

# SECTION 68 TO 69D

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**THE LESSER AMENDED TAX WEAPONS**

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# GOVERNMENT'S OBJECTIVE

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- 2014 Election manifesto: Remove black money.
- Various legislations introduced.
- Section 269SS amended in 2015.
- Direct tax dispute resolution scheme in 2016.
- Benami Act amended, PMLA, and Black Money Act introduced.

# SECTION 68 – CASH CREDITS

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- Introduced in Income-tax Act 1961.
- Legislative recognition of judicial decisions.

# SECTION 68 – AS ON TODAY

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 :

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[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 where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

- (a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
- (b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:

[Provided also] that nothing contained in the first proviso [or second proviso] shall apply if the person, in whose name the sum referred to therein is recorded, is a venture capital fund or a venture capital company as referred to in clause (23FB) of section 10.]



# BURDEN OF PROOF UNDER SECTION 68

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- Onus on taxpayer to explain credits.
- Proof: Identity, creditworthiness, and genuineness.
- Shift of burden to the department.
- Limited responsibility of the taxpayer.
- Supreme Court ruling: Prove source, not the source of the source.

# AMENDMENTS IN SECTION 68

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- Finance Act, 2012: Share application money.
- FA 2022: Loans/borrowings included.
- Effective from AY 2023-24.
- Stated objectives: Prevent evasion.
- Onus to prove source of funds.



# SOURCE OF FUNDS – AMENDMENTS

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- Identity of the creditor.
- Creditworthiness proof.
- Genuineness of the transaction.
- Source of the source of funds.
- Wide ramifications of amendments.

# DEFINITION OF BOOKS

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- Section 2(12A): Ledgers, day-books, etc.
- Electronic or digital form included.
- Loose sheets not considered books.
- Supreme Court and High Court rulings.
- Need for revisiting the definition of books.



# PARALLEL BOOKS OF ACCOUNTS

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- Bombay HC case: Private books not valid.
- Search operations and undisclosed income.
- Court rulings on parallel books.
- Tax implications of undisclosed income.
- Use of private diaries in legal battles.

# BANK PASS BOOK AS BOOKS

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- Bombay HC: Not considered books.
- Bank passbook is a copy of taxpayer's account.
- Relationship: Debtor and creditor.
- Tribunal rulings: Gifts credited in bank passbook.
- Contradictory views in courts.

# REJECTION OF BOOKS OF ACCOUNT

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- Rejected books and subsequent additions.
- Allahabad HC and Punjab & Haryana HC rulings.
- Supreme Court rulings on double additions.
- Peak Credit Theory: Common defense.
- Determination of peak credit.

# WORKING OF PEAK PRINCIPLES

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- Chronological order of transactions.
- Highest closing balance as peak.
- Rejected books and peak credit theory.
- Consistency in applying peak credit.
- Tribunal rulings on peak credit.

# CONCEPT OF TELESCOPING

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- Adjustment of suppressed profit against cash credit.
- Reduction of two additions to one.
- Various scenarios of telescoping.
- Court rulings on telescoping.
- Impact on income reduction and penalties.

# SHARE APPLICATION MONEY

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- Proving source of source.
- Court rulings on share allotment.
- Latest decisions on accommodation entries.
- Additions under section 68 for share capital.
- Requirements for proving genuineness.



# OFFERS NO EXPLANATION

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- Taxpayer's responsibility to explain credits.
- Alternative explanations allowed.
- Appeal rights for providing explanations.
- Parallel authority decisions.
- Supreme Court observations on "may".

# SECTION 69 – UNEXPLAINED INVESTMENTS

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- Unrecorded investments in books.
- Burden of proof on taxpayer.
- Supreme Court rulings on unexplained investments.
- Conditions for applicability.
- Difference between sections 68 and 69.

# ISSUES UNDER SECTION 69

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- Documented purchase price discrepancies.
- Court rulings on unexplained investments.
- Addition based on shortage of stock.
- Deleting additions based on evidence.
- Principles of natural justice in additions.

# UNEXPLAINED MONEY – SECTION 69A

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- Found ownership of money, bullion, etc.
- Possession as evidence of ownership.
- Supreme Court rulings on ownership.
- Difference between sections 68 and 69A.
- Court rulings on loose slips and ownership.

# AMOUNT NOT FULLY DISCLOSED – SECTION 69B

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- Investments exceeding recorded amount.
- Burden on revenue to prove real investment.
- Court rulings on fair market value.
- Section 50C provisions and section 69B.
- Unjustified additions based on assumptions.

# UNEXPLAINED EXPENDITURE – SECTION 69C

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- Expenditure not recorded in books.
- Source of expenditure explanation required.
- Court rulings on bogus purchases.
- Addition of entire bogus purchases.
- Disallowance of part expenditure.



# AMOUNT BORROWED ON HUNDI – SECTION 69D

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- Borrowing/repayment through Hundi.
- Requirement of account payee cheque.
- Indigenous form of bill of exchange.
- Wide practice of uncounted transactions.
- Tax implications of Hundi transactions

# MINOR POINTS AND LEGAL INTERPRETATIONS

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- Legal expectations from taxpayers.
- Cross-examination of affidavits.
- Court rulings on legal and factual issues.
- Hyper technical legal approaches.
- Use of legal battles in tax assessments.

# THANK YOU

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# TAX RATE FOR UNDISCLOSED INCOME (Sec. 68-69D) – SEC. 115BBE

(Decoding Sec. 115BBE of the Act)

- CA Prudhviraj Mattapally  
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# ART OF TAXATION

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❖ Just as a bee collects honey from flowers, drop by drop, over a period of time (without harming them),

so too, should a king collect taxes from his subjects for future use (without hurting them).

- Chanakya's 'Nithi Shasthram'

❖ The art of taxation consists of so plucking the goose as to obtain the largest amount of feathers with the smallest amount of hissing.

-Jean Baptiste Colbert

# At what rate undisclosed income is taxed ?

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- ❖ Prior to A.Y. 2013-14, undisclosed income defined u/s 68-69D was taxed at normal slab rates applicable to Assesseees.

## **Introduction of Section 115BBE of the Act:-**

- ❖ In order to charge special/flat rate of income tax on unaccounted income referred in Sections 68 to 69D, the parliament introduced Section 115BBE in the Income Tax Act, 1961 through the Finance Act of 2012.
- ❖ The provisions of Sec.115BBE was held to be applicable from the assessment year 2013-2014. This section is contained in Chapter XII of the Income Tax Act,1961. The title of the section is "Tax on income referred to in section Sections 68, 69, 69A, 69B, 69C or 69D" – the specified sections. Any income falling under the above said section shall be subject to tax at a flat rate of 30%.



# **Provisions of Sec. 115BBE of the Act - Pre-Amendment**

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**115BBE.** (1) *Where the total income of an assessee includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, the income-tax payable shall be the aggregate of—*

*(a) the amount of income-tax calculated on income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, at the rate of thirty per cent; and*

*(b) 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 (a).*

*(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) of sub-section (1).”*

# Provisions of Sec. 115BBE of the Act – Post Amendment

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**115BBE.** (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).

# Effective Tax Rate u/s 115BBE of the Act

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- Tax on undisclosed Income - 60%
- Surcharge @ 25% on the above tax rate - 15%
- Cess @ 4% of Tax rate and Surcharge - 3%
- **Total** - **78%**
  
- Penalty u/s 271AAC @ 10% of tax - 6%
  
- **Effective rate of tax u/s 115BB** - **84%**

# **Amendment w.r.t. Set Off of loss – Finance Act 2016/2018**

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- ❖ Due to uncertainty on the issue of set-off of losses against income referred to in section 115BBE, the matter has been carried to judicial forums and courts in some cases has taken a view that losses shall not be allowed to be set-off against income referred to in section 115BBE. However, the language of section 115BBE of the Income-tax Act does not convey the desired intention and as a result the matter is litigated.
- ❖ In order to avoid unnecessary litigation, the provision of the sub-section (2) of section 115BBE of the Income-tax Act has been amended vide Finance Act 2016 to restrict set off of loss, applicable from A.Y. 2017-18, but initially it was applicable only for income reflected in the return of income i.e, clause (a) of sub-section 1 of Sec.115BBE of the Act.
- ❖ However, a retrospective amendment was made vide Finance Act 2018 applying it even to the income determined by the Assessing Officer i.e, clause (b) of sub-section 1 of Sec.115BBE of the Act.

# **Amendment w.r.t. Set Off of loss – Finance Act 2016/2018**

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**Finance Act 2018 Memorandum** : Rationalisation of the provisions of section 115BBE

- ❖ Section 115BBE provides for tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D at a higher rate of sixty percent. Sub-section (2) of said section provides that 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 the Act in computing his income referred to in clause (a) of sub-section (1).
  
- ❖ In order to rationalize the provisions of section 115BBE, it is proposed to amend the said sub-section (2) so as to also include income referred to in clause (b) of sub-section (1).
  
- ❖ This amendment will take effect retrospectively from 1st April, 2017 and will, accordingly, apply in relation to the assessment year 2017-2018 and subsequent years.

# **Amendment w.r.t. Increased Tax rate – Taxation Laws (second amendment) Act, 2016**

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- ❖ Amendment to section 115BBE of the Income-tax Act, 1961 vide **Taxation Laws (second amendment) Act, 2016** is directly related to the demonetization announced on the night of 8<sup>th</sup> November, 2016.
- ❖ There were views that the undisclosed income held in the form of demonetized currency can be deposited in the banks and can be offered to taxation under specified sections (68 to 69-D) and tax thereon could be paid at the rate mentioned in section 115BBE as stood before last amendment (i.e. 30% plus applicable surcharge and cess),
- ❖ An amendment was brought on 15.12.2016 to overcome such views wherein normal rates are applied without any specific penalties but said amendment was made applicable to the transactions that took place prior to 15.12.2016 by giving retrospective effect from 01.04.2016.



## RETROSPECTIVE AMENDMENT OF SUBSTANTIVE LAW:

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### ‘Can the Government increase tax rate retrospectively ?’

- ❖ It is well settled that provisions regarding increased tax rate are in the nature of **substantive law and not adjectival law**. Charging sections are to be strictly construed. Even machinery provisions are to be construed as would effectuate the object and purpose of the statute and not defeat the same.
- ❖ Therefore, fresh inclusion of a circumstance in increase in rate of tax, even if construed as forming part of the machinery provisions are to be considered as **substantive law, which cannot be construed retrospectively**, such view is in accordance with the decision of the Hon’ble Apex Court rendered by the 5 judges bench in the case of **J. K Synthetics Ltd. v. Commercial Taxes Officer (1994) 119 CTR 0222**.

## PRINCIPLES W.R.T. RETROSPECTIVE AMENDMENT OF LAW:

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Hon'ble Apex Court in the case of Hitendra Vishnu Thakur v. State of Maharashtra AIR 1994 SC 2623, 2641 (SC) w.r.t. retrospective operation of a statute have culled out following principles:

*(i) A statute which **affects substantive rights** is presumed to be prospective in operation, unless made retrospective, **either expressly or by necessary intendment**, whereas a statute which merely affects procedure, unless such a construction is texturally impossible, is presumed to be retrospective in its application, should not be given an extended meaning, and should be strictly confined to its clearly defined limits.*

*(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal, even though remedial, is substantive in nature.*

## PRINCIPLES W.R.T. RETROSPECTIVE AMENDMENT OF LAW:

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(iii) *Every litigant has a **vested right in substantive law**, but no such right exists in procedural law.*

(iv) *A procedural statute should not generally speaking be applied retrospectively, where the result would be to create new disabilities or obligations, or to impose new duties in respect of transactions already accomplished.*

(v) *A Statute which not only changes the procedure **but also creates new rights and liabilities shall be construed to be prospective in operation**, unless otherwise provided, either expressly or by necessary implication.”*

## **PRECEDENTS ON RETROSPECTIVE AMENDMENT OF TAX RATE:**

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### **KERALA HIGH COURT DECISION**

- ❖ Questioning the sanctity of the retrospective amendment a writ petition was filed before Hon'ble Kerala High Court in the case of Maruthi Babu Rao Jadav bearing WP(C). No. 101 of 2019.
- ❖ Challenge made w.r.t. increased tax rate u/s 115BBE was rejected by Hon'ble Kerala High Court vide order dt.22.01.2019.
- ❖ Thereafter, Assessee filed a Writ Appeal bearing WA No. 984/2019, wherein view mentioned in the writ order w.r.t. retrospective effect of increase in tax rate is upheld vide order dt. 23.09.2020.

## **PRECEDENTS ON RETROSPECTIVE AMENDMENT OF TAX RATE:**

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❖ **Rajasthan High Court admitted writ petition filed by the Petitioner - Deepak Maratha vide CW / 3625 / 2020** on 06/03/2020, wherein challenge was made w.r.t. the amendment to section 115BBE of Income-tax Act 1961 post-demonetization.

❖ Upon hearing the Petitioner, Hon'ble High Court gave interim relief as follows:

“Issue notice, returnable on 15th April, 2020.

Counsel for the petitioner shall be at liberty to serve notice through Additional Solicitor General and the concerned counsel.

In the meanwhile, no coercive steps shall be taken against the petitioner towards recovery.”

## **PRECEDENTS ON RETROSPECTIVE AMENDMENT OF TAX RATE:**

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### **APPELLATE TRIBUNAL SURAT BENCH DECISIONS:**

- ❖ Hon'ble Appellate Tribunal Surat Bench, in the order bearing **ITA No.42/SRT/2022, Dt.08.05.2023** opined that the amendment in section 115BBE came into force only on 15.12.2016 and thus increased tax rate is not applicable for the transactions that were carried out prior to the said date.
- ❖ Recently, on 03.10.2024, following the aforementioned ratio, relief was granted by the Co-ordinate bench in the matter bearing ITA No. 726/SRT/2023.

## **PRECEDENTS ON RETROSPECTIVE AMENDMENT OF TAX RATE:**

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### **APPELLATE TRIBUNAL JABALPUR BENCH DECISION :**

- ❖ Hon'ble Appellate Tribunal, Jabalpur Bench, in the order bearing **ITA No. 41/Jab/2020, Dt.31.10.2022** opined that the amendment in section 115BBE came into force only on 15.12.2016 and thus increased tax rate is not applicable for the transactions that were carried out prior to the said date.



## PRECEDENTS ON RETROSPECTIVE AMENDMENT OF TAX RATE:

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### APPELLATE TRIBUNAL INDORE BENCH DECISIONS :

- ❖ Hon'ble Appellate Tribunal, Indore Bench, in the order bearing **ITA No. 677/IND/2019, Dt.08.10.2021** opined that the amendment in section 115BBE came into force only on 15.12.2016 and thus increased tax rate is not applicable for the transactions that were carried out prior to the said date.
- ❖ However, in the subsequent decision pronounced in the case of **Gaurav Ajmera (ITA No. 71/IND/2022, Dt.01.09.2023)**, Hon'Appellate Tribunal Indore bench following the decision of the Kerala High Court opined that amendment applies to the entire previous year 2016-17. It was also stated that in the co-ordinate bench decisions, wherein amendment was applied prospectively, mention was not made about Kerala High Court decision.

## **SEC.115BBE IS NOT APPLICABLE FOR THE ADDITIONAL INCOME OFFERED DURING SEARCH/SURVEY PROCEEDINGS**

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- ❖ Additional Income disclosed during the course of search and survey proceedings by business Assesses come under the ken of the Business income and chargeable to tax as per normal rates instead of special rate specified u/s 115BBE.
- Madhya Pradesh High Court – Krishna Kumar Verma (161 taxmann.com 44)
- Gujarat High Court – Dharti Estate (163 taxmann.com 179)
- AP High Court – Deccan Tobacco Company (438 ITR 131)

# THANK YOU

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