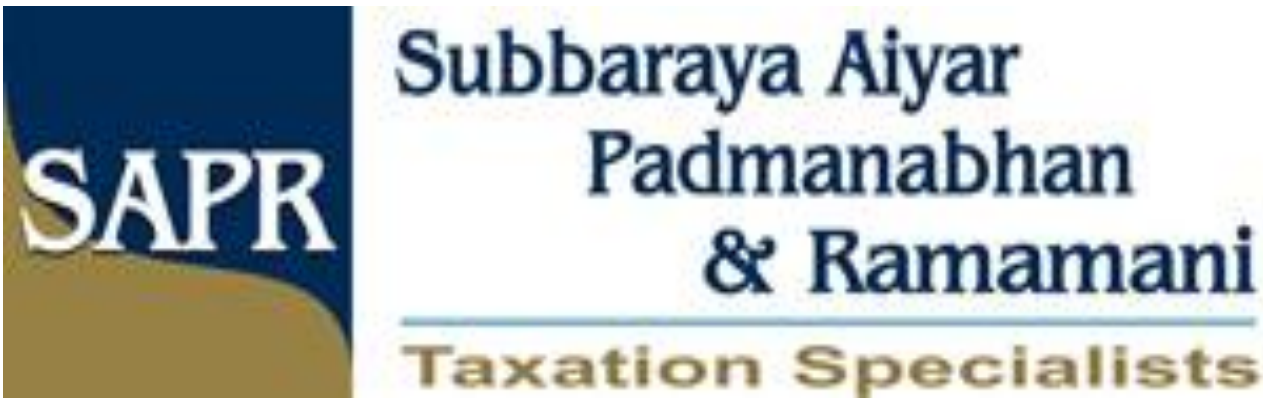
Section 68 of Income Tax Act, 1961



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Introduction

Under the Income Tax Act, if an amount is credited into the books of account held by the assessee and no explanation is given or where such explanation given by the assessee for the amount credited is not acceptable or satisfactory in the opinion of the Assessing Officer, the amount is deemed to be an undisclosed income which would form part of the total income chargeable under the Income Tax Act. For instance, if a manager's account is credited with Rs.100 and the manager did not give any explanation about the amount credited to the Assessing Officer then the Assessing Officer will credit Rs.100 to the total income of the assessee and will be taxed accordingly.

The unexplained amount is added back to the total income of the assessee and tax will accordingly impose on the said sum. The Hon'ble Delhi High Court in the case of **Yadu Hari Dalmia vs. CIT (1980) 126 ITR 48 (DEL)** observed as under:

> **"***The whole history of the introduction of ss. 68 to 69D and the judicial decisions bearing thereupon clearly establish the proposition that these sections are only clarificatory and that even otherwise an addition can be made towards income from undisclosed sources in respect, inter alia, of amounts of expenditure which the assessee is found to have actually incurred but not satisfactorily explained".*

It is to be noted that each entry must be separately explained by assessee to prove the genuineness of the transaction. While explaining the various credits and investments, it is possible that the assessee may be successful in explaining some of them, but that does not by itself mean that the entire investments has to be considered as explained. The Assessing Officer has to apply his mind in each and every individual entry when an explanation is offered by the assessee as observed by the Hon'ble Rajasthan High Court in the case of **CIT v. R.S. Rathore[1995] 212 ITR 390 (Raj.)**.

Applicability of Section 68

Section 68 of the Act can be made applicable in the following cases:

a) When the assessee fails to prove the genuineness of the transaction that has entered into his book of accounts.

b) When there is no satisfactory explanation provided on the part of the assessee to the assessing officer with respect to the amount credited into the accounts

c) When there are documentary evidences required to support the validity of the amount credited but there are no such documents furnished by the assessee

d) When the source of the capital contribution made by the share holders is not disclosed or disclosed but not satisfactorily explained to the assessing officer.

Detailed Analysis of Section 68

Section 68 of the Income Tax Act, 1961 reads as follows

> ***Where any sum is found credited in the book 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*

For the purpose of easy understanding of the provision, let us divide the section into 7 parts as under:

1) A sum is credited into the books of the assessee
2) Maintained for the previous year
3) Assessee does not give any explanation about the source of the sum
4) Assessee does not give any explanation about the nature of the sum
5) The answer by the Assessee does not satisfy the Income Tax Officer
6) The sum credited is chargeable to income tax
7) If the above conditions are satisfied, sum is credited to the income of the assessee in the previous year

The word "Sum" used here in the section is very exhaustive in nature. The sum credited into the account shall be of any from and nature. It applied to all the credits by whatever the name being called. This was laid down in the case of **G.R. Siri Ram v. CIT [1975] 98 ITR 337 (P&H).** The ultimate aim of the Court was to keep the intent of the legislature alive.

The word "Books" is defined under the Section 2 (12) of the Income Tax Act, 1961. The existence of the books is the foremost condition under this act. In **V.C. Shukla v. CBI [1998] 3**

SCC 410, the Supreme Court has given a wider connotation of the term "Book". It has stated that those evidences that come under the ambit of the Section 34 of the Indian Evidence Act, 1872 can be considered as book. The entries must be authentic else would fix the liability on the assessee. The pass book of the bank is not regarded as a valid account books under the section 68. It was laid in **CIT, Poona v. B.H. Gandhi 141 ITR 67 [Bom].**

Maintenance of Book of Accounts

> *"Where any sum is found credited in the book 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"*

The said book of accounts must be maintained for the previous year clearly indicating the transactions relating to the previous year. It must not relate to any other accounts or accounts of the persons other than the assessee.

Explanation as to nature and source of transaction

> *Where any sum is found credited in the book 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*

In the case of the unsecured loans obtained by the assessee from the money lenders it is the duty of the assessee to prove the identity, capacity and the genuineness of the transaction done. It is also his duty to file confirmation with the PAN when the lender is assessed to tax. This was held in **CIT v. Orissa Corporation Private Limited (159 ITR 78) (SC).** The assessee may not prove the source for the source of income acquired. When the amount is obtained through the Gift it is the duty of the assessee to explain the source of income of the donor of the gift to make such gift. When the money is obtained through the will it is not the duty of the assessing officer to go through the legality of the will made and hence the assessee need not submit any proof.

Addition to the Total Income

> *Where any sum is found credited in the book 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***

The Assessee must explain the source and nature of the sum to the Assessing Officer. If the explanation provided by the assessee does not satisfy the Assessing Officer, then the Section 68 will be attracted.

When section 68 is attracted with respect to the entry found in the book then the sum credited is chargeable to income tax under the income of the previous year.

Requirements to avoid application of the Provision

In case of section 68, the assessee is under the obligation to prove to following to avoid application of the deeming provision which has been considered by the Hon'ble Calcutta High Court in **CIT vs. Precision Finance Pvt. Ltd. (1994)208 ITR 465 (Cal)** which laid down the following criteria:-

1. Identity of his creditors;
2. Capacity of creditors to advance money; and
3. Genuineness of transaction.

Also, it is primarily important to ascertain the genuinity of the transaction claimed by the assessee before going into the issue under section 68 of the Act. It is not the entries which speak about the activity of the assessee but the actual act done during the previous year has to be reflected in the books of the assessee. The Assessing Officer is duty bound to satisfy himself with the genuinity of the transaction and only after such satisfaction, the AO has to proceed on the merit of the issue.

The Hon'ble Rajasthan High court in the case of **CIT Vs Kishorilal & Santhoshilal [1995] 216 ITR 9 (RAJ.)** made the following criteria for consideration for the purpose of the section 68 of the Act:

> *"On the basis of the language used under section 68 and the various decisions of different High Courts and the apex court, the only conclusion which could be arrived at is:*
>
> *(i) that there is no distinction between the cash credit entry existing in the books of the firm whether it is of a partner or of a third party.*
>
> *(ii) that the burden to prove the identity, capacity and genuineness has to be on the assessee.*

(iii) if the cash credit is not satisfactorily explained the Income-tax Officer is justified to treat it as income from "undisclosed sources"

(iv) the firm has to establish that the amount was actually given by the lender.

(v) the genuineness and regularity in the maintenance of the account has to be taken into consideration by the taxing authorities.

(vi) if the explanation is not supported by any documentary or other evidence, then the deeming fiction credited by section 68 can be invoked."

a) Identity of the creditors:

Sometime, the authority to satisfy them would delve into the transaction and demand the source of the creditor from whom the assessee has received the amount or in other word, the **source of the source**.

The Assessee's burden is confined to prove identity of the creditors, creditworthiness of creditor and the genuineness of the transaction with reference to transaction between assessee and creditor and the same cannot be extended to include *source of such creditor* for the purpose of section 68 of the Act. A harmonious construction of section 106 of the Evidence Act and section 68 of the Income-tax Act will be that though apart from establishing the identity of the creditor, the assessee must establish the genuineness of the transaction as well as the creditworthiness of his creditor. The burden of the assessee to prove the genuineness of the transactions as well as the creditworthiness of the creditor must remain confined to the transactions, which have taken place between the assessee and the creditor. What follows, as a corollary, is that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and 'sub-creditors' nor is it the burden of the assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been, eventually, received by the assessee. It is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transaction, which took place between the creditor and sub-creditor and/or creditworthiness of

the 'sub-creditors', since, these aspects may not be within the special knowledge of the assessee as observed by Hon'ble Court in the case of **Nemi Chand Kothari v.CIT [2004] 136 Taxman 213 (Gau.).**

This concept of **source of source** has been negated by various jurisdictional courts. Those include

a) CIT Vs Daulat Ram Rawatmull 87 ITR 349 (SC)
b) Anil Rice Mills Versus Commissioner of Income Tax, (2006) 282 ITR 0236
c) DCIT Vs Rohini Builders 256 ITR 360

The Hon'ble Rajasthan High Court in the case of **Labh Chand Bohra Vs ITO (2010) 189 TAXMAN 141** held as under:

"So far as capacity of the lender is concerned, in our view, on the face of the judgment of Hon'ble Supreme Court, in Daulat Ram's case (supra), and other judgments, capacity of the lender to advance money to the assessee, was not a matter which could be required of the assessee to be established, as that would amount to calling upon him to establish source of the source. In that view of the matter, since this part of the judgment runs contrary to the judgment of the Hon'ble Supreme Court, in Daulat Ram's case (supra), while this Court in a subsequent judgment in Mangilal's case (supra) relying upon Daulat Ram's case (supra), has taken a contrary view, we stand better advised to follow the view, which has been taken in Mangilal's case (supra)."

Undoubtedly, as noted above the assessee has a legal duty to identify the creditors in addition to his means and genuineness of the transaction. Also it is also a matter of fact that where the identities of creditors are shown by the assessee, the department is at liberty to proceed against such creditor wherever required. This view has been upheld by the Hon'ble Delhi Tribunal in the case of **Mrs. Ranjana Katyal Vs ACIT (2008) 1 DTR (Del)(Trib) 24** and **Pankaj Sawhney Vs ITO (2004) 3 SOT 1 (Del).**

The Hon'ble Supreme Court in the case of **CIT Vs Orissa Corporation (P) Ltd. 159 ITR 78 (SC)** held as follows:

"13. In this case, the assessee had given the names and addresses of the alleged creditors. It was in the knowledge of the Revenue that the said creditors were income-tax assessees. Their index numbers were in the file of the Revenue. The Revenue, apart from issuing notices under s. 131 at the instance of the assessee, did not pursue the matter further. The Revenue did not examine the source of income of the said alleged creditors to find out whether they were creditworthy or were such who could advance the alleged loans. There was no effort made to pursue the so-called alleged creditors. In those circumstances, the assessee could not do anything further."

Also, it is presumed subject to rebuttal that transaction cannot be considered as bogus when the funds are routed through bank accounts as they cannot be considered as unaccounted monies being the purpose for which the provision was introduced and also the bank statements are very much subject to scrutiny of the department. The Hon'ble Agra Tribunal in the case of **S.K.Jain Vs ITO (2004) 2 SOT 579 (Agra)** observed as under:

"*The creditors have confirmed that they have advanced loan to the assessee. In most of the cases, transactions have been routed through bank account. Therefore, asking source of such deposits will amount to asking source of the source which is not permitted under the law as held by the Hon'ble High Court of Patna in the case of Sarogi Credit Corpn. vs. CIT 1975 CTR (Pat) 1 : (1976) 103 ITR 344 (Pat) and the decision of the Ahmedabad Bench of the Tribunal in the case of Rohini Builders vs. Dy. CIT (2002) 76 TTJ (Ahd) 521 : (2001) 117 Taxman 25 (Ahd)(Mag).*

Once it is established that the amount has been invested by a particular person, be he is a family member or close relative then the responsibility of the assessee is over. The assessee cannot ask that person, who advanced the loan, whether money advanced is properly taxed or not."

Thus, it had become fairly settled law that assessee is not required to satisfy the Assessing Authority of the source of source.

However, amendment to Finance Act, 2012 inserts two provisos to Section 68, with effect from 1-4-2013 (Assessment Year 2013-14) which reads as follows:

"[**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.]"

First proviso to enlarge the onus of a closely held company and provides that if a closely held company receives any share application money or share capital or share premium or the like, it should also establish the source of source (that is, the resident from whom such money is received). The proviso exempts the companies regulated under the SEBI. Second proviso provides that the first proviso will not apply if the receipt of sum is from a VCC or VCF [referred in Section 10(23FB)]. Therefore, in the case of closely held companies, investments are made by known persons and higher onus is required to be placed on such companies besides the general onus to establish identity and creditworthiness of creditor and genuineness of transaction. This additional onus needs to be placed on such companies to also prove the source of money in the hands of such shareholder or persons making payment towards issue of shares before such sum

is accepted as genuine credit. If the company fails to discharge the additional onus, the sum is treated as income of the company and added to its income. Thus in case of private limited companies higher onus is cast upon them to explain even source of source of the share application money/ share premium etc from Asst Year 2013-14 onwards.

b) Capacity of creditors to advance money:

The onus is on the assessee to discharge the onus that the cash creditor is a man of means to allow such cash credit. There should be identification of the creditor and he should be a person of means. When the cash creditor is an income-tax assessee, the department has a free hand to scrutinize the creditor if required as enunciated in the case of ***Kamal Motors* v. *CIT* [2003] 131 Taxman 155 (Raj).**

The Hon'ble Punjab and Haryana High Court in the case of **Gumani Ram Siri Ram v. CIT [1975] 98 ITR 337 (Punj**. & Har.) observed that the language of section 68 shows that it is general in nature and applies to all credit entries in whomsoever name they may stand, that is, whether in the name of the assessee or a third party.

In the case of **P.V. Raghava Reddi v. CIT [1956] 29 ITR 942**, it was observed by the Andhra Pradesh High Court that the burden of proof is not dependent upon the fact of a credit entry in the name of the assessee or in the name of a third party. In either case, the burden lies upon the assessee to explain the credit entry, though the onus might shift to the Income-tax Officer under certain circumstances. Otherwise a clever assessee can always throw the burden of proof on the income-tax authorities by making a credit entry in the name of a third party either real or pseudonymous. The same High Court in the case of **M.M. A.K. Mohindeen Thamby and Co. v. CIT [1959] 36 ITR 481**, relying on the said decision came to the conclusion that there is no distinction between the entries in the names of the partners and those in the names of the third parties, and the nature of the entry is not distinguishable. In the absence of

a satisfactory explanation, it is open to the Department to infer that these monies also belong to the assessee and represent suppressed income.

The Hon'ble Delhi ITAT in the case of **A-One Housing Complex Ltd. Vs ITO (2008) 110 ITD 361 (Del)** has illustrated different scenarios by way of examples to show cause the quantum of burden to be discharged by the assessee in different cases which is not exhaustive as claimed by the Hon'ble Tribunal. Thus, burden of proof and the quantum of burden to be discharged by the assessee cannot be given a straight jacket formula but has to be ascertained based on facts and circumstances of each case.

c) Genuineness of transaction:

In the case of a partnership firm, the Hon'ble Ahmadabad ITAT in the case of **CIT Vs M/s Radiant Embroideries (ITA No. 3428/Ahd/2008)** held as under:

> *"When the assessee has explained the amounts as capital contributions by the partners, the AO is not justified in holding that the assessee has not explained the source. In case the Assessing Officer doubted the genuineness of the source, he should have considered the same in the hands of the partners only and not in the case of the firm. This view of ours is supported by the decisions of the Hon'ble Allahabad High Court in the cases reported in CIT v. Jaiswal Motor Finance [1983] 141 ITR 706 and Surendra Mahan Seth v. CIT [1996] 221 ITR 239."*

Where the nature and source of a receipt, whether it be of money or other property, cannot be satisfactorily explained by the assessee, it is open for the revenue to hold that it is the income of the assessee and no further burden lies on the revenue to show that the income is from any particular source as enumerated the Hon'ble Supreme court n the case of ***Roshan Di Hatti* v. *CIT* [1977] 107 ITR 938 (SC) and *Kale Khan Mohammad Hanif* v. *CIT* [1963] 50 ITR 1 (SC).**

Human Probability Test

Human Probability Test is one of the important tests laid down the highest Court of India in order to check the genuineness of the transactions entered into the books of account of the assessee. A simple example is: a person whose annual income is Rs.20,000 with which he runs his living shows in his Assessment Report that he has a diamond necklace worth Rs.2,00,000 and informs the Assessing Officer that he has bought them out of his savings. Now, when we apply the human probability test, we can infer that the Assessee cannot have bought that necklace out of his income. Thus, it is only a simple test to analyze the minds of the people.

The Human Probability Tests were laid down for the first time in the case of CIT **vs. Durga Prasad More (1971) 82 ITR 540 (SC)** as:

> *"11. ……The Tribunal disbelieved the story, which is, prima facie, a fantastic story.* ***It is a story that does not accord with human probabilities****. It is strange that the High Court found fault with the Tribunal for not swallowing that story. If that story is found to be unbelievable as the Tribunal has found, and in our opinion rightly, then the position remains that the consideration for the sale proceeded from the assessee and, therefore, it must be assumed to be his money."*

It was also followed in the case of **Sumati Dayal vs. CIT (1995) 214 ITR 801 (SC)** as:

> *"The majority opinion after considering surrounding circumstances and applying* ***the test of human probabilities has rightly concluded that the appellant's claim*** *about the amount being her winning from races* ***is not genuine****."*

Thus, the Court has laid down a test to analyze the genuineness of the entry through the logical analysis. The Human Probability Test could be applied when the Assessee makes the Officer to believe his/her story as a valid event. The false claims of the Assessee cannot sustain before the test of Human Probabilities.

The Human Probability test is also applied in the following cases:

1. **A. Rajendran & Ors. vs.ACIT (2006) 204 CTR (Mad) 9**
2. **Hacienda Farms (P) LTD. vs. CIT (2011) 239 CTR (Del) 212**
3. **Major Metals Ltd. vs. UOI AND ORS (2012) 251 CTR (Bom) 385**
4. **Pradip Kumar Loyalka vs. ITO (1997) 59 TTJ (Pat)(TM) 655**
5. **ACIT vs. Sampat Raj Ranka (2001) 73 TTJ (Jd) 642**

Satisfaction Of the Assessing Officer

Section 68 of the Income Tax Act demands that assessee has to provide an explanation to any sum credited in the accounts of the assessee and the said explanation should satisfy the Assessing Officer of the sum credited in the books.

In the case of **A. Govindarajulu Mudaliar v. CIT [1958] 34 ITR 807**, it was observed by the Supreme Court that there is ample authority for the position that where an assessee fails to prove satisfactorily the source and nature of certain amounts of cash received during the accounting year, the Income-tax Officer is entitled to draw the inference that the receipts are of an assessable nature.

In the case of **CIT Vs Oasis Hospitalities (P) Ltd. (2011) 333 ITR 119** the Hon'ble Delhi High Court held as under:

> *"Order of the CIT(A) clearly demonstrates that this remand report was sent to the assessee who had submitted his reply dt. 10th Feb., 2004, which is even reproduced in the order and thereafter the CIT(A) discussed the same in the light of certain decision cited before him and came to the conclusion that the assessee had not given satisfactory evidence to discharge the onus.* ***It had merely given names of the parties without anything more. That would not be sufficient compliance. Even the bank statement of the assessee which was submitted has not been proved.****"*

However while considering the explanation of the assessee, the revenue or Department cannot act unreasonably as held in the case of Hon'ble Supreme court in the case of **Sumati Dayal v. CIT 214 ITR 801 (SC).** Where the assessee has shown all the evidence to substantiate the case, the same cannot be ingnored by the department and claim unsatisfactory. In the case of **CIT vs. Uttamchand Jain (2010) 320 itr 554,** wherein the assessee showed all the proof

available with him to prove the genuine sale of jewellery but the Assessing Officer disallowed the same on extraneous grounds. The Hon'ble Delhi High Court observed as under:

> *"…….**The fact that the jewellery claimed to have been sold by the assessee was not found with the purchaser or his associates cannot be held against the assessee**, because, admittedly, the said jewellery declared under VDIS, 1997 is also not found with the assessee after the sale is effected. If existence of the jewellery with the assessee prior to the sale is evidenced by the VDIS, 1997 certificate and on sale of the said jewellery the assessee has received the consideration which is duly accounted for, then the mere fact that the jewellery sold by the assessee is not found with the purchaser cannot be a ground to hold that the transaction was bogus and the consideration received by the assessee was the undisclosed income of the assessee*
>
> *…….*
>
> *……. The fact that the cash credits are introduced in the accounts of Mr. Trivedi, it cannot be inferred that the said cash belonged to the assessee. The assessee was not under any obligation to prove the cash credits in the accounts of Mr. Trivedi. In the present case, the assessee has proved that he was in possession of the diamond jewellery which was duly declared and certified under VDIS, 1997. **The assessee has proved the identity of the person to whom the said diamond jewe11ery was sold, his credit worthiness and has accounted for the sale proceeds received from the sale of the diamond jewellery.**"*

Also, the Hon'ble Allahabad High Court in the case of **CIT Vs Raghuraji Agro Industries Pvt Ltd (2012) 349 ITR 260 (All)** observed as under:

> *"After hearing both the parties and on perusal of record, it appears that so far as the quantity of HSD and paddy husk are concerned, there is no dispute. It has been fully reconciled and verifiable from the ledger mentioned by the A.O. The books of accounts were not rejected nor any defect was pointed out by the A.O., so, there cannot be any ad-hoc addition……. **If the value and quantity of the fuel is***

fully verifiable from the purchase vouchers, there cannot be any addition until and unless it is proved that there has been purchase made outside the books of accounts or there has been excess consumption of fuel which is not recorded in the books of accounts. *On the other hand, A.O. has taken the figure from the auditor's report and at the same time he has taken the figure from profit and loss account without considering the quantity mentioned in the purchase vouchers.*

Moreover, in the instant case, A.O. has made the addition on estimate basis which is merely a question of fact."

The power of the Assessing officer under the section is not arbitrary or discretionary under the Act but subject to the materials produced before him which the assessee claims it to substantiate his case. Thus no disallowance is likely to be sustained unless the Assessing Officer records his satisfaction for making any disallowance under the provisions of section 68.

Analysis of Finance Act, 2012 Amendments relating to Share Application Money

The share application money is generally an initial payment made by an investor for the purpose of purchase of share. This amount denotes the partial ownership towards the company and unlike debentures, the amount cannot be considered as loan. Private companies generally collect share capital from close relatives and friends who may circulate unaccounted money through share capital. Therefore, it was considered necessary that assessee company show cause the capacity or credit worthiness of the person from whom the amount is received by the assessee.

The share application money or the share capital received by an assessee (company) was considered to be adequate disclosure as the assessee cannot generally collect the source of such source from the prospective shareholder of the assessee. Also the court were of the view that once the company has given the details of the person from whom the share application money was received, the department is at liberty to proceed against those person. Thus, it was found to be unjustified on the part of the department to add the application money received by the assessee as unexplained cash credit under section 68 of the Act.

The Hon'ble Delhi High Court in the case of **CIT Vs. Stellar Investment Limited : (1991) 192 ITR 287 (Del.)** held as under:

> *"It is evident that even if it be assumed that the subscribers to the increased share capital were not genuine, nevertheless, under no circumstances, can the amount of share capital be regarded as undisclosed income of the assessee. It may be that there are some bogus shareholders in whose names shares had been issued and the money may have been provided by some other persons. If the assessment of the persons who are alleged to have really advanced the money is sought to be reopened, that would have made some sense but we fail to understand as to how this amount of increased share capital can be assessed in the hands of the company itself."*

The Hon'ble Delhi ITAT in the case of **A-One Housing Complex Ltd. Vs ITO (2008) 110 ITD 361 (Del)** observed as under:

> *"13. However, the pertinent question for our consideration is when the onus as assessee can be said to be discharged. In our humble opinion, the degree of onus would depend on the facts of each case and no standard degree of proof can be applied in all cases irrespective of the nature of receipt. It may be stringent or light depending upon the facts of the case. We would like to explain through examples hereafter.*
>
> *(a) The amount may be received from close relatives or friends by way of loan or deposit or gift or otherwise. In such situation, the onus would be stringent since the assessee is supposed to know all the particulars of such creditors.*
>
> *(b) In the case of deposits received by a money lender or a bank, the onus would be lighter as such banker is not supposed to know all the particulars of general public. Any person whether a millionaire or beggar can come to a bank and open the account with such banker. The banker is not supposed to know the source of money deposited by his customers. Hence, the onus would be lighter than the one mentioned in example (a). Similar would be the position where share capital is received through public issue since the company is not supposed to know about the source from which share applicant makes the investment.*
>
> *(c) The position would be different where the shares are issued by a private limited company. The reason is that the public issue cannot be made by a private limited company. However, with requisite permission, the share capital can be received through private placement normally to known persons i.e. the relatives and friends of directors. In such cases, the onus would be heavy on the assessee as held by Delhi Bench of the Tribunal in the case of Finquick. Similar would be the position even when shares are allotted by public limited company on private placement basis as observed by the Jurisdictional High Court in para 6 of the judgment in the case of Divine Leasing & Finance Ltd. (supra).*
>
> *(d) Where the payment is received in cash or by demand draft, the standard of proof would be rigorous and stringent than where the transaction is by cheque where the date*

and source of the investment cannot be manipulated as observed by the Hon'ble Delhi High Court in para 11 of its judgment in the case of Devine Leasing & Finance Ltd. (supra).

The above situations are illustrative and not, exhaustive. By giving these examples, the purpose is to point out that no standard proof is required to discharge the onus which lies on the assessee. It would be stringent or light depending upon the facts of the case."

This issue discussed and decided in various judicial forums was finally settled with the verdict of the Hon'ble Supreme Court in the case of **CIT Vs Lovely Exports (P) Ltd. 216 CTR 195** which held as under:

"Can the amount of share money be regarded as undisclosed income under section 68 of the Income Tax Act, 1961? We find no merit in this Special Leave Petition for the simple reason that if the share application money is received by the assessee company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law. Hence, we find no infirmity with the impugned judgement."

The above held proposition of the Hon'ble Supreme Court was followed various High Courts and the matter was mostly decided in favor of assessee. Those include:

a) CIT Vs K.C.Fibres (2010) 187 TAXMAN 53 (Del)

b) CIT Vs Kamdhenu Alloys and Steel Ltd. & Ors (2012) 248 CTR (Del) 33

c) CIT Vs Mishra Preservers (P) Ltd. (2013) 350 ITR 222 (All)

d) CIT Vs People General Hospital Ltd. (2013) 356 ITR 65 (MP)

e) DCIT Vs Rana Girders Ltd. (2013) 84 CCH 128 All HC

f) CIT Vs Rock Fort Metal & Minerals Ltd. (2011) 198 TAXMAN 497

It is illustrative to note the Hon'ble Madras High Court in the case of **Rajani Hotels Ltd Vs DCIT (2012) 82 CCH 451** which decided the issue against the assessee for lack of even basic prerequisite evidence as outlined by section 68.The Court observed as under:

"As far as the third substantial question of law is concerned, learned counsel appearing for the assessee submitted that the Tribunal committed a serious error in treating the share capital as an income of the assessee, even though no business was commenced by the assessee. As already pointed out, ***when the assessee had not substantiated its case before the Assessing Officer as to the persons who had contributed and as to who had made the applications for share allotment, rightly, the Assessing Officer took recourse to Section 68 and the only available course was thus to treat the unexplained amount available at the hands of the assessee as an unexplained income.*** *It is seen from the assessment order that till the date of passing the order of assessment, the assessee had not filed any objection to the proposed addition made. Thus, in the absence of any explanation, the only course open to the Officer was to treat the amount at the hands of the assessee as an unexplained income. In the light of the order passed by us, as indicated above, except to the extent of the relief as stated above, the assessee is not entitled to any relief and hence, the unexplained entries were rightly treated as unexplained income of the assessee."*

Subsequently, the treatment of share capital amount under Section 68 of the Act has been **amended by Finance Act, 2012, w.e.f. 1-4-2013** to insert the following:

"*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:"

By the above amendment the onus of satisfactorily explaining such credits remains on the person in whose books such sum is credited. If such person fails to offer an explanation or the explanation is not found to be satisfactory then the sum is added to the total income of the person.

While recognizing that the pernicious practice of conversion of unaccounted money through masquerade of investment in the share capital of a company needs to be prevented, Courts have advised a balance to be maintained regarding onus of proof to be placed on the company. The Courts have drawn a distinction and emphasized that in case of private placement of shares the legal regime should be different from that which is followed in case of a company seeking share capital from the public at large.

The amendment to the section 68 of the Act states that the nature and source of any sum credited, as share capital, share premium etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained by the assessee company in the hands of the resident shareholder. In other words, the in case of closely held companies the sources of the person from whom the share capital is received is also required to be produced by the assessee so as to escape the clutches of section 68. And where they are not regulated by SEBI, the assessee is now under an obligation to prove the source the person from whom the amount is received by the assessee.

However, this additional onus of satisfactorily explaining the source in the hands of the shareholder, would not apply if the shareholder is a well regulated entity, i.e. a Venture Capital Fund, Venture Capital Company registered with the Securities Exchange Board of India (SEBI). This exemption is granted only to the companies (including closely held companies) which are well regulated by SEBI.

Recently, even after the amendment, the Hon'ble Mumbai ITAT in the case of **Green Infra Ltd Vs ITO (2014) 159 TTJ (Mumbai)** section 68 of the Act is not attracted being transaction directly or indirectly related to the Government of India and held as under:

> *"We find that the share holders in all the related transaction under issue are directly or indirectly related to the Government of India. Therefore, considering the entire issue in the light of the material evidence brought on record, in our considerate view, the Revenue authorities have erred in treating the share premium as income of the assessee u/s. 56(1) of the Act. In our considerate view, for the reasons discussed hereinabove, we do not find it necessary to apply the provisions of Sec. 68 of the Act. We, therefore, direct the AO to delete the addition of Rs. 47,97,10,000/-."*

Thus, in short it can be stated that no specific formula can be drawn for any particular facts but has to be ascertained by the courts based on facts and circumstances of case.

Conclusion

It is general economic principle that the Investments made to a country promote the Growth in the country. However, when the investments are not genuine in nature, it will have a counter-effect on the economy of the country. Hence, it is very essential to have stringent provisions in order to protect the economy of the country. Section 68 of the Income Tax Act, 1961 does well in this regard.

The Satisfaction of the Assessing Officer is mandated in order to escape from the liability. Furthermore, a reasonable burden of proof is laid on the assessee in order to escape from the punishments under the section well defined through various pronouncement of the Judiciary. Thus it can be concluded that a fair checks and balances are provided under the Section. While we have discussed various precedence under the provision, it is important to note that the application of provision depends on the facts and circumstances of each case.