Overview of provisions of Section 115BBE read with other sections from 68 to 69D of the Income Tax Act, 1961 (the Act)

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As inserted by Finance Act, 2012, w.e.f. 01.04.2013

SECTION 115BBE: Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D

(1) Where the ***total income of an assessee includes any income*** referred to in ***section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable*** shall be the aggregate of—

(a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, ***at the rate of thirty per cent***; and

(b) ***the amount of income-tax with which the assessee*** would have been chargeable had ***his total income been reduced by the amount of income*** referred to in clause (a).

(2) Notwithstanding anything contained in this Act, ***no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1)***.

Amendment through Finance Act, 2016

Para 14.12 Rate of tax for unexplained cash credit, investments, etc. [Section 115BBE]

*"Section 115BBE of the Act provides for the rate of tax at 30%, in respect of the following items of income being **unexplained income**, where the additions are made and included in the total income under the provisions stated against the items:*

Items of income	*Provision/Section*
Cash credits	*68*
Unexplained investments	*69*
Unexplained money etc.	*69A*
Amount of investments etc. not fully disclosed in books of account	*69B*
Unexplained expenditure etc.	*69C*
Amount borrowed or repaid on Hundi	*69D*

*In respect of the above additions, on the **gross amount** (that is, without allowing any expenditure or allowance **in computing the above items of income**) tax is payable @ 30%.*

*Finance Act, 2016 amends sub-section (2), with effect from assessment year 2017-18, to provide that in determining the **gross amount of income** of the **nature** referred above, even set off of any loss should not be considered. In relation to the amendment, the Memorandum explaining the provisions of the Finance Bill, 2016 read as follows:*

"Currently, there is uncertainty on the issue of set-off of losses against income referred in section 115BBE of the Act. The matter has been carried to judicial forums and courts in some cases has taken a view that losses shall not be allowed to be set-off against income referred to in section 115BBE. However, the current language of section 115BBE of the Act does not convey the ***desired intention*** *and as a result the matter is litigated. In order to avoid unnecessary litigation, it is proposed to amend the provisions of the sub-section (2) of section 115BBE to expressly provide that no set off of any loss shall be allowable in respect of income under section 68 or section 69 or section 69A or section 69B or section 69C or section 69D."*

The effect of the amendment is that in computing the above items of income, namely, unexplained cash credits, investments, expenditure, etc., no loss shall be allowed and accordingly, the ***gross amount*** *should be taxed.*

Prima facie, the Memorandum explaining the provisions of the Finance Bill, 2016 refers to Gujarat High Court decision in Fakir Mohmed Haji Hasan v. CIT [2001] 247 ITR 290/[2002] 120 Taxman 11 where the Court took a view that when any addition is made for unexplained investment or the like, it is not made under any Head of income and accordingly, no expenditure is allowable as well as no loss would be allowable. Apparently, the Memorandum also refers to Madras High Court decision in CIT v. Chensing Ventures [2007] 291 ITR 258/163 Taxman 175, wherein the contrary view was taken without reference to Gujarat High Court decision.

The effect, as per Gujarat High Court decision would be that the addition (assuming there is only one other source of income and, that is, business and in which the assessee has incurred loss) would be considered as total income of that previous year without allowing set-off of business loss and the entire business loss would be allowed to be carried forward. Thus, on the amount of unexplained investment tax would be payable. Under the section, the tax payable would be 30%.

The effect, as per Madras High Court decision would be that the addition would be set-off against the business loss and the balance addition, if any, would form part of the total income and attract tax. Under the section, the tax payable would be 30%. However, no part of the business loss would be allowed to be carried forward as it is set-off against the addition of unexplained investment.

Thus, if Gujarat High Court's view is followed, the entire unexplained investment is taxable @ 30%; but, if Madras High Court's view is followed, the amount remaining after set-off of business loss would be taxable @ 30%.

To obviate the above conflict, an amendment is made in the section.

The provision forms part of Chapter-XII providing for determination of rate of tax in certain special cases and accordingly, quantification of the amount of tax. The provision, as such, does not relate to the computation of total income. *Prima facie, for quantification of tax, in respect of income referred, the amendment provides for non-allowance of the loss. However, it would not affect the computation of total income.*

As discussed earlier, Gujarat High Court decision affected the computation of total income and, accordingly, had the effect of unexplained investment being treated as total income on which tax is payable. Perhaps, that effect is not achieved by the amendment.

Whenever legislature desires to restrict set-off of loss or allowance of loss, in a particular manner, usually, the provisions are made in Chapter-VI (as they are considered for computing the total income); to illustrate, non-allowance of business

loss against salary income as provided in section 71(2A), regulation of loss under the Head Income from House Property is separately made, treatment of short-term or long-term capital loss and intra-head set-off is separately provided and the like.

In the absence of any amendment in the provisions of Chapter-VI, prima facie, it appears that the amendment may not have the desired effect and the position in law, it can be said, would be continued to be governed by the said Gujarat and Madras High Court decisions."

Amended Section 115BBE applicable w.e.f. 01.04.2017

(1) Where the **total income of an assessee**,—

(a) includes ***any 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) **determined by the Assessing Officer** 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),

the ***income-tax payable shall be the aggregate of***—

(i) the **amount of income-tax calculated on the income referred to in clause (a) and clause (b)**, at the rate of **sixty per cent; and**

(ii) the **amount of income-tax with which the assessee would have been chargeable** had his total **income been reduced by the amount of income referred to in clause (i)**.

(2) Notwithstanding anything contained in this Act, **no deduction** in respect **of any expenditure** or **allowance** or ***set off of any loss*** shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).

Amendment to sub-section (2) to include clause (b) of sub section (1) w.r.e.f. 01.04.2017

Sub-section (2) starting with a non-obstante clause provides that no deduction in respect of any expenses or allowances or set-off of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in Clause (a) of sub-section (1) referred to above.

This bar on non-deduction of expenditure or allowance or set-off of any loss was applicable only to Clause (a) and not to Clause (b).

Therefore, in a case where the assessing officer himself charges tax on income referred to in the specified sections (Section 68 to Section 69D), then the assessee was entitled to claim the deductions of expenses or allowances as well as set-off of any loss. This seemed to be an unintentional anomaly.

The amendment proposed in Finance Bill, 2018 seeks to correct this anomaly and hence proposes a retrospective amendment w.e.f. 1st April, 2017 to include income referred to in both Clauses (a) and (b) of sub-section (1) in sub-section (2).

The above enacted amendments are summarised in the following table:

From AY 2013-14 up to AY 2016-17	AY 2017-18 onwards
115BBE. (1) Where the total income of an assessee includes any income referred to in section68, section 69, section 69A, section 69B, section69C or section 69D, the income-tax payable shall be the aggregate of— (a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty percent; and (b) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause(a)	115BBE. (1) Where the total income of an assessee, — (a) includes any income referred to in section 68, section 69, section 69A, section 69B, section69C or section 69D **and reflected in the return of income furnished under section 139**; or (b) **determined by the Assessing Officer** 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), the income-tax payable shall be the aggregate of— (i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent; and (ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).
(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).	(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance **[or set off of any loss]** shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause(a) of sub-section (1).

A. COVERED UNDER CHAPTER XII DETERMINATION OF TAX IN CERTAIN SPECIAL CASES

B. Objective of the amendment

"The objective of the amendment as stated in the Finance Minister's speech and the Explanatory Memorandum are as follows:

Finance Minister's Speech:

*"155. I propose a series of measures to deter the generation and use of **unaccounted money**. To this end, I propose.*

…. Taxation of unexplained money, credits, investments, expenditures, etc., at the highest rate of 30 per cent irrespective of the slab of income."

Explanatory Memorandum:

*"Under the existing provisions of the Income-tax Act, certain **unexplained amounts** are **deemed as income** under section 68, section 69, section 69A, section 69B, section 69C and section 69D of the Act and are subject to tax as per the tax rate applicable to the assessee. In case of individuals, HUF, etc., no tax is levied up to the basic exemption limit. Therefore, in these cases, no tax can be levied on **these deemed income** if the amount of **such deemed income** is less than the amount of basic exemption limit and even if it is higher, it is levied at the lower slab rate.*

*In order to curb the practice of laundering of **unaccounted money** by taking advantage of basic exemption limit, it is proposed to tax the unexplained credits, money, investment, expenditure, etc., **which has been deemed as income** under section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of 30% (plus surcharge and cess as applicable). It is also proposed to provide that no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of the Act **in computing deemed income** under the said sections."*

Thus, the objective is to prevent misuse of provisions of Income Tax Act and subject defaulting taxpayers to higher tax and stringent penalty.

C. Principles of Interpretations:

1. **The intention of Legislature is expressed through the Speech of the Finance Minister. K P Varghese v. ITO [1981] 131 ITR 597 [SC] –** *"it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision **but the speech made by the mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted.** This is an accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in Sole Trustee, Loka Shikshana Trust v. CIT [1975] 101 ITR 234, the other in Indian Chamber of Commerce v. CIT [1975] 101 ITR 796 and the third in Addl. CIT v. Swat Art Silk Cloth Manufacturers Association [1980] 121 ITR 1/[1980] 2 Taxman 501, where the speech made by the Finance Minister, while introducing the exclusionary clause in section 2(15) of the Act, was relied upon by the Court for the purpose of ascertaining what was the reason for introducing that clause. The speech made by the Finance Minister, while moving the amendment introducing sub-section (2), clearly states what were the circumstances in which sub-section (2) came to be passed, what was the mischief for which section 52 as it then stood did not provide and which was sought to be remedied by the enactment of sub-section (2) and why the enactment of sub-section (2) was found necessary. **It is apparent from the speech of the Finance Minister that sub-section (2) was enacted for the purpose of reaching those cases where there was understatement of consideration in respect of the transfer** or to put it differently, the actual consideration received for the transfer was "considerably more" than that declared or shown by the assessee, but which were not covered by sub-section (1) because the transferee was not directly or indirectly connected with the assessee. **The object and purpose of sub-section (2), as explicated from the speech of the Finance Minister, was not to strike at honest and bona fide transactions where the consideration for the transfer was correctly disclosed by the assessee** but to bring within the net of taxation those transactions where*

the consideration in respect of the transfer was shown at a lesser figure than that actually received by the assessee, so that they do not escape the charge of tax on capital gains by understatement of the consideration."

2. Every word of the statute has to be assumed to have been deliberately and consciously incorporated therein by the Legislature and has thus to be given a meaning and effect. **Dalmia Biscuits Ltd v. CIT [1992] 194 ITR 749 [P&H]**

3. **Purpose of Deeming** – When a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something, the Act of Parliament requires him to be treated as if he were, "Deeming" a past event or thing to be something other than what it was or is, may be an **interference with the course of nature**, since **it creates artificial data in the place of existing fact**. But it is not a retrospective changing of the statue law. Thus, when a statute enacts that something shall be deemed to have been done, which in fact and in truth was not done, the court is entitled and bound to ascertain for which purposes and between what persons the statutory fiction is to be resorted to.

   Kamakshya Narain Singh (Raja Bahadur) v. CIT [1946] 14 ITR 683, 693 [Pat] affirmed by the Federal Court in [1947] 15 ITR 311, 319 [FC], Habib & sons V CIT [1947] 15 ITR 132, 137 (Bom)

4. **Legal fiction created by a deeming provision must be carried to its logical conclusion** - When a legal fiction is created, for what **purpose**, is it so created? After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion by necessary implication, and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate. And not to restrict it unless the section which created that fiction gave an indication that the fiction was for a limited purpose. A deeming provision is intended to enlarge the meaning of a particular word which includes matters which otherwise may not fall within the provision. It should, therefore, be extended to the consequences and incidents which inevitably follow. In other words, the consequences and incidents flowing from a legal fiction should also be deemed real.

   Kamal Textiles v ITO [1991] 189 ITR 339 (MP)

   Santosh Enterprises v CIT [1993] 200 ITR 253 (Kar)

   Rajputana Trading Co. Ltd v CIT [1969] 72 ITR 286, 288 (SC)

   CIT v Teja Singh (S) [1959] 35 ITR 408, 413 (SC)

   Executors and Trustees of Sir Cawasji Jehangit (First Baronet) v CIT [1959] 35 ITR 537, 546 (Bom)

   Venkatachalam (MK), ITO v Bombay Dyeing & Mfg Co. Ltd [1958] 34 ITR 143, 147 (SC)

   CIT V Elphinstone Spg. & Wvg. Mills Co. Ltd [1960] 40 ITR 142, 154 (SC)

   Eastern Cold Storage (P) Ltd v CIT [1983] 139 ITR 664 (Cal)

   Burdwan Wholesale Consumers Co-operative Society Ltd [1991] 191 ITR 570 (Cal)

   CIT v Surat Cotton Spg. & Wvg Mills (P) Ltd [1993] 202 ITR 932 (Bom)

   Caltex Oil Refining (India) Ltd [1993] 202 ITR 375 (Bom)

5. It is equally well settled that a legal fiction is **created only for a definite purpose** and **is limited to that purpose** and **should not be extended beyond it**. Indeed, although full effect must be given to the legal fiction, it should not be extended beyond the purpose for which it is created and **must be within the framework of the purpose** for which it is created.

   CIT v Amarchand N Shroff [1963] 48 ITR 59 (SC)

   CIT v Shrishakti Trading Co [1994] 207 ITR 442 (Bom)

6. **Deeming fiction must be strictly construed** – All provisions enacting a fiction must be strictly construed. When one speaks of a thing being deemed to be something, one does not mean to say that it is that which is deemed to be. **It is rather an admission that it is not what it is deemed to be**, and that notwithstanding it is not that.

   CIT v Khimji Nensi [1992] 194 ITR 192 (Bom)

D. Applicability of Section 115BBE

1. The section applies irrespective of the minimum threshold i.e. the section applies to even a small amount of Rs. 5,000 if the amount is chargeable as income under the provisions of sections 68, 69, 69A, 69B, 69C and 69D ("specified sections").

2. Since the amendment is prospective w.e.f. AY 2017-18, the income under specified sections for earlier years will continue to be governed by the pre-amended provisions irrespective of the fact that the assessments of such years are completed after the amendment.

3. Prior to the enactment of the Amendment Act, 2016 there could have been a question as to whether an assessee, on his own, could offer certain amounts for taxation under the provisions of specified sections.

4. It is now clear that items which could have been taxed by the provisions of specified sections can also be offered for taxation by the assessee in his return of income by paying tax, on or before the end of the previous year, at the rates mentioned in section 115BBE.

5. In fact, penalty under section 271AAC can now be levied if the income assessed includes income of the nature referred to in specified sections and if the assessee has not included such income in his return of income or having included it in the return of income has failed to pay taxon such income before 31st March of the previous year.

6. Up to AY 2016-17 there is no prohibition on set off of loss though deduction in respect of any expenditure or allowance is not allowed.

7. The levy of penalty u/s 271AAC depends on whether the case of an assessee falls under clause (a) or clause (b) of section 115BBE(1).

8. Sub-section (2) of section 115BBE begins with a non-obstante clause and provides that non-deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) ofsub-section (1).

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

10. Clause (a) covers income referred to in specified sections which has been reflected in return of income furnished under section 139. Such income reflected in a belated return or in a revised return furnished under section 139(5) would certainly be covered by clause (a).

11. Pre-requisite for revising a return of income is "discovery" of omission or any wrong statement in the return of income filed by the assessee. Consequently, income covered by specified sections which is reflected in revised return after issue of notice by the AO may not be regarded being covered by clause (a).

12. Return furnished under sections 148, 153A and 153C of the Act is regarded as if it is a return filed under section 139 of the Act and therefore it appears to be arguable proposition that a disclosure in the return filed under section 153A would be regarded as covered by clause (a).

13. Tax rate of 60% is on income under specified sections "included" in total income. If donations are given which donations qualify for deduction under section 80G, a question arises as to whether tax is payable on gross income under specified sections or net income [See Distributors (Baroda) Pvt. Ltd. v. UOI (1985) 155 ITR 120 (SC); CBDT Circular under section112].

14. The total incidence of tax in respect of income of the nature referred to in specified sections is 77.25%. If penalty under section 271AAC is also levied then the incidence of tax works out to 83.25%.

15. Assessee will be liable to pay interest under section 234C of the Act, if assessee in his return of income declares income under specified sections but does not pay advance tax in accordance with the provisions of the Act.

16. Belated returns will be subject to payment of interest under section 234A and default in payment of advance tax will trigger interest under section 234B.

17. In a case where advance tax paid is more than 90% of the tax payable but less than 100% of the tax payable, interest under section 234B may not be leviable but the assessee will not be entitled to claim immunity from penalty u/s 271AAC.

18. **Shiv Narayan Shivhare v. CIT [1995] 83 Taxman 25 (MP)**

- In this case, the assessee disclosed voluntarily Rs. 75,000 as income from undisclosed sources. The AO treated this amount returned as undisclosed incomeas concealed income. The AO also levied penalty on this amount.
- The Tribunal held that there was no question of penalty on the sum which was disclosed as income voluntarily in return, as no penalty is prescribed under the law for not disclosing alleged sources of income.
- On an application under section 256(2), the High Court held –
  There was no question of any levy of penalty on the sum of Rs. 75,000 which was disclosed as income by the assessee voluntarily in his return. There is also no penalty prescribed under the law for not disclosing the alleged source of income. The contention

of the revenue that the penalty should have been imposed by the Tribunal was rightly rejected.

19. **Fakir Mohmed Haji Hasan v. CIT [2001] 247 ITR 290 (Guj)**
- In this case the assessee was found to be in possession of gold valued at Rs.48.72 lakh which was included in his total income. The cost of acquisition of such gold wass ought to be claimed as deduction/expenditure. The Court held that the 'deemed incomes' of the nature covered under sections 69, 69A, 69B and 69C have to be treated separately and such deemed incomes were not in the nature of incomes such as salary, house property, profits and gains of business or profession, or capital gains, nor income from 'other sources'. Accordingly, corresponding deductions which were applicable to incomes computed under various heads were not applicable in this case on 'deemed incomes'. The value of investment to the extent undisclosed was held as chargeable to tax

20. **CIT v. Chensing Ventures [2007] 291 ITR 258 (Mad)**
- In this case the assessee during the course of survey could not explain the source for the payment of Rs. 28.50 lakh. It was surrendered voluntarily as income for taxation. The assessee filed a return admitting business loss of Rs. 11.95 lakh and set off the same against the income of Rs.28.50 lakh admitted at the time of survey as income from undisclosed sources. The Assessing Officer did not allow set off of business loss against income from undisclosed sources. The Court held that once the business loss was determined the same had to be set off against the income determined under any other head of income. A loss after set off against the income under the same head was eligible for set off against other heads of income, unless the law prohibited or banned such set off. The Court, accordingly, held that the income offered during the course of survey had to be scaled down by the business loss of the assessee.

21. **Kim Pharma (P) Ltd v. CIT (ITA No. 106 of 2011) (P&H)**
- In this case the Punjab and Haryana High Court held that the income surrendered by the assessee voluntarily in a survey could not be reduced by set off of brought forward losses. It held that sections 70 and 71 could not be applied for setting off losses against the income surrendered consequent to survey.

22. **Liberty Plywoods (P.) Ltd. v. Asstt. CIT [2013] 29 taxmann.com 268 (Chd.)**
- In this case the assessee was subjected to a survey under section 133A. The case relates to assessment year 2005-06. The assessee offered Rs. 70 lakh as income representing unaccounted cash of Rs. 50 lakh, unaccounted investments of Rs. 7.50 lakh unaccounted expenditure of Rs.12.50 lakh under sections 69A, 69B and 69C respectively.
- The assessment was completed by the Assessing Officer determining the total income at Rs. 32.66 lakh after allowing set off of brought forward business loss and brought forward unabsorbed depreciation against the income admitted during thecourse of survey.
- The Commissioner invoked revisional jurisdiction under section 263 and held that the incomes offered during the course of survey were 'deemed incomes' under sections 69, 69A, 69B. So, those incomes were not eligible for set off against brought forward business loss or unabsorbed depreciation of the earlier years.

  The Tribunal in Liberty Plywood's case referred to its jurisdictional High Court's decision in the case of Kim Pharma (P.) Ltd. (supra) and held that the income offered during the course of survey has to be assessed separately as 'deemed income'. Following the

precedent in Kim Pharma's case the Tribunal held that the business loss cannot be set off against the income surrendered at the time of survey.

However, it held that in Kim Pharma (P.) Ltd.'s case the issue, whether depreciation brought forward from the earlier year(s) is eligible for set off against the surrendered income, was not discussed and, hence, it made a voyage on the decisions on this issue.

It looked into the various changes with regard to treatment of depreciation, both in the year of claim and on carry forward and finally held that depreciation of the block of assessment years, viz., assessment year 1997-98 to assessment year 2001-02 could be set off against the incomeoffered or surrendered during the course of survey.

However, where the depreciation related to assessment years preceding or succeeding the block period (i.e., other than assessment years 1997-98 to 2001-02) the Tribunal held that the surrendered income could be reduced to the extent of unabsorbed depreciation brought forward from the earlier years.

23. Since the amendment to S. 115BBE, made by the Amendment Act, is effective from 1.4.2017, a question arises as to whether it is retroactive since it covers cases where income of the nature referred to in specified sections pertains to the period from 1.4.2016 to 8.11.2016. In other words, is the section applicable to acts done before its enactment.

24. A statute is retrospective when it takes away or impairs any vested right acquired under the existing laws, or creates a new obligation, or imposes a new duty, or attaches a new liability in respect of transactions or considerations already past.

25. A substantive law determines the rights and liabilities of the parties concerned, whereas procedural laws govern the manner in which such rights or obligations are to be enforced or realised.

26. A law applicable to the assessment is the law as it stands in the year of assessment and not that during the year in which the income was earned.

E. <u>Restriction on deductions under Chapter VI-A</u>

Sub-section (2) of section 115BBE restrictsdeduction in respect of any expenditure allowable to the assessee under any provision of theAct. This is not to be confused with deductions admissible in computing "Gross Total Income"under Chapter VI-A. In the case of an assessee having income referred to in section 115BBEand no other income, while determining the "Gross total income", deduction under Chapter VI-Aappears to be admissible. This will result into a lower 'Gross Total Income/Total income' ascompared to income determined u/s 115BBE.

F. <u>Impact of section 115BBE when an assessee credits "Cash sales" in his books of account</u>

The provisions of section 68 are attracted when any sum is found credited in the books of an assessee. The words "any sum" are wide enough to cover the transactions of "Cash Sales" appearing in the books of an assessee and, therefore, if the assessee offers no explanation about the nature and source of "cash sales" or the explanation offered by him is not, in the

opinion of the Assessing Officer, satisfactory, cash sales may be deemed as unexplained incomes chargeable to tax under section 68 of the Act.

While it may seem preposterous that cash sales credited in the books of account can be deemed as income under the provisions of section 68 and can be subjected to flat rate of tax @ 30% from AY 2013-14 to AY 2016-17 or 60% w.e.f. AY 2017-18 without making deduction for purchases. Before reaching any conclusion, it would be useful to take note of the following legal precedents which directly deal with the issue:

1. **ITO v. Jethu Ram Prem Chand [2001] 114 Taxman 219 (Delhi)(Mag.):** HELD – "It was obvious that the assessee made purchases from J.R. New Delhi, on 5-1-1990 to the tune of 1970 quintals and the sales in cash of the same were made on 8-1-1990 and thereafter. As the purchase as well as sales were duly recorded in the books of account and the assessee had shown the profits on these sales made in the return of income, one failed to understand as to how the figure of total cash sales amounting to Rs. 35,48,005 could be treated as unexplained cash credit under section 68. The assessee made available to the Assessing Officer all the necessary particulars of the party from whom the assessee purchased the goods which were sold in cash and became the subject-matter of controversy at hand. The Assessing Officer in his wisdom thought it fit not to examine the supplier. It indicated that he was satisfied with the genuineness of the purchase aspect of the transaction. It was not the case of the revenue that the assessee had not shown any purchase in its books of account against which the sales had been recorded. The case law cited by the revenue as to the burden of proof on the assessee was not applicable to the facts of the present case, because the factum of purchase and sale of the goods in the assessee's books of account stood established beyond a shadow of doubt. Under these circumstances, the order of the Commissioner (Appeals) was to be upheld."

2. **Harish Kumar v. Dy. CIT [2003] 85 ITD 366 (Hyd.) – HEAD NOTE** – "Section 68 of the Income-tax Act, 1961 - Cash credits - Assessment year 1998-99 - Whether provisions of section 68 are in *pari materia* with section 69 and, therefore, before making an addition under section 68, Assessing Officer has to exercise his discretion judiciously - Held, yes - Assessee sold gold and diamond separately and same was shown in its return - However, Assessing Officer did not accept sale of diamond as genuine and added it towards assessee's income as unexplained credit - Whether since assessee had discharged burden of proving that sale transaction in diamonds was genuine and creditworthiness of purchasers had been proved beyond doubt, Assessing Officer was not justified in treating transaction as not being genuine - Held, yes - Whether, therefore, addition under section 68 was to be deleted - Held, yes"

3. **Nitisha Silk Mills (P.) Ltd. v. ITO [IT Appeal No. 896 (Ahd.) of 2011, dated 20-7-2012] – Para 10 –** "We have considered the rival submissions, perused the material on record and have gone through the orders of authorities below and the judgment cited by the Ld. A.R. We find that this is noted by the A.O. on page 30 para 7 of the assessment order that the assessee has claimed to have effected cash sales of grey cloth on three dates i.e. 16.5.2006, 17.5.2006 and 31.3.2007 totalling an amount of Rs.9,95,870/-. The A.O.'s objection is this that why cash sale is only on these three dates in the year and not on other dates. With regard to this objection of the A.O., it was submitted by the assessee before the A.O. vide written submission dated 29.12.2009 that since the assessee decided to discontinue the business, major quantity of grey cloth lying in various process houses were called back without processing and the grey cloth so received was sold in

cash. It is also submitted that some of the process houses could not trace grey cloth of the assessee and therefore, cash equal to that value of grey cloth was given by the owners of the process houses. Considering these facts of the present case, in its entirety, we are of the considered opinion that the claim of the assessee regarding cash sales under peculiar conditions that the assessee was discontinuing its business and therefore some sales were made in cash cannot be summarily rejected. We also find that it is observed by the Ld. CIT(A) on pages 51-52 of his order that the assessee cold not provide even the names and addresses of those parties to whom cash sales were claimed to have been made. This is the main basis on which Ld. CIT(A) has confirmed the decision of the A.O. In our considered opinion, it cannot be said that in the case of cash sales, the assessee is bound to keep record of the names and addresses of the buyers. The judgement of Hon'ble Bombay High Court cited by the Ld. A.R. rendered in the case of R B Gurnam Fatehchand vs ACIT as reported in 75 ITR 33 also supports the case of the assessee. In that case also, the assessee was not in a position to give the addresses of the customers to whom cash sales were made. Under these facts, it was held by the Hon'ble Bombay High Court that this cannot be the basis to reject the book results. Respectfully following the judgment of Hon'ble Bombay High Court, we delete this addition also. Ground No.2 is also allowed."

4. **Impact of section 115BBE in cases of persons having income from profession -** As stated earlier, the expression "sum credited" is wide enough to include receipts from a profession. So, in case of all sums credited/received as professional receipts, the assessee would be duty bound to explain the nature and source thereof, failing which no deduction will be allowed for expenses incurred for carrying out the profession. As has been stated hereinabove, in case of "cash sales", maintenance of stock registers, evidence of purchases, etc., help the businessman in explaining the nature and source of cash sales. But a professional is at a disadvantage as he can seldom establish a link between an expense incurred and revenue generated therefrom. He will have to prove the nature and source of his receipts in some other way, probably by applying "KYC" norms.

G. Chargeability of income for income-tax under the Act - Key points

1. Charge of income-tax - section 4

(1) Where any Central Act enacts that income-tax shall be charged for any assessment year at any rate or rates, **income-tax at that rate** or those rates **shall be charged for that year** in accordance with, and [subject to the provisions (including provisions for the levy of additional income-tax) of, this Act] **in respect of the total income** of the previous year of every person :

Provided that where by virtue of any provision of this Act income-tax is to be charged in respect of the income of a period other than the previous year, income-tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), income-tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.

2. Total Income – section 2(45) – *"total income"* means the total amount of income referred to in Section 5, **computed in the manner laid down in this Act**;

3. **Heads of income - section 14** - Save as otherwise provided by this Act, **all income shall**, for the **purposes of** charge of **income-tax** and **computation of total income**, **be classified** under the **following heads of income** :—

   A. - Salaries.

   B. - ***

   C. - Income from house property.

   D. - Profits and gains of business or profession.

   E. - Capital gains.

   F. - Income from other sources.

4. **Income from other sources – Section 56**

   (1) Income of every kind which is not to be excluded from the total income under this Act **shall be** chargeable to income-tax under the head "Income from other sources", **if** it is **not chargeable** to income-tax **under any of the heads specified in** section 14, items **A to E**.

   (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the **following incomes**, **shall be** chargeable to income-tax under the head "Income from other sources", namely :— …….

5. **ITAT Ahmedabad** in the case of **Fashion World [ITA No. 1646/Ahd/2006]** order dated 12.02.2010 dealt with the issue of characterization of "business stock" found during the course of search to be determined under the head "Profits and gains of business or profession" and that there is no separate identity of addition under section 69.

H. Characterization of Income – Head under which it is to be included

a. In the case of ITO v. Dharambir Hansraj Agarwal [1987] 23 ITD 589 (Bom), the ITAT dealt with the issue on characterization of income assessed u/s 68 – *"Section 68 does not expressly state as to under what head the said income should be assessed. Section 68 is silent about the head under which the said income should be assessed. Consequently, the assessing authority has to look to the surrounding circumstances in order to determine as to under what head the said income should be assessed.* ***In Lakhmichand Baijnath v. CIT [1959] 35 ITR 416 , the Supreme Court has observed that when an amount is credited in the business books, it is not an unreasonable inference to draw that it is a receipt from business."***

b. In Daulatram Rawatmull v. CIT [1967] 64 ITR 593 , it has been held by the Calcutta High Court that where a credit entry is found in the business accounts of an assessee and the explanation as to how the amount came to be received is rejected by the Income-tax authorities and the amount is taken to be income from an undisclosed source, such income can be treated as business income, if the assessee has no other source of income. Similar view has been taken by the Calcutta High Court in Mansfield & Sons v. CIT [1963] 48 ITR 254.

c. In Nalinikant Ambalal Mody v. S.A.L. Narayan Row, CIT [1966] 61 ITR 428 , the Supreme Court has held that whether an income falls under one head or another has to be

decided according to the common notions of practical man because the Act does not provide any guidance in the matter.

d. In CIT v. P.D. Abraham [2014] 48 taxmann.com 352 (Kerala), the issue involved was whether, in the absence of any satisfactory explanation regarding the source of the creditor, can it be said that the credit is not a business income. When the assessee is doing business and has no other source of income, it has to be treated as unaccounted income in the course of its business activities. The Tribunal also relied upon the judgment of th Apex court in Lakhmichand Baijnath v. CIT [1959] 35 ITR 416 and found that it is not unreasonable to infer that the addition made under Section 68 is receipt from the business of the assessee.

e. The Apex Court in the case of Bihar State Co-Operative Bank Ltd. v. CIT [1960] 39 ITR 114 (SC) while holding that the High Court was in error in treating interest derived from deposits as not arising from the business of the bank and therefore not falling within the income exempted under the Notification, noted – *"It may be added that the various heads under section 6 of the Income-tax Act and the provisions of that Act applicable to these various heads are mutually exclusive. Section 12 is a residuary section and does not come into operation until the preceding heads are excluded. CIT v. Basant Rai Takhat Singh [1933] 1 ITR 197."*

I. Coverage of specified sections, viz. 68, 69, 69A, 69B, 69C and 69D

1. **Section 68 Cash Credits:** *"Where **any sum** is **found** credited in the **books of an assessee** maintained for any previous year, **and** the assessee **offers no explanation** about the **nature and source** thereof or the **explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory**, the **sum so credited may** be charged to income-tax **as the income** of the assessee of that previous year :*

   *Provided that where the assessee is **a company** (not being a company in which the public are substantially interested), and the **sum so credited** consists of **share application money, share capital, share premium** or any such amount by whatever name called, any explanation offered by such assessee-company shall be **deemed to be not satisfactory, unless**—*

   *(a) the person, being a **resident** in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; **and***

   (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

   Provided further that nothing contained in the first proviso shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.

Relevant issues to be considered for section 68

- Is section 68 charging section?
- Year of charge?
- Assessee
- Any sum
- Found credited

- In the books of account maintained – what constitutes books of assessee and whose books of account?
- Assessee offers explanation about the nature and source (what is nature & source?)
  - Identity of the creditor
  - Creditworthiness of the creditor
  - Genuineness of the transaction
- Explanation not found satisfactory by Assessing Officer, then shall be charged to income tax
- Conditions should be cumulatively satisfied
- Assessee is company & amount is credited in name of either of the following (deemed not to be satisfactory by Assessing Officer):
  - Share Application Money
  - Share Capital
  - Share Premium
- Person in whose name credit is outstanding in the books should (post amendment effective from 01.04.2013
  - Be resident
  - Offer explanation about the nature and source of income

  Prior to amendment, Identity of shareholder to be proved i.e. Name, address, PAN, Application forms, Payment through proper banking channel, etc. Once all this is established an even if the AO alleges as received from bogus shareholders, then Department can proceed against the individual assessment of such shareholders but cannot assess the same as undisclosed income of the company
- Simultaneous amendment in section 56(2)(viib) – applicable only where section 68 is satisfied and thereafter question of arms-length comes into play by applying the rule to ascertain fair market value – thus, if section 68 applicable, then no need to apply section 56(2)(viib)
- Venture Capital fund or Venture Capital Company – Section 10(23FB)
- Prior to the enactment of the Amendment Act, 2016 there could have been a question as to whether an assessee, on his own, could offer certain amounts for taxation under the provisionsof sections 68, 69, 69A, 69B, 69C and 69D ("specified sections").
- It is now clear that items which could have been taxed by the provisions of sections 68, 69, 69A, 69B, 69C and 69D ("specified sections") can also be offered for taxation by the assessee in his return of income by paying tax, on or before the end of the previous year, at the rates mentioned in section 115BBE.
- Can the assessee be asked to prove source of source
- Is the addition mandatory or discretionary – significance of `may'
- Can addition be made if income is assessed on an estimated basis
- Can addition be made in cases where income is assessed on presumptive basis
- Is the nature of burden different in case of public companies and in case of private companies
- Can addition be made in respect of credits recorded in books which are rejected

2. **Section 69 Unexplained Investments**: *"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."*

- Investments made not recorded
- Books of accounts may or may not be maintained
- No explanation offered or explanation offered not found satisfactory by Assessing Officer
- Nature and source of the investments
- Value of investment **deemed to be income**

3. **Section 69A Unexplained money, etc**:*"Where in any financial year the assessee is **found** to be the **owner** of **any money, bullion, jewellery or other valuable article** and such money, bullion, jewellery or valuable article is **not recorded in the books of account**, **if any**, maintained by him for any source of income, and the assessee **offers no explanation** about the **nature and source** of acquisition of the money, bullion, jewellery or other valuable article, or the **explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory**, **the money** **and** **the value of** the bullion, jewellery or other valuable article **may** be **deemed to be the income** of the assessee for such financial year."*
   - Assessee found to be owner of Money, bullion, jewellery or other valuable article and not recorded
   - Books of accounts may or may not be maintained
   - No explanation offered or explanation offered not found satisfactory by Assessing Officer
   - Nature and source
   - Money and value of bullion, jeweller or any other valuable article deemed to be income

4. **Section 69B Amount of investments, etc., not fully disclosed in books of account**:*"Where in any financial year the assessee has **made investments** or is **found to be the owner** of any **bullion, jewellery or other valuable article**, and the Assessing Officer **finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded** in this behalf in the books of account maintained by the assessee for any source of income, and the assessee **offers no explanation** about such excess amount or the **explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory**, **the excess amount may** be **deemed to be the income** of the assessee for such financial year."*
   - Assessee made investments or found to be owner of any bullion, jewellery or other valuable article
   - AO finds that value of these exceeds the amount recorded in books
   - No explanation or explanation offered not satisfactory
   - Excess amount deemed to be income

5. **Section 69C Unexplained Expenditure, etc.**:*"Where in any financial year an assessee has **incurred any expenditure** and he **offers no explanation** about the **source** of such expenditure or part thereof, or the **explanation, if any, offered by him is not, in the opinion of the Assessing Officer, satisfactory**, the **amount covered by such expenditure** or part thereof, as the case may be, **may** be **deemed to be the income** of the assessee for such financial year :*

   *Provided that, notwithstanding anything contained in any other provision of this Act, such unexplained expenditure which is deemed to be the income of the assessee shall not be allowed as a deduction **under any head of income**."*
   - Assessee has incurred expenditure
   - No explanation or explanation offered not satisfactory

- Deemed to be income
- No deduction shall be allowed under any head of income

6. **Section 69D Amount borrowed or repaid in Hundi**:*"Where any amount is borrowed on a **hundi from,** or any amount **due thereon** is repaid to, any person otherwise than through an account payee cheque drawn on a bank, the amount so borrowed or repaid **shall** be **deemed to be the income** of the person borrowing or repaying the amount aforesaid for the previous year in which the amount was borrowed or repaid, as the case may be :*

   Provided that, if in any case any amount borrowed on a hundi has been deemed under the provisions of this section to be the income of any person, such person shall not be liable to be assessed again in respect of such amount under the provisions of this section on repayment of such amount.

   Explanation.— For the purposes of this section, the amount repaid shall include the amount of interest paid on the amount borrowed."

- Amount borrowed/ due thereon on hundi
- Otherwise than through an account payee cheque
- Deemed to be income of person borrowing or repaying the amount
- If amount borrowed is assessed as income, repayment shall not again be assessed as income
- Amount of repayment to include interest paid

J. Issues arising out of Survey u/s 133A

a. The Central Board of Direct Taxes issued fresh instruction vide F.No.268/98/2013-IT (INV.II)], dated 18-12-2014 following the assurance of Finance Minister in Parliament while introducing Finance Bill, 2003, that there will be no confession extracted in the case of search, seizure, survey operation.

b. The said instruction in para 3 contains - "I am directed to convey that any instance of undue influence/coercion in the recording of the statement during Search/Survey/Other proceeding under the I.T. Act, 1961 and/or recording a disclosure of undisclosed income under undue pressure/coercion shall be viewed by the Board adversely."

c. The statement recorded during the course of survey cannot be made the basis of assessment. In CIT vs. Satyanarayan Agarwal [2002] 255 ITR [AT] (Kol.) (Trib.) the Tribunal held that the only occasion when the assessee's own statement can be used as evidence in search and seizure operations, and by virtue of specific legal provision to this effect in the section 132(4) itself. The general rule of evidence is that no person can be found to be a witness against himself.

d. On the same issue, the Allahabad High Court in the case of Abdul Qaymme vs. CIT (1990) 184 ITR 404 (All.) (HC), made the categorical observation to the effect that "an admission or an acquiescence cannot be a foundation for an assessment, when the income is returned under an erroneous impression or misconception of law. It is always open to an assessee to demonstrate and satisfy the authority concerned that a particular income

was not taxable in his hands and that it was returned under an erroneous impression of law".

e. Statement taken during course of survey has no evidentiary value; it is simply an information which can be used for corroboration purpose for deciding any issue in favour or against assessee - Unitex Products Ltd. Vs. ITO (2008) 22 SOT 429 (Mum.) (Trib.)

f. Section 133A enables the Income Tax Authority to record the statement of any person which may be useful. It does not authorise to take any sworn statement, as held by the Kerala High Court in the case of Paul Mathews & Sons vs. CIT (2003) ITR 101 (Ker.)(HC). It also stated that the statement recorded without oath has no evidentiary value. In our opinion the view of the Hon'ble Court as of no evidential value is not free from doubt and is highly datable. Unsworn statement is an admission and can be used, though its weightage shall not be as that of a sworn statement particularly because it is permitted specifically by section 133A(6).

g. The Supreme Court in the case of CIT vs. S. Khadar Khan & Son (2012) 254 CTR 228(SC) has held that section 133A does not empower any ITO to examine any person on oath; statement so recorded u/s 133A has no evidentiary value and any admission made during such statement cannot be made basis of addition.

   Thus, an admission in survey action in terms of a statement by an assessee cannot be the foundation for an assessment. In the decision of Shankaria vs. State of Rajasthan (1978) 3 SCC 435, held that the tests to be applied to evaluate an admission and / or confession are twofold. The first test is whether the admission was voluntary. The second test is whether the statement is true and trust worthy. The court held that if the first test is not satisfied, the question of applying the second test does not arise.

h. The return of income once submitted assessment process commences for the verification of return and determining the income. In terms of the verification column in the return of income duly signed by an assessee, the details contained in the return stand validated. Assessee's ignorance cannot be taken advantage by the Assessing Officer, as emphasised by the Central Board of Direct Taxes in its Circular No. 14 (XL – 35) 1955 dated 11th April 1955. Apex Court in the case of CIT vs. Mahalakshmi Sugar Mill Co. (1986) 160 ITR 920 (SC) held that the Assessing Officer has a duty to assess a person as per law. If the assessee fails to claim any benefit under a particular provision, he should not be denied that said benefit.

i. Now the question would arise that can the retracted statement be considered as the basis for any proceedings under the income-tax Act? The Telangana & Andhra Pradesh High Court had an occasion to decide such an issue in the case of CIT vs. Naresh Kumar Agarwal (2014) 369 ITR 171 (AP) (HC). The Court held that the retracted statement cannot be the basis of any proceedings under the Act. This is because, no person accused of an offence shall be compelled to be a witness against himself.

j. The Assessing Officer is required to establish by independent enquiry that the retraction was not justified on facts. Reference may also be made to the decision of Kerala High Court in the case of Paul Mathews & Sons vs. CIT (2003) 263 ITR 101 (Ker.)(HC).

k. The Apex Court held on the proposition "the burden to prove that the admission was not correct is on the person retracting from admission" in the decision of Pullangode Rubber Produce Co. Ltd., vs. State of Kerala (1973) 91 ITR 18 (SC). It accordingly, follows that any retraction should be backed by evidence as to why and how, what has been admitted in the statement is not correct.

l. The law envisages that after verifying the details by the assessee from the records, he has the right to modify or clarify the statement. Reference may be made to the decision of Surinder Pal Verma vs. ACIT (2004) 89 ITD (Chd.) (TM).

m. An identical question had come up for consideration before the Hon'ble Gujarat High Court in the case of CIT vs. M.P. Scrap Traders (2015) 372 ITR 507 (Guj.) (HC). The High Court dismissed the appeal filed by the Revenue by holding as follows:

"In view of the aforesaid factual aspect, more particularly, when the Assessing Officer had no other material and / or corroborative material to justify the aforesaid additions except the confessional statement of Shri Kishore bhai Mohanlal Karia recorded on January 4, 2007, which was subsequently retracted within a period 19 days and the same came to be explained with respect to aforesaid additions, we are in complete agreement with the view taken by the learned Tribunal, we see no reasons to interfere with the impugned judgment and order passed by the learned Tribunal deleting the aforesaid additions. Under the circumstances, the proposed question of law are answered against the Revenue. Consequently, both the appeals deserve to be dismissed and are accordingly dismissed."

n. An affidavit properly verified and filed is a place of evidence which along with other material on record has to be taken into consideration before any finding is arrived at. In the case of an affidavit filed on behalf of an assessee, the burden is upon the Revenue to prove if the contents of the affidavit can be accepted or not? An affidavit filed cannot be rejected outright without cross examination of the deponent as has been held by the Apex Court in Mehta Parikh & Co. (1956) 30 ITR 181 (SC). In this context, reference can also be made to the decisions of the Delhi High Court -

(i) CIT vs. Silver Streak Trading Pvt. Ltd. (2010) 326 ITR 418 (Del.)

(ii) CIT vs. Shankarlal Ved Prakash (2008) 300 ITR 243 (Del.)

o. Further, the quantum of evidence necessary for rebutting the presumption arising out of the survey is a matter in the realm of sufficiency or adequacy of evidence necessary to reach a conclusion of fact. It does not give a rise to a question of law. [CIT vs. Mayank Rotoplast Industries (2002) 253 ITR 442 (Guj.) (HC)]

p. The assessee shall have to explain the source for the excess stock. If it cannot be satisfactorily explained keeping in view the income assessed in different years on presumptive basis, addition can be made u/s. 69 of the Act. The provisions dealing with presumptive assessment and those of section 69 operate independently as was held by the Tribunal in ITO vs. Devi Singh Solanki (2006) 99 TTJ 890 (JP) (Trib.)

q. Bombay High Court in its decision of G.M. Breweries Ltd. & Anr. Vs. UOI & Anr. (2000) 241 ITR 446 (Bom.)(HC) observed that powers u/s 131(1) are powers of Court of law and A.O. has to act in a quasi-judicial capacity. The powers u/s 131 can be exercised only if proceedings are pending before the authority concerned under the I.T. Act, the same is the position under the W.T. Act.

r. Apart from the same it has been held by the A.P. High Court in their decisions reported at A.P. Wine Dealers Association & Ors. Vs. Deputy Director of I.T. (Investigation) & Ors. (2005) 276 ITR 225 (AP) (HC) that "Issue of notice after survey u/s 133A without existence of proceedings pending was invalid". The Court distinguished notice u/s 131(1) to be issued during the survey as provide u/s 133A(6).

s. Office premises of the consultant cannot be surveyed, however the authorities concerned can ask the Consultant to show the books of account of the assessee concerned. In U.K. Mahapatra and Co. vs. ITO (2009) 308 ITR 133 (Orissa)(HC), the Court held that survey on Chartered Accountants office held to be illegal and ordered to return the impugned document within two weeks. Affirmed by Apex Court in (2009) 225 CTR 131 (SC).

K. <u>Set off of any loss</u>:

Chapter VI Aggregation of income and set off or carry forward of loss- Circular No. 3/2017 [F.No.370142/20/2016-TPL] Para 46.2 – *"Currently, there is uncertainty on the issue of set-off of losses against income referred to in section 115BBE of the Income-tax Act. The matter has been carried to judicial forums and courts in some cases has taken a view that losses shall not be allowed to be set-off against income referred to in section 115BBE. However, the current language of section 115BBE of the Income-tax Act does not convey the desired intention and as a result the matter is litigated.**In order to avoid unnecessary litigation, the provision of the sub-section (2) of section 115BBE of the Income-tax Act has been amended as to expressly provide that no set off of any loss shall be allowable in respect of income under the sections 68 or section 69 or section 69A or section 69B or section 69C or section 69D.**"*

Para 46.3 – *"**Applicability**: This **amendment takes effect from 1st of April, 2017 and will, accordingly, apply from assessment year 2017-18 and subsequent assessment years**."*

L. General Observations

a. Sections 68 to 69D are some of the provisions in the Act meant to curb the all-pervading evil of generation and proliferation of black money – **CIT v. Intraven 219 ITR 225 (AP)** [on section 69D]

b. These sections are only clarificatory, and an addition can be made even otherwise in respect of income from undisclosed sources – **Yadu v. CIT 126 ITR 48 (Delhi)**

c. These sections are similarly worded and propositions made in this paper would be applicable to all of them.

d. The word **`may'** used in section 68 provides discretion to the AO. In general, the word `may' is an auxiliary verb clarifying the meaning of another verb of expressing an ability, contingency, possibility or probability. When used in a statute in its ordinary sense the **word is permissive and not mandatory**. But when certain conditions are provided in the statute and on the fulfilment thereof a duty is cast on the authority concerned to take an action, then on fulfilment of those conditions the word `may' takes the character of `shall' and then it becomes mandatory. In section 68, there are no such condition on the fulfilment of which the AO is duty bound tomake the addition. The word `may' denotes the discretion of the AO that he can make anaddition or cannot make an addition. – **Umesh Electricals v. ACIT [2011] 131 ITD 127(Agra Trib)(TM)**

e. The word `may' has been used in all of these sections, thereby giving the discretion to the assessing officer to treat a particular sum as income or not; therefore, even if the assessee does not provide an explanation, or provides one that is unsatisfactory, it is not necessary in all cases for the amount to be treated as the assessee's taxable income – **CIT v. Noorjahan 237 ITR 570 (SC), affirming CIT v. Noorjehan 123 ITR 3 (s. 69) (Kerala); CIT v. Moghul Darbar 216 ITR 301 (s. 69) (Andhra Pradesh); DCIT v. Rohini Builders 256 ITR 360 (s. 68) (Gujrat); Mitesh Rolling v. CIT 258 ITR 278 (Gujrat).**

f. While considering the explanation of the assessee, the assessing officer cannot act unreasonably, and his satisfaction that a particular transaction is not genuine must be based on relevant factors and on a just and reasonable inquiry – **Sumati Dayal v. CIT 214 ITR 801 (SC); Khandelwal Constructions v. CIT 227 ITR 900 (Gauhati); Rajshree v. CIT 256 ITR 331 (Raj.)**

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

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

i. The fiction created under sections 68, 69, 69A, 69 B and 69C cannot, by itself, be extended to penalty proceedings to raise a presumption of concealment of income – **CIT v. Baroda Tin 221 ITR 661 (Gujarat)**

M. Penalty under section 271AAC

a. Prior to amendment, if the taxpayer *suo moto* offered the unexplained income to tax u/s 68 to 69D, penalty mechanism u/s 271(1)(c) / 270A would fail.

b. **Section 271AAC** - Penalty in respect of certain income

*"(1) The Assessing Officer **may, notwithstanding anything contained in this Act other than the provisions of section 271AAB, direct that**, in a case where the income determined includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D for **shall pay** by way of penalty any previous year, the assessee, in addition to tax payable under section 115BBE, **a sum** computed at the rate of ten per cent of the **tax payable** under clause (i) of sub-section (1) of section 115BBE:*

*Provided that **no penalty shall be levied** in respect of income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D to the extent such income has been **included by the assessee in the return of income furnished under section 139 and the tax** in accordance with the provisions of clause (i) of sub-section (1) of section 115BBE has **been paid on or before the end of the relevant previous year**.*

*(2) **No penalty** under the provisions of **section 270A** shall be imposed upon the assessee in respect of the income referred to in sub-section (1).*

*(3) The provisions of **sections 274 and 275 shall**, as far as may be, **apply** in relation to the penalty referred to in this section."*

c. Immunity from penalty if
   i. Taxpayer offers income referred to in section 68 to 69D in the return of income to be filed u/s 139 (including belated/revised return) AND
   ii. Pays tax payable u/s 115BBE(1)(i) on or before the end of the relevant previous year
   iii. Cases of self-assessment tax payment at the time of return filing would not trigger automatic immunity from penalty
   iv. No penalty u/s 270A due to under reporting of income shall be imposed in respect of the income on which penalty can be levied u/s 271AAC

d. Provisions of Section 274, dealing with 'Procedure for levy of penalty' and section 275, dealing with Bar of limitation for imposing penalty are applicable

e. Order levying penalty u/s 271AAC is appealable before C.I.T. (A), because 271AAC is covered under Chapter XXI which is covered u/s 246A(1)(q)

f. In search cases penalty under section 271AAC leviable for specified previous year
   i. In search cases, for "specified previous year", penalty in respect of income referred to inspecified sections may be levied under sections 271AAB and not under section 271AAC.

ii. Penalty under both the sections is not envisaged as a person cannot be punished twice unless expressly provided. Certainly, there is no such express provision for levy of penalty under both sections 271AAB as well as section 271AAC.

iii. In fact, the language of sub-section (1) to s. 271AAC and section 271AAB(1A) clearly suggests that in a case where penalty can be imposed under section 271AAB it shall not be imposed bysection 271AAC. The language of s. 271AAC(1) is that the section is notwithstanding anything in this Act other than provisions of section 271AAB. Therefore, section 271AAC is notnotwithstanding what is stated in s. 271AAB. Further, section 271AAB(1A) is notwithstanding anything contained in this Act. Therefore, while section 271AAB(1A) is notwithstanding anything contained in this Act, section 271AAC is not overriding provisions of section 271AAB.

Thanks !!!

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