

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCHES (CAMP AT MEERUT))**

**BEFORE SHRI N.S. SAINI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.1609/Del./2018
(ASSESSMENT YEAR : 2009-10)**

**ITA No.1610/Del./2018
(ASSESSMENT YEAR : 2009-10)**

Shri Zafar Alam, vs. ITO, Ward 1 (1),
C/o Shri Vinod Kumar Goel, Meerut.
282, Boundary Road, Civil Lines,
Meerut.

(PAN : ADHPA7371C)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Vinod Kumar Goel, Advocate
REVENUE BY : Shri Munshi Ram Bihagra, Senior DR

Date of Hearing : 11.01.2019

Date of Order : 29.01.2019

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Since common questions of facts and law have been raised in both the aforesaid appeals, the same are being disposed off by way of consolidated order to avoid repetition of discussion.

2. The appellant, Shri Dinesh Kumar (hereinafter referred to as 'the assessee') by filing the present appeal i.e. ITA No.1610/Del/2018, sought to set aside the impugned order dated

27.12.2017 passed by Id. CIT (Appeals), Meerut qua the assessment year 2009-10 on the grounds inter alia that :-

“1. That CIT(A) is in error in making addition of Rs. 5% of total turnover of Rs.42,50,993/- by applying section 44AF and treated net profit @ 5% of Rs. 2,12,550/- but CIT(A) is in error in holding that out of turnover peak credit of Rs.3,39,035/- also added in the income of peak balance in the bank account of same turnover as unexplained income. Therefore, CIT(A) has made addition of Rs.3,39,035/- as income of the assessee is against the facts and law.

2. That the assessee has furnished the Income Tax Return with Income Tax Officer, Ward-2(4), Meerut as his name is Zafar Alam because the jurisdiction of the case lie with Income Tax Officer, Ward-2(4), Meerut but the Income Tax Officer, Ward-1(1) has issued notice U/s 148, 142(1) and 147 in the name of Alam Zafar. Therefore, all the notices issued by the A.O. is bad in law in view of A.O. does not have jurisdiction but after change the name of the assessee Zafar Alam to Alam Zafar, he trying to create jurisdiction which is bad in law.”

3. The appellant, Shri Dinesh Kumar (hereinafter referred to as ‘the assessee’) by filing the present appeal i.e. ITA No.1609/Del/2018, sought to set aside the impugned order dated 04.01.2018 by confirming the penalty order dated 15.05.2017 passed u/s 271(1)(b) of the Income-tax Act, 1961 (for short ‘the Act’) passed by Id. CIT (Appeals), Meerut qua the assessment year 2009-10 on the grounds inter alia that :-

“1. That no notice under section 148, 147, 144 and 142(1) was received by the assessee because name of the

assessee appear in the assessment order and notices as Alam Zafar. However, as per PAN name of the assessee is Zafar Alam, hence assessment completed U/s 147 r.w.s. 144 is bad in law. Ld. CIT(A) has not considered the same.

2. That the penalty imposed U/s 271 (1)(b) by the A.O. is not permitted in law as no notice was ever served upon the assessee and penalty imposed by the A.O. out of jurisdiction.”

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4. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessing Officer framed assessment under section 144/147 of the Income-tax Act, 1961 (for short ‘the Act’) by making addition of Rs.42,50,993/- deposited as cash in saving bank account on account of unexplained investment u/s 68 of the Act.

5. Assessee carried the matter by way of an appeal before the Id. CIT (Appeals) who has estimated the profit by applying the provisions of section 44AF of the Act @ 5% and thereby treated an amount of Rs.2,12,550/- on account of profit as unexplained income of the year under assessment. The CIT (A) also treated an amount of Rs.3,39,035/- as unexplained income of the year under assessment by taking the peak value of investment by partly allowing the appeal. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

6. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

7. So far as question of estimating the profit @ 5% to the tune of Rs.2,12,550/- u/s 44AF of the Act as unexplained income by Id. CIT (A) is concerned, the Id. AR for the assessee has accepted the same and has not pressed Ground no.1 to that extent. So, we confirm the findings of Id. CIT (A) as to estimating the profit @ 5% of the total turnover of Rs.42,50,993/-.

8. However, Id. AR for the assessee challenged the addition of Rs.3,39,035/- made by the Id. CIT (A) by taking peak value of investment being unexplained investment on the ground that when profit has been estimated @ 5% of the total turnover, the peak value of investment of Rs.3,39,035/- as unexplained income cannot be made. We are inclined to agree with the contention raised by the Id. AR because when profit @ 5% on the total turnover has been estimated by the Id. CIT (A) then peak value of the investment cannot be treated as unexplained income which would otherwise amount to double addition which is not permissible under the Act. So, we order to delete the addition of Rs.3,39,035/-

made by the Id. CIT (A) by making the peak value of the investment.

9. Ground No.2 is dismissed having not been pressed during the course of arguments.

10. In view of what has been discussed above, present appeal being ITA No.1610/Del./2018 filed by the assessee is partly allowed.

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11. Assessing Officer initiated the penalty proceedings u/s 271(1)(b) on the ground that the assessee has failed to comply with the notice issued u/s 142 (1) of the Act on 27.07.2016 and further notice u/s 144 was issued on 09.12.2016 and 23.12.2016 and consequently completed the assessment u/s 144/147 of the Act on 30.12.2016. AO, after treating the assessee as a defaulter, levied the penalty of Rs.10,000/- u/s 271(1)(b) of the Act.

12. Assessee carried the matter by way of an appeal before the Id. CIT (Appeals) who has confirmed the penalty levied by the AO by dismissing the appeal. Feeling aggrieved, the assessee has come up in appeal before the Tribunal.

13. It is the categorical case of the assessee that the notice u/s 148 of the Act has never been served upon him as the assessment order

itself shows that the notice was sent through speed post in the name of Alam Zafar whereas assessee's name is Zafar Alam. Assessee's contention is sustainable as the notices have been sent to the assessee for compliance in the name of Alam Zafar which could not have been expected to have been served on the assessee who is admittedly known as Zafar Alam by any stretch of imagination.

14. Even the Revenue has not brought on record any acknowledgement bearing signatures of the assessee in token of having received the repeated notices issued by the AO. The Id. CIT (A) has confirmed the penalty on the basis of assumptions and presumptions that when the notice to the assessee was issued in the name of Alam Zafar in penalty proceedings and he attended the penalty proceedings then he must have been served in the quantum proceedings also. However, we are of the considered view that penalty cannot be imposed on the basis of assumptions and presumptions rather to levy the penalty the Revenue has to make out a categorical case that the assessee was served upon by proving on record acknowledgements to show that assessee has received the notice and has failed to comply with the same by attending the proceedings.

15. In view of what has been discussed above, we are of the considered view that when the Revenue has failed to prove the

service of notice upon the assessee, question of levying the penalty u/s 271(1)(b) does not arise, hence penalty levied u/s 271(1)(b) is ordered to be deleted. Consequently, this appeal being ITA No.1609/Del/2018 filed by the assessee is allowed.

14. Resultantly, the appeal being ITA No.1610/Del/2018 is partly allowed and appeal in ITA No.1609/Del/2018 is allowed.

Order pronounced in open court on this 29th day of January, 2019.

**Sd/-
(N.S. SAINI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 29th day of January, 2019
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A), Meerut.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**