SMC)]** has held that when an assessee who was liable to deduct tax under Section 194C of the Act, deducted the amount of tax at the rate mentioned in Section 194C but did not deduct surcharge thereon, the assessee was held liable to pay interest under Section 201(1A)failed to deduct tax benches of the Tribunal have, in the above context, held that the term `tax' in the above context has been held to include surcharge and cess.

- 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 under Sections 271AAB and also Section 271AAC. However, it is strongly arguable that for the same offence penalty cannot be levied twice.***

Broad topics on Section 68 covered in this presentation

- General Propositions
- Is S. 68 a charging provision?
- Meaning of `nature and source'
- Will income surrendered in a survey / search be taxed under Specified Sections and therefore attract rate of tax mentioned in S. 115BBE?
- Propositions from precedents
- In a case where books are rejected and income estimated, can the credits in such books be added u/s 68?
  - Addition u/s 68 possible simultaneous with estimation of profits
  - Where profit is declared under presumptive taxation provided as u/s 44AD, AO cannot not make separate addition by invoking S. 69C
- Observations of Bombay High Court
- Section 68 – Background & Scope
- Section 68 – Analysis
- Is the proviso to Section 68 retrospective?
- Simultaneous application of Section 68 and Section 56(2)(viib)

Broad topics on Section 68 covered in this presentation

- Is onus discharged by filing confirmatory letters / receipt of amount being by account payee cheque / furnishing income-tax file particulars
- Law does not expect impossible on the part of the taxpayer
- If explanation is prima-facie credible the fact that the amount has been received without any security, may be non-interest bearing and may not have been repaid does not justify the disbelief
- S. 68 applies to credits not only in cash but also those in cheque and also liabilities
- Under which head is income taxed u/s 68 to be charged to tax – are deductions available against such income?
- Whether Trust / Educational Institution can claim exemption u/s 10 in respect of income added under S. 68
- In certain cases credits of earlier years also held to be covered by s. 68
- Only credits appearing in books are covered by s. 68 but if books not maintained?
- Is rejection of books a pre-condition for making addition under S. 68
- Can estimated business income and cash credit both be taxed?
- `may' – is the addition mandatory or discretionary?

Broad topics on Section 68 covered in this presentation

- Is s. 68 a charging provision? ⇨
- Is cumulative satisfaction of ICG required? ⇨
- Issue of shares at a premium ⇨
- Whether amounts credited to P & L can be re-characterised as Cash Credit? ⇨
- Cases on loans – when held bonafide and when held as covered by s. 68 ⇨
- Penalty under Section 271AAB ⇨

General Propositions

- Sections 68 to 69D are some of the provisions in the Act meant to curb the all pervading evil of generation and proliferation of black money – **CIT v. Intraven [219 ITR 225]** (s. 69D)
- These Sections are only clarificatory, and an addition can be made even otherwise in respect of income from undisclosed sources – **Yadu v. CIT [126 ITR 48]**
- These Sections are similarly worded, and following general propositions would be applicable to all of them.

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)].***

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

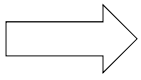
- The assessee is entitled to an opportunity of explaining the transaction before any amount is added to his total income – **Menon v. ITO [96 ITR 148]**; **Unit Const v. JCIT [269 ITR 189]** (s. 69)

- 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.

General Propositions

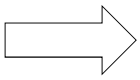
- Further, the fiction created under Sections 68, 69, 69A, 69 B and 69C cannot, by itself, be extended to penalty proceedings to raise a presumption of concealment of income – **CIT v. Baroda Tin [221 ITR 661]**

- 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.)]**



Is s. 68 a charging provision?

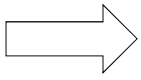
- The effect of Section 68 is that , statutorily, a sum which is found credited in the books of the assessee maintained for any previous year in respect of which either the assessee offers no explanation or the explanation offered by him is not accepted by the AO is to be charged to income-tax as income of the assessee of that previous year. Accordingly, Section 68 has been held to be a charging provision in so far as the particular sum, which is the subject of legislation is concerned – **Bhogilal Virchand v. CIT 127 ITR 591 (Bom.)**; **CIT v. Hari Prasad Chaudhary (1984) 147 ITR 791 (Patna)**.



Meaning of `nature and source'

- "nature and source" – The expression `nature and source' has to be understood as a requirement of identification of the source and its genuineness. The law on the subject prior to 1968 illustrates this position in a number of precedents.

- Supreme Court has in the case of **Kale Khan Mohammad Hanif v. CIT [50 ITR 1 (SC)]** pointed out that the onus on the assessee has to be understood with reference to facts of each case and proper inference drawn from the facts.



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.

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.

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

- In **Femina Knit Fabs v. ACIT [(2019) 104 taxmann.com 306 (Chd.)]** During the survey, a pocket diary was found from the account section of the assessee-company which contained entry of receivables amounting to Rs. 1.25 crore which were not recorded in the regular books of accounts and the assessee subsequently surrendered these stating that these entries were unaccounted sundry receivables being surrendered as income under the head business, to buy peace of mind and subject to no penalty being levied and further that the losses incurred by the assessee in the impugned year will be adjusted against this surrendered income.

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

- The Tribunal held that it is evident that this surrender was on account of debtors / receivables relating to the business of the assessee only. The Revenue had accepted the surrender as such, as being on account of receivables. It follows that the debtors were generated from the sales made by the assessee during the course of carrying on the business of the assessee, which was not recorded in the books of the assessee. Though the said income was not recorded in the books of the assessee but the source stood duly explained by the assessee as being from the business of the assessee. Even otherwise no other source of income of the assessee is there on record either disclosed by the assessee or unearthed by the Revenue. The preponderance of probability therefore is that the debtors were sourced from the business of the assessee. Therefore, there is no question of treating it as deemed income u/s 69, 69A, 69B and 69C of the Act and the same is held to be in the nature of business income of the assessee. Having held so, the same was held to be assessable under the head `Business and Profession' and as stated above, the benefit of set off of losses both current and brought forward was allowable to the assessee in accordance with law.

Deemed income does not constitute part of any of the 5 heads of income

- The Gujrat High Court has in the case of **Fakir Mohmed Haji Hasan v. CIT [(2001) 247 ITR 290 (Guj.)]** held as under –

- The scheme of Ss.69, 69A, 69B, 69C of the Act shows that in cases where the nature and source of investment made by the assessee or the nature and source of acquisition of money, bullion, etc., incurred by the assessee are not explained at all, or not satisfactorily explained, then, the value of such investments and money or the value of articles not recorded in the books of account or the unexplained expenditure may be deemed to be the income of the assessee.

- It follows that the moment a satisfactory explanation is given about such nature and source by the assessee, then the source would stand disclosed and will, therefore, be known and the income would be treated under the appropriate head of income for assessment as per the provisions of the Act.

Deemed income does not constitute part of any of the 5 heads of income

- However, when these provisions apply because no source is disclosed at all on the basis of which the income can be classified under S. 14 of the Act, it would not be possible to classify such deemed income under any of these heads including `other sources' which have to be sources known or explained.

- When the income cannot be so classified under any one of the heads of income under S. 14, it follows that the question of giving any deductions under the provisions which correspond to such heads of income will not arise.

- If it is possible to peg the income under any one of those heads by virtue of a satisfactory explanation being given, then these provisions of Ss. 69, 69A, 69B and 69C will not apply, in which event, the provisions regarding deductions, etc. Applicable to the relevant head of income under which such income falls will automatically be attracted.

Deemed income does not constitute part of any of the 5 heads of income

- The opening words of S. 14 `**save as otherwise provided by this Act**' clearly leave scope for `deemed income' of the nature covered by scheme of Ss. 69, 69A, 69B and 69C being treated separately, because such deemed income is not income from salary, house property, profits and gains of business or profession or capital gains, nor is it income from `other sources' because the provisions of Ss. 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 explained or satisfactorily explained. Therefore, in these cases, the source not being known, such deemed income will not fall even under the head `Income from Other Sources'. Therefore, the corresponding deductions which are applicable to the incomes under any of these various heads, will not be attracted in the case of deemed incomes which are covered under the provisions of Ss. 69, 69A, 69B and 69C of the Act in view of the scheme of those provisions.

Guj HC in Radhe Developers India Ltd. explains the ratio of Fakir Mohmed Haji Hasan

- The decision in the case of Fakir Mohmed Haji Hasan (supra) came up for consideration in the case of **Radhe Developers India Ltd. [(2010) 329 ITR 1 (Guj.)]** The Hon'ble Court, in Radhe Developers India Ltd. (supra) observed as under –
  - The decisions of this Court in the case of Fakir Mohmed Haji Hasan and Krishna Textiles (supra) are neither relevant nor germane to the issue considering the fact that in none of the decisions the Legislative Scheme emanating from conjoint reading of provisions of Sections 14 and 56 of the Act have been considered. The Apex Court in the case of **D. P. Sandhu Bros. Chembur P. Ltd. (supra)** has dealt with this very issue while deciding the treatment to be given to a transaction of surrender of tenancy right. The earlier decisions of the Apex Court commencing from case of United Commercial Bank Ltd. v. CIT [(1957) 32 ITR 688 (SC)] have been considered by the Apex Court and, hence, it is not necessary to repeat the same. Suffice it to state that **the Act does not envisage taxing any income under any head not specified in Section 14 of the Act**. In the circumstances, there is no question of trying to read any conflict in the two judgments of this Court as submitted by the Learned Counsel for the Revenue."

S. 71 permits set off of loss other than that of capital gains against income from other head

- S. 71 permits an assessee to set off loss other than that of capital gains against income from other head. This very issue came up for consideration before the Madras High Court in the case of **CIT v. Chensing Ventures [(2007) 291 ITR 258 (Mad.)]**. The Division Bench of the Madras High Court considered the issue in the following manner –
  - "6. Heard counsel. The Assessing Officer has not given any reason whatsoever to deny the set off of the business loss against the income declared under the head & "other sources". Section 71 deals with set off of loss against income under any other head. After setting off losses against the income under the same head, if the net result is still a loss, the assessee can set off the said loss under Section 71 of the Act against income of the same year under any other head, except for losses which arise under the head "capital gains". The income tax is only one tax and levied on the sum total of the income classified and chargeable under the various heads. Section 14 has classified the different heads of income and income under each head is separately computed. Income which is computed in accordance with law is one income and it is not a collection of distinct tax levied

S. 71 permits set off of loss other than that of capital gains against income from other head

- separately on each head of income and it is not an aggregate of various taxes computed with reference to each of the different sources separately. There is only one assessment and the same is made after the total income has been ascertained. The assessee is subject to income-tax on his total income though his income under each head may be well below the taxable limit. Hence the loss sustained in any year under any heads of income will have to be set off against income under any other head. In this case, the Assessing Officer made addition of Rs.28,50,000/- as undisclosed income under Section 69 of the Act. Once the loss is determined, the same should be set off against the income determined under any other head of income. In the assessment, no reasons were given by the Assessing Officer to deny the benefit of Section 71 of the Act. The benefit provided under Section 71 of the Act cannot be denied and the learned Standing Counsel appearing for the Revenue is also unable to explain or give reasons why the assessee is not entitled to the benefit of Section 71 of the Act. The reasons given by the Tribunal are based on valid materials and evidence and the same is in accordance with the provisions of Section 71of the Act. We find no error or legal infirmity in the impugned order."

S. 71 permits set off of loss other than that of capital gains against income from other head

- The Gujarat High Court in the case of **CIT v. Shilpa Dyeing & Printing Mills (P.) Ltd. [(2013) 39 taxmann.com 3 (Gujarat)]** was considering the case of an assessee who during survey declared Rs. 100.98 lakh on account of excess stock and claimed set off of current years loss against such income. The AO held that the income from unlisted source would not fall under any head of income and current loss could not be set off against such income. CIT(A) allowed appeal filed by assessee by holding that the income declared in survey, to be taxed, has to fall under one of the heads of income and it is available for set off against current years business loss. The Tribunal, dismissed the appeal filed by the revenue.
- The Gujarat HC considering the ratio of the decision of the Madras High Court in the case of **CIT v. Chensing Ventures [(2007) 291 ITR 258 (Madras)]** and the decision of the Gujarat High Court in the case of **Fakir Mohmed Haji Hasan [(2001) 247 ITR 290 (Guj.)]** as considered in **DCIT v. Radhe Developers India Ltd. [(2010) 329 ITR 1 (Guj.)]** held that statutory provisions contained in Section 71 are applicable to the case before it. It held that by applying the decision in case of Fakir Mohmed Haji Hasan (supra) as explained in the case of Radhe Developers Incia Ltd. the same cannot be declined.

Deemed income does not constitute part of any of the 5 heads of income

- In the case of **CIT v. S. K. Srigir & Bros. [(2008) 171 Taxman 264 (Kar.)]**, the assessee, after a survey, filed a revised return disclosing certain income from business. AO completed the assessment accepting revised return. Commissioner initiated proceedings under S. 263 and held that additional income declared in revised return was not from business but from other sources and directed the AO to compute remuneration of partners including income from other sources credited to P & L declared during course of survey.
- On appeal, the Tribunal held that the assessee had received additional income from business only and not from other sources.
- Therefore, a finding of fact was recorded by the Tribunal that the assessee received additional income from business only.
- The High Court, held that 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.)]**

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. HC]**

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.)]**

In a case where books are rejected and income estimated, can the credits in such books be added u/s 68?

Addition u/s 68 possible simultaneous with estimation of profits

- In the case of **CIT v. G. S. Tiwari & Co. [(2014) 41 taxmann.com 17 (All. HC)]**, the assessee was carrying on the business of contractor for civil work of PWD. In the course of assessment, the AO noted that assessee had not maintained proper books of acocunts. He, thus, rejected the book results and estimated net profit at 8% under Section 44AD. AO also made certain additions u/s 68 in respect of unexplained cash credit.
- CIT(A) and ITAT held that once addition was made on estimate basis under S. 44AD, no separate addition could be made in respect of cash credits under S. 68.
- The High Court held that *there is nothing in law which prevents AO in an appropriate case in taxing both sundry credit, source and nature of which is not satisfactorily explained, and business income estimated by him after rejecting books of account f assessee as unreliable.* – **CIT v. G. S. Tiwari & Co. [(2014) 41 taxmann.com 17 (All. HC)]**
- The High Court noted the following judicial precedents –

Addition u/s 68 possible simultaneous with estimation of profits

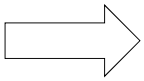
- In the case of **CIT v. Maduri Rajaiahgari Kistaiah [(1979) 120 ITR 294 (AP)]**, it was observed that where a particular business income of the assessee has been estimated and determined and in such a case certain sundry creditors are found, the AO may be precluded from adding the said unexplained sundry creditors as undisclosed income from business, the income of which was determined on estimate basis. But, where the unexplained sundry creditors are not referable to the business income of the assessee which was estimated, the AO is not precluded from treating the unexplained sundry creditors as income from other sources such as salaries, securit8ies or any other income from a business, the source of which was not disclosed by the assessee. Where certain unexplained sundry creditors are found in the account books of the assessee, whose business income is determined on estimate basis and not on the basis of his returned income, the AO is not prevented from treating the unexplained sundry creditors in the books of account as income from undisclosed source.

Addition u/s 68 possible simultaneous with estimation of profits

- The Apex Court in the case of **CIT v. Devi Prasad Vishwanath Prasad [(1969) 72 ITR 194 (SC)]**, observed that where there is an unexplained credit, it is open to the AO to hold that it is income o0f the assessee, and no further burden lies on the AO to show that the income is from any particular source. It is for the assessee to prove that, even if the sundry creditors represents income, it is income from a source which has already been taxed. There is nothing in law which prevents the AO in an appropriate case in taxing both the sundry credit, the source and noature of which is not satisfactorily explained, and the business income estimate by him after rejecting the books of account of the assessee as unreliable.

Addition u/s 68 possible simultaneous with estimation of profits

- The Allahabad High Court having noted the above judicial precedents observed that in the case before it, the consistent plea of the assessee was that the sundry creditors are genuine but at any point of time the assessee take the stand that the sundry creditors are referable to the income of the business which has been determined on estimate basis. Hence, the assessee must be held to have failed to establish that the unexplained sundry creditors were referable to the business income. The addition of the unexplained sundry creditors as income from other sources by the AO, therefore, was held valid.
- The Court set aside the impugned order passed by the Tribunal and remit the matter back with a direction to examine the identity, creditworthiness and genuineness of the transactions of the sundry creditors.



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 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 byt eh assessee. Before the Tribunal the assessee contended htat 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 it 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

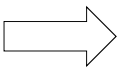
- Further, it is a fact on record that **the assessee had not maintained books of account that is why he opted for 8 per cent income as per Section 44AD of the Act**. **The Section also does not put obligation on the assessee to maintain books of account, more so, in view of the fact that his income 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.

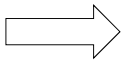
Where profit was declared by the assessee under presumptive taxation asprovided u/s 44AD, AO could not make separate addition by invoking S. 69C

- 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."



Whether amounts credited to P & L can be re-characterised as Cash Credit?

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- **Where proprietary concern of assessee sold gold bars of huge magnitude to undisclosed customers in cash whose identities were not revealed by assessee and said cash from undisclosed sources was deposited in bank accounts of assessee, additions made under Section 68 was justified**
- **FACTS**
- The assessee was an individual running a proprietary concern under the name and style of 'SB' which was, stated to be engaged in the business of purchase and sale of gold bars/bullions. The said proprietary concern was started by the assessee in the month of March 2005 only. The assessee had made huge purchase to the tune of Rs. 48.78 crores and sales of Rs. 49.17 crores, which stood credited to profit & loss account.
- The Assessing Officer observed that said alleged purchases were covered in fifteen transactions mainly in a single month and the payments were stated to be made by cheque. The Assessing Officer issued notices under Section 133(6) to the said

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- parties but these notices were returned back by the postal authorities with the remark 'left'. The Assessing Officer appointed commission wherein the Assessing Officer required ADIT (Inv.) to conduct enquiry of the said party and the ADIT (Inv.), also confirmed the non-existence of the party at the given address. The assessee, did not produce the said parties for verification. Further, the partners of PB did not comply with the summons under Section 131 issued by the Assessing Officer. Thus, the Assessing Officer concluded that there were no genuine purchases made by the assessee from the said party by the assessee as the worthiness of the said party was not proved and even the existence of gold of this quantity was not substantiated. Further, perusal of the assessee's sale bills reflected that no sale bill bears the name of so called purchasers and all the sales were made in cash. The assessee was asked to disclose the identity of the purchaser, however, the assessee expressed his inability under the pretext that the entire transactions were conducted telephonically only against cash which was collected in short span of time and delivery of gold [illegible] collection of cash from the buyer.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- The assessee submitted that the sale in this business of gold was done on cash and carry basis wherein the customer either deposits the cash directly into bank or pay cash to the dealer against the delivery of gold and the delivery was effected only after the full payment for the gold was received and this was the general prevailing practice of the business. The Assessing Officer also observed several irregularities in the bank account that the assessee had deposited cash in bank account as per his whims and to cover such cash deposits, the sales bills for making cash sales were prepared by the assessee with no details of purchaser available. Further, on examination of assessee's bank accounts and sales bills, the Assessing Officer observed that cash sales to the tune of Rs. 49 crores (approx.) had been made till 28-4-2005 while the cash to the tune of Rs. 27.54 crores had been deposited after 28-4-2005, which were later transferred to PB, through cheque. Thus, the Assessing Officer concluded that this was done by the assessee to introduce his undisclosed income and accumulated cash in the business.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

Thus, the Assessing Officer brought to tax in the assessee's hands as 'undisclosed income' without giving any deduction on account of sales amounting to Rs. 49.17 crores.

- On appeal, the Commissioner (Appeals) partly accepted the contentions of the assessee and observed that although 15 out of 16 sale transactions were concluded by 28-4-2005 while the cash deposits in the assessee's bank account continued in the months of May, June, July and August 2005 as well. Thus, the claim of the assessee that gold were delivered only after full payment was received by the assessee in cash or deposited by the customers in his bank accounts is factually incorrect. It was observed that almost Rs. 27.55 crores was deposited by the assessee in the bank account after 28-4-2005, which meant that the sale proceeds were received in cash which were kept with the assessee and deposited in the bank account later or the sales proceeds were received subsequently, which in either case is not believable.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- The book results were therefore clearly not reliable and not acceptable. The Commissioner (Appeals) held that the meagre gross profit ratio of 0.17 per cent shown in the books of account was not acceptable, hence, a gross profit ratio of 5 per cent would be more appropriate under the facts of the case considering that the assessee was shielding the purchasers of gold in cash. Thus, the Commissioner (Appeals) directed the Assessing Officer to work out the gross profit at the rate of 5 per cent on sales shown in the books of account and brought the resultant income to tax. The addition of Rs. 49.17 crores made by the Assessing Officer for the cash deposits in the bank account on cash sales by treating the cash sales as unaccounted cash of the assessee was directed by Commissioner (Appeals) to be deleted.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- **HELD:**
- Despite the insistence of the authorities requesting the assessee to reveal the identity of buyers of the gold bars from the assessee so that the genuineness of the transaction of cash sale of gold bars can be verified, the assessee did not reveal the identity of its customers who bought gold in cash from him on the pretext that there was no requirement under law to reveal the identity of the buyer. It is pertinent to mention that each invoice of cash sale of gold bar in majority of cases issued by the assessee was on an average exceeding Rs. 3 crores in majority of cases. The assessee never revealed the identity of person who bought gold bars in such a huge quantity by paying cash. The assessee was stated to have purchased gold bars mainly from PB. The partner of said firm confirmed the sale of gold bars to the assessee in statement recorded under Section 131 but subsequently the said partner never appeared before authorities below when he was called by the Assessing Officer Revenue sought more information from him.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- The said PB purchased this gold bars/bullion from ICICI bank for which necessary documents such as purchase invoices, payments for purchases by cheque through bank, delivery challan in favour of PB issued by the ICICI Bank are part of the records.
- However there was no material on record as to the delivery of gold bars to the assessee and also there was no evidence of movement of gold bars starting from receipt of gold bars by the assessee from PB at the time of stated purchases till the said gold bars were delivered to the so-called buyers of the assessee whose identities were not revealed. Thus, the assessee did not bring on record any proof of delivery of material received by him from PB and further no proof of delivery of gold bar by the assessee to the buyers to whom the gold bar was stated to be sold by the assessee in cash was placed on record. The assessee had stated to have received cash from unknown/undisclosed buyers which was deposited in the bank accounts of the assessee and cheques were issued to PB towards purchases of gold bullion. The

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- assessee has contended that only after receipt of the payments from buyers which is deposited in the bank, delivery of the gold to the unrevealed/undisclosed buyers is effected but there is no such evidence on records which could substantiate that the gold bars have been delivered to the undisclosed buyers only after the receipt of cash rather the records reveal opposite where in cash sales of gold bar to the tune of Rs. 48.99 crores was shown to have been made by the assessee in the month of April, 2005 while most of the cash proceeds against said stated sale of cash in bank accounts of gold bars amounting to Rs. 27.54 crores was received post April, 2005 and was received in the month of May, June, July & August, 2005 which was deposited in bank of the assessee. Perusal of material on record reveals that the assessee's capital introduction in the firm is a meagre sum of Rs. 87,114/- and the total capital of the assessee stood at Rs. 7.89 lakhs and against this paltry capital of the assessee, the assessee has stated to have entered into huge transaction in gold bars of more than Rs. 56 crores (approx.) in the month of March/April 2005 and has

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- credit of around Rs 27.55 crores to its undisclosed buyers whose identity were withheld by the assessee who have stated to have purchased gold bars in cash from the assessee and the whole theory of the assessee does not inspire confidence. It is also pertinent to mention that the assessee does not have any past experience of dealing in gold bars nor has maintained any infrastructure to handle, secure and store gold/cash of such magnitude as is emanating from the records. There is no evidence on record that security vaults or security personnel's were deployed by the assessee to secure highly expensive commodity being gold bars or even cash dealt/handled by the assessee. The financial statement of the assessee reveals as at 31-3-2005 that 5 kg of stock of gold to the tune of Rs. 30.95 lakhs was held as closing stock but there was no explanation as to how the said gold was stored/secured. Similarly, there was no explanation by the assessee that how it used to secure the movement of gold bars after its receipt from PB till it was delivered to

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- the buyer. There was also no material on record to suggest that any security vaults were hired or constructed or any security personnel were deployed by the assessee nor there was any insurance policy being taken by the assessee to secure gold bars of huge value. The material on record also clearly reveal that the capital of the PB from whom the assessee made purchases was in negative and is merely (-) Rs. 2.75 lakhs as compared to huge transactions in sale of gold running into Rs. 77.26 crores in March 2005 and turnover of Rs. 136.92 crores from April 2005, to 29-06-2005, aggregating to approx. Rs 215 crores were made by said PB to its buyers. Gujarat VAT registration of PB was also cancelled by Gujarat VAT authorities in March 2005 itself and it ceased to undertake operation towards sale / purchase after 29-06-2005. On the complete appreciation of the facts and also touchstone of human probabilities, the story of sale of gold bars appears to be a smokescreen while real objective was to introduce undisclosed income into banking system by way of deposit of cash in bank accounts.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- On the perusal of the documents which are on record it is crystal clear that the assessee was not having adequate infrastructure to handle such huge transactions in gold bars and had no experience to handle turnover in gold bars of such a huge magnitude, rather if the theory of assessee is accepted as to the sale and purchase of gold bars, then by not disclosing the names of ultimate buyers of gold who have allegedly bought gold through assessee, the assessee has in fact facilitated introduction of the undisclosed money of his buyers into the bank accounts of the assessee and its conversion into gold bars without disclosing their identity which also prevented end use of gold bars to be monitored. [Para 10]

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- Now coming back to the controversy in hand, it is observed that the assessee has allegedly made sales of gold bars to the tune of Rs. 49.17 Crores during the impugned assessment year wherein sale proceeds have been stated to have been received in cash from undisclosed buyers which has been deposited by the assessee in the bank account of the assessee and hence sources of these cash deposit could not be satisfactorily explained by the assessee although the same is stated to be cash received on account of cash sales of gold bars to undisclosed buyers. Thus, if the story of the assessee is to be believed then he had acted in a manner to facilitate conversion of undisclosed money of undisclosed persons to enable them to convert their undisclosed money into safe havens of gold bar at his own perils which got further aggravated by a consistent adamant and unacceptable stand of the assessee in not revealing the names of buyers of the gold bars by stating that the details of these buyers who have paid in cash for gold bar are not known to the assessee which stand of the assessee also prevented authorities below to make

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- enquiry against these holders of undisclosed money leading to escapement of income in the hands of such undisclosed buyers due to the adamant stand of the assessee in not revealing the identities of the said undisclosed buyers, and the assessee is acting in a manner to shield these unidentified persons for which the assessee itself is to be blame for his own agonies. It is settled proposition that the Court will assist those who come to Court with clean hands and Court will not help those whose own hands are dirty. At this stage *it is important to refer to provisions of Sections 106 and 114(g) of the Indian Evidence Act,1872. Section 106 of the 1872 Act stipulates that burden of proving fact which is especially within the knowledge of any person is on that person. Similarly Section 114(g) of the 1872 Act stipulates that the evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it*. The assessee in the instant appeal has withheld the details and identity of the buyers of gold bars for which the assessee is to be blamed and presumption is drawn against the assessee as it cannot be

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- accepted that such a huge sales averaging more than Rs 3 crores executed per one sale invoice in majority of cases by the assessee to persons whose details are not known to the assessee rather the assessee is deliberately withholding such details at his own peril and is clearly hit by Sections 106 and 114(g) of the 1872 Act and presumption is drawn against the assessee that either the assessee has introduced his own undisclosed income into the bank accounts of the assessee or if the story of the assessee is believed has facilitated introduction of undisclosed money of the undisclosed buyers of gold and its conversion into gold without revealing identity of the buyers. It is stated by the assessee that there is no onus on the assessee under any law to reveal the identity of buyers who allegedly bought gold bars from the assessee, this argument is fallacious as the amount of cash allegedly received from unknown buyers of gold bars stood deposited in the bank account of the assessee and are cash credits appearing in books of account of the assessee and the

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- assessee has to fulfill three ingredients requirements as are mandated under Section 68 before the said cash credits can be accepted *viz.* identity of the creditors, creditworthiness of the creditors and genuineness of the cash credits . Thus, to say that no burden lay on the assessee to fulfil all the three ingredient requirements stated above before is accepted wherein one of the ingredient requirement is to establish identity of the creditor.
- Thus, these so-called proceeds of cash sales deposited in bank accounts of the assessee are cash credits appearing in the books of account of the assessee sources of which are not satisfactorily explained by the assessee keeping in view detailed factual matrix of the case and onus cast under Section 68 on the assessee is not fulfilled. ***The genuineness of these cash receipts could not be satisfactorily proved by the assessee as there is no third party evidences to substantiate the authenticity of these cash deposits as no details of the said persons to whom cash sales were allegedly made by the assessee was*** [illegible] ***assessee***.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- It is incomprehensible and unacceptable that the assessee having issued cash sales invoices of average value of around Rs.3 crores per single invoice in majority of case and at the same time the assessee is claiming that the name of the said alleged buyers of gold bars is not known to the assessee rather it is the assessee who is actively concealing the identity of these so-called buyers of gold bars. It is incomprehensible keeping in view factual matrix of the case that the assessee have extended credit of Rs. 27.55 crores to its so-called buyers of gold bars out of sale of gold bars of Rs. 48.99 crores concluded in April 2005 as the said amount of Rs. 27.55 crores was realized in the months of May, June, July and August 2005 which does not inspire confidence. *The genuineness of the business of gold bars carried on by the assessee of such huge magnitude keeping in view background of the assessee based on material on record and infrastructure facilities maintained by the assessee as well no experience in this field itself cast serious shadow of doubt on the genuineness of said business carried on by the assessee*.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- The onus was on the assessee to prove genuineness of the business of gold bars conducted by the assessee. *Provisions of Section 68 is a special provisions and is a deeming provision which cast obligation on the assessee to satisfactorily explain the cash credits appearing in books of account of the assessee by revealing identity, creditworthiness of the creditor and genuineness of the transaction which has not been fulfilled by the assessee and burden cast on the assessee is not fulfilled by the assessee* in the instant case as detailed above.
- The assessee failed to satisfactorily explain the sources of these cash deposits in bank accounts of the assessee which are in the nature of cash credits in the books of account /bank accounts of the assessee, which is stated to be from cash sales of gold bar wherein identity of the buyers is not revealed by the assessee and is a devise used to convert undisclosed income/money into gold bars without disclosure of the identity of depositor of cash in bank accounts, and thus burden cast on the assessee under Section 68 did not stood discharged and the said cash credit will be

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- deemed to be income of the assessee from the undisclosed income chargeable to tax within deeming fiction of Section 68, which in the instant case it is held this issue against the assessee and in favour of revenue based on factual matrix of the case detailed above.
- The whole controversy can also be seen from the another angle, the assessee could not satisfactorily explain the sources of expenditure incurred by the assessee towards purchases to the tune of Rs. 48.78 crores during the subject assessment year as the payments for these purchases were stated to be made out of cash deposited in bank accounts out of so-called cash sales of gold made by the assessee of which identity of the buyers was not revealed by the assessee.
- The assessee in the instant case could not satisfactorily explain the sources of cash deposit of huge magnitude of more than Rs. 49 crores in his bank account which he

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- satisfactorily explain the sources of cash deposit in the bank account and consequently sources of incurring expenditure by way of purchases claimed by the assessee in its profit and loss account of Rs. 48.78 crores could not be satisfactorily explained by the assessee and onus cast under Section 69C was not satisfied which would make amount covered by such expenditure represented by purchases of gold bars to be deemed income of the assessee under the deeming fiction of Section 69C. The said Section 69C is further controlled by proviso which has an overriding effect and provides that notwithstanding anything contained in any other provision of the 1961 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. Thus, Section 69C read with proviso makes it abundantly clear that the amount represented by expenditure incurred by the assessee towards purchases of gold bars constitute income within deeming fiction of Section 69C.

Champalal S. Shah v. ITO - CIT [(2017) 86 taxmann.com 258 (Mum. - Trib.)]

- The Tribunal confirmed the addition to the tune of Rs 49.17 crores for detailed reasons as cited above. Thus, revenue succeeded on this ground while the assessee failed on this issue in their respective appeals. [Para 10]

Om Land Realty Pvt. Ltd. v. DCIT - [(2017) 86 taxmann.com 226 (Gujarat)]

- **Where assessee claimed to have received advances towards booking of plots but could not produce details of all applicants who paid said sum, Tribunal was justified in making additions under Section 68 to extent where details of applicants were not produced.**
- **FACTS**
- The assessee was in the business of development of real estate. The assessee had filed the return of income disclosing the activity of sale of plots. The assessee had received advance booking payments from large number of individuals and credited a sum of stated to have received from many persons.
- The Assessing Officer called upon the assessee to provide the details of the investors so that in the context of Section 68, the identity of the customer, the genuineness of the transaction and the creditworthiness of the depositors can be verified. On the ground that the assessee failed to provide any of these details, the Assessing Officer made addition to entire sum as the assessee's unaccounted credit [illegible] section 68.

Om Land Realty Pvt. Ltd. v. DCIT - [(2017) 86 taxmann.com 226 (Gujarat)]

- Before the Commissioner, the assessee produced additional evidence which included application forms of the applicants who were allotted the plots which contained the photograph of the applicant and his personal details such as his name, address, date of birth, occupation, telephone number etc. In some cases, the assessee could also produce the PAN details of the depositors. These details were verified through remand report submitted by the Assessing Officer. The Commissioner (Appeals) gave substantial relief to the assessee but, retained a sum of certain amount observing that the assessee had failed to produce the PAN details of these investors. Independent of the PAN details, there was nothing to establish their identity. There was absolutely nothing on record to prove the genuineness of the transaction and creditworthiness of the creditors.

Om Land Realty Pvt. Ltd. v. DCIT - [(2017) 86 taxmann.com 226 (Gujarat)]

- Before the Tribunal, the assessee produced further material. The Tribunal took such additional material on record and to the extent the deposits were covered by such further explanation of the assessee, remitted the issue back before the Assessing Officer for conducting verification and taking decision as per law. However, with respect to sum which was not covered by any of these additional materials, the Tribunal confirmed the decision of the Commissioner (Appeals).
- On assessee's appeal to the High Court:

Om Land Realty Pvt. Ltd. v. DCIT - [(2017) 86 taxmann.com 226 (Gujarat)]

- **HELD**
- Insofar as the Tribunal confirmed the addition, there is reason to interfere with same. From the outset, the revenue had disputed the credits in the account of the assessee stated to be in the nature of plot booking advances. Before the Assessing Officer, the assessee could not produce even the basic documents of application forms which would provide the minimum details such as the name, address and other details of the plot of the applicant. When the applicant was in the business of real estate development and had launched a major project like the present one, such details had to be handy and readily available with the applicant and should be produced before the Assessing Officer in the first place. Be that as it may, the assessee did produce details with respect to majority of the customers before the Commissioner (Appeals). To the extent, the assessee could produce PAN details and other supporting documents, the Commissioner (Appeals) granted substantial relief, thereby bringing down the addition. [Para 6]

Om Land Realty Pvt. Ltd. v. DCIT - [(2017) 86 taxmann.com 226 (Gujarat)])

- It is true that while confirming the addition of certain amount the Commissioner (Appeals) has erroneously recorded that not only non-production of PAN, but the assessee was also not in position to produce any other evidence establishing the identity of the investors. This would be opposed to the remand report filed by the Assessing Officer confirming the identity details of the customers even in absence of PAN. However, the Appellate Commissioner's further observations that the assessee produced no evidence whatsoever about the genuineness of the transaction and the creditworthiness of the depositors, the assessee was unable to dislodge the findings. ***No case is put up before the lower authorities or before this Court that all or majority of such payments were made through cheque, thereby establishing the genuineness of the transaction***. [Para 7]]

Om Land Realty Pvt. Ltd. v. DCIT - [(2017) 86 taxmann.com 226 (Gujarat)]

- When the issue reached the Tribunal, the Tribunal allowed the assessee to produce further evidence of second appellate stage. To the extent, the additions were explained through such further evidence, the Tribunal remanded the issue before the Assessing Officer for verification. Only to the extent where there was no further material, the Tribunal confirmed the disallowance. [Para 8]

- There is no discussion in any ratio that *Section 68 could not be applied in case of advances received for plot bookings. If all the ingredients of Section 68 exist, nothing would prevent the revenue from invoking the said provision*. [Para 10]