

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "F" : DELHI

BEFORE SHRI BHAVNESH SAINI, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA.No.893/Del./2015
Assessment Year 2005-2006

M/s. RL Travels Pvt. Ltd., 118, Ansal Bhawan, Kasturba Gandhi Marg, New Delhi - 110 001. PAN AAACR2852C	vs	The DCIT, Central Circle-12 New Delhi.
(Appellant)		(Respondent)

ITA.No.5214/Del./2016
Assessment Year 2005-2006

The ACIT, Central Circle-7 Room No.330, ARA Centre, Jhandewalan Extn, New Delhi.	vs	M/s. RL Travels Pvt. Ltd., 118, Ansal Bhawan, Kasturba Gandhi Marg, New Delhi - 110 001. PAN AAACR2852C
(Appellant)		(Respondent)

For Assessee :	Shri Ashwani Kumar & Shri Aditya Kumar, C.As.
For Revenue :	Shri Surender Pal, Sr.D.R.

Date of Hearing :	06.09.2018
Date of Pronouncement :	18.09.2018

ORDER

PER BHAVNESH SAINI, J.M.

ITA.No.893/Del./2015 by Assessee-Company has been directed against the Order of the Ld. CIT(A)-24, Delhi, Dated 22.12.2014, for the A.Y. 2005-2006. ITA.No.5214/Del./2016 by Department is directed against the Order of the Ld. CIT(A)-24, New Delhi, Dated 25.07.2016, for the A.Y. 2005-2006, challenging the cancellation of penalty.

2. We have heard the Learned Representatives of both the parties and perused the material available on record. Both the Appeals are decided as under.

ITA.No.893/Del./2015 – M/s. RL Travels Private Limited :

3. Briefly the facts of the case are that the assessee-company filed its original return of income under section 139 of the Income Tax Act, 1961 on 27.10.2005 showing total income of Rs. 20,94,725/-. Notice under section 148 was issued on 29.03.2012 after recording the following reasons:

"A search, operation was carried out by the Punjab Vigilance Bureau on 17.05.2007 in the case of Sh. Chetan Gupta at his business premises situated at 118, Ansal Bhawan, K. G. Marg, New Delhi. During search, a Pen-drive was found from the possession of Sh. Chetan Gupta, who is one of the Directors of Assessee-Company. In the said pen-drive, ledger accounts of different parties were found to be maintained by Sh. Chetan Gupta. Printouts of the year-wise ledger accounts had been taken by the Punjab Vigilance Bureau from the Pen-drive and were sent to the Income Tax Department. It has been alleged by the Punjab Vigilance Bureau that Sh. Chetan Gupta was keeping the black money earned by Capt. Amrinder Singh, Ex. Chief Minister of Punjab and keeping the record in computerized data stored in Pen-drive.

2. As per information available in this office, the assessee during the relevant previous year entered into financial transactions of expenditure and investments which were apparently not entered in the books of accounts of the assessee and are also not in commensuration with the declared sources of income as per particulars of income declared in the return of income filed for the AY 2005-06.

3. As per details available on page 57 of the Annexure, there is credit of Rs.2,21,00,788/- with particulars "TRF TO P/L" in the account maintained in the name of "RLTRV PVT. EXP". There are debits of Rs.2,21,00,788/- in the aforesaid account which appear to be expenses made on various heads which are apparently not entered in the books of account for the year under consideration and accordingly, not declared in the return of income. The amount of undisclosed expenditure made by the assessee is

covered within the provisions of section 69C of the Income Tax Act, 1961. Therefore, I have reasons to believe that unexplained expenditure of Rs.2,21,00,788/- is not declared fully and truly in the return of income for the A Y 2005-06 and the same has escaped from assessment and levy of tax.

4. *In view above facts, I have reasons to believe that in the case of the assessee, for the AY 2005-06, a total amount of Rs.2,21,00,788/- has escaped from assessment and taxability within the provisions of section 147 of the Income Tax Act, 1961 by reason of the failure on the part of the assessee.”*

2.1. In response to the notice under section 148, the assessee-company submitted that the original return filed may be treated as return filed in response to notice under section 148 of the Income Tax Act, 1961. The A.O. asked for the explanation of the assessee-company regarding entries contained in pen-drive found from the possession of Shri

Chetan Gupta. The assessee-company explained that the alleged pen-drive was recovered from Shri Chetan Gupta has got no relevance or correlation with the affairs of the Company. He was merely a Director of the Assessee-Company and any document being allegedly maintained or belonging to him does not have any correlation with the accounts of the Assessee-Company. Shri Chetan Gupta himself has denied the pen-drive belonging to him during his income tax proceedings as well as search operation carried out by Punjab Vigilance Bureau during 2007. The assessee-company is a Private Limited Company and its accounts are audited by Chartered Accountant who has given unqualified report to the Company. Therefore, assessee-company maintained proper books of account. Therefore, entries contained in the pen-drive cannot be made basis for addition against the assessee-company. The A.O. considered the reply of the assessee-company and noted some entries relating to Shri Chetan Gupta's five companies/firms were found on both the pen-drive and in the fair books of account of Shri Chetan Gupta. The accounts in the pen-drive

were maintained like the normal books of account. Shri Chetan Gupta has given cheque of Rs.2 crores to Shri Gurpal Singh, son-in-law of Capt. Amrinder Singh and it was found that these cheques had been issued from his companies RL Travel, Indo Arab Services and Trans Air in October, 2005. This money was subsequently returned by Shri Gurpal Singh to Shri Chetan Gupta in January, 2006. Assessee's denial is, therefore, not justified. The A.O. considered the issue in the light of provisions of Section 68 of the I.T. Act and noted that working of the peak credit prepared by the A.O. as per entries in the pen-drive comes to Rs.2,21,00,788/-. It was added as unexplained credit in the hands of the assessee-company under section 68 of the I.T. Act.

3. The assessee-company challenged the initiation of re-assessment proceedings under section 148 and addition of Rs.2,21,00,788/- before Ld. CIT(A). The assessee-company reiterated the same submissions before the Ld. CIT(A) and submitted that addition is made because the entries contained

in the pen-drive have not been entered into the books of account of the assessee-company despite the entries have no co-relation with the assessee-company. The A.O. himself was not sure as to the basis of the addition because A.O. in the reasons for reopening of the assessment has initiated the re-assessment proceedings for undisclosed expenditure under section 69C of the I.T. Act. However, the A.O. made addition under section 68 on account of unexplained cash credit. The provisions of Section 69C are not applicable in this case because assessee-company has not debited nor claimed any expenditure in the P & L A/c for the purpose of computing taxable income. The addition under section 68 also cannot be made-out because no entries were found in the books of account of the assessee-company. Therefore, entire addition is liable to be deleted. A perusal of the print out of the said pen-drive would show that nothing concrete or definitive can be made out therefrom. This paper is unsigned and in the name of some 'RLTRV PVT EXP.' This paper is not related to the assessee-company and has no evidentiary value to make any

addition against the assessee-company. It was submitted that the Special Judge, Ludhiana while granting bail to Shri Chetan Gupta has held that *“the entries of the pen-drive are without any basis and has no legal value”*. The entry in the pen-drive are not corroborated by any evidence. The assessee-company submitted that entries in the books of account of any third person cannot be solely the basis for arriving at any conclusion with respect to the case of the assessee-company. Reliance was placed on the decision of Hon’ble Supreme Court in the case of CBI vs. V.C. Shukla & Others (1988) AIR 1406 (SC). The assessee-company further submitted that reopening of the assessment is bad in law because there was no material to justify reopening of the assessment. There was no nexus between the material and the belief of escapement of income from assessment. The A.O. did not apply his mind to the facts. Therefore, assessment order is bad in law.

4. The Ld. CIT(A), however, considering the facts of the case, rejected the explanation of assessee-company and

dismissed the appeal of assessee-company. The Ld. CIT(A) noted that the amount clearly represents the expenses incurred by the assessee-company as recorded in the pen-drive of its Director, therefore, addition is liable to be made under section 69C of the I.T. Act. No addition could be made under section 68 of the I.T. Act. He has also considered the decision of ITAT in the case of Shri Chetan Gupta for A.Ys.2002-2003, 2003-2004 and 2004-2005 and noted that there is a live nexus established between assessee-company and the contents of the pen-drive. Therefore, addition under section 69C was made by the Ld. CIT(A). As regards reopening of the assessment, Ld. CIT(A) noted that A.O. has to come to the *prima facie* conclusion that there was escapement of income, therefore, re-assessment is justified in the matter. Appeal of assessee-company was accordingly dismissed.

5. We have heard the Learned Representatives of both the parties and perused the material available on record. Learned Counsel for the Assessee reiterated the submissions

made before the authorities below and submitted that the issue on merit is covered by the Order of ITAT, Delhi F-Bench, in the case of Shri Chetan Gupta in ITA.Nos.1788 & 2389/Del./2016 for the A.Y. 2005-2006 dated 07.06.2018 in which the Tribunal confirmed the part addition in the hands of Shri Chetan Gupta holding that entries contained in the pen-drive belong to Shri Chetan Gupta only. He has, therefore, submitted that no addition could be made in the hands of the assessee-company. He has, further submitted that the Ld. CIT(A)-23, New Delhi, in the case of the assessee-company for the A.Y. 2007-2008 vide Order dated 23.02.2016 following the Order of the Tribunal in the case of Shri Chetan Gupta held that the addition on account of details mentioned in the pen-drive have been considered in the case of Shri Chetan Gupta. Therefore, no addition could be made against the assessee-company. Similar addition has been deleted by the Ld. CIT(A). He has also relied upon the Order of ITAT F-Bench, in the case of R.L. Agencies Pvt. Ltd., New Delhi vs. DCIT, Central Circle-12, New Delhi in ITA.No.2196/Del./2015, dated 30.07.2018 in

which the Tribunal considered the pen-drive stood accepted by Shri Chetan Gupta, deleted the similar addition in their case. Learned Counsel for the Assessee submitted that it is a case of sister concern of the assessee-company. He has, therefore, submitted that once addition has been considered in the hands of Shri Chetan Gupta, therefore, no addition could be made in the hands of the assessee-company. He has reiterated the submissions as regards reopening of the assessment and also submitted that once Department says that pen-drive belongs to Shri Chetan Gupta, it cannot be the basis for reopening of the assessment in the case of the assessee-company. He has submitted that there is no material available on record to justify reopening of the assessment in the case of the assessee-company. He has relied upon the decisions of the Hon'ble Delhi High Court in the case of Shipra Srivastava vs. ACIT 319 ITR 221, CIT vs. SFIL Stock Broking Ltd., 325 ITR 285 and PCIT vs. Meenakshi Overseas Pvt. Ltd., 395 ITR 677.

6. On the other hand, Ld. D.R. relied upon the Orders of the authorities below and submitted that sufficient material is available on record to justify reopening of the assessment.

7. On consideration of the rival submissions, we are of the view that reopening of the assessment as well as addition in the case of the assessee-company are wholly unjustified. It is an admitted fact that alleged pen-drive was recovered during the search from the possession of Shri Chetan Gupta by Punjab Vigilence Bureau on the reasons that Shri Chetan Gupta was keeping the black money earned by Capt. Amarinder Singh, Chief Minister of Punjab. The Department has also proceeded against Shri Chetan Gupta in various assessment years on the basis of the entries contained in the pen-drive recovered from him. The Tribunal decided several appeals of Shri Chetan Gupta and finally the appeal of Shri Chetan Gupta was decided by ITAT, Delhi F-Bench, in ITA.Nos.1788 & 2389/Del./2016 for the A.Y. 2005-2006 vide

Order dated 07.06.2018 and in paras 3 to 16 it was held as under :

“3. Brief facts of the case are that assessee is an individual filed his return of income u/s 139 of the Income Tax Act, 1961 (hereinafter for short called as the ‘Act’) on 29.10.2005 declaring total income of Rs. 3,41,612/-. The AO issued notice u/s 148 of the Act after recording the reasons. The reasons are reproduced in the assessment order in which it is noted that Punjab State Vigilance Bureau has conducted a search operation on 17.05.2007 at the business as well as the residential premises of the assessee. The Punjab Police Vigilance Bureau registered FIR No.5 dated 23.03.2007 in connection with Ludhiana City Centre Scam an assessee was arrested on 17.05.2007. The police have recovered a computer and pen-drive from the assessee. The print out from the pen-drive showed that the assessee had received credit entries from various persons. In the said pen-drive, ledger

accounts of various persons/parties have been mentioned. In the charge sheet filed by the police, it was clearly brought out that the entries in the pen-drive represent unaccounted income of various persons being deposited with the assessee. As such, the pen-drive represents the accounts of such unaccounted transactions which were being kept and maintained by the assessee. The peak credit of all the credit entries maintained in each and every ledger account has been worked out which comes to Rs.43,67,62,555/-. The assessee has however, shown salary and interest income in the return of income. These credit entries are not shown in the return of income. The AO, therefore, had reasoned to believe that income chargeable to tax has escaped assessment. The assessee in response to notice issued u/s 148 of the Act submitted before the AO that original return filed may be treated as return having been filed u/s 148 of the Act. The AO at the reassessment stage asked for the explanation of the assessee with regard to the credit/debit entries appearing

on these papers which are taken out from the pen-drive. The assessee submitted that from these papers the statement has been prepared after posting day wise each entry reflected in the individual accounts of the statements from the alleged pen-drive and consolidated the same to find out balance of the day. The said entries are verifiable from the statement of accounts. According to the above statement, peak balance as per details enclosed is Rs.1,82,59,248/- as on 10.04.2004. However, this peak balance has been worked out as per instruction of the AO and since the alleged pen-drive does not belong to the assessee, he has nothing to do with the said peak balance. The AO noted that pen-drive was recovered from the assessee which contained the accounts of political persons whose un-accounted/black money was being managed by the assessee. The pen-drive has direct correlation with the books of accounts of the assessee. The explanation of assessee that the pen-drive does not belong to him was rejected. The AO also prepared working of the

peak credit and mentioned at pages 7 to 10 of the assessment order and the total of the same comes to Rs.43,67,62,555/- which was treated as unexplained credit and addition was made to the income of the assessee.

4. *The assessee challenged the addition before the Ld. CIT (A) as well as challenged the reopening of the assessment in the matter. The submissions of the assessee are reproduced in the appellate order in which the assessee explained that the ITAT had decided the case of the assessee for earlier assessment years i.e. 2001-02, 2002-03 & 2003-04, wherein the assessee has been granted the benefit of calculation of peak balance and telescoping thereof in the manner discussed above. Keeping the said decision in view, the addition, if any, at all has to be limited to the peak credit of Rs.1,82,59,348/- as on 10.04.2004 as telescope for the maximum peak balance of earlier years i.e. Rs.46,16,837/- for AY 2003-*

04 resulting in net addition, if at all, of Rs. 1,36,42,861/-.

The assessee also made submissions against reopening of the assessment. The assessee in the rejoinder also explained that the process and methodology adopted by the assessee in earlier years also has judicial sanction because the peak statements were filed before the authorities below and the Tribunal also accepted the same while deciding appeals of the assessee for assessment years 2002-03, 2003-04 & 2004-05. The said orders of the Tribunal support, affirm and approve the methodology adopted by the assessee to determine the peak credit for the respective years and accordingly, there is no course legal, factual or any other logic reason to denote from the same. It was, therefore, submitted that AO should have adopted the calculation of the peak credit as is directed by the Tribunal in earlier year.

5. The Ld. CIT (A) confirmed the reopening of the assessment and dismissed this ground of appeal of the

assessee. The Ld.CIT (A) as regards the working of the peak credit noted that the Tribunal has decided the issue in earlier year and have considered the method of working of the peak credit submitted by the assessee to the AO during assessment proceedings. The working of the peak credit, telescoping and set off all the entries and set off of the opening balances have been accepted. The Ld. CIT (A) forwarded the copy of the peak credit working submitted by the assessee to AO for filing a remand report. The AO filed the remand report in which the AO explained the peak credit is worked out on similar lines as was considered in earlier years AY 2002-03 and 2003-04. However, examination of the working of peak balances showed that assessee while working out the peak balances had also debited the expenses incurred. This method is incorrect for working peak balance. The AO, therefore, reported that the peak after excluding the debits on account of expenses for assessment year under appeal would come to Rs.5,10,51,972/- as against claim of

assessee of Rs.1,82,59,248/-. The Ld. CIT (A) accepted the contention of the AO and noted that the debit entries and expenditure cannot be considered in the peak and accordingly, directed the AO to modify the assessment as per fresh peak balance working considered in the order subject to adjustment of opening balances as directed above. The appeal of the assessee was accordingly, partly allowed.

6. The assessee in his appeal challenged the addition of the peak credit to the extent of Rs.5,10,51,972/- and challenged the reopening of the assessment u/s 148 of the Act. The Revenue in their appeal challenged the deletion of addition of Rs.38,57,10,583/- on account of unexplained credit u/s 68 of the Act.

7. We have heard the Ld. Representatives of both the parties.

8. *Ld. DR relied upon the order of the AO and submitted that pen-drive was seized by the Punjab Vigilance Bureau from the possession of the assessee on the basis of which AO made an addition of peak amount of credit u/s 68 of the Act. The CIT (A) directed the set off of opening balance of cash available against the said peak credit. The AO had worked out the peak of individual ledger account while the assessee consolidated all the accounts in the working of the peak. The ITAT decided the appeals for assessment years 2001-02 to 2004-05 in which the working of the peak as per assessee has been accepted and set off has been given of the opening balance. The orders of the Tribunal dated 21.06.2013 and 31.01.2014 are filed in the Paper Book. For AY 2005-06 the order of the CIT (A) is dated 23.02.2016 on the basis of the remand report dated 22.01.2016 and both the dates are subsequent to the order of the Tribunal in earlier years. The AO in the remand report mentioned that the assessee in his working of peak had also considered the application*

of income and expenses in the rotation of funds as the cash available which is incorrect. The findings of the AO have been upheld by the CIT (A). Therefore, appeal of the assessee is not fully covered by decision of the ITAT.

9. *Ld. DR submitted that the issue of reopening of the assessment u/s 148 of the Act is covered against the assessee by order of the Tribunal for earlier years (supra). Ld. DR referred to the statement of peak filed in the Paper Book to show that assessee has taken into consideration the expenses and interest which AO has excluded. Before the ITAT expenses were not referred, therefore, the AO may be directed to exclude the expenses while computing the peak. Set off of Rs.46,16,387/- of AY 2003-04 is not available to assessee as it also contains the expenses.*

10. *On the other hand, Ld. Counsel for the assessee reiterated the submissions made before the authorities below and submitted that both the issues are covered by the order of the ITAT 'Delhi' Bench in the case of the*

assessee. He has submitted that the issue of peak is covered in favour of the assessee and assessee is entitled for benefit of set off of Rs.46,16,387/- for AY 2003-04 upon which assessee had already paid the taxes. He has submitted that peak contains all entries found in the pen-drive which was provided to the assessee. Similar peak was calculated in earlier years which have been found accepted by the Tribunal. Therefore, all the issues are covered by earlier orders of the Tribunal and peak may be accordingly calculated.

11. We have considered the rival submissions and perused the material available on record. The ITAT 'B' Bench Delhi in the case of the same assessee for assessment years 2001-02, 2002-03 & 2003-04, vide order dated 21.06.2013 decided the identical issue and appeals of the assessee have been partly allowed and departmental appeal has been dismissed.

12. *The findings of the Tribunal in pars 6.13 to 11 are reproduced as under:*

“6.13. We have heard both the parties on these issues at length most of the arguments are contained in the written submissions filed before lower authorities, which are mentioned above in brief. From AO's remand reports and observations contained in the orders ld. AO and CIT(A), the details furnished by assessee are as under:

(i) Assessee filed details about each and every entry on day to day basis, these details are placed on paper book of respective year.

(ii) From the details a summary of mistakes, opening balances (debit or credit as the case may be), contra entries etc is furnished to work out the correct amount of credits emerging from the print outs.

(iii) These details are further supported by working of peak credit for each year from, which are filed by assessee.

6.14. Assessee claims to have submitted all these details before AO, who though gave some cursory interest adjustments but did not look into all other details refusing the assessee claims summarily. They were filed before CIT(A) again who called for remand report, however CIT(A) also did not deal with the core issue and gave some adjustments here and there. Thus assessment has not been framed in a reasonable and proper manner. To ensure high pitched assessments the huge additions have been made one way or other in a capricious manner.

6.15. Ld counsel took us through the relevant entries to demonstrate how the funds have been reutilized from one a/c to other, the effect of contra entries and mistakes committed by lower authorities. While working out the printouts it will be disastrous to add each and every entry without appreciating that same moneys have been reused. Such an arbitrary practice will lead to disastrous result and unthinkable additions which are neither justified nor warranted by the material on record. It has been pleaded that

assessee has discharged its burden in explaining each and every aspect necessary for arriving at a fair and reasonable assessment. Lower authorities have failed to rebut the discharge of burden by the assessee in reconciling his peak credit working. Therefore the peak working as offered by the assessee deserves to be accepted.

6.16. After careful consideration of facts, circumstances and material available on record, case laws and rival contentions it will be desirable to dwell on the aspects of peak credit; telescoping, set off of entries, availability of opening balance and its effect in such print out; this is necessary for arriving at a fair estimate of the deemed income of the assessee for AY 2002-03 and 2003-04.

6.17. Such concepts are well known in the law with a rider of caution that they are question of facts and depend on case to case. Hon'ble Supreme court and various other High Courts have laid down the propositions that such adjustments can be applied while making the assessments in the cases of working

out of seized and incriminating documents in case of repetitive transactions.

6.18. We shall start with the theory of the department that assessee is acting as a manager or administrator of funds for 148 other persons. Though some names are given however no inference are drawn by authorities below. Therefore, we leave this issue here. More so they become third parties to the proceedings and any observations are undesirable and may impinge on principles of natural justice. The departmental theory of assessee being a fund manager for others is supported by the fact that assessee filed complete day to day details and entry by entry details of contents of print outs available with the department. They all are part of the paper books. They were submitted before Assessing officer and CIT(A). Remand report was submitted by AO on CIT(A)'s initiative.

6.19. From the explanation of the entries and departmental theory, it emerges that assessee was working as the fund manger or administrator for

others. While dealing with the issue this fact is to be kept in reckoning.

6.20. Presumption u/s 292C will not be applicable in this case as admittedly there was no search proceedings under income tax act on the assessee. A statutory presumption can be raised against assessee when the prescription of law warrants it. In the absence of enabling statutory provision such presumption can not be propped up against assessee. Since there was no search on assessee u/s 132 under income tax act, presumption u/s 292C can be applied to him. However the assessee case comes in the ken of sec 68 about giving reasonable explanation of cash credits found from his record.

6.21. This scenario does not alter the situation materially in as much as assessee has to discharged the burden cast by deeming fiction of sec. 68. The burden is by and large similar to sec 292C.

6.22. The department proceeds on premise that assessee manages funds for 148 person or so and keeps

a record thereof. Assessee filed every detail in date wise and entry wise manner. AO does not consider it objectively and allows some cosmetic reduction of interest. Issue is carried in appeal, all the documents are filed again before CIT(A) who calls for a remand report from AO. The course of events reveals that assessee's details are again not considered objectively and some prima facie adjustments are reduced by CIT(A).

6.23. The peak credit theory and the benefit of telescoping is generally accepted as it is logical and acceptable provided there is reasonable material to show that withdrawals or repayments could have been available on the date of subsequent credit or repayment, more so, in the accounts of different persons. The fact that assessee has been held to be a fund manager for 148 persons for which the moneys are frequently withdrawn or deposited as per these case laws and facts and circumstances of this case assessee will be entitled to work out a peak credit and avail the benefits of telescoping. We may hasten to add

that it is not a proposition of law but the exercise is to be undertaken on the inferences based on normal preponderance of probabilities and based on normal human conduct. The department is entitled to displace such propositions advanced by the assessee on cogent reasons and not by summary rejection of the explanation. In the next para we will be dealing with various case laws right upto Hon'ble Supreme Court where this factual preposition has been upheld subject to certain conditions.

6.24. The important question which arises is whether the assessee has discharged it's in explaining the entries contained in the pen-drive and its print outs in terms of sec 68 or any other presumption statutory or otherwise which may be raised in the context of the facts of this case. In our considered view assessee has discharged it's onus in explaining these entries by filing the details before AO, CIT(A) and in remand proceedings. Assessee has pushed the ball in the court of department by demonstrating from the details of entries that he manages the funds for others. In the

course thereof he requests for necessary working of peak credit, correction of mistakes, contra entries and considering the claims of available opening balances. The claim of opening balances is made as the data recovered pertains to three years and assessee's fund managing activities span to three years. Despite assessee's diligence in filing all the details the authorities below fail to consider the assessee's objections and workings. In our considered view the facts and circumstances of the case and departmental theory warrant application of peak theory, telescoping, correction of mistakes and taking cognizance of journal/contra entries. In our view ratio of decisions in the cases of - Anantharam Veerasinghaiah & Co. (supra); K.S.M. Guruswamy Nadar & Sons (supra); Singhal Industrial Corpn. (supra); Kantilal & Bros. (supra); Sanjay Kumar Jain (supra); & Ishwardass Mutha (supra), support the assessee's case for peak credit and telescoping benefits.

6.25. In consideration of foregoing we have no hesitation to hold that assessee has discharged his

primary burden in explaining the entries in terms of sec. 68 or any other presumption which may be raised in behalf of the entries in the print outs. Department in effective and convincing terms has failed to rebut the same except giving some general observations that the claims can not be considered. In our view we have to estimate the undisclosed income of the assessee for AYs2002-03 & 03-04 keeping in mind our observations and conclusions in this behalf.

6.26. In the wake of these observation we proceed to decide the quantum of undisclosed income of the assessee as under:

(i) The reassessment for AY 2001-02 is quashed.

(ii) For AY 2002-03 the credit for opening balance is not given as we have quashed the reassessment for AY 2001-02, therefore, the opening figure flowing from the quashed reassessment cannot be verified. Subject to these observations the peak credit as worked out by the assessee at Rs.36,89,310/- is held as undisclosed income for this year.

(iii) For A.Y. 2003-04: On the same methodology the peak credit worked out by the assessee at

Rs.46,16,387/- is held to be the peak credit for this year. However, this peak credit is to be telescoped with the income of AY 2002-03 as the same was available with the assessee for utilization. Consequently, the taxable income for A.Y. 2003-04 is worked out as under:

(i) Peak credit for A.Y. 2003-04 Rs.46,16,387/-

(ii) Less: Peak credit for AY 2002-03 Rs.36,89,310/-

Taxable income for AY 2003-04 Rs.9,27,077/-

7. Thus, the undisclosed income to be included in the assessee's income is determined at Rs.36,89,310/- for A.Y. 2002-03 and Rs.9,27,077/- for A.Y. 2003-04. These grounds are accordingly partly allowed.

8. Apropos the remaining ground for AY 2002-03 in respect of addition of Rs.9,21,200/- being alleged unaccounted payment of US \$ 20,000 transferred to Park Young Tae, it is pleaded that his statement before Enforcement Directorate was taken behind his back. Assessee was neither a party to ED proceedings nor the statement was taken in his presence. Only on the basis of a third party statement before some other agency

Assessing officer has made the addition without giving opportunity to cross examine Mr. Young. This clearly violates the principles of natural justice embodied in the maxim "audi alteram partem". We find merit in the argument of Id. Counsel. The impugned addition cannot be made in the hands of the assessee unless proper opportunity to defend himself against the allegation including the cross-examination of Mr. Young and the result of proceedings before the E.D. authorities are to be considered. This ground is set aside restored back to the file of assessing officer to decide the same afresh in accordance with law.

9. Apropos the revenue's appeal for A.Y. 2002-03, regarding the properties sold by the assessee, the sale consideration has been received by the assessee through a registered sale deed. There is no allegation about violation of any circle rate or comparative sale instance. The purchaser of the property has not been examined so as to raise any doubt about any money received by the assessee. In our view when a property is sold by a registered document, the addition cannot be

made purely on the basis of a valuation report which is only in the nature of an opinion. CIT(A) while deleting the addition, has rightly relied on the Hon'ble Delhi High Court judgment in the case of CIT. In view thereof we do not find any infirmity in the order of CIT(A), which is upheld.

9.1. Since we have disposed of the assessee's appeals in above manner, there is no need to deal with the assessee's ground about additional evidence.

10. In the result, revenue's appeal is dismissed.

11. In the result, assessee's appeal for A.Y. 2001-02 is allowed; for A.Y. 2002-03 & 2003-04 are partly allowed. Revenue's appeal for AY 2002-03 is dismissed."

13. The ITAT 'B' Bench Delhi in the case of the same assessee for AY 2004-05, vide order dated 31.01.2014 following its earlier order dated 21.06.2013 (supra) allowed the appeal of the assessee partly. The findings of the Tribunal in para 6 to 8 of the order are reproduced as under:

“6. We have duly considered the rival contention and gone through the record carefully. Both the Id. Representative have agreed that issue regarding reopening of the assessment by issuance of a notice u/s 148 has been decided against the assessee in AYs 2002-03 and 2003-04, similar circumstances are available in this year, hence, ground no. 4 raised in the present appeal is to be rejected. Similarly it has been agreed that the entries found in the pen-drive is admissible evidence against the assessee upon whom income of the assessee can be determined. Thus ground no. 2 raised by the assessee in the present appeal is also rejected. The following observations of the Tribunal in this connection are worth to note :

'AYs 2002-03 & 03-04 :

6.9. In these two assessment years the only challenge to jurisdiction to reassessment on the only ground about there being no live nexus between the reasons recorded and material available on record has been already dismissed by us. Consequently we proceed to decide the merits of the additions.

6.10. *Reverting to the merits of the addition, department has consistently held that assessee manages wealth for other 148 persons. In this behalf some names of parties are here and there in the assessment order. However no enquiry from such parties have been solicited and findings are given in the order. Thus from the conspectus of facts made available by the department in this behalf the assessee's role by and large emerges to be of a money manager for others apart from the dealings of his associate concerns.*

6.11. *Apropos the peak credit working, set off of opening balances, contra entries, roll over utilization of funds which has been explained in details above; assessee vehemently claims to have fully reconciled the details about each and every entry. The details working thereof were filed before AO and thereafter before Id CIT(A), who called for w remand reports also. These details are placed before us also on the various paper books. Some of the relevant pages thereof are mentioned above.*

6.12 AO and CIT(A) have given some rebates or set off of interest receipts and payments. Assessee claims that his reconciliation of entities is supported by facts and material on record and is backed by the legally established propositions of peak credit working, telescoping and set off, which have not been given to assessee despite the remand reports. It is agitated that assessee's valid contentions have not been considered at all. On one hand assessee is considered as money' manager for others, thus his ostensible role will be to hold such funds in trust for others, receive or pay them on the instructions of principals and to earn some managerial remuneration thereon. On the other hand in the guise of a fiction of presumption u/s 292C all the funds are being treated as owned by the assessee and on top of that proper adjustments of peak credit emerging from the pen-drive is being refused to be worked by the department. That apart the other logical claims of set off role over, correction of mistakes and credit of opening

balances which are emerging from the same contents i.e. print outs of pen-drive is not being allowed to assessee. The assessment of undisclosed income is thus arbitrary and patently against the settled judicial propositions and departments own way of working in other survey, search or reassessment cases in which such principles are routinely applied. ”

7. As far as determination of total unexplained cash credits are concerned, the Tribunal has held that peak credit is to be worked out and income assessed in any earlier assessment year which is opening balance of the current AY is to be excluded. In the present AY the income of AY 2003-04 determined at Rs.92,7,077/- is to be excluded from the peak credit because this amount was available to the assessee on the first day of the accounting year. The Tribunal has made discussion with regard to this issue from Paragraph No. 6.13 which read as under:

“6.13. We have heard both the parties on these issues at length most of the arguments are contained in the written submissions filed before lower authorities, which are mentioned above in brief From AO's remand reports and observations contained in the orders Id. AO and CIT(A), the details furnished by assessee are as under:

(i) Assessee filed details about each and every entry on day to day basis, these details are placed on paper book of respective year.

(ii) From the details a summary of mistakes, opening balances (debit or credit as the case may be), contra entries etc is furnished to work out the correct amount of credits emerging from the print outs.

(iii) These details are further supported by working of peak credit for each year from, which are filed by assessee.

6.14. Assessee claims to have submitted all these details before AO, who though gave some cursory interest adjustments but did not

look into all other details refusing the assessee claims summarily. They were filed before CIT(A) again who called for remand report, however CIT(A) also did not deal with the core issue and gave some adjustments here and there. Thus assessment has not been framed in a reasonable and proper manner. To ensure high pitched assessments the huge additions have been made one way or other in a capricious manner.

6.15. Ld counsel took us through the relevant entries to demonstrate how the funds have been reutilized from one a/c to other, the effect of contra entries and mistakes committed by lower authorities. While working out the printouts it will be disastrous to add each and every entry without appreciating that same moneys have been reused. Such an arbitrary practice will lead to disastrous result and unthinkable additions which are neither justified nor warranted by the material on record. It has been pleaded that assessee has discharged its burden in explaining each and

every aspect necessary for arriving at a fair and reasonable assessment. Lower authorities have failed to rebut the discharge of burden by the assessee in reconciling his peak credit working. Therefore the peak working as offered by the assessee deserves to be accepted.

6.16. After careful consideration of facts, circumstances and material available on record, case laws and rival contentions it will be desirable to dwell on the aspects of peak credit; telescoping, set off of entries, availability of opening balance and its effect in such print out; this is necessary for arriving at a fair estimate of the deemed income of the assessee for AY 2002-03 and 2003-04.

6.17. Such concepts are well known in the law with a rider of caution that they are question of facts and depend on case to case. Hon 'ble Supreme court and various other High Courts have laid down the propositions that such adjustments can be applied while making the assessments in the cases of working out of

seized and incriminating documents in case of repetitive transactions.

6.18. We shall start with the theory) of the department that assessee is acting as a manager or administrator of funds for 148 other persons. Though some names are given however no inference are drawn by authorities below. Therefore, we leave this issue here. More so they become third parties to the proceedings and any observations are undesirable and may impinge on principles of natural justice. The departmental theory of assessee being a fund manager for others is supported by the fact that assessee filed complete day to day details and entry by entry details of contents of print outs available with the department. They all are part of the paper books. They were submitted before Assessing officer and CIT(A). Remand report was submitted by AO on CIT(A) 's initiative.

6.19. From the explanation of the entries and departmental theory, it emerges that assessee was working as the fund manger or

administrator for others. While dealing with the issue this fact is to be kept in reckoning.

6.20. Presumption u/s 292C will not be applicable in this case as admittedly there was no search proceedings under income tax act on the assessee. A statutory presumption can be raised against assessee when the prescription of law warrants it. In the absence of enabling statutory provision such presumption can not be propped up against assessee. Since there was no search on assessee u/s 132 under income tax act, presumption u/s 292C can be applied to him. However the assessee case comes in the ken of sec 68 about giving reasonable explanation of cash credits found from his record.

6.21. This scenario does not alter the situation materially in as much as assessee has to discharged the burden cast by deeming fiction 6f sec. 68. The burden is by and large similar to sec 292C.

6.22. The department proceeds on premise that assessee manages funds for 148 person or so and keeps a record thereof Assessee filed every detail in date wise and entry wise manner. AO does not consider it objectively and allows some cosmetic reduction of interest. Issue is carried in appeal, all the documents are filed again before CIT(A) who calls for a remand report from AO. The course of events reveals that assessee's details are again not considered objectively and some prima facie adjustments are reduced by CIT(A).

6.23. The peak credit theory and the benefit of telescoping is generally accepted as it is logical and acceptable provided there is reasonable material to show that withdrawals or repayments could have been available on the date of subsequent credit or repayment, more so, in the accounts of different persons. The fact that assessee has been held to be a fund manager for 148 persons for which the moneys are frequently withdrawn or deposited

as per these case laws and facts and circumstances of this case assessee will be entitled to work out a peak credit and avail the benefits of telescoping. We may hasten to add that it is not a proposition of law but the exercise is to be undertaken on the inferences based on normal preponderance of probabilities and based on normal human conduct. The department is entitled to displace such propositions advanced by the assessee on cogent reasons and not by summary) rejection of the explanation. In the next para we will be dealing with various case laws right upto Hon'ble Supreme Court where this factual preposition has been upheld subject to certain conditions.

6.24. The important question which arises is whether the assessee has discharged it's in explaining the entries contained in the pen-drive and its print outs in terms of sec 68 or any other presumption statutory or otherwise which may be raised in the context of the facts of this case. In our considered view assessee

has discharged its onus in explaining these entries by filing the details before AO, CIT(A) and in remand proceedings. Assessee has pushed the ball in the court of department by demonstrating from the details of entries that he manages the funds for others. In the course thereof he requests for necessary working of peak credit, correction of mistakes, contra entries and considering the claims of available opening balances. The claim of opening balances is made as the data recovered pertains to three years and assessee's fund managing activities span to three years. Despite assessee's diligence in filing all the details the authorities below fail to consider the assessee's objections and workings. In our considered view the facts and circumstances of the case and departmental theory warrant application of peak theory, telescoping, correction of mistakes and taking cognizance of journal/contra entries. In our view ratio of decisions in the cases of- Anantharam Veerasinghaiah & Co. (supra); K.S.M. Guruswamy Nadar & Sons (supra);

Singhal Industrial Corpn. (supra); Kantilal & Bros, (supra); Sanjay Kumar Jain (supra); & Ishwardass Mutha (supra), support the assessee's case for peak credit and telescoping benefits.

6.25. In consideration of foregoings we have no hesitation to hold that assessee has discharged his primary burden in explaining the entries in terms of sec. 68 or any other presumption which may be raised in behalf of the entries in the print outs. Department in effective and convincing terms has failed to rebut the same except giving some general observations that the claims can not be considered. In our view we have to estimate the undisclosed income of the assessee for AYs2002-03 & 03-04 keeping in mind our observations and conclusions in this behalf.

6.26. In the wake of these observation we proceed to decide the quantum of undisclosed income of the assessee as under:

- i. The reassessment for A Y 2001-02 is quashed.
- ii. For AY 2002-03 the credit for opening balance is not given as we have quashed the reassessment for AY 2001-02, therefore, the opening figure flowing from the quashed reassessment cannot be verified. Subject to these observations the peak credit as worked out by the assessee at Rs. 36,89,310/- is held as undisclosed income for this year.
- iii. For A.Y. 2003-04: On the same methodology the peak credit worked out by the assessee at Rs. 46,16,387/- is held to be the peak credit for this year. However, this peak credit is to be telescoped with the income of AY 2002-03 as the same was available with the assessee for utilization. Consequently, the taxable income for A.Y. 2003-04 is worked out as under:
 - i) Peak credit for AY 2003-04
Rs.46,16,387/-

ii) Less: Peak credit for AY 02-03
Rs.36,89,310/-

Taxable income for AY 03-04
Rs.9,27,077/-

7. Thus, the undisclosed income to be included in the assessee's income is determined at Rs.36,89,310/- for A.Y. 2002-03 and Rs.9,27,077/- for A.Y. 2003-04. These grounds are accordingly partly allowed.

8. Apropos the remaining ground for AY 2002-03 in respect of addition of Rs.9,21,200/- being alleged unaccounted payment of US \$ 20,000 transferred to Park Young Tae, it is pleaded that his statement before Enforcement Directorate was taken behind his back. Assessee was neither a party to ED proceedings nor the statement was taken in his presence. Only on the basis of a third party statement before some other agency Assessing officer has made the addition without giving opportunity to cross examine Mr. Young. This clearly violates the

principles of natural justice embodied in the maxim "audi alteram partem. We find merit in the argument of Id. Counsel. The impugned addition cannot be made in the hands of the assessee unless proper opportunity to defend himself against the allegation including the cross-examination of Mr. Young and the result of proceedings before the E.D. authorities are to be considered. This ground is set aside restored back to the file of assessing officer to decide the same afresh in accordance with law. "

8. Respectfully following the order of the Co-ordinate Bench in the assessee's own case, where assessment was reopened on the similar reasons and same material i.e. credit entries pertaining to those years have been considered, we are of view that there is no disparity on facts, and, therefore, appeal of assessee deserve to be allowed for statistical purposes, we accordingly allow the appeal of assessee and direct the Ld. AO to verify the accounts and worked out the peak credit in

accordance with the working made by the Tribunal in AY 2002-03 and 2003-04."

13.1. *The assessee has filed statement of peak in the Paper Book from pages 15 to 75 of the Paper Book. The peak as on 10.04.2004 is calculated at Rs.1,82,59,248/-. It is not in dispute that working of the peak for this year is same as have been computed by the assessee in preceding AY 2001-02 to 2004-05.*

14. *The Ld. CIT (DR), however, contended that in this year the AO recomputed the peak and filed the remand report in which it is stated that the debit entries on account of expenses may be excluded. However, there is nothing in the order of the Tribunal for earlier years to exclude the debits of the peak. It is not in dispute that peak is worked out in all preceding assessment years and in assessment year under appeal on the basis of entries found in the pen-drive recovered from the possession of the assessee. The*

print out from the pen-drive have been brought on record, therefore, all the entries contained in the seized pen-drive shall have to be taken into consideration for working out the peak. The process and methodology adopted by the assessee in earlier years have been accepted by the ITAT in two orders for assessment years 2001-02 to 2004-05. Therefore, the authorities below are bound to follow the orders of the Tribunal and should not have reworked out the peak in their own way. Since the peak credit statement is prepared by the assessee on the basis of the entries found in the pen-drive and accepted by the Tribunal in earlier years, therefore, same method shall have to be followed in assessment year under appeal. Therefore, there was no justification for the AO to substitute the peak for assessment year under appeal from Rs.1,82,59,248/- to Rs.5,10,51,972/-. The assessee's counsel has also rightly contended that the Tribunal has given benefit of opening balance of the

earlier years and that assessee had paid tax on the peak credit for AY 2003-04 of Rs.46,16,387/-. Therefore, such amount shall have to be reduced from the peak calculated by the assessee and benefit of the same shall have to be granted to the assessee. Therefore, as per the decisions of the Tribunal in the case of the assessee reproduced above, the net addition shall have to be made against the assessee in a sum of Rs.1,36,42,861. The issue of the peak is, therefore, fully covered by the earlier years orders of the Tribunal. In those orders also the Tribunal has dismissed the ground of appeal of the assessee as regards reopening of the assessment u/s 148 of the Act. Therefore, these grounds of appeal of the assessee are dismissed.

15. *Considering the above discussion and following the reasons for decisions of ITAT in the case of the same assessee for assessment years 2001-02 to*

2004-05, we set aside the orders of the authorities below and direct the AO to make an addition of Rs.1,36,42,861/- on account of peak credit.

16. In the result, the appeal of the assessee is partly allowed and Departmental appeal is dismissed.”

7.1. In this Order, the entire facts have been considered which shows that the Department has considered the peak credit of all the credit entries maintained in each and every ledger account at Rs.43,67,62,555/-. According to the Department, the pen-drive represents the accounts of such unaccounted transactions which were being kept and maintained by Shri Chetan Gupta. The Tribunal in earlier Orders decided the issue partly in favour of Shri Chetan Gupta and reduced the working of the peak credit, which is reproduced in the above Order and following the Order of the Tribunal in the case of Shri Chetan Gupta for earlier years, it was observed that the print-out from the pen-drive have been brought on record, therefore, all the entries contained in the

seized pen-drive shall have to be taken into consideration for working out the peak. Shri Chetak Gupta also prepared the statement of the peak credit. The Tribunal following the Order in earlier year in the case of Shri Chetan Gupta directed the A.O. to make addition of Rs.1.36 crores on account of peak credit. The Order of the Tribunal, therefore, clearly established that all the entries in the pen-drive were considered for calculating the peak credit entries in the hands of Shri Chetan Gupta and as such Learned Counsel for the Assessee has rightly contended that when the peak credit has been considered entirely in the hands of Shri Chetan Gupta, there were no question of making any addition against the assessee-company. Further, Shri Chetan Gupta has not made any statement against the assessee-company, if any entries belong to the assessee-company. Nothing is brought on record in this regard. Ld. CIT(A) in the case of the assessee-company for A.Y. 2007-2008 vide Order dated 23.02.2016 following the Order in the case of Shri Chetan Gupta deleted the entire addition. The ITAT, Delhi F-Bench also in the case of sister concern of the

assessee-company R.L. Agencies Pvt. Ltd., (supra) on identical issue following the Order in the case of Shri Chetan Gupta (supra), deleted similar addition. These facts clearly prove and establish that assessee-company has no connection with the entries contained in the pen-drive. The print-out of the pen-drive was brought on record which was unsigned. No name of the assessee-company is mentioned. Therefore, it was having no evidentiary value to make any addition against the assessee-company. The issue is, therefore, covered by the Order of the ITAT, Delhi Bench in the case of Shri Chetan Gupta (supra) and others. We, therefore, hold that no addition could be made against the assessee-company. We, accordingly, set aside the orders of the authorities below and delete the addition of Rs.2,21,00,788/-.

7.2. The A.O. recorded reasons for reopening of the assessment on the basis of pen-drive found from the possession of Shri Chetan Gupta. Shri Chetan Gupta do not make any allegation against the assessee-company. The

Tribunal has held that the pen-drive belongs to Shri Chetan Gupta. In the reasons for reopening of the assessment, no name of the assessee-company have been mentioned because it is mentioned as "RLTRV PVT EXP". The reasons for reopening of the assessment did not refer to any material to connect the assessee-company with escapement of income or incurring any unaccounted expenses. The A.O. did not verify the details contained in the pen-drive. The A.O. has initiated the re-assessment proceedings because assessee-company has incurred unaccounted expenditure under section 69C of the I.T. Act. But, later on, did not make any addition under section 69C of the I.T. Act. The A.O. has failed to establish as to how assessee-company has incurred the expenses. The assessee-company has not debited any expenditure in the profit and loss account and also did not claim deduction of the same in its books of account. How the entries in the pen-drive were connected with the assessee-company have also not been established. It, therefore, appears that A.O. did not apply his mind to the alleged pen-drive before initiating the re-

assessment proceedings in the matter. Thus, there is absence of link between alleged tangible material and formation of belief. At the most, it could be inferred that the belief of the A.O. was based on mere imagination, speculation and suspicion. Therefore, it is not a fit case for initiation of re-assessment proceedings under section 147/148 of the I.T. Act against the assessee-company. We, accordingly, set aside the Orders of the authorities below and quash the reopening of the assessment in the matter. Appeal of the Assessee-Company is allowed.

8. In the result, ITA.No.893/Del./2015 of the Assessee is allowed.

ITA.No.5214/Del./2016 – Revenue Appeal :

9. The Ld. CIT(A) cancelled the penalty on the above addition in the light of the Order of the Tribunal in the case of Shri Chetan Gupta (supra) and held that same amounts cannot be assessed as income in the hands of the assessee. Since, we have quashed the re-assessment proceedings and

deleted the addition on merit, therefore, no basis is left to interfere with the Order of the Ld. CIT(A) in cancelling the penalty. We, accordingly, dismiss the Departmental Appeal.

10. In the result, ITA.No.5214/Del./2016 of the Revenue is dismissed.

11. To sum-up, appeal of Assessee is allowed and appeal of Revenue is dismissed.

Order pronounced in the open Court.

Sd/-
(L.P. SAHU)
ACCOUNTANT MEMBER

Sd/-
(BHAVNESH SAINI)
JUDICIAL MEMBER

Delhi, Dated 18th September, 2018

VBP/-

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT "F" Bench
6.	Guard File

// BY Order //

Asst. Registrar : ITAT Delhi Benches :
Delhi.