

DISCUSSION ON ADDITIONS MADE IN THE ASSESSMENTS DUE TO DEMONETISATION

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DEMONETISATION

- On 08.11.2016, on the recommendations of Central Board of Reserve Bank, the Government of India demonetised Rs.500 and Rs.1,000 notes in circulation with effect from 09.11.2016.
- The Demonetisation is in exercise of powers conferred on Central Government u/s. 26 (2) of Reserve Bank of India, 1934.

NOTIFICATION DATED 08.11.2016

- A series of notifications were issued by Department of Economic Affairs, Ministry of Finance, Government of India from 08.11.2016 to 18.11.2016.
- Notification No. S.O 3407 (E) dated 08.11.2016 is the basic notification. Under this notification -
 - The currency notes Rs.500 / Rs.1000 shall ceased to be legal tender.

NOTIFICATION DATED 08.11.2016

- Various clauses of this notification deal with the procedure to be followed by a banking company with regard to demonetisation.
- It dealt with the procedure for exchange of demonetised notes over the counter
- It dealt with the procedure with regard to operations of ATMs and cash deposit machines after demonetisation

NOTIFICATION DATED 08.11.2016

- Later further notifications were issued prescribing the procedures to be followed by Banks with respect to receipt of demonetised notes and deposit of the same with Reserve Bank of India.

The Specified Bank Notes (Cessation of Liabilities) Act, 2017

- It may be noted that in none of these notifications there were any prohibitions stating that a person is prohibited from holding or transacting in demonetised notes.
- The Parliament passed an Act called “The Specified Bank Notes (Cessation of Liabilities) Act, 2017 (SBN Act for Short)

The Specified Bank Notes (Cessation of Liabilities) Act, 2017

- Under this Act, the appointed day is 31.12.2016.
- The specified bank note means a bank note of denominational value of Rs.500 or Rs.1000 of the series existing on or before the 8th day of November, 2016
- Under sub-section – 3 of the SBN Act, the demonetised notes shall cease to be a liability of Reserve Bank.

The Specified Bank Notes (Cessation of Liabilities) Act, 2017

- Section 5 of the SBN Act states that on and from the appointed day, no person shall, knowingly or voluntarily hold, transfer, or receive any Specified Bank note.
- The proviso to section 5 deals with certain exceptions.

The Specified Bank Notes (Cessation of Liabilities) Act, 2017

- Section 7 of the SBN Act states that a person who contravenes section 5 is liable to pay a fine which may extend to Rs.10,000 or 5 times the amount of face value the SBN involved in the contravention.

The Specified Bank Notes (Cessation of Liabilities) Act, 2017

- The import of section 5 is that on and from appointed date only i.e 31.12.2016, there is a prohibition to hold, transfer or receive any specified bank note.
- This means that from 09.11.2016 till 30.12.2016, there is no prohibition.

The Taxation Laws (Second Amendment) Act, 2016

- Section 115BBE, Section 271 AAB of Income-tax Act, 1961 (IT Act) were amended with effect from 1st April, 2017 by the Taxation Laws (Second Amendment) Act, 2016.
- Section 271AAC was introduced.

The Taxation Laws (Second Amendment) Act, 2016

These said amendments are reproduced below :

Tax on income referred to in section 68 or section 69 or section 69A or section 69B or section 69C or section 69D 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

The Taxation Laws (Second Amendment) Act, 2016

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)*

The Taxation Laws (Second Amendment) Act, 2016

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance ^{46a}*[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) of sub-section (1).]

The Taxation Laws (Second Amendment) Act, 2016

Penalty in respect of certain income.

SECTION 271AAC (1) *The Assessing Officer may, notwithstanding anything contained in this Act other than the provisions of section 271AAB, direct that, in a case where the income determined includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D for any previous year, the assessee shall pay by way of penalty, in addition to tax payable under section 115BBE, a sum computed at the rate of ten per cent of the tax payable under clause (i) of sub-section (1) of section 115BBE:*

The Taxation Laws (Second Amendment) Act, 2016

- ◆ **Provided** that no penalty shall be levied in respect of income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D to the extent such income has been included by the assessee in the return of income furnished under section 139 and the tax in accordance with the provisions of clause (i) of sub-section (1) of section 115BBE has been paid on or before the end of the relevant previous year.
- ◆ (2) No penalty under the provisions of section 270A shall be imposed upon the assessee in respect of the income referred to in sub-section (1).
- ◆ (3) The provisions of sections 274 and 275 shall, as far as may be, apply in relation to the penalty referred to in this section.

DEMONETISATION

- It may be noted that the demonetisation effected from 09.11.2016 is not the first of its kind in India.
- The Ordinance III of 1946, demonetised Rs. 500, Rs. 1000 and Rs.10,000 currency notes.

DEMONETISATION

- The High Denomination Bank Notes (Demonetisation) Act 1978 enacted on 30th March 1978 again demonetised Rs.1,000, Rs.5,000 and Rs.10,000 currency notes.
- The basic scheme of the above demonetisation and the 08.11.2016 demonetisation are broadly similar.

DEMONETISATION

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ASSESSMENTS

- The CBDT issued manual scrutiny selection norms for cases selected during Financial Year 2018-19 .
- Please see Instruction # 4/2018 dated 20-8-2018.
- There is no specific norm to select a case for scrutiny if cash deposit of demonetised notes exceed certain amounts.
- Cases were selected under CASS if deposit of demonetised notes was one of the reasons for selection.

ASSESSMENTS

- Based on these norms, many assessments were made where the amounts deposited during 11.11.2016 to 31.12.2016 were added u/s. 68 and 69A rejecting the explanations offered by the assesseees.
- ◊ The assessments were made mechanically following the instructions following CBDT and higher officials.

ASSESSMENTS

- CBDT issued Instructions vide F. No 225/145/2019-ITA-II dated 9-8-2017 wherein
 - The assessing officers were also directed to examine the spike in cash sales / deposits prior to demonetisation as compared to cash sales / deposits made in the earlier years. A report in prescribed form was to be filed.

ASSESSMENTS

- The various grounds on which the assessing officer justified the addition in assessments are tabulated below :
 - Spike in Sales during the period from 01.11.2016 to 08.11.2016 i.e the sales made during this period are disproportionately high compared to the sales made from 01.04.2016 to 08.11.2016.

ASSESSMENTS

- Explanation of the assessee that the sources for deposit of demonetised notes in bank account is the receipt of demonetised notes during the period 09.11.2016 to 31.12.2016 was rejected on the ground that from 09.11.2016, a person is prohibited from transacting in demonetised notes.
- Rejection of the explanation of the assessee that the deposit of demonetised notes was out of earlier cash withdrawals

ASSESSMENTS

- Addition on the ground that the assessee has not filed any explanation
- Rejection of assessee's explanation that he had kept the cash with him in respect of an earlier transaction like sale of property
- Rejection of assessee's explanation that the deposits out of cash balance held on 08.11.2016 stating that holding such a balance is not justified

ASSESSMENTS

- No uniformity regarding the sections under which the amounts were added.
- Some officers invoked section 68 of the IT Act.
- Some officers invoked section 69A of the IT Act

ASSESSMENTS

- Today we will discuss the following
 - Defences available in respect of each type of addition
 - Whether the penalty u/s. 271AAC can be levied for the assessment year 2017-18
- Whether the amendment to section 115BBE taxing the income added u/s. 68, 69, 69A, 69B and 69C, 69D at 60% is applicable to assessment year 2017-18.

ASSESSMENT – SPIKE IN SALES

- Facts
 - Assessee is engaged in retail sales. Between 09.11.2016 and 30.12.2016, the assessee deposited cash of approx. Rs. 3 crore of demonetised currency in his bank account.
 - The assessee explained that the cash was deposited out of sale proceeds. It is a fact that both the cash sales and cash deposits were accounted in the books.
 - The AO noted that the cash sales from 01.11.2016 to 08.11.2016 was nearly 35% of the sales made during the financial year 2016-17.

ASSESSMENT – SPIKE IN SALES

- He also stated that the cash balance built up in the cash book is not acceptable.
- He estimated that nearly Rs. 1 crore will be normal sales during that period and added a sum of Rs. 2 crore under section 68 of the Act.

ASSESSMENT – SPIKE IN SALES

- Possible defences in appeal
 - If the case is selected under manual scrutiny selection norms
- Contend that the scrutiny norms instruction 4 of 2018 applicable to cases selected during financial year 2017-18 does not specifically include cash depoists during demonetisation period as a criterion..

ASSESSMENT – SPIKE IN SALES

- If it is under CASS
 - Check whether the demonetisation deposits is one of the reasons mentioned.
 - If it is found otherwise, contend that the assessment is bad in law being in violation of the instructions
 - Reliance can be placed on - Indorama Synthetics (India) Ltd v. Addl. CIT 386 ITR 665 and CIT Vs Best Plastics Pvt Ltd 295 ITR 256

ASSESSMENT – SPIKE IN SALES

- On merits

- It can be argued that the addition made u/s. 68 is bad in law as there is no cash credit involved.
- The amount deposited in the bank cannot be added u/s. 68 of the Act

Even if the addition is made u/s. 69A of the Act, no addition can be made if the entry is made in the books of account

ASSESSMENT – SPIKE IN SALES

- Adarsh Co-op Bank Ltd 74 ITR (Trib) 159,
- Babulal C. Borana vs Third ITO 282 ITR 251
- Just because there is an abnormal increase in the sales before cash deposit in the bank account, it cannot be said that the sales is bogus.
Rely on Bhagwant Merchants P Ltd vs ITO 79(ITR)(Trib) 595.

ASSESSMENT – SPIKE IN SALES

- The burden of proving the sales as bogus is on officer and he has to discharge this burden by acceptable evidence
- Merely relying on F. No. 145/2019/ITA II dated 09.08.2019 issued by CBDT he cannot presume that the sales are bogus. In this instruction, the Board has only directed the AO to verify the abnormal increase in the sales and report them in a particular format.

ASSESSMENT

◆ The instructions at best can only be a starting point for enquiry .

Based on instructions it can not be presumed that extra sales represent undisclosed income held in demonetised notes.

ASSESSMENTS – ACCEPTANCE OF DEMONITISATION NOTES BETWEEN 09.11.2016 AND 30.12.2016

FACTS:

- ❖ The assessee deposited demonetised notes in its bank account during the period 09.11.2016 and 30.12.2016.
- ❖ The assessing officer held that as per the Notification no. S.O. No. 3407 (E) dated 8.11.2016 a person is prohibited from accepting the demonetised notes on or after 9.11.2016.
- ❖ Hence the explanation of the assessee is not acceptable.
- ❖ The amount deposited is added u/s 69A
- ❖ The sales disclosed in the books was also assessed.

ASSESSMENTS – ACCEPTANCE OF DEMONITISATION NOTES BETWEEN 09.11.2016 AND 30.12.2016

Possible defences in appeal :

- ❖ As stated earlier check whether scrutiny selection is as per the 1 scrutiny selection norms under CASS as stated in Slide Nos. 31 & 32

On Merits :

- ❖ Notification No. 3407(E) dated 08.11.2016 and various other Notifications issued over a period of time nowhere states that a person cannot transact in demonetised notes.

ASSESSMENTS – ACCEPTANCE OF DEMONITISATION NOTES BETWEEN 09.11.2016 AND 30.12.2016

On Merits :

- ❖ The Notification no. 3407 (E) only state that Rs. 500/1000 notes in circulation as on 8.11.2016 shall cease to be legal tender w.e.f 9.11.2016.
- ❖ It does not further say that the dealing in these notes are prohibited.
- ❖ S.5 of SBN Act 2017 only prohibits the holding, transferring or receiving any specified bank note on and from the appointed day.
- ❖ Appointed day means 31st December 2016.

ASSESSMENTS – ACCEPTANCE OF DEMONITISATION NOTES BETWEEN 09.11.2016 AND 30.12.2016

On Merits :

- ❖ Therefore, up to and including 30.12.2016 there was no prohibition in accepting the demonetised notes.
- ❖ No addition u/s 69A of the Act can be made if the transaction is recorded in the books of account.
- ❖ Rely on the case laws given in Slide No. 33
- ❖ The very fact that the assessing officer does not dispute the receipt of demonetised notes would mean that the sales are genuine.

ASSESSMENTS – ACCEPTANCE OF DEMONITISATION NOTES BETWEEN 09.11.2016 AND 30.12.2016

On Merits :

- ❖ Once the accounted sales are not proved to be bogus , the source of deposit in bank account has been explained. Addition of u/s. 69A is not warranted on this ground also.

ASSESSMENT – DEPOSIT OUT OF EARLIER CASH WITHDRAWAL

FACTS:

- ❖ The assessee does not maintain books
- ❖ The assessee deposited cash in his bank account after 10.11.2016 but before 30.12.2016
- ❖ Such cash was held in demonetised notes. Assessee's explanation before the assessing officer was that he had earlier withdrawn the cash from his bank account for purchase of property and since the deal could not be completed before 8.11.2016 the cash was deposited in various instalments in his bank account.

ASSESSMENT – DEPOSIT OUT OF EARLIER CASH WITHDRAWAL

- ❖ The assessing officer rejected the explanation on the ground that the assessee has not proved that he was negotiating for the property purchase and the assessee has not deposited the amount in one go.

ASSESSMENT – DEPOSIT OUT OF EARLIER CASH WITHDRAWAL

Possible defences :

- ❖ Please see Slides no. 31 & 32 regarding scrutiny selection norms.
- ❖ Please note that the defence of entry has been made in the books is not available as the assessee has not maintained books.
- ❖ The fact that there is no documentary evidence to prove there was an intention to purchase property is not material.
- ❖ The burden of proof is on the assessing officer to show that the assessee has utilized the earlier cash deposits for some other purposes which has not been disclosed.

ASSESSMENT – DEPOSIT OUT OF EARLIER CASH WITHDRAWAL

Possible defences :

Rely on the following decisions :

- ❖ Gordhan Vs DCIT ITA No. 811/Del/2015 dated 19.10.2015
- ❖ ACIT Vs Baldevraj Charla 121 TTJ 366
- ❖ CIT Vs Kulwant Rai 291 ITR 36
- ❖ But the Delhi High Court in Sashigarg Vs Pr. CIT 423 ITR 150 held that the burden of proof is on the assessee to show that he has not spent the amount for any other purpose. With respect it can be stated that the judgment in 423 ITR 150 is not correct as a negative fact cannot be proved.

ASSESSMENT – DEPOSIT OUT OF EARLIER CASH WITHDRAWAL

Possible defences :

- ❖ Moreover, the Hon'ble Delhi High Court has not considered its earlier judgement in 291 ITR 36.

ASSESSMENT – DEPOSIT CASH BALANCE AS ON 08.11.2016

FACTS:

- ❖ The assessee had deposited Rs. 50 Lakh in his bank account on 12.11.2016.
- ❖ The assessee is a non-resident living abroad for nearly 30 years and has no known source of income in India.
- ❖ The assessee's explanation was that the property was sold in the earlier year and the amount was kept in cash with his father. The assessing officer rejected the above explanation on the ground that no rational person will keep such a large amount with him in cash.

ASSESSMENT – DEPOSIT CASH BALANCE AS ON 08.11.2016

Possible defences :

- ❖ Please see Slides no. 31 & 32 regarding scrutiny selection norms.
- ❖ Please note that the defence of entry made in the books is not available as the assessee has not maintained books.
- ❖ Contend that there is no law which compels a person to deposit the cash in his bank account
- ❖ In India many people keep huge cash balance with them.

ASSESSMENT – DEPOSIT CASH BALANCE AS ON 08.11.2016

Possible defences :

Rely on :

- ❖ CIT Vs Smt. P.K. Noorjahan 237 ITR 570 wherein Supreme Court said that even if the explanation offered is not satisfactory, the assessing officer has a discretion not to make an addition taking into account the facts and circumstances of a particular case.
- ❖ In fact in CIT Vs Smt. P.K. Noorjahan 123 ITR 3 (High court decision) the Hon'ble Kerala High Court held that before an addition is made u/s 69 it should be seen whether an assessee is capable of earning such a huge income which has not been disclosed.

ASSESSMENT – DEPOSIT CASH BALANCE AS ON 08.11.2016

Possible defences :

If the answer is no, the addition cannot be made automatically and the assessing officer has to exercise the discretion vested u/s 69.

Assessee is a non-resident. He had no known source of income in India other than sale of property.

Explanation offered by him is reasonable and to be accepted.

ASSESSMENT – LARGE CASH IN THE BOOKS AS ON 08.11.2016

FACTS:

- ❖ The assessee is carrying on business and is maintaining books.
- ❖ The assessee deposited Rs. 1 crore on 29.12.2016.
- ❖ His explanation was he had a cash balance of Rs. 1,10,00,000 on 08.11.2016 out of which One crore was in demonetised notes.
- ❖ The AO disbelieved the above explanation on the ground that the assessee never had such a huge balance in the earlier years and the cash balance has been built up between 1.4.2016 and 8.11.2016.

ASSESSMENT – LARGE CASH IN THE BOOKS AS ON 08.11.2016

FACTS:

- ❖ He rejected the assessee's explanation that his debtors paid in cash during this period and he was holding it in cash and there was also increase in sales between 1-4-2016 and 8-11-2016.

ASSESSMENT – LARGE CASH IN THE BOOKS AS ON 08.11.2016

Possible defences :

- ❖ Please see Slides no. 31 & 32 regarding scrutiny selection norms.
- ❖ As stated in Slides 33 no addition can be made u/s 68, 69, 69A etc if the cash deposits are recorded in the books of account.
- ❖ If the addition is u/s 68 in respect of collections from debtors following will apply.
- ❖ The burden of proof that the cash received from debtors recorded in the books between 1.4.2016 and 8.11.2016 is on the assessee.
- ❖ Affidavits from parties can be filed.

ASSESSMENT – LARGE CASH IN THE BOOKS AS ON 08.11.2016

Rely on the following decisions for rejection of increased sales:

- ❖ Agsons Global (Pvt) Ltd Vs ACIT 75 ITR (Trib) 504
- ❖ Dewas Soya Ltd Vs Ito (ITA No. 336/Ind/2012)
- ❖ The AO has not excluded the sales from the income nor made any adjustments in respect of the closing stock. Therefore, there is a double taxation of the same income.
- ❖ On this ground also the content u/s 69A is not warranted.

ASSESSMENT – VALUE OF DEMONTISED NOTES SEIZED AFTER 01.01.2017

FACTS:

- ❖ The assessee was searched in April 2017.
- ❖ The assessee was found in possession of demonetised notes of Rs. 3 crore.
- ❖ The officer added the above sum of Rs. 3 crore in the search assessment u/s 153A.

ASSESSMENT – VALUE OF DEMONTISED NOTES SEIZED AFTER 01.01.2017

Possible defence:

- ❖ Contend that on or after 31.12.2016, the demonetised notes are worthless.
- ❖ They have no value.
- ❖ Therefore, though the nominational value of demonetised notes is Rs. 3 crore its real value is nil. Hence, nothing can be added to the income.

ASSESSMENT – VALUE OF DEMONTISED NOTES SEIZED AFTER 01.01.2017

Rely on the decision of the Karnataka High court in :

- ❖ CIT Vs Andhra Pradesh Yarn Combines Pvt Ltd 282 ITR 490
- ❖ Karnataka High Court held that the high value demonetised notes are only scraps of paper and they could not be used as the circulating medium having a representative value. It was held that it cannot be unexplained money.

ASSESSMENT – WHETHER ADDITIONAL S 68 OR - 69A

- ❖ In many cases, the cash deposit in the bank account has been added u/s 68.
- ❖ It can be argued that S.68 is not applicable.
- ❖ S.68 comes into play only if any sum is found credited in the books of account.
- ❖ If an assessee deposits money in the bank and his bank account is credited, it cannot be said that the amount has been credited in the books of account.

ASSESSMENT – WHETHER ADDITIONAL S 68 OR - 69A

- ❖ S. 2(12A) (introduced w.e.f 1.6.2001) defines books of account to include ledgers, day books, cash books, account books and other books whether kept in written form or in electronic form.
- ❖ It is to be noted that the bank pass book or bank statements are not treated as books of account. Therefore S.68 is not applicable.
- ❖ Bombay High Court in CIT Vs Bhai Chand Gandhi 141 ITR 67 held that the pass books or bank statements are not to be considered as books of account. Therefore, S.68 is not applicable.

ASSESSMENT – WHETHER ADDITION U\S 68 OR S- 69A

- ❖ But the question is whether the department can argue that the addition is actually u/s 69A and a mere quoting of a wrong section will not make the addition invalid.
- ❖ Recently the Hon'ble Karnataka High Court in K.M. Nagaraj Vs DCIT 425 ITR 533 held that quoting a wrong section will not make the notice invalid.
- ❖ Applying the ratio of the above decision perhaps the department can justify the addition as one being made u\s 69A though wrongly stated as S.68 in the assessment order.
- ❖ There are any number of decisions holding the similar view.

APPLICABILITY OF S. 115BBE FOR AY 2017-18

- ❖ S.115 BBE was amended w.e.f 1.4.2017 by the Taxation Laws (2nd amendment) Act 2016 which received the assent of the President on 15th December 2016.
- ❖ There is an opinion that since the amendment came into effect from 15.12.2016, any deposit made prior to the date which ultimately gets added u/s 68, 69, 69A etc in the assessment for AY 2017-18 cannot be taxed at 60%.
- ❖ The assessee seems to argue on principle of estoppel.

APPLICABILITY OF S. 115BBE FOR AY 2017-18

- ❖ Their argument is that they had deposited the cash in bank account with an intention to declare it u/s 69A which should have been taxed @ 30% under the pre amended S.115BBE.
- ❖ Therefore, S.115BBE should be interpreted in such a way that any deposit up to 15.12.2016 shall be taxed @ 30% and only the deposits on or after 15.12.2016 shall be taxed at 60%.
- ❖ The above argument may not hold water.
- ❖ It is well settled that the law in respect of the assessment of income and tax rates is the law applicable on the 1st day of the assessment year.

APPLICABILITY OF S. 115BBE FOR AY 2017-18

- ❖ If the deposits made during the FY 2016-17 is not properly explained, it can be added u/s 69A for the AY 2017-18.
- ❖ Since the rate of tax has come into effect from 1.4.2017, that rate is to be applied.
- ❖ The Supreme Court in Karim Tharuvi Estates Ltd 60 ITR 232 has held that Income tax Act as it stand amended on the 1st day of April of the relevant assessment year is to be applied by relying on its earlier decision in CIT Vs Scindia Navigation Co Ltd 42 ITR 589.
- ❖ Also see 20 ITR 572(SC) and 426 ITR 289(SC) . These decisions will support the stand that 115BBE applies to A.Y 2017-18 in its entirety and not merely to transactions entered into on or after 15-12-2016.

APPLICABILITY OF S. 115BBE FOR AY 2017-18

- ❖ The tax is generally on total income and therefore a single rate is to be applied.
- ❖ Even if the Income tax Act splits the total income and prescribes rates of tax for different types of income, the rate of tax within the same category of income has to be same for the entire year unless the statute clearly expresses otherwise.
- ❖ S. 115BBE is applicable from 1.4.2017 and hence applies to any addition made u\s 68, 69, 69A etc for A.Y 2017-18.

APPLICABILITY OF S. 115BBE FOR AY 2017-18

- ❖ There is nothing in this Section which says that up to 14.12.2016 the tax rate will be 30% and after that day it will be 60%. Hence, if an addition is made u/s 68, 69 etc for AY 2017-18 the applicable rate is 60%.

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THANK YOU

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