I.One of the most celebrated controversies in income tax has raised its head again.This time in form of a proposed amendment to s 68 of the IT Act 1961.This article is an attempt to demystify the amendment and examine its ramifications and implications,both intended and unintended.Does it solve an old problem or create new vistas of debate and litigation?

II.Proposed Amendment of section 68.

17. In section 68 of the Income-tax Act, with effect from the 1st day of April, 2023––

(i) in the first proviso, for the words "Provided that", the following shall be substituted, namely:––

"Provided that where **the sum so credited consists of loan or borrowing or any such amount, by whatever name called,** any explanation offered by such assessee **shall be deemed to be not satisfactory, unless—**

(a) **the person in whose name such credit is recorded** in the books of such assessee **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";

(ii) in the second proviso,––

(a) for the words "Provided further", the words "Provided also" shall be substituted;

(b) for the words "first proviso", the words "first proviso or second proviso" shall be substituted.

III.MEMORANDUM EXPLAINING THE PROVISIONS IN THE FINANCE BILL, 2022

''Section 68 of the Act provides that where any sum is found to be 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.

2. 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. **Certain judicial pronouncements have created doubts about the onus of proof and the requirements of this section, particularly, in cases where the sum which is credited as loan or borrowing.**

3. It is noticed that **there is a pernicious practice of conversion of unaccounted money by crediting it to the books of assesses through a masquerade of loan or borrowing.**

4. Vide Finance Act, 2012, it was provided that the nature and source of any sum, in the nature of share application money, share capital, share premium or any such amount by whatever name called, credited in the books of a closely held company shall be treated as explained only if the source of funds is also explained in the hands of the shareholder. However, in case of loan or borrowing, the judicial decisions have held that only identity and

creditworthiness of creditor and genuineness of transactions for explaining the credit in the books of account is sufficient**, and the onus does not extend to explaining the source of funds in the hands of the creditor.**

5. It is proposed to amend the provisions of section 68 of the Act so as to provide that the nature and source of any sum, whether in form of loan or borrowing, **or any other liability credited in the books** of an assessee shall be treated as explained only if the source of funds is also explained in the hands of the creditor or entry provider. **However, this additional onus of proof of satisfactorily explaining the source in the hands of the creditor, would not apply if the creditor is a well regulated entity, i.e., it is a Venture Capital Fund, Venture Capital Company registered with SEBI.**

6. This amendment will take effect from 1st April, 2023 and will accordingly **apply in relation to the assessment year 2023-24 and subsequent assessment years.**

[Clause 17]"

IV.An structural analysis of the proposed amendment:

1.The original provision remains unaffected.

2.The amendment is a classic illustration of application of **Mischief Rule** in interpretation of statutes.The stated purpose of the amendment is to curb the *" **pernicious practice of conversion of unaccounted money by crediting it to the books of assessees through a masquerade of loan or borrowing.***"Associated objective is ***to*** remove doubts created by certain judicial rulings ***"about the onus of proof and the requirements of this section, particularly, in cases where the sum which is credited as loan or borrowing."***

3.Phrase used in the amendment is "*loan or borrowing or any such amount, by whatever name called***,"whereas the phrase used in memorandum is "***any***

sum, whether in form of loan or borrowing, ***or*** *any other liability credited in the books of an assessee".*

This may lead to interpretational ingenuity in the litigation that may follow.

3.The provision regarding pvt limited company remains.Please read the amendment carefully.For the phrase"provided that" the whole new amendment is added .Proviso has NOT been substituted.The earlier first proviso now becomes the second proviso.The second proviso becomes the third proviso.

4.**Why is there a let off to VC funds/companies?**Can there not be this pernicious practice of conversion of unaccounted money there?The 2012 amendment giveaway continues.**What exactly is a"well regulated** entity"mentioned in the Memorandum**?** Venture Capital Companies (VCC) or Venture Capital Funds (VCF) are even otherwise exempted from income tax for incomes that they earn from the investments in Venture Capital Undertakings (VCU). Instead, the investors in the VCC or the VCF are taxed directly. VCC and VCF are treated as "**pass-through entities**". VCC, VCF and VCU are regulated by both SEBI and RBI.Is that what is meant by ''well regulated"?

4.1 The onus of establishing the source of funds applies to resident shareholders. If the shareholder is a non-resident, there is no onus on him/it. And if the shareholder is a Venture Capital Fund or a Venture Capital Undertaking, there is no onus on such a fund or the company to establish the second layer source of funds. Is not a window of ''tax management"opening there?Are there privileged classes exempt from the charge of even tax evasion ?Attempts to promote commerce through taxation windows is always hazardous.Have we reached a stage where a so

called pass through entity ,needs promotion to that extent that an otherwise omnibus line of enquiry into ''***pernicious practice of conversion of unaccounted*** money"shall be given a go by in the name of protecting and promoting it?

4.1.1 We need to remind ourselves that even listed Companies are well regulated in the common sense understanding of the term.The overseeing arms of ROC,SEBI,RBI etc have regulatory and punitive powers over them.And yet the 2012 amendment had to be brought, now rechristened as second proviso. The **Memorandum to the Finance Bill, 2012** explained the need for the addition of the proviso to Section 68 of the ITA as below:

> *"In the case of closely held companies, investments are made by known persons. Therefore, a* ***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 shall be treated as income of the company and added to its income."*

Here it was at least additional onus which was the objective and no pernicious practice was referred to.

4.2 And some glaring escape routes still remain inspite of being part of technical analysis by professionals and commentators ,since 2013-

a. Listed companies hardly active in trading acquired by ''investors'' to route their black money;

b. FIIs routing resident Indian funds through various structures and instruments like Participatory Notes.

5.The memorandum tells us that the reason for the amendment was that ‘’***Certain judicial pronouncements have created doubts about the onus of proof and the requirements of this section***” and that ‘’ *the judicial decisions have held that only identity and creditworthiness of creditor and genuineness of transactions for explaining the credit in the books of account is sufficient,* ***and the onus does not extend to explaining the source of funds in the hands of the creditor.***”

What these decisions are is not specified (unlike the amendment in s 37 where a exhaustive note alongwith case laws is given.And it reflects a glaring and astonishing ignorance of a sea of judicial decisions supporting them on the issue.The unspecified contra was noticed ,but the pro was not .Ironic.

Let us see if we can anticipate the unspecified contras first.

5.1 The obvious suspect is landmark ruling of Nemi Chand Kothari:

Nemi Chand Kothari *v.*CIT[2003] 264 ITR 254 (Gauhati)

Extracts:

‘’……. …the burden on the assessee under section 68 is definitely limited. This limit has been imposed by section 106 of the Evidence Act, which reads as follows :

> ***"Burden of proving fact especially within knowledge.***—*When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*
>
> *Illustrations*
>
> ***(a)When a person does an act, with some intention other than that which the character and circumstances of the act suggested, the burden of proving that intention is upon him.***

(b)A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

13. *On a careful reading of section 106, we notice that what is the source from which an assessee has obtained the loan can be safely held to be a fact, which is actually within the special knowledge of the assessee ; hence, it is the burden of the assessee to show the source(s) from which he has received the loans.* ***Once the assessee discloses the source(s) from which he has received the loans, his burden under section 106 stands discharged and the onus, then, shifts to the Assessing Officer to show, if*** *he wants to treat the loans as an income of the assessee from undisclosed source, that the transaction(s) between the assessee and the creditor is/are not genuine or that the creditor has no creditworthiness and/or that the money, which has been received by the assessee in the form of loans, actually belonged to the assessee himself.*

……

15. *What, thus, transpires from the above discussion is that while section 106 of the Evidence Act limits the onus of the assessee to the extent of his proving the source from which he has received the cash credit, section 68 gives ample freedom to the Assessing Officer to make inquiry not only into the source(s) of the creditor, but also of his (creditor's) sub-creditors and prove, as a result, of such inquiry, that the money received by the assessee, in the form of loan from the creditor, though routed through the sub-creditors, actually belongs to, or was of, the assessee himself. ……* ***If section 106 and section 68 are to stand together, which they must, then, the interpretation of section 68 has to be in such a way that it does not make section 106 redundant.*** *Hence, the harmonious con-struction 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. …… 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 between the creditor and sub-creditor and/or creditworthiness of the sub-creditors, ***for, these aspects may not be within the special knowledge of the assessee.***

16. *A person may have funds from any source and an assessee, on such information received, may take loan from such a person. It is not the business of the assessee to find out whether the source or sources from which the creditor had agreed to advance the amounts were genuine or not. If a creditor has, by any undisclosed source, a particular amount of money in the bank, there is no limitation under the law on the part of the assessee to obtain such amount of money or part thereof from the creditor, by way of cheque in the form of loan and in such a case, if the creditor fails to satisfy as to how he had actually received the said amount and happened to keep the same in the bank, the said amount cannot be treated as income of the assessee from undisclosed source. ……'''*

5.1.1 This ruling led to a glut of rulings following it, inspite of some other notable exceptions, which we shall discuss later.Three such illustrations following Nemi Chand are

a. CIT v. Kinetic Capital Finance Ltd. [2013]354 ITR 296(DEL)

b. MOD creations (P.) Ltd. v. ITO [2013] 354 ITR 282(Delhi).

c. ITO v. Wiz-Tech Solutions (P.) Ltd. ITA No 1162/Kol/2015 (C Bench).

5.1.2 It is held that section 68 gives the liberty to the Assessing Officer to enquire into the source/source from where the creditor has received the money,but section 106 makes the assessee liable to disclose only the source(s) from where he has himself received the credit and it is not the burden of the assessee to prove the creditworthiness of the source(s) of the

sub-creditors. 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. Assessee IS NOT REQUIRED TO prove the genuineness of the transactions between his creditor and sub-creditors and/or creditworthiness of the sub-creditors, for, these aspects may not be within the special knowledge of the assessee.

5.2 The theoretical conspectus governing the other rulings specially regarding s 106 of the Evidence Act needs mention as relied upon and detailed in various rulings and also various commentators on the topic favouring the line of reasoning in Nemi Chand.

The **base proposition** first: ***Section 106 cannot come into play where the facts concerned could be known by other also*** .

Second:the contra view employing s 106 started with an astonishing stated or unstated presumption:that the initial burden lay on revenue once the assessee disclosed the credit in its book:hence ''Court cannot shift burden of proof, where burden is on prosecution'': once we initiate the discussion with this proposition ,the conclusion is foregone.

5.3 It is trite of course.**In Dhanpal v State by Public Prosecutor, Madras, AIR 2009 SC (Supp) 2549,** it was held that: *"the court, could not have shifted the burden of proof on the accused. According to the fundamental principles of the Evidence Act, it is for the prosecution to have proved its own case."*

5.3.1 Some commentators hold that section 106 is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution, to establish facts which are "especially" within the knowledge of the accused and which he could prove

without difficulty or inconvenience. The word "especially" stresses that. It means *''**facts that are pre-eminently or exceptionally within his knowledge.**"* This is a point of view.But,defining ''specially'' as ''pre eminently or exceptionally'' is one thing and to hold that it should be well nigh an impossibility for the opposite party to know it for it to kick in,is quite another. Thereafter the argument is well on its way to being unable to be proved wrong implying that if by due diligence, the knowledge of certain fact is as much available to the prosecution, the facts cannot be said to be "especially" within the knowledge of the accused. Hence what is "especially within the knowledge of the assessee" could be also equally "especially within the knowledge of the department", if only the department was to summon due diligence.

5.3.2 The argument scales the heights of invincibility once its conceded that the word "especially" connotes that the facts must in their nature be such as could be within the knowledge of the accused **and possibly of no one else. Section 106 then cannot come into play where the facts concerned are such as are capable of being known by other also. If it were possible by due diligence and proper investigation to find out the facts** it cannot relieve the prosecution from the obligation of establishing the ingredients of an offence alleged.

5.3.3 This may hold good in criminal cases but in civil law,the section becomes virtually otiose.Why only 106,the whole chapter on Burden of Proof is rendered a nullity esp.for I.T.proceedings.

5.4 And this goes well against some celebrated contra rulings.To wit, ***Har Prasad* v. *IT Comm.* AIR 1957 All 746; *Mithoo Lal Tek Chand* v. *CIT UP*1953- 23 ITR 494.** *"If an assessee receives certain sums of money in the*

relevant accounting period, it is for him to explain the true nature and the source of those receipts. ***The taxing authorities could not be expected to provide evidence about the facts which were within the special knowledge of the assessee.*** *If the assessee does not explain* ***what he alone could know,*** *an inference is possible that the nature of the receipts were such as rendered him liable to tax."*

5.5 Revenue ironically never did pursue the contra rulings on above lines and continued to lose even some well investigated cases at the appellate fora for years.Inspite of even a S.C. ruling in its favour,which we shall discuss later,and which antidates Nemi Chand ,the easiest way was adopted:that of bringing a legislative amendment, which may open up a Pandora's box.**Some robust and informed arguing in Courts could have carried the day** without the amendment,but tragically it did not happen.

V.THE MAIN REVOLUTION? : VALIDATION OF ''SOURCE OF SOURCE"

A.

6.The 2012 amendment had brought in this aspect for closely held companies as is clear from the Memorandum of 2012(supra).But it was not as if the black money was doomed earlier not to be taxed at all if it came through a multi layered transaction.One dominant view prior to that amendment was that if the share application money was received by the tax payer from alleged and bogus shareholders, whose names are given to the tax officer, the tax department was free to proceed to reopen their individual assessments in accordance with law and the same in their individual hands but the amount of share money could not be regarded as

undisclosed income of the company u/s 68.Lovely Exports decision [216 CTR 295(SC). [Also CIT vs. Orissa Corpn. Pvt. Ltd. [159 ITR 78 (SC)] , Nemi Chand Kothari vs. CIT [264 ITR 254 (Gau) and Pr.CIT *v.*Paradise Inland Shipping (P.) Ltd. [2017] 400 ITR 439 (Bombay)]

B. WHAT IS SECTION 68 ALL ABOUT?;A SLICE OF ITS SOURCE CODE AND JUDICIAL HISTORY.WHY SOURCE OF SOURCE SHOULD NOT EVEN BE A DEBATE.

7.My humble view is that the real import and scope of the section has been much misunderstood.If we examine the source code behind this section we will find **two key theoretical propositions** we almost invariably fail to realize inspite of their universal judicial acceptance.And if we realize them, we fail to comprehend what degree and standard of proof is envisaged therein.For that takes us into relatively unchartered and fascinating waters of judicial history of receipts/sums being taxed as income from unexplained/undisclosed sources and leads us right into source of source or even two degrees removed source!They ultimately connect through a common thread to the end person.

[I am reminded of the famous concept of **six degrees of separation**.! : *the idea that all people are six or fewer social connections away from each other. As a result, a chain of "friend of a friend" statements can be made to connect any two people in a maximum of six steps. The concept was originally set out in a 1929 short story by Frigyes Karinthy, where a group of people play a game trying to connect any person in the world to themselves by a chain of five others. It was popularized in John Guare's 1990 play Six Degrees of Separation espousing*

that ***everybody on this planet is separated by only six other people. Six degrees of separation between us and everyone else on this planet.****]*

8.A SLICE OF HISTORY:

In Kedar Narain Singh vs. CIT (1938) 6 ITR 157 (All) : TC 32R.258 it was held that ***"anything which can properly be described as income is taxable under the Act unless expressly exempted".*** *The receipt by the assessee is clearly its income and unless it can be shown that any provision like s. 10 has exempted it from tax, it will be taxable.*

In **HOMI JEHANGIR GHEESTA vs. CIT(1961) 41ITR 135(SC)** it was held(para 5) that ***''Indeed, we agree that it is not in all cases that by mere rejection of the explanation of the assessee, the character of a particular receipt as income can be said to have been established; but where the circumstances of the rejection are such that the only proper inference is that the receipt must be treated as income in the hands of the assessee, there is no reason why the assessing authorities should not draw such an inference. Such an inference is an inference of fact and not of law."***

This is such an outstandingly brilliant proposition that Revenue should have jumped upon it,**factored it in with s 68** and thereafter built up an argument for **source removed upto 'n'degrees** on the strength of the main provision itself.IT was a 3 judge bench decision,which still holds good. Regrettably its virtue remained unappreciated by revenue.

We proceed to our main issue-

9. The two propositions ref in pr.7(supra) are:

1.S 68 (to 69D) is a rule of evidence.

2.The section raises a statutory presumption.

(Section 68 was inserted in the I.T. Act, **1961, only to provide statutory recognition to a principle which had been clearly enumerated in judicial decisions.)**

9.1 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".

9.2 It may surprise some to know that in the 1922 Act there was no section analogous to s 68.And yet sustainable additions were made and upheld judicially on account of unexplained sources.The first one perhaps was **CIT *v.*M. Ganapathi Mudaliar***[1964] 53 ITR 623 (SC) relying on ***A. Govindarajulu Mudaliar* v. *CIT*** [1958] 34 ITR 807 (SC),& ***Kale Khan Mohammad Hanif* v. *CIT*** [1963] 50 ITR 1 (SC).

C.WHY SOURCE OF SOURCE SHOULD HAVE BEEN A NON ISSUE?

10.All authority to tax derives from Article 265 of the Constitution.What does it say?

265. Taxes not to be imposed save by authority of law.—

No tax shall be levied or collected except by authority of law.

10.1 This may be read with s 4(1) of the Income Tax Act:

4. CHARGE OF INCOME-TAX

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

Which is the Central Act?It is the Finance Act passed by the Parliament every year.

10.2.The term ''**sum**" used in the section has a very wide connotation.It applies to all the credits by whatever the name called. [**G.R. Siri Ram v. CIT [1975] 98 ITR 337 (P&H)]**

10.3*"the sum so credited* ***may be charged to income-tax as the income*** *of the assessee of that previous year"* :the real import of this is totally lost in translation.A charge(not a legal fiction mind you) is created to tax a sum not otherwise classifiable as part of total income.S 4(1) by plain letter does not tax it.The Central Act does not mention it.s 2(24) does not include it.And s. 115BBE is literally **a no deduction penalty(if I can coin the term)on it,** in that its subsection 2 says that against this"income" '**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'.

10.4. s.68 is unique in another sense even with regard to its coterminous rules of evidence from s 69 to 69D: notice the **deeming fiction** inbuilt in the latter.

10.5 S.69 to 69C create a deeming fiction of ‘’**MAY BE DEEMED TO BE** THE INCOME”.69D goes a step further and says **‘’SHALL” be deemed to be** the income.

10.6 But see what 68 does ?No deeming fiction. All it says is ‘’the sum so credited may be charged to income-tax as the income of the assessee of that previous year.”The sum **may be charged** as the income is all it says.The aspect was brought out beautifully in what in my opinion is a landmark judgment few know/remember: **SHRI LOKNATH CHOWDHURY** *v.***CIT[1985] 155 ITR 291 (Cal)**rendered in context of penalty but with spellbinding analysis of sections (supra)cited from its earlier decisions and wonderfully interwoven. **Rupabani Theatres P. Ltd. [1981] 130 ITR 747 (Cal)** was quoted wherein it was held that *"So, unexplained cash credits found in the books of account by the operation of s. 68 are charged to income-tax as the income of the assessee for that previous year. Significantly, however, s. 69 in the case of unexplained investments, uses the expression that the value of such unexplained investment " may be deemed to be the income of the assessee for such financial year ". It does not merely stop by providing that it may be charged to income-tax but the deeming provision makes that income the income of the assessee.”*

Loknath goes on to say *‘’Where, however, a cash credit is assessed as income of the assessee, the onus still lies on the Revenue to prove that such addition represents the income of the assessee.”*

10.6 Armed with this understanding we can see easily that this was a non issue made into an issue by this proposed amendment of revenue.When the receipt isn't even classifiable as income even by a deeming fiction and is to be merely taxed as if it were income, the normal interpretational principles won't apply.This is not the income referred in s 4(1).Its not referred in s 2(24).Its not classifiable under s 14.

10.6.1 Why then limit its scope by defining it?All definitions are limiting propositions.They are exclusionary.Whenever you tightly define a section's scope as Revenue has here,you also exclude everything else.**Inexactitude is often a virtue in drafted law**.It provides space to accommodate human ingenuity ,for crime will always be a step ahead of the law punishing it.Illustrations are in order:

a.Business deductions can never be exhaustively enumerated.So even after covering a gamut of deductions under s 30 to 36 ,we needed an "inexact" s 37(1): **Any expenditure** (**not being** expenditure of the nature described in sections 30 to 36 **and not being** in the nature of capital expenditure or personal expenses of the assessee**), laid out or expended** wholly and exclusively for the purposes of the business or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".

ANY expenditure: latitude allowed,flexibility provided ,accommodation done.Bases covered.

b.All incomes taxable cannot be enumerated.s 2(24) does not ,s 14 carves exception of savings,no other section refers to it.So 56(1) introduces a universal inexactitude:

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

''Income of **every** kind**":** latitude allowed,flexibility provided ,accommodation done.Bases covered.

So imprecision has salutary purposes specially in fiscal legislation.

10.6.2 **Layering** is a limitless concept.By saying you have the authority in law to unravel two layers, you exclude everything beyond it.As we shall see in judgments cited hereinblelow ,that authority to unravel '**n**' number of layers was with Revenue and that even prior to 2012.In my humble opinion this is a self reverse compliment and a three layered transaction,what to speak of more,shall easily beat the charge.Its almost a self goal without realising it.Time to come will tell whether my prognosis is correct.I am afraid its so simple that its bound to be.

10.7 Legislature does not use words superfluously ; there is a sense and purpose behind the words used since 1962.The law of s.68 stood astonishingly intact for 50 years before the addition of the first proviso by Finance Act 2012Those 50 years tell us a story.Only revenue did not hear it.First in 2012 and now in 2022.It tried to do by amendments what was already validated and accepted in several Court decisions.

10.7.1 Astonishingly ,Revenue failed to capitalize on some stellar decisions,which not only distinguished Nemi Chand but also dissented therefrom.But prior to that, a decision ,which ,if utilized properly ,would not have let Nemi Chand happen or if noticed thereafter would have rendered it per incuriam(because it was not brought to knowledge of

hon'ble HC by revenue and hence not taken cognizance of inspite of being binding on it).

CIT *v.*Biju Patnaik [1986] 160 ITR 674 (SC)

MAY 9, 1986

ISSUE PER COURT

":4. The controversy in these appeals related to the various additions made by the revenue to the total income of the assessee relating to the assessment years 1962-63 to 1964-65. The assessee claimed in his assessment, deduction in respect of payments of interest on loans taken from Kalinga Foundation Trust and others and certain dividend transactions relating to the shares of Kalinga Tubes Ltd."

HELD

In the instant case, the basic question was whether the ***assessee had collected donations from the public;*** *was there any material that the collectors had collected donations from various persons; if so, who were those persons* ***and whether they were capable of making these contributions?*** *The significant fact had to be borne in mind that the trust kept the money with the treasurer without earning any interest.* ***There appeared to be no evidence as to who were the persons from whom the money was collected, how was the money received and how was the money invested?*** *The question whether the donations were the moneys raised by the trust as donations from various people or not should have been considered in its proper perspective but the Tribunal did not seem to have done so. This was the most material portion and in not appreciating the material portion and discussing the evidence in respect of the same there was non-consideration of a relevant factor on a factual aspect.* ***It was true that names of some collectors of money were given and some particulars were given but the persons from whom donations were collected, their particulars were not***

supplied nor examined nor were they produced to prove the genuineness of their donations and their capacity to make the donations. *So the question remained whose money was donated by whom ? There was evidence on record as to who had collected it to a certain extent, but no evidence on the other aspect; ignoring of that fact was a vital fact which influenced the decision. Therefore, the questions which arose on this aspect were questions of law.*

NOTE:THE PROPOSITION AS ABOVE WAS LAID DOWN.THE APPEAL WAS REMITTED FOR VERIFICATION OF DOUBLE TAXATION TO AO ON ALTERNATIVE ARGUMENT OF ASSESSEE THAT AN AMOUNT OF RS.1.5 LAC ALREADY STANDS TAXED IN THE HANDS OF ONE JAYA TRUST.IT WAS OBSERVED THAT:

''In any event, there cannot be any doubt regarding the amount other than Rs. 1,50,000 said to have been taxed at the hands of Jaya Trust referred to by the counsel for the assessee. That part of the order of the Assessing Officer is final. We think that in the circumstances, the Assessing Officer must be directed to recompute the income of the assessee, if it is necessary, after considering the impact of the order of assessment dated 29-8-1995 against Jaya Trust. To consider whether any such deletion is needed or warranted and to pass consequential orders based thereon, the matter will stand remitted to the Assessing Officer.''

10.7.2 APPLYING IT (unreported decision):21st April 2005

IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'B' LUCKNOW

BEFORE SHRI B. R. MITTAL J. M. AND SHRI S. V. MEHROTRA A.M.

M/s Gaurav Pigments Pvt. Ltd. vs Commissioner of Income Tax (Appeals)-II.

I. T. A. NO. 61/LUC/2000 Assessment Year: 1991-92

ORDER

PER S. V. MEHROTRA, A. M.

''This appeal has been filed by the assessee against the order dated 1st Feb. 2009 of CIT (A)-II, Kanpur for assessment year 1991-92.

The assessment order was passed on 20th Feb. 1998 in pursuance of the order of ld. CIT (A), Kanpur under section 263 setting aside the original assessment order. The Assessing officer has observed that in the order u/s 263.It had been observed that no enquiry appear to have been made in respect of loan account in the names of Master Gaurav Goel and Km Pooja Goel children of Shri G. D. Goel Director. The Assessing Officer after detailed enquiry Made the following 3 additions:

(i)	*Unexplained credit as discussed In para 4 to 7 above.*	*-*	*Rs.21,000/-*
(ii)	*Disallowance of interest As discussed in para 8 of the order (out of Pooja Goel's a/c)*	*-*	*Rs.12,742/-*
(iii)	*Disallowance of interest out of Master Gaurav Goel's account as discussed in para 9 of the order*	*-*	*Rs.13,531/-*
		-	*Rs.52,273.00*

These additions were confirmed by ld. CIT (A). Aggrieved by the order of ld. CIT(A), the assessee is in appeal before us.

2. ***The first ground of appeal is that ld. CIT (A) erred in confirming the additions of Rs.21,000/- for alleged unexplained cash credit in the name of Pooja Goel.***

3. Brief facts apropos this issue are that from the copy of accounts of Kum. Pooja Coel filed by the assessee, the Assessing Officer noticed that there was opening balance of Rs.42,814/- and credits of Rs.21,000/- by way of loan and Rs.12,742/- by way of interest. The assessee stated that the loan from Kum. Pooja Goel had come out of gifts received by her. The assessee was, therefore, required to furnish evidence in support of this claim. The assessee filed photo copy of certain gift cheque and had given list of cheque numbers by which Ku. Pooja Goel claimed to have received gifts of Rs.21,000/-. The cheques were in denomination of Rs.500/- and Rs.1,000/-. The assessee had not furnished the names and address of the persons who had allegedly given gifts on the gourd that details were not maintained. The Assessing Officer noted that Km. Pooja Goel was minor and was born in 1982. The Assessee had filed a statement which showed that on 1.4.87, Km. Pooja Goel had a capital of Rs. 1,04,830/- and this capital was claimed to be invested in various family concerns. The assessee could not explain as to how Ku. Pooja Goel who was only 5 years old on 1.4.87 claimed to have capital of Rs.1,04,830/- at that time. After applying the test of human probabilities as laid down by Hon'ble Supreme Court in the case of Sumati Dayal V. CIT 125 ITR 124 (SC) rejected the assessee's explanation regarding gifts being received by Km. Pooja Goel and accordingly made an addition of Rs.21,000/- u/s 68. Ld. CIT (A) taking note of meagre house-hold withdrawals did not believe the assessee's story of big gathering on the birth day of Ku. Pooja Goel. Learned Consel for the assessee referred to page 2-3 of paper book wherein the details of cheques/allegedly received by Km. Pooja Goel are contained. He also referred to page 7 of paper book wherein the Bank statement of Pooja Goel is contained to show that the gift cheques were deposited in the Bank on 15th Oct. and thereafter on 20th Oct. a sum of Rs.21,000/- was paid from her account to assessee. He also referred to page 16 of paper book wherein the assessee's bank

account with Allahabad bank is contained. ***Learned counsel submitted that the assessee was not required to prove source of source.***

In this regard he relied on the decision of Hon'ble Patna High Court in the case of Additional Commissioner Income Tax Vs Bahri Brothers Pvt. Ltd. 154 ITR page 244 and also on the decision of Gauhati High Court in the case of ***Nemi Chand Kothari Vs CIT ITR 264 page 254.*** *In these cases it was held that if assessee establishes identity of creditors and amounts received by him were by way of cheque then assessee must be taken to have proved that creditors had credit worthiness. If creditors fail to show credit worthiness of his sub creditors then addition cannot be made in the hands of the assessee.*

Ld. D. R. submitted that the perusal of Bank account of Ku. Pooja Goel shows that the pattern of deposit in her account is same through out. Merely that the amount was received by account payee cheque is not a conclusive proof regarding the credit worthiness of the lender. Ld. D. R. referred to the decision of Hon'ble Supreme Court in the case of Sumati Dayal vs CIT 214 ITR page 801 wherein it has been held that in view of section 68 of the income tax act 1961 where any sum is found credited in the books of the assessee for any previous year, it may be charged to income tax as the income of the of assessee of that previous year if the explanation offered by the assessee about also the nature and source thereof is, in the opinion of the Assessing officer, not satisfactory. Hon'ble Supreme Court held that test of human probability had to be applied while considering the assessee's explanation.

Ld. D. R. further relied on the decision of Hon'ble Supreme Court in the case of CIT vs Biju Pathak 160 ITR page 674 wherein Hon'ble Supreme Court held that

source of source had to be established. *Ld. D. R. pointed out that the Pooja Goel was not assessed to tax.*

4. ***We have considered the rival submissions and have perused the record of the case.*** *There are number of cases in which the courts and Tribunals have accepted the explanation in respect of cash credit. There are also many cases where such explanations have not been accepted whether particular explanation given in respect of a particular cash credit is satisfactory or not is merely question of proper inference to be drawn on the totality of the facts and the circumstances of the each case once full particulars regarding creditors are given and the confirmation from the creditors is also filed, ordinarily the identify of the creditor would be established. But that in itself would not establish the other two ingredients course i. e. financial capacity of the creditors and genuineness of the transactions. If on further examination the A. O.'s come across any material which disprove the capacity of the creditors or genuineness of the transaction, it would be for the assessee to establish both these ingredients with reference to the material gathered by the A.O. and it would not be sufficient to say that he had produced the creditors who had admittedly the transaction. In the present case we find that no details of the persons who allegedly gifted the amount to Km. Pooja Goel has been furnished. The dates of cheque have also not been furnished. The gift cheques have mainly been obtained from one or the other branch of State Bank of India and Punjab National Bank. Ld. CIT (A) has pointed out that the total withdrawals of Shri G. P. Goel and his wife for house hold expenses were of Rs.18,000/- per year. The meagre house hold withdrawals clearly demolishes the assessee's story of gift cheques being received by Ku. Pooja Goel.* ***Hon'ble Supreme Court in the case of CIT Vs Biju Pathak (cited supra) clearly held that alleged donation received by trust from which the assessee stated to have received the amount had to be established. In this***

case the assessee had claimed deduction in respect of payment of interest on loan taken from Kalinga Foundation Trust for the assessment year 1962-63 to 1964-65.

The Assessing Officer required the assessee to produce evidence and rove that the cash credit in the name of the trust were genuine. The cash credit were claimed to be loans from the Trust. The trust which was claimed to have been found in 1947 had collected large amounts of donation over decade and had kept all the money collected by it with the Maharaja of Sonepur without earning interest. The were not even deposited in bank Evidence of the persons who had collected the donations was given but the assessee did not produce evidence as to who were the persons from whom

the money was collected, how the money was received or how it was invested. The Assessing Officer after making various enquiries held that Kalinga Foundation Trust did not exist and even if it existed it had no funds, and that the name of the trust was used as a camouflage by the assessee to put through his unaccounted money; and treated the cash credits in the books of the assessee and of certain other person and concerns in the name of the trust and all interest and dividends received in the name of the trust as income of the assessee from undisclosed sources Hon'ble Supreme Court finally upheld the action of Assessing Officer.

5. ***In view of the afore mentioned decision it has rightly been pleaded by ld. D. R. that source of source also is required to be established by the assessee because primarily the onus of proving the credit worthiness of lender lies on assessee.*** *In the present case we*

are of opinion that ld. CIT (A) rightly confirmed the order of Assessing Officer taking into consideration the entire circumstances.

6. In the result this ground is dismissed.

……..''

10.7.3 The author of this article was representing Revenue before ITAT Mumbai in **Ito 14(1)(1), Mumbai vs Abacus Real Estate P. Ltd, Mumbai "A" bench In ITA No. 9/MUM/2017 Assessment Year: 2012-13 decided on 20.12.2019** wherein both Biju Patnaik and Gaurav Pigments were pleaded by me alongwith NRA Iron and Steel P ltd. Para 5 of the said decision can be referred wherein I made the specific argument that source of source can be examined.The proposition espoused **was upheld by the Tribunal** and like Biju Patnaik issue was remitted to AO to examine the genuineness of transactions from this perspective.The opposing counsel contested the same specifically.His contentions were negatived.

Unfortunately Revenue again saw probably ,just the conclusion and failed to realize the immense significance of the ratio and the arguments upheld.This decision should have been capitalised upon to argue other cases but unfortunately ,as I have seen in my long career,all was lost in translation.

10.8 What to speak of the decisions, AOs don't even follow/know their own **Standard Procedure for applying provisions of section 68** issued by CBDT VIDE **246/151/2017-A&PAC-1 DATED 10.1.2018** inspite of this being in public domain (a simple google search will lead the reader to it).

11.Landmark decisions favouring revenue have been rendered on this aspect much before even 2012 amendment.

I.ITO *v*. Diza Holdings (P.) Ltd. [2002] 255 ITR 573 (KER.)

NOVEMBER 16, 2001

4……..There is no doubt that a sum of Rs. 3,33,700 was found credited in the books of the assessee maintained for the previous year relevant to the assessment year. The Assessing Officer was, therefore, entitled to call for an explanation regarding the credit thus shown. The Assessing Officer called for an explanation. The assessee offered an explanation. Finding that, *prima facie,* the explanation could not be accepted without an enquiry into it, the Assessing Officer conducted an enquiry. The sum was shown as being credited as deposits from 11 persons, whose names the assessee furnished. The Assessing Officer thereupon summoned those persons and examined them. One alone was not available for examination. The Assessing Officer in his order has detailed the evidence given by these persons and has also pointed out **the infirmities and improbabilities** surrounding the transactions.

……

8. The learned counsel for the assessee argued that once it is found that the deposits into the assessee-company were made by way of cheques and the amount had been credited to the amounts of the assessee he had no jurisdiction to enquire into the question whether the person who is said to have made the deposit had the source to make such a deposit. In the context of section 68 and in the light of the materials available in the case, this argument on the side of the assessee cannot be accepted."

II.Indus Valley Promoters Ltd.*v.*CIT [2008] 305 ITR 202 (Delhi)

EXTRACT;

11. The main plank of the assessee's arguments is that the source of the source cannot be examined. In the present case, the revenue has seen through the ploy of the assessee whereby substantial amount have been deposited in cash purportedly in the books of M/s. Indwheels stated to be a partnership firm and from where the amounts have been withdrawn and credited to the account of Sh. Sanjay Gupta in the books of the assessee-company. It is the case of the revenue that the same cash deposits could have been made in the books of the assessee-company and the method of choosing the circuitous path is only an attempt to circumvent the provisions of section 68 of Act.

12. The amount was deposited in cash and in spite of enquiry, the source of the deposit was not explained. The creditworthiness of the said payment is not clear

from the income shown by them. Therefore, the addition should be confirmed. Since the assessee was a Director in the assessee company having a regular account, what was the reasoning to first deposit the cash in M/s. Indwheels and thereafter transfer the funds to the assessee-company, when the initial deposit could have been made in the books of the assessee-company itself.

13. Thus, we do not find any infirmity in the reasoning given by the Tribunal in upholding the action of tax authorities in bringing to tax the sum of Rs. 11,82,000.

III.CIT vs. NR PORTFOLIO PVT LTD.(2013)96 DTR 281/86 CCH 164(DEL)

22nd November, 2013 Asst. Year 2002-03 and 2003-04 ITA No. 1018/2011 & 1019/2011

24. We are conscious of the doctrine of „source of source or origin of origin and also possible difficulty which an assessee may be faced with when asked to establish unimpeachable creditworthiness of the share subscribers. **But this aspect has to be decided on factual matrix of each case and strict or stringent test may not be applied to arms length angel investors or normal public issues**. Doctrine of source of source or ,origin of origin cannot be applied universally, without reference to the factual matrix and facts of each case. The said test in case of normal business transactions may be light and not vigorous. **The said doctrine is applied when there is evidence to show that assessee may not be aware, could not have knowledge or was unconcerned as to the source of money paid or belonging to the third party. This may be due to the nature and character of the commercial/business transaction relationship between the parties, statutory postulates etc. However,** when there is surrounding evidence and material manifesting and revealing involvement of the assessee in the "transaction" and that it was not entirely an arm's length transaction, resort or reliance to the said doctrine may be counter- productive and contrary to equity and justice. **The doctrine is not an eldritch or a camouflage to circulate ill gotten and unrecorded**

money. Without being oblivious to the constraints of the assessee, an objective and fair approach/determination is required. Thus, no assessee should be harassed and harried but any dishonest façade and smokescreens which masquerade as pretence should be exposed and not accepted.

IV.CIT *v.*Mihir Kanti Hazra* [2015] 375 ITR 555 (Calcutta)(MAG)

.....

3. The facts and circumstances of the case, briefly stated, are that the assessee, in this case, has allegedly received unsecured loans for an aggregate sum of Rs. 41,15,000 from 39 persons.

4. Summons were issued to all 39 alleged lenders under section 131 of the Income-tax Act. Notices sent to 9 of them came back with the endorsement "not known". Notices were served upon the balance 30 persons. 22 of them did not turn up. 8 of them did. Some of them deposed that they never lent any money. Some of them were undecided. The Assessing Officer, for reasons recorded, was of the opinion that the creditworthiness of the alleged creditors and the genuineness of the transactions were not proved by the persons ……..

6. The learned Tribunal, it is obvious, did not examine the correctness of the views expressed by the Assessing Officer and the Commissioner of Income-tax (Appeals). No reasons have been disclosed as to why the views expressed by the Commissioner of Income-tax (Appeals) and the Assessing Officer are wrong.

7. The learned Tribunal proceeded to set aside the order without any examination whatsoever of the views expressed as would appear from the paragraph quoted above.

8. It is now well settled that the creditworthiness of the alleged creditors and the source of the source are relevant enquiries. Reference, in this regard, may be made to the judgment in the case of *CIT* v. *Precision Finance (P.) Ltd.* [1994] 208 ITR 465/[1995] 82 Taxman 31 (Cal) wherein the following views were expressed (page 470) :…….

V.Rajmandir Estates (P.) Ltd.*v.* PCIT [2016] 386 ITR 162 (Calcutta)

MAY 13, 2016 Assessment year 2009-10

29. Whether receipt of share capital was a taxable event prior to 1st April, 2013 before introduction of Clause (VII b) to the Sub-section 2 of Section 56 of the Income Tax Act; whether the concept of arms length pricing in a domestic transaction before introduction of Section 92A and 92BA of the Income Tax Act was there at the relevant point of time are not questions which arise for determination in this case. **The assessee with an authorised share capital of Rs.1.36 crores raised nearly a sum of Rs.32 crores on account of premium and chose not to go in for increase of authorised share capital** merely to avoid payment of statutory fees is an important pointer necessitating investigation. Money allegedly received on account of share application can be roped in under Section 68 of the Income Tax Act if the source of the receipt is not satisfactorily established by the assessee. **Reference in this regard may be made to the judgement in the case of *Sumati Dayal* (*supra*)** wherein Their Lordships held that any sum "found credited in the books of the assessee for any previous year, the same may be charged to income tax….". We are unable to accept the submission that **any further investigation is futile because the money was received on capital account. The Special Bench in the case of *Sophia Finance Ltd.* (*supra*) opined that "the use of the words "any sum found credited in the books" in Section 68 indicates that the said section is very widely worded and an Income-tax Officer is not precluded from making an enquiry as to the true nature and source thereof even if the same is credited as receipt of share application money.** Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine as was held in the case of *Nova Promoters and Finlease (P) Ltd.* (*supra*). Similar views were expressed by this Court in the case of *Precision Finance (P.) Ltd.* (*supra*). **We need not decide in this case as to whether the proviso to Section 68 of the Income Tax Act is retrospective in nature. To that extent the question is kept open. We may however point out that the Special Bench of Delhi High Court in the case of Sophia Finance Ltd. (supra) held that "the ITO may even be justified in trying to ascertain the source of depositor". Therefore, the submission that the source of source is not a relevant enquiry does not appear to be correct.** …… We also have held prima facie that neither the transaction appears to be genuine nor are the applicants of share are creditworthy.

NOTE: SLP dismissed [2017] 77 taxmann.com 285 (SC)

VI.Pragati Financial Management (P.) Ltd. *v.*CIT [2017]394 ITR 27 (Calcutta)

MARCH 7, 2017 Assessment years 2008-09 and 2009-10

14. Arguments in all these appeals have been advanced in the same line, and for that reason we have not recorded in this judgment the submissions made individually in each appeal. Another decision of a Coordinate Bench in ITA No. 723 of 2008 in the case of *CIT* v. *Shyam Sel Ltd.* [2016] 386 ITR 312/[2017] 80 taxmann.com 241 (Cal.) was referred to on behalf of the appellants. This decision was cited to contend that the assessee cannot be asked to discharge the onus of proving the genuineness of transaction relating to the source of its source of share application**. But in the decision of *Rajmandir Estates (P.) Ltd.* (*supra*), the Coordinate Bench had directly addressed this issue and observed that source of source can be relevant inquiry.**

VII.PCIT *v.*NRA Iron & Steel (P.) Ltd.* [2019] 412 ITR 161 (SC)

Assessment year 2009-10

8. We have heard the Ld. Counsel for the Revenue, and examined the material on record.

8.1 The issue which arises for determination is whether the Respondent /Assessee had discharged the primary onus to establish the genuineness of the transaction required under Section 68 of the said Act.

Section 68 of the I.T. Act (prior to the Finance Act, 2012) read as follows:

> *"68. Cash credits- 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"*
>
> *(emphasis supplied)*

The use of the words "any sum found credited in the books" in Section 68 of the Act indicates that the section is widely worded, and includes investments made by the introduction of share capital or share premium.

8.2 As per settled law, the initial onus is on the Assessee to establish by cogent evidence the genuineness of the transaction, and credit-worthiness of the investors under Section 68 of the Act.

The assessee is expected to establish to the satisfaction of the Assessing Officer CIT v. Precision Finance (P.) Ltd. [1995] 82 Taxman 31/[1994] 208 ITR 465 (Cal.):

- Proof of Identity of the creditors;
- Capacity of creditors to advance money; and
- Genuineness of transaction

This Court in the land mark case of ***Kale Khan Mohammed Hanif*** **v.** ***CIT*** **[1963] 50 ITR 1 (SC) and** ***Roshan Di Hatti*** **v.** ***CIT*** **[1977] 107 ITR 938 (SC)** laid down that the onus of proving the source of a sum of money found to have been received by an assessee, is on the assessee**. Once the assessee has submitted the documents relating to identity, genuineness of the transaction, and credit-worthiness, then the AO must conduct an inquiry, and call for more details before invoking Section 68. If the Assessee is not able to provide a satisfactory explanation of the nature and source, of the investments made, it is open to the Revenue to hold that it is the income of the assessee, and there would be no further burden on the revenue to show that the income is from any particular source.**

8.3 With respect to the issue of genuineness of transaction, it is for the assessee to **prove by cogent and credible evidence**, that the investments made in share capital are genuine borrowings, **since the facts are exclusively within the assessee's knowledge…….”**

This view in para 8.3 is vital.Because it specifically negatives the view of Nemi Chand regarding s 106 of the Evidence Act

VIII.CIT (Central), Bangalore *v.*Sadiq Sheikh*[2020] 429 ITR 163 (Bombay)

SLP Dismissed/Rejected in [2021] 277 Taxman 594 (SC)

15. Mr. Kantak, learned senior advocate for the assessees submits that **once the assessees indicate the source from whom the amounts were received by cheque and further, such source confirms the payment, the burden which the law casts**

upon the assessees is fully discharged. He submits that **thereafter, onus shifts upon the Revenue** to establish that nevertheless, the amount represents an unexplained income of the assessees.

16. Mr. Kantak submits that in this case, both the assessing officer and Commissioner (Appeals) had raised certain doubts about the source from which M/s. Prasad Properties may have arranged for the amount of Rs. 8.49 crores. **He submits that the source of the source is not at all relevant consideration in such matters. If at all, there are any doubts about the source of the source, then, it is for the Revenue, to take out appropriate proceedings against the source and not against the assessees in the present case.** Mr. Kantak submits that this error on the part of the assessing officer and Commissioner (Appeals) was quite correctly set right by the ITAT relying upon the decisions in *CIT* v. *Tania Investments (P.) Ltd.* [2010] 322 ITR 394 (Bom.), *CIT* v. *Daulat Ram Rawatmull* [1973] 87 ITR 349 (SC), *Aravali Tranding Co.* v. *ITO* [2010] 187 Taxman 338 (Raj.), *Nemi Chand Kothari* v. *CIT* [2004] 136 Taxman 213/264 ITR 254 (Gau.). Mr. Kantak, therefore, submits that no substantial questions of law as framed arise in this matter and both these appeals be therefore dismissed.

…….

23. The record, in this case, indicates that hardly any explanation as such was offered by the assessees when called upon to explain the transactions leading to the **transfer of this huge amount of Rs. 8.49 crores into their bank accounts on 10-3-2007. ……..**

25. The ITAT, in its impugned order dated 31-7-2013, has, however, purported to accept the assessee's' so-called explanation relying almost entirely upon the following three circumstances:—

(*a*)	That this amount of Rs. 8.49 crores was transferred into the assessees' bank account at Development Credit Bank, Panaji Goa on 10-3-2007. The ITAT regards this as a transfer **through a "normal banking channel".**
(*b*)	That this amount of Rs. 8.49 crores was transferred from out of the bank accounts of Siraj Sheikh (assessees' brother/brother in law) and Vijay Kumar Rao (assessees' close friend) held in the same bank. The ITAT has held that the **identity of the source was thus established.**
(*c*)	That the **identified sources have confirmed** having made these payments to the assessees.

26. Based almost entirely upon the aforesaid three circumstances and **virtually ignoring all other circumstances** emanating from the record, ……

29. …… When it is contended that a person had advanced money or had given a loan, it has to be established that the person was not a man of straw and had the capacity to give the money.

30. …… **Merely because the transactions were through banking channels, it cannot be said that such transactions were genuine when the assessees were not in a position to show the credit-worthiness of the creditors,** ……

34. ***Tania Investment (P.) Ltd.*** **(*CIT* v. *Tania Investments (P.) Ltd.* [2010] 322 ITR 394 (Bom.)) is not an authority for the omnibus proposition relied upon by the ITAT and Mr. Kantak.** In fact, even this decision accepts that to discharge the burden which Section 68 of the said Act casts upon an assessee, the assessee has to not only establish the identity of the source but also **establish at least *prima facie* the capacity of such source** and the genuineness of the transaction.

35. …… *Tania Investments (P.) Ltd* (*supra*) was quite mechanically relied by the ITAT to accept the assessees' so-called explanation in these matters. **It is possible**

that the ITAT merely went by the head notes which, at times, may not accurately represent the ratio of the decision.

36. Similarly, even *Nemi Chand Kothari* (*supra*) rendered by learned Single Judge of the **Gauhati High Court has laid down the following propositions, which, support the case of the Revenue …….**

39. Even according to us, merely pointing out to a source and the source admitting that it has made the payments is not, sufficient to discharge the burden placed on the assessees by Section 68 of the said Act. If this were so, then, it would be sufficient for assessees, to simply persuade some credit- less person or entity to own up having made such huge payments and thereby evade payment of property(sic) tax on the specious plea that the Revenue, can always recover the tax from such credit- less source, if possible. To discharge the burden which section 68 casts upon assessees, at least **some plausible explanation** is required to be furnished, which must be backed by some reliable evidence. If the circumstances listed above are to be taken into consideration, then, it can hardly be said that the assessees in the present case, has discharged the burden which was cast upon it by section 68 of the said Act……..

41. If the ITAT were to have considered the aforesaid circumstances, which, according to us, the ITAT was duty-bound to, we are quite sure that the ITAT would not have, nevertheless, found the so-called explanation of the assessees acceptable or in compliance with the provisions of section 68 of the said Act. **Rather we are inclined to believe, that the ITAT too, would have found the so-called explanation of the assessees too fantastic to deserve any acceptance. In *Mussadilal Ram Bharose* case (*supra*), the Hon'ble Supreme Court has cautioned against acceptance of any 'fantastic' or 'unacceptable' explanations in tax matters.**

…….

45. The finding recorded by the ITAT in these matters is based upon the wholly erroneous view of law and perversity on account of ignoring completely, vital and relevant circumstances emanating from the record. ……...

46. Therefore, for all the aforesaid reasons, we answer the second substantial question of law in favour of the Revenue and against the assessees. As a consequence, we reverse the order of ITAT and restore the order made by the Commissioner (Appeals) in these matters……."

12. Was there any need then for this amendment in view of such brilliantly scripted decisions?I wonder.

The real issue is however left open.**What exactly constitutes CREDITWORTHINESS?** The future legal battles,my prognosis is,shall be foght on this plank.Because if an AO reaches layer 2 i.e. source of source ,what would exactly be his parameter of judging the issue?The person is identified.Identity proven.The transaction is from his bank account via an account payee cheque.Genuineness of transaction through-unless by ''genuine'' we mean ''bonafide''-in that case genuineness and creditworthiness coalesce together -what then will be the criterion?-if defining the layers of proof required was a panacea to the evil of laundering of money,then this too might as well have been defined.They did not.And perhaps could not.The inexactitude of law fortunately prevailed-human probabilities,fantastic explanations,factual matrix,credible credit structure....all will play their role from case to case. In **P.Mohankala (291 ITR 278.SC)para 24** it was held that '' *It is true that even after rejecting the explanation given by the assessees if found unacceptable, the crucial aspect* ***whether on the facts and circumstances of the case it should be inferred that*** *the sums credited in the books of the assessees constituted income of the previous year must receive the consideration of the authorities provided the*

assessees rebut the evidence and the inference drawn to reject the explanation offered as unsatisfactory…"

Thereafter in my view,the most crucial observation is made by the hon'ble Court:" *All the decisions cited and referred to hereinabove are required to be appreciated and understood* ***in the light of the law declared by this Court in Sumati Dayal (1995 Supp (2) SCC 453)."***

12.1 Banarsi Prasad *v.*CIT [2008] 304 ITR 239 (Allahabad) in my view is probably THE most important decision to understand the main clause of s 68 as well as the proviso.Here is the relevant extract:

"6. *For a clear understanding the contents of section 68 of the Act may be divided into two parts.*

7. *The first part requires the assessee to explain the sum found credited in the books of the assessee about the nature and source thereof. This part only requires the assessee to disclose the source from which the money has been received by the assessee. This does not require the assessee to disclose the source of that source, i.e., the source from which the donor or investor has received the money which has been invested.*

8. *The second part of section 68 of the Act consists of offering an explanation which is "satisfactory" in the opinion of the Income-tax Officer. What explanation would be considered "satisfactory****", how much of details should be furnished to make the explanation "satisfactory" normally depends upon the facts."***

Some landmark cases were cited to support assessee's case here but did not find favour: *CIT* v. *Daulat Ram Rawatmull* [1973] 87 ITR 349 (SC) ,*CIT* v. *Orissa Corpn. (P.) Ltd.* 159 ITR 78 (SC),*Dy. CIT* v. *Rohini Builders* [2002] 256 ITR 360 (Guj.) *Nemi Chand Kothari* v.*CIT 264 ITR 254(GAU.)* and *CIT* v. *Jauharimal Goel 2008] 296 ITR 263(Alld)*

12.2 P.Mohankala though prior in time to this decision , goes on to explain what is this aspect of satisfaction of the AO for that is the final stage and

that is ,in my view too,the base code for what I prefer to label as "**n**"**source theory** for I refuse to put a number on the layers through which a subterfuge transaction may pass(para 16): *The expression* ***"the assessee offers no explanation" means where the assessees offer no proper, reasonable and acceptable explanation*** *as regards the sums found credited in the books maintained by the assessees. It is true* ***the opinion of the assessing officer for not accepting the explanation offered by the assessees as not satisfactory is required to be based on proper appreciation of material and other attending circumstances available on record. ……."***

12.2.1 This needs to be read with para 24 of the same decision:" *the same may be charged to income tax as the income of the assessees of the previous year if the explanation offered by the assessees about the nature and source of such sums found credited in the books of the* ***assessees is in the opinion of the assessing officer not satisfactory. Such opinion found (sic formed) itself constitutes a prima facie evidence against the assessees viz. the receipt of money,*** *and if the assessees fail to rebut the said evidence the same can be used against the assessees* ***by holding that it was a receipt of an income nature."***

13.Creditworthiness:the future battleground.

What do Courts say on this? ***Oceanic Products Exporting Co.* v. *CIT* [2000] 241 ITR 497 (Ker.)**says " it has to be established that the person was not a man of straw and had the capacity to give the money." **DIVINE LEASING AND FINANCE LTD. [2008] 299 ITR 268 (Del)**calls it "financial strength"of the creditor: **Sunil Thomas *v.*ITO [2017] 394 ITR 619 (Kerala)labels it** "monetary ability of the creditor" **PCIT *v.*NRA Iron & Steel (P.) Ltd.* [2019] 412 ITR 161 (SC)says "** to prove by cogent and credible

evidence, that the investments made in share capital are genuine borrowings .

To me creditworthiness of anyone,creditor,sub creditor ,sub sub creditor ad infinitum would mean ,with inbuilt inexactitude, **that the person must have ''credible and probative ownership of funds in a bonafide** capacity.''

This then is the future battleground.**The layering trap** which the revenue has created for itself notwithstanding.

:Anadi Varma