


Name	CA Rajendra Agiwal	Saurabh Kulkarni	CA Sakharam Sable
Photo			

Title: Income declared during survey – search and tax rate U/s 115BBE

Background

1. The term ‘income’ as provided in section 2(24) of the Income-tax Act, 1961 (hereinafter referred to as “the Act”) is inclusive and hence, income includes streams of income not only those provided in section 2(24) but also other items according to its general and natural meaning, as held by the Hon’ble Supreme Court in case of **Bhagwan Dass Jain v. UOI [1981] 128 ITR 315 (SC)**. Section 4 of the Act is a charging section which makes total income of the previous year of every person chargeable to tax at the rates which may be specified from time to time. Section 5 provides for the scope of total income.

2. Section 14 of the Act specifies five different heads of income, namely – salary, income from house property, profits and gains of business or profession, capital gains and income from other sources. Hence, any income earned by the taxpayer is required to be categorised in one of the aforesaid heads of income and accordingly, various deductions/ allowances are granted/availed to arrive at taxable income under each of the heads of income. Aggregation of these categorised income under five heads is total income forming basis of computation of tax liability.

3. The Hon’ble Supreme Court in case of **Karanpura Development Co Ltd vs. CIT [1962] 44 ITR 362 (SC)** held that these heads are in a sense exclusive to one another and income which falls within one head cannot be brought to tax under another head. Further, the Hon’ble Supreme Court in case of **Nalinikant Ambalal Mody v CIT [1966] 61 ITR 428**, has held that whether an income falls under one head or another is to be decided according to the common notions of practical man because the Act does not provide any guidance in the matter. Of course, lot of judicial precedents are available to a taxpayer to arrive at a conclusion about determination of appropriate head of income.

4. Having noted the above, question arises when there is survey or search and seizure action wherein certain undisclosed income is found and a taxpayer is unable to explain the source of such income, under which head can it be brought to tax is certainly a fact driven issue. In such cases, there is likelihood that the Income Tax Department (hereinafter referred to as ‘Department’) may invoke provisions of sections 68, 69, 69A to 69D of the Act and shall levy tax under section 115BBE of the Act. Introduction of section 115BBE prescribing special rate of tax is recent development with specific intention which is referred herein below.

Provisions of section 115BBE

5. The provisions of section 115BBE¹ reads as under -

“(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) [and clause (b)] of sub-section (1).]

6. On perusal of the Finance Minister's speech and Explanatory Memorandum², it appears that the legislative intent behind introduction of section 115BBE was to curb the generation and use of unaccounted money and tax the same at the highest rate irrespective of the status or slab of income of the taxpayer. The Finance Minister's speech and the Explanatory Memorandum reads 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 30³ 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%³ (plus surcharge and cess as applicable). It is also proposed to provide that no deduction in respect of any expenditure or allowance shall

¹ As substituted by the Taxation Laws (Second Amendment) Act, 2016, w.e.f. 1-4-2017

² A new section 115BBE relating to tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D has been inserted with effect from assessment year 2013-14.

³ The tax rate of 30% increased to 60% from 1.04.2017

be allowed to the assessee under any provision of the Act in computing deemed income under the said sections."

Provisions of sections 68, 69, 69A to 69D

7. The provisions of sections 68, 69, 69A to 69 read as under -

- Section 68 – Cash credits (only relevant part)

*"68. 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 :
....."*

- Section 69 – Unexplained investments.

"69. 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."

- Section 69A – Unexplained money, etc.

"69A. 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 69B – Amount of investments, etc., not fully disclosed in books of account.

"69B. 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."

- Section 69C – Unexplained expenditure, etc.

"69C. 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.”

- Section 69D – Amount borrowed or repaid on hundi.

“69D. 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.”

8. On conjoint reading of the aforesaid provisions, the following key features emerge -

- Motive of introduction of provisions of section 115BBE was to discourage the generation and use of unaccounted money

- Section 115BBE applies only in cases where income is chargeable to tax under section 68, section 69, sections 69A to 69D of the Act. That means, the provisions of section 115BBE cannot be independently invoked without satisfaction of requirements of sections 68, 69, 69A to 69D.

- If the income does not fall in section 68, section 69, sections 69A to 69D of the Act, then the tax rate as per section 115BBE (i.e. 60% - w.e.f. 1-4-2017) shall not be applicable. The higher rate of tax shall only be applicable in respect of income/ expenditure/ investment/asset of the taxpayer who fails to explain the nature and source in terms of sections 68, 69, 69A, 69B, 69C, 69D.

- No deduction shall be allowed to the taxpayer under any provision of this Act in computing income, in respect of following -

- any expenditure or
- allowance or
- set off of any loss

- The scheme of sections 68, 69, 69A, 69B and 69C provides that in cases where the nature and source of investments or acquisition of money, bullion or expenditure incurred are not explained at all, or not satisfactorily explained, then, the value of such investments and money, or value of articles not recorded in the books of accounts or the unexplained expenditure may be deemed to be the income.

9. In view of the above, it can be said that for triggering section 115BBE what is relevant is whether income is disclosed or undisclosed or explained or unexplained. If the income is disclosed or explained as mandated by the law, then same would be taxable in the ordinary manner. On the other hand, if the income is undisclosed or unexplained then the provisions of section 115BBE may be triggered depending upon the facts involved in each of the cases.

10. The moment a satisfactory explanation is provided about nature and source then the source would stand explained and therefore, the income would be computed under the appropriate head of income as per the provisions of the Act.

11. However, when no source is disclosed at all on the basis of which the income can be classified under any head of income under section 14 then it would be classified as deemed income. If such is the case as the income cannot be so classified under any head of income, the question of giving any deductions/exemption / rebate under the provisions which correspond to such heads of income will not arise.

12. On the other hand, if it is possible to link the income under any one of the heads of income by way of a satisfactory explanation given, then provisions of sections 68, 69, 69A to 69D will not apply. In such an event, the provisions regarding deductions, allowances, etc., applicable to the respective head of income under which income falls will automatically be attracted. The chargeability under the Act is with reference to income and not gross receipts. That means only net income of the person shall be taxable after deducting expenditure incurred as held by the Hon'ble Supreme Court in **Maxopp Investment Ltd vs CIT [2018] 402 ITR 640 (SC)** wherein the Hon'ble Supreme Court stated that tax is leviable on the net income which is arrived at after deducting the expenditures incurred. To state that only net income is taxable is so apparent on reading of the law that, generally, it is not required support of any authority.

13. Going further expenditure incurred in earning gross income is allowed as a deduction and thereafter tax is levied on the net income. The Hon'ble Supreme Court in case of **Kale Khan Mohammad Hanif vs CIT [1963] 50 ITR 1 (SC)** held that onus of proving the source of a sum of money found to have been received by the assessee is on him. However, if the taxpayer disputes the levy of tax on the same then it is up to him to show either the receipt is not income, or it is exempt from taxation under the provisions of the Act. In the absence of proof, the tax officer is entitled to treat the same as taxable income.

14. The Hon'ble Ahmedabad Tribunal in case of **Chokshi Hiralal Maganlal vs DCIT (ITA No. 3281/Ahd/2009 AY 2004-05 dated 5 August 2011)** held that for invoking deeming provisions under sections 69, 69A, 69B & 69C there should be clearly identifiable investment or asset or expenditure (i.e. in our understanding not connected with business so as to make convenient to invoke aforesaid sections). In case source of investment or asset or expenditure is clearly identifiable and has no independent existence of its own where a case arises to claim that it cannot be separated from business then first 'what is to be taxed is the **undisclosed business receipt**. Only on failure of such exercise, it would be regarded as taxable under section 69 on the premises that such excess investment or asset or expenditure is unexplained and unidentified, satisfying the mandate of the law.

15. In light of the above discussion let's now touch upon certain judicial precedents wherein the Courts have held that when the sources of income are explained in relation to surrendered income then invoking of deeming provisions under sections 68, 69, 69A to 69D is not warranted and consequently the higher rate of tax under section 115BBE is not applicable. It is to be noted that being a litigative issue, the taxpayers would be justified to analyse their respective facts before considering applicability/inapplicability of these judicial precedents.

Where sources of surrendered/ undisclosed income are explained, deemed income provisions under sections 68, 69, 69A to 69D are not applicable and consequently, tax rate u/s 115BBE is also not applicable

16. The Hon'ble Rajasthan High Court in case of **CIT vs Bajargan Traders [ITA No. 258/2017 dated 12/09/2017]** has held that when the assessee is dealing in sale of food grains, rice and oil seeds and the excess stock which is found during survey is stock of rice then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the

assessee. Therefore, the investment in the excess stock is to be brought to tax under head “business income” and not under the head income from other sources.

17. In case of **Shri Lovish Singhal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014-15 dated 25 May 2018)**, the Jodhpur Tribunal applying the proposition of law laid down by the Hon’ble Rajasthan High Court in the **Bajargan Traders (supra)**, held that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act and accordingly held that there is no justification for taxing such income U/s 115BBE of the Act.

18. The Hon’ble Chandigarh Tribunal in case of **M/s Bajaj Sons Ltd vs DCIT [ITA No. 1127/CHD/2019 AY 2017-18 dated 25 May 2021]** was concerned with the question of invoking the provision of section 115BBE of the Act on the surrendered income to cover any discrepancy and thereby accessing such income at higher rate of tax as against the normal rate of tax applicable to the business income. Given that no discrepancy was pointed by the AO, it was held that the provisions of sections 68, 69, 69A, 69B, 69C or 69D are not attracted to levy tax under section 115BBE.

19. Before the Hon’ble Jaipur Tribunal in case of **ACIT vs Shri Sudesh Kumar Gupta [ITA No 976/JP/2019 AY 2014-15 dated 9 July 2020]** issue under consideration was whether rectification proceedings u/s 154 were permissible when at the first place while passing assessment order u/s 143(3) provisions of section 69 were not invoked for charging higher rate of tax u/s 115BBE.

The Hon’ble Tribunal held that the assessing officer has not invoked the provisions of section 69 at the first place while passing assessment order u/s 143(3) and therefore, the provisions of section 115BBE which are contingent on satisfaction of requirement of section 69 cannot be independently applied by invoking the provisions of section 154 of the Act.

20. In case of **DCIT vs Ram Narayan Birla (ITA No. 482/JPR/2015 for AY 2011-12 dated 30 September 2019)**, also on the surrendered stock during search, seizure and survey action, it was held that the Revenue had not pointed out that the excess stock had any nexus with any other receipts found. Hence, the surrendered excess stock considered at par with the other business stock.

21. In case of **Obero Motors vs ACIT [ITA No. 3512/Del/2018 AY 2012-13 dated 16 July 2021]**, the taxpayer had declared surrendered income after set-off of business loss. The lower authorities did not accept the above treatment and held that the surrendered amount is deemed income and does not fall under any of the head of income and therefore no set off of business losses could be allowed. The Hon’ble Tribunal held that as the assessee had already introduced the transactions in books of accounts, it would not be reasonable to say that such income does not fall under any of the head of income or that such deemed income does not allow any set off of business losses. Accordingly, the Tribunal accepted that the surrendered income amounts to business income. It is to be noted that this decision is related to AY prior to amendment made by the Finance Act, 2016 w.e.f. 1 April 2017 and accordingly, set off of business loss is allowed by placing reliance on **CBDT Circular No. 11 of 2019 dated 19 June 2019** and decision of **Kirtiman Cement and Packaging Pvt Ltd (ITA No. 2777 and 2778/Del/2017 for AY 2012-13 and AY 2013-14 dated 15 May 2018)**.

22. In case of **M/s Shree Abharana vs. ITO (ITA No. 931 & 932/Bang/2019 for AY 2014-15 dated 20 September 2019)**, the Bangalore Tribunal held that the direction issued by the CIT u/s 263 to make addition u/s 115BBE to the AO without inquiry into sources of funds may not be proper. Hence, the Hon’ble Tribunal remitted the matter back to the files of AO. In this case, income offered during survey was credited in the P&L account and certain routine expenses were claimed. However, as declaration was made during survey, it was stated that income so offered should be taxed u/s 69 of the Act. However, before invoking section 69, the AO ought to have made investigation regarding whether income declared is assessable u/s 69 or under the head of business income or income from other sources.

23. In the below judicial precedents, it was also held that if excess stock found during the course of survey or search and does not have any independent identity as an asset but as mixed part of overall stock found in the survey/search then such excess stock would represent business income

- Fashion World vs. ACIT (ITA No. 1634/Ahd/2006)
- DCIT vs. Ramnarayan Birla 482/JP/2015 dated 30.09.2016

In the following judicial precedents, it was held that where the taxpayer is unable to explain the sources of income then surrendered income shall be considered as deemed income under the provisions of section 68, 69, 69A to 69D of the Act and thus, tax rate u/s 115BBE is applicable

24. The Hon'ble Punjab and Haryana High Court in case of **Kim Pharma Pvt Ltd vs. CIT [2013] 216 Taxman 153 (P&H)**, has held that where amount surrendered during survey was not reflected in books of account and no source of income from where it was derived declared by the taxpayer then it was assessable as deemed income of the assessee u/s 69A of the Act and not as business income.

25. The Hon'ble Gujrat High Court in case of **Fakir Mohmed Haji Hasan vs CIT (2001) 165 CTR Guj 111** had to decide question whether value of gold found during search is to be included in income where no explanation about source of investment made is provided. The Hon'ble High Court was also concerned with the question whether any deduction in relation to confiscated gold is to be given. The relevant AY was AY 1984-85 (i.e. prior to introduction of section 115BBE in the Act). The facts disclosed in customs proceedings, which were relied on in the income tax proceedings were that specific information was received by the Customs Department indicating that the taxpayer would bring imported gold in his car and would make delivery thereof. The car was seized and at that time during search gold bars of foreign markings were recovered. A bag containing currency notes was also recovered. The statements which were recorded under section 108 of the Customs Act were considered in the adjudication proceedings. The Hon'ble High Court upheld the decision of Tribunal that the value of gold was liable to be included in the income of the assessee as the source of investment in the gold or of its acquisition was not explained and that the assessee was not entitled to claim that the value of the gold should be allowed as a deduction from his income.

26. In case of **Satish Kumar Goyal vs JCIT [ITA No. 143/Ag/2014 AY 2010-11 dated 4 May 2016]**, the issue for consideration before the Hon'ble Agra Tribunal was whether miscellaneous income offered by the taxpayer in his computation of income was chargeable as deemed income u/s 68. The facts involved in this case were that the taxpayer had disclosed miscellaneous income u/s 56 under the head of "income from other sources". However, according to the AO, neither the names of persons nor the specific activities/ details of such alleged income were disclosed by the taxpayer during assessment proceedings. The AO was not satisfied with the nature and source of the miscellaneous income and accordingly, he invoked provisions of section 68 in relation to such receipts. Further, the AO denied the set off of the said miscellaneous income against the business loss claimed in the assessment order. The Assessee contended that such income was offered by the assessee on its own in the computation of income u/s 56 and thus, income so offered was not chargeable as deemed income u/s 68.

The Hon'ble Tribunal held that explanation offered by the assessee was too general, scanty and without reference to any basis, material, or evidence. The explanation provided does not inspire any confidence to explain nature and source of alleged receipts and accordingly, the assessee failed to discharge the onus contained in section 68. However, relying on the subsequent decision of Gujarat High Court in **DCIT vs Radhey Developers India Ltd (329 ITR 1)** and the Hon'ble Supreme Court decision in case of **CIT vs D.P. Sandu Bros. Chembur (P) Ltd (273 ITR 1)**, the Tribunal also held that upon conjoint reading of section 14 and section 56(1) read with section 68 suggests that income referred to u/s 68 would be assessable under the head income from other sources.

27. In case of **Bhima Jewellers vs Pr. CIT [(2019) 101 taxmann.com 518 (Cochin – Trib.) dated 20 August 2018]**, the Cochin Tribunal held that where source of unexplained cash credits assessed u/s 68 was not known, they could not have been assessed as income from other sources u/s 56 of the Act.

28. The Hon'ble Madras HC in case of **M/s. SVS Oils Mills vs. ACIT [2020] 113 taxmann.com 388 (Madras)**, has held that where there was a clear admission by assessee firm that excess stock found during survey was added in its stock register but no corresponding entry was passed in books of account, it could be considered that investment in such stock was made out of undisclosed source. Thus, addition was to be made under section 69B in respect of such excess stock.

Concluding comments

29. In the backdrop of above discussion and analysis, ideally every taxpayer should maintain correct books of accounts/state of affairs so as to deduce the correct taxable income basis which appropriate taxes are discharged. This will give no occasion to invoke the provisions of sections 68, 69, 69A to 69D.

30. Having noted the above provisions of sections 68, 69, 69A to 69D read with section 115BBE and various judicial precedents discussed above in that context, following factors emerge for levy of higher rate tax u/s 115BBE -

- Whether nature of income is clearly explained during the course of survey or during assessment proceedings
- Whether income can be classified under a particular head of income based on nature so as to demonstrate that it is flowing from one of the specific sources of income of the taxpayer
- Whether supporting circumstantial evidences of the above are available
- Whether issue would lean more in favour of the assessee not to tax under section 69 when there is only one stream of income as compared to having more than one stream. If there is only one stream income (e.g., business income) whether presumption could be raised that it is a business income unless some tangible contrary evidence is laid.
- Can department contend that section 68/69 etc talk about "Deeming Fiction" and not "Presumption". Certainly, there is difference between "Deeming Fiction" and "Presumption" [for presumption refer section 44AD, 44ADA, 44AE, 132(4A)]. Presumption is rebuttable but deeming fiction gets attracted if facts of the case demand such deemed dividend section 2(22) (e) , deemed short term capital gain u/s 50 etc.
- Whether before invoking section 115BBE, the Department is duty bound to discharge onus that income is undisclosed within meaning of sections 68/69 etc. and hence, liable to tax at higher rate as per section 115BBE.

31. In view of above discussion, when income is surrendered it is likely to be considered as deemed income and provisions of section 68, 69, 69A to 69D may be invoked, thereby liable to tax at higher rate of tax under section 115BBE of the Act, unless the taxpayer has strong factual back-up to demonstrate otherwise.

32. Considering the intention of introducing the said provisions, the Department may contend that the provision is to plug the generation of unaccounted money and deny the benefit of any deduction, including basic exemption. Hence, it is likely that the Courts may be inclined to hold the applicability of the provisions. The authors are not in favour or against of invoking the provisions of section 115BBE in the given scenario. Rather the intention of writing this article is only to highlight the

controversy on the issue. The worthy readers are aware that the courts decide the issue on factual merits and many times register a divergent view with appropriate reasoning for its decision. The principle of consistency, judicial discipline-hierarchy, binding nature of judicial precedents, principle of res judicata, examination of evidence, discharge of onus etc.all these principles are certainly relevant to contend on case to case basis.

33. All in all, the taxpayer is required to be very cautious while recording statements in survey/ search proceedings and while answering questions keeping this perspective in mind. If answers to questions are in conflict with the circumstantial evidences, then litigation is inevitable. The difference in tax rate of 60% versus the normal tax rate can make or break a business and the best solution is of course to ensure that no such unreported income arises in the first place.

Disclaimer: This article is only for general information and is not intended to provide legal advice. Readers desiring legal advice should consult with an experienced professional to understand the current law and how it may apply to the facts of their case. Neither the author nor itatonline.org and its affiliates accepts any liabilities for any loss or damage of any kind arising out of any inaccurate or incomplete information in this article nor for any actions taken in reliance thereon. No part of this document should be distributed or copied (except for personal, non-commercial use) without express written permission of itatonline.org