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BURDEN OF PROOF IN INCOME TAX PROCEEDINGS

Background Material

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Areas covered
Burden of Proof – General Principles
Applicability of Indian Evidence Act for Income Tax Proceedings
Burden of Proof in Income Tax cases – principles
Burden of Proof in the case of deemed income under sections 68 to 69C
Burden of Proof concerning presumptions in section 132(4A) and section 292C

Meaning of burden of proof

- Obligation to prove the truth or falsehood of a fact or proposition - *Bhoormal Premchand v. Collector of Customs* AIR 1967 Mad. 39.
- Proof does not mean proof in the rigid, mathematical sense. Prof.Brett – “all exactness is fake”

Standard or degree of proof –

- Varies according to proceedings.
- Civil proceedings - preponderance of probability
- Criminal proceedings - proof beyond reasonable doubt

Rules of burden of proof:

- He who asserts must prove.
- **Exceptions –**
 - facts within the knowledge of others
 - presumption of law/fact in his favour

General principles on burden of proof

(1) On whom does the burden of proof lies?

The burden of proof is used in two distinct senses,

- (a) the burden of establishing a case (Fixed by law – rests upon the person who substantially asserts the affirmative of the case; the party who would introduce the evidence)
- (b) and the duty to adduce evidence (ambulatory or shifting) – unstable; shifting from one side to the other during trial. The burden of proof in this sense lies on the person, who would fail if no evidence were given on either side. - *Abranath v. N.E. Railway* [1885] 11 QB440, 456

(2) Burden vs Onus - Difference - *Raghavamma vs Chenchamma* – Supreme Court AIR 1964 AIR SC 136 – Burden of proof never shifts; onus of proof keeps shifting

(3) The burden of proof –

- Important in early stages of a case (or) assumes importance where no evidence at all is led by either side.
 - If parties have (a) joined issue (b) have led evidence and (c) the conflicting evidence can be weighed to determine which way the issue can be decided, burden of proof becomes academic *Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi* AIR 1960 SC 100, 105; *B. Malick v. CIT* [1968] 67 ITR 616 (All); *Kalwa Devadattam v. UOI* (1963) 49 ITR 165, 175 (SC)
- (4) When a presumption is in favour of a party, the burden of proof is on the opponent.
- (5) Burden of proof is not upon the party who denies a claim. In *G. Vasu v. Syed Yaseen Saifuddin Quadri* AIR 1987 AP 139 - not possible for the defendant to prove the negative.
- (6) If a party in possession of best evidence withholds it, the court draws an adverse inference against him, even though the onus of proof does not lie on him.
- (7) Plaintiff cannot take advantage of defendant's weakness. Plaintiff's case must stand or fall based on his evidences.

Provisions

The provisions relating to burden of proof are found in the Indian Evidence Act, 1872- from section 101-114. The Act is applicable for all judicial proceedings before any court except arbitration proceedings.

Whether provisions of Evidence Act is applicable to income tax proceedings ?

- It is held consistently by the Supreme Court of India that provisions of the Evidence Act are not applicable to the tax proceedings.
- Strict principles and provisions of the said Act are not to be applied.
- What may not be strictly speaking 'evidence' but only 'material' can also be produced and relied upon by either of the parties in income tax proceedings. (words used in section 143(3) is “material” or “material gathered”) – not just direct evidence is applicable; even circumstantial evidence is admissible – Applicability of human probability theory – Supreme Court in *Durga Prasad Moore, Sumathi Dayal, Mohanakala*. Income Tax Act is wider not only in respect of the relevancy but also in respect of proof of the material which can be taken into consideration by the authorities. *Paras Dass Munna Lal v. CIT* (1937) 5 ITR 523 at 526 (Lahore); *CIT v. Khemchand Ramdas* (1940) 8 TIR 159, 176 (Sind); *CIT v. Metal Products of India* (1984) 150 ITR 714, 717 (Punj); *Addl. CIT v. Jay Engineering Works Ltd.* (1978) 113 ITR 389, 391 (Del. HC)
- The income tax authorities are not strictly bound by the rigours of technical rules of evidence, but they are not prevented from invoking the principles contained in Evidence Act, whenever an occasion demands - *Chuharmal v. CIT* (1988) 172 ITR 250 (SC). But material gathered in the assessment proceedings of one person is not legal evidence in the assessment of another person - *N. S. Choodamani v. CIT* (1959) 35 ITR 676 (Ker).
- But the ITO is not entitled to make a pure guess and make the assessment without reference to any evidence or any material at all—*Dhakeswari Cotton Mills Ltd. v. CIT* [1954] 26 ITR 775 (SC).
- It is necessary that principles of natural justice should not be violated and the assessee should be permitted to meet the case as revealed by the inquiries—*Gopinath Naik v. CIT* [1936] 4 ITR 1 (All.) Evidence brought on record without the knowledge of the assessee and used against him

without giving him an opportunity to rebut it offends the principle of natural justice *MO Thomakutty v. CIT (1958) 34 ITR 501 (Ker)*

Issue: Though the courts have consistently held that strict application of Evidence Act is not to be construed for income tax proceedings, yet section 136 of Income Tax Act and section 245L of Income Tax Act states that proceedings before Assessing Officer and proceedings before Settlement Commission are “judicial proceeding” within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code. Also section 136 further states that the income tax authority shall be deemed to be a civil court for the purpose of section 195 of Criminal Procedure Code. And section 1 of the Evidence Act, while dealing with the applicability of the Act states that evidence act is applicable for all judicial proceedings. So can we say that the provisions of the Evidence Act are applicable and must be followed mandatorily? Also section 131 of the Income Tax Act gives the powers of the court under Civil Procedure Code for discovery, inspection, enforcing attendance of any person and examining him on oath, compelling production of books of accounts and other documents and issuing commissions

Burden of proof in income tax cases

- (1) The primary onus of proof rests on the income-tax authorities, to show that income which they seek to tax is income liable to be taxed by the statute - *Kalwa Devadatham v. Union of India* [1958] 33 ITR 56 (SC). It is for the revenue to establish that a particular receipt is an income liable to tax - *CIT v. Chari & Chari Ltd.* [1965] 57 ITR 400, 407 (SC). However, the burden of proof in such cases is not as heavy as in criminal proceedings. The burden is even less than in ordinary civil proceedings and is discharged by merely showing that the assessee is in receipt of income - *CIT v. Vlkhora Estate Zamindaries Ltd.* [1971] 82 ITR 103 (Cal.) and *CIT v. Maharaja Visweswar Singh* [1935] 3 ITR 216. The assessment carries with it a presumption of validity and legality and there is no burden on the income-tax authorities to show by positive evidence that the accounts are unreliable or that the figure at which he assesses the tax is correct - Lahore High Court in the case of *Ganga Ram Balmokand v. CIT* [1937] 5 ITR 464:

- (2) The ITO's finding could not be discharged, unless, of course, it is altogether capricious and injudicious - *Lalchand Bhagat Ambica Ram v. CIT* [1959] 37 ITR 288 (SC).
- (3) If an assessee receives a certain sum of money in the relevant accounting year or certain cash is found credited in his account, it is for him to explain from where he got the money. The burden lies on the assessee to explain to the income-tax authorities the true nature and source of these receipts *Govindarajulu Mudaliar v. CIT* [1958] 34 ITR 807 (SC) and *Sreelekha Banerjee v. CIT* [1963] 49 ITR 112 (SC). Burden of proof is on the taxpayer, as he alone would be able to reveal the facts of his financial circumstances (Evidence Act – matters within the special knowledge of the party).
- (4) Initial onus is on the Department to prove each item, which is liable to be taxed as revenue receipt, but the extent of the burden always depends upon the nature of the income and the circumstances in which it was made. Once the assessee gives an explanation which in the opinion of the Income Tax Department is not true and which could not reasonably be true, the burden is on him to prove that what he has stated is true and whatever burden is on the department stands shifted thereafter - *Juggilal Kamlapat v. CIT* (1964) 52 ITR 811, 822(All).
- (5) The Supreme Court modified the decisions of *Govindaraju Mudaliar* and *Sreelekha Banerjee* in the case of *Parimisetti Seetharamamma v. CIT* (1965) 57 ITR 532, 537 (SC). In this case it was laid down that the burden of proof held in the earlier two cases to be upon the assessee to prove the source, nature and character of the credit would not apply to a case, where the source of the receipt is disclosed by the assessee and there is no dispute about the truth of that disclosure. In such event, the income tax authorities would not be entitled to raise an inference that the receipt is assessable to Income- tax on the ground that the assessee had failed to lead all the evidence in support of his contention that it is not within taxing provision. (*Ganesh Prasad v. CIT* (1968) 67 ITR 344, 348 (All)).
- (6) Burden of proof has relevance when the issue is contentious between the parties. When a party admits a particular fact, burden of proof loses its relevance as held in *CIT v. Sangmeshwara Associates* [2012] 345 ITR 396 (Kar).

- (7) Burden of proof that an income is exempt is on the assessee. *CIT v. Ramakrishna Deo* [1959] 35 ITR 312 (SC) *Udhavdas Kewalram v. CIT* [1967] 66 ITR 462 (SC) *CIT v. Venkataswamy Naidu* [1956] 29 ITR 529 (SC)
- (8) The burden to prove the genuineness of expenditure claimed as a deduction or an allowance claimed is on the assessee. *Laxmi Ratan Cotton Mills Co. Ltd. v. CIT* [1967] 63 ITR 755 (SC)
- (9) The burden to prove the claim of business loss to be set off is on the assessee - *Jamna Das Rameshwar Das v. CIT* [1952] 21 ITR 109 (Delhi),
- (10) The revenue cannot be called upon to adduce contrary evidence to draw adverse inference against assessee upon whom the burden of proof lies, in the event of assessee's failure to adduce satisfactory evidence. *Chowkchand Balabux v. CIT* [1961] 41 ITR 465 (Gau).

Section 68

- **Issues in Cash credits**
- **Issues in Share application money, share premium, share capital.**

Cash credits

Burden of proof

- Initial burden of proof lies on the assessee to explain the nature and source of credit by producing evidence in support of the identity by giving name and address of the creditor, his creditworthiness and genuineness of the transaction.
- Documents like confirmation letter from the creditor, income tax assessment details, bank accounts details and other relevant evidence to prove the genuineness of the credit may be produced. The evidence at this stage should be robust. When this initial burden is discharged, the burden shifts to the Assessing Officer. For making an addition, the Assessing Officer must rebut the evidence given by assessee by bringing positive materials. Such evidences gathered by the Assessing Officer must be brought to the assessee's knowledge for his rebuttal. The assessee can seek cross-examination of the witnesses and creditors. The assessee can also request the Assessing Officer to summon the creditor for taking the evidence by the assessee.

- The assessee can be asked to prove the source of the credit but not the source of the source as held in the case of *S. Hastimal v. CIT* [1963] 49 ITR 273 (Mad).
- Merely because summons were not served upon the creditors, addition u/s.68 cannot be made. Except for issuing notices u/s 131, the Assessing Officer did not pursue the enquiry further. Therefore, addition deleted and held that the onus on the assessee had been discharged *CIT v. Orissa Corp. (P.) Ltd.* 159 ITR 78 (SC).

Explanation filed by the assessee:

- Explanation filed by the assessee should be based on evidences – not fantastic or fanciful.– *Ravinder Pal Singh v CIT* 2014.367.ITR,65(PH).
- When a plausible explanation is furnished, it cannot be rejected by the Assessing Officer light heartedly without enquiry. It also should not be rejected arbitrarily on suspicion - *Mehta Parikh and Co v. CIT* [1956] 30 ITR 181 (SC) and *Lalchand Bhagat Ambika Ram v. CIT* [1959]37 ITR 288 (SC). Rejection of explanation should be based on positive evidence. The opinion of the Assessing Officer is required to be formed objectively with reference to the material available on record.

Books of accounts and section 68

- Section 68 can be invoked only if books of account are maintained by the assessee. The existence of books of account is a condition precedent.
- The Assessing Officer before invoking section 68 must be *satisfied* that there are books of account maintained by the assessee and the cash credit is recorded in the said books of account.
- Books means books of the assessee – not any third party - A partnership firm is an assessable entity distinct from the individual partner. The books of account of a partnership cannot be treated as those of the individual partner - *Anand Ram Raitani v. CIT* [1997] 223 ITR 544 (Gau.).
- *Arunkumar J. Muchhala v. CIT (Bombay HC)* – “It is incumbent on every assessee doing business to maintain proper books of account. It may be in any form. If the assessee has not done so, he cannot be allowed to take advantage of his own wrong.” Addition u/s.68 sustained, even though assessee did not maintain books!

Issue No.1: Is it mandatory to maintain books? no – not mandatory for all assesses. And for non-maintenance of books, a separate penalty can be levied. But for addition u/s.68, it is mandatory that books must be maintained.

It is a different case where the assessee accepts that he has maintained books but had not produced the books. In such cases, additions may be sustainable - ref - *Sudhir Kumar Sharma (HUF) v.CIT* [2014] 224 Taxmann 178. Incidentally, this case was referred to by the Hon'ble Bombay High Court in Arun Kumar's case while holding that the assessee cannot take advantage of his own wrong. In Arun Kumar's case, the court held that the assessee is taking the plea of non-maintenance of books for the first time and in all previous occasions, the assessee has only sought time to prepare the books.

Seeking time to prepare books and non-production of books that were maintained are different – The facts of Sudhir Kumar Sharma's case and Arun Kumar's case are entirely different.

Issue No.2: Section 68 uses the word “books” whereas sections 69 to 69B uses the word “books of account”. However section 2(12) defines “books or books of accounts” includes ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device.

Is there any difference between “books” and “books of accounts”?

S.J.Agarwal's case (Pune Tribunal - 2008 114 ITD 27 Pune) may be referred for the issue on “books of accounts” and “accounts” in the context of penalty being levied u/s.271B.

Interestingly, in *Haji Nazir Hussain v. ITO* [2004] 91 ITD 42 (Delhi), it was held that where cash credits are recorded in the rough cash book of the assessee and there is no proper explanation, addition u/s.section 68 is sustainable.

- Where books of account are rejected in their entirety, the Assessing Officer cannot rely upon any entry in those books of account for making an addition u/s.68 *CIT v. Dulla Ram, Labour Contractor* [2014] 42 taxmann.com 349/223 Taxman 24 (Mag.)(Punj. & Har.). But Supreme Court in *Kale Khan Mohammad Hanif - v. CIT* [1963] 50 ITR 1 (SC) on the issue whether it would amount to double taxation if estimation of

income is made and also addition u/s.68 is made, held that there is no double taxation when estimate is made on the disclosed source of business but 68 addition is made on the undisclosed source of income. In *Devi Prasad Vishwanath Prasad* [1969] 72 ITR 194 (SC) case the Supreme Court held that whether in a given case the Income-tax Officer may tax the cash credit entered in the books of account of the business, and at the same time estimate the profit must, however, depend upon the facts of each case.

Issue

On one side

- Can there be part rejection of books ? only for the purpose of estimation of income?
- Whether information in books vanishes in to thin air merely because books are rejected? Eg. Cash loan shown in books, can section 269SS be invoked?

On the other side

- When books are rejected, from where will the Assessing Officer consider the cash credit? When books are rejected, can we mean that the books are deemed to be no longer in existence, and there is no question of explaining the credit from such rejected books?
- One of the purposes of books of accounts is for computing the income. If the books are rejected, it means, the Assessing Officer does not believe in the entries in the book and the income computed by the assessee relying on the books is wrong. Then again, how can the Assessing Officer rely on the same books of account that was rejected and ask the assessee to explain an entry? Can the Assessing Officer approbate and reprobate at the same time by accepting what suits him and rejecting what does not suit him? Should not the rejection of books be holistic?

Capacity of lender.

- Assessee should prove the capacity of the creditors to advance the money
- *C. Kant & Co. v. CIT* [1980] 126 ITR 63 (Cal.).
(*Contra*)
- The assessee is not supposed to know the capacity of the money-lender or the cash creditor. It is within the exclusive domain of the creditor. It is

for that specific purpose that section 131 of the Act has been introduced so that in case of any suspicion, the ITO or the authorities concerned may issue summons for verifying the transaction. In case of discrepancy, the onus shifts to assessee for proving the transactions.— *ACIT v. Hanuman Agarwal* [1985] 151 ITR 150 (Pat.).

- When the cash creditor is an income-tax assessee, it cannot be said that he is not a man of means - *Kamal Motors v. CIT* [2003] 131 Taxman 155 (Raj.).
- Source of source need not be proved- *Nemi Chand Kothari v. CIT* [2004] 136 Taxman 213 (Gau.).
- Assessee can furnish alternative explanation and if either of the explanation is accepted, no addition can be made *ACIT v. Ghai Lime Stone Co.* [1983] 144 ITR 140 (MP); *Dhansiram Agarwalla v. CIT* [1995] 81 Taxman 1 (Gau.).
- Identity of creditors is not relevant for cheque transactions - *ACIT v. Bahri Bros. (P.) Ltd.* [1985] 154 ITR 244(Pat.)
- Each entry must be separately explained by assessee - *CIT v. R.S. Rathore* [1995] 212 ITR 390 (Raj.).
- Mere mention of income-tax file number of creditor will not suffice; no confirmation letters were produced - genuineness of the cash credit cannot be said to have been proved by the assessee - *CIT v. Korlay Trading Co. Ltd.* [1998] 232 ITR 820 (Cal.).
- Assessee cannot be asked to explain whether credit has suffered tax - *CIT v. Metachem Industries* [2000] 245 ITR 160 (MP).
- Transaction by cheques may not be sacrosanct - *Nemi Chand Kothari v. CIT* [2003] 264 ITR 254 (Gau.).
- Deposits from tenants – Where cash credit is a deposit from tenant, it will not be necessary for the assessee to prove the capacity of the tenant to make the deposit/advance - *CIT v. Nevendram Ahuja* [2005] 197 CTR (MP) 462.

- the Assessing Officer would not be justified if he merely directed the inspector to verify the statements, and on the basis of his report, straightaway arrive at the conclusion that the transactions were not genuine without giving further opportunity to the assessee to explain the alleged information disclosed by the Inspector to the Assessing Officer - *S.K. Bothra & Sons, HUF v. ITO* [2011] 203 Taxman 436/15 taxmann.com 298 (Kol.).
- Cash receipts found during search – Assessee explained that said cash receipts were realization of sales effected in earlier years by erstwhile firm in which he was partner - confirmations were filed – summons not served / parties denied any relationship with assessee / did not respond to summons – Court held that Assessing Officer was justified in treating said receipts as unexplained and making addition under section 68 - *Vijay Kumar Talwar v. CIT* [2011] 196 Taxman 136/[2010] 8 taxmann.com 264 (SC).
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- Case of name lending – addition sustained - assessee had shown certain trade creditors without any significant transactions of purchases - bank accounts of said creditors were opened and handled by employee of assessee-company at branch where assessee had its own account and loan applications submitted for all these creditors were processed by said employee while these creditors had not shown said loans in their income-tax returns – court held that it is a case of name lending and additions sustained - *CIT v. Karnataka Planters Coffee Curing Work (P.) Ltd.* [2016] 74 taxmann.com 256/243 Taxman 21 (SC).
- Recent judgment of Supreme Court - *Basir Ahmed Sisodiya v ITO* decided on 24.04.2020 – assessee did not prove the creditors during assessment proceedings – additions made u/s.68 and assessee's appeal is pending before Supreme Court – during penalty proceedings, assessee proved the creditors and penalty deleted – based on this fact, Supreme Court deleted the quantum addition – this is a case where quantum additions were deleted based on penalty proceedings – normally it is the other way round – welcome judgment of the Supreme Court

Share capital

Where share application money / share capital / share premium is credited in the books of company

Position with effect from A.Y.2013

- Section 68 of the Act has been amended by inserting two provisos so as to provide that the nature and source of any sum credited, as share application money, share capital, share premium etc., in the books of a closely held company shall be treated as explained only if the source of funds is also explained by the assessee company in the hands of the resident shareholder and such explanation in the opinion of the Assessing Officer is found to be satisfactory. However the amendment shall not apply where the share capital, share premium or share application money is received from Venture Capital Fund or Venture Capital Company registered with SEBI.
- This amendment is prospective in nature – Bombay High Court in Gagandeep Infrastructure Private Limited decided on 02.04.2018

Issue: For company – investment by a person in shares – the person admits before Assessing Officer that investment is made by him - but unable to prove the nature and source of his investment - No issue in adding the income u/s.68 in company's hands (as per amended section). But can the same amount be added as unexplained investment in investor's hands by his Assessing Officer? Addition of same income twice – in the hands of company as well as the investor.

Burden of Proof – pre-amendment

Decisions in favour of assessee –

- Initial onus on assessee - the assessee to prove identity, genuineness, and creditworthiness - furnishing address and permanent account number (PAN) -identity is established - subscriptions received through banking channels as prescribed under SEBI regulations - creditworthiness could not be doubted without some investigation on the part of the Assessing Officer - when there is nothing to suggest that the amount belonged to the company, addition cannot be made
- initial burden of the assessee stands discharged by proving the identity, genuineness and creditworthiness–investigation by Assessing Officer to controvert the material – burden shifts – assessee to provide evidence / materials – no need to prove source of source –Assessing Officer merely by issuing notice and the creditors not appearing / responding is not a

case for the department to make addition u/s.68 – the Assessing Officer should have pursued the matter further - *ACIT v. Venkateshwar Ispat P. Ltd.* [2009] 319 ITR 393 (Chhattisgarh) ; *CIT v. Orbital Communication (P) Ltd.* [2010] 327 ITR 560 (Del.) ; *CIT v. Samir Bio Tech P. Ltd.* [2010] 325 ITR 294 (Del.) .

- The SLP of the department in the case of Lovely Exports has been dismissed by Supreme Court 319 ITR (St) 5 - held that if the share application money is received by the assessee-company from alleged bogus shareholders, whose names are given to the Assessing Officer, then the Department is free to proceed to reopen their individual assessments in accordance with law. Also refer Gagandeep Infrastructure case - in the case of bogus subscribers, department to make additions in the hands of the subscribers
- The Delhi High Court in the case of *CIT v. Value Capital Services P. Ltd* [2008] 307 ITR 334 (Del.) held that department must show that investment made by subscribers actually emanated from coffers of assessee to be treated as undisclosed income of assessee.
- Where the assessee files the return of income of the share applicants and their loan confirmations, the burden of the assessee stands discharged – *CIT v. Jay Dee Securities and Finance Ltd.* [2013] 350 ITR 220 (All.).

Decisions in favour of Revenue

- where information was obtained from investigation wing about accommodation entry providers and their *modus operandi*, and the list contained the name of the assessee to whom entry providers had provided entries, and further summons to such persons were not responded to, in such a case the affidavits filed by assessee after 2 years from entry providers to the effect that transactions were genuine, are of no evidentiary value. There is no duty on assessing officer to prove that monies emanated from coffers of assessee – *CIT v. Nova Promoters and Finlease (P) Ltd.* 342 ITR 169 (Del.).

- parties did not respond to summons issued u/s.131 - duty of the assessee to adduce evidence that source of investment is explained properly and not merely resting on evidences like PAN, RoC details etc. Private companies are well aware of the subscribers of capital and shares are issued on private placement basis or even on request basis – not a stranger to the transactions – access to vital information like bank accounts would be there – case has to be looked into as a whole – circumstantial evidence, human probability theory must be seen – shifting of onus does not mean that once certain facts are provided to Assessing Officer, the assessee's duty is over ; where the Assessing Officer in spite of his best efforts unable to contact the share applicants, the onus shifts back to the assessee – any failure on the part of the assessee at this stage would result in drawing an adverse inference against the assessee. Overall, if there are mechanisms for evading taxes, then addition u/s.68 is sustained. *CIT v. NR Portfolio P ltd – (2013) 214 taxmann 408 (Del.)*
- Cases where companies exist only on paper - *Navodaya castles –(2014) 50 taxmann.com 110 (Del.)*
- False entries and forging the bank statement – just prior to the investment of cheques to assessee company, cash was deposited in to the account of the investors/subscribers. SLP by assessee dismissed - *CIT vs Tarika Properties Investment P Ltd - (2013) 40 taxmann.com 525 (Del.)*
- Just prior to the investment of cheques to assessee company, cash was deposited in to the account of the investors/subscribers. SLP by assessee dismissed – blank share application forms - no allotment number date or shares or ledger folio number etc – Assessee's SLP dismissed. – money laundering – case to be seen in its entirety and initial onus will not come to the rescue of the assessee. *Rajmandir Estates P Ltd – 2016 70 taxmann.com 124 (Cal.)*
- Statement from entry provider u/s.132(4) alone is used to make addition. No other corroborative evidence -No opportunity for assessee to do cross examination or the copy of statement being provided to the assessee – such would be against the principles of natural justice – assessee has

discharged his burden – *PCIT v. Best Infrastructure India P Ltd – (2017) 84 taxmann.com 287 (Del.)*

Inadequate enquiry

- Assessment completed in a hurry without verifying the details produced by the assessee – cannot be said that the assessee has failed to discharge the onus - Assessee cannot be treated as a beneficiary of bogus capital without independent enquiry. *CIT v. Shyam Sel Ltd – (2017) 80 taxmann 241 (Cal.)*
- By order u/s.263, the **commissioner directed the Assessing Officer to conduct proper enquiry** in respect of share application money. It was upheld by High Court and SC dismissed SLP.

Section 69, 69A, 69B

Burden of proof u/s.69:

- Section 69 opens with the words – “*Where in the financial year immediately preceding the assessment year, the assessee has made investments which are not recorded in the books...*”
- Therefore, in the first instance it is incumbent upon the authority to establish that (a) there were investments made by the assessee. (b) that such investments were not recorded in the books of account maintained by the assessee; and that such (c) investments had been made in the financial year immediately preceding the assessment year in question. These are the prerequisites for invoking section 69.
- It is only after satisfying the existence of these prerequisites that the assessee can be called upon to adduce evidence regarding the nature and explain the source of investments - *Ushakant N. Patel v. CIT [2006] 282 ITR 553 (Guj.)*; *CIT v. Smt. V. Prema [2007] 296 ITR 151 (Mad.)*

Burden of proof u/s.69A:

- For invoking the section, Assessing Officer (a) must record a finding / establish that the assessee is the owner of the money , bullion, jewellery (b) not recorded in the books maintained by the assessee. (c) investments had been made in the financial year immediately preceding the assessment year in question.

- Thereafter, the burden of proof lies upon the assessee to explain the nature and source of money / bullion / jewellery

Burden of proof u/s 69B:

- Similarly, for 69B, the Assessing Officer must establish that (a) the assessee is an owner of money bullion jewellery/ assessee has made investment and the (b) amount expended exceeds the amount recorded in the books maintained –
- The finding of the Assessing Officer should rest on evidence and not on mere opinion. Section 69B does not permit an inference relying on the circumstances surrounding the transaction that the purchaser must have paid more consideration than what is recorded in the books. If such an approach is adopted, it would bring a notional or fictional income to tax. This was so decided in the case of *CIT v. Dinesh Jain HUF 352 ITR 629 (Del)*.
- Once the Assessing Officer establishes the initial prerequisites, then the the assessee needs to prove the nature and source of investment / money / bullion / jewellery.

Burden of proof is only on the assessee and the Word 'assessee' does not include legal heirs.

- In *C. Selvakumar v. ITO* [2006] 6 SOT 646 (Cochin), it was held that the word 'assessee' used in sections 69 and 69A contemplates original assessee and not legal heirs. In *Smt. Rajabai B. Kadam v. Asstt. CIT* [2002] 83 ITD 229 (Pune), it was held that the deceased alone could explain and discharge his burden by referring to certain material or evidence.
- Therefore, it cannot be held that after his death, the burden shifted to the legal heir of the deceased. All these circumstances are within the exclusive knowledge of the deceased and the legal heirs could not be forced to explain such things which were not known to them.

Burden of proof u/s.69C

- For Section 69C, there is no requirement of maintenance of books. If the Assessing Officer discovers expenditure that is incurred by the assessee,

and the assessee offers no explanation about the nature and source, then such expenditure is to be added as unexplained expenditure.

- The section takes within its sweep not only expenditure reflected in the books of account which remains unproved, but also items of expenditure discovered in the course of search against which the assessee offers no reasonable explanation – *Srinivasa Ferro Alloys Limited. (2014) 51 taxmann.com 512 (AP)*
- **Where source of expenditure is proved:** In *CIT v. Lakshmi Hospitals [2012] 347 ITR 367 (Ker)*, it was found in the course of search that the assessee had collected fees which had not been accounted for in the books. The assessee explained that the amounts so collected were paid to the doctors in whose names the collection was made. Disregarding this claim, the Assessing Officer added the fees not accounted for as unexplained expenditure u/s 69C without making any enquiry with the doctors. The High Court deleted the addition observing that when a receipt is not accounted for, obviously payment also could not be accounted for by the assessee. It may so happen that when unaccounted income is disclosed in the course of search, the assessee may claim expenditure against the same and if proved, department is bound to accept it.
- **Section 69C requires source of expenditure, not authenticity:** In the course of search, no evidence was found regarding undisclosed income.- audit report u/s. 142(2A) made a mention that some expenditure was not authenticated by vouchers – addition u/s.69C was made, held that the requirement of section 69C is the source of the expenditure but not its authenticity. It was further held that when expenditure is found recorded in the books, merely because it is not authenticated by proper vouchers no addition can be made. *CIT v. Radhika Creation (2011) 10 taxmann.com 138 (Del)*
- **No addition u/s 69B because seller declared higher price:** No addition can be made where for a property sold, the seller has declared higher price before the Settlement Commission. Seller's admission cannot bind the buyer. *CIT v. Vineeta Gupta [2014] 364 ITR 440 (Del)*.

Burden of proof concerning search and seizure operations

Presumption u/s.132(4A) and 292C

- During search if any books of account, other documents , money bullion jewellery is found in the possession or control of any person, a presumption is raised.
- The presumption under 132 (4A) covers three situations-(i) the document, i.e., that the page belongs to the assessee (ii) its contents are true and (iii) it is in the handwriting of the assessee.
- The Supreme Court in *P.R. Metrani v. CIT* (2006) 287 ITR 209 (SC) held that this presumption is rebuttable.
- Further in this case it has also been held that the presumption under Section 132(4A) would not be available for the purposes of framing a regular assessment.
- This view that the presumption will not be available to other proceedings of the Act is overturned with the insertion of 292C with retrospective effect from 01.10.1975.
- 'Possession' and 'control' are the crucial words used in section 132(4A) and section 292C. The words are used disjunctively. The language used in these provisions denotes that possession and control of assets or books found in the course of search or survey need not be with the same person. There may be a case where possession is with one person while the searched party is another and the material may belong to him and he has control over the material. Consequently, a presumption cannot arise against the other person to assess him merely because he is in possession of the material or is a custodian of the material. In respect of assets, the party owning them would be assessed but not the party who possesses them. In *CIT v. K. K. Abdul Kareem* [1996] 88 Taxman 323 (Ker), it was held that a courier cannot be assessed merely because he was carrying cash on behalf of the owner of such cash.

Section 110 of Evidence Act and section 69A:

- Section 110 of the Law of Evidence (The Indian Evidence Act, 1872) reads as follows :-
- "*110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.*"
- In *Chuharmal v. CIT* (1988) 172 ITR 250 (SC), wrist watches were seized from the bedroom of the assessee. Department contended that the

assessee was the owner of the watches which was denied by the assessee. In this case, the Supreme Court relying upon Section 110 of the Evidence Act came to the conclusion that the tests laid down in Section 110 that when the question is whether any person is the owner of anything of which he is shown to be in possession, the onus of proving that he is not the owner is on the person who affirms that he is not the owner. The Supreme Court applied the provisions of the Evidence Act to Section 69 and came to the conclusion that the onus to prove is on the assessee based on the criteria laid down in the Evidence Act. Also ref *CIT v. K T.M.S. Mohamood* (1997) 228 ITR 113 (Mad)

- **Per contra**, in the case of *Mangilal Agarwal v. ACIT* [2007] 163 taxmann 399 (Raj), it was held that section 69A can be invoked only if Department proves that assessee is the owner of the article and not merely because the assessee is in possession. When a third party claims to be the owner of some gold article, merely because he fails to explain the source of acquisition of the asset, no addition can be made in the hands of the assessee.
- **Ingredients of section 69 to be satisfied-Presumption u/s 132(4A) alone will not suffice:** - *Ushakant N. Patel v. CIT* [2006] 282 ITR 553 (Guj) – ownership cannot be presumed merely by relying on section 132(4A). - the ingredients stipulated u/s 69 of the Act have to be satisfied before making any addition.
- *Miss Rose Ben decision* (1998) 65 ITD 57– 110 Evidence vs 132(4A) – Bombay High Court held as follows: Section 110 evidence act gives effect to the principle that possession is prima facie evidence of complete title (common law jurisprudence that possession is 9 points of the law) and anyone who intends to oust the possessor must establish the right to do so. This section, to our mind, appears to operate in a different situation, that is, where contenting claims are made about the title. It comes into picture when another person questions the ownership title of a person who is in possession of the property in question. To bring out the import of section 110 of the Indian Evidence Act, it may be contrasted with section 132(4A), which also contains a similar presumption. The presumption contained in section 132(4A) is only for the purpose of

seizure of valuables in a search operation and the provisions of section 132(4A) have no application for assessment purposes. This section casts a burden on the person in possession of proving that he is not the owner. In contrast, section 110 of the Indian Evidence Act comes into play only when another person disputes the title of the person who is in possession.

- **No addition solely on the basis of presumption:** During the time of search some notings were found. In *CIT v. D. K. Gupta* [2009] 308 ITR 230 (Del), it was held that no presumption can be raised particularly when the assessee has offered his explanation along with an affidavit duly supported by documents and evidence. The Court held that the burden had shifted and now it was for the revenue to prove that the explanation filed by assessee was incorrect. It was further held that no assessment could be made merely on presumption. The presumption had to be backed by direct and corroborative evidence that the notings had materialised into income.

Notings on loose papers-Presumption u/s 132(4A):

- Notings in loose sheets can be the basis of assessment by virtue of the presumption u/s 132(4A).- onus is on the assessee to satisfactorily explain the contents of the documents - when a person has special knowledge of certain facts, he has to explain those facts.- *Kulwant Singh v. DCIT* [2012] 20 taxmann.com 276 (Delhi-T)
- Per contra in *PCIT v. Ajanta Footcare (India) (P.) Ltd.* [2017] 84 taxmann. com 109 (Cal), it was held that even without proper explanation from the assessee, presumption u/s 292C would not be available unless an examination of the information in the loose papers provides a link to the assessee's undisclosed income.
- **Presumption not to apply to entries in dumb document:** Mere possession of the document is not enough to create a presumption against the assessee - contents of the document must be proved against the assessee *CIT v. S.M. Aggarwal* [2007] 162 Taxman 3 (Del),
- **The presumption u/s 292C cannot do away with the onus of the assessee to prove the nature and source of receipts evidenced by the document.** The assessee is obliged to show the nature and source of receipt so as to avoid addition u/s.68 and 69A.- no contradiction between section 292C and sections 68and 69A. – both the provisions are complementary. *Alliance Hotels* 142 ITD 270 (Mum)

- **“Found” as appearing in section 69 and presumption u/s.292C – Harmonious reading – the Assessing Officer must first give a finding that the assessee is the owner of the goods before making an addition u/s.69. Section 69 is strongly worded that the Assessing Officer must “find” the assessee to be owner of investments/money jeweller etc. – also section 292C is only a ‘may presume’ section . So, its not mandatory that the Court must presume the facts**

Burden of proof concerning additions made based on loose sheets discovered during search / survey:

ACIT v. Dr Kamala Prasad Singh 3 ITR (T) 533 (Pat-T)

- Necessary for Assessing Officer to establish the handwriting of the person as appearing on the loose sheet / diary. Casual observation that handwriting is similar to searched party would not suffice.
 - Place where loose sheets recovered is relevant.
 - Assessing Officer to bring on record the evidence as to the nature of transaction and association of the persons mentioned in diary with the transaction. In the absence of such information, there would be no basis to presume that appellant was necessarily the owner of the note book.
 - Presumption u/s.132(4A) cannot be extended beyond the legitimate field and assessment cannot be made purely on the basis of presumption
 - Date and time period mentioned in the notings is crucial. Undated entries not referable to any previous year cannot be the basis for framing the assessment.
 - Because of these deficiencies, the document is a dumb document.
- **Correlation of noting with regular books** –Notings, if correlated with regular books, is not a dumb document- evidentiary value cannot be ignored. If such correlation can be made, then onus is on the assessee to bring out material to rebut and contradict the correctness of the entries in the loose sheet. *Mahavir Wollen Mills* [2000].245 ITR 297 (Del.)
 - **Coded notings:** No addition on the basis of coded entry in loose sheet/diary, without corroborating evidence –48 made as 48lac - Adding

- zeros to the figures noted in loose sheet without any basis is unjustified – *CIT v. Girish Chaudhry* (2007) 163 taxmann 608 (Del.);
- **Estimation of sales on the basis of notings** – estimation by Assessing Officer on the sale made based on the notings of loose slips without substantiating that the assessee had actually effected sales – no addition can be made. *CIT v. Atam Valves P Ltd* [2009] 332 ITR 468 (P&H) ; *CIT v. Lalchand Jaiswal* (2013) 40 taxmann.372 (All.)
 - **Dumb Document – no addition to be made u/s.68,69,69A, B, C**
 - *Bansal Strip P Ltd* – Delhi Bench (2006). 99 ITD 177 -. the burden to establish that income not admitted by assessee is chargeable to tax is on the Assessing Officer. Deeming provisions of sections 68, 69, 69A to 69D were introduced to reduce the rigours of the burden that lies upon the assessee. As these are deeming provisions, the conditions precedents for invoking such provisions are required to be strictly construed. - the Assessing Officer cannot apply the deeming provisions based on surmises and conjectures. The facts and circumstances giving rise to the presumption have to be established with reasonable certainty before invoking the section. For the purpose of resorting to deeming provisions, dumb documents or documents with no certainty have no evidentiary value
 - **No presumption of year of transactions** – seized paper mentioned only date and month and not year – no basis for adding it in for a particular year – *Amar Natvarlal Shah* (1997) - 60 ITD 560 (Ahm.)
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References:

1. Burden of proof in Proceedings under Income tax Act by DC Agarwal [2020] 113 taxmann.com 301 (Article)
2. Section 68 of Income Tax Act and the role of Section 106 of Evidence Act, 1872 – Standard and burden of proof by Pradeep Aggarwal, Hemant O Sharma, Gopal C Mehta
3. Why Is The Evidence Act So Critical For Income-tax Proceedings by Firoze B. Andhyarujina
4. Treatise on the Rule of Evidence as applicable to Direct Tax Laws by Dr.K.Shivaram
5. Search Assessments Law Practice and Concepts by G.C.Das and K.Chandras
6. Misplaced burden of proof by V.Prabhakar [1997] 92 TAXMAN 357 (ART)
7. Burden of proof by Ved Prakash Elhence [1991] 56 TAXMANN 106 (ART)
8. Cash Credits - Discharge of Burden of Proof by Assessee by V.Pattabhiraman [2013] 39 taxmann.com 93 (Article)
9. Standard of proof under the Income-tax Act by K.D.Gaur [1981] 05 TAXMANN 101(ART)

10. Burden of proof and production of evidence in taxation proceedings by K.C.Patel [1983] 14 TAXMAN 79 (ART)
11. Anti-abuse sections – 68, 69 & Benami Law by Jagdish T Punjabi