Taxsutra Eye Share : Compendium of Judicial Pronouncements on Unexplained Investment u/s.69

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Section 69, dealing with unexplained investments, is the weapon in the armoury of the Assessing Officer to detect tax evasion. Section 69 creates a legal fiction whereby investment in an asset is treated as income if it is not disclosed in the regular books of account. In this article today, **Advocate Amit Kumar Gupta** comprehensively analyses the section and discusses over 20 rulings on various issues involving Sec.69.

Briefly discussing the scope and essential conditions of Sec.69, the author highlights that primary onus is cast upon the assessee to make plausible explanation with respect to nature & source of such investment. The author then goes on to analyse the various rulings delivered by the courts in the context of Sec.69, specifically touching upon issues such as addition u/s.69 where books of accounts are not maintained/rejected, addition based on 'estimates', rejection of assessee's explanation, third party confirmation among other issues. Comparing the provisions of Sec.68 and Sec. 69, the author refers to Madras HC decision in case of Shiv Shakti Timbers and highlights that "*in Section 68, there should be a credit entry in the books of account, whereas in Section 69, there may not be an entry in the books of account*." The author also touches upon the taxability of unexplained investments u/s.115BBE.

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Section 69 :Unexplained investments

Bare Act Summary

Section 69 of the Income tax Act 1961 states that **"**Where in the financial year immediately preceding the assessment year the assessee has made investments which are not recorded in the books of account, if any, maintained by him for any source of income, and the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year".

Scope of Section 69

Section 69 is introduced to cover the instances where the assessee has nade investments in the financial year immediately preceding the assessment year the and such investments are not recorded in the books of account, if any, which are maintained by him for any source of income, and also the assessee offers no explanation about the nature and source of the investments or the explanation offered by him is, in the opinion of the Assessing Officer is not satisfactory, the value of the investments may be deemed to be the income of the assessee of such financial year. Thus, for applying the provisions of section 69 of the Act, the Assessing Officer should first come to a finding that the assessee has made investments and the same are not recorded in the books of account and thereafter he can call the assessee for an explanation from about the nature and source of the

investments and in case he finds that the assessee is unable to furnish the explanation or the explanation offered by him is not satisfactory, the assessing officer can treat the value of the investments to be the income of the assessee of the financial year in which he has made the investments.

Essential Conditions of Section 69:

1. The assessee has made investment in the financial year immediately preceding the assessment year.
2. Also, such investments are not recorded in the books of accounts, if any, maintained by him for any source of income.
3. Either the assessee unable to furnish explanation about the nature and source of the investments or the AO is in the opinion that the explanation offered by him is not satisfactory.

If all the above conditions are satisfied, then the value of such investments '**may**' be deemed to be the income of the assessee of the financial year in which he has made the investments.

Opportunity provided to Assessee

Thus, it is clear from the above discussions that the provisions of Section 69 contained that before the amount of the undisclosed investment is included in the total income of an assessee, he is entitled to get an opportunity to explain the same before the assessing officer proceeds for addition. In the case **T.C.N. Menon vs Income-Tax Officer, 1973,** , 96 ITR 148, **Kerela High Court held that "**The

petitioner's case attracts the application of Section 69 of the Act. The Income-tax Officer was, therefore, bound to give an opportunity to the petitioner to explain about the nature and source of his investment before it was treated as his income".

Burden of proof

- The burden of proving that the income is subject to tax is on the revenue.
- But to show that transaction is genuine, the burden primarily lies on assessee.
- The assessee should offer the necessary explanation with suitable proof in respect of the investments under consideration.

Thus, under Section 69 a primary onus is cast upon the assessee to make plausible explanation, and in case the explanation is given by the assessee and it is not accepted, the onus shifts on the Department to prove that the explanation offered by the assessee is either wrong or not sufficient to explain the impugned investment by bringing further material evidence on record.

Judicial Pronouncements

The Hon'ble Supreme Court in the case of **Kale Khan Mohammad Hanif v. CIT [1963] 50 ITR 1 held that** "If an assessee fails to prove satisfactorily the source and nature of certain amount received during the accounting year, the Assessing Officer is entitled to draw the inference that the receipts are of an assessable nature"

In the case of **Som Nath Maini v CIT, [2008] 306 ITR 414 Punjab High Court held** that "the burden of proving that income is subject to tax is on the Revenue but on the facts, to show that the transaction is genuine, burden is primarily on the assessee. The Assessing Officer has to apply the test of human probabilities for deciding genuineness or otherwise of a particular transaction. Mere leading of evidence that the transaction was genuine, cannot be conclusive. Such evidence is required to be assessed by the Assessing Officer in a reasonable way. Genuineness of the transaction can be rejected even if the assessee leads evidence which is not trust-worthy, even if the department does not lead any evidence on such an issue."

In the case of **ITO vs. Daya Chand Jain Vaidya (1975) 98 ITR 280 the Allahabad High Court held that** "When a particular explanation furnished by the assessee and evidence in support thereof is adduced, the onus shifts on the Assessing Officer to falsify the said material or bring new material on record. Mere rejection of good explanation does not convert good proof into no proof".

In the case of Deputy CIT, Ahmedabad v. Shri Haresh R. Vasani, 2014 - IT (SS)A No. 580/Ahd/2010, IT(SS)A No. 581/Ahd/2010, 241/Ahd/2010, 242/Ahd/2010, ITAT Hyderabad held that CIT(A) rightly held that the AO has not independently established that any such transaction has in fact, taken place. From the perusal of the seized material, it is also not clear whether the same pertained to an asset, liability, loan, advance or any other detail and there is no other

document or evidence to suggest that the assessee has advances/ paid a sum of Rs.31,68,750/- to Kalubhai and also there is no justification for presuming that the appellant have paid a sum of Rs.31,68,750. Also, the AO has not carried out any inquiry with the other party of the transaction to find out the facts and has simply rejected the explanation of the appellant and addition has been made on estimate basis. Thus, there is no justification for making the addition on merely presumptive basis. It is further held that Revenue could not point out any specific error in the order of CIT(A). Also, revenue could not bring any material to show that Rs 31,68,750/- was any actual transaction made by the assessee during the year under consideration and the relevant seized document was dumb document having no corroborative material found. Hence, there is no reason to interfere in the order of the CIT(A). Thus the above case is decided against the revenue.

The Punjab and Haryana High Court in the case of Commissioner Of Income Tax, Karnal v. Balbir Singh Mohinder Singh, ITA No. 203 of 2009 held that "In the present case the assessee has satisfactorily explained the source of money recovered from him and also it is clear that from a reading of Section 69 that before the amount is considered to be unexplained and is added as income of the assessee, opportunity should be provided to the assessee to explain the source. The assessee's income is to be assessed by the assessing officer on the basis of material which is required to be considered for the purpose of assessment and ordinarily not on the

basis of the statement of third party unless and until there is a material to corroborate that statement. The mere fact that one of the accomplish tendered inconsistent statement that itself cannot be treated as having resulted in an irrefutable presumption against the assessee specially when in the receipt seized along with the money names of these persons are mentioned, the statements of these persons were duly recorded and they were examined by the assessing officer. Now, under this situation, it can be said that burden shifted to the revenue.

The Commissioner Of Income Tax Versus M/S. Mark Hospitals Private Ltd., [2015] 373 ITR 115, the Madras High Court held that the tribunal was rightly of the view that the loans were given to the assessee through cheques and all the creditors have confirmed by appearing before the Additional CIT stating that they had advanced loans mentioned against their names to the assessee-company. The identity of the creditors could not be disputed . The only difficulty appears to be that some of them do not have PAN numbers, but that by itself should not be a reason to discredit their creditworthiness, all the creditors are agriculturists and they do not require any filing of returns of income and that is the reason they did not have PAN number . The Tribunal considered the minute details that were gone into by the CIT(A) and the explanation given by the assessee company that the entire loan amount was a genuine transaction. Also, the assessee had given plausible explanation for having taken a loan for a sum of Rs. 37 lakh, for which, the assessee had produced

evidences to prove the creditworthiness and genuineness of the transaction. Thus, the assessee had fulfilled the requirements u/s 68 so there is no as such substantial question of law arises for consideration.

The Hon'ble Gujarat High Court in the case of **Ushakant N. Patel v. CIT, [2006] 282 ITR 553** have held that section 69 opens with the words 'where in the financial year immediately preceding the assessment year, the assessee has made investment '. Thus, in the first instance, it is the responsibility of the assessing authority to establish that there are investments made by the assessee and that such investments are not recorded in the books of account maintained by the assessee. Also, assessing officer have to prove that such investments had been made in the financial year immediately preceding the assessment year in question.

<u>If the books of accounts are not maintained or rejected</u>

In the case of Subhash Rajaram Potdar and Sanjay Janardhan Phadke v. Commissioner Of Income Tax Nashik, 2018, Income Tax Appeal No. 43 of 2015 With Income Tax Appeal No. 61 of 2015, the Bombay High Court held that "In the present case, the assessee was running his business and the nature of investment in the bank accounts has not been explained by him. On the contrary, the assessee provided inconsistent explanations, which are not found

satisfactory by the respective Income Tax authorities. As the explanation offered is not proper in respect of the investments, the authorities were right in deeming the same to be the income of the assessee.

Also, whether the assessee had maintained the books of accounts or not, this issue was never raised before the authorities. Hence, it would not be permissible for the appellants to contend it for the first time in the appeals before the High Court, as these appeals can only be considered on the substantial questions of law. Thus, the case was decided against assessee.

The Bombay High Court in the case of The Commissioner Of Income Tax v. Shri Mukesh Ratilal Marolia, 2019, Income Tax Appeal no. 456 of 2007 held that "The Assessee has produced certificates of the four companies to show that the shares were transferred to the name of the Assessee. Thus, in these circumstances, the decision of the ITAT in holding that the Assessee had purchased shares out of the funds duly disclosed by the Assessee cannot be faulted.

It is neither the case of the Revenue that the shares in question are still lying with the Assessee nor it is the case of the Revenue that the amounts received by the Assessee on sale of the shares is more than what is declared by the Assessee. Though there is some discrepancy in the statement of the Director of M/s. Richmand Securities Pvt. Ltd. regarding the sale transaction, the Tribunal relying on the statement of

the employee of M/s. Richmand Securities Pvt. Ltd. held that the sale transaction was genuine. ITAT is correct in holding that the purchase and sale of shares are genuine and therefore, the Assessing Officer is not justified in holding that the amount as unexplained investment under Section 69 cannot be faulted.

Addition under section 69 cannot be made on the "basis of estimation" rather they should be based on evidences

In the case of Commissioner Of Income Tax, Jaipur v. M/S. Vinayak Plasto Chem Private Ltd., [2014] 363 ITR the Rajasthan High Court held that "The Addition u/s 69 cannot be made on the basis of estimated figure of investment shown in estimated project report impounded during search operation. The Project report might have been prepared for diverse purposes and the same cannot be considered as an indicate as to actual investment having made by the assessee. Thus, the court held that the assessing officer has blindly made addition merely on the basis of project report without bringing further evidence in the form of valuation report which may have been obtained by the assessing officer from its valuation officer. The Hon'ble court further held that in our view, the Tribunal came to a correct conclusion and no addition was called for. Merely because a project report shows an estimated figure does not prove that undisclosed investment to the extent of Rs. 36,21,692/- was actually made by the assessee. The Addition under section 69 has to be based on proper foundation and cannot be made merely on the basis of such

an estimated project report, which one can prepare for diverse purposes and really do not indicate as to actual investment having made by the assessee. The burden under Section 69 is on the revenue and it failed. There is no substantial question of law arises and the case was decided against Revenue.

Doubt of Assesing officer cannot be the basis of rejecting the Assessee claim or explanation

The above has been held in the case of **S. Madhavi, Hyderabad vs Assessee on 12 September, 2014, ITA No. 1936/Hyd/2011 by ITAT, Hyderabad**. In this case the assessee has explained the source of investment by producing necessary evidence. The Ld. ITAT observed that it is a fact on record that assessee at the time of assessment proceedings as well as before the CIT(A) had stated that the amount of Rs. 3 lakh is received from her uncle who is an agriculturist and she has also filed a confirmation in support of such claim. Thus, it is not understood what more supporting evidence assessee could have produced in support of her claim. When assessee has explained her source by producing evidence in the form of confirmation, it is duty of the Income Tax authorities to make enquiry and ascertain whether assessee's claim is correct or not. Without conducting any enquiry, assessee's claim cannot be rejected merely on doubts and suspicion. In the aforesaid view of the matter, Ld. Tribunal held that the addition of Ms. S. Madhavi of Rs. 3 lakh sustained by the CIT(A) is to be deleted.

Shyam Sunder Jindal v. ACIT, 2017, ITAT, ITA No. 5448/Del/2016, Delhi

The Ld. ITAT held that, AO informed the assessee about the copy of bank account obtained under DTAA. However, a contradictory observation has been made in the assessment order that the requisite information from Swiss Banking Authority had not been received. We, therefore, considering the totality of the facts as discussed hereinabove, set aside the impugned order and restore the matter back to the file of the AO to be adjudicated afresh in accordance with law after providing due and reasonable opportunity of being heard and by confronting the assessee with the documents which relates to him. As regards to the legal issue relating to the validity of the assessment u/s 153A of the Act, it is noticed that the assessee in his written submissions dated 22.08.2016 stated that the search team had confronted the assessee with unauthentic document. In the present case, it is not clear as to whether any authentic document was confronted to the assessee or not. The AO also mentioned that a reference was made on 27.11.2012 but it is not clear for which purpose the said reference was made. So in the absence of clear facts on record, this issue is also set aside to the file of the AO to be adjudicated afresh, in accordance with law after providing a due and reasonable opportunity of being heard to the assessee. Thus, the case is decided in favour of assessee.

In the case of Commissioner Of Income-Tax v. SM Aggarwal, 2007 293 ITR 43 **the Delhi High Court held that** "It is well settled that the only person competent to give evidence on the truthfulness of the contents of the document is the writer thereof. So, unless and until the contents of the document are proved against a person, the possession of the document or handwriting of that person on such document by itself cannot prove the contents of the document. In the present case as already held above, the documents recovered during the course of search from the assessee are dumb documents and there are concurrent findings of the Commissioner of Income tax (Appeals) and the Tribunal to this effect. Thus, deletion of addition is justified".

Invoking of Section 69 is not compulsory

Initially, in Section 69 the word "shall" had been used but during the course of consideration of the Bill and on the recommendation of the Select Committee, the said word was substituted by the word "may". This clearly indicates that the intention of Parliament in enacting section 69 was to confer a discretion on the Income-tax Officer in the matter of treating the source of investment which has not been satisfactorily explained by the assessee as the income of the assessee and the Income-tax Officer is not obliged to treat such source of investment as income in every case where the explanation offered by the assessee is found to be not satisfactory. The question whether the source of the investment should be treated as income or not under section 69 has to be considered in the light of the facts of each case.

In other words, a discretion has been conferred on the Income-tax Officer under section 69 of the Act to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping in view the facts and circumstances of the particular case.

In the case of CIT vs Smt. P.K. Noorjehan (1997) AIR 1999 SC 1600, 1999 237 ITR 570 SC, JT 1998 (9) SC 265, (1997) 11 SCC 198 (Supreme Court) it is held that "According to the language used in section 69, the applicability of its provisions depend upon the discretion of the AO. Section 69 states the wordings **"may be deemed to be the income of the assessee".** It is for the Assessing Officer to consider on the facts whether considering section 69, the income could have been added in the hands of assessee. Therefore even in case of rejection of the explanation of the assessee, the Tribunal can in the circumstances of a case refuse to make an addition of the value of investment to the income of assessee.

In which year addition are made?

The amount of unexplained investment will be treated the income of the assessee in the year in which he has made the investment.

Addition on statement of third party

In the case of Commissioner of Income Tax v. Indrajit Singh Suri, Tax Appeal No. 872, 2012 "The revenue argued that the assessee and his employees agreed that this was the investment made in the flats and

the suit for possession was also preferred at the behest of the assessee. Therefore, the Tribunal has committed an error in deleting such amount.

The Gujarat High Court held that it appears that the Tribunal extensively dealt with such issue taking note of all the contentions raised by both the sides and concluded in favour of the assessee. It recorded that there was no conclusive documentary evidence to hold that the assessee-respondent had invested a sum of Rs. 20 lakhs in Ninad Co-op. Housing Society by using his four employees as conduits for booking of flats. The Tribunal, therefore, in absence of any conclusive evidence, deleted such amount.

The entire issue is based on factual matrix presented before the authorities. We are in complete agreement with the findings of the Tribunal that the Assessing Officer had largely proceeded on the basis of the statement of one Shri Gajjar in whose books of account, the said transaction of Ninad Co-op. Housing Society had emerged. It further appears that no opportunity of cross examination of Shri Gajjar, though requested for, was granted by the Assessing Officer. Cumulatively, thus, when the Tribunal found that there was violation of principles of natural justice by not allowing cross examination despite such request coupled with absence of any evidence, no error much less any substantial error is committed by the Tribunal in deleting the said amount.

Miscellaneous Issues under section 69

a) Cross examination of Third Party

In the case of **M/S. Kamakshi Hospitality Pvt. Ltd. v. The DCIT, 2018, ITA No. 481/JP/2016, ITAT held that "**Admission by a person is good evidence in his own case but it is not sufficient and conclusive in case of other person when that person had own interest in giving such statement unless the other person is given cross examination and statement is supported by any other independent evidence. The facts of this case clearly establishes that denial of appointment of cross examination resulted into violation of principles of natural justice. The object of cross examination is to test the veracity of the version given in examination in chief. In this case the persons who gave statements were interested persons as they were found in possession of unaccounted investment and by giving such statement they have explained such unaccounted investment and also claimed benefit u/s 54 of the Act on the amount so admitted. No incriminating documents were found at the business premises of the Assessee Company or residence of the directors of the assessee. The assessee had not been provided any incriminating documents which could suggest that any on-money was paid. It is important to note that the Jain Brothers have explained their unaccounted investment by making such statement and also claimed benefit u/s 54 of the Act for such amount. Thus, no addition can be sustained on the basis of such oral admission of interested party without providing opportunity of

cross examination and not supported by independent evidence. The provisions of Transfer of Property Act also does not permit admission of oral evidence in contradiction to the written and registered documents. Hence, in these peculiar facts and circumstances of the case, the purchases consideration declared in respect of the Plot No. D-112A and D-112B, Power House Road, Bani Park, Jaipur admeasuring 500 sq. yards each at 1.00 crore (@ 20,000 x500 sq yard) each cannot be rejected.

Dirisala Bala Murali v. Income Tax Officer , 2020 ITA No. 1372/Hyd/2016 ITAT Visakhapatnam, In this case, the deposit were made in the bank account, but not recorded in the regular books of accounts maintained by the assessee. Thus the Ld. Tribunal held that "As per the provisions of section 68, the amount found credited in the books of accounts for which the assessee failed to offer explanation to the satisfaction of the AO required to be brought to tax u/s 68, whereas in the instant case, the said sum was not credited in the books of accounts, but the amount was found credited in the bank account of the assessee. The correct course of action for taxing the sums paid into the bank account is to tax u/s 69 of the Act. Neither the AO nor the Ld.CIT(A) has made addition u/s 69. On identical facts in the case of Smt.Asha Sanghavi [2019], ITAT Visakhapatnam, this Tribunal held that the cash deposits or deposits made in bank account required to be brought to tax u/s 69 and not u/s 68.

Thus, the AO is not permitted to make the addition u/s 68 of the Act in respect of the deposits made in the bank account. Accordingly, the Tribunal set aside the order of the Ld.CIT(A) and delete the addition made by the AO.

b) <u>Investment in case of partnership firm</u>

In the case of Jayashree Anand Enterprises, Hyderabad. v. Income Tax Officer, 2020, ITA No. 1372/Hyd/2016, the ITAT Hyderabad held that "As decided in Smt. PK Noorjahan (1997) by Supreme Court, where any assessee had not carried on any business activity, it cannot be presumed to have earned any income. Assessee has not carried on any business activity and earned any income. In such circumstances, it could only have received capital contribution from the partners. Capital contribution by the partners cannot be treated as income of the assessee and if the partners are not able to explain the sources for their investment, the AO can only make the addition in the hands of the partners and not in the hands of the assessee firm. Further, in the dissolution deed of the assessee firm , there is a mention of the return of the capital and this deed is not disputed by the AO. Thus, the addition made in the hands of the assessee firm is not justified and, therefore, the said addition is deleted.

c) Valuation of stock

In 'B.T. Steels vs. CIT', 328 ITR 471 (P&H), the Assessing Officer had made additions to the declared income of the assessee on the basis of stock available with the assessee, but not reflected in the books of account. The stock statement of hypothecated goods furnished to the bank was also at variance with the stock entered in the books of account of the assessee. The CIT (A) deleted the additions, observing that without verification from the bank, the stock statement furnished to the bank could not have been relied on. The Tribunal set aside the order of the CIT (A) and restored the additions made by the Assessing Officer. Dismissing the appeal filed by the assessee, the Hon'ble High Court held that whether difference between the statement of value of stock furnished to the bank and entries in the books of account justified addition, was a question of fact in each individual case and that the Assessing Officer had to determine the same on the basis of books of account and other material available. The burden of showing that income is under the taxation ambit is on the revenue and the same should be discharged by drawing appropriate inference from the material on record. However, the Assessing Officer drew inference from the statement furnished by the assessee to the bank and made the addition on that basis. The Tribunal had held that the Assessing Officer not only had the bank statement before him, but also the verification by the Regional Officer which states that the stock was actually lying with the assessee. Despite due opportunity to explain the difference was

provided to the assessee, he could not give any satisfactory explanation and therefore, the CIT(A) is not justified in deleting the addition, as correctly held by the Tribunal as a finding of fact.

d) Cost of Construction:

The Rajasthan High Court decision in Commissioner Of Income-Tax v. Pratapsingh Amrosingh Rajendra Singh and Deepak Kumar, [1993] 200 ITR 788 which is a case of estimate of income from undisclosed sources being unexplained investment in property. It was held that there is no dispute that the assessee maintained proper books of account and the same had been accepted in the past and no defects were pointed out in the books. The expenses are fully supported by vouchers. Also, full details are also mentioned in respect of each item in the books. Simply because the valuation report of the valuation cell was of a higher amount, the books could not be said to be unreliable. The Tribunal was, therefore, justified in deleting the addition. The relevant extract of the j udgement is below:

"In respect of the investment which is made in the property, there can be only two methods to find out the correct position

(i) when proper books of account are maintained, and

(ii) valuation report.

If the assessee has maintained proper books of account and all details are mentioned in such books of account, which are duly supported by vouchers and no defects are pointed out and the books are not rejected, the figures shown therein have to be followed. The valuation report can be taken into consideration only when the books of account are not reliable or are not supported by proper vouchers or the income-tax Officer is of the opinion that no reliance can be placed on such books of account. It is true that the Income-tax Officer has no option but to rely on the valuation report which is a document prepared by an expert and is admissible, but there must be a finding by the Income-tax Officer that the books of account maintained by the assessee are defective or are not reliable. There may be a marginal difference in the actual investment and the report of the Valuation Officer for a number of reasons as the valuation report is prepared on the basis of norms prescribed by the C.P.W.D. for the construction of buildings and the difference may be with regard to quality of the materials, etc. The Income-tax Officer could have examined the matter in detail with regard to the books of account in order to say that the books are not reliable. Simply because the valuation report is of a higher amount, the books cannot be said to be unreliable unless, by a deeper probe, any defect is found in the maintenance of the books of account. The Tribunal was, therefore, justified in deleting the addition.

e) Income from undisclosed sources

The **ITO vs. Pravinchandra Girdharlal, ITAT, Ahmedabad (1999) 63 TTJ Ahd 357** Bench held that in this case the addition is made under section 69 on account of unexplained investment in construction. But Neither the AO nor the DVO pointed out any material defect in the books of account or in the cost of construction declared by assessee. Cost of construction as reflected in the books of account cannot be rejected. DVO has categorically stated in his report that the estimate made by him are on higher side. Further the A O has not given the basis of his own estimate. AO totally failed to appreciate the report of registered valuer submitted by assessee.

<u>Comparison between Section 68 and Section 69</u>

In the case **of Unit Construction Co. Ltd. v. Joint Commissioner Of Income-Tax, (2003) 181 CTR Cal 82, 2003 260 ITR 189 Cal ,** the Calcutta High Court held that **"**Under section 68 the Assessing Officer can add back only if he rejects the books of account or if it is found by him that the books of account are not reliable or are not supported by proper vouchers or that no reliance can be placed on the books of account. However, Sections 69 and 69B, of the Income-tax Act, make it clear that if the amount is not recorded in the books of account, even then it can be explained. But if the

explanations is not satisfactory, then the amount can be held to be undisclosed income and not otherwise.

The Madras High Court in the case of Commissioner Of Income-Tax vs Shiv Shakti Timbers, 1996, observe that "A close reading of both these Sections makes it clear that in Section 68, there should be a credit entry in the books of account, whereas in Section 69, there may not be an entry in the books of account. This is a fundamental difference between the two provisions. In the case of Section 69 only where investment has been made but has not been satisfactorily explained, the income should be treated to be the income of the assessee whereas in the case of Section 68, there should be a book entry and if that book entry is not satisfactorily explained, then it should be treated as income of the assessee. It appears that these provisions were introduced in order to check bogus entries which are resorted to by firms in order to raise the corpus of the firm and the money which is being invested may not come from a valid source. Therefore, both these Sections were engrafted so as to raise a statutory presumption in the event of unsatisfactory explanation of those entries. This was with a view to check the evil of illegal bogus entries. For the purpose of avoidance of tax, certain black money of the firm is sought to be invested in the names of bogus persons so as to convert it into white investment. Therefore, law has made such a strong presumption so as to deter this kind of tendency

The ITAT Jaipur in the case of Shri Aeshwarya Jain v. The DCIT, ITA No. 1129/JP/2019, held that there is nothing either in the proceedings u/s 132 or in the statement recorded u/s 132(4) of the Act regarding unaccounted expenditure incurred by the assessee on construction of house. There is no mention of the actual construction of the house by the assessee or the timing the construction period or completion of construction work. Even the alleged expenditure not recorded in the books of account is not based on any documentary evidence or even on physical verification of the Electrical items as well as furniture and fixture installed in the house of the assessee".

When the said income is not represented by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions then even if the assessee has surrendered a sum of Rs. 10.00 lacs as unaccounted expenditure, the same would not fall in the ambit of undisclosed income as defined in explanation to Section 271AAB . A bare surrender of income not representing the money, bullion, jewellery or other valuable article or thing or any entry in the books of account will not be regarded as undisclosed income for the purpose of levy of penalty u/s 271AAB.

In this case, it is clear from the records that the assessee in his statement recorded has made a surrender of Rs 10 lakh based on said seized materials. Therefore, in the absence of any undisclosed income revealed by said seized materials, the income surrendered by the assessee cannot be said to be undisclosed income for the purpose of

Section 271AAB. Hence, when income surrendered by the assessee does not fall in the ambit of undisclosed income as defined in Section 271AAB the same would not attract the levy of penalty u/s 271AAB of the Act. Thus, the case is decided in favour of assessee.

Section 115BBE

Taxability

As per Section 115BBE, income tax shall be calculated at 60% where the total income of assessee includes following income:

a) Income referred to in Section 68, Section 69, Section 69A, Section 69B, Section 69C or Section 69D and reflected in the return of income furnished under Section 139; or

b) Which is determined by the Assessing Officer and includes any income referred to in Section 68, Section 69, Section 69A, Section 69B, Section 69C or Section 69D, if such income is not covered under clause (a).

Such tax rate of 60% will be further increased by 25% surcharge, 10% penalty, i.e., the final tax rate comes out to be 83.25% (including cess). Provided that such 10% penalty shall not be levied when the income under Section 68, 69, etc., has been included in return of income and tax has been paid on or before the end of relevant previous year.

No deduction in respect of any expenditure or allowance [or set off of any loss] shall be allowed to the assessee in computing his income referred to in clause (a) of sub-section (1) of Section 115BBE

In the Case of **The ACIT, Alwar Versus Shri Sudesh Kumar Gupta Prop. M/S Salasar Textiles, 2020**, ITA No. 976/JP/2019 the ITAT Jaipur held that " As per AO amount has been surrendered by way of undisclosed investment in stock from undisclosed income and the provisions of section 69 and section 115BBE are clearly attracted and there cannot be two views about it - undisclosed investment in stock from undisclosed income found during the course of survey and in the return of income, the same has been offered to tax under the head "business income" and the return of income so filed has been accepted by the Assessing officer without making any adjustment/variation either in the quantum, nature or classification of income so offered by the assessee. The Ld. Tribunal held that "Though the Assessing officer has issued a show-cause as to why penalty proceedings u/s 271(1)(c) may not be initiated in respect of such investment, however, he has not issued any show cause for invoking provisions of section 69 of the Act or has called for any explanation of the assessee regarding the nature and source of such investment. In fact, the assessment order so passed by the Assessing officer is silent about invoking the provisions of section 69 of the Act. Where the provisions of section 69 have not been invoked by the Assessing officer while passing the assessment order u/s 143(3),

going by the plain language of section 115BBE, the latter cannot be invoked in the instant case.

It is therefore not a case where provisions of section 69 have been invoked by the Assessing officer while passing the assessment order u/s 143(3) and at the same time, he has failed to apply the rate of tax as per section 115BBE.

Thus, it is clearly be a case of rectification and powers under section 154 can be invoked. Here, the Assessing officer has not invoked the provisions of section 69 while passing the assessment order u/s 143(3), therefore, the provisions of section 115BBE which are contingent on satisfaction of requirements of section 69 cannot be independently applied by invoking the provisions of section 154 of the Act. Therefore, the matter is decided in favour of the assessee and against the Revenue.

Non-allowability of set-off of losses against the deemed income under section 115BBE

Circular No. 11/2019-Income Tax

Government of India

Ministry of Finance

Department of Revenue

Central Board of Direct Taxes

North-Block, New Delhi, dated the 19th of June, 2019

Subject: Clarification regarding non-allowability of set-off of losses against the deemed income under section 115BBE of the Income-tax Act, 1961 prior to assessment-year 2017-18-reg.

With effect from 01.04.2017, sub-section (2) of section 115BBE of the **Income-tax Act, 1961** (Act) provides that where total income of an assessee includes any income referred to in section(s) 68/69/69A/69B/69C/69D of the Act, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provisions of the Act in computing the income referred to in section 115BBE(1) of the Act.

2. In this regard, it has been brought to the notice of the Central Board of Direct Taxes (the Board) that in assessments prior to assessment year 2017-18, while some of the Assessing Officers have allowed set off of losses against the additions made by them under Section(s) 68/69/69A/69B/69C/69D, in some cases, set off of losses against the additions made under Section 115BBE(1) of the Act have not been allowed. As the amendment inserting the words ‘or set off of any loss’ is applicable with effect from 1st of April, 2017 and applies from assessment year 2017-18 onwards, conflicting views have been taken by the Assessing Officers in assessments for years prior to assessment year 2017-18. The matter has been referred to the Board so that a consistent approach is adopted by the Assessing Officers while applying provision of section 115BBE in assessments for period prior to the assessment year 2017-18.

3. The Board has examined the matter. The **Circular No. 3/2017** of the Board dated 20th January, 2017 which contains Explanatory notes to the provisions of the Finance Act, 2016, regarding amendment made in section 115BBE(2) of the Act mentions that currently there is uncertainty on the issue of set off of losses against income referred to in section 115BBE. It also further mentions that the pre-amended provision of section 115BBE of the Act did not convey the intention that losses shall not be allowed to be set off against income referred to in section 115BBE of the Act and hence, the amendment was made vide the Finance Act, 2016.

4. Thus keeping the legislative intent behind amendment in section 115BBE(2) vide the Finance Act, 2016 to remove any ambiguity of interpretation, the Board is of the view that since the term ‘or set off of any loss’ was specifically inserted only vide the Finance Act 2016, w.e.f. 01.04.2017, an assessee is entitled to claim set-off of loss against income determined under section 115BBE of the Act till the assessment year 2016-17.

In the case of M/S Saber Paper Ltd. v The DCIT, ITA Nos.663 And 664/CHD/2017 And ITA No.773/CHD**,** the ITAT Chandigarh held that “Set off business losses with the surrendered/ disclosed business income, this issue now stands clarified with the CBDT Circular No.11 of 2019 whereby the CBDT has clarified that an assessee will be entitled to set off of losses against income determined u/s 115BBE of the Act till assessment year 2016-17. The assessment years involved

in appeals are 2012-13 & 2013-14, therefore, the assessee is accordingly entitled to set off of current year losses against deemed income. In view of our observations made above, the case is decided in favour of the assessee.

Conclusion

Section 69 is the weapon in the armoury of the Assessing Officer to detect the tax evasion in respect of Investments made by the assessee which are not recorded in the books of accounts, if any, maintained by him. Also, Section 69 gives power to AO to treat the value of investments as the income of the assessee, if the assessee does not offer any explanation or the explanation offered by him is not satisfactory. However, section 69 does not provide any guideline about the extent and length of the discretionary power given to AO in the matter of treating the investment as income which is unexplained or unsatisfactorily explained by the assessee. Therefore, the Assessing Officer is expected to appreciate the reasonable explanation offered to him, the evidences produced before him about the nature and source of investment and he cannot make the addition merely on surmises, conjectures as well as without any supporting evidences. It is worthwhile to mention here that section 69 is a legal fiction whereby investment in an asset is treated as income if it is not disclosed in the regular books of account. No further legal fiction from elsewhere in the statute can be borrowed to extend the field of section 69. This fiction cannot be

extended any further and, therefore, cannot be invoked by the Assessing Officer to tax the difference in the hands of the purchaser. The Hon'ble Andhra Pradesh High Court in the case of Addl. CIT v. P. Durgamma [1987] 166 ITR 776 AP held that it is not possible to extend the fiction beyond the field legitimately intended by the statute. Similar view was taken by the Hon'ble Kerala High Court in CIT v. Kar Valves Ltd. 1987, [1993] 204 ITR 490, 112 CTR 30 wherein it is held that a legal fiction is limited to the purpose for which it is created and could not be extended beyond that legitimate frame. The Hon'ble Allahabad High Court in the case of Controller of Estate Duty v. Krishna Kumari Devi [1988] 173 ITR 561, 66 CTR 80 held that in interpreting the legal fiction the court should ascertain the purpose for which it was created and after doing so assume all facts which are logical to give effect to the fiction. The Hon'ble Supreme Court in CIT v. Mother India Refrigeration Industries P. Ltd.1985 155 ITR 711 SC held that legal fictions are created only for some definite purpose and they must be limited to that purpose and should not be extended beyond that legitimate field.