

**IN THE INCOME TAX APPELLATE TRIBUNAL  
JODHPUR BENCH, JODHPUR**

**BEFORE SHRI B. R. BASKARAN, ACCOUNTANT MEMBER  
AND  
Dr. S. SEETHALAKSHMI, JUDICIAL MEMBER**

**ITA Nos. 168 & 169/Jodh/2015**  
**(ASSESSMENT YEARS- 2007-08 & 2008-09)**

Income Tax Officer, Ward-1(1), Udaipur.	Vs	Shri Suresh Kumar Khatik S/o Shri Bhagchand Ji, 3-F-14, Hiran Magri, Sector-5, Udaipur.
<b>(Appellant)</b>		<b>(Respondent)</b>
<b>PAN NO. AMMPK 0595 L</b>		

**CONos. 10 & 11/Jodh/2015**  
**(Arising Out of ITA No. 168 & 169/Jodh/2015)**  
**(ASSESSMENT YEARS- 2007-08 & 2008-09)**

Shri Suresh Kumar Khatik S/o Shri Bhagchand Ji, 3-F-14, Hiran Magri, Sector-5, Udaipur.	Vs	Income Tax Officer, Ward-1(1), Udaipur.
<b>(Appellant)</b>		<b>(Respondent)</b>
<b>PAN NO. AMMPK 0595 L</b>		

<b>Assessee By</b>	Shri Shrawan Kumar Gupta-Adv.
<b>Revenue By</b>	Ms Nidhi Nair, JCIT-DR
<b>Date of hearing</b>	19/01/2023
<b>Date of Pronouncement</b>	13/03/2023

**ORDER**

**PER: Dr. S. Seethalakshmi, JM**

These two appeals filed by the Revenue and the two Cross Objection by the assessee against the order of Learned Commissioner of Income Tax (Appeals)-1, Udaipur [herein after referred to as 'CIT(A)'] for the assessment years 2007-08 & 2008-09 both dated 24.02.2015, which in turn arises from the order passed by the Deputy Commissioner of Income Tax, Ward-1(4), Udaipur passed under Section 144/147/143(3) of the Income Tax Act, 1961 (in short 'DCIT') 14.03.2013 respectively.

2. Since the issues involved are common, all these revenue appeals were heard together and are being disposed off by this consolidated order. Against the department appeal there are cross objections filed by the respective assessee.

3. At the outset, the Id. AR has submitted that the matter pertaining to Shri Suresh Kumar Khatik in ITA no. 168/Jodh/2015 & Co. No. 10/Jodh/2015 may be taken as a lead case for discussions as the issues involved in the lead case are common and inextricably interlinked or in fact interwoven and the facts and circumstances of other cases are exactly

identical. The Id. DR did not raise any specific objection against taking the case of Shri Suresh Kumar Khatik as a lead case. Therefore, for the purpose of the present discussions, the case of Shri Suresh Kumar Khatik is taken as a lead case.

4. For deciding these appeals, we taken ITA No. 168/Jodh/2015 for the A.Y. 2007-08 as lead case for wherein following grounds have been raised by the Revenue:

*“ On the facts and in the present circumstances of the case and in law the learned CIT (A) has erred in:*

*1. restricting the addition made on account of unexplained cash deposits in the savings bank account of Rs. 2,53,29,777/- to Rs. 7,99,655/- after considering the peak credit incorrectly, as bank transactions of petrol pump business of other person namely Shri Rakesh Kumar, Prop. M/s Gundoj Filling Station, Pali were also included on the plea that these belong to the assessee.*

*2.1 admitting the additional evidences filed by the assessee before the Ld. CIT(A) despite the fact that no compelling circumstances beyond control of assessee to file the details before the AO were existing and AO was also not given opportunity of rebut the additional evidence thereby ignoring the provision of Rule 46A(1) of the IT Rules.*

*2.2 accepting the wrong method adopted by the assessee for determination of the peak credit ignoring the facts that :-*

*a) assessee has calculated the peak credit on the basis of highest cash balance in the hands of the assessee whereas as per settled law it has*

*to be calculated on the basis of highest cash balance in the bank account.*

*b) as per settled law only cash credit and debit entries have to be considered while calculating the peak credit but the assessee has considered withdrawals other than the cash in calculation of the peak credit.*

*c) as per settled law only cash credit and debit entries have to be considered while calculating the peak credit but the contend personal savings of Rs. 1,20,000/- has also been considered, though without any evidence of saving being produced and rather earlier years' withdrawal are inadequate.*

*That the appellant craves to add, amend, alter, delete or modify any or all the above grounds of appeal before or at the time of hearing.”*

5. For deciding these appeals, we taken ITA No. Co/Jodh/2015 for the A.Y. 2007-08 as lead case for wherein following grounds have been raised by the assessee:

*“1.1 The impugned order u/s 144/147/143(3) dated 14.03.2013 is bad in law and on facts of the case, for want of jurisdiction, barred by limitation and various other reasons and hence the same may kindly be quashed.*

*1.2 The action taken u/s 147 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same may kindly be quashed.*

*2. The Id. AO has erred in passing the ex-party assessment order without providing adequate and reasonable opportunity of being heard in the gross breach of law. Hence the assessment so made and consequent additions so made may kindly be quashed and delete.*

*3. Rs.7,99,655/-:The Id. CIT(A) has grossly erred in law as well as on the facts of the case in sustaining the addition of Rs.7.99.665/- on account of cash. deposit in the bank account taking to peak credit theory. Hence the addition so made by the AO and partly sustained by the CIT(A), being contrary to the provisions of law and facts, hence the same may kindly be deleted in full.*

*4. The Id. AO has grossly erred in law as well as on the facts of the case in charging interest u/s 243ABC. The appellant totally denies it liability of charging of any such interest. The interest, so charged, being contrary to the provisions of law and facts, may kindly be deleted in full.*

*5. The appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing.”*

6. Briefly the facts of the case are that the assessee is an individual and he has declared his income for the year under consideration at Rs.2,23,000/- on 03.10.2007. The Ld. AO had information that there were huge transactions in the Bank accounts of the assessee. A notice U/s 148 of the Act is alleged to be issued on 28/3/2012. Thereafter a show cause notice U/s 144 of the

Income Tax Act was issued on 26/2/2013 and served through registered AD. On account of non compliance of the above said notices the Ld. AO has passed ex-parte assessment treating the whole deposits in the bank accounts of the assessee on different dates as income of the assessee totaling the same. The Ld. AO has considered in his order the total cash deposit of Rs.2,53,29,777/- as unexplained and made addition to this extent. The Ld. AO has assessed the income at Rs.2,55.26,811/- U/s 144/147 of the Act.

7. In the aforesaid order, the AO issued notice to the assessee and re-adjudicated the matter. The relevant part of the assessment order is reproduced as under:-

“ As per information available in this office the assessee has made juge cash deposits in various bank accounts as per the following details:-

1. PNB A//c(3566000110014821), Chetak Circle, Udaipur	Rs.
1,04,32,552/-	
2. ICICI A/c (004505005229),Mmadhuban, Udaipur	Rs. 1,37,27,405/-
3. ICICI A/c (004501519527), Madhuban, Udaipur	Rs. 11,69,820/-
Total	Rs. 2,53,29,777/-

The source of above cash deposits has not been explained in the revenue of income filed by the assessee on 03.10.2007. In the circumstances notice u/s 148 was issued on 28.03.2012, after recording reasons. The notice was properly served on the assessee through Reg./AD no compliance was made to this notice. On 26.02.2013 a show cause notice u/s 144 of the I.T. Act was issues to the assessee and the case was fixed for hearing on 07.03.2013. The show cause notice was properly served on the assessee through Reg./Ad. In Show cause notice, it was

clearly mentioned that You are required to explain the source of the above mentioned cash deposits. In case no compliance is made, 'assessment order will be passed under section 144/147 of the I.T. Act without providing any further opportunity treating the cash deposits as unexplained and undisclosed income for A.Y. 2007-08. On 07.03.2013 again no compliance was made.

As no compliance has been made by the assessee therefore this order is passed on the basis of material facts available on records. The total unexplained cash deposits of Rs. 2,53,29,777/- made during the year in various banks as mentioned above, is treated as undisclosed income.”

8. Being aggrieved by the AO the assessee preferred an appeal before the Id. CIT(A) and the findings are reproduced as under:-

“I have considered the submissions of the appellant, the decisions of different higher appellate authorities and courts and the findings and the remand report of the Ld. AO. On perusal of the records and written submission of the appellant it is noticed that on the basis of the above relevant facts and circumstances of the appellant's case I am of the opinion that the notice u/s 148 of the Act was duly served upon the appellant. On perusal of the records I am of the considered opinion that the Ld. AO has rightly initiated proceedings u/s 147/148 of the Act as he had reason to believe that income has escaped assessment and there is tangible material to come to the conclusion that there is escapement of income in view of the above mentioned facts and circumstances of the case. Therefore, the re-opening proceedings are justified and the action of the Ld. AO is confirmed. Further, since notice u/s 148 of the Act and show cause notice u/s 144 of the Act were duly served it is therefore held that impugned assessment order passed U/ss 144/147/143(3) of the Act as ex-party assessment by the Ld. AO is valid. Accordingly, the action of the Ld. AO is confirmed and the above ground of appeal is dismissed.”

“ I have considered the submission of the Ld. AR and finding of the Ld. AO on perusal of the details filed by the Ld. AR I incline to agree with the contention of the appellant that once it is a case of the Id. AO that the deposits belong to the assessee, then the benefit of peak credit needs to be allowed in order to determine the unexplained deposits in such accounts. Peak credit principle is applicable in a case where there is several credit and debit entries are found in one account. The funds operated from such account should be taken to be one and hence, to avoid multiple counting of the same sums, only highest or peak of the amounts in that account should be taken as unexplained investment.

It is worth to mention here that in this respect the similar and identical issue of the principle of peak credit has been accepted for determination of undisclosed income by the Jurisdictional ITAT in the cases decided by under signed in the case of the appellant, Shri Suresh Kumar Khatik for AY 2009-10 vide order dated 29/10/2013 in appeal No. 228/IT/UDR/2011-12 as well as in the case of Shri Sarfraj Ahmed in AY 2010-11 vide order dated 18/10/2013. The principle of peak credit was accepted/adopted for determination of undisclosed income/unexplained investment in the above cases considering the regular debit and credit entries in the saving bank account of the assessees. Against both the above orders the department had preferred appeal before the Hon'ble Jurisdictional ITAT, Jodhpur The Hon'ble ITAT has confirmed the decisions given by the undersigned in both the above cases and dismissed the appeal of the department on this issue. The Hon'ble ITAT has commented on this issue in the case of appellant in AY 2009-10 vide their order dated 22/9/2014 in ITA No.20/Jodh/2014 as under:

“We have considered the submissions of both the parties and carefully gone through the material available on record. In the present case, it is an admitted fact that the transaction was recorded in the bank account of the assessee and the Assessing Officer was not satisfied from explanation given by the assessee with regard to the transactions in bank account, however, the Assessing Officer made the addition by considering the deposits only. He did not allow any benefit for the rotation entries i.e. entries which were on account of redeposit of the amount

already withdrawn from the bank. In such type of cases, where there are several credit and debit entries for which proper explanation is not there then the funds operated from such account should be taken to be one and to avoid multiple counting of the same sums only highest amount or peak amount, in that account should be taken as unexplained investment particularly when there is rotation of the amount i.e. amount withdrawn is re-deposited. In the present case, the Ld. CIT(A) worked out the peak amount at Rs. 1,50,153/- and the same was sustained as an addition in the hands of the assessee, therefore, we do not see any infirmity in the order of the Ld. CIT(A) on this issue.”

Similarly the Hon’ble ITAT, Jodhpur Bench, Jodhpur has commented on this issue in the case of Shri Sarafraj Ahmed vide their order dated 11/9/2014 in appeal No. ITA No. 578/Jodh/2013 for assessment year 2010-11 as under:-

“We have considered the submissions of both the parties and carefully gone through the material available on record. In the present case, it is an admitted fact that the Assessing Officer treated the deposits in the bank account as undisclosed income of the assessee while doing so he considered only the credit entries i.e. deposits in the bank, but ignored the withdrawals which were re-deposited. He also ignored the withdrawals made by the assessee from the partnership firm which were deposited in the bank account. In such type of cases, when the deposits are not verifiable, the peak theory is applicable which requires that only highest or peak of the amounts in the accounts should be taken as unexplained investment to avoid multiple counting of the same sums. In the present case also, the Ld. CIT(A) applied the peak credit principle and allowed the due benefit of those entries which were verifiable and accordingly sustained the addition of Rs. 3,45,000/-. We therefore, considering the totality of the facts and circumstances of the case, do not see any valid ground to interfere with the findings of the Ld. CIT(A).”

The ratios of the above judgments are fully applicable in this case also as the facts and circumstances are similar and identical. Therefore, respectfully following the Hon’ble jurisdictional ITAT in the interest of natural justice I consider it

reasonable and justified to take the peak credit which as per the details filed by the ld. AR works out to peak amount of credit of Rs. 7,99,655/- be treated as unexplained deposit out of income from undisclosed sources. So I order accordingly. The assessee gets relief of Rs. 2,45,30,122/-. Hence, this ground of appeal is partly allowed.”

9. Now the revenue is in appeal before us. The Ld D.R submitted that the Ld CIT(A) has considered new materials in violation of Rule 46A of Income tax Rules, i.e., he has not confronted those new materials with the assessing officer. The Ld AR for the assessee, on the contrary, submitted that the Ld CIT (A) has not followed decision rendered by the Tribunal in the assessee’s own case in ITA No. 20/Jodh/2014 dated 22.09.2014 for A.Y. 2009-10.

10. We have heard both the parties, perused materials available on record. It is noted that the ld. AR for the assessee made his submission on legal grounds in both cross appeal and also on merit. Taking into the facts and circumstances of the case, we are not adjudicating the cross appeals filed by the ld. AR for the assessee and not going into legal issues. Since there is violation of Rule 46A of Income tax Rules, we are of the opinion that all the issues need to be restored to the file of AO for examining them afresh by duly following the decision rendered in the assessee’s own case in ITA No. 20/Jodh/2014 dated 22.09.2014 for A.Y. 2009-10. The Cross appeal filed by

the assessee does not require adjudication, since the revenue's appeals are restored to the file of AO. The assessee is given liberty to raise the legal issues before the AO, if so advised.

11. The appeal in ITA Nos. 169/Jodh/2015 filed by the Revenue and CO. No. 11/Jodh/2015 filed by the assessee pertain to A.Y 2008-09. The Bench noted that the facts and issues urged in these appeals are exactly identical to AY 2007-08 discussed supra. Therefore, following the decision rendered by us in the earlier paragraphs for AY 2007-08, we restore all the issues to the file of AO with similar directions.

12. In the result, the appeals of the revenue are allowed for statistical purposes and the cross objections filed by the assessee are dismissed.

Order pronounced on 13/03/2023

**Sd/-**  
(B. R. BASKARAN)  
ACCOUNTANT MEMBER

**Sd/-**  
(Dr. S. SEETHALAKSHMI)  
JUDICIAL MEMBER

Dated : 13/03/2023

*\*Santosh*

Copy to:

1. The Appellant
2. The Respondent
3. The CIT

4. The CIT(A)
5. The DR
6. Guard File

Assistant Registrar  
Jodhpur Bench