

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "C" KOLKATA**

Before **Shri N.V. Vasudevan, Judicial Member** and
Shri Waseem Ahmed, Accountant Member

ITA No.274/Kol/2013 Assessment Year :2010-11
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DCIT, Central Circle- XIII, Aaykar Bhavan, Poorva, 110, Shanti palli, E.M.Bye Pass, 4 th Floor, Kolkata – 07	V/s.	Sri Ram Chandra Daga 71, Canning Street, Bagri market, Room No. 548, Block-C, 5 th Floor, Kolkata -01 [PAN No.ADUPD 5238 J]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थी की ओर से/By Appellant	Shri Amitabha Choudhuri, DR
प्रत्यर्थी की ओर से/By Respondent	Shri Rajeeva Kumar, Advocate
सुनवाई की तारीख/Date of Hearing	30-11-2015
घोषणा की तारीख/Date of Pronouncement	20-01-2016

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal by the Revenue is arising out of order of Commissioner of Income Tax (Appeals)-II, Kolkata in appeal No.255/CC-XIII/CIT(A)C-II/11-12 dated 16.11.2012. Assessment was framed by JCIT(OSD),CC-XII, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 22.12.2011 for assessment year 2010-11.

2. The Revenue in its solitary ground has challenged the action of Ld. CIT(A) in calculating the peak credit as calculated by the Assessee rather than adopting the peak credit calculation as done by the Assessing Officer.

3. Facts in the present case are that assessee is an individual and has declared income "from other sources". During the year there was a search & seizure operation on the assessee conducted on 26.03.2010 at the premises of assessee at 71, Canning Street, Bagri market, Room No. 548, Block-C, 5th Floor, Kolkata-01. The assessee is a proprietor of two businesses i.e., M/s Rungta Engineering Traders and M/s Rao & Co. which are engaged in the business of providing accommodating entries. The assessee used to issue cheques in lieu of cash received from the parties concerned. The assessee was maintaining several bank accounts for depositing cash and issuing cheques. The statement of assessee was recorded u/s 132(4) of the Act at the time of search and seizure. During the course of assessment proceedings, the AO found that deposits and withdrawals were inter-linked trading transactions therefore the peak credit theory should be applied in the instant case. Accordingly, the AO combined all the transactions of both cash deposits and cheques and found the peak credit on dated 19.3.2010 for an amount of Rs. 2,52,15,740.00 in the ICICI Bank, account no. 090105000419, Brabourne Road, Kolkata. The AO in the instant case has worked out peak credit by taking only the credit entries in the bank on a particular date and no effect of the debit entries on that date was given. Accordingly the AO has added unexplained peak credit for an amount of ₹2,52,15,740/- to the total income of assessee.

4. Aggrieved, assessee preferred appeal before Ld. CIT(A) who has given some relief to the assessee in applying the peak credit theory. The relevant extract of the order is reproduced:-

"7. I have considered the submission of the appellant and perused the assessment order as well as the remand report. The facts of the case have already been discussed as above. There is no dispute on the fact

that the appellant was operating a number of bank accounts in the name of proprietorship concerns, firms and companies etc. in which the monies were regularly deposited and withdrawn. In the course of search operation, it was contended by the appellant that he is engaged in the activity of providing accommodation entries through his controlled various entitles and their bank accommodation entries through his controlled various entries and their bank accounts. In lieu, he has earned the commission income. It is observed that in the am order completed by the AO, he has made addition on account of peak credit as well as the commission income. During the course of appellate proceedings the appellant vehemently argued that in his case no addition could be made by applying principle of peak credit because he is engaged in the business of providing accommodation entries and the monies deposited and withdrawn from bank accounts belonged to third parties. That, the appellant has earned only the commission income and this fact has also been accepted by the AO by making addition on account of commission income. Therefore, once the AO has added commission income to the total assessed income, it proves that the monies deposited and or withdrawn from the bank accounts did not belong to the ape but to the third parties. On careful consideration of facts, I am of the opinion that it would not be correct to say that the AO has accepted that the monies deposited and withdrawn from the bank account operated by the appellant belonged to the third parties because he has made the addition on account of commission income. If the AO has made the addition on account of commission income, simultaneously, he has also made the addition on account of peak credit. It is observed that in the course of assessment proceedings the appellant did not provide the details of third parties from whom monies were received and paid, as claimed by the appellant. Further, at appellate stage also during the course of discussion the appellant was asked to produce the details of third parties who are the beneficiaries, but he showed his inability to produce the details in the absence of any books of account and record. Thus, I am of the opinion that conclusively it cannot be said that the monies deposited and or withdrawn from the bank accounts belonged to the third parties and not the appellant. Therefore I am of the considered opinion that in the case of appellant principle of peak credit is applicable and the AO has rightly applied the same. However, I find force in the submission of the appellant that in the assessment order, the AO has not correctly worked out the peak credit balance and it has to be worked out by merging all the bank accounts date-wise. In the course of appellate proceedings, the appellant submitted the working of peak credit by merging all the bank accounts and worked out the peak credit balance credit by merging all the bank accounts and worked out the peak credit balance as on 17.03.2010 at Rs.1,61,84,676/-. In the remand report, the AO has disputed the working of the peak credit provided by the appellant and

according to him the peak credit as on 17.03.2010 should be Rs.4,18,96,676/- by ignoring the withdrawals mad on 17.03.2010. According to him, the meaning of peak credit is only credit entries and the appellant cannot claim the debit entries. However, I am not inclined to agree with the view taken by the AO to work out the peak credit. In fact, on perusal of remand report it is observed that the AO himself has made contradictory statements in the remand report. At one place he has mentioned that the meaning of 'peak credit' is peak of credit balance of the bank account on a particular date and at other place he has stated that 'peak credit' means only the credit entries and not the debit entries. If the view of the AO in the remand report is accepted then it would mean that only the credit entries are to be taken into consideration and in that situation there is no need of applying the peak credit theory and all the deposits are to be added as income u/s. 68 of the Act. Further, in the remand report, the AO has worked out the peak credit at Rs.4,18,96,676/- by adding deposits made on 17.03.2010 with the opening balance as on 17.03.2010. However, he failed to appreciate that the opening balance s on 17.03.2010 of Rs.1,44,81,356/- is the net balance by taking into consideration all the deposits and withdrawals from 01.04.2009 to 16.03.2010. Therefore, the peak credit worked out by the AO in the remand report is not correct and deserves to be ignored. The peak credit has to be worked out on day to day basis by considering the date-wise deposits as well as withdrawals and the maximum balance on a particular date is the amount of peak credit to be added as income u/s. 68 of the Act. I have gone through the peak credit balance arrived by the appellant by merging all the bank accounts and the peak credit comes on 17.03.2010 t Rs.1,61,84,676/-. Hence, the AO is directed to restrict the addition on account of peak credit at Rs.1,61,84,676/-.

7.1 On careful consideration of facts and in law, I also find force in the submission of the appellant that if addition on account of peak credit is sustained then there is no question of making addition on account of commission because the addition on account of peak credit proceeds on the fundamental premise that the monies deposited and or withdrawn from the bank accounts belonged to the appellant. If it is so, then there is no question that the appellant will earn the commission out of the transactions of his own money. In the case of appellant, I have upheld the addition on account of peak credit which is more than the commission and, therefore, the AO is directed to delete the addition made on account of commission.

7.2 I find support of my decisions as discussed above from the decision of the Hon'ble ITAT, Kolkata in the case of Pramod Sharma, Kolkata vs. DDCIT, CC-VII, Kolkata ITA No. 515 (Kol) of 2009 dated 14.10.2009. In this case during the course of search it was found that the assessee

was engaged in the business of providing accommodation entries through various companies. In the assessment completed by the AO, he has made addition u/s. 68 of the Act on account of monies deposited in the bank accounts and also made addition on account of commission income. The ads made by the AO were confirmed by the CIT(A). Aggrieved by the order of the CIT(A), the assessee filed an appeal before the Hon'ble ITAT, Kolkata. It was submitted before the ITAT that both the additions on account of commission income and the peak credit cannot be made in the hands of assessee. That, in the case of Praveen Kumar Agarwal, in **IT(SS)A. No. 74/Kol/2003** dated 28.09.2007 and **IT(SS)A. No.61/Kol/2003**, the ITAT had taken a view that either 2% of the commission or the peak credits during the block period, whichever is high, has to be taken as income of the assessee. In the said decision the ITAT followed its earlier decision in the case of Loknath Prasad Gupta in **ITA No. 190/Kol/2003** and **ITA No. 185/Kol/2003**. It was pleaded before the ITAT that the Revenue should have assessed either the commission income or the peak credit appearing on a particular date. The Hon'ble ITAT, after considering the facts of the case and relying on its earlier decision in the case of Praveen Kumar Agarwal held that higher of the peak credit or commission income should be taken as undisclosed income. Since, in the case of assessee the peak credit of Rs.4,07,17,055/- is higher than the commission of Rs.25,00,000/- declared by him, his undisclosed income is assessable at Rs.4,07,17,055/-. In the case of Praveen Kumar Agarwal, the Hon'ble ITAT accepted the proposition that where many years are involved, in the subsequent years only increase in the peak balance is to be added to the income of the assessee. For example, in that case, in AY 1990-91, the peak balance was Rs.50,100/- and same was added to the income in AY 1990-91. In A.Y 1991-92, the peak balance was Rs.32,103/- and therefore no addition on account of peak was made in AY 1991-92. Further, in A.Y 1992-93, the peak balance was Rs.57,080/- but in this year only increase in the peak balance was added and not the entire amount of peak balance.

7.3 In the case of appellant as discussed above, the amount of peak is higher than the commission income and, therefore, peak balance Rs.1,61,84,676/- is to be assessed as income of the appellant. In view of above, the ground nos. 3 and 4 are dismissed and ground no. 5 is partly allowed.”

6. Being aggrieved by this order of Ld. CIT(A) Revenue preferred second appeal before us on the following ground:-

“1. That on the facts and circumstances of the case, the Ld. CIT(Appeals) Committed a mistake apparent from record on admitted facts in computing “peak credit” as calculated by the assessee.”

Shri Rajeeva Kumar, Ld. Authorized Representative appearing on behalf of assessee and Shri Amitabha Choudhuri, Ld. Departmental Representative appearing on behalf of Revenue.

7. We have heard rival contentions of both the parties and perused the materials on record. Ld. DR vehemently relied on the order of Assessing Officer whereas Ld. AR submitted that as per the theory of peak credit all the deposits should be taken after deducting withdrawals while working out the peak credit. From the aforesaid discussion, we find that assessee was engaged in the business of providing accommodation entries to the parties concerned by converting the cash into cheque. The assessee is also depositing cheques and transferring cheques to the parties through banking channels after involving certain intermediaries. The AO applied the peak credit theory and made addition of peak credit amount reflecting in the ICICI Bank on a particular date i.e. 19.3.2010 amounting to ₹2,52,15,740/-. But Ld. CIT(A) was not satisfied with the working done by AO of the peak credit balance in that particular account of assessee as debit entries from the bank were not considered while working out the peak credit balance. Accordingly, Ld. CIT(A) has applied the peak credit after taking into all the deposits minus withdrawals of a particular date which is coming for an amount of ₹1,61,84,676/-. We also find from the statement recorded by AO of the assessee that he is only a conduit in a syndicate of accommodation entries providers and earned income for providing such accommodation entries. There is no doubt about that assessee was engaged in providing accommodation entries. In view of above we opine that peak credit balance should be worked out only after taking into account the debit entries. Therefore we are inclined not to interfere in the order of Id. CIT(A) as the Id. DR has not brought anything on record to controvert the order of the Id. CIT(A). we are also relying on the on the decision of Co-ordinate Bench in the case of *ITO vs. Shri Piyush Poddar* in **ITA No. 1050/Kol/2011** for AY 2006-07

dated 07.09.2015, wherein exactly on similar circumstances, the Tribunal has directed the AO to assess the peak credit by observing held as under:-

*"10. We have heard the rival submissions and perused the materials available on record. It is seen that the assessee apart from his regular income had a bank account with Central Bank of India which was used by him only for the limited purpose of providing accommodation entries to various parties. Initially the assessee took a stand that he was deriving finance commission @ .25% of all the transactions in the accommodation entry business and offered the same to tax. However, he shifted his stand by accepting the peak credit theory before the Id. CIT(A). This is evident from the fact that he had not preferred further appeal before the Tribunal against the Id. CIT(A)'s order. In accordance with the directions of the Hon'ble Calcutta High Court, we had examined the veracity of the claim of peak credit theory made by the assessee in respect of all the transactions in Central Bank of India. It is observed that the assessee had rotated his own funds in Central Bank of India for providing accommodation entries to various parties. It is not disputed that the genuineness of the transaction could not be proved by the assessee by mentioning the names, addresses, PAN, confirmation of the parties to whom the payments were made and from payments were received by the assessee. Hence it is proved that transactions contained in the bank account are not genuine. Once the transactions in the bank account are proved ingenuine then it is an accepted practice of adopting the peak credit theory for the purpose of determination of undisclosed income of the assessee. Hence, reliance placed by the Id. DR in the decision of the Hon'ble Allahabad High Court reported in **276 ITR 38** which rejected the concept of peak credit theory is not applicable to the facts of the instant case. Co before the Hon'ble Allahabad High Court, the assessee claimed that the credits in the bank account represented genuine loans borrowed and the character of the loan transactions were not disputed and hence their lordships of Allahabad High Court held that the peak credit theory would not be applicable in that case. But in the facts of the instant case, the assessee had clearly owned up the transactions and that he is engaging himself in accommodation entry business with his own funds as well as funds received from parties to whom the accommodation entries are provided by the assessee and the names and addresses of such parties could not be provided by him for want of maintenance of books and details. This goes to prove that the genuineness of the transaction contained in the accommodation entry business as reflected in the said bank account could not be proved by the assessee. This is a distinct and crucial factor which distinguishes the decision rendered by the Hon'ble Allahabad High Court in 276 ITR 38 which was heavily relied upon the Revenue.*

11. On perusal of the bank account with Central bank of India, we are satisfied that the deposits and withdrawals are closely linked with and related to each other on day-to-day basis. It is also observed that the Id. AO had not brought any material or evidence on record to prove that the withdrawals made by the assessee form the said bank account having utilized for making any other investments outside the books or meant for any other purpose other than for accommodation entry business. It is pertinent to look into the decision

rendered by the Kolkata Tribunal in the case of Mahesh Kumar Gupta in IT(SS)A No. 11/Kol/.2014 dated 0.2.2005 wherein ITAT observed that the claim of the assessee was that the cheque withdrawals were for giving loan for the short period. Held as follows:-

'The AO cannot refuse to grant set off for the withdrawal made by cheque without bringing on record any materials so that the amount withdrawn by cheque cannot have been received back by the assessee and utilized by him in making subsequent deposits by cheque. Taking all this into consideration, we are of the considered pinion that AO should adopt peak credit method to arrive at the undisclosed income of the assessee in the undisclosed bank account No.SB6664 with the Syndicate Bank'

Reference may also be drawn to the decision of the Hon'ble Apex Court in the case of CIT vs. Smt. P.K.Noorjehan reported in 237 ITR 570 (SC) wherein their lordships have held that mere unsatisfactoriness of the explanation offered by these, does not, and need not, automatically result in deeming the value of investment to be the income of the assessee. That is still a matter within the discretion of the officer and, therefore of the Tribunal. In other words, the discretion has been conferred on the Income Tax Officer u/s. 69 of the Act to treat the source of investment as the income of the assessee if the explanation offered by the assessee is not found satisfactory and the said discretion has to be exercised keeping the view the facts and circumstances of the particular case The Income Tax Officer is not obliged to treat the value of investment as income in very case where the explanation offered by the assessee is found to be unsatisfactory.

12. Hence it would be unreasonable to tax all the deposits in the bank account of the assessee. To this extent, we do not appreciate the action of the Id. AO in taxing the entire credits of Rs.6,30,89,413/- as undisclosed income of the assessee for A.Y 2006-07. To put this ongoing dispute to rest, in the interest of justice and fair play, we direct the Id. AO to assess the peak credit in this case in respect of both cash as well as cheque transaction contained in the said bank account by verifying the veracity of the figures worked out by the assessee and bring to tax the same. We draw support from the decision rendered by 'C' Bench of Kolkata ITAT in ITA No.2069/Kol/2010 for A.Y 2007-08 dated 23.03.2012 in the case of ITA vs Shri Ganga Prasad Vyas wherein it was held that:-

'We find that the assessee has filed statement of peak credit i.e deposit and withdrawals from the bank account of SBBJ wherein the peak credit as on 24.10.2007 was at Rs.1,80,247/-. We further find that the money deposited in the bank account was withdrawn either on the same day or on subsequent dates. It is seen that the total addition of the aggregate deposits in the bank account after giving benefit of withdrawals is the peak amount and in that case peak amount is to be added. We find that the assessee has maintained a bank account which is admittedly not disclosed to the revenue and there is no doubt that the deposits in this bank account represents undisclosed income of the assessee to be assessed as undisclosed income but qua only

the peak amount. The assessee has filed complete statement of peak deposit and withdrawals which is at Rs.1,87,247/- and before CIT(A). We are of the view that the CIT(A) has rightly directed the AO to restrict the addition to the extent of peak amount and we confirm the same. This issue of revenue's appeal is dismissed.'

13. However, we would like to make it clear that this direction to the Id. AO to assess the peak credit in this case should not be construed as a conclusive proof in the hands of the beneficiary in the said bank account for explaining their amounts. Accordingly, this issue is set aside to the file of the Id. AO to complete the assessment in accordance with the directions mentioned hereinabove."

8. So in the interest of justice and fair play, we opine that for taxing the peak credit, the debit entries/ withdrawals should also be taken into account. Therefore we do not find any reason to interfere in the order of Id. CIT(A). Accordingly this ground of Revenue's appeal is dismissed.

9. In the result, Revenue' appeal is dismissed.

Order pronounced in the open court 20/01/2016

Sd/-
(N.V.Vasudevan)
(Judicial Member)
Kolkata,
*Dkp

Sd/-
(Waseem Ahmed)
(Accountant Member)

दिनांक:- 20/01/2016 कोलकाता ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant-DCIT,CC-XIII, Aayakar Bhavan, Poorva, 110, Shanti Palli
E M Mye Pass, 4th Floor, Kolkata-07
2. प्रत्यर्थी/Respondent-Sri Ram Chandra Daga, 71, Canning Street, Bagri Market,
Room No. 548 Block "C" 5th Floor, Kolkata-1
3. संबंधित आयकर आयुक्त / Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।