

IN THE INCOME TAX APPELLATE TRIBUNAL "D", BENCH KOLKATA  
BEFORE SHRI S.S.VISWANETHRA RAVI, JM & DR. A.L.SAINI, AM

आयकर अपील सं./ITA No.1920/KoI/2016

(निर्धारण वर्ष /Assessment Year:2008-2009)

Sri Santanu Chatterjee, C/o Benu Radio Product, Baidyapur More, Opp.UTI Bank PO-Kalna, Dist-Burdwan- 713101	Vs.	ITO Ward-1(2), Burdwan Aayakar Bhawan, Court Compound, Burdwan
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No.: <b>AHHPC 8020 E</b>		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by : Shri Suvo Chakraborty, Advocate  
Revenue by : Md. Ghayas Uddin, JCIT

सुनवाई की तारीख / **Date of Hearing** : **24/04/2017**

घोषणा की तारीख/**Date of Pronouncement** **28/04/2017**

**आदेश / O R D E R**

**Per Dr. Arjun Lal Saini, AM:**

The captioned appeal filed by the Assessee, pertaining to Assessment Year 2008-2009, is directed against the order passed by Id. Commissioner of Income Tax (Appeals), Burdwan, in appeal No.365/CIT(A)/Asl/Wd-1(2)/Bwn/2010-11, dated 26.07.2016, which in turn arises out of an order passed by the Assessing Officer Under Section 143(3) of the Income Tax Act, 1961 ( hereinafter referred to as the 'Act'), dated 19.10.2010.

2. Brief facts of the case, qua the assessee are that the assessee filed its return of income on 17.06.2008 declaring total income at Rs.1,04,640/- . Assessee's case was selected for scrutiny u/s.143(2) of the Act and the AO completed the assessment by making the addition on account of undisclosed income u/s.69 at Rs.11,04,790/-. During the assessment proceedings, it had come to the notice of the AO that the assessee had

made cash deposit of Rs.11,04,790/- in Axis bank Kalana bearing account No.323010100021757 Burdwan. Accordingly, the AO issued a letter to the bank u/s.133(6) of the I.T.Act and in response to the notice the concerned bank had forwarded the bank statement of the said account for the period 1<sup>st</sup> April, 2007 to 31.03.2008. The said bank account was not disclosed by the assessee in his assessment. The AO found that total cash deposit in the said bank account was at Rs.11,04,790/- and to that extent the assessee did not disclose the income, therefore, the AO added Rs.11,04,790/- treating it undisclosed income u/s.69 of the I.T.Act.

3. Aggrieved from the order of the AO the assessee filed an appeal before the CIT(A), who has confirmed the addition made by the AO. The assessee submitted before Id. CIT(A) that he used to withdraw the amount from the current account of partnership firm and used to deposit the said amount in his personal bank account but the Id. CIT(A) rejected the contention of assessee stating that there should have been a correlation between withdrawals from current account and Axis bank deposit on the one hand and the withdrawals from the Axis bank and purchases on the other hand. These were not established by the assessee because the assessee did not have any purchase vouchers or bills and even the purchase register produced by the assessee before the Id. CIT(A) did not show any correlation whatsoever. However, the assessee has admitted before the Id. CIT(A) that the said bank account is an undisclosed bank account and unaccounted money , but the assessee requested the Id CIT(A) that he should be allowed either benefit of peak

credit or may be allowed the benefit of Section 44AF, which is available to retail businessmen. The Ld. CIT(A) has refused the assessee to provide any benefit and confirmed the addition made by the AO.

4. Being dissatisfied with the order passed by the Id. CIT(A), the assessee is in further appeal before us and has taken the following grounds of appeal :-

*GROUND OF APPEAL BEFORE ITAT*

*1. For that non consideration of peak credit ground is unjust and cryptic.*

*2. For that rejection of peak credit plea of applicant by Ld. CIT (A) is contrary to settled judicial proposition by Apex Court in Surendra M. Khandar case whereby if there is rotation of cash deposits by consecutive deposits and withdrawals and non application of said withdrawals for any external purpose except for deposits in same account then peak credit facility is available to applicant. Applicant's had full rotation of the said deposit.*

*3. For that the appellate authority should have considered the fact that the A.O. cannot add entire amount without giving benefit of expenses. Therefore, application of peak credit is best attentive and as affirmed in C.I.T. vs U.S. Nelliapan, 66 ITR 722 (SC), Sarwchand Kojwan vs C.I.T. 235 ITR 732 (KT), ACIT Ahmadabad vs Iqbal Shafi Mohammad Chippa, ITAT (Ahm).*

*4. For that the case deposits in bank account during the year under consideration included the peak credit and none of those deposits yielded deemed income of the applicant.*

*5. The appellant craves leave to press new, additional grounds of appeal or modify, withdraw any of the above grounds at the time of hearing of the appeal.*

**5. Although in this appeal, the assessee has raised five grounds of appeal but at the time of hearing the main grievance of the assessee has been confined to the issue that Id. CIT(A) erred in not allowing the appeal of the assessee either based on the peak credit theory or based on the provisions of Section 44AF of the Act, i.e. Id. CIT(A)**

**rejected the peak credit plea of the assessee and, therefore, the assessee is in appeal before us.**

6. Ld. AR for the assessee has submitted before us that the assessee has requested before the Id. CIT(A) to allow the appeal based on peak credit or based on the provisions of section 44AF of the Act. The assessee had already admitted that this is undisclosed bank account and amount deposited in the said bank account were undisclosed. However, the assessee has agreed to offer the taxation on undisclosed amount of Rs.11,04,790/- based on the peak credit theory or based on the provisions of Section 44AF of the Act. Ld. AR submitted that if there is rotation of cash deposits by consecutive deposits and withdrawals and non-application of said withdrawals for any external purchase except deposits in same account then in that case peak credit facility is available to the assessee. The assessee under consideration had filed rotation of the said deposits. Besides, the AO cannot add entire amount without giving benefits of expenses, therefore, application of peak credit is best attentive and as affirmed in CIT Vs. U.S.Nelliapan, 66 ITR 722 (SC). In addition to this, Id. AR for the assessee had relied on the following judgments :-

i) In the case of Shri Madho Prashad Gupta, ITA No.6695/Del/2015, order dated 02.09.2016; wherein the Delhi Tribunal held that Id. CIT(A) in the interest of natural justice taken the peak credit which as per the details filed by the Id. AR for the assessee which works out to Rs.2,00,000/- and rightly treated as income from undisclosed sources.

ii) In the case of Sri Kamlesh Dutta, ITA No.408/Kol/2015, order dated 21.09.2015, wherein it has been held that in the interest of justice and fairplay, to set aside this issue to the file of the Id. AO to bring to tax the peak credit in the bank account and frame the set aside assessment after due verification of the veracity of the workings of peak credit furnished by the assessee.

Therefore, the Id AR for the assessee has submitted before us that there is clear evidence to show the nature and source of the monies deposited into the bank account which belongs to the assessee, the peak credit would arise only in the case of recycling of funds, and assessee in fact does the recycling of funds, which would therefore, be applicable in the case of the regular and systematic activity and therefore the assessee is eligible to claim benefit of peak credit theory.

7. On the other hand, Ld. DR for the Revenue has stated that the assessee is a partner in the partnership firm and the undisclosed bank account which was found by the AO, does not relate to business of the assessee, it is the undisclosed money of the assessee. The argument of the assessee that he used to withdraw the amount from the current account of the partnership firm and used to deposit the said amount in his S/B bank account, the assessee has failed to establish the correlation between the withdrawal and current account and deposit in the Axis Bank (undisclosed bank account). The Ld. DR also submitted that this undisclosed bank account does not pertain to the assessee's business, therefore, the order passed by the AO should be treated as a final order.

Apart from this, Id. DR for the revenue has also relied on the following judgments :-

i) M.H.Raney, [2013] 34 taxmann.com 5 (Mumbai-Trib) :-

*6. The issue with regard to the satisfaction or otherwise of the Assessing Officer (AO) with the assessee's explanation as to the nature and source of investment found to have been made during the relevant year, as by way of deposit of cash in his bank account in the instant case, is essentially a matter of fact, to be decided considering the entirety of the facts and circumstances of the case. It is the reasonableness of the said non-satisfaction, since confirmed by the first appellate authority, that we are called upon to examine in the appellate proceedings.*

*The assessee's explanation is vague and unsubstantiated; rather, being limited to the working of the quantum of the unexplained funds involved, contending recycling, so as to impact the addition to income exigible on account of the unexplained nature and source of the investment. The peak credit theory is based on recycling of funds, implying systematic activity, while neither the nature of the deposits nor their utilization, stands explained, so that the plea is not maintainable at the threshold. Scrutiny (of the bank account statement) reveals it to be inconsistent with not only the explanation of the amounts being possibly used for charitable purposes, but also with the fact of the same being, apart from withdrawn in cash, also by cheques for ostensibly personal purposes, on a regular basis and in no insignificant sums. Further, the pattern of withdrawal reveals the account to be employed for transfer of funds in the main, i.e., deposit of cash at one place and its withdrawal at other; the funds being withdrawal almost in toto, and soon after their deposit. The assessee has been wholly unable to discharge the onus of a satisfactory explanation qua cash deposits, including the quantum of funds involved and, accordingly, its appeal fails.*

*The decision by the apex court, it must be borne in mind, is rendered in the context of a penalty provision, which is first to be strictly applied and, besides, its trite that a plausible explanation saves penalty. This would explain the use of the words 'reasonably attributable' or 'reasonably explained' by it. It is also to be noted, and cannot be overlooked, that this is not a case of telescoping in its true sense, but one of application of peak credit, to determine the quantum of the same, single income, while the telescoping is normally of the use of funds attributable to one income, against 'income' wherein it finds reflection in some other form. For example, as where there is a suppression of the sales and, correspondingly, certain unrecorded trade debtors are also found, and so on. Further, while there may be no direct evidence with regard to concealed income, so that a reasonable view - under the facts and circumstances of the case which, in any case have to be kept focus*

*- has to be adopted, the peak credit would arise only in the case of recycling of funds, which would, therefore, be applicable only in the case of the regular and systematic activity. The said decision or the peak credit has no application in the facts of the instant case. The other cited decisions are rendered on their facts, and in fact in ratio endorse the Revenue's case.*

*7. In the result, the assessee's appeal is dismissed.*

ii) Manoj Aggarwal, [2008] 113 ITD 377 (Delhi)(SB) :-

*26. The argument advanced on behalf of the assessee before us was that the assessee was not maintaining any books of account and the deposits were found only in the assessee's bank statement which cannot be considered as the books of account of the assessee and, therefore, section 68 was not applicable. Our attention was drawn to the confirmation letters placed at pages 159 and 160 of the paper book. We are however unable to accept the argument. Though section 68 of the Act may not be strictly applicable since the assessee was not maintaining any books of account and the bank statement cannot be considered as the assessee's books of account, on the basis of the judgment of the Supreme Court in the case of A. Govindaraiulu Mudaliar v. CIT 1958 34 ITR 807, it is the onus of the assessee to explain the cash received by him and if there is no explanation or acceptable evidence to prove the nature and source of the receipt, the amount may be added as the assessee's income on general principles and it is not necessary to invoke section 68, nor is it necessary for the income-tax authorities to point out the source of the monies received. Even if section 68 is not applicable, the cash deposit in the bank can be asked to be explained by the assessee under section 69 or section 69B of the Act. No doubt the assessee had tried to file additional evidence before the CIT (Appeals) in the form of confirmation letters and income-tax returns but these were not admitted by the CIT (Appeals) and no reasons have been shown before us as to why they should have been admitted. In the absence of any clinching evidence to show the nature and source of the monies deposited into the bank account which belongs to the assessee, the Assessing Officer was justified in adding the amount of Rs. 15 lakhs as the assessee's unexplained income. We confirm the addition and dismiss the ground."*

6. Having heard the rival submissions, perused the material on record, we are of the view that there is merit in the submissions of Id. AR for the assessee, as Id AR for the assessee explained us that there is clear evidence to show the nature and source of the monies deposited into the bank account

which belongs to the assessee, the peak credit would arise only in the case of recycling of funds, and assessee in fact does the recycling of funds, which would therefore, be applicable in the case of the regular and systematic activity and therefore the assessee is eligible to claim benefit of peak credit theory.

The judgments cited by the Id DR for the Revenue do not apply to the issue under consideration because the assessee does the recycling of funds. We noticed that the assessee has suo moto admitted that bank account No.323010100021757, Axiz bank Ltd. was undisclosed bank account and the deposits and the withdrawals for the said account are unexplained. In order to buy the peace the assessee has suo moto admitted that his undisclosed bank account should be assessed either, as per the peak credit theory or as per the provisions of Section 44AF of the Act. We also noticed that in the bank account there is deposits and withdrawals in the same account. Considering the factual position we direct the AO to reassess the deposits in the bank account as per the peak credit theory. Accordingly, we allow this issue for statistical purposes.

7. In the result, appeal filed by the assessee is, allowed for statistical purposes.

Order pronounced in the open court on this 28/04/2017.

**Sd/-**

**(S.S.VISWANETHRA RAVI)**

न्यायिक सदस्य / JUDICIAL MEMBER

**Sd/-**

**(DR. A.L.SAINI)**

लेखा सदस्य / ACCOUNTANT MEMBER

कोलकाता /Kolkata; दिनांक Dated 28/04/2017

प्रकाश मिश्रा/Prakash Mishra,नि.स/ PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant-Sri Santanu Chatterjee
2. प्रत्यर्थी / The Respondent.- ITO, Ward-1(2) Burdwan
3. आयकर आयुक्त(अपील) / The CIT(A), Kolkata.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाईल / Guard file.

**आदेशानुसार/ BY ORDER,****सत्यापित प्रति //True Copy//****उप/सहायक पंजीकार****(Asstt. Registrar)****आयकर अपीलीय अधिकरण, कोलकाता / ITAT, कोलकाता**