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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA 315/2005**

Date of decision: 13th March, 2018

JAYA AGGARWAL ..... Appellant

Through Mr. Somil Agarwal, Ms. Monika Ghai, Mr. Rohit Kumar Gupta and Mr. Rishi Sehgal, Advocates.

versus

INCOME TAX OFFICER ..... Respondent

Through Mr. Deepak Anand, Jr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

C.M. No. 1419/2018

This is an application for restoration of the appeal, which was dismissed in default and for non-prosecution on 15th November, 2017. The application was filed shortly thereafter on 20th December, 2017. In the application, it is stated that the appeal was filed in the year 2005 and had remained pending for about 12 years. The appellant had no knowledge that the matter was taken up for hearing on 14th November, 2017 and thereafter on 15th November, 2017.

For the reasons stated in the application, we are satisfied that non-appearance on 14th and 15th November, 2017 was not intentional and has been satisfactorily explained.

The application is allowed and the appeal is restored to its original number.

ITA 315/2005

With the consent of the Counsel for the parties the appeal is taken up for hearing.

2. The present appeal by Jaya Aggarwal, an individual, relates to assessment year 1998-99 and arises from the order of the Income Tax Appellate Tribunal (Tribunal, for short) dated 25th April, 2004 in ITA No.3354/Del/2002.

3. The appeal was admitted for hearing vide order dated 16th May, 2005 on the following substantial question of law:-

> "Whether in the facts and circumstances of the case and in law the ITAT is right in confirming the addition under section 68 of the Act for deposit of cash by appellant out of cash withdrawn by appellant from the same bank account for purchase of immoveable property?"

4. The appellant's return of income filed on 29th October, 1998 for the assessment year 1998-99 declaring a loss of Rs.7716/- was taken up for scrutiny assessment. The Assessing Officer noticed and had asked the appellant to explain source of deposit of Rs.1,60,000/- in cash in her bank account on 13th January, 1998. The appellant had explained that she had withdrawn Rs. 2 lakhs in cash from her bank account on 2nd May, 1997 and cash deposit of Rs. 1,60,000/- was from the amount withdrawn. This withdrawal was to buy property for which earnest money in cash was to be paid. As the deal could not be finalized and Rs.1.60.000/- was re-deposited in the bank. The Assessing Officer rejected the explanation observing that

withdrawal of Rs.2,00,000/- was on 2nd May, 1997 but the deposit made was after more than 7 months on 13th January, 1998. No other reason or ground was elucidated and stated in the assessment order. Rs.1,60,000/-was treated as unexplained cash credit and addition was made under section 68 of the Act.

5. Assessee preferred first appeal and had reiterated that the cash was withdrawn to buy immoveable property i.e. basement located at 19A, Arjun Nagar, New Delhi, but as the deal did not materialize, Rs.1,60,000/- was deposited in the bank on 13th January, 1998. Additional evidence in a form of a certificate issued by M/s. S.G. Realtors was filed. However, the appeal was dismissed observing that the certificate given by M/s. S.G. Realtors was not conclusive proof that the cash deposited was out of the Rs.2,00,000/-, withdrawn earlier. Onus to prove source of money deposited was on the appellant, which had not been discharged by showing nexus between the cash withdrawn and cash deposited.

6. Appellant thereafter preferred second appeal before the Tribunal, which as noticed above, has been dismissed by the impugned order dated 25th April, 2004. The impugned order passed by the Tribunal is rather short and for the sake of convenience, we would like to reproduce the same:-

> "1. After giving thoughtful consideration to the rival parties and from a careful perusal of the record. I find that on a scrutiny of details it was noticed by the A.O. that the assessee has deposits of cash of Rs.1,60,000/- on 30.1.98 in its bank account. In response to query about the source of deposit it was stated that the assessee has made the withdrawals of Rs.2 lakh on 2.5.97 and out of this fund Rs.1,60,000/- was deposited on 13.1.98. The purpose of retaining this huge

> amount at residence was stated to be the involvement of the assessee in buying a property. This explanation was not accepted by the A.O. and confirmed he addition and the addition was also confirmed by the CIT (A). The assessee has reiterated the same contentions before us. But I do not find force therein because no prudent man would keep a huge amount of Rs.2 lakhs at residence to negotiate a property deal. There is no bar in withdrawing the amount from the bank at any time whenever the assessee finalise the deal for making the payment of earnest money. I, therefore, do not find any merit in the appeal of the assessee. Accordingly, the same is dismissed and the order of the CIT (A) is hereby upheld."

7. Impugned order holds that no prudent person would keep a huge amount of Rs.2,00,000/- at their residence to negotiate a property deal. There was no bar in withdrawing the money from the bank at any time before deal was finalized to pay earnest money.

8. We find it difficult to accept the approach and findings recorded for several reasons. The brief order does not examine and consider the entire explanation and material on record as withdrawal of Rs.2,00,000/- in cash was undisputed. Naturally, the huge withdrawal was for a purpose and objective. From the beginning the explanation given was that withdrawal was to pay earnest money for purchase of immovable property, which deal did not fructify. Explanation given was not fanciful and sham story. It was perfectly plausible and should be accepted, unless there was justification and ground to hold to the contrary. Delay of some months in redeposit of part amount is the sole and only reason to disbelieve the appellant. Persons can behave differently even when placed in similar situations. Due regard and latitude to human conduct and behaviour has to be given and accepted when

we consider validity and truthfulness of an explanation. One should not consider and reject an explanation as concocted and contrived by applying prudent man's behaviour test. Principle of preponderance of probability as a test is to be applied and is sufficient to discharge onus. Probability means likelihood of anything to be true. Probability refers to appearance of truth or likelihood of being realised which any statement or event bears in light of the present evidence (Murray's English Dictionary). Evidence can be oral and cannot be discarded on this ground. Assessment order and the appellate orders fall foul and have disregarded the preponderance of probability test.

9. In view of the observations recorded above, we would answer the substantial question of law in favour of the appellant-assessee and against the respondent-Revenue, but with an order of remand for deeper examination and consideration by the tribunal. However the amount involved is Rs.1,60,000/- only and the matter is rather old. We would therefore draw curtains and direct that addition of Rs.1,60,000/- should be deleted.

10. The appeal is accordingly allowed. There would be no order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

MARCH 13, 2017
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