IN THE INCOME TAX APPELLATE TRIBUNAL, JODHPUR BENCH, JODHPUR
BEFORE SHRI SANDEEP GOSAIN, JUDICIAL MEMBER AND SHRI VIKRAM SINGH YADAV, ACCOUNTANT MEMBER

ITA Nos. 07 TO 11/JODH/2021
(Assessment Years 2006-07 TO 2010-11)

Mr. Neeraj Paliwal, Plot No. 2, Kishore Nagar Extn., Kankroli, Rajasamand-313324.	Vs.	I.T.O. Ward-2, Rajsamand.
PAN No. ADXPP 3119 P		

Assessee by	Shri S.S. Nagar, CA
Revenue by	Miss. Kajal Agarwal, JCIT-DR
Date of Hearing	11/08/2021
Date of Pronouncement	2/11/2021

O R D E R

PER: SANDEEP GOSAIN, J.M.

These are the appeals filed by the assessee against the separate orders of the ld. CIT(A)-1, Udaipur dated 23/03/2017 and 16/12/2017, for the A.Y. 2006-07 to 2010-11 respectively in the matter of order passed u/s 147 r.w.s. 144 of the Income-tax Act, 1961 [hereinafter referred to as 'the Act', for short].

2. The hearing of the appeals was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. In all these appeals, the assessee has raised certain common grounds of appeal, thus all the appeals were clubbed together, heard and are being decided by a common order for avoiding the conflicting decision.

4. We are taking the facts of the first year i.e. A.Y. 2006-07 in ITA No. 07/Jodh/2021 under appeal which is common to other years except the change in the quantum of addition made. In this appeal, the assessee has raised following grounds of appeal:

"1.0 The order passed by ld. CIT(A) is bad in law considering the facts and circumstances of the case.

2.0 That on the facts and the circumstances of the case, the delay in filing of appeal may kindly be condoned since the appellant was completely unaware and was under the false impression that his previous income tax consultant has filed appeal against the order of the CIT(A) before the ITAT.

3.0 That on the facts and in the circumstances of the case, the ld. CIT(A) was not justified and grossly erred in upholding order of ld. AO without appreciating the fact that assessment order nowhere specifies under which section the addition has been made.

4.0 Without prejudice to the above grounds presuming but not admitting that the addition on account of cash deposits has been made by the AO u/s 68 of the Act the same is invalid and unlawful, inasmuch as bank statement is consistently held to be not books of accounts for the purposes of section 68 of the Act.

5.0 Without prejudice to the above grounds, based on the facts and the circumstances of the case, the ld. CIT(A) grossly erred in treating the entire unexplained cash deposit as income of appellant without considering the explanation made by appellant.

5.1 Without prejudice to the above grounds, based on the facts and the circumstances of the case, the ld. CIT(A) grossly erred in treating the entire unexplained cash deposit as income of appellant and should have restricted the addition to the commission income @ 7.5% earned by the appellant on such amount.

6.0 That the appellant craves leave to add, amend, modify, rescind, supplement or alter any of the grounds stated hereinabove, either before or at the time of hearing of this appeal."

5. Rival contentions have been heard and record perused. From perusal of the record, we observed that there is delay of 1402 days in filing the present appeal, for which, the assessee has filed application for condonation of delay, in which he has submitted as under:

> *"Affidavit for condonation of delay in filing appeal before ITAT (Fortn-36) against the order of CIT(Appeals)-1 Udaipur.*
>
> *(1) I, Neeraj Paliwal Prop of M/s Paliwal Departmental Store aged about 52 years, son of Mr. Basanti Lalji Paliwal identified by PAN ADXPP3119P at present residing at Address Plot No.2 Kishore Nagar Extn. Scheme, Near LIC Office, Kankroli, Rajsamand do solemnly affirm and state on oath as under:*
>
> *(2) That we received an Assessment Order for the Assessment Year 2006-07 under section 144 r.w.s 147 of the Income Tax Act 1961 on 30-03-2013.*
>
> *(3) That as per the said assessment order we found that returned income has been enhanced by Rs. 4,45,588/- and a demand of Rs. 2,27,290/- has been raised.*
>
> *(4) That we were advised by our legal consultant that the said assessment order is legally incorrect and an appeal before CIT-(Appeals) was accordingly filed.*
>
> *(5) That as per the said order passed by CIT-(Appeals) dated 23-03-2017 disallowances made by Ld. AO has been confirmed. The same was received by me on 23-03-2017.*
>
> *(6) That as per provisions of section 253(3) of the Act I was required to file the appeal before ITAT within 60 days of receipt of order of CIT-(Appeals) i.e by 22-05-2017.*

The provisions of section 253(3) of the Act is produced as follows for your ready reference:-

> *"(.....)(3) Every appeal under sub-section (1) or sub-section (2) shall be filed within sixty days of the date on which the order sought to be appealed against is communicated to the assessee or to the Principal Commissioner or Commissioner, as the case may be...."*

However, I am filing the appeal now. Such delay of 1402 days i.e from 22-052017 to 24-03-2021 in filing of the present appeal before ITAT is because of the following reasons:-

"1. That I was always under impression that previous consultant has filed the appeal before ITAT against the order of the CIT(Appeals). It was only when I appointed a new Income Tax Consultant in Feb/21 and while he was reviewing and getting documents and previous/old records from my previous consultant that the new consultant informed to me that no appeal has been filed before the ITAT. When I confronted my earlier consultant about the said fact he also has confirmed that no appeal has been preferred by him before the ITAT. Further, I have already lodged a complaint against previous consultant for breach of trust. The copy of complaint filed by me is also enclosed herewith.

2. In terms of section 253(5) of the Act the Appellate Tribunal can condone the delay in filing of memorandum of cross objections or appeal if there is sufficient cause. The provisions of Section 253(5) of the Act states as under:-

> *" (....)(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period."*

(3) Further, it is imperative to note that section 5 of the Limitation Act deals with condonation of delay in case of appeal. Since the limitation

period for appeals is very short, this section was introduced to meet the end of justice so that the purpose of justice is not defeated if "sufficient cause" is present due to which the appeal could not be preferred.

(4) *The word "sufficient cause" is an important phrase in this section. Since the section is not a matter of right for the party who pleads the condonation, but it depends on the discretion of the court. The court must be satisfied that the delay is caused due to a genuine reason. It is sufficiency of the cause which counts, and not length of delay - Expression "sufficient cause" should receive a liberal construction - As regards delay on the part of State, certain amount of latitude is not impermissible - Expression "sufficient cause" should be considered with pragmatism in justice oriented approach rather than technical detection of sufficient cause for explaining every day's delay.*

(5) *In the case of Concord of India Insurance Co. Ltd. v. Smt. Nirmala Devi AIR 1979 SC 1666, the Hon'ble Supreme Court has held that a legal advice tendered by a professional and the litigant acting upon it one way or the other could be a sufficient cause to seek condonation of delay and coupled with the other circumstances and factors for applying liberal principles and then said delay can be condoned. Eventually, an overall view in the larger interest of justice has to be taken. None should be deprived of an adjudication on merits unless the Court of law or the Tribunal/Appellate Authority finds that the litigant has deliberately and intentionally delayed filing of the appeal, that he is careless, negligent and his conduct is lacking in bona fides. These are, therefore, some of the relevant factors. Those factors should therefore necessarily go into an adjudication of the present nature.*

(6) Reliance has been placed in the decision of Hon'ble Bombay High Court in the matter of Vijay Vishin Meghani -vs.- DCIT [(2017) 86 TM 98] dated 19-09-2017 wherein appeal has been accepted with condonation of delay of 2984 days by taking a plea that he was wrongly advised by his Chartered Accountant earlier not to file appeal, in view of fact that assessee produced affidavit of Chartered Accountant in support of his plea and said affidavit was not contested by revenue authorities, Tribunal was not justified in refusing to condone delay in filing appeal. Hence, Hon'ble Bombay High Court decided the case in favour of assessee.

(7) That I had no intention to jeopardize the interest of the revenue by delaying the filing of the appeal.

(8) In view of the above, it is prayed before your goodself to kindly condone the delay of 1402 days in filing appeal i.e from 22-05-2017 to 24-03-2021 in fling the present appeal and admit the same for adjudication in the interest of justice.

6. On the other hand, the ld DR has raised objection about condonation of delay and submitted that the facts and reasons stated by the assessee for condoning the delay are not sufficient to condone the delay. The attitude of the assessee is negligible in nature and he has not interested in pursuing his matter before the ITAT. It is a common phenomenon that any proceedings pending before any authority, then the party has full knowledge of the proceedings but delay has to be caused in filing the matter within prescribed time, then there is only laches on the part of the assessee. In the present case, there is huge i.e. 1402 days delay in filing the present appeal and if the assessee takes advantage of not taking the action by the concerned

consultant, it is not admissible in law. Therefore, the ld. DR has prayed to dismiss the appeal on the grounds of delay filing of the present appeal.

7. We have considered the rival submissions as well as relevant material on record. As regards the sufficiency of cause for filing the appeals belatedly, it is settled principles of law that the Courts have to take liberal approach while interpreting the expression 'sufficient cause' for condonation of delay. In case **of Collector, Land Acquisition Vs. Mst. Katiji (1987) 167 ITR 471**, the Hon'ble Supreme Court has laid down the principle that the power to condone the delay provided under the statute is to enable the Courts to do substantial justice to the parties by disposing of the matter on merits, therefore, while considering the matters for condonation of delay, the law must be applied in a meaningful manner which subserves ends of justice and technical considerations should not come on the way of cause of substantial justice. There is no quarrel that the explanation and reasons explained for delay must be bonafide and not merely a device to cover an ulterior purpose such as laches on the part of the litigant or an attempt to save limitation in the underhand way. If the party who is seeking condonation of delay has not acted in malafide manner and reasons explained are factually correct then the Court should be liberal in construing the sufficient cause and lean in favour of such party. A justice-oriented approach has to be taken while deciding the matter for condonation of

delay. However, this does not mean that a litigant gets free right to approach the court at its will.

8. In his condonation application, the assessee has stated that the assessee was under impression that previous consultant has filed the appeal before ITAT against the order of the CIT(Appeals). It was only when assessee appointed a new Income Tax Consultant in Feb/21 and while he was reviewing and getting documents and previous/old records from the previous consultant that the new consultant informed the assessee that no appeal has been filed before the ITAT. When confronted with the earlier consultant about the said fact, he also has confirmed that no appeal has been preferred by him before the ITAT. Against the said act by the previous consultant, the assessee had already lodged a complaint against him for breach of trust. The word "sufficient cause" is an important phrase in Section 5 of the Limitation Act. Since the section is not a matter of right for the party who pleads the condonation, but it depends on the discretion of the court. The court must be satisfied that the delay is caused due to a genuine reason. It is sufficiency of the cause which counts, and not length of delay - Expression "sufficient cause" should receive a liberal construction - As regards delay on the part of State, certain amount of latitude is not impermissible - Expression "sufficient cause" should be considered with pragmatism in justice-oriented approach rather than technical detection

of sufficient cause for explaining every day's delay. In this regard, we draw strength from the decision in the case of **Concord of India Insurance Co. Ltd. v. Smt. Nirmala Devi AIR 1979 SC 1666,** the Hon'ble Supreme Court has held that *a legal advice tendered by a professional and the litigant acting upon it one way or the other could be a sufficient cause to seek condonation of delay and coupled with the other circumstances and factors for applying liberal principles and then said delay can be condoned. Eventually, an overall view in the larger interest of justice has to be taken. None should be deprived of an adjudication on merits unless the Court of law or the Tribunal/Appellate Authority finds that the litigant has deliberately and intentionally delayed filing of the appeal, that he is careless, negligent and his conduct is lacking in bona fides. These are, therefore, some of the relevant factors. Those factors should therefore necessarily go into an adjudication of the present nature*. We also draw strength from the decision of Hon'ble Bombay High Court in the matter of **Vijay Vishin Meghani -vs.- DCIT [(2017) 86 TM 98] dated 19-09-2017** *wherein appeal has been accepted with condonation of delay of 2984 days by taking a plea that he was wrongly advised by his Chartered Accountant earlier not to file appeal, in view of fact that assessee produced affidavit of Chartered Accountant in support of his plea and said affidavit was not contested by revenue authorities, Tribunal was not justified in refusing to condone*

delay in filing appeal. Hence, Hon'ble Bombay High Court decided the case in favour of assessee.

9. If we apply the settled principles as laid down by the Hon'ble Supreme Court as well as other courts on the facts of the present case, we find that the assessee has explained cause of delay, therefore, in the facts and circumstances of the case, we condone the delay of 1402 days in filing the present appeal and admit the appeal for hearing.

10. Now we come on the merits of the appeal. In this appeal, the assessee has mainly aggrieved by the order of the ld. CIT(A) in confirming the addition made U/s 68 of the Act amounting to Rs. 4,45,588/-. The brief facts of the case are that the return of income for the year under consideration was filed on 31/07/2006 declaring total income of Rs. 1,24,262/- In this return of income, the assessee shown net profit of Rs. 1,24,039/- from his proprietory business concern in the name of Paliwal Departmental Store. The return of income of the assessee was processed U/s 143(1) of the Income Tax Act, 1961 (in short, the Act). It was noticed by the A.O. that during the year under consideration, the assessee deposited cash of Rs. 4,45,588/- in his savings bank account No. 104104000015455 maintained with IDBI bank and this account was not disclosed by the assessee in his return of income. Thereafter, the A.O. made enquiry and verification completed the assessment determining total income

of Rs. 5,69,850/- by making addition of Rs. 4,45,588/- on account of cash deposit in bank account out of undisclosed sources of income.

11. Being aggrieved by the order of the A.O., the assessee carried the matter before the ld. CIT(A), who after considering the material placed on record, confirmed the action of the A.O. Against which, the assessee has preferred the present appeal before the ITAT on the grounds mentioned above.

12. Having considering the rival contentions and carefully perused the material placed on record. From perusal of the record, we observed that the order of the AO as well as that of the CIT(A) that they have not specifically mentioned as to under which section of the Act the additions have been made. In this regard, we draw strength from the decision of the Coordinate Bench of the Delhi ITAT in the case of **Smt. Sudha Loyalka vs ITO, ITA No. 399/De1/2017** wherein the Coordinate Bench has held as under:

> *"In our considered opinion, the sustaining of impugned addition is not justified due to the following reasons:-*
>
> *i). It has not been mentioned either by A.O. or by Ld. CIT(A) as to under which section of the Income Tax Act, these closing credit balances appearing as on 31.03.2012 could be added. Therefore, non-mentioning the precise provision of law makes the impugned addition bad in law.*

We also draw strength from decision of the Coordinate Bench of Bangalore ITAT in the case of **Shree Ramareddy Ramesh** -vs.- **ITO ITA No. 2027/Bang/2016** wherein it has been held as under:

"About the third amount of Rs. 30,21,961/-, we find that this is a fact that no section is mentioned by the AO or CIT (A) for making this addition and for this reason alone, the addition is bad in law as per the tribunal order cited by the learned AR Of the assessee having been rendered in the case of Smt. Sudha Loyalka vs. ITO (Supra) wherein it was held that non mentioning the precise section makes the addition bad in law."

13. We noticed from perusal of the record that the ld. CIT(Appeals) has not specifically mentioned as to under which section of the Act addition has been done. Also, assessee during the course of assessment proceedings has submitted that the cash deposits are not the income of the assessee. The cash deposits and other credits in the bank statement of the assessee comprises of cash received on behalf of the parties, home loan disbursement from bank and cash deposits out of own sources. In respect of invoices and receipts were submitted during the assessment proceedings. However, the AO ignoring the explanation given by the assessee on the basis of entries in the bank statement considered the cash deposits of the assessee as the income of the assessee.

14. It is important to mention here that the bank statements cannot be termed as books of accounts for the purposes of Sec. 68 of the Act. In this regard we draw strength from the decision of the Coordinate Bench of this Tribunal in the case of **Dr. Vishan Swaroop Gupta, vs ITO ITA No. 13/JP/2020** wherein the Coordinate Bench has held as under:

"We thus are of the considered view that in the backdrop of the aforesaid settled position of law, the addition made by the A.O in respect of the cash deposits of Rs.7,13,000/- in the bank accounts of the assessee by invoking Section 68 has to fail, for the very reason that as per the judgment of the Hon'ble Bombay High Court in the case of CIT Vs. Bhaichand N. Gandhi

(1983) 141 ITR 67 (Bombay), a bank pass book or bank statement cannot be considered to be a 'book' maintained by the assessee for any previous year for the purpose of Section 68 of the Act. Therefore, on this count itself the impugned addition made and sustained deserves to be deleted and we direct to delete the same"

We also draw strength from the decision of the Hon'ble Bombay High Court in the case of **CIT Vs Bhaichand N Gandhi (1983) 141** ITR 67 **(Bombay)** wherein the High Court has held as under:-

"As the Tribunal has pointed out, it is fairly well settled that when moneys are deposited in a bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor and not of trustee and beneficiary. Applying this principle, the pass book supplied by the hank to its constituent is only a copy of the constituent 's account in the books maintained by the hank it is not as if the pass book is maintained by the hank as the agent of the constituent, nor can it be said that the passbook is maintained by the bank under the instructions of the constituent . In view of this, the Tribunal was, with respect , justified in holding that the pass book supplied by the hank to the assessee in the present case could not be regarded as a hook of the assessee, that is, a book maintained by the assessee or under his instructions. In view, the Tribunal was justified in the conclusions at which it arrived."

15. We also found from perusal of the record that in the A.Y. 2007-08 & 2009-10 such cash deposits in the same bank account has been treated as sales executed through the assessee on which the assessee has earned commission income @ 7.5% on sale. In this regard the assessee has submitted that the Ld. CIT(A) grossly erred in treating the entire unexplained (deposit as income of assessee and the same should have been restricted to the commission income @ 7.5% earned by assessee on such amount and which has been accepted by the AO in subsequent Assessment Years. In this regard, we draw strength from the decision of the

Coordinate bench of this Tribunal in the case of **Uma Mandal** -vs.- **ITO [2021] 128 taxmann.com 369 (Jaipur - Trib.)** wherein it has been held that "where assessee had received certain amount in cash in her bank account, since assessee had not given any evidence to prove that this was not her turnover, Assessing Officer was justified in treating entire deposits as assessee's turnover and assuming net profit thereupon at rate of 5 per cent." However keeping in view the specific arguments put forth before us by ld. AR that A.O. as well as ld. CIT(A) have not specifically mentioned as to under which Section of the Act the additions have been made and also keeping in view the fact that Bank statement is constantly held to be not books of account for the purpose of Section 68 of the Act.

16. Therefore, in view of the above facts and circumstances as well as material placed on record and the case laws with regard to the issue under consideration, we find merit in the contentions of the ld. AR and we direct to delete the addition made U/s 68 of the Act. We order accordingly.

17. Now we take ITA No. 08 to 11/Jodh/2021 for the A.Y. 2007-08 to 2010-11 respectively.

In all these appeals, the grounds, facts of appeals as well as submissions of both the parties are identical to the grounds, facts and submissions of both the parties made in ITA No. 07/Jodh/2021 for the A.Y. 2006-07. Therefore, finding given in ITA No. 07/Jodh/2021 for the A.Y. 2006-07 shall apply mutatis mutandis in all these appeals also.

18. In the result, all these appeals of the assessee are allowed.

Sd/-	**Sd/-**
(VIKRAM SINGH YADAV)	**(SANDEEP GOSAIN)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Jodhpur
Dated 2/11/2021
*Ranjan
Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT (A)
5. The DR
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Assistant Registrar
Jodhpur Bench