

CASH DEPOSITS – TAX IMPLICATIONS

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Section 68 - Cash Credits

- Provisions of section 68 of the Act reads as under:

“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.”*

Section 68 : Key Points

- ▶ Sum must be credited in the “books of account”
- ▶ In case of a private limited company, if the sum is received from resident in India, source of investment by such resident also needs to be established
- ▶ Amendment relating to source of source was inserted by Finance Act, 2012 w.e.f. 01.04.2013.
- ▶ Bank account is not books of account [*CIT v. Bhaichand H. Gandhi: 141 ITR 67 (Bom.)*; *Sheraton Apparels vs. ACIT: 256 ITR 20 (Bom)*; *Sampat Automobiles vs. ITO: 96 TTJ 368 (Jodh ITAT)*].

Section 69A - Unexplained Money

- Provisions of section 69A of the Act reads as under:

*“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.”*

Section 68 vs. Section 69A

- ▶ Where any sum is not credited in the books of account, the same would be treated as unexplained money under section 69A; where sum is credited in the books of account, addition could be made under section 68 of the Act.
- ▶ The aforesaid principle has been upheld in the following decisions:
 - Vinod Behari Jain vs. ITO: 117 ITD 220 (Del ITAT)
 - ITO vs. Naveen Kumar Agarwal: 25 SOT 253 (Del ITAT)
 - Smt. Renu Agarwal vs. ITO : 51 taxmann.com 207 (Agra ITAT)

Section 115BBE - Tax on income referred to in section 68 or section 69

Total tax

Tax on income referred to in sections 68, 69, 69A to 69D at the rate of 60%*



25%
Surcharge



1% Cess



Penalty @ 10% u/s 271AAC w.e.f 2017-18- If not declared suo moto in ROI



83.16%

- ▶ No deduction in respect of any expenditure or allowance (or set off of any loss) shall be allowed in computing his income referred to in sections 68, 69, 69A to 69D of the Act.
- ▶ *Amendment was made by the Taxation Laws (Second Amendment) Act, 2016, w.e.f. assessment year 2017-18, i.e., after demonetization which took place on 08.11.2016, wherein existing tax rate @ 30% was increased to 60%.

Initial onus on the taxpayer

- ▶ To fall out of the rigors of deeming provisions of section 68, the assessee has to prima facie prove [*CIT vs. Precision Finance Pvt. Ltd.*: 208 ITR 465 (Cal), *Divine Leasing and Finance Ltd. & Ors*: 299 ITR 268 affirmed in *CIT v. Lovely Export (P) Ltd.*: 319 ITR (st.) 5 (SC)]:
 - **the genuineness of the transaction** : Encompasses bringing on record evidence about nature of the receipt, be it share application money, loan, advance, etc.
 - **the identity of the creditor/ lender** : Envisages establishing the identity of the source/ person from whom the amount is received.
 - **the creditworthiness or financial strength of the creditor/subscriber/ lender**: Envisages establishing the creditworthiness of the source/ person from whom the amount is received.
- ▶ Once the taxpayer furnishes reasonable explanation qua the disputed transaction, the onus shifts to the Revenue.

Documentation to be maintained in order to satisfy the test under section 68/69A

Identity of the creditor/lender

- Identity can be proved by the maintaining a record of documents such as name, address and PAN number of the lender/creditor.

Creditworthiness of the creditor/lender

- Creditworthiness can proved by maintaining a record of the documents such as return of income, wealth tax return and audited financial statement.

Genuineness of the transaction

- Genuineness of the transaction can be proved by maintaining a record of documents such as invoices/vouchers, purchase orders, loan agreement (in case of loan borrowed), bank statement, etc.

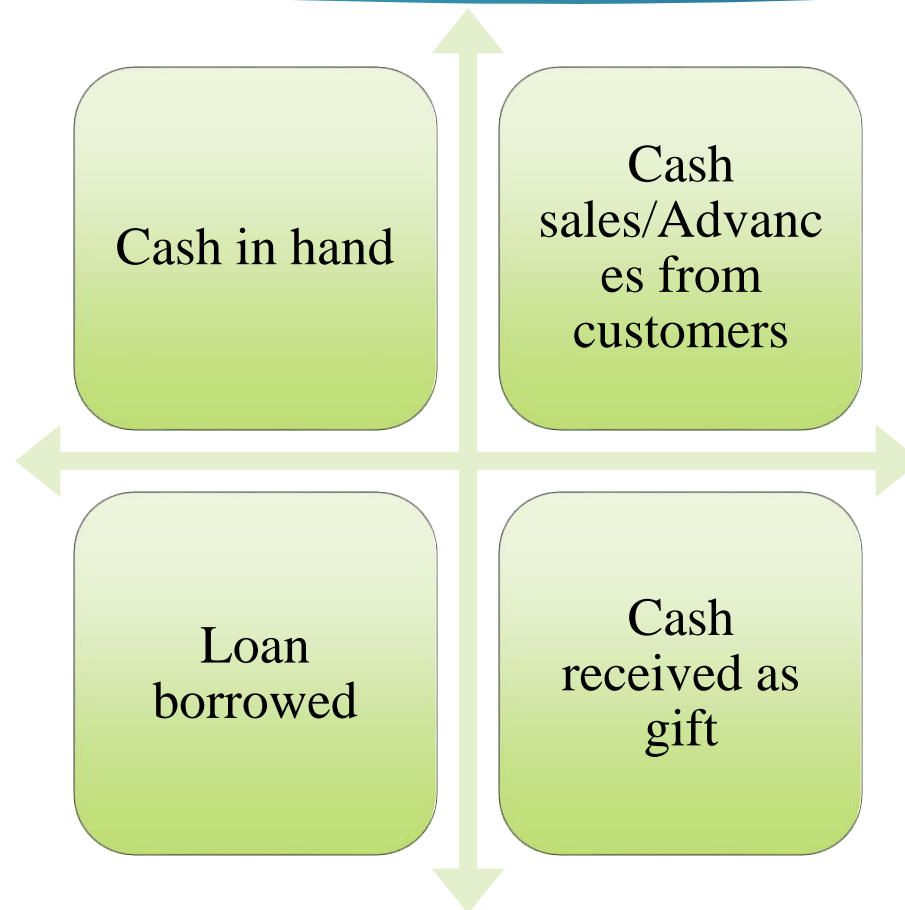
Key Points

- ▶ Evidences in the form of third party confirmations are relevant.
- ▶ Self-serving documents to be avoided [Durga Prasad More: 82 ITR 540 (SC)].
- ▶ No response from third party – not conclusive for decision against the assessee [Refer Fancy International 166 Taxmann 183 / CIT v. Nikunj Exim Enterprises (P) Ltd.: IA No.5604/2010 (DHC)]
- ▶ Burden is on the Revenue to bring material on record to dislodge evidences produced by the assessee and cannot make addition on suspicion / *ipsi dixit* [Refer Daulat Mal Rawat Mal: 87 ITR 349 (SC)]
- ▶ While disregarding the evidences produced by the assessee the Revenue can apply the test of human probability (Refer Sumati Dayal: 214 ITR 801).

SOURCE OF DEPOSIT - INSTANCES

Instances – For Analysis of section 68/69A

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CASH IN HAND

Test to be satisfied

Identity of the creditor/lender

- Not required to be proved in case of cash in hand

Creditworthiness of the creditor/lender

- Not required to be proved in case of cash in hand

Genuineness of the transaction

- Books of account disclosing cash in hand is mandatory in order to establish the genuineness of such cash.

Practical issues

Issues	Remarks
Time gap between cash in hand and date of deposit	The time period between cash in hand and deposit of such cash in bank account should not be too long and therefore, must not be against human probabilities. (Refer <i>Sumati Dayal v. CIT [1995] 80 Taxman 89/214 ITR 801 (SC)</i>)
Books of account not maintained	In cases where books of account are not maintained, then documents to establish cash in hand is to be maintained in order to satisfy the test as per the provisions of section 68 of the Act. Taxpayer can maintain balance sheet/statement of affairs to prove opening cash in hand.

Legal Position - Against

- ▶ In the following cases, the Courts upheld the addition made by the lower authorities under section 68 of the Act due to unavailability of proper documentation to establish source of cash in hand deposited in bank account:
 - Krishan Kumar Sethi v. CIT: [2018] 403 ITR 189 (Del)
 - Dinesh Kumar Jain v. Pr.CIT: [2018] 407 ITR 65 (Del)
 - Surinder Kumar vs. ITO: 326 ITR 21 (P&H)

Legal Position –Favorable

Case law	Finding/Observation
ACIT vs. Joginder Paul: 58 taxmann.com 289 (Chand Trib)	Genuineness of the cash in hand deposited was established on the basis that such cash was surrendered during search and tax was paid and further cash was reflected in wealth tax return.
Moongipa Investment Ltd. vs. ITO: [2013] 30 taxmann.com 113 (Delhi Trib)	Held that where deposits in bank were from cash balance available to assessee in its books of account, no addition could be made under section 68. It was further held that the addition could not be made on the basis that there was time gap between withdrawal and deposits.
Sudhirbhai Pravinkant Thaker vs. ITO: [2017] 88 taxmann.com 382 (Ahm Trib)	Held that where assessee demonstrated that cash was withdrawn and there was no finding by authorities that such cash was invested or utilized for any other purpose, it was not open to authority to make addition on basis that assessee failed to explain source of deposits.

CASH SALE / ADVANCES FROM CUSTOMERS

Test to be satisfied

Identity of the creditor/lender

- **Less than Rs. 2 lakhs** – Advisable to maintain proper documentation
- **More than Rs. 2 lakhs** - Required to maintain documentation including name, address and PAN number of the purchaser. Rule 114C(2) read with Sl. No. 18 of Rule 114B of the Income tax Rules, 1962 obligates the person raising bills to ensure that PAN is correctly furnished by the purchaser.

Creditworthiness of the creditor/lender

- Not required to be proved in case of cash sales

Genuineness of the transaction

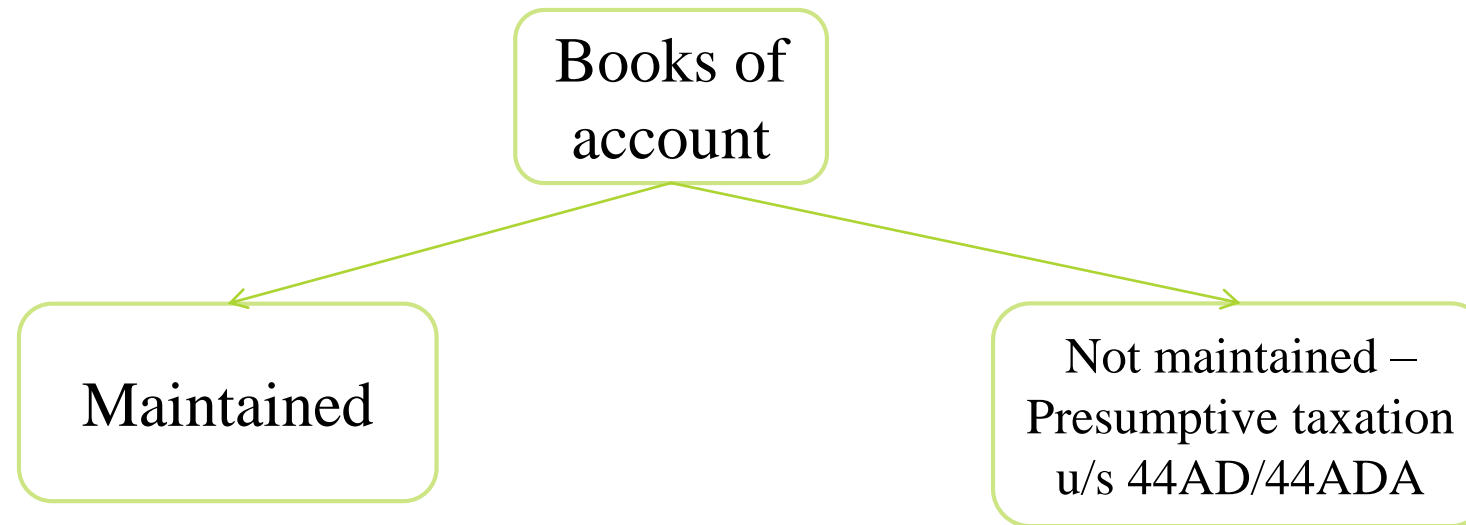
- The nature of activity/business carried on by the assessee.
- Disclosure in books of accounts, stock register, invoices, purchase orders, etc. are required to be maintained in order to establish the genuineness of the transaction.
- Test of preponderance of probability

Cash Sale – Tax provisions

- ▶ Section 269ST, introduced vide Finance Act, 2017 w.e.f. 01.04.2017 prohibits cash transaction exceeding Rs. 2 Lakh otherwise than by an account payee cheque or an account payee bank draft or use of electronic clearing system through a bank account.
- ▶ As per the provisions of section 271DA, any person who enters into a cash transaction of Rs. 2 Lakh or above, will be liable to a penalty of an amount equivalent to the amount of transaction.

Genuineness of the Transaction : Cash sale

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Genuineness of the Transaction : Cash sale - Legal Analysis

► CIT vs. G.S. Tiwari & Co.: 357 ITR 651 (All)

Facts : Assessee carried on a business of contractor for civil work of PWD. In course of assessment, assessing officer noted that assessee has not maintained proper books of account. He thus rejected book results and estimated net profit rate of 8 per cent under section 44AD of the Act. Assessing Officer also made certain addition under section 68 in respect of unexplained cash credit which was deleted by CIT(A) and Tribunal holding that once addition was made on estimate basis under section 44AD, no separate addition could be made in respect of cash credit under section 68.

Finding : Observed that there is nothing in law which prevents assessing officer in an appropriate case in taxing both sundry credit, source and nature of which is not satisfactorily explained, and business income estimated by him after rejecting books of account of assessee as unreliable. On the basis of the said finding, the matter was remanded to the assessing officer with a direction to examine identity, creditworthiness and genuineness of transactions of sundry creditors.

LOAN BORROWED / GIFTS

Test to be satisfied

Identity of the creditor/lender

- Taxpayer is required to maintain documents including name, address and PAN number of the purchaser

Creditworthiness of the creditor/lender

- Keep a record of income tax return/Balance sheet of the lender

Genuineness of the transaction

- Keep a record of loan agreement and bank statement of the borrower.
- Whether loan is interest bearing or interest free?

Creditworthiness of the creditor/lender

: Legal Position

- ▶ Having sufficient reserves is enough for proving credit worthiness even though the creditor has reported meagre income:
 - CIT v. Shri. Mahavir Crimpers: 95 taxmann.com 323 (Guj. HC)
 - Zion Promoters & Developers Pvt. Ltd. v. ACIT: ITA No. 679/Del/2015 (Del. Trib.) – R. K. Panda
 - Ajay Kumar Mamgain v. ITO (ITA No. 903/D/18) (31.10.2018) (ITAT, Delhi) – Low income cannot be a ground for drawing adverse inference and net worth is to be seen
 - Prabhatam Investment Pvt. Ltd. v. ACIT: I.T.A .No. 2523 to 2525/Del/2015 (Del. Trib.)
- ▶ **Contra** - PCIT vs. NRA Iron & Steel Pvt. Ltd (Supreme Court) and Seema Jain vs. ACIT: 406 ITR 411 (Del) – Coupled with other negative factors.

Section 269SS and Section 69D - Tax implications

Section	Consequences
Section 69D (borrowed on hundi otherwise than through an account payee cheque)	Unexplained income – Taxable @ 60% u/s 115BBE
Section 269SS (Received amount exceeding Rs. 20,000 otherwise than by an account payee cheque or account payee bank draft or use of electronic clearing system through bank account)	Penalty equivalent to the amount of loan/deposit/specified sum accepted u/s 271D

Meaning of Hundi

- ▶ **Hundi** refer to financial instruments evolved on the Indian sub-continent used in trade and credit transactions. They are used as remittance instruments (to transfer funds from one place to another), as credit instruments (to borrow money) and for trade transactions (as bills of exchange).
- ▶ Technically, a Hundi is an unconditional order in writing made by a person directing another to pay a certain sum of money to a person named in the order. (source: https://rbi.org.in/Scripts/ms_hundies.aspx)

Income Tax Provisions

- ▶ In terms of provisions of clause (a) of section 56(2)(x) of the Act, if the aggregate amount of money received in any previous year on or after 01.04.2017 is more than Rs 50,000, the entire amount received shall be taxable as income from other sources.
- ▶ However, as per the proviso to section 56(2)(x), a sum of money received from any relative; or on the occasion of the marriage of the individual; or under a will or by way of inheritance; or in contemplation of death of the payer or donor, is fully exempt from tax.

Legal Position – Section 68 vs. Section 56(2)(x)

- ▶ In the following cases, the Courts upheld the addition made by the lower authorities under section 68 of the Act due to unavailability of proper documentation to establish source of the gift received from the donor:
 - Sunil Thomas vs. ITO: 394 ITR 619 (Ker HC)
 - Sunil Ramakrishna vs. DCIT: 173 ITD 468 (Bang Trib)
 - B. Nanjamari, Ex-MLA vs. ACIT: 52 SOT 165 (Bang Trib)
- ▶ Relevant – Due to difference in rate of tax.

Validity of gift – Legal Position

► Additional test of natural love and affection/relationship

Against	Favorable
P.P. Koya vs. DCIT: 175 Taxman 4 (Ker)	Roopchand Manoj Kumar vs. CIT: 235 ITR 461 (Gau)
Sajan Dass & Sons vs. CIT: 264 ITR 435 (Del)	CIT vs. R.S. Sibal: 269 ITR 429 (Del)
Prem Nath Goel & CO. vs. CIT: 271 ITR 390 (Del)	
CIT vs. Jawahar Lal Oswal: 267 ITR 308 (P&H)	
CIT vs. P. Mohanakala: 291 ITR 278 (SC)	

Peak Credit Theory

- ▶ The principle of peak credit comes into play where there are several credit and debit entries in one bank account. The funds operated from such account is taken to be one and the same and only the highest or peak of the amounts in that account is taxed as unexplained cash credit.
- ▶ The basic idea behind the peak credit theory is to avoid double addition and to bring only the actual income of the assessee to suffer tax, where there are large number of unexplained cash credit and debit entries.

Peak Credit Theory

- ▶ Peak credit theory can be applied in a case where there is only rotation of funds whereby the funds withdrawn on earlier dates were deposited back subsequently and there were no fresh deposits.
- ▶ The aforesaid principle has been upheld in the following decisions:
 - CIT v Tirupati Construction Company: 230 Taxman 198 (Guj.)
 - CIT v Purushottam Jhavar: 220 Taxman 74 (AP)
 - CIT v Fertilizer Traders: 222 Taxman 162 (All.)
 - ITO v Pawan Kumar: 153 ITD 448 (Delhi Trib.)
- ▶ Contra – CIT vs. D.K. Garg : 404 ITR 757 (Del) – SLP granted by Supreme Court (reported in 253 Taxman 1)

THANK YOU

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