

Section 68

Where any sum is found credited in the **books** of an **assessee** maintained for any previous years and the **assessee offers** no explanations about **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**.

Law is vague and subjective.

No clear parameters have been laid down.

We have to depend upon the judicial development of law for its proper understanding.

Books :

- Latest judgement of supreme court in the case of CBI vs. V.C. Shukla (1998) 3 SCC 410, 433, 434

“Collection of sheet fastened or bound together so as to form material whole. Loose sheets or scraps of paper cannot be termed as books.”

Followed by Hon’ble Delhi High Court in a recent judgement of **Girish Chaudhary 296 ITR 619**

It was further held in these cases that entries made therein are relevant in view of section 34 of Indian Evidence Act. 1872 but these entries above shall not be sufficient evidence charge any person with the liability.

Thus no addition can be made merely on the basis of rough jottings or scribbling found during the course of search unless these are supported with some cogent evidences.

Pass book: It is a record book of the client maintained by the banker but not on the instructions of its client.

It can not be said to be book of the assessee

- CIT v. Bhai Chand Gandhi 141 ITR 67, 69 (Bom.)
- Ms. Mayawati 113 TTJ 178 (Del)
- Jawaharlal oswal 71 ITD 324 (Chandigarh)

Assessee's explanation

Nature and its source

Law explained through judicial developments.

Identity,

Creditworthiness and

Genuineness

Identity: Best evidence is Copy of PAN Card/letter of the creditor.

Other useful evidences can be voters I-card, Ration Card, Driving license, Copy of acknowledgement of Return, certificates from sarpanch of village panchayats and so on.

In the case of Companies : MOA, COI, Annual Return, Form 18 & 32.

Credit worthiness: Copy of ITR, Balance Sheet and Profit and Loss Account, Bank Statement, evidences of holding of land and agricultural income, other evidences of availability of funds with creditor e.g. sale deed of properties etc.

Genuineness: The objective is to ensure that the transaction is not camouflaged. Once identity and creditworthiness of the creditor are established, the burden would normally be upon the A.O. to prove that the transaction is not genuine.

However the burden remains upon assessee in some circumstances e.g.

1. The transaction is in cash.
2. The transaction is through cheque but the creditor has deposited cash in its bank account for the equivalent amount just before issuance of cheque to the assessee.
3. There is some adverse material suggesting that transaction is bogus.

There is one thing more, which may be required for the satisfaction of the A.O. i.e. confirmation of the transaction by the creditor. Primarily

it is duty of the assessee to arrange for confirmation of the transaction which can be filed in one or more of the following ways:

1. Duly signed confirmation by the creditor containing at least following information:

- Date of signing of confirmation.
- Confirmation of fact of transaction of giving the amount by the creditor to the assessee.
- Mode of payment i.e. through cheque/DD/Cash.
- Date of cheque/ DD its number and drawee bank, its account no. and name and address of drawee bank's branch.
- In case of cash transaction date of transaction.
- Ostensible source of amount given.
- Nature of loan/advance/share application.
- If interest Bearing: state this vital fact.
- PAN and Place of assessment of the creditor.

2. Duly sworn and notarized affidavit from the creditor deposing on oath all these facts as stated in the confirmation.

Mehta Parekh 30 ITR 181 (SC): The contents of the affidavit can not be disbelieved without rejecting the same.

3. By producing the creditor and facilitating recording of his statement.

4. By requesting the A.O. to enforce the attendance of the creditor if so desired by A.O. and/or to make direct confirmation/ verification from the said creditor if the creditor is not in the assessee's control.

By making such request, duty of the assessee is discharged and burden is shifted upon the A.O., provided proper address is given and identity is established by the assessee.

Law in this regard was laid down by a celebrated judgment of the supreme court in the case of **CIT vs. Orissa Corporation (P) Ltd. 159 ITR 78.**

Under these circumstances it is not the responsibility of the assessee to enforce the attendance of these persons. Non appearance of the creditors in response to summons of the A.O. issued u/s 131 which were duly served or inaction on the part of the A.O. to issue the summons would not lead to the inference that assessee had failed to discharge the onus on his part as held in the following cases:-

- GG films vs. ITO 45 TTJ 644.
- Anil Kumar Midha vs. ITO 100 TTJ 644

Let us now examine the position of cash credit in different circumstances:-

1. **Cash Credit found in the books of the assessee before the commencement of the business.**

Under these circumstances the amount credited in the books of the assessee can't be deemed to be income of the assessee. The assessee can't be expected to earn its income even before the commencement of its income. There is one more dimension to the situation that income has to be assessed for the amount received in the previous year. In the case of newly set up business the previous year has been defined u/s 3 to begin from the dated of setting up of the new business or from the date of coming into existence from the new source of income.

Thus, the amount received before the beginning of the previous year can't be brought to tax. It has been so held in the following cases:-

- CIT vs. Bharat Engineering & construction 83 ITR 187 (SC)
- Indian Rice Mills vs. CIT 218 ITR 508, 511 (All.)
- Surender Mohan Seth vs. CIT 221 ITR 239 (All.)
- Janta Coal Depot vs. ITO 19 TTJ 445 (All.)
- Bhupinder Food & Malt Industries vs. CIT 229 ITR 496 (HP)
- Mitesh Rolling Mills (P) Ltd. Vs. CIT 258 ITR 278 (Guj.)
- Baba Rupadas Spinning Mills Ltd, ITA No. 1543/98.
- Esteem Tower, 99 TTJ 472 (Del.)

There is one judgment which is against the assessee on this issue by Kolkata High Court reported at 125 ITR 336. But this judgment has been distinguished by Tribunal in the case of Baba Rupadas.

2. When the sum is found debited in the name of the partner in the books of the firm:

Once it is confirmed that partners have contributed the capital no addition can be made in the hands of the firm. It has been so held in the following cases:-

- CIT vs. Berner Electric Corpn. 252 ITR 344 (P&H)
- Insteomed (I) Internationals vs. ITO 63 TTJ 191
- Swastic Kiran Co. vs. ITO 19 TTJ 442 (All.)
- Sapna Traders vs. ACIT, 41 TTJ 77 (All.)
- 141 ITR 706 (All.)
- 208 CTR 457 (P&H), CIT vs. Metal & Metals of India
- 208 CTR 459 (P&H), CIT vs. Ramshwer Dass Suresh Pal Cheeka

3. Amount received as Share Application money in the case of company.

The amount received as Share Application money in the case of a company. The amount received as share application money by a company has been given a different treatment in comparison to a normal cash credit by various courts and tribunals including the Hon'ble Supreme Court right from the celebrated judgment of Steller Investment Ltd. 251 ITR 263 upto the recent five judgments of Supreme Court in the case of Divine Leasing etc.

The stand of the Supreme Court has been consistent that the addition cannot be made in the hands of a company. Thus now Hon'ble Supreme Court, Hon'ble Allahabad High Court, Hon'ble Madras High Court, Hon'ble Guahati High Court and Hon'ble Rajasthan High Court have laid down in very clear words that no addition can be made in the hands of the company on account of share application money received u/s68.

The recent dismissal of the SLP of the department by a speaking order is also have binding effect as held in the case, of 245 ITR 360 (SC) Kunayammed & Ors. Vs. State of Kerala & Anr.

4. When books of accounts are rejected and income is estimated.

Once income is estimated no further addition is possible for the reason that once the books are rejected the same cannot be relied for making addition and moreover once the income is estimated everything is included in that and no further addition is justified. As held in following cases:-

- 229 ITR 229 (All)
- 50 ITR 641 (All)
- 232 ITR 776 (AP)
- Tohir Ali 116 Taxman 266 (Jab) (Mag)
- Raja Rani Overseas ITA No.354/2005
- Fair Deal Leather (Del, ITAT)

5. **Addition u/s 68 with regard to trade creditors i.e., the creditors from whom purchases have been made in regular course of business.**

It has been held in the following cases that no addition can be made in the case of persons from whom purchases have been made in the regular course of business:-

- CIT vs. Pancham Dass Jain 205 CTR 444 (All)
- Annamaria Travels & Tours (P) Ltd. 95 TTJ 71 (Del)
- CIT vs. M.K. Brothers 163 ITR 249 (Guj.)

Position with regard to those cash credits where the assessee has not been able to bring on record the enough evidences to show the credit worthiness of the creditors;

Although it is generally believed that it is the responsibility of the assessee to prove the identity, genuineness and credit worthiness of the transaction. However, there are few very good judgments of High Court, Supreme Court and ITAT laying down that the burden of proving the credit worthiness of the creditors is not very heavy upon the assessee rather in some cases it has been held that it cannot be the responsibility of the assessee to know the credit worthiness of its creditors two such judgments are listed below:-

1) CIT vs Metachem Industries 245 ITR 160 (MP)

“Once it is established that the amount has been invested by a particular person, be he a partner or an individual, then the responsibility of the assessee is over. Whether that person is an income-tax payer or not and where he had brought this money from, is not the responsibility of the firm. The moment the firm gives a satisfactory explanation and produces the person who has deposited the amount, then the burden of the firm is discharged and in that case that credit entry cannot be treated to be the income of the firm for the purposes of income tax.”

2) Tolaram Daga V/s Commissioner of Income Tax 59 ITR 632 (Assam)

“But the position is different in regard to a sum which is shown in the assessee’s books in the name of a third party. In such a case, the onus of proof is not upon the assessee to show the source or nature of amount of the cash credit; on the other hand, the onus shifts to the department to show by some material that the amount standing in the name of the third party does not belong to that third party but belongs to the assessee. That is the principle laid down by the division Bench of this court in S. N. Ganguly’s case. There is a decision to a similar effect in an earlier case, Ramkinkar Banerji vs Commissioner of Income Tax.

All that could be said to follow from this decision is that once the assessee explains the credit entry and brings in evidence to show that the entry related to a third party and that credit was that of that third party, the burden would shift to the Income Tax Officer in such a case to establish that the entry was not real but was pseudonymous.”

3) CIT vs Shri Ram Narain Goel 224 ITR 180 (Pun. & Har.)

“The finding of fact given by the Tribunal is based on the material on record. The Tribunal correctly took the view that the assessee was not supposed to prove the source of the loans. Suspicion, howsoever strong, cannot take the place of evidence or proof.”

4) Nemi Chand Kothari vs CIT & another 264 ITR 254 (Gauhati)

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

5). Rohini Builders vs DCIT 76 TTJ 521(Ahmd.)

Income- Cash credit – Burden of proof – Assessee furnished complete addresses of all the creditors along with GIR numbers/ PAN as well as confirmations along with copies of assessment orders passed in the cases of individual creditors , wherever available , and copies of returns filed by the creditors in the remaining cases – All loans were received and repaid by assessee by account payee cheques along with interest – thus , assessee has discharged the initial onus which lay on it in terms of sec.68 – Assessee is not further expected to prove the genuineness of cash deposited in the bank accounts of the creditors – Merely because summons issued to some of the creditors could not be served or they failed to appear before the AO the loans taken from those creditors could not be treated as non genuine – Further, AO has not disallowed the interest paid in relation to these credits and tax has been deducted at source out of the interest paid in relation to these credits and tax has been deducted at source out of the interest paid / credited to the creditors – addition not justified.

6). DCIT vs Rohini Builders 256 ITR 360 (Gujarat)

Appeal (High Court) – substantial Question of law – Cash Credit – Assessee furnished complete addresses of all the creditors along with GIR numbers /PAN as well as confirmations along with copies of assessment orders passed in the cases of individual creditors, wherever available , and copies of returns filed by the creditors bin the remaining cases – All loans were received and repaid by the assessee by account payee cheques along with interest – Tribunal deleted the addition – no substantial question of law arises – appeal of the department dismissed.

7) CIT vs Rohini Builders 254 ITR 275 (Statute)

Supreme Court dismissed the SLP filed by the revenue against the judgement dated 19-3-2001 of the Gujarat High Court in Tax Appeal No. 65 of 2001, whereby the high Court dismissed the appeal of the revenue on the ground that no substantial question of law arose. The assessee was a firm engaged in the business of dealings in land. The assessee had taken loans from various parties and at the time of assessment proceedings, the assessee had furnished confirmations giving the addresses of all the depositors. The Assessing Officer passed a detailed order treating the cash credit of Rs. 12.8 lakhs as unexplained. The Tribunal relying on 237 ITR 570 held that an unsatisfactory explanation did not and need not automatically result in deeming the amount credited in the books as the income of the assessee. The Assessing Officer had not disallowed the interest paid in relation to these credits and the tax had been deducted out of such interest: CIT v. Rohini Builders: S L.P. (C) No. 515 of 2002.

8) Jalan Timbers vs CIT 223 ITR 11 (Gauhati)

In order to establish the fact of receipt of a cash credit as required u/s 68 of the Income Tax Act, 1961 the assessee must prove three important conditions, namely, (1) the identity of the person, (2) the genuineness of the transaction, and (3) the capability of the person giving the cash credit. Section 68 of the Act makes it clear that in respect of a cash credit entry the explanation offered by the assessee can be rejected by the Income Tax Officer on cogent grounds. When such grounds themselves are based on no evidence, the question of presumption against the assessee does not arise.

9) Sona Electric Co. vs CIT 152 ITR 507(Delhi)

Section 68 of the Income Tax Act, 1961 makes it abundantly clear that a cash credit entry in the assessee's books of accounts can be rejected by the Income Tax Officer on cogent grounds. When such grounds are themselves based on no evidence, the question of raising a presumption against the assessee does not arise.

10) M/s Essan Remedies Ltd. vs DCIT ITA No. 256/Del/04

In this case, all the creditors and the share contributors were assessed to income tax and their PAN numbers were also field in their confirmations. They had also filed their statement of affairs or Balance Sheet and evidence for having filed the return of income. Moreover, there is no suggestion in the impugned order that the assets and income position exhibited in the records of the creditors / share contributors is false. Merely because they did not appear before the assessing officer in response to the summons, it cannot be concluded that the amount have to be added as the assessee's income. The assessee had no power to enforce their attendance.

11. Tam Tam Pedda Guruva Reddy vs JCIT And another 291 ITR 44 (Karn)

Cash credit – Genuineness of transaction – Assessee to prove not only identity of creditor but also capacity of creditor to advance money – Source of income spelt out in affidavit of creditor – Finding that amount in question is unexplained income – Not acceptable – Addition on account of unexplained credit – Not justified – Section 68, Income Tax Act, 1961.

Certain important aspects

1. At the assessment stage:

- Deny allegations made in the reasons recorded at the earliest stage in case of reopened assessments.
- Request for confronting entire material sought to be used against the assessee including statements recorded of various persons relied upon in the reasons or in the show cause.
- Make humble request for providing cross examination of all those parties whose statements may be used against the assessee.
- In case it is not possible to provide desired confirmation or produce the creditors in person, provide complete addresses along with proof of identity the A.O. and make a request for direct verification with an offer for depositing amount of diet money as may be suggested by A.O.
- If possible give PAN No. in all cases. Please download from website if you do not have.
- In the case of companies, download from ROC's website NOA, COI, Form 18, Form 32, Annual Return etc. and submit it to A.O. clarifying in bold letter that the creditor company does exist on the records of ROC.
- Make a request to the creditors that they should at least receive the notices of A.O. and respond these notices by post in case it is not possible to make personal appearance.

