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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 115/2005**

COMMISSIONER OF INCOME TAX ..... Appellant

Through: Mr. Ruchir Bhatia, Senior Standing Counsel.

Versus

D. K. GARG ..... Respondent

Through: Dr. Rakesh Gupta, Advocate with Mr. Ashwani Taneja, Mr.Rohit Kumar Gupta, Mr. Lakshya Goyal, Advocate.

CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 04.08.2017

Dr. S. Muralidhar, J.:

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') is against an order dated 12th February, 2004 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 4514/Del/2003 for the Assessment Year ('AY') 1995-96.

Question of law

2. While admitting this appeal on 28th November, 2008, the following question of law was framed:

> "Whether the Income Tax Appellate Tribunal was correct in law in restricting the addition made on account of unexplained deposits in the bank accounts of the assessee to Rs 5,87,374/- as against Rs

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72,08,996/- on the basis of peak credit theory ?"

Background facts

3. The Respondent/Assessee is a Chartered Accountant. For the AY in question, he filed his return of income on 10th October, 1996 declaring his taxable income at Rs. 49,880 which comprised his gross professional receipts of Rs. 1,91,050. The Assessing Officer ('AO') noted that the Assessee was holding two current accounts in the Union Bank of India, Karol Bagh, wherein sufficient cash and cheque deposits were made during the relevant period. It was also noted that the Assessee had floated one company viz., M/s Prem Chand Plantation Private Limited and purchased two other companies viz., M/s Anuradha Pharmaceuticals Pvt. Ltd. and M/s Sai Fisheries Pvt. Ltd. The AO further noted that the said three companies and other two companies viz., Zamindar Plantation Pvt. Ltd. and Kisan Plantation Pvt. Ltd. were all sold to M/s James Group.

4. Notice was issued to the Assessee on 29th April, 1999 under Section 148 of the Income Tax Act ('the Act') regarding his income that escaped assessment. The Assessee did not participate in the re-assessment proceedings for a long time. Thereafter, on 5th February, 2002, the Assessee informed the AO that the return already filed by him on 10th October, 1996 should be treated as his return in response to the notice under Section 148 of the Act. Before the AO the Assessee gave a statement in writing in which he, *inter alia*, stated thus:

> "I have already stated to your honour on the statement recorded and the subsequent note on the activities carried by me that I was indulged in the business of providing entries to the parties who are in need for

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the same. The entries were routed thru agriculture companies. I have earned an income of Rs. 1,91,168/- from the said business during the year 1994-95 and in the subsequent year I could not earn the income because the demand for fresh entries were negligible. The calculation and the detail how I have earned income are enclosed herewith for both the years. The entries consists of loan entries and loan entries for applying shares in public issues. I was getting merely 1 % commission / services charges and 0.25% on amount utilized in public issues. The name of the companies are also enclosed herewith giving the quantum of entries provided as loan and for subscription in public issues."

Assessment order

5. In the assessment order dated 28th March, 2002, the AO noted that the Assessee was not in a position to prove the source of deposits made in his bank accounts. Inquiries were made with the Union Bank of India, Karol Bagh, to obtain the details of cheques which were issued by Assessee. These cheques were deposited in different bank accounts and these banks were further requested to provide the account opening forms of these concerned persons/beneficiaries to whom cheques were issued by the Assessee. After getting the addresses of these beneficiaries from their respective account opening forms, summons were issued to them. But almost all these beneficiaries were not found at the addresses given in their account opening forms. As regards the credit entries in the said accounts of the Assessee are concerned, wherever the Assessee was able to show that the corresponding issuance of cheque therefrom was to the same person, the benefit of the principle of 'peak credit' was given to him by the AO. Where, however, the source of the deposit and the issuance of the cheque was unexplained and could not be 'squared off', the AO treated the deposits as the Assessee's

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income and added it to the returned income. From the Assessee's books it was found that cheques worth Rs. 90 lakhs were received by the Assessee from three companies viz., M/s Anuradha Pharmaceuticals, M/s Sai Fisheries and M/s Premchand Plantations. The unexplained peak credit of the cheques deposited in the Assessee's bank accounts were considered and a sum of Rs.20,91,882 was added to the total income of the Assessee under Section 68 of the Act. Likewise, the unexplained cash deposits in his bank accounts amounting to Rs.51,17,114 were also added to his total income. The total income was, therefore, revised to Rs.72,58,880 under Section 143(3) read with Section 147 of the Act.

Before the CIT (A)

6. The Assessee then went in appeal before the Commissioner of Income Tax (Appeals) ['CIT (A)'] against the aforementioned order of assessment. Before the CIT (A), it was pointed out by the Assessee that he was merely lending his name and providing accommodation entries. Accordingly, it was pleaded before the AO on behalf of the Assessee that only the peak credit in the two bank accounts should be worked out taking into account both the cash and cheque transactions. It was argued on behalf of the Assessee that the additions made by the AO should be restricted to the extent of peak credit only. The Assessee worked out the peak credit as Rs.5,87,374.

7. On this, the CIT (A), asked for a Remand Report from the AO. On 8th July 2003, the AO submitted a remand report wherein the peak balance in the two bank accounts, as worked out by the Assessee at Rs.5,87,374, as on 6th December, 1995, was accepted. However, the AO reiterated his stand that

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the additions made separately, for the cash deposits as well as for the peak credit on account of cheque transactions with the three companies viz., M/s Anuradha Pharmaceuticals, M/s Sai Fisheries and M/s Premchand Plantations, were justified.

8. By the order dated 21st August 2003, the CIT (A) dismissed the Assessee's appeal and upheld the assessment order. It was categorically noted by the CIT (A) that the Assessee could not substantiate his stand through documentary evidence. The AO tried to locate the concerned persons/beneficiaries through the addresses given in their account opening forms, however, to no avail as, most of these addresses were found to be incorrect. It was noted that the Assessee was involved in the activity of providing cheques by accepting deposits in cash. In the circumstances, noting that the AO had duly accounted for squared off transactions and made additions only to the extent to which there was no convincing explanation given by the Assessee, for cash or cheque transactions, the CIT (A) dismissed the Assessee's appeal.

Impugned order of the ITAT

9. The Assessee went in further appeal before the ITAT. The Assessee challenged the two additions made by the AO i.e. of Rs.51,17,114 on account of unexplained cash deposits and of Rs. 20,91,882 representing the peak amounts in respect of the cheques in the three accounts i.e. M/s Anuradha Pharmaceuticals, M/s Sai Fisheries and M/s Premchand Plantations. According to the ITAT, "the method of working out the addition adopted by the AO and sustained by the CIT (A) wherein the cash entries and cheque

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entries have been treated differently is absolutely illogical and irrational and cannot be upheld". It was noted that while dealing with the cash deposits, the AO had worked out the difference between the total deposits and the total withdrawals in regard to the two accounts whereas with regard to the cheque transactions, the AO had worked out the peak separately relating only to the three companies i.e. M/s Anuradha Pharmaceuticals, M/s Sai Fisheries and M/s Premchand Plantations.

10. The ITAT disapproved of the AO having worked out the peak credit separately for the cheques issued by the three companies and, according to ITAT, "the entire approach adopted by the revenue authorities betrays lack of understanding of basic accounting principles." The ITAT also found that there was a contradiction in the findings of the AO and CIT (A) inasmuch as, even after finding that the three companies were non-existent, the peak credits have been worked out separately for cash deposits and cheques issued by the companies. The ITAT then observed that if the companies were non-existent, there was no justification for the AO to treat the payments vis-a-vis the three companies as the income of the Assessee. It was further observed by the ITAT that the Assessee had himself deposited the unaccounted money in these accounts and issued cheques. It was also observed by the ITAT that the additions could not be made twice, once on the basis of cash deposits and again on the basis of cheque transactions. This would amount to double addition which could not be upheld. The ITAT, thereafter, restricted the addition to peak credit as worked out by the Assessee as Rs. 5,87,374 as against Rs. 72,08,996.

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Submissions of learned counsel for the Revenue

11. Mr. Ruchir Bhatia, learned Senior Standing counsel for the Revenue, submitted that the approach of the ITAT was erroneous inasmuch as the ITAT has failed to appreciate that the Assessee had not provided an explanation for all the cheque deposits or even the cash deposits and the corresponding cheques issued from his account. According to him, the concept of working out the peak credit would arise only if it was possible to square off the deposits made in an account against the cheques issued therefrom. If 'A' made a deposit in the account and the ultimate payment was made to 'A' either in A's account by cash or cheque then to that extent, the peak credit can be worked out. However, where a source of deposit is not explained and the corresponding outgo is also unexplained, the question of giving the Assessee the benefit of peak credit would not arise. He placed reliance on the decision of the Allahabad High Court in ***CIT v. Vijay Agricultural Industries (2007) 294 ITR 610*** which in turn followed its earlier decision in ***Bhaiyalal Shyam Bihari v. CIT (2005) 276 ITR 38 (All).***

Submissions of learned counsel for the Assessee

12. Dr. Rakesh Gupta, learned counsel for the Assessee, on the other hand submitted that the issue in the present appeal under Section 260 A of the Act is confined only to working out of the peak credit. He pointed out that the AO had himself accepted the peak credit as worked out by the Assessee. There was no justification for the CIT (A) in sustaining the order of the AO and not restricting the addition to the peak credit as worked out by the Assessee. After the CIT (A) and the AO had both accepted that the Assessee was an accommodation entry provider, there was no justification in working

out the peak credit separately for the cash and the cheque transactions. His argument was that all the cheque and cash credits in his own accounts should be consolidated and adjusted against all the entries reflecting the outgo, either by cash or cheque. The peak credit, thus, worked out should alone be taxed as that alone was the Assessee's income. According to him, the issue should not be seen from the point of view of 'ethics' but only from the point of view of 'accountancy'.

Analysis and reasons

13. There have been numerous cases before the AO, CIT (A), the ITAT and for that matter even before this Court, where the question involved concerns the treatment of 'accommodation entries'. Basically, what an accommodation entry provider does is to accept cash from an Assessee and arranges to have a cheque issued from his own account or some other account, usually of 'paper' or fake entities, to make it appear to be a loan or an investment in share capital. The accommodation entry provider usually charges a commission which is deducted upfront. Where the Assessee is unable to explain the source of such credit in his account - i.e. by demonstrating the identity of the provider of the credit, the creditworthiness of such entity, and the genuineness of the transaction - the credit entry is treated as unexplained and the income is treated under Section 68 of the Act as the income of the Assessee.

14. In cases where the Assessee discharges the initial onus of establishing the identity and creditworthiness of the credit provider and the genuineness of the transaction, be it one of loan or subscribing to share capital, the onus

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shifts to the revenue to show the contrary. Where, for instance, an Assessee furnishes the complete details of the entity like its certificate of incorporation, PAN number, income tax returns, bank accounts, names and addresses of the directors and so on, the Courts have insisted on the AO to make a proper enquiry to examine the identity and creditworthiness of such companies and the genuineness of the transactions in question. Where the AO fails to make such an enquiry, a Court might delete the additions made by the AO.

15. The present case, however, is of a different nature. Here, we are dealing with an Assessee who does not deny that he is an accommodation entry provider. He, in fact, makes no bones of the fact that he either owned or floated 'paper companies' only for that purpose. He also does not dispute the fact that he has not been able to explain the source of all the deposits in his accounts or the ultimate destination of all the outgo from his accounts.

16. The Assessee's plea that he should be taxed only on a composite 'peak credit' is based entirely on principles of accountancy. He questions the logic behind allowing peak credits for some of the credit entries by way of cheques and denying it for the other entries in cash. He also questions the practice of working out separate peak credits for cheque and cash transactions.

17. The premise underlying the concept of peak credit is the squaring up of the deposits in the account with the corresponding payments out of the account to the same person. In ***Bhaiyalal Shyam Bihari v. CIT*** (*supra*), the

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Allahabad High Court explained that benefit of peak can be given only when the assessee owns up all the cash credits in the books of accounts. It was further held:

> "For adjudicating 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."

18. In that case, it was held that as the amount of cash credits stood in the names of different persons which the Assessee had all along been claiming to be genuine deposits, withdrawals/payments to different persons during the previous years, the Assessee was, therefore, not entitled to claim the benefit of peak credit. Later in ***CIT v. Vijay Agricultural Industries*** (*supra*), it was reiterated that: "The principle of peak credit is not applicable in case where the deposits remained unexplained under Section 68 of the Act. It cannot apply in a case of different depositors where there has been no transaction of deposits and repayment between a particular depositor and the assessee." On the facts of that case it was held that peak credit could be applied only in the case of squared up accounts. In other words, where an Assessee was unable to explain the sources of deposits and the corresponding payments then he would not get the benefit of 'peak credit'.

19. The legal position in respect of an accommodation entry provider seeking the benefit of 'peak credit' appears to have been totally overlooked by the ITAT in the present case. Indeed, if the Assessee as a self-confessed accommodation entry provider wanted to avail the benefit of the 'peak credit', he had to make a clean breast of all the facts within his knowledge

concerning the credit entries in the accounts. He has to explain with sufficient detail the source of all the deposits in his accounts as well as the corresponding destination of all payments from the accounts. The Assessee should be able to show that money has been transferred through banking channels from the bank account of creditors to the bank account of the Assessee, the identity of the creditors and that the money paid from the accounts of the Assessee has returned to the bank accounts of the creditors. The Assessee has to discharge the primary onus of disclosure in this regard.

20. While the AO in the present case did not question the working out of the peak credit by the Assessee, he, at the same time, insisted that the additions made by him to the returned income of the Assessee should be sustained. The peak credit worked out by the Assessee was on the basis that the principle of peak credit would apply, notwithstanding the failure of the Assessee to explain each of the sources of the deposits and the corresponding destination of the payment without squaring them off. That is not permissible in law as explained by the Allahabad High Court in the aforementioned decisions which, this Court concurs with.

Conclusion

21. As already noted, the ITAT went merely on the basis of accountancy, overlooking the settled legal position that peak credit is not applicable where deposits remain unexplained under Section 68 of the Act. The question of law framed by this Court, is accordingly, answered in the negative i.e. in favour of the Revenue and against the Assessee. The impugned order of ITAT is, accordingly, set aside and the order of the AO is restored to file.

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22. The appeal is allowed in the above terms with no order as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 4, 2017
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