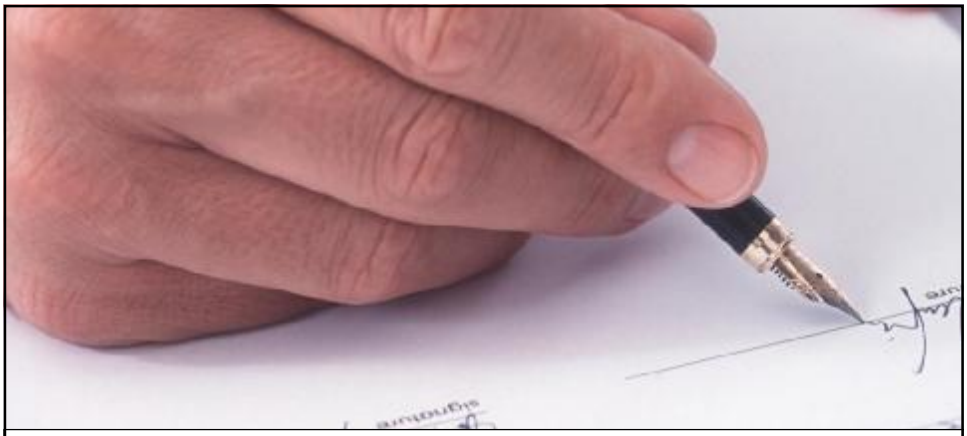

Anti-abuse sections – 68, 69 & Benami Law

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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.

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 [61][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[64], 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[64] 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 [64a][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 [64a][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.

Amendment to section 69C

Section 69C relating to unexplained expenditure has been amended with effect from assessment year 1999-2000 to provide that notwithstanding anything contained in any other provision of the Act, any unexplained expenditure which is deemed to be the income of the assessee under section 69C shall not be allowed as a deduction under any head of income. This amendment has been carried out to neutralise certain Tribunal decisions holding that if unexplained expenditure not recorded in books was actually incurred for business purposes, such expenditure would have to be allowed separately as a deduction [*M.K. Mathivathanan* v. *ITO* [1989] 31 ITD 114 (Mad.) ; *S.F.Wadia* v. *ITO* [1986] 19 ITD 306 (Ahd.) ; *Nishant Housing Development (P) Ltd*. v. *Asstt. CIT* [1995] 52 ITD 103 (Pat.)]

Issues

- Is proviso to section 68 retrospective?
- Can the provisions of section 68 and 56(2)(viib) apply simultaneously?
- If the answer to the above question is that the two provisions cannot apply simultaneously, then which is the provision which will have to be first examined.
- In a case where assessee has offered income under clause (viib), can the AO re-characterise that income and tax it under section 68.
- In a case where the residential status of the person from whom share money has been received undergoes a change between the date of the receipt of money and end of the financial year, will the AO be justified in asking the assessee to comply with the requirements of the proviso?

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

S. 68 - Background and scope

- The section has been introduced in the 1961 Act w.e.f. 1.4.1962.
- In the 1922 Act, there was no provision corresponding to section 68.
- The principle in section 68 is a statutory recognition of what was always understood to be the law based upon the rules of evidence, that it is for the taxpayer to prove the genuineness of the borrowings or other credits in his books, since the relevant facts are exclusively within his knowledge. Precedents indicate that the law was no different earlier to this provision.
- Section 68 incorporates only a rule of evidence, placing the onus of proof on the assessee.
- There have been hardly any amendments in this section since its introduction.
- The major amendment was by the FA, 2012 which introduced the two provisos to this section.

Can assessee, in its return of income, offer amounts under these sections as its income

- Prior to the enactment of The Taxation Laws Second Amendment Act, 2016 there could have been a question as to whether an assessee, on his own, could offer certain amounts for taxation under the provisions of sections 68, 69, 69A, 69B, 69C and 69D ("specified sections").

- It is now clear that items which could have been taxed by the provisions of sections 68, 69, 69A, 69B, 69C and 69D ("specified sections") can also be offered for taxation by the assessee in his return of income by paying tax, on or before the end of the previous year, at the rates mentioned in section 115BBE.

S. 68 - Analysis

- Ingredients of section 68
  - there is an assessee;
  - assessee has maintained books for any previous year;
  - any sum is found credited in the books of the assessee;
  - assessee offers no explanation about the source;

    OR
  - the explanation offered by the assessee is not, in the opinion of the AO, satisfactory,

- upon all the abovementioned conditions being cumulatively satisfied,

- the sum so credited may be charged to income-tax as income of the assessee of that previous year.

MAINTAINING OF 'BOOKS' OR 'BOOKS OF ACCOUNT'

- As per section 2(*12A*) of the Income-tax Act, 1961 books include ledgers, day books, cash books, account books and other books, whether kept in the written form or as print outs of data stored in floppy, disc, tape or any other form of electro-magnetic data storage device.
- In ***Central Bureau of Investigation* v. *V.C. Shukla*** **[1998] 3 SCC 410** , the Supreme Court held that 'Book' ordinarily means a collection of sheets of paper or other material, blank, written or printed, fastened or bound together so as to form a material whole.
- **Loose sheets or scraps of paper cannot be termed as book, for they can be easily detached and replaced**. Thus, spiral notebooks and spiral pads can be regarded as 'books' within the meaning of section 34 of the Indian Evidence Act, 1872, but not the loose sheets of papers contained in the files.
- Further, to ascertain whether a book of account has been regularly kept, the nature of occupation is an eminent factor for weighment. The test of regularity of keeping accounts by a shopkeeper who has daily transactions cannot be the same as that of a broker in real estate. Not only their systems of maintaining books of account will differ, but also the yardstick of contemporiness in making entries therein.

BOOKS WHICH CAN'T BE CONSIDERED AS BOOKS OF ACCOUNT OF THE ASSESSEE FOR THE PURPOSE OF SECTION 68

- It was held in the case of *CIT* v. *Bhaichand N. Gandni* [1982] 11 Taxman 59 (Bom.) that **the pass book supplied by the bank to the assessee could not be regarded as the book of the assessee**, that is, a book maintained by the assessee or under his instructions. Therefore, a cash credit for the previous year shown in the assessee's bank pass book but not shown in the cash book maintained by the assessee for that year, would not fall within the ambit of section 68 of the Income-tax Act, 1961, and, as such, the sum so credited was not chargeable to tax as the income of the assessee of that previous year.

- In *Smt. Shanta Devi* v. *CIT* [1988] 37 Taxman 104 (Punj. & Har.), it was held that a perusal of section 68 would show that the expression "books" has been used with reference to the word "assessee". In other words, **such books have to be books of the assessee himself, and not of any other assessee**. Thus, the books of account of partnership firm cannot be considered to be the books of account of the partner. Any cash credit shown therein cannot be brought to tax as income under section 68 in the hands of the partners.

IF BOOKS OF ACCOUNT HAVE BEEN REJECTED AND TAX IS LEVIED ON ESTIMATED INCOME, CAN A.O. MAKE AN ADDITION FOR CASH CREDIT UNDER SECTION 68?

- There is nothing, in law, which prevents the Assessing Officer in an appropriate case in taxing both - the cash credit the source and nature of which is not satisfactorily explained, and the business income estimated by him after rejecting the books of account of the assessee as unreliable. This was so decided in ***Kale Khan Mohammad Hanif* v.** CIT [1963] 50 ITR 1 (SC). Whether in a given case the Assessing Officer may tax the cash credit entered in the books of account of the business, and at the same time estimate the profit depend upon the facts of each case - ***CIT* v. *Devi Prasad Vishwanath* [1969] 72 ITR 194 (SC)**.

IF BOOKS OF ACCOUNT HAVE BEEN REJECTED AND TAX IS LEVIED ON ESTIMATED INCOME, CAN A.O. MAKE AN ADDITION FOR CASH CREDIT UNDER SECTION 68?

- Where a particular business income of the assessee has been estimated and determined, and in such a case certain cash credits are found, the Assessing Officer may be precluded from adding the said unexplained cash credit as undisclosed income from the business, the income of which was determined on estimate basis. But where the unexplained cash credits are not referable to the business income of the assessee which was estimated, the Assessing Officer is not precluded from treating the unexplained cash credit as income from any other source - *CIT* v. *Maduri Rajaiahgari Kistaiah* [1979] 120 ITR 294 (AP).

IF BOOKS OF ACCOUNT HAVE BEEN REJECTED AND TAX IS LEVIED ON ESTIMATED INCOME, CAN A.O. MAKE AN ADDITION FOR CASH CREDIT UNDER SECTION 68?

- In *CIT* v. *Neemar Ram Badlu Ram* [1980] 122 ITR 68 (All.), the books of account of the assessee-firm for the years 1960-61 to 1963-64 were found to be irregular. The balance-sheets revealed excess of assets over actual liabilities. It was discovered that there were a large number of mistakes in the totals of the cash book and at many places the assessee had deliberately inflated the total on the credit side and deflated the total on the debit side of the cash book to suit his convenience. Taking each year separately, the Assessing Officer made addition for **peak credit/unaccounted money** and also for **extra profits**. The Tribunal drew the inference that there was a connection between the unaccounted money and excess assets discovered in the business from year-to-year. There was also a connection between the unaccounted money and the extra profits withheld from the account books from year-to-year. The Tribunal, therefore, held that **only the difference of the peak unaccounted money from year-to-year after giving adjustment for earlier years' additions could be brought to tax**. It was further held that there should not be any further addition on account of extra profits where the amount of such extra profits did not exceed the amount of the difference in peak credit/unaccounted money added for that year. Where, however, the extra profits estimate was more than the addition on account of the difference in peak credits, the bigger of the two alone would be added. The Tribunal's view was upheld by the High

IF BOOKS OF ACCOUNT HAVE BEEN REJECTED AND TAX IS LEVIED ON ESTIMATED INCOME, CAN A.O. MAKE AN ADDITION FOR CASH CREDIT UNDER SECTION 68?

- In *Ramcharitar Ram Harihar Prasad* v. *CIT* [1953] 23 ITR 301 (Pat.) it was held that adding up extra estimated profits as well as the amounts of cash credits was open to authorities only **when there was material to show that assessee carried on an independent business apart from the business** for which assessment was being made.
- In *Maddi Sudarsanam Oil Mills Co.* v. *CIT* [1959] 37 ITR 369 (AP) it was held that where the authorities reject the books of account and estimate the gross profits at a flat rate, they cannot rely on the books for the purpose of adding cash credit which is part of the scheme of balancing accounts to the profits so ascertained.
- Similar view has been expressed in ***Reliable Surface Coatings* v. *Asstt. CIT* [2012] 20 taxmann.com 268 (Ahd.).**
- In *CIT* v. *Babban Pandey* [1970] 77 ITR 601 (All.) the High Court followed *Maddi Sudarsanam Oil Mills Co.* case *(supra)*, observing that the decision of the Supreme Court in *Kale Khan Mohammad Hanif's* case *(supra)* was not an authority for the contention that where the income of an assessee had been estimated on a percentage basis, the unexplained cash credit appearing in the business books had to be separately added.
- In *CIT* v. *Daluram Pannalal Modi* [1981] 7 Taxman 92 (MP) it was held that unless the assessee showed by adducing satisfactory evidence that the cash credits were referable to the undisclosed income of the known or disclosed source, namely, the business income from which had already been estimated, the Tribunal could not assume that once the business income was estimated, the unexplained cash credit would be covered by the income so estimated.

WHETHER AN ADDITION CAN BE MADE ON ACCOUNT OF CASH CREDIT UNDER SECTION 68 EVEN IF NO BOOKS OF ACCOUNT ARE MAINTAINED?

- In the case of *Anand Ram Raitani* v. *CIT [1997] 223 ITR 544 (Gau.)* it was held that the Assessing Officer before invoking the power under section 68 of the Act must be satisfied that there are books of account maintained by the assessee and the cash credit is recorded in the said books of account. If the assessee fails to satisfy the Assessing Officer, the sum so credited has to be charged to income-tax as the income of the assessee of that previous year. The existence of books of account is a condition precedent for invoking the power and discharging the burden is a subsequent condition.

Arunkumar J. Muchhala v. CIT (Bombay HC) – non-maintenance of books of account required to be maintained

- **Argument that the assessee did not maintain "books of account" and so s. 68 will not apply is not acceptable. It is incumbent on every assessee doing business to maintain proper books of account. It may be in any form. If the assessee has not done so, he cannot be allowed to take advantage of his own wrong. Burden lies on the assessee to show from where he has received the amount and what is its nature**

- Now, Appellant intends to say that he has not maintained books of accounts and therefore, those amounts can not be considered. When Appellant is doing business, then it was incumbent on him to maintain proper books and/ or books of account. It may be in any form. Therefore, if he had not maintained it, then he can not be allowed to take advantage of his own wrong. Burden lies on him to show from where he has received the amount and what is its nature. Unless this fact is explained he

Arunkumar J. Muchhala v. CIT (Bombay HC) – non-maintenance of books of account required to be maintained

- can not claim or have deduction of the said amount from the income tax. Sec. 68 of I. T. Act provides that where the assessee offers no explanation about the nature and source of the credits in the books of account, all the amounts so credited or where the explanation offered by the assessee is not satisfactory in relation to the same then such credits may be charged to tax as income of the assessee for that particular previous year

Can "may" be interpreted as "shall" …/ Is s. 68 a charging provision?

- 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.)]

- 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).

Addition is not mandatory even when explanation may not be satisfactory

- Merely because the explanation may not be satisfactory, it should not be necessary to treat the amount as income in every case as was found in interpretation of analogous provisions in s. 69, which empowers the AO to treat the unexplained investment in the same manner as unexplained cash credit in section 69.

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.

Is onus discharged by filing confirmatory letters / receipt of amount being by account payee cheque / furnishing income-tax file particulars

- Where the prima facie inference on the facts is that the assessee's explanation is probable, the onus will shift to the Revenue. Though the Department, often, acts on confirmatory letters as evidence, the onus does not get discharged merely by such confirmatory letters – CIT v. United Commercial and Industrial Co. (P.) Ltd. 187 ITR 596 (Cal.); nor does the fact that the amount is received by an account payee cheque, makes it sacrosanct – CIT v. Precision Finance Pvt. Ltd. 208 ITR 465 (Cal) and CITR v. Mohanakala (P) 291 ITR 278 (SC). Even income-tax file particulars, where the creditor is assessed, may not be sufficient – CIT v. Korlay Trading Co. Ltd. 232 ITR 820 (Cal).

- But at the same time, the law does not expect the impossible on the part of the taxpayer as was pointed out in Life Insurance Corporation of India v. CIT 219 ITR 410, 418 (SC) in a different context.

Smt. Rekha KrishnaRaj v. ITO - [2013] 33 taxmann.com 64 (Karnataka)

- **Addition under section 68 can be made even for an unexplained credit amount on account of supply of goods, and not necessarily only for a cash credit**
- **FACTS**
- The Assessing Officer on noticing that the credit balances as shown by the assessee were more than the amounts shown by the creditors as receivable, asked assessee to reconcile the difference. On receiving no response, addition under section 68 on account of cash credits, was made.
- On appeal, the Commissioner (Appeals) partly deleted the addition.
- On second appeal, the assessee contended that section 68 was applicable only when there was a credit in the books of account and had no application to a case of credit being shown for the supply received by assessee and payments made to creditors for such supplies. The Tribunal dismissed assessee's appeal.
- On further appeal by assessee:

Smt. Rekha KrishnaRaj v. ITO - [2013] 33 taxmann.com 64 (Karnataka)

- **HELD** The weight which should be attached to the heading (Cash credits) of section 68 is to be considered in the present case. A heading is to be regarded as giving the key to the interpretation of the clauses arranged under it, unless the wording is inconsistent with such interpretation. The headings might be treated as preambles to the provisions following them. Though the Court is entitled to look at the headings in an Act of Parliament to resolve any doubt that they may have as to ambiguous words, the law is clear that those headings cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words. The title of a chapter cannot be legitimately used to restrict the plain terms of an enactment. The headings prefixed to sections or entries cannot control the plain words of the provision; they cannot also be referred to for the purpose of construing the provisions when the words used in the provision are clear and unambiguous; nor can they be used for cutting down the plain meaning of the words in the provision. Only in the case of ambiguity or doubt, the heading or sub-

Smt. Rekha KrishnaRaj v. ITO - [2013] 33 taxmann.com 64 (Karnataka)

- heading may be referred to as an aid in construing the provision but even in such a case it could not be used for cutting down the wide application of the clear words used in the provision. Those headings are not meant to control the operation of enacting the words and it may be wrong to permit them to do so. [Para 7]
- It is in this background, that the above provision, in particular the opening words of the section, are to be considered. What is referred to is 'where any sum is found credited in the books of an assessee' and in the end what is mentioned is 'the sum so credited may be charged to income-tax'. Therefore, in the body of the section, the word used is either found credited or so credited. There is no indication in the section that such a credit should be a cash credit. It may be a cash credit or it may be a credit representing the value of the supplies made by the suppliers on credit. The essence is that the credit should be shown in the account and that would satisfy the requirement of section 68. Once the credit so mentioned in the section is found to be not supported by any acceptable evidence, then the sum so credited may be

Smt. Rekha KrishnaRaj v. ITO - [2013] 33 taxmann.com 64 (Karnataka)

- charged to income-tax as the income of the assessee of that previous year. This is precisely what can be done in the instant case. [Para 8]
- In that view of the matter, the orders passed by the authorities are legal, valid and call for no interference. Hence, the substantial question of law is answered in favour of the Revenue and against the assessee.
- The appeal is dismissed accordingly. [Para 9]

A. Godwin Maria Visuvasam v. ITO - [2017] 84 taxmann.com 197 (Chennai-Trib)

- **Where assessee in support of outstanding credit balance furnished confirmation letter by creditors, same would at best only establish identity of creditors but could not establish genuineness and creditworthiness of creditors, thus, addition made under section 68 in respect of said balance was justified. FACTS:**
- The assessee individual was engaged in civil construction business through his proprietary concern, GC. In the course of the assessment proceedings, it was found that assessee had an outstanding credit balance of certain amount in the balance sheet of GC under the account head 'Advance from customers'. The assessee explained it to be unsecured loans as well as advances from customers, received in cash. However, he did not furnish any evidence *qua* any of these loans and advances, except the rent advance certain amount toward which a copy of the lease agreement entered into between the assessee and the said payer advancer was adduced.

A. Godwin Maria Visuvasam v. ITO - [2017] 84 taxmann.com 197 (Chennai-Trib)

- The Assessing Officer accepted the same and, the balance was regarded as unexplained cash credit and deemed as the income of assessee.
- On appeal, the Commissioner (Appeals) partly allowed the assessee's appeal by confirming the impugned addition to the extent of certain amount.
- In instant appeal, the assessee contended that he had by furnishing the confirmation letters by the loanees and advancees discharged the onus cast on him by law. Thus, no adverse inference could be drawn by the Assessing Officer who had not brought any contradictory material on record.
- **HELD**
- The primary onus to prove a credit, explaining the nature and source thereof satisfactorily is on the assessee. Further, as explained, the same is on the parameters of identity, capacity and genuineness, by leading relevant materials, is on the assessee. It is only thereupon that the assessee can be said to have discharged

A. Godwin Maria Visuvasam v. ITO - [2017] 84 taxmann.com 197 (Chennai-Trib)

- the burden of proof on it, which then shifts to the Assessing Officer/Assessing authority. Further, the decision as to whether the credit has been, under the facts and circumstances, satisfactorily explained or not, is essentially one of fact. [Para 4.1]
- To begin with, none of the findings by the Commissioner (Appeals), sought to be challenged, have been rebutted. How, then, could the same be reversed or even modified, *i.e.*, unless the same are shown to be imbued with some infirmity? *There was nothing on record towards establishing the creditworthiness of the creditors and/or genuineness of the impugned credits. Mere furnishing of a confirmation letter by a creditor, as it again well settled, does not prove the credit; the same would at best only establish the identity of the creditors, i.e., given that the revenue has not required the assessee to prove the signatures on the confirmation letters, so that the same may be regarded as accepted. There was no whisper of the capacity or genuineness of the loans or advances*. Where assessee claimed amount as advances against work done, the assessee had failed to furnish any evidence

A. Godwin Maria Visuvasam v. ITO - [2017] 84 taxmann.com 197 (Chennai-Trib)

- towards the work done for the concerned creditors nor of the invoices raised on them during the relevant year or even subsequently, which would normally follow as a matter of course. The assessee failed to furnish the bank pass-book of his father, which was found to be in receipt of a monthly pension of Rs. 7800 only. Why he has already extended a loan, in no insubstantial sum, to the assessee in the preceding year. The assessee's whole case is unsubstantiated and without any merit. Under the circumstances, it was not necessary to consider to dwell on each of the credits separately, issuing separate findings *qua* each, as is normally to be the case endorse that by the Commissioner (Appeals). Why, a perusal of the record itself reveals several further inconsistencies, to some of which, so as to highlight the assessee's conduct and explanations, reference is made hereinafter. None of the confirmations in the present case bear the Permanent Account Number (PAN) of the creditors. In the facts of that case, the name of the assessee did not appear in the list of the beneficiaries (of accommodation entries) in which the creditors where purportedly

A. Godwin Maria Visuvasam v. ITO - [2017] 84 taxmann.com 197 (Chennai-Trib)

- engaged in, confirmations from whom clearly reflected their income-tax numbers. Why, the assessee respondent made it abundantly clear to the revenue that all it's attempts to produce the creditors, who had been repaid, had failed, and that it may summon them. The said case law in no manner supports the case of the revenue. [Para 4.3]
- The assessee's balance sheet reflecting advances was completely in contrast with the unsecured loans and advances furnished by the assessee during the course of assessment proceedings. That is to say, the assessee has nowhere explained the said difference in as much as it is only the sum actually credited in its accounts that need to be explained. No doubt, the ledger accounts of the relevant creditors are on record, and which are in agreement with the breakup of the loans as provided subsequently, but then it is only the assessee who can explain as to how its balance sheet, which purports to reflect its state of affairs as at the year-end per its accounts,

A. Godwin Maria Visuvasam v. ITO - [2017] 84 taxmann.com 197 (Chennai-Trib)

- discloses a separate and different set of figures, including their profiling. In this regard, it is notable that all the loans/advances are received in cash, without as much as a cash receipt being issued, so the assessee could, at any time, change a creditor, or the amount ascribed to him, to suit himself. The revenue is equally to blame for not questioning the assessee in this respect, which clearly undermines, nay, castigates, the assessee's case, who only could explain the said differences. Another anomaly observed is that the assessee's stand before the Tribunal is of being unaware of the appellate proceedings before the First Appellate Authority (in the first round), and of having become aware of the same only on the receipt of the show cause notice by the Assessing Officer. This is in complete disagreement with the proceedings as recorded by the Commissioner (Appeals). It may also be necessary to bring certain other inconsistencies observed on record. While the Tribunal per its order in the first round, states of the assessee having returned

A. Godwin Maria Visuvasam v. ITO - [2017] 84 taxmann.com 197 (Chennai-Trib)

- agricultural income of certain amount for the current year, there is no such disclosure either in the computation of income nor the income-tax computation forming part of the assessment order. [Para 4.4]
- Thus, there is no merit in the assessee's case.

CITO v. Five Vision Promoters Pvt. Ltd. (Delhi HC)

- **(i) It is a fallacy to assume that a company which has not commenced business has unaccounted money, (ii) Fact that investors have a common address is not relevant, (iii) Fact that shares were subsequently sold at reduced rate is not relevant**
- There is a basic fallacy in the submission of the Revenue about the precise role of the Assessee, Five Vision. The broad sweeping allegation made is that "the Assessee being a developer is charging on money which is taken in cash". This, however, does not apply to the Assessee which appears to be involved in the construction of a shopping mall. In fact for the AYs in question, the Assessee had not commenced any business. The construction of the mall was not yet complete during the AYs in question. The profit and loss account of the Assessee for all the three AYs, which has been placed on record, shows that only revenue received was interest on the deposits with the bank. Assessee is, therefore, right in the contention that the

CITO v. Five Vision Promoters Pvt. Ltd. (Delhi HC)

- basic presumption of the Revenue as far as the Assessee is concerned has no legs to stand. Correspondingly, the further allegation that such 'on money' was routed back to the mainstream in the form of capital has also to fail.

Glen Williams v. ACIT (ITAT Bangalore)

- **Old unclaimed liabilites which are not written back by the assessee can neither be assessed as "cash credits" u/s 68 nor assessed u/s 41(1) as "remission or cessation of liability"**.
- On the applicability of section 68, we are of the view that those provisions will not apply as the balances shown in the creditors account do not arise out of any transaction during the previous year relevant to AY 2009-10. The provisions of sec. 68 are clear inasmuch as they refer to “sum found credited in the books of account of an assessee maintained for any previous year”. Since the credit entries in question do not relate to previous year relevant to AY 2009-10, the same cannot be brought to tax u/s. 68 of the Act. The proper course in such cases for the Revenue would be to find out the year in which the credits in question were credited in the books of account and thereafter make an enquiry in that year and make an addition in that year, if other conditions for applicability of section 68 are satisfied.

Perfect Paradise Emporium Pvt. Ltd. v. ITO (ITAT Delhi)

- **Unclaimed liabilities to creditors, even if fictitious and bogus, cannot be assessed u/s 41(1) in the absence of a write-back. The bogus credits can be assessed u/s 68 only in the year the credits were made and not in the year they are found to be not payable**.
- Applying the ratio in the cases mentioned supra, the amount in question cannot be brought to tax in the year under appeal under the provisions of Section 41(1) of the Act. It is trite law that an addition under Section 68 can be made only in the year in which credit was made to the account of the creditors in the books of account maintained. Admittedly, in this case the credit to the account of creditors was made in the earlier years and therefore, the amount even cannot be brought to tax under Section 68 in the year under appeal. However, it is open to the Department to levy tax on such amount by resorting to the remedies available under the provisions of Act by duly following the procedure known to the law.

Rita Stephen Pinto v. ITO (ITAT Mumbai)

- **Only credits received during the year can be assessed as unexplained cash credits. Credits of earlier years, even if unexplained, cannot be assessed.**
- Though the assessee could not furnish the confirmation of the loan and other evidences but such a loan could not have been added in the A.Y. 2005-06 as the same was taken in the earlier years and is being carried forward. In this year it is appearing balance of the current year. Thus, legally such an addition could not sustained in this year.

Panna S. Khatau v. ITO (ITAT Mumbai)

- **Old liabilities, even if treated as genuine in earlier years and even if on capital account, are liable to be assessed as "income" in year of write-back if assessee is unable to provide confirmations and substantiate genuineness of liabilities.**
- When an amount, which is stated, claimed and accepted as a payable, is no longer so, the assessee gains to that extent. There is nothing unreal or notional about this gain. What is admitted though is that there has been remission/cessation of liability in-as-much as these are no longer payable. Why? No reason is advanced. It is under these circumstances that the law permits the A.O. to draw an adverse inference of it as representing the assessee's income. As regards the year, there can again be little doubt in the matter.

Bharat Dana Bera v. ITO (ITAT Mumbai)

- **Failure to establish genuineness of old liabilities means that there is a remission/ cessation of such liabilities.**
- The assessee failed to establish the genuineness of these liabilities by producing supporting evidence. Simply the liabilities being reflected against certain names in the books of account would not establish the genuineness of liabilities.

AT WHAT RATE DEEMED INCOME UNDER SECTIONS 68, 69, 69A, 69B, 69C AND 69D IS TO BE TAXED?

- With effect from assessment year 2013-14, the Finance Act, 2012 has inserted a new section 115BBE which provides that the deemed income on account of unexplained cash credit under section 68, unexplained investment under section 69, unexplained money under section 69A, unrecorded investment under section 69B, unexplained expenditure under section 69C and borrowing or repaying of hundi under section 69D shall be taxed at a flat rate of 30%, (plus applicable surcharge and cess) irrespective of the total income of the assessee. This section has been amended by the Taxation Laws (Second Amendment) Act, 2016 w.e.f. 1.4.2017 and the rate of 30% has been increased to 60%. In addition, a surcharge of 25% of tax is to be levied on such income. Section 115BBE provides that no expenditure or allowances shall be allowed from such income. Further, w.e.f. AY 2017-18, no loss shall be set off against income of the nature referred to in specified sections. The income other than the income referred to above included in the income of the assessee shall be taxed at normal rates.

RELEVANCE OF ENTRIES IN THE BOOKS OF ACCOUNT WITH REFERENCE TO THE INDIAN EVIDENCE ACT, 1872

- It has been observed in *V.C. Shukla (supra)* that according to section 34 of the Indian Evidence Act, 1872, entries in books of account regularly kept in the course of business are relevant whenever they refer to a matter into which the Court has to inquire into. From a plain reading of section 34 it is manifest that to make an entry relevant thereunder it must be shown that it has been made in a book; that book is a book of account and that book of account has been regularly kept in the course of business. From the said section 34 it is also manifest that even if the above requirements are fulfilled and the entry becomes admissible as relevant evidence, still the statement made therein shall alone not be sufficient evidence to charge any person with liability. It is, thus, seen that while the first part of that section speaks of the relevancy of the entry as evidence, the second part speaks, in a negative way, of its evidentiary value for charging a person with a liability.

- Where the genuineness and regularity of the accounts have not been challenged, the accounts are relevant, *prima facie* proof of the entries and the correctness thereof under section 34 of the Evidence Act - *Tolaram Daga* v. *CIT* [1966] 59 ITR 632 (Assam); *Dhansiram Agarwalla* v. *CIT* [1995] 81 Taxman 1 (Gau.).

PROPER ENQUIRY BEFORE MAKING ADDITION UNDER SECTION 68

- Section 68 of the Income-tax Act, 1961 empowers the Assessing Officer to make an enquiry regarding cash credit. If he is satisfied that these entries are not genuine he has every right to add these as income from other sources. But before rejecting the assessee's explanation, A.O. must make proper enquiries. In the absence of proper enquiries, addition cannot be sustained as was held in *Khandelwal Constructions* v. *CIT* [1997] 227 ITR 900 (Gau.).

- The assessee may seek assistance of section 131 of the Act for the purpose of proving its own case. Section 131 empowers the A.O. to exercise the same power as is vested in a civil court for compelling attendance of witnesses.

ASSESSEE'S RIGHT TO CROSS-EXAMINE

- The assessee is entitled to cross examine any person whose statement has been recorded by the A.O., if such statement is proposed to be used by the A.O. - *CIT* v. *Eastern Commercial Enterprises* [1994] 210 ITR 103 (Cal.)

- The assessee had on its part produced the discharged hundis and also vouchers showing payment of interest. That was sufficient for the assessee to discharge its initial burden. It was for the ITO to have examined the bankers when he wanted to rely on the statements obtained from them. The A.O. ought to have given an opportunity to the assessee to cross examine the bankers before taking into account the contents of those statements - *CIT* v. *Gani Silk Palace* [1988] 37 Taxman 295 (Mad.).

SHARE APPLICATION MONEY CREDITED IN THE BOOKS OF THE COMPANY

- ***The position, with effect from assessment year 2013-14*** **-** With effect from **assessment year 2013-14**, section 68 has been amended to provide that if a closely held company fails to explain the source of share capital, share premium or share application money received by it to the satisfaction of the A.O., the same shall be deemed to be the income of the company under section 68. However, the amendment shall not apply where the share capital, share premium or share application money is received from Venture Capital Fund or Venture Capital Company registered with the SEBI.

- ***The position prior to the amendment*** **-** Some of the Courts had taken a view that amounts received towards share capital are totally outside the scope of assessment, even if they are unproved, on the ground that they cannot be treated as cash credits falling within the purview of section 68.

SHARE APPLICATION MONEY CREDITED IN THE BOOKS OF THE COMPANY

- **Relevant case laws -** The Delhi High Court after a review of the precedents on the subject in *CIT* v. *Divine Leasing & Finance Ltd./Lovely Exports (P.) Ltd.* [2007] 158 Taxman 440 in a group of cases held that section 68 would require both the identity of the depositor and his creditworthiness to be proved. Where a company furnishes the address and permanent account number (PAN) of depositor, such identity is established. As regards creditworthiness in a matter of subscription to public issue, more may not be expected from the assessee. The burden of proof that is expected as regards creditworthiness has to be decided in the light of the facts of each case. Where the subscriptions were received through banking channels as prescribed under the SEBI regulations, the inference that the subscribers lacked creditworthiness could not have been lightly drawn without some investigation on the part of the Assessing Officer. The addition without such investigation should be treated as based upon mere surmises. The principle that identity is more important in such cases has been reiterated and that where creditworthiness is not established to the satisfaction of the Assessing Officer, it need not be unexplained income of the company, since the legitimate inference is that the income is that of the subscriber as long as the advance of the amount to the company is established and there is nothing to suggest that the amount belonged to the company.

SHARE APPLICATION MONEY CREDITED IN THE BOOKS OF THE COMPANY

- The SLP of the department in the case of *Divine Leasing & Finance Ltd./Lovely Exports(P.) Ltd.(supra)* had been dismissed by the Supreme Court 319 ITR (St.) 5 observing as follows:
  - *"Can the amount of share money be regarded as undisclosed income under section 68 of the Income-tax Act, 1961? We find no merit in this special leave petition for the simple reason that if the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgment."*
- The Allahabad High Court in the case of *Jaya Securities Ltd.* v. *CIT* [2008] 166 Taxman 7 held that no addition under section 68 can be made in respect of investment made by different persons in the share capital of a company limited by shares, whether public or private.
- However, in *Hindusthan Tea Trading Co. Ltd.* v. *CIT* [2003] 129 Taxman 601 (Cal.) it was held that the amounts received as share capital by way of cheques on nationalised banks after advertisement in newspapers inviting share capital, cannot be subject to addition. Also refer to *CIT* v. *Victor Electrodes Ltd.* [2012] 20 taxmann.com 680 (Delhi).

SHARE APPLICATION MONEY CREDITED IN THE BOOKS OF THE COMPANY

- In *CIT* v. *Down Town Hospital (P.) Ltd.* [2004] 139 Taxman 247 (Gau.), the High Court reviewed the case law on the subject and concluded, where the identity of the shareholders is established, the further requirement as to the source may not be expected, since the burden shifts to the Revenue once the identity is established.

- The Delhi High Court in the case of *CIT* v. *Value Capital Services (P.) Ltd.* [2008] 307 ITR 334 held that department must show that investment made by subscribers actually emanated from coffers of assessee to be treated as undisclosed income of assessee.

- A review of the case laws would indicate that the degree of responsibility in respect of share capital on the company may well be less, but it cannot disown the responsibility, especially if it is a private company where the shareholders may ordinarily be expected to be known to the company.

SHARE APPLICATION MONEY CREDITED IN THE BOOKS OF THE COMPANY

- The same issue came up before the Madras High Court before a different Bench in *CIT* v. *Gobi Textiles Ltd.* [2008] 170 Taxman 142 where the assessee had on the request of the Assessing Officer produced evidence regarding share capital contributions of more than Rs. 1 lakh each. Salary certificates were produced to show their identity as well as capacity to subscribe to the shares. The identity of the shareholders was not in doubt. The Assessing Officer accepted the genuineness of one of the shareholders and added the share capital of nine others. The Commissioner (Appeals) not only confirmed the addition but also sustained the penalty. The Tribunal deleted the addition since the assessee had discharged the onus by the identification and proof as to source, so that the addition could only be taken as made on mere surmises. The finding of the Tribunal being one of fact, the High Court declined to interfere.

- The Chhattisgarh High Court in the case of *Asstt. CIT* v. *Venkateshwar Ispat (P.) Ltd.* [2009] 319 ITR 393 held that merely because notice issued to some shareholders was not responded to, their share application money could not be treated as unexplained amount under section 68.
- Where the assessee furnishes the return of income of the share applicants and their loan confirmations, the burden of the assessee stands discharged - ***CIT* v. *Jay Dee Securities & Finance Ltd.*** [2013] 214 Taxman 62/32 taxmann.com 91 (All.)**.**

SHARE APPLICATION MONEY CREDITED IN THE BOOKS OF THE COMPANY

- The Delhi High Court in the case of *CIT* v. *Orbital Communication (P.) Ltd.* [2010] 327 ITR 560 held that where assessee has established the genuineness of the share transaction and the creditworthiness of the applicant, then mere failure to produce the creditor cannot be a ground for making addition under section 68. Also refer to *CIT* v. *Samir Bio-Tech (P.) Ltd.* [2010] 325 ITR 294 (Delhi).

- However, where information was obtained from investigation wing about accommodation entry providers and their *modus operandi*, and the list contained the name of the assessee to whom entry providers had provided entries, and further summons to such persons were not responded to, in such a case the affidavits filed by assessee after 2 years from entry providers to the effect that transactions were genuine, were of no evidentiary value. There was no duty on Assessing Officer to prove that monies emanated from coffers of assessee - ***CIT* v. *Nova Promoters & Finlease (P.) Ltd.*** [2012] 206 Taxman 207/18 taxmann.com 217 (Delhi).

BURDEN OF PROOF - ON WHOM IN A MATTER INVOLVING CASH CREDIT

- *Prima facie* onus is upon the assessee.The Supreme Court in the cases of *Roshan Di Hatti* v. *CIT* [1977] 107 ITR 938; *Kale Khan Mohammad Hanif(supra)* held that the law is well-settled that the onus of proving the source of a sum of money found to have been received by an assessee is on him. Where the nature and source of a receipt, whether of money or other property cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that the income is from any particular source.

- In the case of *Shankar Industries* v. *CIT* [1978] 114 ITR 689, the Calcutta High Court held that it is necessary for the assessee to prove *prima facie* the transaction which results in a cash credit in his books of account. Such proof includes proof of the **identity** of his creditor, the **capacity** of such creditor to advance the money and lastly, the **genuineness** of the transaction. Only after the assessee has adduced evidence to establish *prima facie* the aforesaid, the onus shifts to the department.

- The Supreme Court in the cases of *A. Govindarajulu Mudaliar* v. *CIT* [1958] 34 ITR 807; *CIT* v. *M. Ganapathi Mudaliar* [1964] 53 ITR 623 held that where the assessee has failed to prove satisfactorily the source and nature of a credit entry in his books and it is held that the relevant amount is the income of the assessee, it is not necessary for the department to locate its exact source.

BURDEN OF PROOF - ON WHOM IN A MATTER INVOLVING CASH CREDIT

- The Kerala High Court in the case of *ITO* v. *Diza Holdings (P.) Ltd.* [2002] 120 Taxman 539 held that it was clear in the terms of section 68 that the burden was on the assessee to offer a satisfactory explanation about the nature and source of the amount found credited in the books of the assessee. It was also clear that the mere furnishing of particulars was not enough. The mere fact that payment was made by way of account-payee cheque was also not conclusive. Therefore, the A.O. would be entitled to consider whether notwithstanding the fact that the payments were made by cheques, whether the assessee had satisfactorily explained the nature and source of the amounts found credited in the books of the assessee?

- The Madras High Court in the case of *V. Datohinamurthy S. Natarajan* v. *Asstt. Director of Inspection* [1983] 12 Taxman 185 held that it had been a long accepted principle of income-tax law that an assessee was obliged to explain the nature and source of cash credits in his accounts and in the absence of satisfactory explanation on his part, the assessing authorities could very well proceed to treat the amount of cash credits in question as representing the taxpayer's income.

BURDEN OF PROOF - ON WHOM IN A MATTER INVOLVING CASH CREDIT

- The Calcutta High Court in *C. Kant & Co.* v. *CIT* [1981] 5 Taxman 64 held that in the case of cash credit entry it was necessary for the assessee to prove not only the identity of the creditors but also to prove the capacity of the creditors to advance the money and the genuineness of the transactions. On whom the onus of proof lay in a particular case was a question of law. But whether the onus had been discharged in a particular case was a question of fact.

- In the case of *Northern Bengal Jute Trading Co. Ltd.* v. *CIT* [1968] 70 ITR 407 (Cal.) it was held that there could not be one general or universal proposition of law which could be the guiding yardstick in the matter of cash credit. Each case had got to be decided on the facts and circumstances of that case. **The surrounding circumstances to be considered must, however, be objective facts, evidence adduced before the taxing authorities, presumption of facts based on common human experience in life and reasonable conclusions**. In holding a particular receipt as income from undisclosed source, the fate of the assessee cannot be decided by the revenue on the basis of **surmises, suspicions or probabilities**.
- In *S. Hastimal* v. *CIT* [1963] 49 ITR 273 the Madras High Court held that inability of the Department to verify the explanation offered by the assessee was not a sufficient cause for rejection of the explanation. **The assessee cannot be presumed to have special knowledge about the source of source or the origin of origin.**

BURDEN OF PROOF - ON WHOM IN A MATTER INVOLVING CASH CREDIT

- In *Sriram Jhabarmull (Kalimpong) Ltd.* v. *CIT* [1967] 64 ITR 314 the Calcutta High Court held that it was not correct to say that as soon as the initial burden of proof on the part of the assessee was discharged, the ITO was not entitled to reject the assessee's explanation without some other positive evidence falsifying the assessee's case. It cannot be true that any possible explanation which an assessee puts forth for clarifying the source and nature of a cash receipt must have to be accepted by the income-tax department nor can it be lawfully urged that the ITO can arbitrarily reject the assessee's explanation.
- Delhi High Court in the case of *Sona Electric Co.* v. *CIT* [1984] 19 Taxman 160 held that the explanation offered by the assessee can be rejected by the ITO on **cogent grounds**. When such **grounds are themselves based on no evidence,** the question of **presumption does not arise**.
- In *Tolaram Daga(supra)*, the High Court held that even if the credit is in the name of a close relation, *e.g.*, the wife, **the assessee cannot be presumed to have knowledge of the source from which the depositor obtained the money**. The fact that an assessee was unable to satisfy the authorities as to the source from which the depositor derived the money could not be used against the assessee.
- The Allahabad High Court in the case of *Sheo Narain Duli Chand* v. *CIT* [1969] 72 ITR 766 held that there is no presumption that witnesses appearing for an assessee come forward **to give false evidence to oblige the assessee**.

DISCHARGING THE ONUS TO PROVE 'IDENTITY'

- ***Relevant judicial views:***
- ***Orient Trading Co. Ltd.* v. *CIT*** [1963] 49 ITR 723 (Bom.) - When the entry stands in the name of the third party and the assessee establishes the identity of the creditor and produces evidence showing that the entry is not fictitious, initial burden lying on the assessee stands discharged; the burden shifts on to the Revenue to show that the entry represents assessee's suppressed income.
- ***ITO* v. *Suresh Kalmadi*** [1988] 32 TTJ (Pune) (TM) 300 - Where identity of creditor is established and entry is shown not to be fictitious, the burden shifts on to the Department to show as to why the entry still represented the suppressed income of the assessee? The assessee cannot be called upon to prove the worth of the creditor's creditor. The fact that in the books of the creditors exactly the same amounts had been credited in the name of other parties and that immediately after repayment, the creditors withdrew the money could not lead to any adverse inference when this was their *modus operandi* and assessee's case was not the solitary transaction. In this case the creditors appeared before the ITO; produced their books and admitted categorically having advanced money to the assessee. Furthermore, a diary was seized in a search of assessee's premises in 1980 alleged to contain certain entries showing payments, whereas the assessee was called upon in 1983 to explain the entries in diary and assessee produced proof of confirmation of the creditors and their addresses, etc.. Therefore, the period of three years could not be said to be bought by assessee to manufacture evidence. The assessee could, therefore, be taken as having established that he had borrowed money [illegible] and no addition was, therefore, called for.

DISCHARGING THE ONUS TO PROVE 'IDENTITY'

- ***ITO* v. *B. Wariyam Singh Bhagat Singh*** [1987] 27 TTJ (All.) 501 - The assessee produced confirmatory letters from the creditors which neither contained their addresses nor their permanent account numbers. The AAC, without considering the same, deleted the addition. The Tribunal held that deletion in first appeal was not justified.

- In ***Gumani Ram Siri Ram* v. *CIT*** [1975] 98 ITR 337 (Punj. & Har.) it was held that in a case, where the entry stands in the name of an independent third party, the burden will still lie upon the assessee to establish the identity of the said third party, and to satisfy the A.O. that the entry is real and not fictitious. [distinguishing *Tolaram Daga (supra)*].

DISCHARGING THE ONUS TO PROVE 'CAPACITY TO ADVANCE MONEY' OR 'CREDITWORTHINESS'

- In case of*Shankar Ghosh* v. *ITO* [1985] 13 ITD 440 (Cal.) the assessee failed to prove the capacity of the person from whom he had allegedly taken loan. Further, assessee could not explain the need for loan and the manner in which the loan amount was spent. The creditor had issued two letters demanding repayment but did nothing on non-compliance therewith. Such letters did not, therefore, carry any conviction about the explanation of the assessee. The burden not having been discharged by assessee, loan amount was rightly held as assessee's own undisclosed income.

- In case of *Jagadamba Construction Co.* v. *ITO* [2004] 3 SOT 670 (Jodh.) some of the creditors were produced before the A.O. while affidavits of some of them had been produced. Balance sheets of some of the creditors were also produced wherein the transactions were entered into. Some of the creditors had filed confirmations. Cash creditors were income-tax assessees who also had bank accounts. The finding of the A.O. that the creditors were not creditworthy was not justified. The examination by the A.O. of some of the creditors had not revealed any finding adverse to the claim of the assessee. Thus, when the cash credit stand was explained, no addition, including addition on account of interest thereon, was justified.

DISCHARGING THE ONUS TO PROVE 'GENUINENESS'

- ***Case of* Sikri & Co. (P.) Ltd. *v.* CIT** *[1977] 106 ITR 682 (Cal.)*- In case of cash credit the assessee has to prove the genuineness of cash credits. In this case summons issued by ITO to creditors were not served as creditors were not traceable and the assessee gave no further information regarding whereabouts of creditors. No other evidence was produced by the assessee to show creditworthiness of creditors. The creditors were also shown to have denied advancing any loan to assessee before their respective ITOs. Held that cash credit was rightly assessed as income from undisclosed sources.

- ***Case of* CIT *v.* Sahibganj Electric Cables (P.) Ltd.** *[1978] 115 ITR 408 (Cal.)* - Amounts of loan were received by cheques and repayments were also made by cheques through assessee's bankers. The creditors gave confirmation letters mentioning their Income-tax file numbers. ITO without making any further enquiry, disbelieving the evidence of the assessee made addition. ITAT held the addition was not justified as the assessee had discharged the onus. The High Court held - Tribunal justified in deleting the addition.

- ***Case of* CIT *v.* Korlay Trading Co. Ltd.** *[1998] 232 ITR 820 (Cal.)*- Mere filing of the income-tax file number of the creditors was not enough to prove the genuineness of the cash credit. The creditor had to be identified. There should be creditworthiness. There should be a genuine transaction.

DISCHARGING THE ONUS TO PROVE 'GENUINENESS'

- ***Bhagawandas Sharda* v. *Asstt. CIT*** [2004] 4 SOT 469 (Hyd.)**-** Lender, an income-tax assessee, confirmed the loan but could not be produced as he was not available. The loan was cleared by assessee before assessment proceedings started. Onus on assessee stood discharged. The addition based on non-production of lender was unjustified. The A.O. had also enquired from the bank. The only ground for addition being that cash was deposited and cheque issued to assessee on the same day could create a suspicion but not proof. The addition was deleted – Rulings in cases of *CIT* v. *Daulat Ram Rawatmull* [1973] 87 ITR 349 (SC), *Sreelekha Banerjee* v. *CIT* [1963] 49 ITR 112 (SC), *CIT* v. *Luxmi Trading Co.* [1979] 117 ITR 439 (Cal.) and *Dhakeswari Cotton Mills Ltd.* v. *CIT* [1954] 26 ITR 775 (SC) were relied on.

- ***In* Nemi Chand Kothari *v.* CIT** *[2004] 136 Taxman 213 (Gau.)* the assessee who carried on the business of supply of bamboo had taken loans amounting to Rs. 4,35,000 and Rs. 5 lakhs during the previous year, relevant to the assessment year 1992-93. The amounts were paid by cheques by the creditors to the assessee. The creditors received the said amount by way of loans from their sub-creditors by means of cheques. The A.O. declined to treat the loan amount of Rs. 4,35,000 as genuine. As regards Rs. 5 lakhs he declined to treat the loan amount to the extent of Rs. 4,25,000 as genuine. The A.O. added the two amounts to the total income of assessee as income from undisclosed sources. The Tribunal set aside the order passed by the Commissioner (Appeals) and upheld the order of the A.O. on the ground that neither the sub-creditors nor the creditors in question had creditworthiness to advance the said loans.

DISCHARGING THE ONUS TO PROVE 'GENUINENESS'

- On appeal the Gauhati High Court held as follows-
- **(i)** that the assessee had established the identity of the creditors. The assessee had also shown in accordance with the burden which rested on him under section 106 of the Evidence Act, that the said amounts had been received by him by way of cheques from the creditors which was not in dispute. Once the assessee had established these, the assessee must be taken to have proved that the creditor had the creditworthiness to advance the loans. Thereafter, the burden had shifted to the A.O. to prove the contrary.

- **(ii)** that the failure on the part of the creditors to show that their sub-creditors had creditworthiness to advance the said loan amounts to the assessee, could not, under the law be treated as the income from undisclosed sources of the assessee himself, when there was neither direct nor circumstantial evidence on record that the said loan amounts actually belonged to, or were owned by, the assessee. The A.O. failed to show that the amounts, which had come to the hands of the creditors from the hands of the sub-creditors, had actually been received by the sub-creditors from the assessee. Therefore, the A.O. could not have treated the said amounts as income derived by the assessee from undisclosed sources.

DISCHARGING THE ONUS TO PROVE 'GENUINENESS'

- (iii) that no assessment could be made contrary to the provisions of law. In the instant case, the very basis for making the assessment was under challenge. If the assessment was based on a completely erroneous view of law, such findings could not be regarded as mere findings of fact, but must be treated as substantial questions of law. Therefore, the question raised in the appeal was a substantial question of law because it went to the very root of the assessment made.

- (iv) that a person may have funds from any source and an assessee, on such information received, may take a loan from such a person. It is not the business of the assessee to find out whether the source or sources from which the creditor had agreed to advance the amounts were genuine or not. If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep it in the bank, the said amount cannot be treated as income of the assessee from undisclosed sources.
- .

DISCHARGING THE ONUS TO PROVE 'GENUINENESS'

- The above decision is likely to have far reaching effect with regard to provisions of section 68. It is praiseworthy that the Gauhati High Court has added a new dimension by reading section 68 together with section 106 of the Indian Evidence Act. Now, in view of the above decision, a creditor's creditworthiness has to be judged *vis-a-vis* transactions, which have taken place between the assessee and the creditor and, it is not business of assessee to find out source of money of his creditor or genuineness of his transactions, which took place between creditor and sub-creditor and/or creditworthiness of sub-creditors for these aspects may not be within special knowledge of the assessee.

TREATMENT OF CREDITS IN ROUGH CASH BOOK AND EVIDENTIARY VALUE OF AFFIDAVITS

- **TREATMENT OF CREDITS IN ROUGH CASH BOOK**
- Where cash credits are recorded in the rough cash book of the assessee and there is no proper explanation, section 68 will apply and the credit amount will be assessable as income of the assessee - *Haji Nazir Hussain* v. *ITO* [2004] 91 ITD 42 (Delhi).

- **EVIDENTIARY VALUE OF THE AFFIDAVITS**
- **Where the subscribers of the shares had availed of accommodation entries from professional name-lenders and there had been no response to the summons issued to the subscribers**
- It was held in ***CIT* v. *Nova Promoters & Finlease (P.) Ltd.*** [2012] 18 taxmann.com 217/206 Taxman 207 (Delhi)that there was no evidentiary value of the affidavits filed after two years, specifically in view of the fact that subscribers did not appear or respond to the summons and issued statement before investigation wing that share application was accommodation entry**.**

- Affidavit unless rebutted has evidentiary value – Meha Parikh 30 ITR (Ashok Sharma)

Under which head can income assessable under s. 68 be charged ?

- **Income assessable under section 68 cannot be assessed under any particular head of income including income from other sources under section 56 [AY 2006-07] – ITO v. Dulari Digital Photo Services (P.) Ltd. [2012] 24 taxmann.com 31 / 53 SOT 210 (URO)(Chd.).**

- Income can be taxed under a specific head of income as enumerated in section 14 only when it is possible to peg the same to a known source / head of income. If the nature and source of a particular receipt is not known, it cannot then be pegged to a known source / head of income. Chapter IV contemplates computation of income arising from known sources / heads of income whereas Chapter VI, on the other hand, contemplates aggregation of the netire sum the nature and sources of which are not known. The aforesaid two Chapters are completely different in their nature, scope and effect. Though the incomes assessable under them are part of total income as defined in section 2(45) or section 4 or section 5 yet that does not mean that thte income assessable under section 68 has to be assessed under section 56.

- Income from unexplained or unknown sources cannot therefore be considered or taxed as Income from other sources.

- **Cash receipts found during search** - Where register seized during search conducted at assessee's premises revealed cash receipts in name of 15 persons, though assessee stated that said cash receipts were realization of sales effected in earlier years by erstwhile firm in which he was partner and filed confirmations of seven parties but when letters were sent to said parties, same were returned by post office marked 'not known' and other parties also either did not respond or denied any relationship with firm, Assessing Officer was justified in treating said receipts as unexplained and making addition under section 68 - **Vijay Kumar Talwar v. CIT [2011] 196 Taxman 136 / [2010] 8 taxmann.com 264 (SC).**

- **SHARE APPLICATION MONEY**- Creditworthiness or genuineness of transaction depends on whether two parties are related or known to each other, manner or mode by which parties approached each other, whether transaction was entered into through written documentation to protect investment, whether investor professes and was an angel investor, quantum of money, creditworthiness of recipient, object and purpose for which payment /investment was made, etc. Certificate of incorporation of company, payment by banking channel, etc. cannot in all cases tantamount to satisfactory discharge of onus- **C!T v.N R. Portfolio (P.) Ltd [2014] 42 taxmann.com 339/222 Taxman 157 (Mag.) (Delhi).**

- Where the matter concerns money receipts by way of share application from investors through banking channel, the assessee has to prove the existence of the person in whose name the share application is received. Once the existence of the investor is proved, it is not further the burden of the assessee to prove whether that person itself has invested the said money or some other person has made investment in the name of that person. The burden then shifts on to the revenue to establish that such investment has come from the assessee-company itself. Once the receipt of the confirmation letter from the creditor is proved and the identity and the existence of the investor has not been disputed, no addition on account of share application money in the name of such investor can be made in the assessee's hands - **Shree Barkha Synthetics Ltd v. Asstt. CIT[2006] 155 Taxman 289 (Raj.)**.

- In the case of a public issue, the company concerned cannot be expected to know every detail pertaining to the identity as well as financial worth of each of its subscribers. The company must, however, maintain and make available to the Assessing Officer for his perusal all the information contained in the statutory share application documents. In the case of private placement the legal regime would not be the same. A delicate balance must be maintained while walking the tightrope of sections 68 and 69. The burden of proof can seldom be discharged to the hilt by the assessee; if the Assessing Officer harbours doubts of the legitimacy of any subscription, he is empowered, nay duty bound, to carry out thorough investigations. But if the Assessing Officer fails to unearth any wrong or illegal dealings he cannot obdurately adhere to his suspicions and treat the subscribed capital as the undisclosed income of the company. A distillation of the precedents yields the following propositions of law in the context of section 68: The assessee has to prima facie prove (1) the identity of the creditor / subscriber; (2) the genuineness of the transaction, namely, whether it has been transmitted through banking or other indisputable channels; (3) the creditworthiness or financial strength of the creditor/subscriber; (4) if relevant details of the address or PAN identity of the creditor / subscriber are furnished to the Department along with copies of the shareholders' register, share application forms, share transfer register, etc., it would constitute acceptable proof or acceptable explanation by the assessee; (5) the Department would not be justified in drawing an adverse inference only because the creditor / subscriber fails or neglects to respond to its

- notices; (6) the onus would not stand discharged if the creditor/ subscriber denies or repudiates the transaction set up by the assessee nor should the Assessing Officer take such repudiation at face value and construe it, without more, against the assessee; (7) the Assessing Officer is duty bound to investigate the creditworthiness of the creditor / subscriber, the genuineness of the transaction and the veracity of the repudiation – **CIT v. Divine Leasing & Finance Ltd. [2007] 158 Taxman 440 (Delhi).**

- If the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the department is free to proceed to reopen their individual assessments in accordance with law but this amount of share money cannot be regarded as undisclosed income under section 68 of the assessee company- **CIT v. Lovely Exports (P.) Ltd. [2008] 216 CTR (SC) 195.**

- If department wants to make addition on account of share application money, burden is on the Department to show that even if applicant did not have means to make investment, investment made by assessee actually emanated from coffers of assessee so as to enable it to be treated as undisclosed income of assessee- **CIT v. Value Capital Services (P.) Ltd. [2008] 307 ITR 334 (Delhi).**

- Where in respect of share application money received by assessee, all applicants had given confirmation of advancing money, and assessee had proved identity and creditworthiness of applicants and in respect of loan obtained by assessee from its managing director, Tribunal found that said person was a man of means and his creditworthiness could not be doubted, Tribunal was justified in deleting additions made on account of said share application money and loan- **CIT v. VLS Foods (P.) Ltd. [2011] 203 Taxman 213/ 15 taxmann.com 225 (Delhi).**

- Certificate of incorporation, PAN etc., are not sufficient for purpose of identification of subscriber company when there was material to show that subscriber was a paper company and not a genuine investor- **CIT v. Navodaya Castles (P.) Ltd. [2014] 226 Taxman 190 (Mag.)/ 50 taxmann.com 110 (Delhi) [SLP dismissed in Navodaya Castle (P.) Ltd. v. CIT [2015] 56 taxmann.com 18/230 Taxman 268 (SC)]**

- Assessee has to establish identity of subscribers to share capital and prove their creditworthiness and genuineness of transaction; furnishing of income-tax file numbers may not be sufficient to discharge the burden- **CITv. Nivedan Vanijya Niyojan Ltd. [2003] 130 Taxman 153 (Cal.).**

- In CIT v. N Tarika Properties Investment (P.) Ltd. [2013] 40 taxmann.com 525/[2014] 221 Taxman 14 (Delhi) [SLP dismissed in N Tarika Property Invest. (P.) Ltd. v. CIT [2014] 51 taxmann.com 387/227 Taxman 373 (SC)] the assessee-company was required to give information about respective persons who had subscribed to its share capital. On enquiry, the Assessing Officer found that the subscribers' bank account statements were forged and fabricated as there were corresponding cash deposits in the bank accounts before issue of share application cheques and that the deposits were through cash or transfer entries from same bank of entry operators. It was held that since false evidence had been adduced by the assessee to give colour of genuineness to bogus entries through the bank accounts and deposits, which were mostly by cash, the Assessing Officer was justified in making addition.

- Where Commissioner, in section 263 proceedings, set aside ITO's order holding that there was a device used by assessee for converting black money by issuing shares and ITO failed to conduct detailed investigation into genuineness of shareholders and Tribunal reversed Commissioner's order and rejected reference application, Tribunal came to a conclusion on facts and as such no interference was called for- **CITv. S teller Investment Ltd [2001] 115 Taxman 99 (SC)**.

  Note: See amendments to section 68 by the Finance Act, 2012.

- **No deductions are allowable against deemed income**

- The Gujarat High Court in the case of *Fakir Mohmed Haji Hasan* v. *CIT* [2001] 247 ITR 290/[2002] 120 Taxman 11 held that the opening words of section 14 'save as otherwise provided by this Act'? clearly leave scope for 'deemed income' of the nature covered under the scheme of sections 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 sections 69, 69A, 69B and 69C treat unexplained investments, unexplained money, bullion, etc., and unexplained expenditure as deemed income where the nature and scope of acquisition, investment or expenditure have not been explained or satisfactorily explained. Therefore, in these cases, the sources not being known such deemed income will not fall even under the head 'Income from other sources'.

- Therefore, the deductions which are applicable to the incomes under any of these various heads, will not be attracted in case of deemed income which are covered under the provisions of sections 69, 69A, 69B and 69C in view of the scheme of those provisions.

Is proviso to section 68 retrospective

- The Calcutta Bench of the Tribunal has in the case of ***Subhalakshmi Vanijya (P.) Ltd. 60 taxmann.com 60 (Cal)*** has held that the proviso to section 68 is retrospective and will apply to the pending assessments of earlier years as well.

- The Mumbai Bench of ITAT has in the case of ***Cougar Investment Pvt. Ltd. (ITA No. 1866/Mum/2015; order dated 11.9.2015)*** held that the proviso to section 68 is prospective and will apply w.e.f. assessment year 2013-14.

- The Bombay High court, in the case of ***CIT v. Gagandeep Infrastructure Pvt. Ltd.***, has held that the proviso to s. 68 (which creates an obligation on the issuing Co to explain the source of share capital & premium) has been introduced by the Finance Act 2012 with effect from 01.04.2013 and does not have retrospective effect. The Parliament did not introduce the proviso to Section 68 of the Act with retrospective effect nor does the proviso so introduced state that it was introduced "for removal of doubts" or that it is "declaratory". Therefore it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to Section 68 of the Act is immaterial and does not change the interpretation of Section 68 of the Act both before and after the adding of the proviso.

Is proviso to section 68 retrospective

- Prior to the introduction of the proviso to section 68, as per Lovely Exports 317 ITR 218 (SC), if the AO regards the share premium as bogus, he has to assess the shareholders but cannot assess the same as the issuing company's unexplained cash credit.

- The Apex Court has in the case of Lovely Exports held that it is not for the assessee to prove source of the source. Following the ratio of this decision and otherwise various High Courts have in several cases held that the onus is not on the assessee to establish source of source. The Calcutta Tribunal was coloured by the bad facts of the case before it. It is a classic example of bad facts making bad law. The proviso certainly cannot be retrospective because it is casting an additional burden on the assessee. Complying with the proviso may not be possible for the assessee at this stage. The Legislature has not made the provision retrospective. Infact, the FM and the Govt is on record to state that it does not want to bring in any retrospective amendments.

CIT v. Gagandeep Infrastructure Pvt. Ltd. – Bom HC - [2017] 80 taxmann.com 272 (Bombay)

- The proviso to section 68 has been introduced by the Finance Act, 2012 with effect from 1-4-2013. Thus, it would be effective only from the assessment year 2013-14 onwards and not for the subject assessment year. In fact, before the Tribunal, it was not even the case of the Revenue that section 68 as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1-4-2013 was its normal meaning. The Parliament did not introduce the proviso of section 68, with retrospective effect nor does the proviso so introduced state that it was introduced 'for removal of doubts' or that it is 'declaratory'. Therefore, it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to section 68 is immaterial and does not change the interpretation of section 68 both before and after the adding of the proviso.

Simultaneous application of proviso to s. 68 and s. 56(2)(viib)

- The proviso to section 68 and provisions of clause (viib) of sub-section (2) of section 56 cannot operate simultaneously to the same transaction. The two provisions are in two different fields. The proviso to section 68 will operate if the assessee is not able to establish identity, capacity and genuineness of the transaction. Only when the identity, capacity and genuineness of the transaction is established by the assessee, the transaction will be regarded as a genuine transaction of issue of shares. Else, it is a case of a transaction which is purported to be a transaction of issue of shares but is not really so. Upon the transaction being classified as a genuine transaction of issue of shares, the provisions of clause (viib) of sub-section (2) of section 56 will apply.

Simultaneous application of proviso to s. 68 and s. 56(2)(viib)

- The following observations of Kolkata Bench of the Tribunal, in the case of Shubhalakshmi Vanijya (P.) Ltd. v. CIT (2015) 172 TTJ 721 (Kol.) are relevant in this connection –
  - "We fail to find out any parallel between the amendments made to section 68 and section 56(2)(viib) except for the fact that these provisions have been added by the Finance Act, 2012. A conjoint reading of the proviso to section 68 and section 56(2)(viib) divulges that where a closely held company receives, interalia, some amount as share premium whose genuineness is not proved by the assessee company or its source, etc., is not proved by the shareholder to the satisfaction of the AO, then the entire amount including the fair market value of the shares is chargeable to tax u/s 68 of the Act. If, however, the genuineness of the amount is proved and the shareholder also proves his source, then the hurdle of s. 68 stands crossed and the share

Simultaneous application of proviso to s. 68 and s. 56(2)(viib)

  - premium, to the extent stipulated, is chargeable to tax u/s 56(2)(viib) of the Act.

- It shows that only when source of such premium in the hands of a shareholder is properly explained to the satisfaction of the AO, that the provisions of section 56(2)(viib) get triggered. Approaching this section pre-supposes that the assessee genuinely received share premium from the shareholder having satisfactorily explained the transaction. Thus, it is evident that sections 68 and 56(2)(viib) can never simultaneously operate. The latter excludes the former."

Simultaneous application of proviso to s. 68 and s. 56(2)(viib)

- **Royal Rich Developers Pvt. Ltd. v. DCIT (Mumbai ITAT) itatonline.org**
- Amendment to section 68 casting onus on assessee and requiring it to explain source of source of share subscription is clarificatory and retrospective. Law in Lovely Exports 299 ITR 268; Sophia Finance 205 ITR 98, etc. does not apply as they are prior to Money Laundering Act, 2002.
- A conjoint reading of proviso to section 68 and section 56(2)(viib) divulges that where a closely held company receives, inter alia, some amount as share premium whose genuineness is not proved by the assessee company or its source etc. is not proved by the shareholder to the satisfaction of the AO, then the entire amount including the fair market value of the shares, is chargeable to tax u/s 68 of the Act. If however, the genuineness of the amount is proved and the shareholder also proves his source, then the hurdle of section 68 stands crossed and the share premium, to the extent stipulated, is chargeable to tax u/s 56(2)(viib) of the Act. It shows that only when source of such share premium in the hands of a shareholder is properly explained to the satisfaction of the AO, that the provisions of section 56(2)(viib) gets triggered

CIT v. Gagandeep Infrastructure (P.) Ltd. -[2017] 80 taxmann.com 272 (Bombay)

- **Where revenue urged that assessee company received share application money from bogus shareholders, it was for revenue to proceed by reopening assessment of such shareholders and assessing them to tax and not to add same to assessee's income as unexplained cash credit**
- During the previous year relevant to subject assessment year the assessee had increased its share capital from Rs. 2.50 lakhs to Rs. 83.74 lakhs. The asessee had collected share premium to the extent of Rs. 6.69 crores and charged share premium at Rs. 190 per share. The assessee furnished the list of its shareholders, copy of the share application form, copy of share certificate and Form No. 2 filed with the Registrar of Companies.
- The Assessing Officer invoked section 68 to treat the amount of Rs. 7.3 crores, i.e., the aggregate of the issue price and the premium on the shares issued as unexplained cash credit within the meaning of section 68.

CIT v. Gagandeep Infrastructure (P.) Ltd. -[2017] 80 taxmann.com 272 (Bombay)

- On appeal, the Commissioner (Appeals) deleted the addition made by the Assessing Officer by holding that the Assessing Officer had given no reason to conclude that the investment made was not genuine. He observed that if the amounts have been subscribed by bogus shareholders it was for the revenue to proceed against such shareholders. Therefore, the Assessing Officer was not justified in adding the amount of share capital subscription including the share premium as unexplained credit under section 68.
- On further appeal, the Tribunal observed that the assessee had established the identity, genuineness and capacity of the shareholders who had subscribed to its shares and upheld the findings of the Commissioner (Appeals).
- In instant appeal to the High Court, the revenue contended that proviso to section 68 which was introduced with effect from 1-4-2013 would apply in the facts of the present case even for assessment year 2008-09.

CIT v. Gagandeep Infrastructure (P.) Ltd. -[2017] 80 taxmann.com 272 (Bombay)

- **HELD:**
- The proviso to section 68 has been introduced by the Finance Act, 2012 with effect from 1-4-2013. Thus, it would be effective only from the assessment year 2013-14 onwards and not for the subject assessment year. In fact, before the Tribunal, it was not even the case of the Revenue that section 68 as in force during the subject years has to be read/understood as though the proviso added subsequently effective only from 1-4-2013 was its normal meaning. The Parliament did not introduced to proviso of section 68, with retrospective effect nor does the proviso to introduced states that it was introduced 'for removal of doubts' or that it is 'declaratory'. Therefore, it is not open to give it retrospective effect, by proceeding on the basis that the addition of the proviso to section 68 is immaterial and does not change the interpretation of section 68 both before and after the adding of the proviso.

CIT v. Gagandeep Infrastructure (P.) Ltd. -[2017] 80 taxmann.com 272 (Bombay)

- HELD …
- In view of the matter the three essential tests while confirming the section 68 laid down by the Court namely the genuineness of the transaction, identity and the capacity of the investor have all been examined by the impugned order of the Tribunal and on fact it was found satisfied. Further it was a submission on behalf of the Revenue that such large amount of share premium gives rise to suspicion on the genuineness (identity) of the shareholders, i.e., they are bogus. The Apex Court in a case in this context to the pre-amended section 68 has held that where the revenue urges that the amount of share application money has been received from bogus shareholders then it is for the Income-tax Officer to proceed by reopening the assessment of such shareholder and assessing them to tax in accordance with law. It does not entitle the revenue to add the same to the assessee's income as unexplained cash credit. [Para 3]

Major Metals. Ltd. v. UOI - [2012] 19 taxmann.com 176 (Bom.)

- **Settlement Commission is empowered to pass orders on matters covered by application as well as on matter relating to case referred to in report of Commissioner**
- Relevant Facts:
- The Settlement Commission having noticed (*i*) that during the assessment year 2008-09 the assessee had unsecured loans of Rs. 3.73 crores, the genuineness of which needed to be verified, bearing in mind the *modus operandi* adopted by the group, (*ii*) that during the assessment year 2008-09 the assessee claimed to have received two loans of Rs. 2 crores from two companies, (*iii*) that during the assessment year 2009-10 the assessee received amounts of each of Rs. 90 lakhs from the two companies, and (*iv*) that during the assessment year 2009-10 the assessee allotted 30,000 shares each to the two companies of a face value of Rs. 10 at a premium of Rs. 990 per share, which resulted in share capital of Rs. 3 lakhs and

Major Metals. Ltd. v. UOI - [2012] 19 taxmann.com 176 (Bom.)

- share premium of Rs. 2.97 crores being realized from each of the two companies, opined that it was difficult to understand the loan transactions, which resulted in the conversion of loans into share capital and share premium particularly when the assessee was not a listed company. The Commissioner was directed to submit a factual report verifying the genuineness of loans and creditworthiness of the two companies who were said to have given loans and inquiring into the genuineness of conversion of the loans to share capital and share premium by issue of shares. The Commissioner, in the report submitted to the Commission, stated (*i*) that the two companies had confirmed having advanced the loans, (*ii*) that the said companies were income tax assessees whose identity was established, (*iii*) that the assessee had disclosed an income each of Rs. 10 lakhs for the two assessment years which was stated to be commission income earned out of the transactions involving purchase and sale of non-ferrous metals, (*iv*) that the assessee had not furnished any details of the said income,

Major Metals. Ltd. v. UOI - [2012] 19 taxmann.com 176 (Bom.)

- (*v*) that if the history of the assessee was to be taken into account, the income disclosed was rather meagre inasmuch as for the assessment year 2007-08, the assessee had introduced its own money of Rs. 2 crores in the form of share application money, and (*vi*) that, therefore, the extent of the undisclosed income of the assessee could be much more than the income which was disclosed. The Commission came to the conclusion that the purported transactions were not genuine. It held that the claim of having received such high premium on shares was fictitious and an attempt by the assessee to launder its own unaccounted funds in the guise of such receipts. It, therefore, held that the amount shown in the books of account of the assessee as share capital/premium was liable to tax in accordance with the provision of section 68. It, therefore, made an addition of Rs. 6.18 crores to the income of the assessee under the provisions of section 68.

Major Metals. Ltd. v. UOI - [2012] 19 taxmann.com 176 (Bom.)

- **HELD**
- ***Addition of Rs. 6.18 crores made to the income of the assessee under the provisions of section 68***
- *The Settlement Commission has noted in its order that in order to scrutinize the genuineness of the transactions entered into by the assessee with the two companies it had directed the assessee to produce relevant records, such as, minute books, attendance registers of AGMs, dispatch registers, share certificates and authorization of proxy forms amongst other documentary material. The order of the Settlement Commission indicates at least fourteen reasons on the basis of which it has arrived at considered findings of facts (*i *) that the transactions of the two companies were not genuine transactions, (*ii*) that the two companies lacked a credit standing which would have enabled them to pay large amounts towards share premium of Rs. 990 on a face value of Rs. 10 per share, and (*iii*) that neither the past*

Major Metals. Ltd. v. UOI - [2012] 19 taxmann.com 176 (Bom.)

- *performance or the financial standing of the assessee itself would justify the payment of such a large premium. The Settlement Commission has relied upon the law laid down by the Supreme Court in the case of* Sumati Dayal *v.* CIT *[1995]* 214 ITR 801 / 80 Taxman 89 *(SC) in applying the test of human probabilities. [Paras 22 and 23]*
- *It has been urged by the assessee that an addition within the meaning of section 68 would not be justified in law in its hands even if the share application money was received from bogus shareholders. It further submitted that in the instant case the report submitted by the Commissioner under section 245D(3) showed that the two companies were duly identified being income tax assessees whose PANs were also furnished. Consequently, recourse to the provisions of section 68 was not in order. [Para 24]*

Major Metals. Ltd. v. UOI - [2012] 19 taxmann.com 176 (Bom.)

- *In the instant case, it needs to be emphasized that the Settlement Commission has considered all the material on record including the material which had a bearing on the creditworthiness and financial standing of the alleged subscribing companies to the share capital of the assessee. None of the companies was held to have a financial standing or creditworthiness which would justify making of such a large investment of Rs. 6 crores at a premium of Rs. 990 per share. The allotment of shares, it must be noted, has taken place in pursuance of a private placement.* ***The principles which have been applied in relation to the public subscription of shares of a public limited company can obviously have no application to the facts of a case such as the instant one****. The view which has been taken by the Settlement Commission is consequently borne out on the basis of the material on record. This is not a case where the Commission has proceeded contrary to law or on the basis of no evidence. There is no perversity in the findings of the Settlement Commission. [Para 26]*

Major Metals. Ltd. v. UOI - [2012] 19 taxmann.com 176 (Bom.)

- *In the exercise of the power of judicial review particularly against the findings of the Settlement Commission the Court would not be justified in re-appreciating the findings of facts, which, in any event, are based on the material on record. [Para 29]*

Pragati Financial Management (P.) Ltd. v. CIT - [2017] 82 taxmann.com 12 (Cal.)

- **Even under unamended provision of section 68, an income-tax officer was not precluded from making an inquiry about true nature and source of sum found credited in books even if same was credited as receipt of share application money.**
- **FACTS**
- The assessee-company was engaged in investment activities. It filed return declaring a loss of Rs. 24,805.
- The Commissioner issued a show-cause notice to the assessee under section 263 stating therein that the assessee raised a paid-up share capital of Rs. 25.06 lakhs with premium of Rs. 4.76 crores for which no requisite inquiries were conducted by the Assessing Officer as to what prompted the subscribers to the shares to pay such substantial premium on shares of a little known company. It was also stated that no proper inquiry was conducted regarding the identity and creditworthiness of the shareholders and the assessment order was passed mechanically.

Pragati Financial Management (P.) Ltd. v. CIT - [2017] 82 taxmann.com 12 (Cal.)

- The Commissioner set aside the order of the Assessing Officer and held that he did not pursue the inquires to the logical end, thereby order passed was prejudicial to the interest of the revenue. The Assessing Officer was directed to conduct inquiries and verifications regarding the share capital of the assessee-company.
- On appeal, the Tribunal, sustained the order of the Commissioner holding that amended provision of section 68 was retrospective in operation.
- On appeal before the High Court:
- **HELD**
- A coordinate bench of the Court in dealing with an almost identically worded order of the Commissioner in the case of *Rajmandir Estates (P.) Ltd.* v. *Pr. CIT* [2016] 386 ITR 162/240 Taxman 306/70 taxmann.com 124, construed the provisions of section 68 as it was before the amendment being the law which prevailed in the relevant previous year in that proceeding, and held that 'the use of the words 'any sum found credited in the books' in section 68 indicates that the said section is very widely

Pragati Financial Management (P.) Ltd. v. CIT - [2017] 82 taxmann.com 12 (Cal.)

- worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money. ***Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine***. The ITO may even be justified in trying to ascertain the source of depositor'. Therefore, ***the submission that the source of source is not a relevant enquiry does not appear to be correct***. The exercise of power under section 263 by the Commissioner was not an act of reactivating stale issues.' [Para 10]
- This judgment was carried up in appeal by the assessee before the Supreme Court and the Supreme Court dismissed the special leave petition finding no reason to entertain the same. [Para 11]

Pragati Financial Management (P.) Ltd. v. CIT - [2017] 82 taxmann.com 12 (Cal.)

- The capital receipts in respect of which inquiries have been ordered by the Commissioner was fresh share capital issued at high premium. The assessee, however, urged the point that it was only after the aforesaid amendments such inquiries would have relevance. It sought to take cue from the observation of the Coordinate Bench that the question as to whether proviso to section 68 of Income-tax Act is retrospective in nature or not was being kept open. [Para 12]
- The judgment in the case of *Rajmandir Estates (P.) Ltd.* (*supra*) was delivered considering the unamended provision of section 68. In the instant case of the assessees, there is no differing feature so far as applicability of the said statutory provision is concerned, even though the Tribunal in *Subhlakshmi Vanijya (P.) Ltd.* v. *CIT* [2015] 155 ITD 171/60 taxmann.com 60 had held that the provisos to section 68 are retrospective in their operation, and delivered the decision against the assessee in that case that reasoning. In the appeal of *Rajmandir Estates (P.) Ltd.* (*supra*), the Coordinate Bench did not consider it necessary to examine the

Pragati Financial Management (P.) Ltd. v. CIT - [2017] 82 taxmann.com 12 (Cal.)

- question of retroactivity of the aforesaid provision. The Coordinate Bench found the order of the Commissioner to be valid examining the order applying the unamended provision of section 68. No distinguishing element in these appeals is found which would require addressing the question as to whether the amendment to section 68 was retrospective in operation or not. Neither it is needed to address the issue that if the inquiries, as directed, revealed that share capital infused were actually unaccounted money, whether the same could be taxed in accordance with section 56(2)(viib) or not. It is not necessary in these appeals to deal with the question of retroactivity of the aforesaid provisions, for which that authority was cited. [Para 13]
- Thus, the appeals are to be dismissed.

B. R. Petrochem (P.) Ltd. v. ITO - [2017] 81 taxmann.com 424 (Madras)

- **Where assessee received share capital from various contributors, in view of fact that those contributors were persons of insignificant means and their creditworthiness to have made contributions had not been established, impugned addition made by authoirties below in respect of amount in question under section 68 was to be confirmed.**
- **FACTS**
- In the course of assessment the Assessing Officer noticed that the share capital of the assessee was an amount of Rs. 50 lakhs, of which a sum of Rs. 49,74,000 had been introduced during the relevant financial year. An enquiry was launched in response to which the assessee furnished the names and addresses of the contributors.

B. R. Petrochem (P.) Ltd. v. ITO - [2017] 81 taxmann.com 424 (Madras)

- The Assessing Authority recorded detailed findings to the effect that while the identity of the creditors was furnished, neither their creditworthiness, nor the genuineness of the transaction was established. The examination also revealed various discrepancies in the dates and amounts of the contributions vis-à-vis the statements recorded from the contributors and the details furnished by the assessee.
- It also came to light that none of the creditors had any evidence for having advanced the amounts towards share capital, owned no immovable property or moveable property in their names and several of them had no bank accounts. In the light of the aforesaid facts, the assessing authority was of the view that the onus placed on the assessee in terms of section 68 had not been discharged. He thus added amount representing share capital to assessee's taxable income.
- The Tribunal confirmed addition made by the Assessing Officer.
- On appeal:

B. R. Petrochem (P.) Ltd. v. ITO - [2017] 81 taxmann.com 424 (Madras)

- Section 68 is a provision that enables the assessment of any sum found credited in the books of an assessee where no satisfactory explanation is offered by the assessee to explain the same. *The courts have consistently held that the three guiding principles in the context of section 68 would be the establishment of the identity and creditworthiness of the creditor and the genuineness of the transaction. In the present case, only the first of the three conditions has been established by the assessee. Neither the creditworthiness nor the genuineness stands explained. The stand of the assessee to the effect that any transaction styled as a contribution to share capital would stand excluded from the purview of section 68 is too wide to be accepted. The language of section 68 does not admit of such an interpretation. In fact, it would indicate the opposite* insofar as the opening words of the section are 'Where any sum is credited in the books of an assessee….' [Para 10]

B. R. Petrochem (P.) Ltd. v. ITO - [2017] 81 taxmann.com 424 (Madras)

- The Division Bench of the High Court in the case of *CIT* v. *Steller Investment Ltd.* [2001] 251 ITR 263/115 Taxman 99 (SC) held that even if it was assumed that the subscribers to the increased share capital are genuine, under no circumstances could the subscriptions be assessed as undisclosed income of the company. The only remedy available to the department was an enquiry in the hands of the alleged share contributors and an assessment of the amount in their hands, assuming that if it was found that the contributions were not genuine. [Para 11]
- Reference was also made to the judgment of the Supreme Court in *CIT* v. *Lovely Exports (P.) Ltd.* [2008] 216 CTR 195 where the issue was held in the favour of assessee. [Para 13]
- The judgment extracted above should be same in the context of the facts of the case that have been dealt with in extension by the Division Bench of the Delhi High Court in *Lovely Exports (P.) Ltd.* (*supra*). The distinguishing features that would set apart that case from the present one are detailed below:

B. R. Petrochem (P.) Ltd. v. ITO - [2017] 81 taxmann.com 424 (Madras)

- (*i*) Payments made through banking channels, whereas in the present case, payments are in cash and no receipts or any proof thereof has been produced.
- (*ii*) Several of the contributors were assessed to tax and details of the assessments furnished. In the present case, none of the contributors were assessed to tax, barring one, in whose case also no particulars were furnished in this regard.
- (*iii*) The finding of the authorities is to the effect that the Assessing Officer had neither controverted, nor disapproved the material filed by the assessee whereas in this case, no material whatsoever was produced to establish proof of payment by the contributors, their creditworthiness or genuineness of the transaction. [Para 14]

B. R. Petrochem (P.) Ltd. v. ITO - [2017] 81 taxmann.com 424 (Madras)

- The clear and distinguishing distinction of fact is that the Assessing Officer, in that case, had not met or controverted the details furnished by the assessee. It was in the above circumstances, and on account of such failure that the Tribunal, the highest fact finding body and High Court in confirmation thereof, came to the view that no addition could be made when primary details had been furnished to the Assessing Officer who had not carried out the required investigation with due diligence. The burden placed on the assessee in terms of section 68 was thus discharged by the assessee in the case of *Lovely Exports (P.) Ltd.* (*supra*). This has not been done in the present case. Apart from establishing the identity of the creditor, the assessee was unable to dislodge the findings of the Assessing Officer to the effect that the alleged contributors were not creditworthy, or that the transaction was *bona fide.* [Para 15]

B. R. Petrochem (P.) Ltd. v. ITO - [2017] 81 taxmann.com 424 (Madras)

- In all, the result of enquiries carried out by the department should reveal and satisfy transparently all parameters of section 68, concurrently. In the present case, the finding of fact is to the effect that neither the creditworthiness nor the genuineness of the parties has been established by the assessee. The detailed investigations carried out by the Assessing Officer establish the position that the contributors to share capital were persons of insignificant means and their creditworthiness to have made the contributions had not been established. The Assessing Authority had put the result of his enquiries to the assessee granting it opportunity to offer its explanations. The appellant however failed to establish the genuineness of the cash contributions as well as the capacity of the persons to have made such contributions in the first place. The findings of the fact arrived at by the Tribunal are accepted and nothing has been placed on record to show that they are perverse. [Para 16]
- In view of aforesaid, impugned order of Tribunal is upheld and, consequently, assessee's appeal is dismissed. [Para 17]

Daniel Merchants Pvt. Ltd. v. ITO (SC) – law laid down in Subhlakshmi Vanijya Pvt. Ltd. v. CIT 155 ITD 171 (kol) cannot be interfered with.

- **Law laid down in Subhlakshmi Vanijya Pvt. Ltd vs. CIT 155 ITD 171 (Kol), Rajmandir Estates 386 ITR 162 (Cal) etc that the CIT is entitled to revise the assessment order u/s 263 on the ground that the AO did not make any proper inquiry while accepting the explanation of the assessee insofar as receipt of share application money is concerned cannot be interfered with**.
- The Commissioner of Income Tax had passed an order under Section 263 of the Income Tax Act, 1961 with the observations that the Assessing Officer did not make any proper inquiry while making the assessment and accepting the explanation of the assessee(s) insofar as receipt of share application money is concerned. On that basis the Commissioner of Income Tax had, after setting aside the order of the Assessing Officer, simply directed the Assessing Officer to carry thorough and detailed inquiry. It is this order which is upheld by the High Court. We see no reason to interfere with the order of the High Court.

ITO v. Neelkanth Finbuild Ltd. (ITAT Delhi)

- **Even if the issued share capital is bogus, no addition can be made in assessee's hands if identity of shareholder is established. Assessee is not required to show source of shareholder's funds.**
- Once the identity of the share holder have been established, even if there is a case of bogus share capital, it cannot be added in the hands of company unless any adverse evidence is not on record. It is a certain law that the assessee is to prove the genuineness of transaction as well as the creditworthiness of the creditor must remain confined to the transactions which have taken place between the assessee and the creditor. It is not the business of assessee to find out the source of money of creditors.

DCIT v. Alcon Biosciences P. Ltd. (ITAT Mumbai)

- **The fact that a pvt. ltd co issued shares at an exorbitant premium is irrelevant if the assessee has proved the genuineness of the transaction. If the assessee has furnished necessary evidence to prove the identity of the share applicants and their PAN details, the department is free to proceed to reopen the individual assessments of the share applicants but it cannot be regarded as undisclosed income of the assessee.**
- As regards the AOs observation with regard to the issue of shares at a face value of Rs.10/- issued at a premium of Rs.990 per share, we find that there is no merit in the findings of the AO for the reason that the issue of shares at a premium and subscription to such shares is within the knowledge of the company and the subscribers to the share application money and the AO does not have any role to play as long as the assessee has proved genuineness of transactions
- .

Umbrella Projects Pvt. Ltd. v. ITO (ITAT Delhi)

- **If the assessee has discharged the initial onus regarding the identity, creditworthiness and genuineness, the onus shifts to the AO to bring material or evidence to discredit the same. The fact that the shareholders did not respond to s. 133(6) summons is not sufficient to draw an adverse inference. There must be material to implicate the assessee in a collusive arrangement with person who are accommodation entry providers.**
- In view of the above documents and evidences filed by the assessee, we are of the opinion that these are sufficient to discharge its initial onus regarding the identity, creditworthiness and genuineness as required under Section 68 of the Act. The assessee having discharged its onus, it was upon the AO to bring material or evidence to discredit the same. In the present case, from the assessment order, it is evident that no adverse material is available with the AO.

ACIT v. TRN Energy Pvt. Ltd. v. ITO (ITAT Delhi)

- **Share application money cannot be treated as unexplained credit if the AO does not make any investigation on the documentary evidences filed by the assessee or ask for the production of the investors for examination u/s 131 or if adverse material is found during search to prove that share application money is bogus or an arranged affair of the assessee.**
- The A.O. however, did not make any further enquiry on the documents filed by the assessee-company. The A.O. thus, failed to conduct any enquiry and scrutiny of the documents at assessment stage and merely suspected the transaction between the Investor Company and assessee-company because the Investor Company was from Kolkata. The A.O. thus, did not perform his duties at the assessment stage so as to make addition against the assessee-company. No cash was found deposited in the account of the Investor. Therefore, the totality of the facts and circumstances clearly prove that assessee-company discharged initial onus to prove identity of the Investor Company, its creditworthiness and genuineness of the transaction in the matter.

ITO v. Shreedham Construction Pvt. Ltd. (ITAT Mumbai)

- **In the case of credit as share capital by corporate entity, whose existence is shown by its registration with Registrar of companies and its filing of tax returns, adverse conclusion is not justified merely because its directors are not produced personally before the AO by the assessee. The AO has to demonstrate with specific evidence that the assessee has in reality obtained accommodation entries by showing cash deposits linked to the investors.**

ITO v. Shreedham Construction Pvt. Ltd. (ITAT Mumbai)

- Section 68 casts the initial burden of proof on the assesse to show prima facie and to explain the nature and source of credit found in its books. When the statute places the burden of proof in income tax cases on the tax payer, it is understood to be only the initial burden. ***When the tax payer explains the credit by providing evidence of identity, confirmation and credit worthiness, the burden shifts on the revenue to show that the explanation is not satisfactory or incorrect***. In the case of credit as share capital by corporate entity, whose existence is shown by its registration with Registrar of companies and its filing of tax returns, adverse conclusion is not justified merely because its directors are not produced personally before the assessing officer by the tax payer.

Pr. CIT v. Paradise Inland Shipping Pvt. Ltd. (Bombay HC)

- **Companies which invest share capital cannot be treated as bogus if they are registered and have been assessed. Once the assessee has produced documentary evidence to establish the existence of such companies, the burden shifts to the Revenue to establish their case. Reliance on statements of third parties who have not been subjected to cross examination is not permissible. Voluminous documents produced by the assessee cannot be discarded merely on the basis of statements of individuals contrary to such public documents.**

Pr. CIT v. Paradise Inland Shipping Pvt. Ltd. (Bombay HC)

- This Court in the Judgments relied upon by the learned Counsel appearing for the Respondents, have come to the conclusion that once the Assessee has produced documentary evidence to establish the existence of such Companies, the burden would shift on the Revenue-Appellants herein to establish their case. In the present case, the Appellants are seeking to rely upon the statements recorded of two persons who have admittedly not been subjected to cross examination. In such circumstances, the question of remanding the matter for re-examination of such persons, would not at all be justified. The Assessing Officer, if he so desired, ought to have allowed the Assessee to cross examine such persons in case the statements were to be relied upon in such proceedings. Apart from that, the voluminous documents produced by the Respondents cannot be discarded merely on the basis of two individuals who have given their statements contrary to such public documents.

CIT v. Orchid Industries Pvt. Ltd. (Bombay HC)

- **Mere fact that parties to whom the share certificates were issued and who had paid the share capital money were not traceable and did not appear before the AO in response to summons does not mean that the transaction can be treated as bogus if the documentation shows the genuineness of the transaction.**
- The Assessing Officer added Rs.95 lakhs as income under Section 68 of the Income Tax Act only on the ground that the parties to whom the share certificates were issued and who had paid the share money had not appeared before the Assessing Officer and the summons could not be served on the addresses given as they were not traced and in respect of some of the parties who had appeared, it was observed that just before issuance of cheques, the amount was deposited in their account.

Prabhatam Investment Pvt. Ltd. v. ACIT (ITAT Delhi)

- **(i) The AO cannot ignore the documentation produced by the assessee to show that the investors are genuine,**
- **(ii) A section 132(4) statement cannot be relied upon if the assessee is not give right of cross-examination,**
- **(iii) Fact that the shareholders did not respond to s. 133(6) notices does not warrant an adverse inference,**
- **(iv) Fact that the shareholders have low income does not warrant adverse inference,**
- **(v) Assessee is not required to prove source of source.**

Prabhatam Investment Pvt. Ltd. v. ACIT (ITAT Delhi)

- The AO doubted the genuineness of the transaction because notice u/s 133(6) could not be served upon the investors and that the assessee was directed to produce both the parties by 19.03.2014. The Ld. Counsel for the assessee however, referred to Paper Book page 157 which is the reply before the AO dated 24.03.2014 in which the assessee has provided correct and updated address of the entity as per MCA website. The AO instead of issuing fresh notice u/s 133(6) at the correct address of the investor companies merely relied upon the fact that the earlier letter under the above provision has returned unserved. Since the AO did not issue fresh notice at the correct address provided by the assessee and no coercive action has been taken for the production of investors, therefore, no adverse inference could be drawn against the assessee

CIT v. Laxman Industrial Resources Pvt. Ltd. (Delhi HC)

- **Fact that the investigation wing's report alleged that the assessee was beneficiary to bogus transactions and that the identity of shareholders, genuineness etc was suspect is not sufficient. The AO is bound to conduct scrutiny of documents produced by the assessee and cannot rest content by placing reliance on the report of the investigation wing.**

CIT v. Laxman Industrial Resources Pvt. Ltd. (Delhi HC)

- The assessee had provided several documents that could have showed light into whether truly the transactions were genuine. It was not a case where the share applicants are merely provided confirmation letters. They had provided their particulars, PAN details, assessment particulars, mode of payment for share application money, i.e. through banks, bank statements, cheque numbers in question, copies of minutes of resolutions authorizing the applications, copies of balance sheets, profit and loss accounts for the year under consideration and even bank statements showing the source of payments made by the companies to the assessee as well as their master debt with ROC particulars. The AO strangely failed to conduct any scrutiny of documents and rested content by placing reliance merely on a report of the Investigation Wing. This reveals spectacular disregard to an AO's duties in the remand proceedings which the Revenue seeks to inflict upon the assessee in this case.

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CIT v. Green Infra Ltd. (Bombay HC)

- **Even if the premium at which the shares are issued defies commercial prudence, the receipt cannot be assessed as "unexplained credit" if the identity of the payer, genuineness of the transaction and capacity of the subscriber are not disputed. Interest earned on short-term fixed deposits is assessable as "profits and gains of business" and not as "income from other sources"**
- Mr.Chhotaray the learned counsel for the Revenue states that the impugned order itself holds that share premium of Rs.490/per share defies all commercial prudence. Therefore it has to be considered to be cash credit. We find that the Tribunal has examined the case of the Revenue on the parameters of Section 68 of the Act and found on facts that it is not so hit. Therefore, Section 68 of the Act cannot be invoked. The Revenue has not been able to show in any manner the factual finding recorded by the Tribunal is perverse in any manner

Pr. CIT v. Jatin Investment Pvt. Ltd. (Delhi HC)

- **A transaction cannot be treated as fraudulent if the assessee has furnished documentary proof and proved the identity of the purchasers and no discrepancy is found. The AO has to exercise his powers u/s 131 & 133(6) to verify the genuineness of the claim and cannot proceed on surmises.**

Pr. CIT v. Jatin Investment Pvt. Ltd. (Delhi HC)

- The assessee has adduced the documentary evidences in support of the transaction in question. The identity of the purchasers of the shares was established as it was borne on the record of the Income Tax Department. The purchasers have PAN card as well. Turning to the shares which were sold by the appellant as per its version, there is no evidence or material to even suggest, as pointed out as on behalf of the assessee, that the cheques directly or indirectly emanated from the assessee so that it could be said that the assessee's own money was brought back in the guise of sale proceeds of the shares. Though, the purchasers of the shares could not be examined by the AO, since they were existing on the file of the Income Tax Department and their Income Tax details were made available to the AO, it was equally the duty of the AO to have taken steps to verify their assessment records and if necessary to also have them examined by the respective AOs having jurisdiction over them which has not been done by him.

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Cornerstone Property Investments Pvt. Ltd. v. ITO (ITAT Bangalore)

- **Share premium received can be assessed as undisclosed income if (a) directors are allotted shares at par while others are allotted at premium, (b) the high premium is not justified by a valuation report, (c) the high premium is not supported by the financials, (d) based on financials the value of shares is less and no genuine investor would invest at the premium, (e) there are discrepancies & abnormal features which show transaction as "made up" to camouflage real purpose.**

Cornerstone Property Investments Pvt. Ltd. v. ITO (ITAT Bangalore)

- The argument of the assessee that the provisions of Sec.56(1)(viib) of the Act does not apply to the case on hand for the year under consideration as it has been introduced by Finance Act, 2012 w.e.f. 1.4.2013 is a misplaced one. From a reading of the order of assessment, it is clear that the Assessing Officer has invoked the provisions of Sec. 68 of the Act. This leads us to the question of whether the provisions of Sec. 68 of the Act can be invoked for the nature of transactions involved in the case, where sums of money are credited in the name of share premium. This question has been addressed by the Hon'ble Calcutta High Court in the case of Pragati Financial Management Pvt. Ltd. Vs. CIT in C.A. 887 & 998 of 2016 and others dt.7.3.2017. In its order (supra) on the issue of whether enquiry under Section 68 of the Act can be carried out for examining the genuineness of the share premium transaction, the Hon'ble High Court held that Sec. 68 of the Act can be invoked to conduct enquiry on the genuineness of share premium transactions

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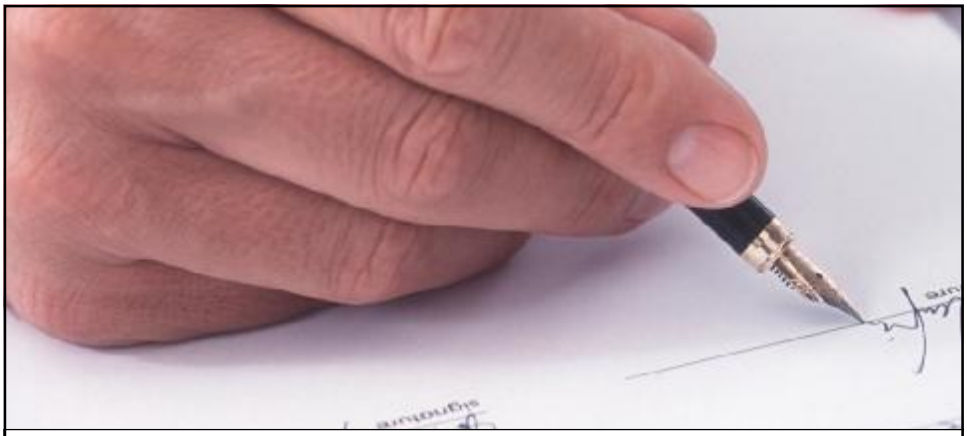

Anti-abuse sections – 68, 69 & Benami Law

Jagdish T Punjabi **April 14, 2018**

What is the meaning of `benami'

- The word `benami' means without name
- It is a system of acquiring and holding property and even of carrying on business in names other than those of the real owners. This system is usually called the benami system which is and has been common practice in this country.
- A benamidar is simply an `alias' for that of the person beneficially interested.
- Benami transactions is a practice common to all communities and prevalent in this country for a very long time. Benami transactions have received judicial recognition from very early times, as can be seen from the classic decision of the Privy Council in Gopeekrist Gosain v. Gungapersaud Gosain [1854]
- Why benami ?

Background

- In the 57th Report of the Law Commission of India on benami transactions, regarding benami transactions in general, it was stated, with reference to judicial decisions, thus:

  "**Principle that transaction is presumed to be for benefit of person providing money**. The principle is that where property is acquired in the name of one person but the purchase price is paid by another, a presumption arises that the transaction was one for the benefit of the person providing the money. Such cases are common in India where benami transactions are recognised.

  Benamidar representing the true owner. — In general, the benamidar fully represents the owner of the property in dealings with third persons. In fact, that is the very object of benami transactions. The property stands in the name of the benamidar, and a third party would not be able to challenge his title so long as the real owner does not come in the picture.

  Position as between real owner and third parties. — As to the position between the real owner of the property and third parties: Ordinarily, the real owner will have no occasion to make any assertions about title. If however, such a situation does arise, then the law will have regard to the reality, and (disregarding the ostensible title of the benamidar), the law will allow the real owner to assert his ownership, as a general rule."

Background

- Originally, the President, following the recommendations of the 57th Law Commission Report promulgated the Benami Transactions (Prohibition of Right to Recover Property) Ordinance, 1988, on 19th May, 1988.
- Thereafter, the Benami Transactions (Prohibition) Bill, 1988 was passed by both the houses of Parliament and on 5th September, 1988, it became the Benami Transactions (Prohibition) Act, 1988 (hereinafter referred to as “the Original Act”). The Original Act was a small Act with 9 sections.
- The Benami Transactions (Prohibition) Amendment Act, 2016 (hereinafter referred to as “the Amending Act”) has amended the Original Act and has enlarged it from an Act having 9 sections to an Act having 72 sections.
- The Amending Act has even renamed the Original Act as “The Prohibition of Benami Property Transactions Act, 1988”.
- The Amending Act has come into force on 1.11.2016.

Chronology of Amendment Act

May 13, 2015	The Benami Transactions (Prohibtion) Amendment Bill, 2015 introduced in Lok Sabha to amend and incorporate certain provisions to the Original Act
April 28, 2016	Standing committee submitted its report upon examination of the Bill
July 22, 2016	Government proposed amendments to the Amendment Bill, 2015
July 27, 2016	Amendment Bill was passed by Lok Sabha
Aug 2, 2016	Rajya Sabha approved the Amendment Bill
Aug 10, 2016	President gave his assent to the Amending Act
Nov 1, 2016	Date on which the Amending Act came into force
Nov 1, 2016	The Prohibition of Benami Property Transactions Rules, 2016 came into force

Benami Transactions as understood prior to the Original Act

- Benami transactions, a practice common to all communities and prevalent in this country for a very long time, have received judicial recognition from very early times, as would be seen from the classic decisions of the Privy Council in *Gopeekrist Gosain* v. *Gungapersaud Gosain* [1854] 6 MIA 53, in *Mt. Bilas Kunwar* v. *Desraj Ranjit Singh* AIR [1915] PC 96 and in *GurNarayan* v. *Sheo Lal Singh* AIR [1918] PC 140.

- **What then were benami transactions, as understood prior to the Act**? As early as 1908, the Privy Council, in *Petherpermal Chetty* v. *Muniandy Servai* [1908] ILR 35 Cal. 551 at 558, approved the statement in *Mayne's Hindu Law* (7th edition) as correct. The Privy Council observed thus:

Benami Transactions as understood prior to the Original Act

- "In *Mayne's Hindu Law* (7th edn., p. 595, para 446), the result of the authorities, on the subject of benami transactions, is correctly stated thus:
  - '446 . .. Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But, if A requires the help of the Court to get the estate back into his own possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias,* then it has ceased to be a mere mask, and has become reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded anyone, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away ... where they had intended to defraud creditors, who, in fact, were never injured... But, where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies: *In pari delicto potior est conditio possidentis.* The court will help neither party. 'Let the estate lie where it falls'.' "

Difference between `benami' and `sham'

- Is there any difference between benami and sham transactions? In a very early decision of the Madras High Court in *Rangappa Nayakar* v. *Rangasami Nayakar* AIR 1925 Mad. 1005 it was held thus:

  ".. .The essence therefore of a sham transaction is that though a registered deed is brought into existence no title of any kind, either legal or beneficial is intended to be passed thereby to any person whatsoever, that is to say, the deed of transfer is not intended to effect any transfer of property. **The difference therefore between sham transactions and benami transactions is one of intention**. If the deed of transfer is made with the intention of placing the property in the name of third person, the intention clearly amounts to a transfer of the legal title and such a transaction can scarcely be called a sham transaction, but comes directly within the meaning of benami transactions properly so called." (p. 1008)

Difference between `benami' and `sham'

- We have the direct authority of the Supreme Court in at least two decisions. In *Sree Meenakshi Mills Ltd.* v. *CIT* [1957] 31 ITR 28, Justice Venkatarama Ayyar, speaking for the Court, held thus:
  - ". . . In this connection, it is necessary to note that the word 'benami' is used to denote two classes of transactions which differ from each other in their legal character and incidents. In one sense, it signifies a transaction which is real, as for example, when A sells properties to B but the sale deed mentions X as the purchaser. Here the sale itself is genuine, but the real purchaser is B, X being his benamidar. This is the class of transactions which is usually termed as benami. But the word 'benami' is also occasionally used, perhaps not quite accurately, to refer to a sham transaction, as for example, when A purports to sell his property to B without intending that his title should cease or pass to B. The fundamental difference between these two classes of transactions is that whereas in the former there is an operative transfer resulting in the vesting of title in the transferee, in the latter there is none such, the transferor continuing to retain the title notwithstanding the execution of the transfer deed. It is only in the former class of cases that it would be necessary, when a dispute arises as to whether the person named in the deed is the real transferee or B, to enquire into the question as to who paid the consideration for the transfer, X or B. But in the latter class of cases, when the question is whether the transfer is genuine or sham, the point for decision would be, not who paid the consideration but whether any consideration was paid. . . ." (p. 52)

`Sham' as explained by Delhi HC in Krishna Kumar v. Harnamdas

- The Delhi High Court has in the case of Krishna Kumar v. Harnamdas [1991] 56 Taxman 233 (Delhi) has held as under –
  - "Benami transaction, according to section 2(e) means any transaction in which the property is transferred to one person for a consideration paid or provided by another person. This definition would apply only if (i) there is a transfer of property, and (ii) the consideration is paid or provided not by the transferee, but by another person. In a benami transaction it must be established that the property is held or possessed by the benamidar and that consideration was paid by another person. If possession is not transferred to the benamidar and actually the consideration is paid by another person and the possession of the property is also taken by such other person, the transfer deed by which the property is shown to have been sold to the benamidar would be merely a sham document. It will go to show that the real intention of the parties was not to confer any right, title or interest on the benamidar. The Act will apply only when both the conditions, i.e., the transfer of possession to the benamidar as well as the payment of consideration by a person other than the benamidar are proved and it will not extend to a case where actually the possession of the property has not been transferred to the benamidar.

`Sham' as explained by Delhi HC in Krishna Kumar v. Harnamdas

- In such a case, if a party pleads that there never was any intention to create any right in the name of transferee and he was simply used as a name-lender, and is able to prove that fact by some cogent and convincing evidence, the Court is obligated to return a finding that the deed was sham and did not affect the rights of such a person. Rather the real and ostensible title merges in one and the same person and the person in whose name the property is mentioned in the deed is a mere name-lender. In the instant case, the gist of the pleadings of the defendants was that actually the defendants had given the bid at the spot, had paid consideration after the acceptance of the bid, had taken the possession of the plot and, after raising construction thereon had gone into possession. Nowhere in their written statement they had used the word 'benami'. Throughout they had stated that the plaintiff was only a name-lender and that was also because of the relationship of mutual trust and confidence. The plaintiff happened to be the real brother-in-law of the deceased defendant, i.e., the maternal uncle of defendant Nos. 2 and 3. It was never the intention of the parties that plaintiff would ever get possession of the property in question and, therefore, section 4 would not be applicable."

Onus or Burden of proof

- The burden of proof regarding benami is upon the one who alleges benami. The burden to prove passing of consideration or the motive is on the person who alleges benami. This aspect of the matter was considered by the **Supreme Court in Valliammal (D) By Lrs vs Subramaniam & Ors (2004) 7 SCC 233, where it was held:**

  *"This Court in a number of judgments has held that it is **well- established that burden of proving that a particular sale is benami lies on the person who alleges the transaction to be a benami.** The essence of a benami transaction is the intention of the party or parties concerned and **often, such intention is shrouded in a thick veil which cannot be easily pierced through.** But such difficulties do not relieve the person asserting the transaction to be benami of any part of the serious onus that rests on him, nor justify the acceptance of mere conjectures or surmises, as a substitute for proof. Referred to Jaydayal Poddar vs. Bibi Hazra,*

Onus or Burden of proof ...

- *1974 (1) SCC 3; Krishnanand vs. State of Madhya Pradesh, 1977 (1) SCC 816; Thakur Bhim Singh vs. Thakur Kan Singh, 1980 (3) SCC 72; His Highness Maharaja Pratap Singh vs. Her Highness Maharani Sarojini Devi & Ors., 1994 (Supp. (1) SCC 734; and Heirs of Vrajlal J. Ganatra Vs. Heirs of Parshottam S. Shah, 1996 (4) SCC 490. It has been held that in the judgments referred to above that the question* ***whether a particular sale is a benami or not, is largely one of fact, and for determining the question no absolute formulas or acid test, uniformly applicable in all situations can be laid.*** *After saying so, this Court spelt out following* ***six circumstances which can be taken as a guide to determine the nature of the transaction:***

  (i) the source from which the purchase money came;

  (ii) the nature and possession of the property, after the purchase;

  (iii) motive, if any, for giving the transaction a benami colour;

Onus or Burden of proof ...

(iv) the position of the parties and the relationship, if any, between the claimant and the alleged benamidar;

(v) the custody of the title deeds after the sale; and

(vi) the conduct of the parties concerned in dealing with the property after the sale."

- ***The above indicia are not exhaustive and their efficacy varies according to the facts of each case. Nevertheless, the source from where the purchase money came and the motive why the property was purchased benami are by far the most important tests*** *for determining whether the sale standing in the name of one person, is in reality for the benefit of another. We would examine the present transaction on the touchstone of the above two indicia."*

Distinction between the Original Act and Amended Act

Original Act	Amended Act
Benami Transactions (Prohibition) Act, 1988	Prohibition of Benami Property Transactions Act, 1988
9 sections	72 sections
Acquisition of property	Confiscation of property
Benami Transactions Rules absent	Benami Transactions Rules notified
No administration	Administration defined
Imprisonment for 3 years or fine or both	Rigorous imprisonment for a period not less than one year

Definitions as per original Act

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

(*a*) "benami transaction" means any transaction in which property is transferred to one person for a consideration paid or provided by another person;

(*b*) "prescribed" means prescribed by rules made under this Act;

(*c*) "property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.'

Prohibition of benami transactions as per original Act

Prohibition of benami transactions.

3. (1) No person shall enter into any benami transaction.

(2) Nothing in sub-section (1) shall apply to –

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

(b) the securities held by a –

(i) depository as registered owner under sub-section (1) of section 10 of the Depositories Act, 1996 (22 of 1996);

(ii) participant as an agent of a depository.

Explanation: The expressions "depository" and "participants" shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of section 2 of the Depositories Act, 1996.

(3) Whoever enters into any *benami* transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence under this section shall be non-cognizable and bailable.

Acquisition of benami property and Act not to apply in certain cases – Ss 5 and 6 of the original Act

5 Property held benami liable to acquisition -

(1) All properties held benami shall be subject to acquisition by such authority, in such manner and after following such procedure, as may be prescribed.

(2) For the removal of doubts, it is hereby declared that no amount shall be payable for the acquisition of any property under sub-section (1).

6 Act not to apply in certain cases –

Nothing in this Act shall affect the provisions of section 53 of Transfer of Property Act, 1882, or any law relating to transfers for an illegal purpose."

Whether the original Act applies to a sham transaction?

- Before the Kerala High Court in the case of **Ouseph Chacko v. Raman Nair [1990] 49 Taxman 410 (Ker.)** the following questions arose for determination –

  (i) Is a sham transaction `benami'?

  (ii) Does section 4 of the Benami Transactions (Prohibition) Act, 1988 apply to sham transactions?

  The Court after exhaustively considering various decisions of the Privy Council, the Apex Court and also the provisions of the Indian Trusts Act, the provisions of the Benami Transactions (Prohibition) Act, 1988, it observed that in view of the decision of the Apex Court in Shree Meenakshi Mills case and in Bhim Singh's case ***the question for consideration is whether the Act applied to both these cases, or whether it is limited only to the benami transactions falling in the first category and does not extend to those falling in the second category***.

  The Kerala High Court, in this case held that -

`sham transaction' – is it a `benami transaction' as per the original Act

- *The Act has provided a definition for 'benami transaction'. It means any transaction in which property is transferred to one person for a consideration paid or provided by another. It contemplates cases where (*a *) there is a transfer of property, and (*b*) the consideration is paid or provided not by the transferee, but by another. Where there was no transfer of property as in a sham document, there is no consideration for the transaction which does not satisfy the definition of 'benami transaction' under the Act. The definition of 'benami transaction' in the Act, thus, excludes from its purview a sham transaction. Further, section 81 of the Indian Trusts Act, 1882, applies to a transaction under which no transfer was intended and no consideration passed,* i.e., *to a sham transaction. But section 82 provides for another class of transactions which are also statutorily treated as obligations in the nature of a trust and they relate to transfer to one for consideration paid by another. It is significant that section 82 has practically been bodily lifted and incorporated in the definition of 'benami transaction' in the present Act. This definition has nothing to do with the concept contained in section 81. If the Act intended to embrace transactions covered by section 81 also, there was no reason for restricting the definition of 'benami transaction' to the phraseology employed in section 82.* ***This also gives an indication that sham transactions, loosely called benami transactions, which are in fact not benami transactions in the real sense of the term, are not subject to the rigour of the Act****. It is true that section 3 uses the words 'benami transaction' and section 4 uses only the word 'benami'. But that makes no qualitative difference in the application of the Act.*

Does `held' in s. 4 mean possessed or occupied?

- As regards applicability of s. 4 it held that –
- "Ss. 3 and 4 have to be read and understood together. They are not disjunctive provisions in a comprehensive legislation intended to prohibit benami transactions. Sections 3 and 4 are complementary to each other and intended to achieve the same object. While section 3 prohibits the creation of any 'benami transaction', section 4 prevents any suit, claim or action to enforce any right in respect of any property 'held benami'. It is only when any right in respect of a property 'held benami' is sought to be enforced in any suit or claim that section 4 is attracted. 'Hold' according to Black's Dictionary means 'to possess by virtue of a lawful title as in the expression, common in grants, to have and to hold, to possess, to occupy, to be in possession and administration of. **In the context and setting of section 4, the word 'held' has to be understood as 'possessed or occupied'. If the possession or occupation is not benami, section 4 can have no application**. An intended benami does not confer even pretended rights. A benami transaction where the property is so held as benami is the subject of the statutory prohibition under sections 3 and 4. The definition of 'benami transaction' is inextricably connected with all the provisions of the Act, as the Act is intended 'to prohibit benami transactions and the right to recover property held benami and for matters connected therewith or incidental thereto'. **S. 4 cannot be invoked in case of transactions which were sham or only nominal**."

Short title, extent and commencement – S. 1

- **Short title, extent and commencement.**

1. (1) This Act may be called the [1]**[***Prohibition of Benami Property Transactions Act, 1988***]** (45 of 1988).

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) The provisions of sections 3, 5 and 8 shall come into force at once, and the remaining provisions of this Act shall be deemed to have come into force on the 19th day of May, 1988.

1. Substituted for "*Benami* Transactions (Prohibition) Act, 1988" by the *Benami* Transactions (Prohibition) Amendment Act, 2016, w.e.f. **1-11-2016**†

- †**NOTIFICATION NO. SO 3289(E) [No.98/2016 (F.No.149/144/2015-TPL (Part-II, dated 25-10-2016**.—In exercise of the powers conferred by sub-section (2) of section 1 of the Benami Transaction (Prohibition) Amendment Act, 2016 (43 of 2016), the Central Government hereby appoints the 1st day of November, 2016 as the date on which provisions of the said Act shall come into force.

Definition of `benami property' and `property'

- '2. In this Act, unless the context otherwise requires,—
- (*8*) "*benami* property" means any property which is the subject matter of a *benami* transaction and also includes the proceeds from such property;

- The term `benami property' is exhaustively defined. It also includes proceeds from such property. A question would arise as to whether a property acquired with such proceeds will also be regarded as benami property? What would be the position if the proceeds are since invested in another property or are spent away?

- (10) "benamidar" means a person or a fictitious person, as the case may be, in whose name the benami property is transferred or held and includes a person who lends his name.

- (*26*) "property" means assets of any kind, whether movable or immovable, tangible or intangible, corporeal or incorporeal and includes any right or interest or legal documents or instruments evidencing title to or interest in the property and where the property is capable of conversion into some other form, then the property in the converted form and also includes the proceeds from the property;

Definition of `transfer' and `person'

- '2. In this Act, unless the context otherwise requires,—
- *(29)* "transfer" includes sale, purchase or any other form of transfer of right, title, possession or lien;

- The term `transfer' is inclusively defined. The second part states that any other form of transfer (ie. a form other than sale or purchase) of right, title, possession or lien is also covered. Therefore, mortgage, lease, tenancy, gift, will all be transfers.

- (*24*) "person" shall include—
  - (*i*) an individual;
  - (*ii*) a Hindu undivided family;
  - (*iii*) a company;
  - (*iv*) a firm;
  - (*v*) an association of persons or a body of individuals, whether incorporated or not;
  - (vi) every artificial juridical person, not falling under sub-clauses (i) to (v);

  The definition is identical to the definition of `person' in s. 2(31) of the Income-tax Act, 1961 except that local authority is not included herein.

Definition of `benami transaction'

- (*9*) "*benami* transaction" means,—
  - (*A*) a transaction or an arrangement—
    - (*a*) where a property is transferred to, or is held by, a person, and the consideration for such property has been provided, or paid by, another person;

and

    - (*b*) the property is held for the immediate or future benefit, direct or indirect, of the person who has provided the consideration,

except when the property is held by—

(*i*) a *Karta*, or a member of a Hindu undivided family, as the case may be, and the property is held for his benefit or benefit of other members in the family and the consideration for such property has been provided or paid out of the known sources of the Hindu undivided family;

Definition of `benami transaction' ...

(*ii*) a person standing in a fiduciary capacity for the benefit of another person towards whom he stands in such capacity and includes a trustee, executor, partner, director of a company, a depository or a participant as an agent of a depository under the Depositories Act, 1996 and any other person as may be notified by the Central Government for this purpose;

(*iii*) any person being an individual in the name of his spouse or in the name of any child of such individual and the consideration for such property has been provided or paid out of the known sources of the individual;

Definition of `benami transaction' ...

(*iv*) any person in the name of his brother or sister or lineal ascendant or descendant, where the names of brother or sister or lineal ascendant or descendant and the individual appear as joint-owners in any document, and the consideration for such property has been provided or paid out of the known sources of the individual; **or**

- (*B*) a transaction or an arrangement in respect of a property carried out or made in a fictitious name; **or**
- (*C*) a transaction or an arrangement in respect of a property where the owner of the property is not aware of, or, denies knowledge of, such ownership; **or**
- (*D*) a transaction or an arrangement in respect of a property where the person providing the consideration is not traceable or is fictitious;

Definition of `benami transaction' ...

Explanation.—For the removal of doubts, it is hereby declared that *benami* transaction shall not include any transaction involving the allowing of possession of any property to be taken or retained in part performance of a contract referred to in section 53A of the Transfer of Property Act, 1882, if, under any law for the time being in force,—

(i) consideration for such property has been provided by the person to whom possession of property has been allowed but the person who has granted possession thereof continues to hold ownership of such property;

(ii) stamp duty on such transaction or arrangement has been paid; and

(iii) the contract has been registered.

Is the Explanation retrospective in view of the opening words `For the removal of doubts, it is hereby declared that ….”

words and expressions not defined in this Act

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

  (*31*) words and expressions used herein and not defined in this Act but defined in the Indian Trusts Act, 1882, the Indian Succession Act, 1925, the Indian Partnership Act, 1932, the Income-tax Act, 1961, the Depositories Act, 1996, the Prevention of Money-Laundering Act, 2002, the Limited Liability Partnership Act, 2008 and the Companies Act, 2013, shall have the same meanings respectively assigned to them in those Acts.'.

- Therefore, if a word / expression is used in this Act but is not defined in this Act one will need to check if it is defined in any of the 8 Acts mentioned above. If the answer is in the affirmative, such word / expression will have the same meaning assigned to them in those Acts. A difficulty may arise if a word / expression is defined in more than one of these 8 Acts and the two definitions are different, which one be adopted for the purposes of this Act.

Meaning of `fiduciary relationship' ...

- Personal representatives,
- Directors,
- Solicitors and Professional Advisers (eg Accountants, Stock Brokers)
- Employees,
- Tenants for life;
- Guardians,
- Company Promoters,
- Partners,
- Receivers,
- Liquidators

Prohibition of Benami Transactions – Section 3 of amended Act

- '3. **Prohibition of benami transactions**
  - (1) No person shall enter into any benami transaction.
  - (2) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.
  - (*3*) Whoever enters into any *benami* transaction on and after the date of commencement of the *Benami* Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section (*2*), be punishable in accordance with the provisions contained in Chapter VII.";

- Present sub-section (2) was earlier sub-section (3) and sub-section (2) under the Old Act was –

"(2) Nothing in sub-section (1) shall apply to –

(a) the purchase of property by any person in the name of his wife or unmarried daughter and it shall be presumed, unless the contrary is proved, that the said property had been purchased for the benefit of the wife or the unmarried daughter;

(b) the securities held by a –

(i) depository as registered owner under sub-section (1) of section 10 of the Depositories Act, 1996 (22 of 1996);

(ii) Participant as an agent of a depository.

Explanation: The expressions "depository" and "participants" shall have the meanings respectively assigned to them in clauses (e) and (g) of sub-section (1) of section 2 of the Depositories Act, 1996.

Legal consequences of benami transaction

- The following are the legal consequences of benami transactions:
- 1 **Benami transaction is a punishable offence –** Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may be extend to three years or with fine or with both – Section 3(2) of the Act [Formerly section 3(3) of the Act].
- 2 **Prohibition of the right to recover property held benami –** No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name this property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property – Section 4(1)
- 3 **No defence based on any right in respect of any property held benami**, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action or by or on behalf of a person claiming to be the real owner of such property – Section 4(2).
- 4 **Property held benami liable to confiscation -** Any property, which is the subject matter of benami transaction, shall be liable to be confiscated by the Central Government – New section 5 as substituted by the 2016 Amendment Act.

Legal consequences of benami transaction ...

- 5 **Prohibition on re-transfer of property by benamidar –** No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf – New section 6(1). Any such re-transfer shall be null and void – New section 6(2). However, this prohibition shall not apply where the re-transfer is made in accordance with the Income Declaration Scheme, 2016 – i.e. in accordance with section 190 of the Finance Act, 2016 – New section 6(3).

Prohibition of the right to recover property held benami – S 4

- "4. **Prohibition of the right to recover property held benami**

  (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property.

  (2) No defense based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property."

Omitted by the *Benami* Transactions (Prohibition) Amendment Act, 2016, w.e.f. **1-11-2016**. Prior to its omission, sub-section (3) read as under :

(3) Nothing in this section shall apply,—(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity."

Confiscation of benami property and prohibition on re-transfer of property by benamidar – Ss 5 and 6

5 Property held benami liable to confiscation - Any property, which is subject matter of benami transaction, shall be liable to be confiscated by the Central Government.

6 Prohibition on re-transfer of property by benamidar –

(1) No person, being a benamidar shall re-transfer the benami property held by him to the beneficial owner or any other person acting on his behalf.

(2) Where any property is re-transferred in contravention of the provisions of sub-section (1), the transaction of such property shall be deemed to be null and void.

Jagdish T Punjabi

B.Com., B.G.L., FCA.