CROSS SECTIONING TAX AND PENAL IMPLICATIONS OF SEC 68/69/69A - INCOME TAX ACT – 1961

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Introduction

Deeming provisions has become increasingly common in modern statutes. The term 'Deemed' is used to impose for the purposes of statute an artificial construction of word or phrase that would not prevail otherwise. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain and also to give a comprehensive description for something uncertain, which is in the ordinary sense impossible. And there by deeming provision is not made for the purpose of creating fiction every time, and might be to impose for the purpose of a statute or artificial construction of a word or a phrase that would not otherwise prevail. It may be for the purpose of formulating a principle of general applicability and may create no legal fiction. (Consolidated Coffee Limited vs. Coffee Board (1980) 46 STC 164, 174 (SC)). The word deemed may not always introduce a legal fiction or a legal presumption but in certain special circumstances introduce a provision i.e., a 'glossary provision' in which event the word 'equivalent means'.

Income Tax is a tax on Income. Income is a word of elastic context as it is defined under Section 2(24) of Income Tax Act in an inclusive pattern. A block of 6 Sections ranging from Section 68 to 69 D have been introduced in the statute, in deeming nature, step by step in order to block loopholes , and make the taxation beyond doubt even though there were judicial decisions covering some of the aspects. The source of these incomes are not known and hence they cannot be linked to any known source/head of income, including the 'income from other sources'.

Section 68, 69 and 69 A presuming income from unexplained cash credit, unexplained investments and unexplained money respectively will come to play consequent on demonetization of high denomination of notes w.e.f 8th of November 2016. It is generally accepted that such demonetization is one of the strong effective measures to cure black money but it is equally agreed that it is not enough. But this initiative have made the entire economy towards legal indecisiveness and lacunas relating to taxing such deposits of SBNs specified bank notes as deemed income via these sections.

Demonetisation has raised many legal and taxation questions that require one's attention. This policy led to various chaos in the minds of assesses regarding the applicability of various taxation aspects with this regard. Especially when these deemed income provisions were elastically imported by the assessing officers, deep understanding of these provisions are need of the hour and this article throws light towards some of those key aspects. The majority of orders through scrutiny assessment were made applying the provisions under section 68,69, and 69 A of the act. And there by a brief knowledge about these sections are must before the analysis tax and penal implications regarding the same.

Sec .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.

Sec . 69 – Un Explained 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.

Sec. 69 A – Un Explained Money etc.

Where in any financial year the assessee is found to be the owner of any money, bullion, jewelry or other valuable article and such money, bullion, jewelry 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, jewelry 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, jewelry or other valuable article may be deemed to be the income of the assessee for such financial year.

Constitutionality

Entries in the schedule VII of Constitution of India are not powers but are only fields of legislation and the widest import of significance must be given to the language used by the makers of the constitution in various entries. So entry 82 in the Union List should be read as not only about imposition of tax but also as authorizing an enactment which prevails the tax imposed being evaded.

These sections merely gives Statutory recognition, to what may be called as common sense approach. For being questioned the assessee gives a farfetched explanation, which is rejected, or his explanation is found unsatisfactory, there would be nothing improper in the amount being considered as the assessee income from undisclosed in the previous year. The explanation should not be rejected in whole or part arbitrarily when it is quite reasonable in the circumstances of case and thereby when only there is no reasonable explanation regarding the investments, cash deposits, cash credits, additions under these sections would be held under justified.

115 BBE – Rates of Tax.

Those incomes referred in sections 68, 69, 69 A, 69 B, 69 C and 69 D shall be taxed at the rate specified under section 115 BBE inserted via Finance Act 2012. After amendment w.e.f 1st of April 2017, it is expressly provided that no set of any losses shall be allowed in respect of these incomes and also to increase the rate of tax to 60% (prior to which it was 30%). Such tax rate of 60% will be further increased by 25% surcharge, 6% penalty, i.e., the final tax rate comes out to be 83.25% (including cess). Provided that such 6% 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.

Section 115BBE of the Act is only a machinery provision to levy tax on income and it should not enlarge the ambit of before mentioned sections of the Act to create a deeming fiction to tax any sum already credited/offered to tax as income. The intention of the Legislature behind introduction of section 115BBE was not to bring to tax genuine cash credits already offered to tax as income by the Assessee at higher tax rates. Such an interpretation would lead to recurring attempts on the part of the Revenue Authorities to reject genuine explanations offered by the Assessee with respect to sums credited/offered as income in its books as unsatisfactory solely to extort higher rates of taxes thereon u/s 115BBE of the Act.

Penalty Provisions:

In order to rationalize and bring objectivity, certainity and clarity ,the penalty for concealment of income vide erstwhile section 271(1)(c) a new section 270 A was inserted via annual finance act 2016. This section provides for levy of penalty in case of under reporting and Misreporting of Income. Under reporting of income carries penalty at the rate of 50% whereas in case of Misreporting it gets enhanced to 200%.

The cases of misreporting of income shall be the following, namely:—

a) misrepresentation or suppression of facts;
b) failure to record investments in the books of account;
c) claim of expenditure not substantiated by any evidence;
d) recording of any false entry in the books of account;
e) failure to record any receipt in books of account having a bearing on total income; and
f) failure to report any international transaction or any transaction deemed to be an international transaction or any specified domestic transaction.

Sec 270 AA – Immunity

If the tax is paid with in 30days of service e of order u/s 156 and an undertaking not to prefer appeal , the AO is bound to grant immunity for penalty under reporting of income. Where as the immunity is only discretionary in case of Misreported income.The immunity can be granted only in the prescribed circumstances and that too in the prescribed manner as the discretion of the asessing officer. Section 270AA restricts in its import the liability towards tax and the interest determined and payable subject to the outcome of proceedings either under section 143(3) or section 147, but does not come within the purview of the provision of section 144. In the event of an-exparte assessment, the assessee will not be in a position to file an application for seeking immunity from imposition of penalty and initiation of prosecution proceedings under section 270A and 276C/276CC of the Act.

Sec 271 AAC – Penalty

Penalty at the rate of 10% is leviable if additions is made under section 68,69,69A,69C and 69D of the act.

Present Position

Post demonitisation for the AY 2017-18, the Income Tax Department had issued **notice u/s. 142(1) of the I.T. Act, 1961 to more than 1.16 lakh individual and firms that made cash deposits exceding normal limits. A stand was taken by many taxpayers that the SBNs deposited were proceeds out of genuine cash sales made during the year and not out of undisclosed income of past years. This led to various legal issues regarding legality of acceptance of banned SBNs.**

In addition to this, the **CBDT came up with a Standard Operation Procedure Instruction/Internal Guidance Note for assessing officer with regard to handling of cases related to demonetisation vide circular dated 09.08.2019 in F.no.225/145/2019 – ITA.II.** It specifically instructed the Assessing Officers to make a comparative analysis of cash sales, cash deposited (year wise and month wise). The Guidelines also suggested to keep an eye on the special indicators for bogus sales or backdated sales and to further look at the situations described below:

1. Any unusual increase in the cash sales during the period November to December 2016 as compared to previous assessment year
2. Any sudden deposit of cash to another account or entity, which may seem inconsistent.
3. Any unusual increase in the percentage of cash trails of identifiable persons as compared to previous assessment year.

The books of accounts were produced during the course of assessment proceedings and no defect could be pointed out in the same, however still in many instances, the assessing officer has made the addition of cash deposited during the demonetisation period on the pretext **that assessee has created fictitious books of accounts. The assessing officer has simply assumed that the assessee had undisclosed income since past many years and the same was deposited in bank account in the garb of bogus cash sales or cash in hand which has been skillfully portrayed in the books of accounts. The addition in such cases has been made u/s. 68 ,69,69A of the I.T. Act, 1961.**

The following arguments may be made at appeallate stage in such cases.

1. Assessee opting to file return u/s. 44AD is not obliged to explain individual entry of cash deposit in bank unless the AO proves that the said cash deposit has no nexus with gross receipts and also 44AD cannot be asked to prove that 92% of his receipts have been expended.
2. Questioning the proposed unlawful and factually misconceived additions towards income , merely on the basis of deviation/variance in cash deposits and cash sales ratio of demonitisation period with that of earlier periods.
3. Cash in hand cannot be equated to bogus sales without bringing evidence on record, when assessee had filed Sales & Purchase details like Sales Register, Purchase Register, Sales and Purchase Invoices, Stock Register and the AO had not made any further enquiry.

4. When cash deposited in reflected as cash sales in books of accounts and if the AO has not rejected the books of accounts u/s 145(3), he cannot make any seperate addition for cash deposit.
5. Regarding onus of proof, there are various contradictory case laws for which whether it is on the department part or assessee part.
6. Ignorance of aged illiterate people to commit the mistake of carrying cash with out proper books and deposit during the mean period may be considered on humanitarian consideration basis.
7. Fundamental questioning for declaring acceptance of SBNs to be illegal and proving the deposited cash were received and deposited in the mean period.
8. Questioning the constitutionality regarding exorbitant rate of taxes prescribed as per sec. 115 BBE and penalty us. 270A.

Judicial Pronouncements.

Some of the critical decisions regarding Sec 68, 69,69A before demonitisation are listed below:

A. In favour of the revenue:

1. Kale Khan Mohammad Hanif v. CIT 1963 50 ITR 1 SC. -The Income-tax officer had assessed the gross profits of the businesses on the basis of certain percentages of the total sales which had also to be fixed by estimates.It was held **that the onus of proving the source of a sum of money found to have been received by the assessee is on him**. If he disputes liability for tax, it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. **In the absence of such proof, the Income-tax Officer is entitled to treat it as taxable income.**

2. **Naresh Kumar Tulshan Vs Fifth Income Tax Officer** - In the present case, assessee deposited high denomination Tax Officer notes in bank declaring their source as past profits. In subsequent statement however during survey, the source was given as withdrawal from a partnership firm, but examination in firms book made possession of such high denomination cash by firm on date of withdrawal improbable and thus Bombay HC held that the ITO was justified in treating the impugned high denomination cash as assessee's income as unexplained money u/s 69A and was made taxable. It was held that "there was a clear contradiction in the two statements of the assessee about the source of the impugned amount. Had the source of the notes been his past profits as stated on 19-1-1978, there was no necessity for him to state subsequently that the amount had been withdrawn from the firm. Clearly if it represented his past profits, there was no need for any withdrawal from the firm. Also, the certificate of the firm was in general terms and there was no other contemporaneous evidence to corroborate the assessee's case. Even the firm itself had not explained the source of high denomination notes worth more than Rs. 619 lakhs and had asked for a settlement.Considering all the evidence produced by the assessee, the conclusion would be that the notes were never part of the firm's cash and the assessee had not been able to establish this fact. The lower authorities were, accordingly, justified in making the addition.

3. **CIT v. Devi Prasad Vishwanath Prasad. -** The High Court, in disposing of the application under section 66(2), expressed that the question again assumes that it was for the Income-tax Officer to indicate the source of the income before the income could be held taxable and unless he did so, the assessee was entitled to succeed. That is not, in our judgment, the correct legal position**. Where there is an unexplained cash credit, it is open to the Income-tax Officer to hold that it is income of the assessee and no further burden lies on the Income-tax Officer to show that that income is from any particular source. It is further for the assessee to prove that even if the cash credit represents income, it is income from a source which has already been taxed.**

4. Manoj **Aggarwal v. DCIT [2008] 113 ITD 377 (DELHI) –** Though section 68 of the Act may not be strictly applicable since the assessee was not maintaining any books of account and the bank statement cannot be considered as the assessee's books of account, on the basis of the judgment of the Supreme Court in the case of A. Govindarajulu Mudaliar v. CIT [1958] 34 ITR 807, it is the onus of the assessee to explain the cash received by him and if there is no explanation or acceptable evidence to prove the nature and source of the receipt, the amount may be added as the assessee's income on general principles and it is not necessary to invoke section 68, nor is it necessary for the income-tax authorities to point out the source of the monies received. Even if section 68 is not applicable, the cash deposit in the bank can be asked to be explained by the assessee under section 69 or section 69B of Act.

5. CIT **vs. Metachem Industries (2000) 245 ITR 160 (MP) -** The moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be the income of the firm for the purposes of income-tax. It is open to the Assessing Officer to take appropriate action under Section 69 of the Act, against the person who has not been able to explain the investment.

B. Case laws on cash deposits in favour of assessee:

1. Lalchand Bhagat Ambica Ram vs. CIT [1959] 37 ITR 288(SC) – **Where amount en-cashed on demonetization was part of cash balance in the books of account, ASSESSING OFFICER cannot disbelieve a part of such cash balance as being not of specified denominations, when the books are not rejected.**

2. Mehta Parikh & Co vs CIT (1956) 30 ITR 181 (SC) - **When assessee submitted books of account showing relevant entries showing payment being made to them which resulted in cash in its books and also submitted affidavits of payers, Revenue authorities cannot hold that it was not possible that all payments after a particular date were being made in multiples of Rs. 1000. No addition can be sustained based on pure surmise.**

3. Shree Sanand Textiles Industries Ltd. V. DCIT vide ITA No. 1166/AHD/2014. We also note that the provisions of section 68 cannot be applied in relation to the sales receipt shown by the assessee in its books of accounts. It is because the sales receipt has already been shown in the books of accounts as income at the time of sale only. We are also aware of the fact that there is no iota of evidence having any adverse remark on the purchase shown by the assessee in the books of accounts. Once the purchases have been accepted, then the corresponding sales cannot be disturbed without giving any conclusive evidence/finding. In view of the above we are not convinced with the finding of the learned CIT(A) and accordingly we set aside the same with the direction to the AO to delete the addition made by him.

4. CIT v. Vishal Exports Overseas Limited (Gujarat High Court) 2009 Revenue carried the matter in appeal before the Tribunal. The Tribunal did not address the question of correctness of the C.I.T. (Appeals)'s conclusion that amount of Rs.70 lakhs represented the genuine export sale of the assessee. The Tribunal however, upheld the deletion of Rs.70 lakhs under section 68 of the Act observing that when the assessee had already offered sales realisation and such income is accepted by the Assessing Officer to be the income of the

assessee, addition of the same amount once again under section 68 of the Act would tantamount to double taxation of the same income.

5. Lakshmi Rice Mills v. Commissioner of Income-tax [1974] 97 ITR 258 (PAT.) – **Section 69A of the Income-tax Act, 1961 – Unexplained moneys – Assessment year 1946-47 – Whether when books of accounts of assessee were accepted by revenue as genuine, and cash balance shown therein was sufficient to cover high denomination notes held by assessee, assessee was not required to prove source of receipt of said high denomination notes which were legal tender at that time – Held, yes.**

Vivad Se Vishwaas Scheme 2020

The primary reason for bringing out the **Direct Tax Vivad Se Vishwaas Scheme 2020**, as asserted by the learned Revenue Secretary is to ensure amicable resolution of disputes arising out of Demonetisation Cases.

The Income-tax department has launched an aggressive outreach drive, wherein, a large number of jewellers and real-estate developers have been sent notices, emails and proposals to opt for this Tax Amnesty Scheme and avail the benefit of immunity from interest and penalty and even prosecution.The chance for the assessee's under appeal to opt for this scheme is open till December of this year.

Conclusion

After scrutiny assessment for AY 2017-18 (Demonitisation Previous Year) in December 2019, it's literally a procession of appeals against demand applying these deemed provisions. Now in the era of digitalization especially after implementing Face Less Assessment and Face Less Appeal schemes , from the assessee point of view, literally the concept of 'Hearing' is no more before assessing authorities/ first appellate authority and more over there would not be any opportunity for being heard rather opportunity to write. And thereby adequate preparations are the need of hour both for tax payer as well as administrators point of view.

Biblio : Sampath Iyengars Law of Income Tax. and Internet Sources.