

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI**

**BEFORE
SHRI C.M. GARG, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

ITA Nos. 611, 612, 613,614, & 615/Del/2017
Asstt. Years :2010-11, 2011-12,2009-10,2010-11 2011-12

J.N.Jewellery House Pvt. Ltd. C-4/309-A, Janakpuri New Delhi – 110- 058 PAN AAAACJ4345G	Vs.	ITO, Ward-13 (1), New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri Varun Kaushal, ITP
Department by :	Shri Yogesh Nayyar, Sr. DR
Date of Hearing	05.05.2022
Date of pronouncement	18.05.2022

ORDER

PER C.M. GARG, JM

The aforesaid appeals have been filed by the assessee against separate impugned orders, passed by Ld. CIT (Appeals)-5, Delhi for the Assessment Years 2009-10 to A.Y. 2011-12. Since the issues involved in all the appeals are common, arising out of identical set of facts, therefore, same were heard together and are being disposed of by way of this consolidated order.

2. First of all we take ITA Nos. 611/Del/2017 and 612/Del/2017 for assessment year 2010-11 and 2011-12 respectively wherein the Ld. CIT(A) has partly allowed appeal of the assessee by order dated 30.11.2016.

3. The grounds taken by the assessee for both the appeals are almost similar, therefore we proceed to adjudicate grounds of appeal for assessment year 2010-11 which read as under:-

“1. That Ld. Income Tax Officer ward 13(1) New Delhi, imposed penalty of Rs.70,000/-U/s 271(l)(b) of the Income Tax Act, 1961, without considering the facts and circumstances of the case. That Ld. Commissioner of Income Tax (Appeals) V New Delhi, Confirmed the Penalty of Rs. 50,000/-, which is bad in law and beyond the interest on natural justice.

2. That Ld. Income Tax Officer ward 13(1) New Delhi, imposed penalty of Rs.70,000/- u/s 271(1) (b) of the Income Tax Act, 1961 arbitrarily and without considering the reply and evidences afforded by the appellant and the Ld. Commissioner of Income Tax (Appeals) V New Delhi, confirmed the penalty of Rs. 50,000/-, and upheld the order of Ld. Income Tax Officer without considering the Reply and Explanations filed by Appellant during the Appeal Proceedings and has not considering the facts and Circumstances of the Case.

3. That all the above action being arbitrary, erroneous, unjustified, untenable and unlawful and must be quashed with direction of appropriate relief.

4. That the appellant craves to leave, to add or alter, delete, amend, modify, rescind, supplement or alter any of the ground herein above, either before or at the time of the appeal. “

4. Ground No. 1 The Ld. Counsel submitted that the Ld. CIT(A) has erred in not quashing the invalid action of the AO in invoking provision of section 148 of the Income Tax Act, 1961 (in short the Act) as the assessee has shown impugned bank account with Axis Bank, Janak Puri, New Delhi in the income tax return filed under PAN No. AAACJ4345G. Therefore, the initiation of reassessment proceedings under section 147 of the Act and notice under section 148 of the Act deserve to be quashed being initiated without application of mind and change of opinion. Ld. Counsel lastly submitted that all the relevant material was before the AO during assessment proceedings relating to operating PAN No. AAACJ4345G. Therefore no action can be taken against the assessee under section 147/148 of the Act.

5. Replying to the above the Ld. Sr. DR submitted that the assessee created two PAN Nos. i.e. PAN No. AAACJ4345G and AABCJ10858R simultaneous opened account by using second PAN Number AABCJ0858R and had submitted all KYC documents with the Axis Bank, Janak Puri showing the same name and address. Since the assessee had not filed any return of income under said PAN No. AABCJ10858R, the AO was validly entitled to initiate action under section 147 of the Act and to issue notice under section 148 of the Act.

6. On careful consideration and submission from the copy of the reasons recorded by the AO on 7.2.2014 it is clearly discernable that the AO initiated reassessment proceedings by alleging that for assessment year 2011-12 the assessee has not filed any return of income towards PAN No. AABCJ10858R. On being asked by the Bench the Ld. Counsel for the assessee simply stated that since the assessee was not using said PAN No. therefore there was no occasion and requirement for the assessee to file return against said PAN No. and assessee was regularly filing return of income under PAN AAACJ4345G.

7. It is also worth mentioning to note that on being asked by the Bench the Ld. Counsel for the assessee, in all fairness admitted that the assessee is surrendering second PAN No. AABCJ0858R during first appellate proceedings as per the directions of the Ld. CIT(A) and thus the same is not existing in the records on today. In my humble understanding when the assessee is obtained two PAN Nos. and opening account by using second PAN No. with Axis Bank Janak Puri and not filing return towards second PAN No. and only filing return by using first PAN No. AAACJ4345G. Merely because the assessee has shown and declared such bank account with Axis Bank, Janak Puri, New Delhi in the return of income filed by using first PAN No. then in absence of any return of income by the assessee pertaining to PAN No. AABCJ0858R the AO is well within his powers to assume valid jurisdiction for invoking the provisions of section 147 of the Act and calling the assessee to file return of income. Therefore, we hold that the AO has rightly invoked the provisions of section 147 and 148 of the Act in absence of return of income pertaining to PAN No. AABCJ0858R. Therefore, ground No. 1 of assessee is dismissed.

Ground No. 2 to 4

8. The Ld. Counsel submitted that the Ld. CIT(A) has erred in enhancing the turnover of the assessee on account of cash deposit to the bank account and sustaining addition to the extent of 1.1% of the total cost deposit in the bank therefore the addition made by the AO and confirmed by the Ld. CIT(A) may kindly be deleted. The Ld. Counsel also submitted that when the assessee has shown impugned bank account in the return of income fled under PAN No. AAACJ4345G then there is no need of further making any addition in the hands of the assessee by applying NP rate of 1.1%. Therefore addition may kindly be deleted. Replying

to the above the Ld. Sr. DR strongly supported the assessment and first appellate order and submitted that the Ld. CIT(A) has taken a very balancing and justified approach in applying net profit @ 1.1% of total cash deposit to the impugned bank account to the assessee. Therefore, the same may kindly be confirmed.

9. On careful consideration and rival submissions first of all we note that the Ld. CIT(A) has upheld the addition with following observations :-

“3.7.1 have given careful consideration to the facts and find that in so far as the estimation of sales/turnover is concerned, the AO has increased the recorded turnover for all the three years by an arbitrary amount, i.e. Rs. 10,39,460/- for A.Y. 2009-10, Rs. 13,87,448 for A.Y. 2010-11 and Rs. 18,86,432 for A.Y. 2011-12. No reasons or justification has been given for increasing the turnover. Over and above the same, he has applied the net profit percentage of 5% on the entire cash deposits which he treated as unaccounted sale proceeds/turnover. This has resulted in double addition in the hands of the appellant. In the preceding para, this action on the part of the A.O has not been approved and he has been directed to apply the net profit results of earlier years to the declared turnover. However, keeping in mind that the appellant has not explained with regard to his books of accounts that the impugned cash deposits were part of his recorded turnover, which has led to rejection of books of accounts and which has been upheld in appeal, the action on the part of the AO in treating the cash deposits as not disclosed in the audited accounts, is approved. As already directed hereinbefore, in view of the past financial results of the appellant, the AO would apply the net profit percentage of

1.11% on the impugned amount of cash deposits, by treating them as unrecorded turnover. It is further seen that the AO requisitioned information from Andhra Bank, Janak Puri [where the appellant maintained CC account no. 2049] by issuing summons dated 24.09.2014 and in response the Bank sent account opening form and the statement of account for the period 01.04.2008 to 31.03.2011. This aspect has not been discussed in the assessment order but the account statements shows that this bank account also has heavy cash deposits and the totals for the impugned years are Rs. 66,49,500, Rs. 63,34,500/- & Rs. 1,12,04,300/- respectively. The total cash deposits for all the three years is to the tune of Rs. 2,41,88,300/-. The total picture of the overall cash deposited in the appellant's bank account at Andhra Bank and Axis Bank Janakpuri vis-a-vis the recorded sales is as under;

Assessment Year	Cash deposit in Axis Bank	Cash deposit in Andhra Bank	Total cash deposits	Recorded sales
2009-10	55,00,000	66,49,500	1,21,49,500	1,79,60,540
2010-11	2,05,35,500	63,34,500	2,68,70,000	2,36,12,552
2011-12	45,07,500	1,12,04,300	1,57,11,800	2,36,13,568

3.7.2 As can be seen from the table herein before the amount of cash deposits is in excess of the total turnover in the assessment year 2010-11 and is disproportionately high, between 66 to 67 percent of the total turnover, for A.Y. 2009-10 & 2011-12. It is therefore clear that the impugned cash deposits are not part of the recorded turnover, and not disclosed in the audited accounts.

Keeping in mind the provisions of section 147, wherein the AO is empowered to assess any other income chargeable to tax which has escaped,, assessment and which comes to his notice subsequently in the course of proceeding, and also keeping in mind the fact that the CIT(A) in the discharge of his/her functions has powers co-terminus with that of the AO, and in the absence of the appellant to produce any evidence substantiating that all the receipts in bank account has been disclosed in the books and are part of the recorded turnover, these cash deposits are also to be treated as part of unrecorded turnover. The AO would apply the net profit percentage of 1.1 % on the total cash deposits i.e. Rs. 1,21,49,500/-, Rs. 2,68,70,000/- & Rs. 1,57,11,800/- for working out the profits. Since there is overall reduction in the N.P percentage and consequently profit assessed, there seems to be no requirement in law on the part of the undersigned to issue a notice of enhancement. Ground no. 3 is treated as partly allowed.”

10. In view of the above findings we are compelled to hold that in absence of any substantial evidence and cogent explanation by the assessee substantiating that all the receipts in the impugned bank account has been disclosed in the books of accounts and are part of the disclosed turn over, impugned cash deposits had to be treated as part of unaccounted turnover of the assessee. The Ld. CIT(A) rightly observed that the AO should have applied net profit percentage of 1.1% on the total cash deposits for working out the element of profit earned by the assessee out of unrecorded turnover. In our humble understanding the Ld. CIT(A) has taken a very balanced and justified approach in making addition of 1.1% of total impugned unrecorded turn over considering the

profit element embedded therein only. We are also in agreement with the findings arrived by the Ld. CIT(A) since there was overall return of the NP percentage and consequently profit assessed therefore there was no requirement on the part of the Ld. CIT(A) to issue a notice of enhancement. In view of the foregoing discussion we come to the conclusion that the Ld. CIT(A) has rightly considered and adjudicated the grievance of assessee and has given a major part of relief by only making addition of 1.1% of total unrecorded turn over taking out the element of profit embedded therein. We therefore are unable to see any ambiguity perversity of any valid reason to interfere with the findings arrived by the Ld. CIT(A). Accordingly ground No. 2 to 4 of assessee are dismissed. Ground No. 3 is general in nature which requires no adjudication.

11. In the result, appeal of the assessee for assessment year 2010-11 is dismissed.

12. Since the facts and circumstances of the assessment year 2011-12 are quite similar and identical with the facts and circumstances in assessment year 2010-11 therefore, our findings recorded for assessment year 2010-11, in the earlier part of this order would apply mutatis mutandis to assessment year 2011-12. Consequently appeal of the assessee for assessment year 2011-12 is also dismissed.

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13. Now we take up the above three appeals wherein the Ld. CIT(A) -5 Delhi by order dated 7.11.2016 has confirmed penalty of

Rs. 50,000/- in each case under section 271(1)(b) read with sub clause (ii) of the Income Tax Act 1961 (in short the Act).

14. The sole ground taken by the assessee in these identical appeals is that the Ld. CIT(A) has erred in confirming the penalty of Rs. 50,000/- without considering the reply and explanation filed by the assessee during appellate proceedings and has not considered the facts and circumstances of the case in which the assessee could not comply with the notices issued by the AO.

15. The Ld. Counsel for the assessee pressing into service submission of assessee during first appellate proceedings, as has been reproduced in para 4.3 of first appellate order submitted that the penalty under section 271(1)(b) of the Act on account of seven defaults imposed by the AO is arbitrary, erroneous, unjustified and untenable and the same may kindly be quashed. The Ld. Counsel submitted that the reply of assessee has not been considered properly therefore the first appellate order may kindly be dismissed cancelling the penalty under section 271(1)(b) of the Act.

16. Replying to the above the Ld. Sr. DR drew our attention towards para 4.4 to 5.2 of the first appellate order and submitted that the explanation and reply of the assessee has been properly considered by the Ld. First appellate authority while confirming the part penalty of Rs. 50,000/- instead of Rs. 70,000/- for seven defaults as has been imposed by the AO. Therefore it cannot be presumed that the Ld. CIT(A) has not applied his mind to explain and reply of the assessee during first appellate proceedings. The Ld. Sr. DR submitted that there was no reasonable cause on the

part of appellant who had not complied with the notices dated 26.7.2014, 4.8.2014, 20.11.2014, 16.11.2014 and 5.2.2015. Therefore the AO was right, entitled and well within his jurisdiction to impose penalty under sub clause (ii) of section 271(1)(b) of the Act after reaching a sustainable conclusion and satisfaction that the assessee has failed to comply with statutory notices to levy penalty. The Ld. SR. DR submitted that the Ld. CIT(A) has granted part relief to the assessee dropping penalty for two occasions. Therefore the penalty may kindly be upheld.

17. On careful consideration and submission first of all we place our satisfaction on record that the Ld. CIT(A) has properly considered reply and explanation of the assessee filed during the first appellate proceedings which is clearly discernable from para 4.4 to 5.2 at pages 7 to 11 of first appellate order. We also note that Ld. CIT(A) has confirmed penalty of Rs. 50,000/- with following observations :-

“5.2 Therefore, perusal of the history of compliance on the pSrt of the appellant reveals that there has been a deliberate attempt to withhold information relating to the cash deposits In its bank account. The only compliance was to the 148 notice and the first notice issued u/s 142(1) when identical letters for all three years were filed dated 19.6.2014 stating that the return was filed and all the show room and cash sales had been duly deposited in the bank and reflected in the ITR. The only other reply filed in response to section 142 notice was in the letter dated 27.02.2015 in which the appellant reiterated that the transactions in all the three bank accounts including Axis Bank Account were duly reflected in the audited financials of the company and therefore, the reopening IT

*proceedings was unjustified. From the submissions of the appellant it is noted that at no stage has it denied that it was not the owner of PAN AABCJ0858R. Since it was the owner of duplicate PAN, having filed return with the PAN AAACJ4345G it was incumbent upon the appellant to demonstrate before the AO that all the cash deposits were reflected in the turnover/sale/cash book in the other PAN. Thus I hold that there was no reasonable cause on the part of the appellant to have not complied with the notices dated 23.07.2014, 14.08.2014, 20.11.2014, 16.11.2014 & 05.02.2015. It is noted that section 271(l)(b) r.w. sub clause (ii) authorized the AO on reaching of satisfaction that the assessee has failed to comply with statutory notices to levy penalty, in addition to tax payable of a sum of Rs.10,000/- "for each such failure". In the present case, it is noted that the appellant has delicately not filed the particulars as sought, simply on the ground that all the cash deposits have been reflected in the books. The appellant has possession of two PANs and has tried to take advantage of the situation by stating that the PAN on which proceedings were reopened was not being used and that all the transactions were reflected in the return filed using the other PAN. Consequently since the facts are materially different from the case before the Delhi ITAT in the case of Rekha Rani (ITA No. 6131/Del/2013), and in the absence of any reasonable cause advanced by the appellant for not appearing on the different dates of hearing, the penalty imposed for all the years is sustained to the extent of Rs. 50,000/- on account of non-compliance on five different occasion as stated above. **Grounds 1 & 2 are partly allowed.**"*

18. In view of the above rival contentions and findings recorded by the Ld. CIT(A) we have no hesitation to hold that Ld. CIT(A) rightly concluded that the appellant had in possession of two Pan Nos. and tried to take advantage of the situation by stating the PAN No. for which proceedings were reopened by stating that all the transactions are reflected in the return filed using the other PAN No.. This may be the plausible explanation for not filing return pertaining to second PAN No. but the same is also not tenable in the light of fact the assessee has opened bank account with Axis Bank by using second PAN No. Merely because such bank account was disclosed in the return of income does not establish the bonafide of assessee in having two PAN Nos. Simultaneously. In view of the above findings we decline to accept contention of the Ld. Counsel that there was a bonafide and tenable reason that the assessee explaining the non complying the five notices as noted by the Ld. CIT(A) in para 5.2 of the first appellate order. The onus was on the assessee to explain and substantiate a bonafide reason to explain the cause of non compliance of the notices issued by the AO during the assessment proceedings. In the event of failure on the part of the assessee penalty has to be imposed under sub clause (ii) of section 271(1)(b) of the Act. Therefore, we are unable to see any valid reason to interfere with the findings arrived by the Ld. CIT(A) and thus, we uphold the same. Accordingly ground No. 3 for assessment year 2009-10 in ITA No. 613/Del/2017 is dismissed.

19. Since facts and circumstances of assessment year 2010-11 and 2011-12 are quite similar and identical to the facts and circumstances of assessment year 2009-10, therefore, our

findings recorded for assessment year 2009-10 confirming the penalty of Rs. 50,000/- would apply mutatis mutandis to the appeals of the assessee for assessment year 2010-11 and 2011-12. Consequently ITA No. 614/Del/2017 and 615/Del/2017 for assessment year 2010-11 and 2011-2 are also dismissed.

20. In the result all three appeals of assessee are dismissed.

Order pronounced in the open court on 18th May, 2022.

sd/-

**(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER**

sd/-

**(C.M. GARG)
JUDICIAL MEMBER**

Dated: 18/05/2022

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2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
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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	
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