

Income Tax Search and Seizure: "Insertion of Section 79A"-Plugging of lacuna by the Finance Bill 2022



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Introduction:-

In the Union Budget 2022-23 through Finance Bill 2022, among other tax measures, the Hon'ble Finance Minister recommended "**Insertion of New Section 79A: - No set off of losses consequent to search, requisition and survey**".

Para 136 of the Hon'ble Finance Minister's Speech denotes the same as "**Deterrence against tax-evasion**", reproduced herein-under.

"

Deterrence against tax-evasion:

136. *Presently, there is ambiguity regarding set off, of brought forward loss against undisclosed income detected in search operations. It has been observed that in many cases where undisclosed income or suppression of sales etc. is detected, payment of tax is avoided by setting off, of losses. In order to bring certainty and to increase deterrence among tax evaders, I propose to provide that no set off, of any loss shall be allowed against undisclosed income detected during search and survey operations.*

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The relevant extract of the proposed insertion by way of Section 79A is reproduced herein under:-

'79A. Notwithstanding anything contained in this Act, where consequent to a search under section 132 or a requisition under section 132A or a survey under section 133A other than under sub-section (2A) of that section, the total income of any previous year of an assessee includes any undisclosed income, no set off, against such undisclosed income, of any loss, whether brought forward or otherwise, or unabsorbed depreciation under sub-section (2) of section 32, shall be allowed to the assessee under any provision of this Act in computing his total income for such previous year.

Explanation.--For the purposes of this section, the expression "undisclosed income" means,--

(i) any income of the previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the course of a search under section 132 or a requisition under section 132A or a survey under section 133A other than under sub-section (2A) of that section, which has—

(A) not been recorded on or before the date of search or requisition or survey, as the case may be, in the books of account or other documents maintained in the normal course relating to such previous year; or

(B) not been disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search or requisition or survey, as the case may be; or

(ii) any income of the previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the previous year which is found to be false and which would not have been found to be so, had the search not been initiated or the survey not been conducted or the requisition not been made.'

The legislative intent with regard to the above insertion could be gathered from the Finance Minister's speech and more so with the deep perusal of Memorandum explaining the provisions of Finance Bill 2022, which is reproduced herein under:-

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Set off of loss in search cases - Amendment in the provisions of section 79A of the Act

Chapter VI of the Act deals with aggregation of income and set off or carry forward of loss. In Sections 70-80 of the Act there are specific provisions relating to set off or carry forward and set off of losses while computing the income under various heads and with respect to different classes of persons.

2. It is noticed that in some cases, assessee claim set off of losses or unabsorbed depreciation, against undisclosed income corresponding to difference in stock, undervaluation of stock, unaccounted cash payment etc. which is detected during the course of search or survey proceedings. Currently there is no provision in the Act to disallow such set-off and no distinction is made between undisclosed income which was detected owing to search & seizure or survey or requisition proceedings and income assessed in scrutiny assessment in the regular course of assessment though for incomes falling in section 68, section 69, section 69B etc., such restriction is there.

3. Allowing the adjustment of undisclosed income detected as a result of search or requisition or survey against the loss or unabsorbed depreciation is resulting in short levy of tax. The provision of non-adjustment of loss or unabsorbed depreciation against undisclosed income detected as a result of search or requisition or survey would help in ensuring that proper tax is paid on income detected due to a search or survey and also result in increased deterrence against tax evasion.

4. Therefore, it is proposed to insert a new section 79A in the Act to provide that notwithstanding anything contained in the Act, where consequent to a search initiated under section 132 or a requisition made under section 132A or a survey conducted under section 133A, other than under sub-section (2A) of section 133A, the total income of any previous year of an assessee includes any undisclosed income, no set off, against such undisclosed income, of any loss, whether brought forward or otherwise, or unabsorbed depreciation under sub-section (2) of section 32 shall be allowed to the assessee under any provision of this Act in computing his total income for such previous year.

5. Further, the term "undisclosed income" is proposed to be defined for the above purpose as--

(i) any income of the previous year represented, either wholly or partly, by any money, bullion, jewellery or other valuable article or thing or any entry in the books of account or other documents or transactions found in the

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course of a search under section 132 or a requisition made under section 132A or a survey conducted under section 133A, other than that conducted under sub-section (2A) of section 133A, which has—

*(a) not been recorded on or before the date of search or requisition or survey, in the books of account or other documents maintained in the normal course relating to such previous year; or
(b) not been disclosed to the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner before the date of search or requisition or survey, or*

(ii) any income of the previous year represented, either wholly or partly, by any entry in respect of an expense recorded in the books of account or other documents maintained in the normal course relating to the previous year which is found to be false and would not have been found to be so, had the search not been initiated or the survey not been conducted or the requisition not been made.

6. This amendment will take effect from 1st April, 2022 and will accordingly apply in relation to the assessment year 2022-23 and subsequent assessment years.

[Clause 19]

”

Therefore, by virtue of proposed insertion of Section 79A through the Finance Bill’2022, the government has once again highlighted its Zero Tax Evasion Acceptance/Settlement Policy and wants to create an utmost deterrence against tax evasion which should undoubtedly be applauded.

Lacuna and the Background for such proposed insertion of Section 79A :-

In cases of Search and Seizure action(s) and survey(s) wherein certain undisclosed income is unearthed, the tax department as a matter of practice and also being empowered by law invokes provisions of sections 68, 69, 69A to 69D of the Act and accordingly levy tax under section 115BBE of the Act which can also loosely be termed as “**Super Tax**” as compared to normal rate of tax .

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Such "Super Tax" u/s 115BBE of the act is chargeable at 60% plus surcharge of 25% on such tax plus normal cess and higher education cess as applicable.

Section 115BBE was originally introduced by Finance Act 2012 w.e.f. 01.04.2013. The legislative intent behind introduction of section 115BBE was to curb the generation and use of unaccounted money and tax the same at the highest rate irrespective of the status or slab of income of the taxpayer.

The relevant extract of Finance Minister's Budget Speech of 2012-13 reads as follows-

"155. I propose a series of measures to deter the generation and use of unaccounted money. To this end, I propose.....

.....

.....

Taxation of unexplained money, credits, investments, expenditures, etc., at the highest rate of 30 per cent irrespective of the slab of income."

Section 115BBE was further amended vide Finance Act 2016 w.e.f. 01.04.2017 to the effect that no setting off of any loss shall be allowed against income of the nature referred to in the sections viz. 68, 69, 69A, 69B, 69C and 69D. This section was further amended vide Taxation Laws (Second Amendment) Act 2016 w.e.f. 01.04.2017 (A.Y 2017-18) .

Section 115BBE of the Income Tax Act'1961 as amended as on today reads as under:-

"Section 115BBE

(1) Where the total income of an assessee,—

(a) includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D and reflected in the Return of Income furnished under section 139; or

(b) determined by the Assessing Officer includes any income referred to in section 68, section 69, section 69A, section 69B, section 69C or section 69D, if such income is not covered under clause (a),

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the income-tax payable shall be the aggregate of—

- (i) the amount of income-tax calculated on the income referred to in clause (a) and clause (b), at the rate of sixty per cent.; and*
- (ii) the amount of income-tax with which the assessee would have been chargeable had his total income been reduced by the amount of income referred to in clause (i).*

(2) Notwithstanding anything contained in this Act, no deduction in respect of any expenditure or allowance or set off of any loss shall be allowed to the assessee under any provision of this Act in computing his income referred to in clause (a) 9[and clause (b)] of sub-section (1). "

The purpose and object of the amendment was explained in the statements of objects and reasons "Concerns have been raised that some of the existing provisions of the Income tax Act, 1961 could possibly be used for concealing black money. It is, therefore, important that the Government amends the Act to plug these loopholes as early as possible so as to prevent misuse of the provisions. The Taxation Laws (Second Amendment) Bill, 2016, proposes to make some changes in the Act to ensure that defaulting assesseees are subjected to tax at a higher rate and stringent penalty provision."

Further a surcharge of 25% on such tax was also imposed by amending sub section (a) in section 2 of chapter II of Finance Act 2016. This is further subject to normal cess and higher education cess as applicable.

Therefore, the legislative intent of introducing Section 115BBE with multiple amendments thereafter to enhance the rate of tax @ 60% and not allowing any set off loss , expenditure or allowance is to create utmost deterrence of any kind of tax evasion and discourage the generation and use of unaccounted money.

It is worthwhile to mention here is that Section 115BBE applies only in cases where income is chargeable to tax under section 68, section 69, sections 69A to 69D of the Act. That means, the provisions of section 115BBE cannot be independently invoked without satisfaction of requirements of sections 68, 69, 69A to 69D. Accordingly, If the income does not fall in section 68, section 69, sections 69A to 69D of the Act, then the tax rate as per section 115BBE (i.e. 60% – w.e.f. 1-4-2017) shall not be applicable. The higher rate of tax shall only be applicable in respect of income/ expenditure/

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investment/asset of the taxpayer who fails to explain the nature and source in terms of sections 68, 69, 69A, 69B, 69C, 69D.

Therefore, any set of loss/deduction/ expenditure / allowance can only be denied if such income falls under the ambit of sections 68, 69, 69A, 69B, 69C, 69D.

It is further pertinent to mention that Section 14 of the Act specifies five different heads of income, namely – salary, income from house property, profits and gains of business or profession, capital gains and income from other sources. Hence, any income earned by the taxpayer is required to be categorised in one of the aforesaid heads of income. Further, certain courts have held that when the sources of income are explained in relation to the income detected during search and survey, then invoking of deeming provisions under sections 68, 69, 69A to 69D is not warranted and consequently the higher rate of tax and other provisions of non-set of losses etc. as envisaged under section 115BBE are not applicable.

- The ***Hon'ble Rajasthan High Court in case of CIT vs Bajargan Traders [ITA No. 258/2017 dated 12/09/2017]*** has held that when the assessee is dealing in sale of food grains, rice and oil seeds and the excess stock which is found during survey is stock of rice then, it can be said that investment in procurement of such stock of rice is clearly identifiable and related to the regular business stock of the assessee. Therefore, the investment in the excess stock is to be brought to tax under head "business income" and not under the head income from other sources.
- In case of ***Shri Lovish Singhal vs ITO (ITA No 142 to 146/Jodh/2018 for AY 2014-15 dated 25 May 2018)***, the Jodhpur Tribunal applying the proposition of law laid down by the Hon'ble Rajasthan High Court in the ***Bajargan Traders (supra)***, held that the lower authorities were not justified in taxing the surrender made on account of excess stock and excess cash found U/s 69 of the Act and accordingly held that there is no justification for taxing such income U/s 115BBE of the Act.
- The ***Hon'ble Chandigarh Tribunal in case of M/s Bajaj Sons Ltd vs DCIT [ITA No. 1127/CHD/2019 AY 2017-18 dated 25 May 2021]*** was concerned with the question of invoking the provision of

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section 115BBE of the Act on the surrendered income to cover any discrepancy and thereby accessing such income at higher rate of tax as against the normal rate of tax applicable to the business income. Given that no discrepancy was pointed by the AO, it was held that the provisions of sections 68, 69, 69A, 69B, 69C or 69D are not attracted to levy tax under section 115BBE.

- Before the ***Hon'ble Jaipur Tribunal in case of ACIT vs Shri Sudesh Kumar Gupta [ITA No 976/JP/2019 AY 2014-15 dated 9 July 2020]*** issue under consideration was whether rectification proceedings u/s 154 were permissible when at the first place while passing assessment order u/s 143(3) provisions of section 69 were not invoked for charging higher rate of tax u/s 115BBE. The Hon'ble Tribunal held that the assessing officer has not invoked the provisions of section 69 at the first place while passing assessment order u/s 143(3) and therefore, the provisions of section 115BBE which are contingent on satisfaction of requirement of section 69 cannot be independently applied by invoking the provisions of section 154 of the Act.
- In case of ***DCIT vs Ram Narayan Birla (ITA No. 482/JPR/2015 for AY 2011-12 dated 30 September 2019)***, also on the surrendered stock during search, seizure and survey action, it was held that the Revenue had not pointed out that the excess stock had any nexus with any other receipts found. Hence, the surrendered excess stock considered at par with the other business stock.
- In case of ***Obero Motors vs ACIT [ITA No. 3512/Del/2018 AY 2012-13 dated 16 July 2021]***, the taxpayer had declared surrendered income after set-off of business loss. The lower authorities did not accept the above treatment and held that the surrendered amount is deemed income and does not fall under any of the head of income and therefore no set off of business losses could be allowed. The Hon'ble Tribunal held that as the assessee had already introduced the transactions in books of accounts, it would not be reasonable to say that such income does not fall under any of the head of income or that such deemed income does not allow any set off of business losses. Accordingly, the Tribunal accepted that the surrendered income amounts to business income. It is to be noted that this decision is related to AY prior to amendment made by the Finance

Act, 2016 w.e.f. 1 April 2017 and accordingly, set off of business loss is allowed by placing reliance on **CBDT Circular No. 11 of 2019 dated 19 June 2019** and decision of **Kirtiman Cement and Packaging Pvt Ltd (ITA No. 2777 and 2778/Del/2017 for AY 2012-13 and AY 2013-14 dated 15 May 2018)**.

- In case of ***M/s Shree Abharana vs. ITO (ITA No. 931 & 932/Bang/2019 for AY 2014-15 dated 20 September 2019)***, the Bangalore Tribunal held that the direction issued by the CIT u/s 263 to make addition u/s 115BBE to the AO without inquiry into sources of funds may not be proper.

Therefore, in view of the aforementioned position of law and judicial precedents, the assessee's subjected to search and survey actions were taking an alternative stand that the undisclosed income unearthed during the course of such actions were emerging out of their regular business only and thus should be treated as business undisclosed income under normal heads of income which give no occasion to invoke the provisions of sections 68, 69, 69A to 69D and accordingly Section 115BBE of the act in a way was not applicable in such cases. In such a scenario, once the income is outside the rigors of section 68, 69, 69A to 69 of the act, there is no bar on set off losses against such undisclosed income being disguised as undisclosed business income as against income referred to u/s 68, 69, 69A to 69D of the act.

Conclusion:-

The aforementioned lacuna has been very rightly plugged by proposing to Insert Section 79A in the Finance Bill'2022 which will debar any set off of losses and unabsorbed depreciation against the undisclosed income unearthed as a result of a search or a survey action irrespective of the applicability of Sections 68, 69, 69A to 69D of the act on such undisclosed income. However, the issue of rate of tax on such undisclosed income which may be in the nature of "undisclosed business income" still needs to be addressed by the legislature to avoid any ambiguity and certainty of taxation.

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ABOUT CA.MOHIT GUPTA

Mr. Mohit Gupta is a Fellow Member of the Institute of Chartered Accountants of India, a commerce graduate from prestigious Ramjas College, Delhi University and an alumni of St. Xavier's School, New Delhi. He is practicing as a Chartered Accountant for more than 15 years and managing the Direct Tax Advisory and Litigation practice of M/s. Dhanesh Gupta & Co., Chartered Accountants, New Delhi a renowned Chartered Accountancy firm in the core domain of direct taxation established in 1978.

His forte is handling Income Tax Search and Seizure matters, direct tax litigation matters and legal representation before various authorities enforcing economic and tax laws incl. under PMLA, SFIO, EOW, DRI, SEBI, CCI, Benami Laws and Black Money etc. As on today, he has wide experience of handling Income Tax Search and Seizure Cases across the country, represented matters before the Income Tax Settlement Commission, ITAT and other appellate tribunals constituted under various economic laws. He has been contributing articles in various professional magazines/journals and addressing various seminars on topics relating to Income Tax Search and Seizure, allied tax matters and economic laws. He has to his credit plethora of well researched articles out of which many have appeared in leading journals. In Addition to the above, Mr. Mohit Gupta is also a Special Auditor of the Income Tax Department and has carried out numerous Special Audits across the country on being appointed by the Income Tax Department which have plugged tax evasions, tax base erosion and other tax manipulative practices and in turn facilitated the Income Tax Department to collect huge tax revenues. Mr. Mohit Gupta has also been appointed as Special Auditor under other economic statutes and by other Investigation Agencies of the Government of India. Mr. Mohit Gupta has also authored the periodical Newsletter on Income Tax Search and Seizure. The said newsletter contained well researched write ups / articles and judicial developments on the matters of Direct Taxation.

Mr. Mohit Gupta is also a renowned author on Direct Tax Subjects. His books received extremely overwhelming responses from the readers including the tax

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payers, tax administration, tax professionals, corporate houses and academicians. The said books were released by the top dignitaries of the country.

Due to his continuous desire to always rise on the learning curve, he always has a quest and quench to read more, learn more and perform even more.

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