

# Recent Issues In SECTION 68



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# SECTION 68

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- ✗ 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 AO, satisfactory,
- ✗ the sum so credited may be charged to income-tax as the income of the assessee of that PY

# SECTION 68 W.E.F. 1.4.2013

- ✘ Where assessee is a company (not being co. in which public are substantially interested), & the sum so credited consists of share application money, share capital, share premium or any such amt. by whatever name called, any explanation offered by such assessee-co. shall be deemed to be not satisfactory, unless
  - + person, being a resident - source of source and
  - + such explanation in the opinion of the AO aforesaid has been found to be satisfactory
- ✘ Provided that nothing contained in 1st proviso shall apply – if applicant is a VC fund or a VC company

# TRANSACTIONS

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- ✖ **Share Capital / Share Application**
- ✖ **Loans**
- ✖ **Gifts**
- ✖ **Penny Stocks**
- ✖ **Any Credits of sum of money**

# IMPACT - TAX U/S 115BBE

- ✖ **S. 115BBE substituted w.e.f. Taxation Laws (2<sup>nd</sup> Amendment) Act 2016 w.e.f. 15<sup>th</sup> December 2016**
- ✖ **Applicable if Income assessed u/s 68 / 69 / 69A / 69B / 69C / 69D even if reflected in IT Return**
- ✖ **Tax Rate increased from 30% to 60%.**
- ✖ **Plus surcharge u/Chapter II of Finance Act @ 25% i.e. 75% plus... cesses i.e. 78%**

# YEAR

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✗ **Carried forward cash credit entries can only be examined in the year of receipt.**

+ *Usha Sud 301 ITR 384 (Del. HC)*

# BOOKS OF ACCOUNTS

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- ✖ Maintenance of books of accounts is a precondition
- ✖ Books have to be of the assessee and not third party.
- ✖ Books of partnership firm are not books of assessee

+ *Anand Ram Raitani v. CIT 223 ITR 544 (Gau.)*

+ *Nanak Chandra Laxman Das v. CIT 140 ITR 151 (All)*

# BOOKS OF ACCOUNTS

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- ✖ **Passbook supplied by the bank to the assessee could not be regarded as a book of the assessee. The expression “books” used in section 68 of the Act means the books have to be books of the assessee himself, not of any other assessee.**

- ✖ *Anand Ram Ratiani vs. CIT [1997] 223 ITR 544 (Gau.)*
- ✖ *CIT vs. Bhaichand H. Gandhi [1982] 141 ITR 67 (Bom)*
- ✖ *Manish Agarwal HUF vs. ITO, Del ITAT*



# CROSS EXAMINATION

- ✘ Audi Altrem- Partem(Principle of Natural Justice) Where Assessing Officer does not provide cross examination.
- ✘ Denial of the opportunity to cross examine witnesses whose statements were relied upon by the AO would be in violation of principles of natural justice.
  - ✘ *Rajasthan Cable Industries Ltd. vs. DCIT & Ors.* (2019) 55 CCH 0296 Jaipur Trib
  - ✘ *Andaman Timber Industries vs. CCE* (2015) 281 CTR 0241 (SC)
    - ✘ *CIT vs. S M Aggarwa* 1 293 ITR 43 (Del)
    - ✘ *CIT vs. SMC Share Broker Ltd.* 288 ITR 345 (Del)
    - ✘ *CIT vs. Pradeep Kumar.* (2008) 303 ITR 95 (Delhi)
    - ✘ *Ayubkhan Noorkhan Pathan vs. State of Maharashtra*
  - ✘ *Amarjit Singh Bakshi (HUF) vs. ACIT* (2003) 86 ITD 13 (Delhi)

# STATEMENT U/S 132(4)

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- ✘ **Statements recorded under Section 132(4) of the Act of the Act do not by themselves constitute incriminating material.**
  - ✘ ***CIT v. Harjeev Aggarwal (2016) 290 CTR 263 (Delhi)***
  - ✘ ***Pr.CIT vs. Best Infrastructure (India) P. Ltd [2017] 397 ITR 82 (Delhi)***

# SUMMONS

- ✘ Merely because they did not appear before the AO in response to the summons, it cannot be concluded that the amount have to be added as the assessee's income.
- ✘ *Anis Ahmad & Sons. Vs. CIT (A) &Anr (2008) 297 ITR 441 (SC)*
  - ✘ *ITO vs. M/s Emperor Interant ITA No. 2038/Del/2009*
  - ✘ *Rohini Builders vs. DCIT (2001) 117 Taxman 25 (Ahd.)*
  - ✘ *M/s Essan Remedies Ltd. vs. DCIT ITA No. 256/Del/04*

# ONUS

- ✗ Section 68 was first introduced and made effective from 1st April, 1962.
- ✗ By way of Section 68, the ITD shift the rule of evidence and the **onus to prove the genuineness of transaction to the taxpayer.**
- ✗ At all times, the taxpayer would be responsible to provide details of the nature or source of money received in his/her account.
- ✗ If a taxpayer is unable to prove the nature and source of money received, the money would be taxable under the Income Tax Act.

# ONUS

- ✘ In *Kale Khan Mohammad Hanif v. CIT (50 ITR 1 SC)* the Supreme Court, in answering the question Whether the burden of proving the source of the cash credit is on the assessee observed that:
- ✘ It is well established that the onus of proving the source of a sum of money found to have been received by the assessee is on him. If he disputes liability for tax it is for him to show either that the receipt was not income or that if it was, it was exempt from taxation under the provisions of the Act. In the absence of such proof, the Income-tax Officer is entitled to treat to as taxable income.

# TO PROVE

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- ✗ Identity
- ✗ Creditworthiness
- ✗ Genuineness
  - ✗ *CIT v. Precision Finance Pvt. Ltd. (1994) 208 ITR 465 (Cal) 15*
  - ✗ *CIT v. Oasis Hospitalities Pvt. Ltd., 333 ITR 119 (Delhi)(2011)*
- ✗ Source of Source (in case of share capital)  
w.e.f. AY 2013-14

# IDENTITY

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- ✖ **PAN**
- ✖ **ITR**
- ✖ **Ration Card**
- ✖ **Aadhar**
- ✖ **Certification of Incorporation**
- ✖ **Corporate Identification No.**

# **CREDITWORTHINESS**

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- ✖ Income in ITR**
- ✖ Net worth in balance sheet**
- ✖ Bank statements**



# GENUINENESS

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- ✗ **Nature of transaction completion evidence**
- ✗ **Mode of payment**
- ✗ **Confirmation**
- ✗ **Affidavit**

# **IDENTITY ETC PROVED – NO 68**

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- ✖ ***CIT VS. Lovely Exports (P) Ltd. (2008) 299 ITR 261 (SC)***
- ✖ ***CIT & ORS vs. Five Vision Promoters Pvt. Ltd. & ORS.(2016) 380 ITR 0289 (Delhi)***
- ✖ ***CIT vs. Divine Leasing & Finance Ltd [2007] 207 CTR 38 (Del)***
- ✖ ***CIT vs. Pranav Foundation Ltd 117 DTR 0227 (Ker)***
- ✖ ***CIT vs. Nishan Indo Commerce Ltd. (2014) 101 DTR 413***
- ✖ ***Modinagar Rolls Ltd. vs. CIT 2015-TIOL-1369-ITAT-DEL***
- ✖ ***M/s AI Developer Pvt. Ltd. vs. CIT 2016-TIOL-281-ITAT-DEL***
- ✖ ***CIT vs. M/s Hi-tech Residency Pvt. Ltd. 2016-TIOL-226-ITAT-DEL***
- ✖ ***ITO vs. Neelkanth Finbuild Ltd (2015) 44 CCH 0001 Del Trib***
- ✖ ***ACIT vs. VIP Growth Fund P. Ltd (2016) 46 CCH 0231 Del Trib***
- ✖ ***CIT vs. Som Tobacco India Ltd (2014)222 Taxman 58(Mag.) All HC***
- ✖ ***CIT v. Vacmet Packaging (India) Pvt Ltd 88 CCH 065 All HC***

# **RECENT JUDGMENTS - NDR**

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- ✖ **NDR Promoter 410 ITR 379 (Del)(HC) – 17<sup>th</sup> January 2019**
- ✖ **The practice of conversion of un-accounted money through cloak of Share Capital/Premium must be subjected to careful scrutiny especially in private placement of shares. Filing primary evidence is not sufficient. The onus to establish credit worthiness of the investor companies is on the assessee. The Assessee is under legal obligation to prove the receipt of share capital/premium to the satisfaction of the AO, failure of which, would justify addition of the said amount to the income of the Assessee**

# **RECENT JUDGMENTS - NRA**

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- ✖ **PCIT vs. NRA Iron & Steel 103 TM.com 48 (SC) dated 5<sup>th</sup> March 2019**
- ✖ **Assessee filed original return of income which was assessed. Thereafter, AO sought to reopen assessee's case u/s 147**
- ✖ **AO found that assessee had received an amount through Share Capital/Premium during FY 2009-10 from companies situated at Mumbai, Kolkata, and Guwahati of Rs. 17.60 Crs.**
- ✖ **Assessee submitted that said share capital was received through normal banking channels by account payee cheques/demand drafts**

# **RECENT JUDGMENTS - NRA**

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- ✖ It subsequently, filed ITR acknowledgments to establish identity and genuineness of transaction
- ✖ AO had issued summons to representatives of said investor companies however, nobody appeared on behalf of them
- ✖ Department only received submissions through dak, which created a doubt about identity of investor companies
- ✖ From field enquiries, AO recorded that at Mumbai, out of four companies, two companies were found to be non-existent at address furnished

# **RECENT JUDGMENTS - NRA**

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- ✖ **With respect to Kolkata companies, response came through dak only, however, nobody appeared, nor did they produce their bank statements to substantiate source of funds**
- ✖ **With respect to Guwahati companies, they were non-existent at given address**
- ✖ **Thus, assessee failed to prove existence of identity of investor companies & genuineness of transaction**
- ✖ **Consequently, AO made addition**
- ✖ **CIT(A) deleted such addition on ground that assessee had filed confirmations from investor companies**

# **RECENT JUDGMENTS - NRA**

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- ✖ **ITAT confirmed order of CIT(A)**
- ✖ **High Court dismissed Revenue's appeal**
- ✖ **SC Held —Initial onus was on assessee to establish by cogent evidence genuineness of transaction, and credit-worthiness of investors u/s 68**
- ✖ **AO had conducted detailed enquiry which revealed that there was no material on record to prove, or even remotely suggest, that share application money was received from independent legal entities**
- ✖ **Survey revealed that some of investor companies were non-existent, and had no office at address mentioned by assessee**

# **RECENT JUDGMENTS - NRA**

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- ✖ **Enquiries also revealed that investor companies had filed returns for a negligible taxable income, which would show that they did not have financial capacity to invest funds in AY 2009-10, for purchase of shares at such a high premium**
- ✖ **Furthermore, none of so-called investor companies established source of funds from which high share premium was invested**
- ✖ **Thus, mere mention of IT file number of an investor was not sufficient to discharge onus u/s 68**
- ✖ **Lower appellate authorities had ignored detailed findings of AO from field enquiry and investigations carried out by his office**



# **RECENT JUDGMENTS - NRA**

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- ✘ **Lower authorities had erroneously held that merely because assessee had filed all primary evidence, onus on it stood discharged**
- ✘ **Lower appellate authorities failed to appreciate that investor companies which had filed ITR with a meagre or nil income had to explain how they had invested such huge sums of money in assessee**
- ✘ **Therefore, onus to establish credit worthiness of investor cos. was not discharged hence, entire transaction seemed bogus, and lacked credibility**
- ✘ **Practice of conversion of un-accounted money through cloak of Share Capital/Premium must be subjected to careful scrutiny**

# **RECENT JUDGMENTS - NRA**

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- ✖ **This would be particularly so in case of private placement of shares, where a higher onus was required to be placed on assessee since information was within its personal knowledge**
- ✖ **Assessee was under a legal obligation to prove receipt of share capital/premium to satisfaction of AO, failure of which, would justify addition of said amount to income of assessee**
- ✖ **Hence, Revenue's appeal allowed.**
- ✖ **Judges - UDAY UMESH LALIT & INDU MALHOTRA**

## RECENT JUDGMENTS - CHAIN HOUSE

- ✘ No reason to interfere. SLP dismissed by SC
- ✘ HC held there is no limitation on amount of premium that can be charged. AO cannot question transaction merely because he thinks investor could have managed by paying a lesser amount as share premium. It is the prerogative of the BoD to decide the premium and it is the wisdom of the shareholder whether they want to subscribe to shares at such a premium or not. S. 68 does not apply as the funds were received through banking channels and the identity, creditworthiness and genuineness of the investors was established
  - ✘ *PCIT vs. Chain House International (P) Ltd (SC) dt 18.2.2019*
  - ✘ *Judges - UDAY UMESH LALIT & INDU MALHOTRA, JJ.*

# RECENT JUDGEMENTS

**Merely presenting of documents & making payment through bank or appearance by director before AO & admitting fact of share application made is in itself not sufficient to justify the genuineness of the transaction. It is against human probability that anyone will invest and pay share premium in a company without net worth or future prospectus. All applicants with common address are being controlled remotely by one person. These applicants are all paper companies not having sufficient worth and created for providing entries of share application money or share capital or loans by way of accommodation entries [NDR Promoter 410 ITR 379 (Del) & NRA Iron & Steel 103 TM.com 48 (SC) followed] - *ITO vs. Synergy Finlease Pvt. Ltd (2019) 55 CCH 0267 DelTrib***

# RECENT JUDGEMENTS

- ✘ **NRA Iron case is distinguishable on facts & does not apply to a case where the assessee has discharged its onus to prove the identity, creditworthiness and genuineness of the share applicants by producing the PAN details, bank account statements, audited financial statements and IT acknowledgments.**
- ✘ **Once replies to notices issued u/s 133(6) were received, which were later strengthened by compliance to summons u/s 131 by directors of share subscribing cos., there is absolutely no reason to draw an adverse inference on impugned transactions.**

✘ **Baba Bhootnath Trade & Commerce Ltd vs. ITO (2019) 55 CCH 0412 KolTrib**

# RECENT JUDGEMENTS

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- ✘ **Merely because the investment was considerably large and several corporate structures were either created or came into play in routing the investment in the assessee through a Mauritius entity would not be sufficient to brand the transaction as colorable device. The assessee cannot be asked to prove the source of source (PCIT Vs. NRA Iron & Steel 103 TM.com 48 (SC) referred)**
- ✘ ***PCIT vs. Aditya Birla Telecom Ltd (Bombay High Court) (2019) 104 CCH 0246 MumHC – 26<sup>th</sup> March 2019***

# RECENT JUDGEMENTS

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- ✖ Once assessee has discharged its onus by furnishing necessary details, no addition can be made u/s 68. (PCIT Vs. NRA Iron & Steel 103 TM.com 48 (SC) not referred)
- ✖ *DCIT vs. Amba Township Pvt. Ltd (2019) 55 CCH 0360 AhdTrib – 29th March 2019*

# PENNY STOCKS

- ✘ **When Assessing officer does not find any adverse inference against the supportive documents the addition cannot be sustained**
  - + *Nishika Aggarwal Vs. ITO (Del ITAT) dt 1.1.2019*
  - + *Amarnath Goenka & ors Vs. ACIT (Del ITAT) dt 12.12.2018*
  - + *Rajesh Garg & ors Vs. ITO (Del ITAT) dt 12.12.2018*
  - + *Pr. CIT vs. Hitesh Gandhi (P&H HC) dt 16.02.2017*
  - + *Prempal Gandhi (104 ITR253) (Pun.)*
  - + *CIT vs. Smt. Pushpa Malpani (2011) 242 CTR (Raj.) 559*
  - + *Alpine Investments(620/2008)(Kol)*
  - + *Pooja Agarwal(385/2011)(Raj)*
  - + *Surya Prakash Toshniwal HUF vs. ITO (Kol ITAT)*
  - + *CIT vs. Mukesh Ratilal Marolia Bombay HC*



# **PENNY STOCKS – UDIT KALRA**

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- ✗ **Held 4,000 shares of M/s Kappac Pharma Ltd. for 19 months**
- ✗ **Cost Rs. 12/- per share in cash**
- ✗ **Sold @ Rs. 720/- per share**
- ✗ **Assessee not regular investor in shares**
- ✗ **ITAT upheld the addition**
- ✗ **HC held - It is intriguing is that the company had meagre resources and reported consistent losses. The astronomical growth of the value of company's shares naturally excited the suspicions of the Revenue. The company was even directed to be delisted from the stock exchange.**

# PENNY STOCKS – UDIT KALRA

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- ✖ The assessee's argument that he was denied the right to cross-examine the individuals whose statements led to the inquiry and ultimate disallowance of the long term capital gain claim is not relevant in the wake of findings of fact
- ✖ No cross examination was sought in any earlier proceedings
  - ✖ *Udit Kalra vs. ITO (Del. HC) ITA 220/2019 dated 8.3.2019*

# PENNY STOCKS

- ✖ It cannot be inferred that assessee has manipulated the share price merely because it moved up sharply. AO has to produce material/evidence to show that assessee/brokers did price rigging/manipulation of shares
  - ✖ *Arun Kumar vs. ACIT [ 2018-ITRV-ITAT-DEL-45 ]*
- ✖ In order to treat CG from penny stocks as bogus u/s 68, Dept has to show that there is a scam and that assessee is part of scam. The chain of events and the live link of the assessee's action giving her involvement in the scam should be established. The Dept cannot rely on alleged modus operandi & human behavior & disregard evidence produced by the assessee.
  - ✖ *Navneet Agarwal vs. ITO [ 2018-ITRV-ITAT-KOL-023 ]*

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# THANK YOU



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