

Unexplained Deemed Income u/section(s) 68; 69 etc Income Tax Act, 1961

Presentation by :

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OBJECT/SCOPE

To deliberate on provisions of and issues from :

- a) Section 68 Unexplained Cash Credit*
- b) Section 69/69B Unexplained Investment*
- c) Section 69A Unexplained Money*
- d) Section 69C Unexplained Expenditure*
- e) Section 69D*
- f) Section 269SS Section 269T*

Section 68- Year of Charge

If the sum is credited in the books of account in AY 2001-2002, the same cannot be taxed in any other assessment year other than AY 2001-2002. Raj HC in 301 ITR 404

Delhi High Court in Usha Stud 301 ITR 384 – carried forward cash credit balances can only be examined in the year in which they are firstly/freshly introduced

Confrontation and Cross Examination during asst. proceedings

- Many times AO gathers information at the back of assessee, during asst. proceedings, eg in form of information u/s 133(6), statement of creditor recorded u/s 131 etc. – Whether mandatory on part of assessee to confront back material and in case, assessee learns from verbal discussion with AO's office regarding back material – a specific request in writing may be filed (as a precaution)

Confrontation and Cross Examination during asst. proceedings

- Yes Mandatory : Latest DHC in Jindal Vegetable (6 Nov 2008 in ITA 428 of 2007) and Raj HC in 174 Taxman 440, Guj HC in Laxman Bhai Patel (22/7/2008 ITR No. 41/1997), SC in 125 ITR 713 etc
- Even if assessee requests for confrontation of back material and AO do not provide so, said back material will become unreliable and consequential addition will be not tenable at law (apart from above, refer DHC in 172 Taxman 64, SC in 26 ITR 775, SC in 176 ITR 169 ETC)

Confrontation and Cross Examination during asst. proceedings

- P&HHC latest in Sanjeev Kumar Jain held that in case statement recorded at the back of assessee of third party, same are not offered for cross examination, matter must be remanded back to AO and addition cannot be annulled (However DHC in Dharampal Premchand (SLP dismissed by SC); Jindal Vegetable, SMC Share Brokers etc (REFERRED IN ABOVE SLIDES) has held that addition must be annulled)



Confrontation and Cross Examination during asst. proceedings

- P&HHC in N.P.Garodia has held that in case assessee borrower gives complete identity & address details of lender to AO and requests to AO to issue summons u/s 131 – it is duty of AO to issue said summons (if not issued, matter can be remanded back)
- Even P&HHC in Brij Pal Sharma has upheld ITAT order whereby accepting, assessee's version of inability to produce trade creditor and request to AO for issuing summons u/s 131 (not adhered by AO), addition deletion was affirmed.
- SC in Food Corporation 1 SCC 68

Confrontation and Cross Examination during asst. proceedings

The legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, if the addition is made, the same is required to be deleted on the ground of violation of the principles of natural justice Guj HC in Laxman S Patel 174 Taxman 206 (Also refer Raj HC in Geetanjali 174 Taxman 440 approving 114 TTJ 697)



Role of Assessee's Affidavit

- *Mad HC in 158 ITR 826:*

“According to the learned counsel appearing for the Revenue, the Tribunal ought not to have accepted the interested testimony of the assessee, when even according to her, there are other documents, particularly crossed cheques, which are said to have been issued by the assessee in favour of some of the multani bankers in partial payment of interest. We find that the Revenue's contention sounds reasonable. It might be that any judicial authority can accept any statement of an assessee, when that is the only piece of evidence available in that particular case, and order assessment on such sole evidence. But when, even according to the assessee, there is other documentary evidence of corroborative value and the same is within the reach of the assessee, in such a case, we are of the opinion that a judicial body cannot act on such interested testimony of the assessee alone”



Section 68: Share Application Money

- SHARE CAPITAL AND SECTION 68: LATEST SC RULING IN LOVELY EXPORTS PVT LTD. 216 CTR 195 : Whether share application money can be treated as undisclosed income of the assessee? If the share application money is received from alleged bogus shareholders, whose names are given to AO, then department is free to proceed to reopen their individual asst. in accordance with law, but it cannot be regarded as undisclosed income of the assessee."

Section 68: Share Application Money

- SC in Lovely Exports applied latesty in:

Delhi High Court	ITAT
Bhav Shakti Steels 18 DTR 194	Software Consultants
Gongour Investments 18 DTR 242	Sumangal Commercial
Samir Bio Tech 17 DTR 224	Acquatech 119 TTJ 140
Other: Value Capital 221 CTR 511	Anu Industries 19 DTR 465



Section 68: Share Application Money

- SC in Lovely Exports :

Issue	Possible View
Whether SC ruling in Lovely Exports can be applied in context of unsecured loans taken by a corporate assessee?	Seems to be Yes (more in case of corporate lenders)
Whether SLP dismissal by speaking order in Lovely Exports attract binding force of Article 141?	Yes Refer SC in 245 ITR 360

Section 68: Unsecured Loans

- ❑ Assessee should prove identity, capacity of lenders as well as genuineness of transaction.
- ❑ Where lender is assessed to tax, assessee can avoid addition by filing confirmation with particulars of PAN.
- ❑ Case Laws:
 - CIT Vs. Orissa Corporation (P) Ltd. (159 ITR 78) (SC)
 - CIT Vs. Rohini Builders (256 ITR 360) (Guj.)
 - Metachem 245 ITR 360 (MPHC)
 - Nem Chand Kothari 264 ITR 254 (Gau)
 - DHC in ITAC Ltd and Rajokri Farms Pvt Ltd; Real Time Marketing 221 CTR 716; Diamond Products 177 Taxman 331*
 - Raj HC in 219 CTR 571 & 220 CTR 622*

Section 68: Unsecured Loans

- Assessee is not required to prove source of the source of credit.

Case Laws:

Hastimal V. CIT (49 ITR 273) (Mad.)

Tolaram Daga V. CIT (59 ITR 632) (Assam)

Nemichand Kothari v. CIT (264 ITR 254) (Gau)

Murlidhar Lahorimal Vs. CIT (280 ITR 512) (Guj)

Section 68: Unsecured Loans

Mere Non production of lender/shareholder etc cannot by itself be a ground for making addition u/s 68 Held in

- a) Jodh ITAT in 100 TTJ 644
- b) DHC in Divine Leasing etc 299 ITR 268
- c) Cal HC in 168 ITR 493
- d) Guj HC in Rohini Builders (supra)
- e) SC Orissa Corporation (supra)
- f) SC in Anis Ahmed 297 ITR 441
- g) BHC in 90 ITR 396
- h) Patna HC in 151 ITR 150
- i) DHC in Rungta Irrigation

Section 68:Unsecured Loans

While furnishing Confirmation for Unsecured loans etc: precautions (points to be covered in conformation)

- a) Date of Signing of confirmation
- b) Confirmation of fact of transaction of giving the amount by the creditor
- c) Mode of Payment i.e through DD/Cash/cheque
- d) In case of banking channel adopted, particulars of cheque etc
- e) In interest bearing: state this vital fact
- f) PAN and place of assessment of creditor
- g) If possible, source of lending the money

Section 68: Unsecured Loans

In case of firm, once a partner having accepted that he advanced certain sum to the firm: No addition in hands of firm (investment can be examined in hands of partner as per section 69 etc):

- a) P&HHC in 208 CTR 459; 224 ITR 180
- b) Mad HC in Taj Browellers 291 ITR 232
- c) SC in Lovely Exports (supra)
- d) All HC in 141 ITR 706; (- 272 ITR 136 first day – partner's money credited in firm's books)

Section 68: Unsecured Loans

In case credit is introduced in books on first day of first previous year for the assessee and/or before commencement of the business, it is held in Cases of firms and companies, that no cash credit can be added under section 68 of the Act:

- a) Mad HC in Taj Browllers (supra)
- b) SC in Bharat Engg 83 ITR 187
- c) Raj HC in Kewal Krishan dated 12/1/2009
- d) Luck ITAT in 7 SOT 457 Surender.Prasad.Mishra
- e) Del ITAT in Sai Baba Rupadas ITA 1543/98
- f) Del ITAT in Ghabiabad Footwear 142 Taxman 8 Magazine
- g) All ITAT in 14 SOT 190 Smt Meera Devi

Section 68:Unsecured Loans

In case explanation offered by assessee is found Unacceptable, whether addition u/s 68 of the Act is Automatic (Held no by SC in P.K.Noorjahan 237 ITR 570) In view of word "MAY" used instead of "shall" *(also applicable to section 69 eg: where an assessee cannot be supposed to have earned undisclosed income of alleged sum given the factual background (viz. a lady aged 17 years – never engaged in business), no addition is possible in hands of said assessee) (also applicable to first year cash credit where assessee operated for few months in a year etc)- Applied by All ITAT in 14 SOT 190*

Section 68: Unsecured Loans

Connotation of Word "Books" as used in section 68 of the Act: Held Pass Book/Bank Statement is not "books" : in BHC in Bhai Chand Gandhi 141 ITR 67; Ms Mayawati 113 TTJ 178; Jawaharlal 71 ITD 324 P&HHC in 171 ITR 532

Connotation of phrase "Found to be credited" as used in section 68: Incumbent on AO to give finding by reference to books that alleged credit is found credited in books (Refer SC in Hind Lamps)

Section 68:Unsecured Loans

In case affidavit of a lender etc is filed, whether without rejecting the contents of affidavit (by WITHOUT examining deponent of affidavit), can AO proceed to make the addition? HELD NO

Refer:

- SC in Mehta Parikh 30 ITR 181
- BHC in 94 ITR 1
- Raj HC in 256 ITR 331
- Orissa HC in 212 ITR 85
- MPHC in 146 ITR 140

Section 68:Unsecured Loans

Whether section 68 is applicable to creditor arising out of purchases made in normal course of business, Which have not been doubted u/s 37 of the Act (that is purchase stands allowed) Held No

- Delhi ITAT 5 Member Special Bench in Manoj Aggarwal
- All HC in 205 CTR 444 Pancham Dass
- Delhi ITAT in 95 TTJ 71
- Guj HC in 163 ITR 249
- Ahd ITAT in 101 TTJ 810

Section 68:Unsecured Loans

In case of sale of jewellery declared under VDIS, capital gains thereon albeit can be examined u/s 68 of the Act, however no addition for the same can be Made, in case assessee has furnished:

- Conformation from jewellery purchaser
- Bank a/c copy for transaction proof
- Sale/Purchase Voucher of Jewellery etc.

(Refer Special Bench of ITAT in Manoj Aggarwal (supra); BHC in Inder V Nankani

www.itatonline.org); Mad HC in 163 Taxman 682

Section 68: Unsecured Loans

Applicability of section 68 to security deposits (tenancy) :

MPHC in 290 ITR 453; Held sufficient if landlord Proves identity of tenant and genuineness of transaction (no need to prove creditworthiness)
Also see REWA Group : Jab ITAT in 109 TTJ 657

DHC in Tulip Finance 15 DTR 185: In case deposits Subsequently Adjusted against rentals – duly accounted for- No question of taxation u/s 68

Section 68: Unsecured Loans

Applicability of section 68 to ADVANCE BOOKING AMOUNT RECEIVED BY REAL ESTATE DEVELOPER:

In case subsequently offered to taxation as sale price or refunded to flat bookers – DHC in Tulip Finance can be applied – No taxation u/s 68

Otherwise, prima facie- SC Lovely Exports can be Applied and by proving the identity (names and Addresses of flat bookers)- initial onus can be Discharged (Question pending before Delhi ITAT in Rajni Constructions)

Section 68:Unsecured Loans

Applicability of section 68 to ADVANCE BOOKING AMOUNT RECEIVED BY DEALER – ASSESSEE

Raj HC in 208 CTR 208: When ITAT found that assessee was receiving money from the customers in hands against payment on delivery of vehicles , the said amount could not attract section 68 because cash deposits become self explanatory... Also See Chd ITAT in 132 Taxation 148 ; Chennai ITAT in 83 TTJ 352

Section 68: Amount recd through Gift

Bang ITAT in T Krishnamurthy ITA 262/2008

Where assessee explained source of funds as cash gift from his mother, which assessee stated his mother accumulated from agricultural savings- was Held rightly rejected by AO; CIT-A & ITAT on the Ground of human probabilities/surrounding Circumstances (that is Keeping cash in remote village – is against human probability and before rejecting mother's confirmation, it is not sine qua non that she must be examined and AO on basis of human conduct reject assessee's version)

Section 68: Amount recd through WILL

Delhi ITAT in Budh Kishore 87 TTJ 140:

Amount recd through Will cannot be taxed by rejecting the will on conjectures and surmises (that is will is not on stamp paper, there are no witnesses; it merely bears thumb impression etc)

Also similar conclusion by Jodhpur ITAT in 102 TTJ 161

Section 68: Amount recd through WILL

A Case study:

An assessee recd certain amount through Will in cash from his deceased father, which was deposited in assessee's bank account in installments as per needs of assessee. On assessee's query as to source of amount deposited in bank a/c, assessee filed with Will of assessee (which duly identified witnesses with addresses) and affidavit from one of the Will witness as to passing of money to assessee

Section 68: Amount recd through WILL

A Case study:

AO disbelieved assessee's version stating:

- Since assessee's father was having bank a/c and there is no withdrawal from same, assessee's explanation that amount was accumulated by late father from retirement savings and post retirement tuitions is incorrect
- Since amount has not been deposited in one go and is deposited by assessee in installments

Section 68: Amount recd through WILL

CIT-A further rejected assessee's version stating that:

- Keeping cash in DELHI by assess'es father being unsafe – is improbable
- Assessee's father not having filed Income Tax Return (disregarding assessee's version that tuition income was below taxable amount)
- It is improbable that assessee's father at his last stage (on death bed) could have executed will

Section 68: Amount recd through WILL

Prima facie View:

- Since affidavit of witness of Will has not been rejected and Will witnesses have not been examined- no addition is possible
- Since assessee has disclosed the source of funds – he cannot be asked source of source
- Since assessee has duly identified the source of money – any addition if required can be made in hands of deceased under section 69 – SC Lovely Exports
- Burden to prove that money recd from Will actually emerged from assessee is not discharged by revenue

Section 68: Agreement for sale of Shops

- P&HHC in 179 Taxman 141: In case of amount recd in cash, on stated execution of agreements for sale of shops, same does not stand proved merely by fling of affidavits of payers, when those could not be produced for authentication; Similarly production of agreement to sale incomplete and unsigned does not prove assessee's version. (Factor that assessee did not handover possession of shops under stated agreements till the date of hearing before ITAT and said payers did not seek refund of said money, went against the assessee) (Assessee's reliance on share capital case laws u/sec 68 distinguished)

Section 68: Non Residents

Money brought by Non residents from their foreign bank accounts (being money earned Outside India) in India (deposited in Indian NRE account etc) :

Held by Delhi ITAT in Finlay case 86 ITD 626

- a) Cannot be examined u/s 68 in absence of books
- b) As regards section 69, same gets satisfied since the assessee has proved by way of FIRC (Foreign Inward REMITTANCE certificate) that money was transferred out of foreign bank account

Section 68: Non Residents

Further CBDT Circular No 5 dated 20/2/1969 states That "Money brought into India by non residents for investments or other purposes is not liable to Indian Income Tax."

Further, Delhi ITAT in Saraswati Holdings 16 SOT 535 has held that "Money brought into India by Assessee through banking channels for investment in shares could not be brought to tax in India as unexplained cash credit under section 68"

Section 68: Non Residents

Delhi High Court in Pongdy Metal and Steel (SLP dismissed by Supreme Court) in context of share application money recd by assessee from corporate Shareholder incorporated in MAURITIUS : HELD THAT:

ONCE ASSESSEE PROVED IDENTITY OF SHAREHODLER BEING INCORPORATED IN MAURITIUS : NO ADDITION POSSIBLE IN HANDS OF ASSESSEE; AT BEST INVESTMENT CAN BE EXAMINED IN HANDS OF MAURITUS COMPANY

Section 68 Loose Sheets whether books/ inferences

Where loose sheets are found there is usual inference of the AO that they represent concealed Transactions. Such inference does not readily follow. Such inference can be positively made only after identification of the papers and their due verification. Figures therein cannot be lightly inferred to be unaccounted income, unless there is something more to it. Third Member ITAT ruling in S.P.Goyal 269 ITR (AT) 59 Mumbai (*also in this case On basis of SC in V.C Shukla 3 SCC 410 held loose Sheets are not books – also see Mad HC in Taj Browllers (supra); BHC in Sheraton Apparels 256 ITR 20)*)



Section 68:Bank Deposits

Asr ITAT in 9 DTR 60/120 TTJ 178

Held Amount in the accounts maintained by an assessee bank, are customer deposits and are not under control of the assessee, therefore provisions of section 68 are not applicable to banks and further Banks are not required to go for detailed verification of the addresses of customers and therefore additions u/s 68 cannot be made if customer's addresses are found to be incomplete



Section 68: Tax Exempt Entity

Delhi High Court in 294 ITR 76:

Held Undisclosed Income u/s 68 is eligible for exemption u/s 10(22) of the Act **since words “derived from” are not used thereunder** (*the Underlying ratio can be applied to contend that undisclosed/unexplained Income u/sec (s) 68/69 etc can be treated/tagged as business income (if facts justify) and hence eligible (if facts justify) for consequential Benefit of carried forward loss set off etc*)



Section 68 Charitable Trust

DHC in Keshav Social Charitable 278 ITR 152
(applied by Jodhpur ITAT in Geetanjali Education
Society 114 TTJ 697 affirmed by Raj HC in 174
Taxman 440)

“In the present case, assessee has not only disclosed its donations, but has submitted a list of Donors . The fact the complete list of donors were not filed or the donors were not produced, does not necessarily lead to an inference that assessee was trying to introduce unaccounted money by way of donation receipts. This is more particularly when assessee has applied more than 75% of its donations for charitable purposes ”



Section 68 Charitable Trust

Raj HC in Geetanjali Education read with ITAT
Jodhpur

“ Most of the donations having been recd by cheques/drafts through banking channels in the normal course, from existing assesses, confirmations having been filed, no enquiry having been conducted in correct perspective, the action in holding such donations bogus is also in violation of natural justice....and assessee could not be denied exemption u/s 11 on the ground that donations were bogus without giving opportunity to assessee to cross examine some of the witnesses on whose statements said conclusion was reached”

Section 68 versus Section 56

Whether gift from relatives etc being specifically exempt u/s 56, can be examined still under section 68 on touchstone of parameters thereunder viz. creditworthiness etc?

Albeit Litigative: but apparently Yes

Section 68 versus Section 145

In K.M.N.Naidu 221 ITR 451 :

There is no objection to the proposition that ITO can rely upon rejected books for purpose of making addition towards unexplained cash as also held by APHC in 120 ITR 294 (also see Kale Khan SC in 50 ITR 1) that is, on facts, AO can both estimate Enhanced Profits and tax unexplained cash credits- However benefit of **Telescoping** (that is tracing/covering unexplained cash credits by Profits Addition) is possible – refer Raj HC in 165 ITR 453; Mad HC in 149 ITR 127; BHC in 151 ITR 353

Section 68 Etc.

Certain Basic Principles:

- *Suspicion however great cannot take the place of evidence SC in Umacharan 37 ITR 271 applied by P&HHC in Anupam Kapoor 299 ITR 179 (useful ruling for addition and reopening in context of alleged bogus capital gains/share capital etc)*
- *Burden to Prove apparent is not real lies on the shoulders of the revenue SC in 125 ITR 713 – Kishanchand Chellaram; SC in 26 ITR 775 Dhakeshwari Cotton Mills; SC in 87 ITR 349*
- *Addition cannot be made merely on the basis of conjectures and surmises.*

Section 68 Etc.

Certain Basic Principles:

- *The department cannot draw inferences and assume that there has been some illegality in the assessee's transaction in the absence of any material in its possession Refer Mad HC in 34 ITR 328 & Ker HC in 117 ITR 371*
- *It is not open to the department while rejecting assessee's explanation to make presumption that the witness come forward to give false evidence to oblige the assessee Refer All HC in 72 ITR 766.*

Section 68 Etc.

Certain Basic Principles:

- *In cases where the assessee furnishes full details regarding the alleged lenders/creditors etc, it is up to the department to peruse the matter further to examine these and to examine their creditworthiness Refer SC in 159 ITR 78; Raj HC in 270 ITR 477 etc*
- *An explanation given by the assessee has to be considered objectively before AO takes a decision to accept it or reject it that is, department cannot convert a good proof into no proof on mere ipse-dixit (suspicion etc) – Refer SC in 49 ITR 112*

Section 68 Etc.

Certain Basic Principles:

- *Theory of HUMAN PROBABILITIES AND SURROUNDING CIRCUMSTANCES SC IN 82 ITR 540 & 214 ITR 801 Held: Tribunal etc are entitled to disbelieve any story which is prima-facie fantastic and which does not accord with human probabilities. Taxing authorities are not required to put blinkers while looking into documents produced before them and they were entitled to look into surrounding circumstances..*

Section 69; Section 69B; Section 69C versus Section 68 Contrast

Provision	Jurisdictional Fact
Section 68	Where any sum is found credited..
Section 69	Where assessee has made investments not recorded in books...
Section 69A	Where assessee is found to be the owner of any money...
Section 69B	Where assessee's investments are undervalued in his books
Section 69C	Where assessee incurs any expense...

Section 69; Section 69B; Section 69C versus Section 68 Contrast

.From the nature of things, it is clear that so far as section 68 is concerned the onus is wholly upon the Assessee to explain the source of the entry. But in cases falling under section 69,69A etc the phraseology used goes to show that before any of these sections are invoked, the condition precedent as to existence of investment, expenditure, etc. must be conclusively established by material on record/ evidence.

Refer Chaturvedi Pithisaria Page 3125 Vol2 5th edition

Section 69; Section 69B; Section 69C versus Section 68 Contrast

Related Citations on aforesaid observations:

a) Hyd ITAT TM M P Maliwal 10 SOT 319

b) Jodh ITAT Jugalkishore 116 Taxman 271 Magazine

c) Cochin ITAT in 19 SOT 201

d) Chd ITAT in Nahar Spinning 8 SOT 6



Section 69 : Inflated Stock to Bank

- In case of inflated stock to avail higher credit facility, whether addition of difference in stock value can be made as undisclosed investment ?
- Hypothecation, bank never vouched the quantity declared and/or mere value inflated (no quantity declared), physical control always with assessee, books audited, no trading outside the books detected – factors fav to assessee- may be highlighted to AO
- Mad HC in 241 ITR 363,158 Taxman 363, 236 ITR 340, J&K HC in 201 CTR 178



Section 69 : Investment by One person in name of Other Person

- APHC in 47 ITR 516: Held when investment made by a husband in name of wife, source of purchase consideration not traceable to wife but to Husband u/s 69 of the Act
- Also refer:
 - Mad HC in 258 ITR 266
 - P&HHC in 178 ITR 660
 - All HC in 126 ITR 42
 - Mad HC in 55 ITR 610



Section 69 : Investment by One person in name of Other Person

- Case Study:

A husband made investment in units of Mutual FUNDS from joint bank account in the name of Him and his wife and wife being second holder, on AIR information in name of assessee's wife, AO made assessment in hands of wife as unexplained investment u/s 69 : Whether Valid

NO



Section 69 : Investment by One person in name of Other Person

Whether section 69 can be applied in hands of legal heirs to seek explanation on source of funds being invested by deceased?

Held No IN:

- a) Pune ITAT IN Rajbai Kadam 83 ITD 229
- b) Cochin ITAT in C Selvakumar 6 SOT 646



Section 69 : Case Study

- During search on a seller of property, certain cash was found, which was explained by seller as excess consideration over an above what is stated in sale deed. Seller's affidavit was also obtained by search wing. AO made addition of excess consideration in hands of purchaser as unexplained investment without offering cross examination to seller and without seeking valuation cell assistance and without examining Middle men and Witness to Sale Deed. It was assessee's case before AO that cash found from seller's bank locker- bank slips thereon - there is no corresponding transaction by purchaser from said bank.



Section 69 : Case Study

- How far aforesaid addition is sustainable at law.
- Clues:
 - *File Own Valuation report justifying consideration stated in sale deed*
 - *Bring Contemporaneous sale deed on record and*
 - *Rely on Middle Men Affidavit and Bring its presence on record*
 - *Bring Witness to Sale Deed Affidavit on record.*



Section 69 : Understatement of Purchase Consideration

*Mad HC in 282 ITR 259 affirmed by SC in 294 ITR 49
P.V.Kalyansundaram*

The onus to prove that the investment made by the assessee for purchase of a plot was understated would be on the Department. Therefore, no additions to the assessee's income could be made based on the conflicting statements of the vendor and in the absence of an independent inquiry by the AO

Section 69 : Understatement of Purchase Consideration

Unexplained investment Addition on basis of vendors statement 1991-92. The assessee had shown the purchase price of a property at Rs. 6 lakhs. During the search at premises of the vendor 'P'. She stated that the property was sold at Rs.45 lakhs to the assessee. She had disclosed the sale price at this figure of Rs.45 lakhs in her return of income. The copy of her statement was given to the assessee. In spite of repeated opportunity the assessee did not chose to cross examine 'P'. Only when assessment was getting time barred he made a request on 23 March 2000 for cross examination of P. The unexplained investment of Rs.39 lakhs could be added under s.69 of the Income Tax Act 1961.

S.69 of the Income Tax Act 1961 DHC in 212 CTR 469 distinguished Mad HC P.V.Kayan Sundaram

Section 69 : Understatement of Purchase Consideration

- AY 2001-02. The assessee was engaged in the business of purchase of land and building and development thereof. During the relevant year, it sold residential flats of the buildings constructed by it. *The AO, relying on some letters given by the assessee to prospective buyers mentioning the rate of flats at Rs.1,250 per sq. ft., made additions to the assessee's income, as the actual sale price as per the sale deeds was lower. Since the letters were prior to finalisation and execution of written agreement, the sale price was to be taken as per the final sale price stated in the sale deed. The estimate of income on presumed sale price was improper in the absence of any comparative figures and report of the Valuation Cell.*

S.143(3) and s.145 of the Income Tax Act 1961 Omega Estates 106 ITD 427 Chennai ITAT Mad HC P.V.Kalyansundaram relied



Section 69 : Understatement of Purchase Consideration

- "The burden of showing that the assessee had undisclosed income is on the revenue. That burden cannot be said to be discharged by merely referring to the statement given by the assessee to a third party in connection with a transaction which was not directly related to the assessment and making that the sole foundation for a finding that the assessee had deliberately suppressed his income" Mad HC in N Swamy relied by Chennai ITAT in Omega Estates and Chd ITAT in Dr R.L.Narang

Section 69 : Understatement of Purchase Consideration

- All HC in 262 ITR 289

In our opinion, the addition made by the Tribunal is wholly arbitrary. In this connection it may be mentioned that the scrap which the petitioner purchases for use in the manufacture of steel contains some dust and the petitioner has to eliminate this dust before the said scrap is used for the manufacture. The petitioner does not pay the price for this dust to the seller of the scrap. In our opinion there is no material on record to sustain the addition in question. The addition of Rs. 4,44,605 is an estimated price of the eliminated dust which has been arbitrarily added by the income-tax authorities though no price for this dust was admittedly paid, no expenditure was incurred nor the title in the goods in the form of dust eliminated pass to the assessee.



Section 69 : Understatement of Purchase Consideration

Ahd ITAT in 80 TTJ 69 AFFIRMED BY GUJ HC IN 182 CTR 370: "However, the fact remains that the AO has not brought any material on record to indicate that the assessee involved in these appeals who admittedly belong to Uttamchandani family who is having 50 per cent share in M/s JJ Corporation, have in fact paid any "on money" to M/s JJ Corporation in respect of the shops purchased by them. The AO has made these additions presumably by invoking the provisions of s. 69B and as such the onus is on him to prove by evidence that the assessee has in fact paid any "on money" over and above the money which has been recorded in the books of account for making investments in the purchase of shops. Since no evidence has been brought on record by the AO in this regard, the additions made on account of alleged unexplained investments in the purchase of shops by alleged understatement of consideration cannot be sustained."



Section 69 : Understatement of Purchase Consideration

Chd ITAT in DrR.L.Narang 174 Taxman96
Section 69 of the Income-tax Act, 1961 -
Unexplained Investments - Assessment years
1997-98 & 1998-99 - Whether assessee's income
is to be assessed by Assessing Officer on basis of
material which is required to be considered for
purposes of assessment and ordinarily not on
basis of statement of a third party, unless there
is a material to corroborate that statement -
Held, yes - Whether burden of showing that
assessee had disclosed income is on revenue and
that burden cannot be said to be discharged by
merely referring to statement of a third party in
connection with a transaction - Held, yes

Section 69 : Understatement of Purchase Consideration

Further relevant are:

- a) Chennai ITAT in M.M.Financiers 17 SOT 5 (Merely on third party statement which has been retracted – no addition for undisclosed investment is possible)*
- b) Jodhpur ITAT in 100 TTJ 639: Merely on Inspector report stating assessee invested more sum than admitted in construction of house – since neither Inspector is technical person nor the Inspector's report confronted to assessee- addition bad in law*
- c) Ahd ITAT in 6 SOT 78: In project report submitted to Bank, assessee in PROJECT REPORT disclosed more value than purchase price of a property, AO considering the same as Valuation report added the difference in Project report value and Purchase price as unexplained investment – Held not Valid*

Section 69 : Understatement of Purchase Consideration

Further relevant are:

- d) Mum ITAT in Rupee Finance 119 TTJ 643: Merely because assessee purchased certain shares at value much less than market price, difference in purchase cost and market price cannot be added u/s 69*
- e) DHC In Naresh Khattar 261 ITR 664: Merely on statement of assessee's counsel in Civil cost as to investment amount in a property, cannot be a sole ground for making addition u/s 69B for which burden lies on revenue to prove unexplained investment by material on record*
- f) All HC in 154 Taxman 170 : Unexplained investment added on basis of consistent stand of Vendor – duly cross examined by assessee purchaser Held Valid*

Section 69 : Understatement of Purchase Consideration

Further relevant are:


- g) DHC in Good Year 173 Taxman 377: Where enquiries conducted by Securities Exchange Commission of USA revealed that assessee parent company made unrecorded expense in India – Assessee company Admitted undisclosed Income in India – Held Addition Valid*
- h) Ker HC in 173 Taxman 384: Where assessee seller was held validly taxed on extra consideration : on basis of a) Purchaser's Statement/Admission (albeit retracted and retraction in cross examination not reliable) b) Purchaser offered extra consideration for taxation c) Deptt Valuation corroborated Purchaser's Original Statement d) Purchaser obtaining higher bank loan on admitted purchase consideration- Needs to be examined in light of Unconsidered SC ruling in P.V.Kalyansundaram*



Section 69 : Builder Assessee

Ajit Karve 112 TTJ 480: Addition made to assessee's builder income on account of difference between sale price and work in progress solely on assessee's declaration during survey which stood retracted , was not justified when there was no incriminating material found during survey and no defect in books is pointed and assessee had not sold single flat


Also refer Ahd ITAT Third Member Pramukh Builders 112 ITD 179: Merely on basis of assessee's admission no taxation of undisclosed income is possible unless evidence is there



Section 69 : Case Study

- Delhi High Court in Prince Gutka (SLP dismissed by SC)
 - In case income tax proceedings proposing to add certain income are initiated on excise proceedings, wherein Excise Tribunal/CESTAT has decided the issue in favor of assessee, same is binding under Income Tax Proceedings.


Similar Conclusion by Mad HC In Vignesh Kumar 12 DTR 293



Section 69 : Case Study

In case income tax addition is based on sale tax/excise/custom proceedings, if same is set aside by appellate authority thereunder, no Addition survives under Income Tax Law:

- Also refer: P&H HC in 266 ITR 388
- DHC in Vinod Kumar ITA 1145/2006
- P&HHC in K.S.Bhatia 257 ITR 614
- Asr ITAT in 114 TTJ 197 Panchvati Motors



Section 69 : Case Study

Merely on basis of affidavit filed by seller (purchaser for assessee) during sale tax proceedings, purchases made by assessee from seller cannot be held to be bogus so as to justify addition in that respect

Jodhpur ITAT in Jagdamba Trading 107 TTJ 398

(Permanand 107 TTJ 395 : alleged bogus Purchases: No addition can be made in hands of Assessee on basis of observations made by a third party i.e Sale Tax Department) – ALSO SEE 43 ITD 156



Section 69 : Case Study

Chd ITAT in Nahar Spinning Mills 8 SOT 6:
On basis of search at cargo agent of assessee, and book entries therein, AO concluded that Assessee paid excessive freight charges. No Evidence of incurrence of expense was put by AO. CIT-A deleted the addition & ITAT affirmed the same:


- a) Basis of invocation of section 69C is unavailable as no evidence for expense is there
- b) Assessee has categorically denied for incurring any expense – hence no explanation required
- c) No addition can be made on basis of mere third party books



Section 69 : Case Study

The assessee was engaged in the business of processed man-made fabrics. It used to get the grey material processed from a processor. In pursuance of a search carried out by the excise authorities at the factory premises of its processor, the assessee was confronted, who subsequently admitted the receipt of processed material from the processor outside the books of account and paid the duty and the penalty imposed by the excise.

In the income-tax proceedings, the AO took note of the admission made by the assessee and held that the assessee had made an unexplained investment in the processed material and therefore, S. 69 was attracted. Estimating the cost of the material not accounted at Rs.8.5 lacs, the addition was made. On appeal, the CIT(A) relied upon the statement of the assessee made before the excise authority and upheld the addition made



Section 69 : Case Study

The Tribunal noted that subsequent to making a statement before the excise authorities, the assessee had filed an affidavit denying the receipt of any material without the payment of any duty. Further, it also noted that the addition was made on the sole basis of the statement of the assessee. No independent investigation was made, nor any evidence of suppressed sales was found, as was reflected from the fact that sale figure had been accepted by AO as well as the sales-tax authorities. No defect in the books of account was also pointed out. In view of the same, it was held that the addition made u/s.69 was not justified.

Jodhpur ITAT in R.K.Synthetics 81 TTJ 909



Characterization of Deemed Income

Head of Taxation for Unexplained Investment :

Refer:

- a) Mad HC in 212 CTR 539 (Held tagging off surrendered cash etc is possible under head of “other sources” and current year business loss is eligible for set off against said surrendered income)
- b) Guj HC in 247 ITR 290 (Held no tagging possible in case of deemed income taxable u/sec 69 etc)
- c) SC in 35 ITR 416; 34 ITR 807
- d) Cal HC in 48 ITR 254; 64 ITR 593; 201 ITR 747 (Held unexplained deposits are in nature of business income, hence eligible for benefit of rule 8 assessee being engaged in tea business) distinguished by P&HHC in 288 ITR 18
- e) Mum ITAT in 7 SOT 208



Section 69: Goods stored in Cold Storage

Mum ITAT in Polar Cold Storage 13 SOT 180:
Held since was in warehousing business and there is no material on Record to indicate assessee has been in business of dealing in the goods which were stored in its warehouse, AO cannot make addition for stored goods merely because assessee could not produce owner persons or give their complete addresses

Section 69A : Unexplained Money Case Study

- A assessee recd a A/C PAYEE cheque of Rs 55 crores from a sikkim resident, which remained undeposited and was found as such during search operations. The said cheque was returned as such to the drawer of the cheque. Whether creditworthiness of sikkim resident can be examined in HANDS OF ASSESSEE when cheque remained unencashed and whether assessee can be asked to prove the source of "money" found in its possession u/s 69A?

Seems to be No

Section 69A : Unexplained Money Case Study

The provisions of S. 69A of the Income-tax Act, 1961 can be applied if (i) the assessee is found to be the owner of any money, bullion, jewellery or other valuable articles, and (ii) the same had not been recorded in the books of account, if any, maintained by him.

(ii) The assessee was found to be in possession of loose slips and not any valuable article or things. Neither the possession nor the ownership of any jewellery mentioned in the slips was proved. Therefore, the Tribunal had rightly held that the provisions of S. 69A of the Act were not applicable. The Tribunal also held that if the assessee failed to explain the contents of the slips, it was for the Revenue to prove on the basis of material on record that they represented transactions of sales or stock-in-trade before making any addition on this score. The assessee had duly explained that these were rough calculations and the assessee's explanation had not been rebutted by any material evidence. Therefore, the order of the



Sec 142A – Issues and Concerns

Section 69; 69B etc

- Inserted by Finance No 2 Act of 2004 w.e.f 15 April 1972 to overrule SC ruling in Amya Bala Paul case, giving power to refer the valuation of investment to DVO
 - *For the purposes of making an asst.*
 - *Where estimate is required to be made*
 - AO may refer the valuation of invest referred in sec 69/69A/69B to DVO
 - Before using DVO report, AO bound to confront it to assessee (del ITAT 23 SOT 297 SMC)
 - *Final Discretion lies with AO to use or not to use DVO report (AO not bound to accept DVO report)*

Sec 142A – Issues and Concerns

- Whether provision can be applied first time by ITAT in pending appeals where reference to DVO made by AO before Oct 2004 when Finance Act 2004 came in operation Held Yes :
 - Del ITAT in 93 TTJ 425
 - Asr ITAT in 109 TTJ 568
 - Luck TM ITAT in 104 ITD 126

Sec 142A – Reopening on Valuation Report

- Whether reopening allowed on basis on DVO report where previously 143(1)/intimation is issued? Held:
 - Yes in 107 TTJ 779 Pune ITAT, Luck ITAT Dinesh Dua &
 - No in 22 SOT 156 Del ITAT, Jp ITAT in 9 DTR 459
 - Ref BHC in 216 CTR 217 & TM Ahd ITAT in 113 ITD 255 For Principles laid
 - HELD NO By Guj HC in Manjusha Estates Pvt Ltd March 2009
 - Held No by Jaipur ITAT in Shree Goverdhan Builders 29 SOT 72 (URO)

Sec 69 and Valuation Report

- Whether addition u/s 69/69B for understatement of purchase consideration of property, can be made only on basis of DVO report collected u/s 142A? Answer seems to be NO:
 - Refer Del ITAT in 102 TTJ 964 Fav, 89 ITD 586; Ahd ITAT (Third Member) in Amit Estate 113 ITD 255
 - Ref Jaipur ITAT in 111 TTJ 531 Fav
 - **Deeming Fiction of section 69/69B requiring factum of investment may not be discharged by solitary reference to DVO report u/s 142A (Refer Pithisaria Commentary Page 3211/Vol 2) Also see Ralkt ITAT in 98 TTJ 518**
 - Adv Del ITAT in Haneamp 101 ITD 19

Section 69 and VALUATION REPORT

Contd...

Further, when as held by Guj HC and, DVO report is not material sufficient for reopening the case u/s 148, same cannot be used for justifying the addition (as DVO report is mere guidance value and is not gospel truth)

Addition u/s 69 on basis of DVO report/Stamp valuation rates is not justifiable unless positive evidence for understatement is there:

a) Del ITAT in Chandni Bhuchar (URO)

b) Del ITAT in Rajeshwar Nath HUF

c) DHC in Shakuntla Devi

Section 69- Valuation Report

- Whether addition for excessive construction cost as estimated by DVO u/s 142A, can be made even when assessee has maintained audited books recording cost of construction with reference to vouchers etc.? Answer seems to be no:
 - Refer Luck ITAT TM in Rohtas Projects 104 TTJ 1, Jd ITAT in 97 TTJ 426' Mad HC in 20 DTR 113 etc
 - In case assessee also furnished own valuer's report which remained unchallenged – Addition on basis of DVO's report u/s 142A invalid Jaipur ITAT in 29 SOT 72 (URO)- Held section 142A not for estimating expense u/s 69C as same is not covered u/s 142A

Section 69C- Unexplained Household expense

- Size of family and so called living standard cannot be made basis for additions on account of unexplained house hold expenses 106 TTJ 712 Jodhpur ITAT
- Where AO had totally relied upon Inspector report which was based on estimation and no other evidence was collected, much less statement of persons who alleged to have performed various functions for marriage celebration by assessee of his daughter, whereas assessee gave detailed accounts disclosing expense incurred and source of the same, rejection of assessee's explanation was unsustainable 118 TTJ 272

Section 69C- Unexplained Household expense

- An addition cannot be made merely in the basis of suspicion especially when there was no material on record to suggest that household expenses claimed to have been incurred and declared by assessee were not correct 114 TTJ 973

Section 69C- Recent J&K High Court verdict H.P.Raina

“Therefore, in terms of Section 69C of the Act, appellant was required to explain satisfactorily the source of the expenditure of Rs. 17.00 lacs, which he had incurred for construction of the house in question. The explanation as was put forward by the appellant was repayment of loans, which were used for the construction, and payments on account of purchase of materials. Receipt of loans, utilization thereof for construction and purchase of materials were, therefore, the essential ingredients to satisfy that the payments in question were made for repayment of loans and for discharging the debts incurred on account of purchase of materials. Since there was nothing to suggest receipt of loans and utilization thereof for construction, except assertions, and at the same time there being nothing to suggest procurement of materials from those individuals, who were paid the amounts in question, nonacceptance of such assertions, to our mind, cannot be said to be based on suspicion, conjecture or surmise or by applying the rule of thumb”

Bad Debt u/s 36(1)(vii)

- Post amendment of 1989, w.e.f 1April 1989, only requirement u/s 36(1)(vii) is debt must be written off in the books and as per sec 36(2)(i) same must have been taken into a/c in computing the income of the assessee:
- Refer DHC in Morgan 292 ITR 339, Autometers 292 ITR 345, Global Capital 201 Taxation 210, Sawhney Exports 304 ITR 93, Nilopher I Singh 14 DTR 108, DCM 167 Taxman 160
- HPHC in Suresh Gaggal 11 DTR 345
- MPHC in Nai Dunia 295 ITR 346, Mum ITAT SB Oman 100 ITD 285
- BHC in Omparkash Salecha & Star Chemicals 11 DTR 311
- Mad HC in Brilliant Tutorials 292 ITR 399
- Adv – Guj HC in Dhall Entp 295 ITR 481, Mad HC in South India Surgical 287 ITR 62

Section 269SS/269T – Legislative Object

- CBDT Memorandum Circular to Sec 269SS No 387/6-7-1984 (study in light of SC ruling in R&B Falcon 301 ITR 289 – Importance of Memo Circular)
- *“Unaccounted cash found in the course of searches carried out by I.Tax Department is often explained by taxpayers as loans taken from various persons. Unaccounted income is also brought into books of accounts in the form of such loans/deposits and taxpayers are also able to get confirmatory letters from such persons in support of their explanation. With a view to countering this devise...”*
- *Fears have been expressed in certain quarters that provision will adversely affect the rural sector and farmers who bring produce to mandis for sale. The prohibition contained in section 269SS is confined to loans/deposits and does not extend to sale/purchase transaction”*

Section 269SS/269T – Latest Judicial Developments etc

- Section 271D of the Income-tax Act, 1961 - Penalty - For failure to comply with section 269SS - Assessment year 1991-92 - Assessee company purchased goods from time to time from creditor company - As it was not able to make payment of outstanding purchase price immediately, it arrived at an understanding with creditor company whereunder outstanding purchase price was to be treated as loan on 'sarafi account' after making part payment of outstanding dues - Assessing Officer however treated outstanding amount in 'sarafi account' as acceptance of deposit in violation of section 269SS and imposed penalty upon assessee under section 271D - Tribunal deleted penalty holding that there was no evidence on record to show that infraction of provisions was with knowledge or in defiance of provisions, and that breach, if any, was merely a technical or venial breach - Whether Tribunal was justified in deleting penalty - **Held, yes Guj HC in Bombay Conductors 301 ITR 328**

Section 269SS/269T – Latest Judicial Developments etc

- Section 271D, read with sections 269SS and 273B of the Income-tax Act, 1961 - Penalty - For failure to comply with Section 269SS - Assessment year 1993-94 - Assessee-contractor had taken certain loans from its sister concern in cash to make payments to labourers at site - Assessing Officer held that transaction was not genuine and imposed penalty under section 271D - Commissioner (Appeals) and Tribunal came to a finding that transactions were genuine and same was merely technical breach of law for which no penalty was exigible - Whether question as to whether a particular transaction is genuine or otherwise is a question of fact, and if it had been found by appellate authority that assessee had shown reasonable cause for accepting money in cash, finding of fact given by appellate authority which was affirmed by Tribunal could not be interfered with as it could not be said that any substantial question of law arose for determination - Held, yes Raj HC in **Maheshwari Nirman Udyog 302 ITR 201**

Section 269SS/269T – Latest Judicial Developments etc

- Mad HC in 215 CTR 198 (ON TRADING ACCOUNT TRANSACTIONS – SECTION 269SS NOT ATTRACTED – ALSO IN 270 ITR 445)
- **Jhar HC in 217 DTR 144 (when transactions are genuine and no tax evasion intent is there- no penalty for contravention of section 269SS/269T)**
- 173 Taxman 434
- Mad HC in 285 ITR 221 (held amount recd by a company from its directors/shareholders do not attract 269SS)
- Genuine Transaction for urgent business needs in violation of section 269SS/269T – are protected by reasonable cause – 284 ITR 609 Mad HC; P&HHC in 277 ITR 420 etc
- CBDT Circular No 556/23-2-1990 sale proceeds of agriculturist collected by Kaccha Arhatitya who sells goods belonging to former, sale proceeds which remained with Arhatitya cannot be “deposit”

Section 269SS/269T – Latest Judicial Developments etc

- Transaction between Sister concerns – not attract penalty for violation of section 269SS – Guj HC in 6 DTR 169
- Where credit entries made in the books of account of assessee are by way of transfer entries and there being no deposit as per mode prescribed in 269SS – there cannot be violation of section 269SS- Luck ITAT in 2 SOT 543; 3 SOT 811
- Also held in 262 ITR 260 & 303 ITR 5: where there is settlement of account through third party or in case of agency transaction, there is no violation of section 269SS/269T
- For transaction between partner and firm vis a vis section 269SS/269T : Held in 64 ITD 300 that firm-partner transactions are self transaction (also in 82 TTJ 549 – held repayment of partner capital in cash would not be hit by section 269T)

Section 269SS/269T – Latest Judicial Developments etc

- For temporary accommodation entries between Karta & HUF – refer Fav decision in 90 TTJ 940 (also see 19 DTR 276; 94 ITD 281; 96 ITD 163; 2 SOT 564 etc)
- Transaction between husband-wife – fav ITAT order in 128 Taxman 20(MAg)
- Transaction between father-son – fav ITAT order in 52 ITD 236 ; 10 SOT 378 etc

Section 269SS/269T – Latest Judicial Developments etc

In case of Sunil Kumar Goel, in context of levy of penalty on cash acceptance /repayment of loan transaction, in excess of specified amount, under section 271D & 271E resp., it is held that if transactions are between the family members or with sister concern, due to business exigency and are bonafide transactions (not aimed to avoid tax liability and/or in nature of technical/venial breach), same being reasonable cause u/s 273B of the Act, no penalty is leviable under aforesaid provisions. ITA 777/2008 -3/3/2009 P&HHC

Section 269SS/269T – Latest Judicial Developments etc

Whether share application money recd in cash attracts section 269SS?

Seems to be NO:

- a) Mad HC in 285 ITR 221 (As per Co Acceptance of Deposit Rules, it excludes share application money from compass of deposit)
- b) Del ITAT in Aar Dee Finvest 79 ITD 547
- c) All HC in Kardah Lexoplast
- d) Mad HC in Henkel – share application money is recd in TRUST and cannot be loan/deposit (also see 82 TTJ 549)
- e) In case there is no intention to conceal/evade the tax and transaction is genuine- no section 269SS attracted refer:
 - i) Del ITAT 80 TTJ 82
 - ii) Hyd ITAT in 80 ITD 484
 - iii) P&HHC in Sunil Goel (supra)

Thank You

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