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IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH "A" AHMEDABAD

Before S/Shri Bhavnesh Saini, JM and D.C.Agrawal, AM

ITA No.2258/Ahd/2010 along with
C.O. No.258/Ahd/2010
Asst. Year :2007-08

Income-tax Officer, Ward 14(4), Ahmedabad.	Vs.	Murlidharan G. Pillai, A-1, Samay Apartment, Opp. Sahakari Vasahat Gurukul Road, Ahmedabad.
(Appellant)	..	(Respondent)

Appellant by :-	Shri M. Mathivanan, DR
Respondent by:-	Shri S. N. Divatia, AR

ORDER

Per D.C. Agrawal, Accountant Member.

The appeal has been filed by the Revenue raising following grounds :-

- (1) The Id. CIT(A) has erred in law and on facts in deleting the additions of Rs.13,79,921/- out of addition of Rs.17,48,500/- made by the AO being unexplained cash deposits in bank account.
- (2) The Id. CIT(A) has erred in law and on facts in entertaining additional evidences regarding unexplained credit payment and unexplained cash deposited in the bank without giving opportunity to the AO, thus violating Rule 46A of the Income-tax Rules.

Whereas assessee has raised following grounds in its Cross Objection:-

- (1) The Id. CIT(A) has erred in law and or on facts in hpholding that the appellant had failed to explain satisfactorily the source of investment of Rs.17,48,500/-
- (2) The Id. CIT(A) has failed to appreciate that in view of confirmations of 15 depositors filed, the source of cash deposits of Rs.17,48,500/- should not have been treated as unexplained.

It is therefore, prayed that entire addition of Rs.3,68,579/- should be deleted.

2. The facts of the case are that assessee is an individual serving with M/s Sheth Metal (P) Ltd. as salaried employee. During the course of assessment proceedings the AO called for the bank statement in respect of his account with Federal Bank Ltd., Ashram Road Branch. On its verification he found total deposits aggregating to Rs.17,48,500/-. When asked to explain that it was submitted to the AO that assessee has borrowed a sum of Rs.7.85 lacs from seven different parties as under :-

Sl.No.	Name of depositor	Amount
1.	Shri Pankaj A. Parikh	Rs.50,000/-
2.	Shri Parin K. Jardosh	Rs.1,00,000/-
3.	Shri Ashish K. Jardosh	Rs.1,25,000/-
4.	Shri Arunsig B. Yadav	Rs.1,00,000/-
5.	Shri Rohit Laljibhai Patadia	Rs.1,00,000/-
6.	M/s Arihant Steel Industries	Rs.1,00,000/-
7.	Shri Hasmukh H. Brahmhatt	Rs.1,10,000/

It was submitted that assessee has borrowed money from these parties and deposited the same in the bank account. Confirmations from these parties were also filed before the A.O. However, the AO noted that transactions with these parties have taken place in the previous year relevant to Asst. Year 2006-07. During the course of assessment proceedings assessee further explained it had borrowed another sum of Rs.10.60 lacs from different parties as under :-

Sl.No.	Name of depositor	Amount
1.	Shri Prakash R. Patel	Rs.1,25,000/-
2.	Shri Ranjit S. Desouza	Rs.1,50,000/-
3.	Shri Subastian P. Thomus	Rs.2,00,000/-
4.	Shri Umedram B. Chaudhary	Rs.1,50,000/-
5.	Shri Chetan H. Patil	Rs.1,35,000/-
6.	Shri Arunsing G. Porwell	Rs.1,25,000/-
7.	Shri Shyambhai L. tommar	Rs.1,25,000/-
8.	Shri Raghuvveer S. Sainee	Rs.50,000/-
	Total	Rs.10,60,000/-

The confirmations from these parties were also filed. When AO issued summons to these parties then summons in some cases returned back unserved or in some cases no reply was received. In five cases postal authorities submitted following remarks :-

1. Shri Arunsing B. Yadav – No such No. in Parth Avenue
2. Shri Prakash R. Patel - Left
3. Shri Ashish K. Jardosh - Not known
4. Shri Parin K. Jardosh - Not known
5. Shri Chetan H. Patil - Left

In all other cases where summons apparently were served nobody attended on the given dates and, therefore, claim of borrowings remained unverified. The AO on the basis of non-verification of the claim of the assessee held that entire sum of Rs.17,48,500/- found deposited in the bank account is an unexplained investment under section 69A. He accordingly proposed the addition of this sum. In appeal Id. CIT(A) held that it will be better to work out the peak of deposits made in the bank account. He worked out such peak at Rs.3,68,579/- and confirmed the addition to this extent and allowed relief of the balance sum of Rs.13,79,921/-. The Revenue is in appeal against this relief whereas the

assessee has filed the Cross Objection requesting to delete the balance addition sustained by the Id. CIT(A) as per grounds raised by both the parties as above.

3. Before us, the Id. DR submitted that such peak could not be worked out by Id. CIT(A) unless assessee admits that money deposited in the bank account was his unaccounted money and that he has regularly withdrawn the money and redeposited the same in the bank. Theory of peak according to the Id. DR pre-supposes that some money was rotated time and again in deposit and withdrawal and was not used elsewhere as expenditure or investment. The onus to prove this is on assessee if he wants to take the benefit of peak. The Id. DR then referred to the bank statement of the assessee in the Paper Book filed by the assessee annexed on pages 6, 7 & 8 and pointed out that there are only cash deposits and no cash withdrawals. Whatever withdrawals are there, they are to yourself and certain numbers are mentioned which show that cheques were issued to the bank marked yourself which further indicated that assessee has purchased drafts by issuing cheques to the bank. Once they are not withdrawals of cash the assessee cannot get the benefit of peak. The Id. DR referred to the decision in the case of CIT vs. Vijay Agricultural Industries (2007) 294 ITR 610 (All) for the proposition peak credit could be added as unexplained cash credit only when there are transactions of deposits and repayment between the depositors and the assessee. If there are no repayment or withdrawals, then the theory of peak cannot be applied.

4. On the other hand, the Id. AR submitted that assessee has filed confirmations indicating PAN, addresses of parties thereby the identities of the parties are proved and once those parties filed confirmations to

show that they have paid the money to the assessee and also received money back from the assessee then the transaction is genuine. Once summons are issued to the parties and if they did not appear, onus from the assessee is discharged and assessee cannot be held liable for non-appearance the depositors as held in the case of CIT vs. Orissa Corporation (P) Ltd. (1986)159 ITR 78. It was held therein that if department does make further efforts to examine the source of credit then onus is discharged from the assessee.

5. In rejoinder the ld. DR submitted that confirmations so filed by the assessee are incomplete inasmuch as there is no verification of the signatures over those confirmations with the copy of PAN. The Paper Book filed by the assessee shows different signatures over confirmations and copy of the return. He referred to pages 11 & 12 of the Paper Book, 11 being the alleged confirmations and 12 being the copy of the acknowledgement of the return of Shri Prakash R. Patel one of the alleged depositor, showing different signatures. Even these signatures are not verifiable with the copy of the PAN. If their plea of giving money to the assessee is to be accepted then they should have appeared before the AO. The ld. DR also submitted that the date on which money was allegedly received from these parties and the date on which the money was deposited in the bank account do not tally. In the case of Shri Prakash R. Patel money of Rs.1,25,000/- was allegedly received on 10th April, 2006 and from Shri Arunsing B. Jadav of Rs.1 lacs on 4th April, 2006 but cash of Rs.1,50,000/- was claimed to be deposited on 17.4.2006. Thus there is no co-relation between alleged claim of receipt of money from these parties in cash and deposits in bank account. The ld. DR also pointed out that the payments made to these parties as shown in the confirmations are not supported by any withdrawals from the bank

account. Therefore, such confirmations and transactions recorded there cannot be relied upon.

6. We have considered the rival submissions and perused the material on record. In our considered view the Id. CIT(A) has not correctly appreciated the concept of peak. The theory of peak can be applied only when assessee admits to have made withdrawals in cash and redeposits the same in the bank account without there being any outflow in any other expenditure or investment. Firstly there should be withdrawal in cash. If there are withdrawal in cash from the bank account then it cannot be accepted that same money could have been deposited in the bank account. The copy of bank account furnished by the assessee annexed at pages 6-8 of the Paper Book show that there was no cash withdrawal by the except through ATM of Rs.10,000/- on 31.8.2006, of Rs.8,000/- on 4.9.2006 and of Rs.15,000/- on 21.12.2006. In all other cases assessee has issued cheques addressing yourself meaning thereby that money has gone to the bank and apparently for purchase of bank drafts for squaring up in the loan. In any case this aspect has not been explained by the Id. AR. For our purpose, the only relevant inference is that assessee did not withdraw any money in cash and, therefore, it cannot be said available to redeposit in the bank account. Secondly let the assessee admit that money deposited in the bank account was his own unexplained money, the benefit of peak in unexplained deposits cannot be given. If assessee is taking from the depositors and returning the same to the depositor and reborrowing and redepositing then benefit of peak can be given only when there are transactions of deposits and repayments between the assessee and the depositors. We refer to the head notes from the decision of Hon. Allahabad High Court in CIT vs. Vijay Agricultural Industries (supra) :-

“The Assessing Officer for the assessment year 1979-80 noticed certain cash credits in the squared up accounts of the assessee-firm and treated them as unexplained deposits liable to be treated as income from unexplained sources under section 68 of the Income-tax Act, 1961. This was upheld by the Appellate Assistant Commissioner. On further appeal contending that the peak credits should alone be considered for addition under section 68 of the Act and not as added by the Assessing Officer and confirmed by the Appellate Assistant Commissioner, the Tribunal held that only the amount of peak credit should be determined by the Assessing Officer and added as unexplained cash credit under section 68 of the Act. On a reference :

Held, that in respect of the squared up accounts of the two depositors, the Assessing Officer himself had taken the peak credit as unexplained deposit and added it under section 68 of the Act. So far as the remaining deposits were concerned there was no transaction between the depositors and the assessee. The principle of peak credit could not apply in case of different depositors where there had been no transaction of deposits and repayment between a particular depositor and the assessee. The Tribunal was not justified in directing the Assessing Officer to take the peak credit for the purposes of section 68 of the Act.”

Hon. Allahabad High Court in the case of Bhailal Shyambehari vs. CIT (2005) 276 ITR 38 (All) held that benefit of peak can be given only when the assessee owns up all the cash credits in the books of accounts. The head Notes from the judgment are as under :-

“In order to adjudicate upon the plea of peak credit the factual foundation has to be laid by the assessee. He has to own all cash credit entries in the books of account and only thereafter can the question of peak credit be raised.

Held, that as the amount of cash credits stood in the names of different persons which all along the assessee had been claiming to be genuine deposits, withdrawals/payments to different persons during the previous years, the assessee was not entitled to claim the benefit of peak credit.

Almost similar view was taken by Hon. Allahabad High Court in CIT vs. Neemar Ra, Badlu Ram (1980) 122 ITR 68 (All) wherein assessee

admitted that his unaccounted money was used in the business and balance sheet excess of assets over liabilities represented his own money and, therefore, even it was used in different names or in different manner would not make it acceptable by bifurcation and hence it is so that benefit of peak could be given. Hon. High Court in that case held as under :-

“The books of account of the assessee-firm for the years 1960-61 to 1963-64, revealed irregularities. The Income-tax Officer included various amounts as income from undisclosed sources for these years. The Appellate Assistant Commissioner upheld the orders of the Income-tax Officer. On further appeal, the Tribunal observed that there was no dispute about figures of difference in the balance-sheet, i.e., excess of assets over the actual liabilities, the unaccounted moneys used in the business from year to year and the additions by way of extra profits to be made each year. The assessee's statement that it had no other known source of income and the department's acceptance of that position constituted a good circumstantial evidence in favour of the assessee. The assessee's statement that unaccounted moneys used in the business and the balance-sheet excess of assets over liabilities represented the assessee's own money justified the inference that the two items were not separate, but fell in the same category, i.e., unaccounted moneys used in the business. The Tribunal held that the unaccounted money so used was not capable of bifurcation on the ground that it was used in different names or in a different manner. The Tribunal also did not agree with the departmental authorities that merely because the assets in the balance-sheet changed from time to time, the difference would not be available for explaining a similar difference in the subsequent years. If a particular asset was sold and in its place new assets were purchased that did not mean that fresh unaccounted money was used. The Tribunal held that the

additions in each of the years under appeal should be nil for the years in which the addition on the basis of difference in the peak money used from year to year exceeded the extra profit and where the extra profit addition was more than the addition on account of the peak credits, the bigger of the two should remain as the addition. On a reference it was contended that the findings of the Tribunal were speculative:

Held, that, in the circumstances, the inference drawn by the Tribunal that there was a connection between unaccounted money and excess assets discovered in the business from year to year could not be said to be perverse or unreal. Clearly there was evidence to sustain it. The other inference of the Tribunal that there was a connection between the unaccounted money and the extra profits withheld from the account books from year to year was based on the testimony of the assessee. The findings of the Tribunal were not perverse. They were fully supported by the material on record.”

7. When we apply the above principles to the facts of the present case, we find that there is no admission by the assessee that money deposited in the bank account represented his unaccounted money. Secondly, there are no withdrawals in cash from the bank account. Thirdly, there is no evidence of any source of money claimed to have been paid back to the depositors on different dates during the accounting year as per confirmations. Such repayment was shown to have been made in cash and there is no source of money of such repayment. Fourthly, alleged confirmations from the depositors cannot be relied upon because identities of the depositors are not verifiable, they are not available at the given addresses as in several cases, summons could not be served, onus is always on the assessee to produce the depositors to prove his case unless all the necessary ingredients of cash credit as per section 68 are primarily satisfied by the assessee which in this case has not been done. Assessee

has to show that money has been transferred through banking channels from the bank account of creditors to the bank account of the assessee, identity of the depositors/creditors is beyond shed of doubt and money has also been repaid or interest has been repaid during the year and also subsequent year and also gone back to the bank account of the depositor/creditors. If assessee is able to give in the first instance to the AO then it can be said that assessee had discharged the onus and thereafter it is for the AO to enforce attendance of the depositors/creditors and if they fail to appeal then adverse inference against the assessee cannot be drawn. But where such prima facie case is not made out by the assessee in its favour then onus cannot be put on the department for enforcing the attendance of the depositors. Therefore, where assessee has not discharged the primary onus lying on him it cannot be accepted that money could have come from the depositors. To us confirmations are apparently self-serving documents without they are being any proof of their truthfulness. They can safely be rejected as not being the credible evidences.

8. In view of the above, neither the deposits are proved by the assessee nor the claim of peak is established by him. In fact assessee has also failed to show real destination of the money through bank draft so purchased by him out of the cash deposited in the bank account thereby suppressing material facts in understanding the nature of cash inflow and its destination. Entire transaction of deposits in the bank account remained under crowd of secrecy and, therefore, the explanation furnished by the assessee remained unsatisfactory. Even the benefit of withdrawal through ATM mentioned as above cannot be given importance because they are apparently for household purposes and cannot be said to be available for redeposit in absence of any other

evidence of meeting out household expenditure by the assessee. We apparently uphold the contentions of Revenue that entire sum of Rs.17,48,500/- deserves to be confirmed. As a result, we uphold the order of AO setting aside the order of Id. CIT(A). Appeal filed by the Revenue is allowed whereas the Cross Objection filed by the assessee is dismissed.

9. In the result, appeal filed by the Revenue is allowed whereas the Cross Objection filed by the assessee is dismissed.

Order was pronounced in open Court on 16-12-2010

Sd/-

(Bhavnes Saini)
Judicial Member

Sd/-

(D.C. Agrawal)
Accountant Member

Ahmedabad,

Dated : 16-12-2010

Mahata/-

Copy of the Order forwarded to:-

1. The Assessee.
2. The Revenue.
3. The CIT(Appeals)-
4. The CIT concerns.
5. The DR, ITAT, Ahmedabad
6. Guard File.

BY ORDER,

Deputy/Asstt.Registrar
ITAT, Ahmedabad

- 1.Date of dictation 8/12/2010.
- 2.Date on which the typed draft is placed before the Dictating Member.....Other Member..... 10/12/2010
- 3.Date on which the approved draft comes to the Sr.P.S./P.S 15-12-2010
- 4.Date on which the fair order is placed before the Dictating Member for Pronouncement 16-12-2010
- 5.Date on which the fair order comes back to the Sr.P.S./P.S 16-12-2010
- 6.Date on which the file goes to the Bench Clerk 16-12-2010.
- 7.Date on which the file goes to the Head Clerk.....
- 8.The date on which the file goes to the Asstt. Registrar for signature on the order.....
- 9.Date of Despatch of the Order.....