

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
**IN THE INCOME TAX APPELLATE TRIBUNAL
 SURAT BENCH, SURAT**
 श्री सी.एम.गर्ग, न्यायिक सदस्य तथा श्री ओ.पी.मीना, लेखा सदस्य के समक्ष
**BEFORE SHRI C.M.GARG, JUDICIAL MEMBER
 AND SHRI O.P.MEENA, ACCOUNTANT MEMBER**

आ.अ.सं./I.T.A No's.2031 & 2663/AHD/2015/SRT
 निर्धारण वर्ष/Assessment Years : 2010-11 & 2011-12

Amitkumar Mathurdas Kaneria, 64, Hingiri Bunglows, Near: Rajhans Cinema, Piplod, Dumas Road, Surat – 395 007. [PAN: ADPPK 7315 J] अपीलार्थी Appellant	Vs	The Income Tax Officer, Ward-3(3), Surat. प्रत्यर्थी/ Respondent
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आ.अ.सं./I.T.A No's.1545 & 2029/AHD/2015/SRT
 निर्धारण वर्ष/Assessment Years : 2010-11 & 2011-12

Smt.Jayaben Mathurdas Kaneria, 64, Hingiri Bunglows, Near: Rajhans Cinema, Piplod, Dumas Road, Surat – 395 007. [PAN: ADPPK 7316 M] अपीलार्थी Appellant	Vs	The Income Tax Officer, Ward-3(3), Surat. प्रत्यर्थी/ Respondent
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आ.अ.सं./I.T.A No.2030/AHD/2015/SRT
 निर्धारण वर्ष/Assessment Year : 2010-11

Smt.Jullie Amit Kaneria, 64, Hingiri Bunglows, Near: Rajhans Cinema, Piplod, Dumas Road, Surat – 395 007. [PAN: AIZPK 3199 B] अपीलार्थी Appellant	Vs.	The Income Tax Officer, Ward-3(3), Surat. प्रत्यर्थी/ Respondent
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निर्धारिती की ओर से /Assessee by	Shri Hiren R.Vepari - CA
राजस्व की ओर से /Revenue by	Mrs. Smitha V.Nair - Sr.DR

सुनवाई की तारीख/ Date of hearing:	20.08.2018
उद्घोषणा की तारीख/Pronouncement on	26.09.2018

आदेश /O R D E R

PER O. P. MEENA, ACCOUTANT MEMBER:

1. These five appeals filed by three Assessee's are directed against the different orders of learned Commissioner of Income tax (Appeals)-1 & II, Surat (in short "the CIT (A)") dated 10.04.2015, 24.08.2015, 02.03.2015, 05.05.2015 & 01.04.2015 pertaining to Assessment Years 2010-11, 2011-12, 2010-11, 2011-12 & 2011 respectively.

ITA No.2031/Ahd/2015/SRT for AY 2010-11; (by Shri Amitkumar Mathurdas Kaneria):

2. Ground No.I relates to validity of assessment in not following direction given by Additional Commissioner u/s.144(A) is not pressed before us, hence same is treated as dismissed.

3. Ground No.II relates to confirming addition of Rs.95,22,650/- being cash deposit in Savings Bank Account No.10399460072 when the source of cash deposits was furnished to the Assessing Officer

explaining item to item cash deposit in bank account from opening cash balance of Rs.52,62,023/- and withdrawals of cash made from bank account.

4. Briefly stated facts of the case are that on the basis of AIR information it was revealed that the assessee has made cash deposit of Rs.95,22,650/- in the Savings Bank Account No.103994600072 with SBI this bank account was not disclosed in the Return of income filed by the assessee. A copy of bank statement furnished by the assessee shows that the credit side amount comes to Rs.3,21,55,298/- and total of the cash deposit Rs.95,22,650/-. In reply show caused noticed dated 20.03.2013, the assessee has replied vide letter dated 23.03.2013 that the amount deposited in the bank account of the assessee is out of opening balance of Rs.52,62,023/- (closing balance of cash dated 31.03.2009) and cash withdrawals during the year. A copy of personal cash book maintained by the assessee and personal balance sheet and copy of wealth tax return for A.Y.2009-10 disclosing cash on hand as on 31.03.2009 of Rs.52,62,023/- was filed. Therefore, it was contended that there is no question of cash being deposited out of books. It was also submitted that the

Return was filed in ITR-3 for the relevant assessment year which does not require specifying cash on hand anywhere. The AO examined the reply of the assessee and observed that the assessee has neither carried out any business activities nor carried out of any such business of cash deposits on commission basis by which it can be proved that there was any source from where the money could have given to the assessee. The AO also noted that during the assessment proceedings for A.Y. 2009-10, the assessee has also confessed / admitted this as unaccounted income earned from undisclosed source vide letter addressed to CIT-1, Surat. The AO observed that the assessee is changing his stand and submissions time and again. During the proceedings for A.Y. 2009-10 the assessee has prepared a cash in hand statement showing an amount of Rs.52,62,023/- as carried forward as opening balance on 01.04.2010. However, the AO was of the view that the transaction of bank accounts are from undisclosed source and same has been admitted by the assessee, therefore, the disclosure of cash on hand as on 31.03.2009 of Rs.52,62,023/- was not accepted. As the W.T.Return for A.Y. 2009-10 was filed only on 04.07.2012 i.e after the assessment u/s.143(3) for A.Y. 2009-10 was completed. The AO also observed that if the argument, which is

for the cover up the story of cash in hand of Rs.52,62,023/- is considered for time being, then also several ambiguity and discrepancies emerges, like the cash deposits amount during the year is Rs.91,25,650/- whereas cash in hand is only Rs.52,62,023/- and no explanation / evidence has been given for the amount of cash balance deposit. Further, the submission of the assessee shows that there is a cash in hand of Rs.23,11,023/- as on 12.05.2009, however, it was noticed that thereafter the assessee has withdrawn cash of Rs.13,00,000/- from the period from 15.05.2009 to 20.05.2009. Therefore, the AO observed that when the assessee was having cash in hand of Rs.23,11,023/- on 12.05.2009, then what is the need to withdraw such huge amount of cash from the bank and keep in hand for future deposit in the same bank account?. Considering these facts, the AO treated the cash deposit of Rs.95,22,650/- in SBI Account as unaccounted income of the assessee u/s.68 of the Act.

5. Being aggrieved, the assessee filed appeal before the Id.CIT(A). It was contended before the CIT(A) that in view of the cash book entries, the assessee should have been given the benefit of telescoping and peak credit. It was submitted that in the

personal cash book, the peak credit was worked out at Rs.40,23,892/- for A.Y. 2009-10 to show the availability of cash balance to explain the cash deposit but the cash book transactions were not supported by documents. Hence, the CIT(A) noted that the explanation of the appellant is not in conformity with the basic principles of working of peak credit. Further, the bank account with SBI was never disclosed in the tax returns of bank account by the appellant. It was only when the bank account was detected and confronted, he came with fanciful explanation and make believe stories before the AO. Therefore, the CIT(A) was of the view that burden of proof lies on the appellant to support the contentions and explanation regarding source of cash deposit in the bank account. Therefore, the submissions and evidences produced by the appellant found to have been fabricated and manufactured for a make believe arrangement.

6. Being aggrieved, the assessee filed this appeal before the Tribunal. The Id.AR of the assessee referred paper book, page no.106 which is a copy of Return of income and claimed that this bank account was explicitly disclosed by the assessee in the Return of income for A.Y. 2010-11. It was further submitted that income

earned from this bank account in the form of bank interest was always offered for taxation in the Return of income from A.Y. 2006-07 onwards. As evidenced from computation of income for A.Y. 2006-07 showing interest income of Rs.9,841/- [PB-79]. The ld.AR submitted that the assessee has already disclosed undisclosed income of Rs.52,53,000/- on account of bank deposits in this account during the A.Y. 2009-10 and therefore the closing balance thereon at Rs.52,62,023/- should be allowed as telescoping as against the cash deposits made during the year under appeal. It was further submitted that peak credit for this bank account worked out to Rs.40,23,972/- as on 02.07.2009. Therefore, the same could be considered for addition as against the total addition of entire cash deposits of Rs.95,22,650/- made by the AO. The ld.AR further referred the order of ITAT in the appellant's own case for A.Y. 2009-10, [paper book page no.133 para 17] in which the ITAT had accepted the peak credit on the basis of working given in the case of Jayaben Kaneria, mother of the assessee, and thereby following the same in the case of assessee also, In pursuance of the ITAT order, the AO has framed an order u/s.143(3) r.w.s. 254 of the Income Tax Act on 26.11.2015 [paper book, page no.135 to 138] wherein the AO has accepted the

peak credit worked out at Rs.52,53,000/- in the case of assessee as per direction of ITAT, in the set-aside the assessment proceedings. Therefore, it was requested that the AO may be directed to adopt the peak credit Rs.40,23,972/- instead of addition of entire cash deposits. The Ld.AR, further argued that telescoping be allowed to the assessee.

7. *Per contra*, the ld.DR relied on the order of the Learned Authorities below.

8. We have heard the rival submissions and perused the material available on record. We find that the similar addition was made in assessment year 2009-10 in the case of assessee, his wife Julie Kaneria and his mother Jayaben Kaneria on the basis of unexplained cash deposits in the bank accounts of the concerned assessee's. After considering the facts on record, the Tribunal has accepted the concept of peak credit in respect of cash deposits in the bank account of assessee as per para 17 of ITAT no.1613 & 1692/Ahd/2013 dated 16.05.2014 wherein the Tribunal has observed as under :

"..... We therefore for similar reasons while deciding the appeals in the case of Jayaben Kaneria (ITA Nos.1605 & 1739/A/2013) remit the entire issue to the file of AO to examine the

evidence and submission of the Assessee and with respect to the cash deposits, to work out the peak credit on the basis of settled practice and thereafter decide the issue as per law. Needless to state that AO shall grant adequate opportunity of hearing to the Assessee. We also direct the Assessee to submit promptly all the required details called for by the Assessing Officer. Thus the grounds of Assessee and Revenue are allowed for statistical purposes."

9. We find that this bank account is continuation from the assessment year 2009-10 wherein the peak credit balance accepted by ITAT and the issue was set-aside to the file of the AO for working out correct peak credit and assessed accordingly. In compliance thereof, the AO has accepted the peak credit of the assessee. In view of above, the facts of present case are similar to that of A.Y.2009-10, we direct the AO to adopt peak credit for addition. However, since the peak credit working was not before the AO, therefore on the similar line of direction as in A.Y. 2009-10, of Tribunal Order, we deem it fit to set-aside this issue for limited purpose to the file of the AO to work out the peak credit on the basis of settled working and consider accordingly for addition instead of entire cash deposit. With regard to telescoping, we find that Tribunal has not given any finding on this issue for A.Y. 2009-10. Further, the AO noticed that theory of opening cash brought forward is not correct, as there are several ambiguity like

withdrawal of cash of Rs.13 lakhs for the period from 15.05.2004 to 20.05.2009 when the assessee was having cash in hand of Rs.52,62,023/- on 12.05.2009. Hence, telescoping claim is not justified, accordingly, this ground of appeal is dismissed. This ground is therefore disposed off accordingly.

10. Ground No.III relates to addition of Rs.1,16,43,762/- on account of cheque received from Raj Enterprises.

11. Facts apropos of this ground are that the AO found that the assessee has shown cheque deposits of Rs.1,16,43,765/- which are claimed to have been received from M/s.Raj Enterprises on account of loan and repayment. The addition has been made on the basis of balance sheet of M/s.Raj Enterprises, in which net outstanding loan has been shown in the name of assessee, as debit balance with M/s.Raj Enterprises. The AO added this amount as income from unexplained source.

12. Being aggrieved, the assessee filed an appeal before the CIT(A) wherein it was submitted that the assessee has filed confirmation and audited balance sheet from M/s.Raj Enterprises for A.Y. 2010-11 showing that the appellant was one of the partners in M/s.Raj Enterprises and was having overdraft balance

of Rs.75,25,497/-. It was also submitted that the CIT(A) has deleted the addition of Rs.1,10,24,989/- of similar amount received from M/s.Raj Enterprises during the A.Y. 2009-10. However, for the year under appeal, the CIT(A) observed that the appellant was not able to furnish any evidences to show that the loan / advances have been given to M/s.Raj Enterprises. The balance sheet of M/s.Raj Enterprises shows that the appellant has no outstanding loan as debit capital balance. The appellant could not furnish any details regarding the source of giving loans / advances to M/s.Raj Enterprises and that is the reason why the cheques from M/s.Raj Enterprises has been deposited in the undisclosed bank account. Therefore, CIT(A) has confirmed the addition made by the AO.

13. Being aggrieved, the assessee filed appeal before this Tribunal. The ld.AR for the assessee submitted that the assessee is a partner in M/s.Raj Enterprises with 25% share. The audit report of M/s.Raj Enterprises is appearing at page no.29 to 46 of the paper book which shows that assessee had debit capital of Rs.75,25,497/- as on 31.03.2009. This balance was confirmed by the M/s.Raj Enterprises [confirmation placed at paper book, page

no.27]. It was submitted that during the year, the assessee withdrew a total sum of Rs.1,16,43,726/- from M/s.Raj Enterprises all by Account Payee Cheques. It is this receipt from the M/s.Raj Enterprises, which was added by the AO in the hands of the appellant. However, as a whole this withdrawal is the debit capital balance from the books is aggregating to Rs.1,91,000/- from opening of Rs.65,259/- which is duly reflected at page no.103 of the paper book in the liabilities side. The Id.AR submitted that the assessee has received a sum of Rs.1,10,24,989/- from M/s.Raj Enterprises resulting into debit balance of Rs.75,25,497/- which was added by the AO during A.Y. 2009-10 and same was allowed by Id.CIT(A) while deciding the appeal for A.Y. 2009-10 in para no.10 of appellate order appearing at page no.120. However, the CIT(A) has not appreciated the facts produced and evidences placed on record for the year under appeal. Therefore, it was requested that the addition made by the AO may be deleted.

14. *Per contra*, the Id.Sr.DR relying on the orders of the Lower Authorities submitted that nowhere it is given the source of loan. Therefore, the Lower Authorities were justified in making the addition.

15. We have heard the rival submissions and perused the material available on record. It is seen from the tax audit report and computation of income placed at paper book, page no.39 that the assessee's partner in M/s.Raj Enterprises with 20% share in the profit. The confirmation has been filed by M/s.Raj Enterprises which is placed at paper book, page no.27 & 28 wherein opening balance of Rs.75,25,497/- has been shown in the books of accounts of M/s.Raj Enterprises as on 01.04.2009 which is carried forward balances from 31.03.2009 as appearing at page no.27. The assessee has further received a sum by cheque aggregating to Rs.1,16,43,762/- from M/s.Raj Enterprises which is backed by confirmation from M/s.Raj Enterprises as well as appearing in the opening balance of the assessee with audited statement of M/s.Raj Enterprises. Thus, the total debit capital from the books of the firm accounts was Rs.1,91,69,259/- which is duly appearing in the balance sheet of the assessee as on 31.03.2010 in the name of M/s.Raj Enterprises in the liability side. Since the source of the entries is explained and transactions are by cheque and duly supported by the bank account maintained with the SBI along with audited statement account of group concern, therefore the source

of the same stands explained, hence the addition made by the AO is without any basis and devoid of any merit, accordingly, same is directed to be deleted. Accordingly, Ground No.III is allowed.

16. In the result, appeal of Shri Amit Kaneria (assessee) for A.Y. 2010-11 is partly allowed and partly set-aside.

ITA No.2663/Ahd/2015/SRT for A.Y.2011-12 (by Shri Amitkumar Mathurdas Kaneria):

17. Ground No.I relates to not allowing of telescoping effect of opening cash balance of Rs.40,69,233/- in respect of undisclosed cash credit treated as unexplained income.

18. Briefly stated facts of the case are that the AO was in a possession of AIR information, according to which the assessee has made cash deposits of Rs.38,12,997/- in the bank account on various dates. Since, the source of the same is not explained, The AO, therefore made the addition of Rs.38,12,997/- of cash deposit found in the bank account of the assessee.

19. Being aggrieved, the assessee has filed appeal before the Id.CIT(A), wherein it was claimed that the assessee should be allowed telescoping of opening balance of Rs.40,69,233/- as

available on 01.04.2010 from the cash deposit made in the impugned bank account. However, the CIT(A) was of the view that in the A.Y.2010-11 the benefit of telescoping of opening balance shown in the cash book of Rs.52,62,063/- as on 01.04.2009 and Rs.40,69,233/- as on 01.04.2010 was not allowed. However, the claim of peak credit theory was allowed by ITAT, Ahmedabad in the A.Y. 2009-10. Therefore, following the decision of ITAT, the CIT(A) observed that the assessee deserves the benefit of peak credit theory, however it was found in the case of assessee that if the opening balance as on 01.04.2009 is ignored, because matter is subjudiced before Hon'ble High court then the assessee will have negative cash in cash book. Therefore, the AO was directed to worked out the negative cash balance and sustained addition to that extent accordingly. Since it was not possible for the CIT(A) to check the veracity of the claim of the assessee. Consequently, addition was sustained to that extent and for remaining account the assessee will get relief. However, the CIT(A) further observed that he was of the considered view that the appellant failed in furnishing satisfactory explanation about the sum of Rs.38,12,997/- found deposited in the impugned bank account, resultantly, the addition of Rs.38,12,997/- was sustained subject

to relief as per peak credit theory. Subject to condition that addition made may be altered after receiving the order from Hon'ble High about the opening cash balance with the assessee as on 01.04.2009.

20. Being aggrieved, assessee filed appeal before this Tribunal. The ld.AR submitted that the CIT(A) was not correct in his approach when he dismissed the appeal of the appellant on the ground that the matter was pending finality before the High Court for A.Y.2009-10. The ld.AR submitted chart which containing 15 pages which summaries the position of cash book for A.Y. 2009-10 which shows that what is being sought by the assessee is nothing but the benefit of telescoping.

21. *Per contra*, the ld.DR relied on the orders of the Lower Authorities.

22. We have heard the rival submissions and perused the material on record. We find that the issue involved is same as in the A.Y. 2010-11 in the case of assessee which we have discussed in above part of this order above. We find that the CIT(A) has already allowed benefit of peak to the assessee following ratio laid

down by ITAT in the assessee's own case for A.Y. 2009-10. With regard to claim of telescoping deposits in the bank account and cash withdrawals made from the bank account which have not been evidenced by proper documentary evidences. Further, the assessee has not maintained books of accounts, therefore, the balances prepared on the basis of disclosures as on opening balance is not found to be acceptable proposition. Therefore, we are not inclined to allow the benefit of telescoping to the assessee nor it was allowed in earlier year by Tribunal. However, the benefit of peak is always available to the assessee which the ld.CIT(A) has already allowed to the assessee, therefore following our findings in the case of assessee for A.Y. 2010-11, this ground of appeal is dismissed.

23. In the result, appeal of the assessee is dismissed.

ITA No.1545/Ahd/2015 for A.Y.2010-11(by Smt. Jayaben Mathurdas Kaneria):

24. Ground No.I regarding validity of assessment, which has not been pressed before us, hence same is treated as dismissed as not pressed.

25. Ground No.II reads as under :

"II. Alleged undisclosed cash deposit:

(1) The Commissioner of Income-tax (Appeals) was not justified in ignoring available opening cash balance of Rs.10,61,930 and gift received of Rs.12,51,000/- from the appellant's son while directing Assessing Officer to work out peak shortage in cash book. The Commissioner of Income-tax (Appeals) ought to have fully allowed the appeal when the appellant explained the source of Rs.47,21,500 being cash deposit into savings bank account No.30360786486.

(2) The Commissioner of Income-tax (Appeals) failed to give benefit of telescoping of cash being made available from A.Y.2008-09, as a result of voluntary uncontested income disclosure by the appellant in that year.

(3) On the facts and circumstances of the case and as per law, the addition sustained is required to be deleted."

26. Briefly stated the facts of the case are that the AIR information revealed that the assessee has held an account with SBI which was not disclosed by her in her Return of Income. The perusal of statement for A.Y.2010-11 showed the total credit of Rs.1,50,69,461/- and cash deposits amounting to Rs.47,21,500/-. The source was explained to be gift of Rs.12,51,000/- in cash from her son i.e. Amit Kaneria on 13.04.2009. It was further claimed that the assessee was having cash of Rs.10,61,930/- as on 01.04.2009 which were deposited in her bank account. She had

deposited an amount of Rs.6,00,000/- on 07.04.2009 in her bank account out of available cash in hand. However, the AO has not accepted the claim of gift as according to him what was the occasion for such a gift was not mentioned in the gift declaration dated 13.04.2009 which appears to be an afterthought just to camouflage her cash deposits. Then after she gave a gift of Rs.4,00,000/- on 15.04.2009 to her husband. She has filed a gift declaration in support of this gift. It is pertinent to mention that first she got a gift from her son on 13.05.2009 and then she gave a gift to her husband on 15.05.2009. Therefore, this claim of the assessee was not justified and accepted. The claim of cash in hand was also not found acceptable on the ground that in spite of huge cash in hand the assessee kept on withdrawing cash amounts from her bank account and kept with her for days and then again withdrew huge amount and kept with her. No prudent lady should kept charging interest from her own son, and would loose the interest on the funds if not kept in the bank account. The AO also noted that the assessee had purchased property of Charnaia and the amount withdrawn in cash was not kept with her but in fact was paid on money for purchasing land was the plea of the assessee to kept withdrawing account from her account is nothing but

afterthought. Accordingly, cash deposits of Rs.47,21,500/- were treated as unaccounted income of undisclosed sources.

27. Being aggrieved, the assessee filed this appeal before the Id.CIT(A). In the appeal, it was claimed that telescoping of opening cash balance shown in cash book at Rs.10,61,930/- as on 01.04.2009 should be given which is carried forward from A.Y. 2009-10. The CIT(A) observed that the matter has been travelled up to ITAT who restored the matter back to the file of the AO for allowing the benefit of peak credit. However, Department has challenged this direction and filed appeal before Hon'ble High Court, where it has been admitted. Thus, the benefit of opening cash balance of Rs.10,61,930/- is not explained. With regard to the amount of Rs.12,51,000/- shown by the assessee as gift received in cash from her son Shri Amit Kaneria, the CIT(A) has not accepted the said claim as the test of genuineness of the gift that it is true and full disclosure of the appeal of the assessee to the Department in the Return of income filed by her is not established. The assessee has not made any whisper about any Return filed by her. The gift being examined categorically should figure in the Return of Income filed by the assessee, and by not disclosing this

fact in Return. Therefore, CIT(A) observed that this gift is non-genuine, afterthought and make believe transaction. The so-called evidence of gift declaration was also having defective title as it is not on a stamp paper to show the actual date of gift transaction, because the date of purchase of stamp paper and entry in the register of notary make it authentic as to when the document was executed between the parties. Therefore, relying on the ratio of judgment of Hon'ble Supreme Court in the case of Sumati Dayal, the CIT(A) held that the AO was absolutely right, when he refers to the tradition and Gujarati customs and culture where parents are expected to give gift to son and not vice-versa. This is also surprising fact that she had charged interest from her son Shri Amit Kaneria, on the balance loan amounting Rs.25,65,268/-. Similarly, the argument of gift cash of Rs.4,00,000/- made by the assessee to her husband on 15.04.2009 is also not found genuine to justify the receipt of gift of Rs.12,51,000/-. However, the assessee's claim of benefit of peak credit theory was allowed to the assessee, in the light of decision of ITAT in A.Y. 2009-10.

28. In the light of these facts, the CIT(A) has allowed the benefit of peak credit the theory in the case assessee, however, the opening balance as on 01.04.2009 as well as gift of Rs.12,51,000/- was also maintained being held as non-genuine and the assessee would probably have negative cash balance in cash book. Therefore, the AO was directed to worked out the negative cash balance and make the addition accordingly.

29. Being aggrieved, the assessee filed an appeal before this Tribunal. The ld.AR submitted that the AO sustained addition of Rs.22,64,500/- based on cash book appearing at paper book, page no.155. The basis adopted by the AO is working of amounts of Rs.14,50,000/- on 15.04.2009 and Rs.8,14,500/- on 02.07.2009 by not granting a credit of opening balance of Rs.10,61,930/-. Regarding gift received by the assessee from her son of Rs.12,51,000/-, it was submitted that cash book at page155 is need to be compared with the page no.27 of the paper book being cash book of the assessee. The AR, therefore, submitted that the telescoping effect of closing balance of cash as on 31.03.2009 of Rs.10,61,930/- as a result of voluntary offer by the appellant should be allowed and gift received by the assessee from his son

Amit Kaneria at Rs.12,50,000/- should be treated as genuine. The assessee prepared a chart of cash summary appearing at page no.16 of the paper book which is compared with the cash book appearing at page 27 of paper book, then there is no point cash balance of appellant turns into negative.

30. *Per contra*, the Id.DR supported the order of the AO and CIT(A) and submitted that the CIT(A) has already allowed peak credit to the assessee in accordance with the decision of Tribunal, hence, the same required to be sustained.

31. We have heard the rival submissions and perused the material on record. We find that the Tribunal has decided the similar issue of cash deposits in assessee's own case in ITA No.1605 and 179 Ahd/2013 for A.Y. 2009-10 dated 16.05.2014 for the A.Y. 2009-10 wherein para 9, the issue was set-aside to the file of the AO to work out the peak credit accordingly. In the light of this decision, the CIT(A) has already allowed the peak credit to the assessee following the order of the Tribunal. Therefore, we do not find any infirmity in the order of the CIT(A). With regard to claim of telescoping of the amount of Rs.10,61,930/- we find from the order of the Tribunal that no such telescoping has been allowed by

the Tribunal. Therefore, for the reasons discussed in the case of Amit Kaneria in the part of this order, we are not inclined to accept the claim of the assessee on the ground that the cash book prepared by the assessee is not genuine and is prepared afterthought. Similarly, with regard to addition in respect of gift of Rs.12,51,000/- from his son Amit Kaneria is concerned, we find that the same is not found to be genuine by the CIT(A) on the ground that the assessee is not able to explain as to why the gift was received in cash even though the assessee and his mother are having bank accounts with same SBI bank. Further, the gift received by the assessee falls in the exempted category of relative mentioned u/s.56(2)(vi), hence this should have been find mention in the Return of income. However, no such mention is given in the Return of income. Therefore, it is clear that the gift is not genuine and claim is afterthought which is make believe transaction to explain the cash deposits in the bank accounts. It is further seen that declaration of gift has been not made on the stamp paper, therefore, the CIT(A) has rightly placed reliance in the case of Sumati Dayal vs. CIT 214 ITR 801 (SC) which refers the human probability and behavior. According to which as per Indian / Gujarati Customs and Culture where parents are expected to give

gift to son and not vice-versa. It is also noticed that the assessee has charged interest from her son on the balance amount of loan of Rs.25,25,268/-. Therefore, instead of giving gift, Shri Amit Kaneria could have repaid the said loan to his mother to reduce the interest liability. Considering these facts, we are inclined to accept the reasoning advanced by the AO as well as CIT(A) accordingly, their findings are upheld.

32. In view of above facts, this ground of appeal of assessee is dismissed.

33. Ground No.III relates to addition of deemed dividend of Rs.15,07,561/-, without considering that the account is in the name of current account and it would not be covered by section 2(22)(e) of the Act and without prejudice that the CIT(A) ought to have further restricted the addition in respect of deemed dividend u/s.2(22)(e) of the Act to the extent of shareholding of the appellant by following the decision of Pune Bench ITAT in the case of Keval Kuman Jain vs. ACIT, 144 ITD 672.

34. Brief facts are that, the AO, on perusal of the copy of account from the books of Rahul Textiles Industries Pvt. Ltd. noticed that there was a credit balance of Rs.15,33,739/- as on

01.04.2009 but during the year, as a result of various transaction it resulted into a debit balance of Rs.13,02,079/- and the maximum debit balance on 12.09.2009 was at Rs.15,07,561/-. Since the assessee is one of the directors and shareholders in Rahul Textile Industries Pvt. Ltd., therefore, the loan / advances of Rs.15,07,561/- were treated as deemed dividend u/s.2(22)(e) of the Act.

35. Being aggrieved, the assessee filed appeal before the Id.CIT(A), wherein detailed submissions were made. However, the CIT(A) observed that it is an undisputed fact that the assessee holds more than 10% share in the company M/s.Rahul Textile Industries Pvt. Ltd. It is also undisputed fact that there was a maximum debit balance of Rs.15,07,561/- on 12.09.2009 in the account of the assessee with said company. The contention of the assessee that the account was in the nature of current account, but in the remand report, the AO observed that in the past the assessee was having credit balance with the company on which interest was charged. This year, the assessee withdrawing money from the company has ended up in having debit balance of Rs.13,02,079/- as on 31.03.2010. In the case of CIT vs. Raj Kumar

[2009] 318 ITR 462 (Del) it was held that word “advance” which appears in the company of the word loan in section 2(22)(e) can only mean such an advance which carries with it an application of repayment. In the instant case, the financial transactions are not in the nature of commercial transactions but purely an advance with an application of repayment. The transaction in the account is nowhere treated as trade advances and the assessee has not claimed it to be so. The Hon'ble Supreme Court in the case of Tarulata Shyam and Others vs. CIT 108 ITR 345 (SC) has held that loan advances to shareholders was repaid within 23 days still provision of the deemed dividend u/s.2(22)(e) are applicable. The claim of the assessee that account with the company is in the nature of current account is not supported by the fact of the case. Even if money is repaid by the assessee. It will not affect the applicability of provision to section 2(22)(e) of the Act. The Id.CIT(A) further observed that the assessee has argued that deemed dividend could be brought to tax to the maximum of accumulated profit and the computation of which should be less than accumulated profit + profit earned up to the date of grant of impugned advance. The appellant has worked out the figure of accumulated profits of Rs.5,54,263/- which *inter-alia*

include current years profit on pro-rata basis. However, the Id.AO did not accept this working and worked out the accumulated profit as on 31.03.2010 at Rs.12,03,769/- including the current years profit of Rs.7,05,892/-. However, CIT(A) held that it is no more res-integra to say that current years profit should be taken till the date of grant of advance for the purpose of working of accumulated profits. However, further deduction against the figure of Reserve and Surplus and current years profit is uncalled for. Because the same has apparently been already deducted before arriving at the figure of current years profit [similarly in earlier years]. Therefore, the figure of accumulated profit worked out by the AO is correct except the figure of Rs.7,05,892/- current years profit has to be reworked and need to be restricted on pro-rata basis till the grant of advance i.e.12.09.2009. Accordingly, the Id.AO was directed to re-compute the taxable amount of deemed dividend u/s.2(22)(e) of the Act. The Id.CIT(A) has also distinguished the decision of Keval Kumar Jain (supra) wherein the AO computed the deemed dividend @14% of accumulated profit corresponding to assessee's shareholding, which were found erroneous by CIT u/s.263 of the Act. On this, the ITAT held that there was no justifiable reason for invoking the provisions of

section 263 of the Act. Thus, basically the finding of the ITAT Pune was to be read in respect of erroneous orders of the AO and invoking the jurisdiction by CIT u/s.263 of the Act and not on the issue of working of deemed dividend of percentage of shareholding corresponding accumulated profit, hence, the ratio of said decision is not applicable to the fact of the case.

36. Being aggrieved, the assessee filed appeal before this Tribunal. The Id.AR submitted that the assessee has held 13.66% share in Rahul Textile Industries Pvt. Ltd. The AO made addition of Rs.15,07,561/- based on maximum debit balance of the assessee as on 12.09.2009, while the CIT(A) by giving direction to the AO asked to restrict the addition to the extent of accumulated profits, also considering the current years profit accordingly, the substituted addition of Rs.8,16,868/- is being contested by the assessee before the Tribunal. The Id.AR drawing our attention to page no.65 and 66 of the paper book submitted that it can be seen from the accounts of the books of Rahul Textiles Industries Pvt. Ltd. that the account starts with credit balance of Rs.15,33,739/- and remains credit balance in the books of Rahul Textiles Industries Pvt. Ltd. at least till 11.09.2009 and only, thereafter it turns into debit. When number of transactions are looked into, in

no uncertain terms it would emerge as an account which is nothing but current account in the character. Therefore, deemed dividend cannot be brought into play in case of current account. The Id.AR further placing reliance on the decision in the case of P.Satya Prasad 141 ITD 403 (Visakhapatnam) submitted that current years profit accrues only at the end of the year, therefore, for working out deemed dividend u/s.2(22)(e) only accumulated profits at the beginning of the year needs to be considered. Further placing reliance in the case of Kewal Kumar Jain (supra) it was contended that such addition needs to be restricted to the extent of shareholding which is 13.66%, hence addition u/s.2(22)(e) should be restricted to 13.66% of the accumulated profit at the beginning of the year which is at Rs.1,84,984/- as per the working given by the Id.AR [i.e. Rs.4,97,762/- reserves (-) advance tax Rs.3,12,783/-], accordingly 13.66% comes to Rs.25,269/-.

37. On the other hand, the Id.DR submitted that the accumulated profit as on 01.04.2009 should be considered at Rs.7,97,767/- in which current years profit on pro-rata basis should be added till the grant of advance i.e.12.09.2009 as done by the

CIT(A), therefore, Id.CIT(A) has correctly allowed the relief to the assessee.

38. We have heard the rival submissions, considered the facts and perused material available on record. On going through the page no.65 & 66 of the paper book which is the copy of the account of the assessee Rahul Textile Industries Pvt. Ltd., we find that there was a credit balance of Rs.15,33,739/- as on 01.04.2009 in the name of assessee and assessee has earned interest income of such loan in earlier years. Thereafter, the assessee has started withdrawing amount from this company on various dates which resulted into debit balance of Rs.13,02,079/- as on 31.03.2010. This balances has been reflected in the Schedule-9 (PB-103) of loan and advances and deposits in the books of the Rahul Textile Industries Pvt. Ltd. Thus, the entries in the books of accounts of the company are itself establish that the amount received by the assessee was in the nature of loan and advances. It is further seen that the said company has also deducted TDS of Rs.911 on the interest of Rs.9107/-. Therefore, the claim of the assessee that it is in the nature of current account is devoid of any merit, hence the AO and CIT(A) has rightly held that nature of transactions are

in the nature of loan and advances within the meaning of section 2(22)(e). As regards the claim of the assessee that for working out deemed dividend u/s.2(22)(e) of the Act only accumulated profit at the beginning of the year needs to be considered. We find that the accumulated profit is defined under Explanation-2 to section 2(22)(e) of the Act, which says that expression accumulated profit was included all profits of the company up to the date of distribution or payment referred into clause (a)(b)(e) and therefore it may be mentioned that expression accumulated profit means profit earned up to date of distribution of payment. The ld.AR has contended that the accumulated profit as on 31.03.2010 should be considered for the purpose of section 2(22)(e) of the Act. However, the said contention does not appear to be in accordance with the law, since the liability for tax comes into play as money was paid by a company, hence, the amount of accumulated profit has to be determined on the date of which loan are given by the company. Therefore, as per the Explanation-2 to section 2(22)(e) the accumulated profit means profit as on 31.03.2009 + prorata profit upto date of distribution of loan. It is in this case accumulated prorata profit was at Rs.4,97,762/- and current years profit on pro-rata basis i.e. 12.09.2009 $(705892 \times 165/365)$ of

Rs.3,19,109/-) accordingly, total accumulated profits as on 12.09.2009 comes to Rs.8,16,868/- i.e. [Rs.4,97,762/- + Rs.3,19,109/-]. Therefore, the findings recorded by the Id.CIT(A) for restricting the accumulated profit on pro-rata basis till the grant advance is upheld. With regard to the contention of the assessee that only 13.66 % share should be considered for deemed dividend based on the decision in the case of K.K.Jain is not found acceptable as the said decision has been rightly distinguished by the CIT(A) that it was in the context of appeal against the order of 263 where the one plausible view has already been taken by the AO. Since, in the case of assessee, the loan and advances are to the tune of Rs.15,07,561/- whereas the accumulated profit is at Rs.8,16,868/-, hence the deemed dividend in the form of loan far exceeds the accumulated profit, therefore this contention of the assessee that only her share of holding in the company should be considered for deemed dividend not found to be sustainable accordingly the findings of the CIT(A) are upheld, therefore, this ground of appeal is therefore dismissed

39. In the result, appeal of the assessee for A.Y. 2010-11 is dismissed.

ITA No.2029/Ahd/2015 for A.Y. 2011-12 (by Shri Jayaben Mathurdas Kaneria):

40. Ground raised by the assessee read as under :

"1. Addition of Rs.15,23,000 in respect of alleged undisclosed cash credit:

(1) *The Commissioner of Income-tax (Appeals) was not justified in confirming addition of Rs.15,23,000 being cash deposits in the bank account of the appellant particularly when the trace of such cash deposits was clearly explained by the appellant from the cash book.*

(2) *The Commissioner of Income-tax (Appeals) was not justified in confirming the addition particularly when the appellant clearly demonstrated that the cash balance available as on 1-4-2010 had genesis to her uncontested declaration during A.Y.2009-10. The Commissioner of Income-tax (Appeals) ought to have given telescoping effect of the cash available on 31-3-2009 as a result of such voluntary undisputed declaration of the appellant.*

(3) *The Commissioner of Income-tax (Appeals) was not correct in his approach when he dismissed the appeal of the appellant on the ground that the matter was pending finality before the assessing officer for A.Y. 2009-10, particularly when the appellant showed to the Commissioner of Income-tax (Appeals) that the cash balance available on 1-4-2010 was as a result of uncontested and undisputed voluntary declaration of peak shortage of cash during A.Y. 2009-10, from which the appellant was not withdrawing.*

(4) *On the facts and circumstances of the case, the appeal may be allowed."*

41. The above ground pertains to not allowing telescoping while confirming addition of cash deposits. The ld.AR submitted that what is being sought by the assessee is nothing but the benefit of telescoping, and at no point the balance of appellant turns into negative.

42. Since the facts are identical except figures are that of A.Y. 2010-11 in the case of assessee, and we have already decided the issue in A.Y. 2010-11 in the case of assessee in above part of this order, by not allowing telescoping benefit, accordingly the findings given by there would apply to this ground of appeal also, accordingly, this ground is dismissed on the basis of reasons given in ITA No.1545/Ahd/2015 for A.Y. 2010-11 the case of assessee and in ITA No.2663/Ahd/2015 in the case of Shri Amit Kaneria.

43. In the result, appeal of the assessee is dismissed.

ITA No.2030/Ahd/2015/SRT for A.Y. 2010-11(by Smt.Julie Amit Kaneria):

44. Ground No.I relates to validity of assessment in not following direction given by Additional Commissioner u/s.144(A) is not pressed before us, hence same is treated as dismissed.

45. Ground No.II raised by the assessee reads as under :

“(II) Addition of Rs.19,50,000 in respect of alleged undisclosed cash deposit:

- (1) The Commissioner of Income-tax (Appeals) was not justified in confirming addition of Rs.19,50,000 being cash deposits in Savings Bank A/c. No.10399467840 when the source of cash deposits was furnished to the Assessing Officer explaining item to item cash deposit in bank account from opening cash balance of Rs.16,67,366/- and withdrawals of cash made from the bank account.*
- (2) While dismissing the appeal, the Commissioner of Income-tax (Appeals) misconstrued the letter written by the appellant to the Commissioner of Income-tax -1, Surat during A.Y.2009-10 voluntarily disclosing cash deposits in that year.*
- (3) The appellant further submits that the Commissioner of Income-tax (Appeals) was not justified in confirming the treatment of impugned bank account as unaccounted when the above cash and bank account being part of the personal books of the appellant were not required to be filed alongwith the introduction of Form No.ITR-3.*
- (4) The appellant further submits that the Commissioner of Income-tax (appeals) ought to have considered the admitted undisputed income of the appellant in A.Y.2009-10 in cash as spill over and granted telescoping effect*
- (5) Without prejudice to the above, the Commissioner of Income-tax (Appeals) failed to appreciate the theory of peak cash shortage while dismissing the appeal.*
- (6) On the facts and circumstances of the case and as per law, the addition is required to be deleted.”*

46. The facts of this ground of appeal are same and identical as in the case of Shri Amit Kaneria in ITA No.2663/Ahd/2015/SRT for A.Y.2011-12 except figures, as dismissed earlier part of this order. Therefore, following the same, we are not inclined to allow benefit of telescoping. Hence, this ground of appeal is dismissed.

47. In the result, appeal of the assessee for A.Y. 2010-11 is dismissed.

48. To sum up, appeal of the assessee ITA Nos.2031/Ahd/2015/SRT is partly allowed, appeal in ITA No.2663/Ahd/2015/SRT is dismissed, and appeal in ITA No.1545/Ahd/2015/SRT, ITA.No.2029/Ahd/2015/SRT and ITA No.2030/Ahd/2015/SRT are dismissed.

49. The order pronounced in the open Court on 26-09-2018.

Sd/-

(सी.एम.गर्ग /C.M. GARG)

न्यायिकसदस्यतथा/JUDICIAL MEMBER

Sd/-

(ओ.पी.मीना/O.P.MEENA)

लेखासदस्यकेसमक्ष /ACCOUNTANT MEMBER

सुरत/ Surat, दिनांक Dated: 26th September, 2018/S.Gangadhara Rao,Sr.PS

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

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Assistant Registrar, Surat