

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'SMC': NEW DELHI)**

BEFORE SMT. DIVA SINGH, JUDICIAL MEMBER

**ITA No.:- 5306/Del/2018
(Assessment Year: 2010-11)**

Gaurav Agarwal C/o D.K. Gupta, Advocate, 21-Gher Khatti, New Mandi, Muzaffarnagar, Uttar Pradesh, Pin: 251001	Vs.	DCIT Circle- 1 Muzaffarnagar, Uttar Pradesh
PAN No: ADAPA9829L		
APPELLANT		RESPONDENT

Assessee by : None
Revenue by : Sh. S.L. Anuragi, Sr. DR
Date of Hearing : 11.06.2019
Date of Pronouncement : 25.06.2019

ORDER

PER DIVA SINGH:

The present appeal has been filed by the assessee assailing the correctness of the Order dated 28.05.2018 of CIT(A), Muzaffarnagar, pertaining to 2010-11 Assessment Year wherein the penalty imposed u/s 271(1)(c) on the additions made in the assessment Order has been upheld in appeal.

2. At the time of hearing no one was present on behalf of the assessee, the appeal was passed over. In the second round also the assessee remained unrepresented. The record shows that the Registry has pointed out a delay of one day in the filing of the present appeal. The record shows that the appeal has been presented by Post on 07.08.2018. Accordingly considering the delay of one day on account of the documents being in transit and beyond the control of the assessee since 03/08/2018 (the date of Speed Post Stamp) the receipt of the same on 07/08/2018 leading to the delay is condoned. No objection was posed by the Ld. Sr. DR to the condonation of the delay. Said order was pronounced in the open Court. The Ld. Sr. DR was accordingly directed to argue the appeal.

3. The record shows that the assessee in the course of the assessment proceedings was required to explain the deposit of Rs. 2,00,000/- in his savings bank account on 28.09.2009. The assessee attempted to explain the deposits however ultimately he gave up the issue accepted the addition. The record shows that no appeal against the addition made by the AO was filed before the CIT(A). As a result of this addition, penalty proceedings were initiated.

4. The explanation offered was discarded by the A.O. and penalty of Rs. 61,800/- was imposed. Before the CIT(A), the assessee relied upon a cash flow statement. However the penalty was confirmed. Aggrieved the assessee is in appeal. The assessee remains unrepresented however the explanation offered before the CIT(A) extracted in the impugned order is extracted for the sake of completeness:

From the facts of the case and material on record, it is noted that the explanation " of the AR for the source of cash deposits of Rs.2,00,000/- in his bank account is based upon cash flow statement which is a summary of periodic cash withdrawals made and cash deposits made in the bank account by the appellatant. The cash flow statement is reproduced as under:-

GAURAV AGARWAL A.Y. 2010-2011					
DATED	WITHDRWAL FROM BANK	AMOUNT	DATE OF DEPOSIT IN BANK	AMOUNT	BALANCE
5.2.2009 TO					
31.3.2009	O/B	314500.00 ✓			314500.00
2.4.2009 TO					
19.5.2009	WITHDRWAL FROM BANK	70000.00 ✓	19.5.2009	27000.00	357500.00
22.5.2009 TO					
2.6.2009	WITHDRWAL FROM BANK	68000.00 ✗	3.6.2009	49000.00	376500.00
4.6.2009 TO					
15.6.2009	WITHDRWAL FROM BANK	38000.00 ✗	5.6.2009	150000.00	264500.00
15.6.2009 TO					
27.8.2009	WITHDRWAL FROM BANK	131000.00 ✗	28.7.2009	100000.00	295500.00
28.7.09 TO 28.8.09	WITHDRWAL FROM BANK	109000.00 ✗	28.8.2009	200000.00	204500.00

The submission of the appellatant that cash deposits of Rs.2,00,000/- have been made out of his income and out of the past savings has been considered along with the cash flow statement. It is noted that the appellatant has claimed opening cash in hand of Rs.314500/- as on 01-04-2009. In spite of having sufficient cash in hand, the appellatant has shown to have made frequent cash withdrawals which have been explained to have been used to make cash deposits of Rs.2,00,000/- on 28-08-2009. However, such submission lacks genuineness as no prudent person would withdraw the money

5. The Ld. Sr. DR relies upon the impugned Order.

6. In the light of the facts available on record as referred to herein above I am of the view that the levy of penalty cannot be confirmed. Simply because the addition has been accepted by the assessee cannot lead to the conclusion that levy of penalty is automatic. It is well settled that penalty proceedings and assessment proceedings are separate and distinct. The explanation offered in the penalty proceedings necessarily is required to be addressed in the context of the penal provisions. In the facts of the present case I find that the explanation of the assessee has been discarded in the penalty proceedings on the reasoning that the explanation that cash withdrawals were the sources of deposits was considered to be not relevant. A perusal of the grounds specifically ground no. 2 shows that it had been argued that the addition was accepted for the sake of avoiding litigation but there was adequate withdrawals available both with the assessee and also with his wife from her accounts. The said claim made when considered with the explanation offered before the Ld. CIT(A) leads to the conclusion that it has been discarded based on generalistic opinions as nothing is available on record to show that the said withdrawals were not available to the assessee. In the absence of any discussion on record as to the utilization of the funds available the claim of the assessee that the withdrawals made from the bank account were the source of the deposits deserves to be accepted *de horse* the fact that the addition was accepted in the assessment proceedings. Considering the factual matrix as available on record, I hold that the explanation offered by the assessee in the penalty proceedings deserves to be accepted. The impugned Order accordingly is set aside and the penalty Order is directed to be quashed. The appeal of the assessee is allowed. Said order was pronounced in the open court at the time of hearing itself.

7. In the result the appeal of the assessee is allowed.

Sd/-
(DIVA SINGH)
JUDICIAL MEMBER

Dated: 25.06.2019

Bidhan/AG(Chd)/Poonam(CHD)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	10.06.19
Date on which the typed draft is placed before the dictating Member	13.06.19 17.06.19,20.06.19 24.06.19
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	